

# Anticipating Legal Issues in Higher Education

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*Learning how to recognize and anticipate the legal risks associated with student affairs practice is a crucial skill all successful administrators must develop. This can be done by developing a sense for scanning the broad legal environment and being aware of legal issues in other parts of the education enterprise.*

Good professionals make a considerable effort to remain current in their career fields. Professional associations assist their members in this task by developing training and professional development programs that address the critical skills that professionals need to do their jobs. In higher education and student affairs, many practitioners acknowledge the importance of knowing how the law affects what they do. Constitutional law affects what kinds of rules and regulations public institutions promulgate. Contract law affects the type of business relationship administrators have with students and other constituents. Tort law affects how managers maintain facilities and supervise student events. As a result, professional associations have been created to focus attention solely on legal issues in higher education (e.g., Education Law Association and the Association for Interdisciplinary Initiatives in Higher Education Law and Policy), programs on a wide variety of legal topics appear on almost every national conference schedule, many professional associations devote part of

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their Web sites to law and legislation (e.g., American College Personnel Association, National Association of Student Personnel Administrators, and the Association for Student Judicial Affairs), and private companies publish newsletters designed to inform their readers about the latest court rulings (e.g., *The College Student and the Courts* by Gehring and Letzring, *Synfax weekly report* by Pavela). Some of these resources examine events that may be several years old since litigation takes time and initial decisions may be appealed. Many of the authors of these publications restate the facts of the particular case and give some guidance on appropriate administrative practice. These resources, however, may not always be able to identify what administrators might face on their own campuses in the near future or define decision-making processes that might help administrators avoid legal pitfalls.

The purpose of this paper is to identify two important mechanisms that college administrators can use to more actively anticipate the legal issues that may occur on their own campuses. First, practitioners should scan the broad legal environment. Secondly, they should be aware of legal issues in other parts of the education enterprise.

## Anticipating Legal Issues

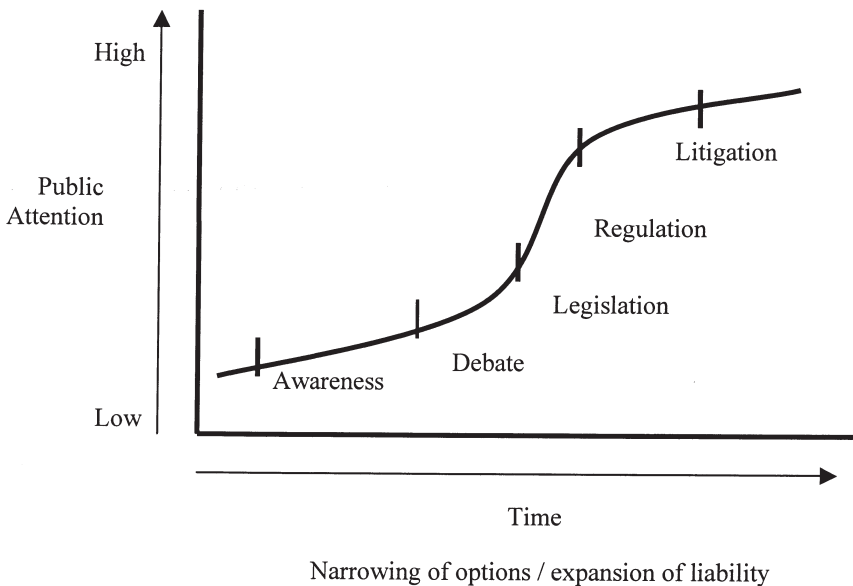
### Develop a Sense for Scanning the Broad Environment

Legal issues often reveal themselves as social issues concerning justice, equity, and equality. Paying close attention to current events, topics identified by special interest groups, and issues that seem to be receiving increasing attention from elected officials is crucial to identifying emerging legal issues. Understanding the life cycle of a strategic issue may help develop this perspective.

