PRE-CONFERENCE WORKSHOP
FOUNDATIONS OF HIGHER EDUCATION LAW

Introduction

Institutional Legal Relationships

Basic Organizing Principles

Workshop Materials, pp. 4-12.
The Law/Policy Distinction

Policy:
1. What options are available?
2. Which are the "best" options?
3. How feasible are the options we have chosen or rejected?

Law:
1. How does the law constrain the identification and choice of options?
2. What legal issues must be weighed in choosing the best options?
3. How does the law constrain or shape the implementation of the chosen option?
Basic Concepts
(The Underlying Basic Concepts of Higher Education Law)

Authority (Governance)

1. Who has what authority to govern the institution and its affairs?
2. What authority do I have? Who has what authority over me?

Workshop Materials, pp. 7-8.
LHE & SUPP. Secs. 2.1 and 2.2.

Authority (Governance) (continued)

1. External Governance (external sources of law)
   - Federal Government (LHE Chap. 1)
   - State Government (LHE Chap. 6)
   - Local Governments (LHE Chap. 5)
   - NCAA, Accrediting Agencies, etc. (LHE Chap. 6)

2. Internal Governance (internal sources of law) (LHE Secs. 2.1 and 2.2)
   - Governing Board (Trustees, etc.)
   - Officers (Pres., Provost, etc.)
   - Faculty
   - Student Organizations
Preventive Law (Legal Planning)  
(continued)

Three reasons to do careful legal planning on your campus:
1. Avoid liability/Manage legal risk.
2. Facilitate fulfillment of your institution's mission.
3. Minimize adversarial relationships on campus; build community.

Academic Freedom in American Higher Education

The Law of Higher Education, sec. 3.7, and SUPP., sec. 3.7.

- a basic concept **unique** to higher education

- a basic concept **essential** to higher education

Three 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
Liability (Legal Risk)
LHE & SUPP, secs. 2.3, 2.4, and 2.5

I. Types of Liability
   A. Involuntary Liability
   B. Personal Liability
   C. Breach of Contract
      A. Tort Liability
      B. Contract Liability
   D. Constitutionality Liability (Public Institutions)
   E. Civil Rights Suits Liability (e.g., Title IX, ADA)
II. Managing Liability (Risk Management)
   A. Avoiding and Controlling Risk
   B. Transferring Risk

Preventive Law (Legal Planning)
Law of higher education, Sec. 1.7

Three Basic Questions:
1. What access do I have to legal counsel?
2. When should I consult legal counsel?
3. How should I work with legal counsel? And how should legal counsel work with me?

Preventive Law (Legal Planning) (continued)

Two types of legal assistance:
1. Treatment Law (reactive).
2. Preventive Law (proactive).
   - See the 8 steps for preventive law planning in workshop materials pp. 17-18.
Two Views of Academic Freedom

1. Academic Freedom as Custom or Policy

2. Academic Freedom as Law or a Legal Right

Academic Freedom As Custom or Policy

A. Institutional Customs and Policies

B. AAUP Policy Statements

C. National Academic Custom or Tradition: customs of higher educational institutions nationwide

Academic Freedom as Law

A. U.S. Constitution (Re: Public Institutions)
   1. Free Speech and Press Clauses (First Amendment)
   2. Due Process Clause (Fourteenth Amendment)
   3. Establishment and Free Exercise Clauses (First Amendment)

B. Contract Law (Re: All Institutions)
   1. Faculty Handbook, if incorporated into faculty contract
   2. Institutional By-laws and Regulations
   3. AAUP Policies, if incorporated into faculty contract
   4. Academic Custom that Fills Gaps in Contracts
Question 1
Under the U.S. Constitution, as interpreted by the U.S. Supreme Court, academic freedom:
(a) is a right shared by professors, students, and colleges and universities.
(b) is designed to protect the autonomy of colleges and universities from governmental control.
(c) is designed to protect professors in their teaching and research, not to protect colleges and universities or their students.
(d) is not mentioned in the Constitution, and is not protected at all by constitutional law.
(e) has had, at one time or another, each of the meanings indicated in (a), (b), (c), and (d) above.

