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The Law of
Higher Education
Fourth Edition

Student Version



John Wiley & Sons, Inc.

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William A. Kaplin

Barbara A. Lee

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Notice to Instructors

The authors have prepared a compilation of teaching materials for classroom use (see below) that is available in electronic format free of charge for instructors who adopt this *Student Version* as a required text. In addition, we have a Web site supporting the *Student Version* (as well as the full *Fourth Edition of The Law of Higher Education*) that is accessible to both instructors and students; it includes new developments, clarifications, and errata that update and supplement the *Fourth Edition* and the *Student Version*. We have also prepared an Instructor's Manual that provides suggestions on using the *Student Version* as a course text and on organizing and teaching higher education law courses. It is available, only to instructors, on the Web site. This Web site is hosted by the National Association of College and University Attorneys (NACUA), and is available at <http://www.nacua.org/publications/lohe/index.asp>. The teaching materials, *Cases, Problems, and Materials for Use with the Law of Higher Education, Fourth Edition, Student Version*, is for instructors and students in courses on higher education law or administration, as well as for leaders and participants in workshops that address higher education legal issues. These teaching materials include court opinions carefully edited by the authors and keyed to the *Student Version*, notes and questions about the cases, short problems designed to elicit discussion on particular issues, a series of "large-scale" problems suitable for role playing, and guidelines for analyzing and answering all the problems. *Cases, Problems, and Materials (Student Version)* is published by NACUA (which also hosts the Web site for the *Student Version* and the full *Fourth Edition*) and is available both in electronic format that can be downloaded from NACUA's Web site (<http://www.nacua.org/publications/lohe/index.asp>) and in hard copies that may be purchased at cost from NACUA. Any instructor who has adopted the

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

The authors, in cooperation with the publisher, have made arrangements for two types of periodic updates for the *Student Version* (and the full *Fourth Edition*) of *The Law of Higher Education*. First, the National Association of College and University Attorneys (NACUA) has generously agreed to host a Web site for the *Student Version* (and the full *Fourth Edition*) to provide periodic postings of new developments and clarifications that update and supplement both books. This Web site is available to all readers and may be accessed through the NACUA Web site (<http://www.nacua.org/publications/lohe/index.asp>). Second, the authors intend to prepare periodic supplements to the *Student Version* (and the full *Fourth Edition*) as feasible. Both of these updating services are intended as a response to the law's dynamism—to the rapid and frequent change that occurs as courts, legislatures, government agencies, and private organizations develop new requirements, revise or eliminate old requirements, and devise new ways to regulate and influence institutions of higher education.

Contents

Notice to Instructors	v
Notice of Web Site and Periodic Supplements for the <i>Student Version</i>	vii
Preface	xvii
Crosswalk for the <i>Student Version</i> and <i>The Law of Higher Education, 4th Edition</i>	xxv
Acknowledgments	xxxiii
The Authors	xxxvii
General Introduction: The Study of Higher Education Law	1
A. The Universe of Higher Education Law	1
B. The Governance of Higher Education	2
C. Sources of Higher Education Law	3
D. The Legal Relationships Within Institutions of Higher Education	4
E. The Law/Policy Distinction	6
F. The U.S. Legal System as It Relates to Higher Education Law	6
PART ONE PERSPECTIVES AND FOUNDATIONS	9
1 Overview of Higher Education Law	11
1.1 How Far the Law Reaches and How Loud It Speaks	11
1.2 Evolution of Higher Education Law	16