Green (1989) suggested that a strategic issue has a life cycle that often begins with societal expectations created through awareness and public debate. If the issue receives the attention of government, the issue develops in the political arena and becomes the subject of legislation. Once legislation is passed, regulations soon follow. Disagreements about the implementation of the promulgated legislation and regulations may result in litigation. Figure 1, an adaptation of Green's model, illustrates how society and its citizenry react to strategic issues over

time. Green suggested that as time passes the number of options that may be used to resolve an issue narrows and the potential for liability expands. Knowing about this cycle and knowing how strategic issues develop over time help college administrators anticipate legal issues.

**Figure 1**  
**The Life Cycle of a Strategic Issue**



The reaction to hate speech serves as a good example. In the very late 1980s and early 1990s, minority groups became increasingly vocal about demeaning and intimidating speech being directed toward them. As a result of this increased awareness and public debate about the issue, some local officials created laws that banned hateful acts. College administrators, anxious to create welcoming environments where human dignity was respected and differences were tolerated, created hate speech codes that were designed to prevent and punish speech that intimidated or conveyed hatred for certain individuals or groups. Not everyone agreed that these rules were appropriate, however (see *Doe v. University of Michigan*, 1989; *R.A.V. v. St. Paul*, 1992; *UWM Post v. Board of Regents of the University of Wisconsin*, 1991). Some

thought, for example, that the harm to individuals and the campus climate generally should outweigh the right to express oneself.

The hate speech example followed the life cycle pattern. Awareness and debate over the issue led to regulation. The conflict about the appropriateness of these rules resulted in litigation and was ultimately settled by the courts.

The alert college administrator could have anticipated the evolution of these cases and by scanning a broader environment might have been able to predict the outcome. The U.S. Supreme Court had already ruled that speech, no matter how offensive, could not be shut off on a public college campus (*Papish v. University of Missouri*, 1973); that speech aimed at communicating disdain and hatred may be constitutionally protected (*Hustler v. Falwell*, 1988); and that hateful, symbolic speech against the U.S. government was protected speech (*Texas v. Johnson*, 1989).

Despite the case law on the issue of hate speech, opposing groups continue to disagree on this matter. College administrators on some college campuses remain committed to fostering civility among their student bodies through the use of speech codes and nondiscrimination policies. While the semantics and the strategies employed may have shifted, the issue remains the same.

Today, the debate continues. Some argue that while these policies are well intended, they go too far. Special interest groups such as the Foundation for Individual Rights in Education (FIRE) and the Thomas Jefferson Center for the Protection of Free Expression have been created to protect free expression in all of its forms. Other groups such as the Student Press Law Center devote themselves exclusively to educating high school and college journalists about the rights and responsibilities embodied in the First Amendment and supporting the student news media in its struggle to cover important issues free from censorship.

These organizations remain very active in preserving their interpretation of the First Amendment. Recently for example, FIRE brought suit against Citrus College for its policy that “quarantined free speech to three small and remote parts of campus” and required students to

notify administrators of their intended message (“Victory,” 2003). Shortly after the suit was brought, the Board of Trustees revoked its policies. In a second case involving FIRE, Shippensburg University was enjoined from enforcing its speech policies (*Bair v. Shippensburg University*, 2003) and ultimately agreed to (a) remove unconstitutional provisions from its Code of Conduct and (b) rewrite its Racism and Cultural Diversity Policy (“Great Victory,” 2004). Under the speech policies in place before the suit, students could be punished for speech that was inflammatory, demeaning, harmful, or annoying. By reading FIRE’s press releases and by listening to recent conference presentations by FIRE’s legal staff, it is clear this group intends to bring litigation against school administrators whose rules in any way impinge upon the First Amendment rights of college students.

As another example, a student recently sued administrators at Texas Tech University. The federal district court ruled that requiring prior approval and restricting a student who wanted to deliver a speech and distribute materials about the sinfulness and immorality of homosexuality to a free speech area was unconstitutional (*Roberts v. Haragan*, 2004). As the hate speech issue matures, and as Green suggested, fewer and fewer options to resolve such conflicts remain.

To make good use of the life cycle model, alert administrators should scan all sorts of media and stay attuned to the public debate surrounding strategic issues in their communities and state. Carefully tracking the political agenda of special interest groups and the pending actions of their local and state governments is crucial to monitoring the broader environment.