Question 2
Assume that the new Department of Homeland Security has promulgated regulations implementing recent anti-terrorism legislation passed by Congress. One regulation requires colleges and universities to monitor certain email sent and received on their computer networks. In some states, however, there are provisions in the state constitution that protect personal privacy and would prohibit institutions in those states from monitoring email as required by the Department of Homeland Security regulations. How should this conflict between laws be resolved?

Question 2 (continued)
(a) The state constitutional provision would trump the federal regulation because a constitution is higher law than an administrative regulation.
(b) The state constitutional provision would trump the federal regulation because the federal Constitution allows the sovereign immunity of the states concerning personal matters such as privacy.
(c) The federal regulation would trump the state constitutional provision because the federal Constitution is the supreme law of the land and the states must comply with this authority.
(d) The federal regulation would trump the state constitutional provision because the regulation was enacted after the constitutional provision in the case at issue, the amendment that is in the state provision over the earlier enactment.
(e) Which law prevails must be determined on a case-by-case basis, considering whether the federal interest or state in the particular case are more important than the state interests, or vice versa.
Faculty Employment Issues

Tenure

Remitting, Hiring, Evaluating Faculty

Disciplining and Terminating Faculty

Accommodating Faculty

What is Tenure?

Tenure is a set of procedural protections that ensure continued employment unless one of a set of specific reasons is found to justify the termination of tenure.

"Also, the expiration of a probationary period, tenure, or investigators should have permanent or continuous tenure, and their service should be terminated only for adequate cause, except in the case of retirement for age, or under extraordinary circumstances because of financial exigencies" (AAUP 1940 Statement of Principles of Academic Freedom and Tenure).

What is Tenure?

Tenure is created by:

Contract

Statute

Past Practice

Board of Regents v. Roth
Perry v. Sindermann

See LHE 36, Sec. 3.6.2.1, pp. 260-262
What Is Tenure?
Tenure Protects
Classroom speech
Research subjects and results
Exercise of academic judgment in institutional governance
Actions taken as a private citizen
See LHE 3d, Sec. 3.7

What is Tenure?
Tenure does not protect
Disruptive speech
Unlawful or unethical conduct
Personal misconduct
Classroom speech irrelevant to subject matter
See LHE 3d, Sec. 3.5.2

Faculty Employment Issues
Recruiting Faculty
Defining the position
Obtaining a diverse pool of candidates
Documenting the search process
Negotiating with the candidate
Defining the contract
Teaching Expectations
Research Expectations
Service Expectations
Other Expectations (Funding? Service? Student Advising?)
See LHE 2d, Sec. 3.1
Evaluating Faculty

Routine evaluations
Who is evaluated? (Tenured only? Everyone?)
Criteria
Documented evaluation
Use of the evaluations
Who sees them?
Are they used for decisions? (salary increases? Sabbaticals?)
Mentoring

Evaluating Faculty

Evaluations
Evaluations for promotion or tenure decisions
Procedural compliance
Development of the promotion dossier
Use of external experts
Documentation of teaching, service activities
Student course evaluations
Peer evaluations
The tenure committee and/or advisory committee

See JHE Jnl. Secs. 3.6.2.1, 3.6.2.2, 3.6.3

Evaluating Faculty

Post-Tenure Review
Purpose of review
Evaluative
Developmental
Initiation of review
Periodic
Triggering event
By request
Institutional response to review
Termination
Retraining or development
Reevaluation

See Year 2000 Research/Ed. 5.4.4
Disciplining Faculty

Reasons for discipline

Classroom conduct
Out-of-class conduct
Dishonesty
Academic misconduct
Other forms of misconduct

Disciplining Faculty

Procedures for discipline

Contractual compliance
Due process compliance
Peer review and recommendation
Use of external consultants if appropriate

See Year 2000 Supplement, Sec. 3.6.2.4

Disciplining Faculty

Types of discipline

Suspension
Demotion
Differential workload
Reassignment and/or relocation
Debarred from work with students
Terminating Faculty

Without tenure

Contractual issues

Nurture

Due Process

Need for hearing?