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

PART TWO THE COLLEGE AND ITS GOVERNING BOARD AND STAFF 81

- 3 The College's Authority and Liability 83
 - 3.1 The Question of Authority 83
 - 3.1.1 *Overview* 83
 - 3.1.2 *Trustee authority* 87
 - 3.2 Institutional Tort Liability 87
 - 3.2.1 *Overview* 87
 - 3.2.2 *Negligence* 91
 - 3.2.2.1 *Premises liability* 93
 - 3.2.2.2 *Liability for injuries related to on-campus instruction* 95
 - 3.2.2.3 *Liability for injuries in off-campus courses* 96
 - 3.2.2.4 *Liability for cocurricular and social activities* 99
 - 3.2.2.5 *Student suicide* 101
 - 3.2.2.6 *Liability for injuries related to outreach programs* 103
 - 3.2.3 *Educational malpractice* 104
 - 3.3 Institutional Contract Liability 105
 - 3.4 Institutional Liability for Violating Federal Constitutional Rights
(Section 1983 Liability) 109
- 4 The College and Its Employees 117
 - 4.1 Overview of Employment Relationships 117
 - 4.2 Employment Contracts 119
 - 4.2.1 *Defining the contract* 119
 - 4.2.2 *The at-will doctrine* 120
 - 4.3 Collective Bargaining 121
 - 4.3.1 *Overview* 121
 - 4.3.2 *The public-private dichotomy in collective bargaining* 121
 - 4.3.3 *Collective bargaining and antidiscrimination laws* 122
 - 4.4 Personal Liability of Employees 124
 - 4.4.1 *Overview* 124
 - 4.4.2 *Tort liability* 125
 - 4.4.2.1 *Overview* 125
 - 4.4.2.2 *Negligence* 126
 - 4.4.3 *Contract liability* 127
 - 4.4.4 *Constitutional liability (personal liability under Section 1983)* 128
 - 4.4.4.1 *Qualified immunity* 128
 - 4.4.4.2 *Issues on the merits: State-created dangers* 132
 - 4.5 Employment Discrimination 135
 - 4.5.1 *Overview: The interplay of statutes, regulations, and constitutional protections* 135
 - 4.5.2 *Sources of law* 137
 - 4.5.2.1 *Title VII* 137
 - 4.5.2.2 *Equal Pay Act* 147
 - 4.5.2.3 *Title IX* 148
 - 4.5.2.4 *Section 1981* 149
 - 4.5.2.5 *Americans With Disabilities Act and Rehabilitation Act of 1973* 150

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

PART THREE THE COLLEGE AND ITS FACULTY 183

5 Special Issues in Faculty Employment 185

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

6 Faculty Academic Freedom and Freedom of Expression 239

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

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

PART FOUR THE COLLEGE AND ITS STUDENTS 291

7 The Student/Institution Relationship 293

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

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

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

PART FIVE THE COLLEGE AND THE OUTSIDE WORLD 591

10 The College and Government 593

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

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

11 The College and External Private Entities 644

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

Appendices

- A. Constitution of the United States of America: Provisions of Particular Interest to Postsecondary Education 659
- B. The American Court System 663
- C. Reading and Analyzing Court Opinions 666
- D. Glossary of Legal Terms 669

Bibliography 676

Statute Index 686

Case Index 689

Subject Index 699

Preface

Operating the colleges and universities of today presents a multitude of challenges for their leaders and personnel. Often the issues they face involve institutional policy, but with continually increasing frequency they have legal implications as well. For example:

- A wealthy alumna may call the vice president for development and offer to make a multimillion dollar donation for scholarships on the condition that they be awarded only to African American students from disadvantaged families. Can and should the vice president accept the donation and follow the potential donor's wishes?
- A tenured faculty member may have been accused of sexually harassing a student. What standards and processes should be used to determine whether the faculty member should be discharged, disciplined, or reprimanded?
- A student religious organization may approach the dean of students seeking recognition or an allocation from the student activities fees fund. If membership in the organization is limited to students of a particular faith, or if the organization does not admit gays or lesbians, how should the administration respond?
- A faculty member may challenge a negative promotion or tenure decision, or defend against a grievance complaint, that is based in part on the professor's performance as a classroom teacher. Are there any circumstances in which the faculty member would have viable academic freedom rights to assert?

