

# HIED 752/852

## THE LAW OF HIGHER EDUCATION

### FALL 2005

Thursdays: 4:20 – 7:00 p.m.  
ED 155

Dennis E. Gregory, Ed.D.

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Graduate Teaching Assistant

Seann Kalagher, J.D.

**Course Description:** Lecture and Discussion; 3 hours; 3 credits. Doctoral level seminar with a strong emphasis on reading; class will meet for discussion of topical issues. Legal perspectives related to higher education will be discussed as a major part of the course. Among the topics to be discussed will be the bases from which higher education law comes, current (case, state and regulatory) law, as well as risk management and liability issues for higher education. The remainder of the course will focus upon the ethical issues that must be faced when shaping and implementing institutional policy, curriculum and procedures. Some emphasis will be placed on the areas in which legal and ethical issues come into conflict.

**Course Purpose:** The purpose of this course is to introduce the learner to the basic and current legal concepts that face American higher education today. To do this, the course will assist the learner to:

- (1) recognize legal issues,
- (2) develop analytical skills in order to think more clearly and confidently about legal issues, and
- (3) develop the ability to make professional decisions from a legal perspective.

As a result of this course, it should become clear to the learner that:

- (1) there are important legal issues imbedded in every professional decision,
- (2) that one's understanding of and reaction to professional issues can make a difference from both a personal and institutional perspective, and
- (3) that there are a variety of ways to approach legal issues, some of which can better address those issues than others.

**Course Objectives/Competencies:** At the conclusion of this course, the enrolled student who regularly attends and actively participates in class will:

1. possess a basic understanding of the major legal principles which confront American higher education today,
2. be able to perform basic legal research,
3. be able to describe important legal concepts, sources, cases, and other related issues which face American higher education,
4. be able to describe important legal dilemmas facing American higher education and to describe a framework for professional decision making which takes legal concepts into account, and
5. be able to demonstrate the application of legal concepts in the higher education decision-making context.

**Course Requirements:** All students enrolled in the course will be expected to complete the following requirements:

1. complete all reading assignments in a timely manner.
2. attend class on a regular basis, participate actively in class discussions, and be ready to discuss the issue(s) for the particular class session.
3. prepare and turn in “case briefs” for all legal cases as assigned by the instructor (model provided) and be able to provide the class with analysis of a case or cases as requested by the instructor.
4. with prior topical approval by the instructor, develop and write a research paper on a legal issue facing American higher education, then present this paper to the class as the “expert” on that topic. Papers for doctoral students should be a minimum of ten (10) double-spaced type written pages and contain a minimum of ten (10) professional/legal references. Papers for master’s students should be a minimum of five (5) double-spaced type written pages and contain a minimum of five (5) professional/legal references. Use of Internet based and other technologically obtained references is encouraged though the exclusive use of internet based sources is inappropriate. Presentations should be planned to last approximately one half-hour.
5. successfully complete a final examination that will cover material from the entire course. The examination will be an “open book” take-home examination and will include five (5) discussion questions to be chosen from a list of eight (8) questions provided by the instructor for doctoral students and four (4) questions for master’s students.

Accommodating students with special learning needs: In accordance with university policy, students with documented sensory and/or learning disabilities should inform the instructor so that special needs may be accommodated.

**Class Attendance:** It is expected that students will attend all classes. This class will consist of readings that will be discussed and analyzed in class. As a result, if students miss class they may not gain the full benefit of these readings and the resulting discussions, case briefs, and presentations. If a student finds it necessary to miss class she/he should contact the instructor in advance except in emergency cases.

**Final Grade:** Grades in this class will be assigned in the following manner

1. Case Briefs and Analysis – 20%
2. Research Paper – 20%
3. Research Paper Class Presentation – 20%

4. Final Examination – 20%
5. Class attendance and participation – 20%

Grades will be assigned based upon the following scale:

92.1 to 100	=	A	90 to 92	=	A-
85 to 89.9	=	B+	80 to 84.9	=	B
78 to 79.9	=	B-	75 to 77.9	=	C+
70 to 74.9	=	C	68 to 69.9	=	C-

**Honors Pledge:** Each student is expected to abide by the honor system of Old Dominion University.

“I pledge to support the honor system of Old Dominion University. I will refrain from any form of academic dishonesty or deception, such as cheating or plagiarism. I am aware that as a member of the academic community, it is my responsibility to turn in all suspected violators of the honor system. I will report to Honor Council hearings if summoned.”