See LHE 3d, Sec. 3.6.2.1

Terminating Faculty

With tenure

Termination for cause may be based on

Moral turpitude

Incompetence

Neglect of duty

Insubordination

Conviction of a felony

Terminating Faculty

With tenure

Procedural compliance

Application of AAUP policies

Role of peer judgment

Documentation of performance problems

Potential for disability claims

Judicial review of termination cases

See LHE 3d, Sec. 3.6.2.3
Accommodating Faculty

Religious accommodations
Subscribing
Dress

Accommodating Faculty

Disability accommodations

Documentation of disability
"Supervisory with a student," activity.
Ability to perform essential functions of the position
Reasonable accommodation and undue hardship

See LHE 3d, Sec. 3.3.5

Quiz on Faculty Employment Issues

Ben Blunt has been denied tenure by the provost of Eastern State College. He is challenging his tenure denial in court because he was told that the past six years by his department chair that he was "doing fine." The faculty handbook is silent on annual evaluations or mentoring, but Blunt's department has a formal mentoring process that is used for all non-tenured faculty.
a) Ben will win because the annual evaluation is a contract.

b) Ben will lose because the provost has no respect for Ben's department chair.

c) Ben will win because his measuring committee is correct that his performance was sufficient to gain tenure.

d) Ben will lose because there is no institutional policy that requires the provost to accept the recommendation of a department chair or dean.

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Quiz on Faculty Employment Issues

Jean Jett taught at Milford College for twenty years and was tenured. Milford is a private college. A new president arrived at Milford last year and made numerous changes that Jean and most of the other faculty were very unhappy about. One of the president's new initiatives was to replace the former system of student course evaluations with a system of classroom visits by administrators (including the president). Jean and her colleagues were furious with this change, and refused to submit course syllabi to the president's office so that he and other administrators can schedule visits. After a second deadline passed for submission of the syllabi and Jean continued to refuse, the president fired Jean. There is no faculty handbook at Milford College.

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a) Jean's termination is illegal because the president didn't follow the AAUP guidelines for terminating a tenured faculty member.

b) Jean's termination is illegal because her syllabus is protected by academic freedom and the president can't force her to give it to him.

c) Jean's termination is lawful because she engaged in gross insubordination.

d) Jean's termination is lawful because faculty have no due process rights at a private college unless so provided in the faculty handbook.
CHALLENGES TO ACADEMIC DECISIONS

Academic judgment

Academic freedom and harassment claims

Defending academic judgments

Academic judgment

What is academic judgment?

How do courts review academic judgments?

Arbitrary

Capricious

Without reference to professional standards

Defending academic judgments

Grading disputes

Clarity of course expectations

Consistency of treatment

Administrator power to change grades

Determination of courts to grading decisions

See LHE 3d, Sec. 4.7.1
Dealing With Challenges to Faculty Decisions

Faculty Academic Freedom and Harassment of Students
1. Classroom Speech and Conduct
2. Speech and Conduct Outside the Classroom

Faculty Academic Freedom: An Example

In the classroom and in institutional affairs:

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

Defending academic judgments

Other evaluations of student performance

Clinical performance
Performance in laboratories and other experiential learning
Thesis and dissertation issues
Quiz on Challenges to Academic Decisions

Susan Smart, a student at Public College, is unhappy with her final exam grade. If Professor Dim doesn’t change her grade from a "D" to a "D+", Susan will sue on the grounds that Professor Dim told the class that he would give a multiple-choice exam and he gave an essay exam instead. Susan says she can prove that she would have received at least a B- if a multiple-choice format had been used.

a) Susan will lose because the court won’t hear the case
b) Susan will win because Professor Dim’s promise was a contract binding him to give a multiple-choice exam.

c) Susan will win because Professor Dim is required to follow due process and fundamental fairness guidelines because he teaches at a public college.

d) Susan will lose because the faculty member’s decision about what type of test to give is based upon academic judgment.