- Student protesters (or nonstudent protestors from the community) may claim a right to hold a demonstration at a place on campus *other than* the “free speech zones” that the university’s administration has set up for this purpose. On what basis (if any) would such protesters have legal support for their claim, and would the students’ rights differ from those of community members?

To assist students and instructors who wish to study, research, or teach about issues such as these, and innumerable others, we have prepared this *Student Version* of our two-volume work, *The Law of Higher Education* (Fourth edition, 2006) (“*LHE 4th*” or “full *4th Edition*”). The *Student Version* provides foundational information, in-depth analysis, and practical suggestions on a wide array of legal issues faced by public and private institutions. The discussions draw upon pertinent court opinions, constitutional provisions, statutes, administrative regulations, and related developments. In order to enhance readability and keep the *Student Version* of manageable size, we have only occasionally included text or footnote citations to resources for further study and research, such as selected journal articles, books, and Web sites. We have, however, included a bibliography of such resources at the end of this book. In addition, we have created a convenient crosswalk from the various sections of the *Student Version* to the corresponding sections of the full *4th Edition*, which are chock full of text citations, footnotes, and annotated bibliographies (at the end of each chapter) that will be highly useful for any student or instructor seeking such resources. The crosswalk follows in the front matter of this book.

How the Student Version Was Developed

We have designed this special edition of *LHE 4th* for use in higher education law and higher education administration courses. Guided by our own experiences teaching courses and workshops in higher education law, and by the suggestions of teaching colleagues, we have selected the topics from the full *4th Edition* that we believe are of greatest importance and interest to students and their instructors. We have given primary consideration to the significance of the topic for the development of higher education law and policy, the topic’s currency or timelessness for administrators of colleges and universities, and its usefulness in illustrating particular legal problems or the application of particular legal principles. The issues we have emphasized for each topic are usually ones that administrators, faculty members, or students could encounter at virtually any institution of higher education in the country (or, sometimes, in the world). In developing these issues, we have focused not only on the applicable law, but also on pertinent policy considerations and on implications for practice.

We had to make difficult choices about which topics and issues to omit or to treat much less expansively than they are treated in the full *4th Edition*. For example, we included most of the topics and discussions in the chapters from the full *4th Edition* involving tort claims, faculty employment issues, academic freedom, student affairs, and academic issues concerning students. On the other

hand, we omitted many of the topics and discussions involving the employment of administrators and staff members. We also omitted most of the full *4th Edition*'s discussion of government regulation of higher education—although we retained overviews of each level of government and illustrative examples of regulatory activities at each level. For the federal government, for instance, we retained a discussion of federal copyright law and a discussion of federal civil rights laws (such as Title IX) prohibiting discrimination in programs that receive federal funding. Similarly, we omitted most of the material in the full *4th Edition* that discusses the various private educational associations, in particular the American Association of University Professors (AAUP), the accrediting agencies, and the intercollegiate athletics associations; and most of the material on college and university relationships with the business world. But we retained overviews and illustrative examples for each of these topics. (The material on the AAUP is in Section 6.1.3.) Readers interested in further information on topics or issues that we have compressed are invited to consult the crosswalk to *LHE 4th* that appears next in the front matter; and to consult the Table of Contents of *LHE 4th* for topics we have omitted from the *Student Version*.

Besides reediting and reorganizing the materials that we have adapted from *LHE 4th*, we have updated these materials to account for the most important developments occurring from the press deadline for *LHE 4th* to the press deadline for this *Student Version*; and we occasionally have made small insertions of new material to capture points of particular interest to students. In addition, we have prepared numerous study aids designed specifically for students and instructors, and integrated them into this book. These enhancements are:

- New introductory materials, titled “General Introduction: The Study of Higher Education Law,” that lay the foundation for, and facilitate the study of, the subject matter; and also include a section providing guidance for students who do not have background or training in the law.
- An appendix (Appendix B) that provides an overview of the American system of courts and highlights key distinctions between federal and state courts, and between trial and appellate courts.
- Another appendix (Appendix C) that provides practical guidelines for reading and analyzing judicial opinions.
- Another appendix (Appendix D) that presents a glossary of legal terms used in this book.
- Overviews at the beginning of chapters (in italic) that introduce the topics and concepts to be addressed in each chapter.
- Six graphics (or figures), spread throughout the book, that illustrate particular legal concepts and distinctions.
- A crosswalk (in the front matter) that connects each section in the *Student Version* to the corresponding section in the full *4th Edition*, and is designed for readers who may seek additional discussion, cases, or bibliographical resources available in *LHE 4th*.