### Be Aware of the Entire Education Continuum

Too often, busy administrators are content to know about only those issues that directly affect their administrative function or their segment of the education enterprise. Administrators would be well advised to pay close attention to strategic developments in other segments of the education continuum. There are many more elementary and secondary schools than there are colleges and universities. Many more students are enrolled in the K-12 system in America than attend our nation’s colleges. Based on the size alone, the K-12 arena provides many more opportunities for conflict and litigation. Strategic issues

may begin in one segment of the enterprise and then immigrate or evolve into legal issues in any other segment.

Looking back one sees clearly that *Brown v. Board of Education of Topeka* (1954, 1955) signaled the end of a dual system of higher education in the United States. Progress on desegregation of higher education was slow but sure. The outcomes of *Adams* (1973), *Knight* (1991), and *U.S. v. Fordice* (1993) were predictable. In *Adams* (1973), the Federal District Court found that the 10 states that had operated dual systems of higher education had not submitted acceptable desegregation plans as required by previous court decisions. Five of the 10 had submitted no plans at all. This decision required them to do so. In *Knight* (1991), the Federal District Court found that the state of Alabama had still not complied with previous desegregation decrees and reasserted earlier decisions. In *Fordice* (1993), the Supreme Court found that even though the state of Mississippi had implemented race-neutral admissions policies as part of its plan to do away with the vestiges of its dual system, these policies still substantially restricted a person's choice of which institution to enter and contributed to the racial identifiability of the universities in the system.

College administrators must interpret K-12 case law with great care, however. Judges rightfully draw distinctions between the school child who is usually a minor and who is required to participate in public or private schooling until the age of 16 and college students who are usually legal adults, able to think for themselves, and can exercise free choice. What makes good case law in elementary and secondary education may not make good law in higher education.

In *Hazelwood School District v. Kuhlmeier* (1988), for example, school administrators were given the right to censor the work of students who wanted to print a story about teen pregnancy because the publication was part of a journalism class offered for academic credit. School administrators argued that the school newspaper was not an open forum. Such arrangement rarely if ever applies on a public college campus.

Educating school students with disabilities also is an area where a great deal can be learned, but caution must be exercised. The Individuals with Disabilities in Education Act (IDEA) of 1997 man-

dates that individual education programs (IEPs) of instruction be developed for each child with a disability. Conflicts about the contents of these IEPs and what constitutes reasonable accommodation are litigated with regularity in the K-12 setting. While IEPs are not part of the college curriculum, reasonable accommodation under the American with Disabilities Act of 1990 and Section 504 of the Rehabilitation Act (1973) are. The academic success of students in K-12 is resulting in a “tremendous increase in expectation on the part of families regarding their children with intellectual disabilities. . . . People with intellectual disabilities [will] want something more than what has typically been available [in the college setting]” (Schmidt, 2005, A26). Knowing about these expectations and knowing the case law in K-12 will help college administrators anticipate and plan for potential conflicts in their own settings.

Focusing on the case law and emerging issues in only one segment of the education enterprise provides a limited view of the strategic legal issues that may be developing. College administrators should be alert for important changes in school law as well. As previously mentioned, the legal relationships found in the school environment can be much different than that found in higher education. Still, important lessons can be learned.

### A Case Study: Gun Possession on College Campuses

Gun control is a hotly debated issue in this country. This debate notwithstanding, many college administrators have decided that guns should not be allowed on campus. In a recent study (“National Survey,” 2003), researchers found that 80% of the campuses surveyed prohibited guns altogether or exercised strict control on gun possession. The remaining 20% required gun registration or prior authorization. College administrators have acted on notion that they should be able to create reasonable rules to maintain order and ensure the integrity of the academic mission of the institution. Bickel and Lake (1999) suggest that this deference by judges to higher education as a special environment may be changing. By using both of the mechanisms described in this paper college administrators can become more aware of how the issue of gun possession is developing and begin to plan their response.