Quiz on Challenges to Academic Decisions

Merrill Tate was a fourth-year medical student at Kaplin State University. He had received outstanding grades in all academic courses, and had performed satisfactorily in all clinical rotations except his last, gynecology. The supervising professor gave Tate a failing grade in his rotation, which meant that Tate must repeat the rotation. Tate was placed on academic probation, and after repeating the rotation under the supervision of the same professor, Tate again failed the rotation. Under KSO medical school rules, the faculty is allowed to dismiss a student for failing a course while on probation.

(continued)
Tate appeared before the faculty evaluation committee and informed them that the supervising professor, Bertha Bone, told him twice because "she doesn't like me." Tate's evidence for Bone's alleged dislike of him involved several disagreements over patient care in which Tate "allowed bone that she was endangering patients" by not testing research on each issue and giving it to her. Bone provided the faculty committee with a one-paragraph summary of the "clinical failings" of Tate. The faculty committee ruled against Tate, and he is dismissed from medical school one week before graduation. Tate files a lawsuit against KBU, alleging constitutional and contract violations.

a) Tate will win because the faculty did not investigate Tate's allegations against Bone, which is a violation of his due process rights.
b) Tate will win because he has performed well throughout medical school and it is arbitrary and capricious to dismiss him for failing one small portion of the program.
c) Tate will lose because he has been provided sufficient due process to satisfy constitutional and contractual requirements.
d) Tate will lose because collegial relationships between medical school and faculty are an appropriate criterion to use to evaluate medical students.

DISTINGUISHING DISCIPLINARY FROM ACADEMIC JUDGMENTS

Key case: Board of Curators of the University of Missouri v. Horowitz

435 U.S. 76 (1978)
The Law of Higher Education, Sec. 4.8.3
The result in *Horowitz*:

"The [medical school] fully informed respondent of the faculty's dissatisfaction with her clinical progress and the danger that this poses to timely graduation and continued enrollment. The ultimate decision to dismiss respondent was careful and deliberate. These procedures were sufficient under the Due Process Clause of the Fourteenth Amendment.*

Why did the Court in *Horowitz* require minimal due process for dismissal from medical school?

An academic judgment was involved.

Justice Rehnquist outlined two key distinctions between disciplinary and academic decision making:

a) an academic evaluation "is by its nature more subjective and evaluative" than the "typical factual questions" encountered in the "average disciplinary decision;" and

b) disciplinary proceedings "automatically" bring "adversarial flavor to the normal student-teacher relationship. The same conclusion does not follow in the academic context."
Is evaluation of clinical performance a "disciplinary" or an "academic" judgment?

Justice Powell concurring in Horewitzi wrote:

"It is well to bear in mind that respondent was attending a medical school where competence in clinical courses is as much of a prerequisite to graduation as satisfactory grades in other courses. Respondent was dismissed because she was as deficient in her clinical work as she was proficient in the academic part of the curriculum. Evaluation of her performance in the former area is no less an 'academic' judgment because it involves skills and techniques in actual conditions of practice, rather than assigning a grade to her written answers on an essay question."

Is academic dishonesty a "disciplinary" or an "academic" offense?

The cases are clear and consistent:


Lightsey v. King, 587 F. Supp. 648 (E.D. N.Y., 1983). Cheating was a disciplinary matter rather than an academic one: "Cheating is more ... despite such sanctions" of campus officials.

The Law of Higher Education and Year Supplement, Sec. 4.2.2.
What if a student claims that the substance of an academic decision was "arbitrary and capricious," regardless of the procedural due process followed?

In Regents of the University of Michigan v. Ewing, 474 U.S. 214 (1985) the Court wrote:

"The faculty's decision [to dismiss a medical student] was made conscientiously and with careful deliberation, based on an evaluation of the entirety of Ewing's academic career. When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment."