In addition to these study aids that are incorporated into this *Student Version*, we have also prepared a separate volume of edited cases and practice problems, keyed to the *Student Version*, which is available to instructors for distribution to students. (See “Notice to Instructors” in the front matter.)

Developments in Higher Education Law Since the Publication of the Third Edition of LHE

In the years since publication of the *Third Edition* of *The Law of Higher Education* in 1995, many new and newly complex legal concerns have arisen on America’s campuses—from the implications of tort law cases on an institution’s “special relationship” with certain students, to affirmative action in admissions and financial aid, to the allocation of mandatory student activities fees, to the clashes among faculty, student, and “institutional” academic freedom, to legal issues regarding internet communications. Indeed, it is difficult to identify any other entities—including large corporations and government agencies—that are subject to as great an array of legal requirements as are colleges and universities. To reflect this continual growth of the law, this *Student Version* of *LHE 4th* retains the material of continuing legal currency from the *3d Edition* of *LHE*, and the 1997 and 2000 supplements, that is within the parameters we have set out above. We reorganized and reedited this material to accommodate the deletion of old and the addition of new developments, and to maximize clarity and accessibility. To this base, we added considerable new material: more than one-third of the material in the eleven chapters of the *Student Version* did not appear in earlier editions of *The Law of Higher Education* or the supplements. This new material integrates pertinent new developments and insights regarding topics in the earlier editions and introduces numerous new topics and issues not covered in earlier editions.

Like the full *4th Edition*, this *Student Version* covers all of *postsecondary* education—from the large state university to the small private liberal arts college, from the graduate and professional school to the community college and vocational and technical institution, and from the traditional campus-based program to the innovative off-campus or multistate program, and now to distance learning as well. The *Student Version* also reflects the same perspective as the full *Fourth Edition* and earlier editions on the intersection of law and education. As described in the preface to the *1st Edition*:

The law has arrived on the campus. Sometimes it has been a beacon, at other times a blanket of ground fog. But even in its murkiness, the law has not come “on little cat feet,” like Carl Sandburg’s “Fog”; nor has it sat silently on its haunches; nor will it soon move on. It has come noisily and sometimes has stumbled. And even in its imperfections, the law has spoken forcefully and meaningfully to the higher education community and will continue to do so.

Organization and Content of the Student Version

We have organized this *Student Version* into five parts: (1) Perspectives and Foundations; (2) The College and Its Governing Board and Staff. (3) The College and Its Faculty; (4) The College and Its Students; and (5) The College and the

Outside World. In turn, we have divided these five parts into eleven chapters. Each chapter is divided into numerous sections and subsections with their own titles. Chapter One provides a framework for understanding and integrating what is presented in subsequent chapters and a perspective for assimilating future legal developments. Chapter Two addresses foundational concepts concerning legal liability, preventive law, and the processes of litigation and alternative dispute resolution. Chapters Three through Nine develop the legal concepts and issues that define the *internal* relationships among the various members of the campus community, and address the law's impact on particular roles, functions, and responsibilities of students, faculty members, and trustees and administrators. Chapter Ten is concerned with the postsecondary institution's *external* relationships with government at the federal, state, and local levels. This chapter examines broad questions of governmental power and process that cut across all the *internal* relationships and administrative functions considered in Chapters Three through Nine. Chapter Eleven also deals with the institution's *external* relationships, but the relationships are those with the private sector rather than with government. This chapter explores the various national and regional education associations with which postsecondary institutions interact, as well as the various research ventures that institutions engage in with private entities from the commercial world.