### *Scanning the Broad Environment*

The debate about student safety has taken many forms and has matured as a strategic issue. From a legislative perspective, the Gun-Free Schools Zones Act (18 U.S.C.A § 922) was passed (but later declared unconstitutional, see *United States v. Lopez*, 1995) in 1990, along with the Student Right to Know and Campus Security Act (20 U.S.C. § 1092(f)). The subject of student safety was a topic of concern for school and college administrators, public officials, parents, and students alike. In 1994, the Gun-Free Schools Act (20 U.S.C. § 7151) and the Violence Against Women Act (42 U.S.C.A. § 14015) were added to the federal code. During the early and mid-1990s, special interests groups and many elected officials pointed to increasing rates of crime in the United States as one reason such legislation was needed. Indeed, in recognition of this change in American society, the Association for Student Judicial Affairs passed a resolution at its annual conference supporting gun prohibition on college campuses (Crotty, 1994).

Curbing violence and reducing crime in schools and colleges remain important issues in most communities. Despite falling crime rates since the late 1990s, the shooting deaths at Columbine High School in 2000 and at the Appalachian School of Law in 2004 serve as reminders of the tragedies that can occur when distraught individuals have easy access to guns. Although many believe that guns do not belong at schools or on college campuses and many college administrators have prohibited such weapons for decades on their campuses, there are many who do not share this view.

Several events taking place in the state of Utah may influence this issue. In 2002, administrators at the University of Utah filed a lawsuit to allow the continuation of the 30-year-old gun ban even though a state law limited the ability of public colleges to ban legally concealed weapons. A state district judge ruled that the ban was legal, but the state has appealed the decision. In the meantime, the attorney general of Utah has filed a brief arguing against the ban and the Utah state legislature passed a bill (U.C.A. § 63-98-101, 2004) to reassert its authority to regulate guns on school campuses (Sykes, 2004).

In a related matter in the private sector, the Utah Supreme Court ruled that employees do not have a right to carry a firearm on the employ-

er's premises in the face of a "freely entered-into agreement to the contrary" (*Hansen v. AOL, Inc.*, 2004). A law designed to override this ruling did not make it out of committee in the 2005 Short Session of the Utah General Assembly ("Short Sessions," 2005). Although these two actions do not address guns on college campuses, college administrators and their attorneys might use them as they plan their next response. This example illustrates how scanning the broader environment by following the status of legislation in General Assemblies, the actions of other state officials such as attorneys general, and tracking related law affecting private employers provides a much deeper understanding of this issue.

### *Being Aware of the Entire Education Continuum*

The gun issue is playing itself out in Virginia in a slightly different manner. In March 2003, a student with a valid weapons permit gained permission to carry a concealed weapon onto the Blue Ridge Community College (BRCC) campus. He disputed the college's ban on weapons and after several weeks an upper-level administrator at the institution concluded, with the help of the Virginia Attorney General, that students could carry concealed weapons if they possessed the proper permit (Jasper, 2003). This student also maintained that public colleges in Virginia that prevent people who hold concealed weapons permits to carry guns onto school property are violating state law (Jasper, 2004a).

Virginia lawmakers failed to address this issue in 2005 by leaving a bill in committee that would have allowed the governing body of a public institution of higher education to establish rules and regulations concerning the possession of certain weapons, including firearms, on the institution's property (S. Bill 1343, 2005). They did, however, pass a bill regarding firearms on school property. The short title of the bill reads, "Possession of firearms on school property; concealed gun permit exemption" (H. Bill 2535, 2005). The summary of the bill as passed reads in part:

[This statute] allows the holder of a valid concealed handgun to possess a concealed handgun on school property while in a motor vehicle in a parking lot, traffic circle, or other means of vehicular ingress or egress to the school.

This bill addresses the issue of concealed weapons at the K-12 level and gives some clues at what the Virginia General Assembly's intent is. How a judge might interpret this intent or how parties might use it to advance their own positions remains to be seen. At this writing, in Virginia, the issue of carrying a handgun onto a college campus is pending before a Rockingham County Circuit Court (Jasper, 2004b).