Law of Higher Education, Sec. 4.7.1

FUNDAMENTALS OF DUE PROCESS IN STUDENT DISCIPLINARY CASES

Key cases and opinions:
The requirements of due process are flexible

In the educational setting, as elsewhere, the "accommodation of the competing interests involved" in defining due process (Goss v. Lopez, 419 U.S. 565 (1975) means that "the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." Colambo v. Naimy, 387 U.S. 856, 895 (1967).
Panich, continued: "The judicial model for factfinding for all constitutionally protected interests, regardless of their nature, can turn national decision making into an unmanageable enterprise" (Footnote 16).

College disciplinary proceedings are essentially "investigatory" in nature.


"In considering the possibility of change, we must open our minds to the variants and alternatives employed by other communities that also aspire to civilization. Without voting firmly, I raise the question whether the virginal, ignorant judge is always to be preferred to one with an investigative file. We should be prepared to inquire whether our arts of examining and cross-examining, often geared to preventing excessive outpourings of facts, are inescapably preferable to safeguarding interrogation by an informed judicial officer."
The lead case:
Dixion v. Alabama, 294 F. 2d 150,159 (5th Cir. 1971)

"This is not to imply that a full-dress judicial hearing, with the right to cross-examine witnesses, is required. Such a hearing, with
the attending publicity and disturbance of college activities, might be detrimental to the
college's educational atmosphere....

Dixion continued: The student should be
given the names of the witnesses against him
and an oral or written report on the facts to
which each witness testifies. He should also
be given the opportunity to present to the
Board, or at least to an administrative official
of the college, his own defense against the
charges and to produce either oral testimony
or written affidavits of witnesses in his behalf.
If the hearing is not before the Board directly,
the results and findings of the hearing should
be presented in a report open to the student's
inspection.

The Law of Higher Education, Sec. 4.8.2

The key Supreme Court precedent:
Goss v. Lopez, 419 U.S. 565

"We stop short of construing the Due
Process Clause to require, countrywide,
that hearings in connection with short
suspensions must afford the student the
opportunity to secure counsel, to confront
and cross-examine witnesses supporting
the charge, or to call his own witnesses to
verify his version of the incident."

The Law of Higher Education, Sec. 4.8.2
Goss, continued:

"[F]urther formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process."

Goss, continued:

"On the other hand, requiring effective notice and informal hearing permitting the student to give his version of the events will provide a meaningful notice against erroneous action. At least the disciplinarian will be alerted to the existence of disputes about facts and arguments about cause and effect."

Goss, continued:

"[The disciplinarian] may then determine himself to summon the accuser, permit cross-examination, and allow the student to present his own witnesses. In more difficult cases, he may permit counsel."

Goss, continued:

"[The disciplinarian] may then determine himself to summon the accuser, permit cross-examination, and allow the student to present his own witnesses. In more difficult cases, he may permit counsel."
Goa, continued:

"[T]here are recurring situations in which prior notice and hearing cannot be insisted upon. Students whose presence poses a continuing danger to persons or property, or an ongoing threat of disrupting the academic process may be immediately removed from school. In such cases, the necessary notice and rudimentary hearing should follow as soon as practicable..."

Based on the reasoning in Goos, most cases (i.e. those not resulting in suspension or expulsion) can be resolved in informal "disciplinary conferences." See Paveza: "Model Code of Student Conduct" at:

http://www.collegepulse.com/ref/ModelCodeStdCndv.html

Benefits of "disciplinary conferences":

a. Informal and conversational
b. Student perspectives are heard
c. Human contact is established
d. Penalties tend to be less harsh
e. Cases are resolved faster
f. The Maryland experience: no litigation in 20 years
Due process and economic analysis

"The danger that without the procedural safeguards deemed appropriate in civil and criminal litigation public universities will engage in an orgy of expulsions is slight. The relation of students to universities is, after all, essentially that of customer to seller."

Osteen v. Hanley, 13 F.3d 221 (7th Cir. 1993)
Law of Higher Education, Sec. 4.5.3

Students at private institutions may have contractual rights to basic due process;
Law of Higher Education, Sec. 4.6.2

Carr, continued

“When a student is duly admitted by a private university . . . there is an implied contract between the student and the university that, if he complies with the terms prescribed by the university, he will obtain the degree which he sought. The university cannot take the student's money, allow him to remain and waste his time in whole or in part . . . and then arbitrarily expel him . . ."
Private (and public) institutions will be expected to follow their own rules:

"The law of associations accords judicial relief to an association member suspended or expelled without adherence to its rules . . ."