Prior to the first chapter, we have included a General Introduction with six sections. After the last chapter we have included a bibliography of resources for research and independent study, as well as four appendices containing various study aids.

A Note on Nomenclature

The *Student Version* uses the terms “higher education” and “postsecondary education” to refer to education that follows a high school (or K–12) education. Usually these terms are used interchangeably; but occasionally “postsecondary education” is used as the broader of the two terms, encompassing formal post-high school education programs whether or not they build on academic subjects studied in high school or are considered to be “advanced” studies of academic subjects. Similarly, this book uses the terms “higher education institution,” “postsecondary institution,” “college,” and “university” to refer to the institutions and programs that provide post-high school (or post-K–12) education. These terms are also usually used interchangeably; but occasionally “postsecondary institution” is used in the broader sense suggested above, and occasionally “college” is used to connote an academic unit within a university or an independent institution that emphasizes two-year or four-year undergraduate programs. The context generally makes clear when we intend a more specific meaning and are not using the above terms interchangeably.

The term “public institution” generally means an educational institution operated under the auspices of a state, county, or occasionally a city, government. The term “private institution” means a nongovernmental, nonprofit, or proprietary educational institution. The term “religious institution” encompasses a private educational institution that is operated by a church or other sectarian

organization (a “sectarian institution”), or is otherwise formally affiliated with a church or sectarian organization (a “religiously affiliated institution”), as well as an institution that has no affiliation with an outside religious organization but nevertheless proclaims a religious mission and is guided by religious values.

Recommendations for Using the Student Version and Keeping Up-to-Date

There are some precautions to keep in mind when using this book. The legal analyses throughout the book, and the practical suggestions, are not adapted to the law of any particular state or to the circumstances prevailing at any particular postsecondary institution. The book is not a substitute for the advice of legal counsel, nor a substitute for further research into the particular legal authorities and factual circumstances that pertain to any legal problem that an institution, administrator, student, or faculty member may face in real life. Nor is the book necessarily the latest word on the law. There is a saying among lawyers that “the law must be stable and yet it cannot stand still” (Roscoe Pound, *Interpretations of Legal History*, p. 1 (1923)), and the law moves especially fast in its applications to postsecondary education. Thus, we suggest that instructors and students keep abreast of ongoing developments concerning the topics and issues in this book. Various aids (described below) are available for this purpose.

First, we plan to maintain a Web site, hosted by the National Association of College and University Attorneys (NACUA), Washington, D.C. (www.nacua.org), on which we will announce or post pertinent new developments, keying them to this *Student Version* as well as to the full *4th Edition*. Periodically (perhaps every two years), we expect to organize and expand these postings into a supplement for the *Student Version* (as well as the full *4th Edition*), to be published by NACUA. For further information on the Web site and the supplements, see page vii in the front matter of this book.

Next, there is another, very helpful, Web site: the Campus Legal Information Clearinghouse (CLIC), <http://counsel.cua.edu>, operated by the General Counsel’s Office at The Catholic University of America in conjunction with the American Council on Education, that includes information on recent developments, especially federal statutory and federal agency developments. In addition, there is a legal reporter that reprints new court opinions on higher education law and provides commentary on recent developments: *West’s Education Law Reporter*, published biweekly by Thomson/West Publishing Company, St. Paul, Minnesota.

For news reporting of current events in higher education generally, but particularly for substantial coverage of legal developments, instructors or students may wish to consult the *Chronicle of Higher Education*, published weekly in hard copy and daily online (<http://www.chronicle.com>); or *Inside Higher Ed.*, published daily online (<http://insidehighered.com>).

Other resources will be helpful not only for keeping abreast of recent developments, but also for identifying pertinent research. *Higher Education Abstracts* provides information on conference papers, journal articles, and government and association reports; it is published quarterly by the Claremont Graduate School,

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