## Developing an Effective Scanning and Awareness Strategy

Developing the skill set necessary to anticipate legal issues requires a strategy. Clearly, there are not enough hours in the week to process the overwhelming amount of information that is available; nor are there enough hours in the day to read everything that may be important. The following suggestions are offered here.

1. Use the expertise of others at your institution. If you have legal counsel or risk managers on your campus, take advantage of them. Many colleges employ a legislative liaison. This individual will know the status of pending state legislation and should be aware of public hearings regarding issues that might affect your work. Regrettably, many college administrators meet with these professionals once a problem has arisen. Use these resources proactively. For a complete discussion on how to work effectively with legal counsel, see Gregory (1991).
2. Invest in only the highest quality periodicals. Today's marketplace is full of newsletters and trade journals. Many are expensive. Consider for purchase those that address contemporary strategic issues in a comprehensive manner, and encourage your librarian to add selected subscriptions to reduce your cost. Subscriptions that reprint material from other sources, address issues with dated resources, or fail to give complete references may not be worth the cost or your time.
3. Create your own list of hot topics. The list must be manageable. Any list must include employment, civil rights, and constitutional rights issues. These are the areas most frequently litigated in the higher education environment (Janosik & Short, 1999; Leatherman, 1999).

4. Involve your staff. Sensitize your staff to the mechanics offered in this paper. For those with expertise and interest in specific strategic issues, delegate responsibility for maintaining a current but objective perspective on that topic that can be shared with others.
5. Use the Internet effectively. The Internet contains a wealth of free information and can be an invaluable resource. At the same time, to the nondiscriminating researcher, the quality of what is found can be highly suspect. Learn how to evaluate what you find.
6. Follow the activities of federal, state, and local officials. The agenda of state government can shift quickly from legislative session to legislative session and from election to election. Create tracking mechanisms to follow the work of members of Congress, the governor, attorney general, delegates, and senators as well as the governing council for higher education in your state. Do not underestimate the impact town/gown relationship can have on your work.
7. Follow the activities of special interest groups. Fortunately, most special interest groups have their own Web sites, and they make it easy to view their materials. Make sure to include not only popular sites in your “hot topics” list (explained in bullet 3), but also those sites that may not be considered mainstream.
8. Build personal networks. Getting to know the people with information can be the most valuable resource of all. Remember that staffers and administrative assistants are apt to be much more accessible than upper-level officials or executive directors.
9. Use distribution lists carefully. Sharing new legal developments with others is an important part of this process, but it must be done effectively. Long emails or listservs that may encourage off-target commentary lose their effectiveness quickly. Consider the use of a distribution list that alerts staff members of a new development and then directs them to a Web site that contains more complete information.

## Conclusion

The legal issues connected with administration of a college or university campus are too numerous to count and change over time. White (2005) identified a short list of legal issues that will keep college

administrators busy for the next few years. The list includes free expression, copyright infringement, gender discrimination, and faculty employment. Peer-to-peer sexual harassment, sexual orientation discrimination, legal weapons possession, and workplace privacy should be added to this list.

White suggests that life on campus is growing more complex, and where there is complexity, lawyers will be found. In American society, we are quick to resolve our differences in court. Students, parents, staff, and faculty are no longer willing to defer to those in positions of authority when they feel that they have been mistreated. Unfortunately, hiring the most competent legal counsel, training the most knowledgeable administrators, and adopting the most widely accepted best practice will not prevent law suits from being filed. However, college administrators, with the involvement of their legal counsel and others, can reduce their exposure to law suits and increase the likelihood of winning cases brought against them if they learn to anticipate and manage the legal issues inherent in their professional practice. The need for doing so has been well demonstrated. In addition to legal fees, court costs and potential damage payments from adverse rulings, the cost of expert testimony, and the indirect costs associated with the time and human resources invested in negotiating and preparing a defense must be considered as part of the price to be paid for administrative shortsightedness. As higher education budgets become tighter and tighter, preventing any loss becomes more and more crucial (Janosik & Andrews, 1985). Dealing with a legal issue after a summons has been served is simply not cost effective. College administrators can learn to anticipate legal problems on their own campuses more effectively by developing a sense for the broader environment and becoming more aware of the entire educational continuum.

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