Law of Higher Education, Sec. 4.8.1

The Supreme Court on discipline, education and character development:

"The role and purpose of the American public school system was well described by two historians, saying 'public education must prepare youth for citizenship in the Republic . . . it must instill the habits and manners of work and values in themselves conducive to happiness and an indispensable to the practice of self-government . . .'."

Bettel v. Fraser, 478 U.S. 675 (1986).

Student Character Development Initiatives

1. www.umd.edu/ethics
2. www.umd.edu/pra ("academic integrity")
Freedom of Expression

Student Free Speech

The Law of Higher Education, Secs. 4.9, 4.10, 4.11.1, 4.11.2, and 4.13
See also Year 2000 Cumulative Supplement, Sec. 4.18 ("Free Speech on Campus Computer Networks")

Student Free Speech: Public Institutions vs. Private Institutions

I. Public Institutions
A. First Amendment Free Speech Clause
B. Institutional Bill of Rights, state statute, or state constitution supplementing First Amendment

II. Private Institutions
A. Institution's own Bill of Students' Rights
B. Free speech provisions in state statutes or state constitution
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

Healy v. James, 408 U.S. 159 (1972) (College unlawfully denied recognition to the Students for a Democratic Society).

"[T]he precedents of this court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large."

Law of Higher Education, Secs. 4.10.4.11.1

Freedom of expression is not absolute.

The Supreme Court in Healy also stated that expression or associational activities "need not be tolerated where they infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education."
But "offensive" expression is usually protected. See Cohen v. California, 403 U.S. 15 (1971) (appellant wore jacket in Los Angeles courthouse bearing words "F*ck the Draft.")

The Court observed that "...one man's vulgarity is another's lyric."

Law of Higher Education, Sec. 4.10

Papish v. Board of Curators of the University of Missouri, 410 U.S. 667 (1973)

The university may not expel a student for distribution of newspaper containing offensive language and depicting policemen raping the Statue of Liberty.

Law of Higher Education, Sec. 4.13.3

Papish, continued:

The Court concluded that "...the mere dissemination of ideas--no matter how offensive to good taste--on a state university campus may not be shut off in the name alone of 'conventions of decency.'"
Speech codes' come from many ideological directions. Note [then] Justice Rehnquist's dissent in Papish:

"In theory, at least, a university is not merely a forum for the discussion of ideas by students and faculty; it is also an institution where individuals learn to express themselves in acceptable, civil terms."

Every speech code challenged in the courts has been struck down. See, generally, Iota Xi Chapter of Sigma Chi Fraternity v. George Mason University, 83 Ed. Law Rep. 43 (CA 4, 1993):

"The University should have accomplished its goals in some fashion other than silencing speech on the basis of its viewpoint."

Law of Higher Education and Year 2000 Supplement, Sec. 4.12

Racial and sexual harassment:

See Meritor Savings Bank v. Vinson, 477 U.S. 67 (1986); the "mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee would not affect the conditions of employment to sufficiently significant degree to violate Title VII" [citation omitted].
To state a Title VII claim, the harassment must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."

Law of Higher Education and Year 2000 Supplement, Sec. 3.3.4.3

Religious expression is protected.
Sec. Widmar v. Vincent, 454 U.S. 263 (1981) ("[A] state university, which makes its facilities generally available for the activities of registered student groups" may not "close its facilities to a registered student group desiring to use the facilities for religious worship and religious discussion").

Law of Higher Education and Year 2000 Supplement, Sec. 4.11.4

Widmar, continued:
"The basis for our decision is narrow. Having created a forum generally open to student groups, the University seeks to avert a content-based exclusion of religious speech. Its exclusionary policy violates the fundamental principle that a state regulation of speech should be content-neutral..."

