The Law of Higher Education
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Notice to Instructors

A Student Version of *The Law of Higher Education*, fifth edition, will be published shortly after this fifth edition is published, as will a volume of classroom teaching materials for instructors and students using the fifth edition. In addition, a Web site supporting the fifth edition and the Student Version will be available to instructors and students. This Web site will be hosted by the National Association of College and University Attorneys (NACUA) and will be accessible at http://www.nacua.org/publications/lohe/index.asp. There will also be an Instructor’s Manual available only to instructors, which will be on the Web site of Jossey-Bass (http://www.josseybass.com) as well as on the NACUA Web site.

*The Law of Higher Education: Student Version* will be approximately one-half the length of the fifth edition and will contain material from the fifth edition that has been carefully selected by the authors for its particular relevance for classroom instruction. The Student Version will also include a new Preface, a General Introduction to the study of higher education law, and four appendices directed specifically to students and instructors. This Student Version will be available from Jossey-Bass in the spring of 2014.

The volume of teaching materials—*Cases, Problems, and Materials for Use with The Law of Higher Education, Fifth Edition*—is for instructors and students in courses on higher education law, as well as for leaders and participants in workshops that address higher education legal issues. There are two versions of these materials, one keyed to the fifth edition and one keyed to the Student Version. The materials include court opinions carefully edited by the authors; 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 will be available from the National Association of College and University Attorneys and may be obtained in electronic format that can be downloaded from NACUA’s Web site or in hard copies available for purchase at cost from NACUA (see below). Any instructor who has adopted the Student Version or the full fifth edition as a required course text may obtain permission from NACUA to download a copy of Cases, Problems, and Materials or selected portions of it, free of charge, and to reproduce the materials for distribution to students in the course. No other reproduction, distribution, or transmission is permitted. To obtain such permission, or to inquire about or order hard copies, contact:

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Through NACUA, the authors also plan to provide Web site postings on recent legal developments and new research resources, as well as periodic supplements to the Law of Higher Education books, as described in the Notice that immediately follows this one. These services should greatly assist instructors in keeping their courses up to date. Further information on these various resources and instructions for using them are on the NACUA Web site.
Notice of Web Site and Periodic Supplements for the Fifth Edition

The authors, in cooperation with the publisher, have made arrangements for two types of periodic updates for this fifth edition of *The Law of Higher Education*. First, beginning with the publication of the fourth edition in 2006, the National Association of College and University Attorneys (NACUA) has hosted a Web site for *The Law of Higher Education* and its progeny, including the *Student Version* of *The Law of Higher Education* and *A Legal Guide for Student Affairs Professionals*. A primary purpose of this Web site is to provide quick access to the authors’ brief updates and citations on major new developments and resources that affect the discussions in these books. (There are also teaching materials on the Web site, as described in the Notice immediately preceding this one.) The Web site may be accessed through the NACUA Web site at http://www.nacua.org/publications/lohe/index.asp. Further directions for using the Web site will also be available at this address.

As the second means of updating, the authors plan to prepare periodic supplements to this fifth edition of *The Law of Higher Education* (as well as the Student Version). These supplements will be available approximately every two years and will be published by NACUA. These updating services for users of *The Law of Higher Education*, the *Student Version*, or the *Student Affairs* volume are intended to be 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.
The Jossey-Bass Higher and Adult Education Series
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Much as it takes a village to raise a child (a saying of obscure origin), it takes an “academical village” (Thomas Jefferson’s phrase) to raise a book—at least a book such as this that arises from, and whose purpose is to serve, a national (and now international) academic community. This book is dedicated to all those members of our academical village who in numerous and varied ways have helped raise this book from its origins through this fifth edition, and to all those members who will face the great challenges of law and policy that will shape higher education’s future.
Preface

*Overview of the Fifth Edition*

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 these issues have legal implications as well. Examples abound. A student enrolled in an online course may commit plagiarism or some other alleged violation of the code of student conduct. In what ways may the college discipline the student, and what process should be followed? A staff member may become a “whistleblower” and allege that the college is violating the law. Suppose the college was preparing to dismiss the complaining staff member for poor performance just before he “blew the whistle”? May the college still dismiss the staff member? A student religious organization may approach the dean of students seeking recognition or an allocation from the fund for student activities. If membership is limited to students of a particular faith, or if the student organization does not admit gays or lesbians, how should the administration respond? A faculty member may challenge a negative promotion or tenure decision on the ground that her performance was negatively affected by a disability. Is the college required to modify the tenure criteria it applies to the faculty member, or might the faculty member have other rights to assert? A faculty member is disciplined by the school’s dean for having made various comments to high-level administrators and the press about the importance of racially and ethnically diverse faculty and the school’s failure to work toward this goal. The faculty member claims a violation of free speech and academic freedom. Is this a viable claim? A wealthy alumna may call the vice president for student affairs and offer to make a multimillion-dollar donation for scholarships on the condition that the...
scholarships 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?

We have designed this book as a resource for college and university attorneys, officers and administrators, trustees, faculty, and staff who may face issues such as these or innumerable others. The book provides foundational information and conceptual building blocks, in-depth analysis of key developments, and practical suggestions on a wide array of legal and policy issues faced by public and private institutions; the book also recommends and describes numerous additional resources to aid research, analysis, and legal planning. In particular, the book identifies trends and tracks their implications for academic institutions—often pointing out how particular legal developments may clash with, or support, important academic practices or values. In addition, the book explores relationships between law and policy, suggests preventive law measures for institutions to consider, and includes other suggestions and perspectives that serve to facilitate effective working relationships between counsel and administrators who grapple with law’s impact on their campuses.

The discussions draw upon pertinent court opinions, constitutional provisions, statutes, and administrative regulations, as well as selected secondary sources such as journal articles, books, reports, and Web sites. In selecting topics and cases for discussion, we have primarily considered their significance for higher education policy making or legal risk management, their currency or timelessness, and their usefulness as illustrative examples of particular problems or as practical applications of particular legal principles.

**Relationship Between the Fifth Edition and Earlier Editions**

This fifth edition of *The Law of Higher Education* is the successor to the fourth edition, published in 2006, and the periodic supplement published in 2009. The fifth edition features a major reorganization of materials, especially in Chapters 9 and 10, and a thoroughly revised, updated, and expanded text. This edition is current to approximately June 2012 with the occasional addition of selected new developments beyond June 2012.

In the years since publication of the fourth edition and then its supplement, many new and newly complex legal concerns have arisen on U.S. campuses—from the implications of the Internet for teaching and research, to continuing conflict about affirmative action in admissions and financial aid, to the application of institutional nondiscrimination policies to student religious organizations, to the clash between faculty and “institutional” academic freedom, to the rights of intercollegiate athletes, to name a few. 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 serve the needs occasioned by this continual growth of the law, the fifth edition retains all material of continuing legal currency from the fourth edition and the 2009 supplement, reorganized and reedited (and often reanalyzed) to accommodate the deletion and addition of materials