*Outline*, p. 49, no. 9.

*Law of Higher Education and Year 2000 Supplement*, Sec. 4.11.4

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Should First Amendment standards apply at private institutions?

See statement on campus freedom of expression by Harvard University President Derek Bok in the March 16, 1991 Harvard University Gazette.

*Law of Higher Education*, Sec. 1.6.3

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Bok: "Although it is not clear to what extent the First Amendment is enforceable against private institutions, I have great difficulty understanding why a university such as Harvard should have less free speech than the surrounding society—or than a public university, for that matter..."
Bok: "Like the rest of society we should also worry about who will draw the lines and how wisely they will be drawn if we begin to restrict the bounds of permissible speech..."

Bok: "In addition, I suspect that no community can expect to become humane and caring by restricting what its members can say. The worst offenders will simply find other ways to irritate and insult."

Bok: "Once we start to declare certain things 'offensive,' with all the excitement and attention that will follow, I fear that much ingenuity will be exerted trying to test the limits, much time will be spent trying to draw hopeless distinctions, and the resulting publicity will eventually attract more attention to the offensive material than would ever have occurred otherwise."

Classroom management and the ADA

Two case studies in the outlines: "A Mean 'n' Nightmare" (p. 46) and "Baxter and His English Professor" (p. 55).
Under the Americans with Disabilities Act (ADA), preceded by Rehabilitation Act of 1973, students with "[a]ny mental or psychological disorder, such as ... emotional or mental illness" (or those who are regarded as having such a disorder) may be entitled to protection under the law if their impairment "substantially limit[s] one or more major life activities."

Law of Higher Education and Year 2000 Supplement, Sec. 4.7.4

Even if protected by the ADA, a student with a mental disability may be dismissed or withdrawn if he or she poses a "direct threat."

The EEOC's ADA regulations explain that "direct threat" means "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation."
The EEOC Guidance states that a "direct threat" may be "to be safety of the individual," thereby allowing colleges to apply "direct threat" analysis to suicidal students.

The view that "direct threats" could encompass threats to self was recently upheld by the U.S. Supreme Court in Chevron USA v. Mario Echazabal, (No 00-1406, 2002).

The "EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities," as modified on February 1, 2000:

http://www.eeoc.gov/locc/psych.html
FERPA: Family Educational Rights and Privacy Act

See "Questions and Answers on Student Privacy Rights" on p. 64 of the outline. This document is available at:

Law of Higher Education and Year 2000 Supplement, Sec. 4.16.1

In U.S. v. Miami University (8th Cir. 00-3519, June 27, 2002), the U.S. Court of Appeals for the Sixth Circuit held that institutions of higher education are barred from releasing student disciplinary records to the public, except as expressly permitted under FERPA.
In Gonzaga University v. Doe (No. 01975, June 20, 2002), the U.S. Supreme Court held that individuals cannot bring private lawsuits under a federal civil rights statute to enforce FERPA rights.

**QUIZ Question**

Due process:

1. Requires notice, an opportunity to be heard before an unbiased panel or committee, and a right to appeal.

2. Requires notice, a right to some kind of legal representation, and an opportunity to be heard before an unbiased panel or committee.

3. Requires notice, the right to be heard before an unbiased panel or committee, the right to question adverse witnesses, and a right to...  

**Answer**

The best answer is [d]. The nature of due process varies, depending on the type of decision (e.g., academic dismissals may require a "hearing and deliberation" decision, not a "show-cause" procedure; Board of Trustees of the University of Missouri v. Horne, 435 U.S. 78, 1978) and the severity of the possible sanction (e.g., contrast the use of "disciplinary conferences" for non-suspension or expulsion offenses with "hearings" for any case that might result in dismissal).
See generally, Cafeteria Workers v. McElroy, 367 U.S. 886, 898 (1961) ("The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation").

See also the "Model Code of Student Conduct in Asymmetric Law and Policy in Higher Education, Spring 2000 and the "Model Code of Academic Integrity" available at www.umd.edu/ethics ("library"); "Applying the Power of Association on Campus").