**Office Hours:** Monday through Thursday –1:00 p.m. – 4:00 p.m. Other hours by appointment

**Course Sequencing:** While there is no required sequence in the Higher Education program, it is recommended that students take this course after completing at least 21 credits in the master’s degree program or later. This is, perhaps, the most difficult course in the master's curriculum, and among the most difficult in the Ed. S. and doctoral curriculums. This is primarily true since it introduces new concepts and ways of thinking that are different from those used in most education classes. It is recommended that the course generally should be taken late in the program.

**Class References:**

The Primary reading assignments for this course will be legal cases. In addition, articles from the Chronicle of Higher Education, class handouts and other materials will be used to supplement the cases.

**TEXT:**

Bickel, R. D. & Lake P.F. (1999). *The rights and responsibilities of the modern university: Who assumes the risks of college life?* Durham, NC: Carolina Academic Press.

**TEXT:**

Publication manual of the American psychological association (5th ed.) (2001). Washington, D.C.: American Psychological Association

## **Recommended Text:**

Kaplin, W. A. & Lee, B.A. (1995). *The law of higher education: A comprehensive guide to legal implications of administrative decision-making* (3rd ed.). San Francisco: Jossey Bass Publishers.

This book has moved from being the primary text for this course to a recommended text due to the fact that much of its content is outdated. It is, however, still a wonderful reference book for basic legal theory and practice as regards higher education law. Reading assignments to coordinate with weekly topics and or to enrich the knowledge base of students will be provided as materials that will be beneficial to students for these topics and for use in the exam and topical paper.

## **Additional Readings and Resource Material**

Please refer to my web site (<http://www.web.odu.edu/educ/dgregory>) for links to legal issues sites that will be helpful in obtaining case, statute and other legal issues materials. Many other legal and ethical issues sites are also available on the Internet.

American College Personnel Association and National Association of Student Personnel Administrators. (1997). *Principles of good practice for student affairs*. Washington, DC: American College Personnel

Association, Inc. and National Association of Student Personnel Administrators, Inc.

Alexander, K., and Solomon, E. (1972). *College and university law*. Charlottesville, VA: Michie.

Astin, A. W. (1977). *Four critical years: effects of college on beliefs, attitudes and knowledge*. San Francisco: Jossey-Bass. (This book is out of print, but if you can find a copy in the library or elsewhere, I recommend that you review it.

Astin, A. W. & Erlanson, G. (1997) *What matters in college: Four critical years revisited*. San Francisco: Jossey-Bass. (This book revisits and updates the earlier book.).

Barbour, I. (1993). *Ethics in an age of technology*. San Francisco: Harper Collins Publishers.

Barr, M. J. (Ed.). (1983). *Student affairs and the law*. (New Directions for Student Services #22), San Francisco: Jossey-Bass.

Barr, M. J. and Associates. (1988). *Student services and the law*. San Francisco: Jossey-Bass.

- Brinton, C. (1990). *A history of western morals*. New York: Paragon House.
- Bryan, W. A., & Mullendore, R. H. (Eds.). (1992). *Rights, freedoms, and responsibilities of students*. (New Directions for Student Services #59), San Francisco: Jossey-Bass.
- Callahan, D. & Bok, S. (Eds.). (1980). *Ethics teaching in higher education*. New York: Plenum Press.
- Campbell, J. (1995). *Understanding John Dewey*. Chicago: Open Court Publishing Company.
- Canon, H. J. & Brown, R. D. (Eds.). (1985). *Applied ethics in student services*. (New Directions for Student Services #30), San Francisco: Jossey-Bass.
- Chickering, A. W. and Associates. (1981). *The modern American college*. San Francisco: Jossey-Bass.
- Cooper, D. L. & Lancaster, J.M. (Eds.). (1998). *Beyond law and policy: reaffirming the role of student affairs*. (New Directions for Student Services #82). San Francisco: Jossey-Bass.
- Edward, H. T., and Nordin, V. D. (1979). *Higher education and the law*. Cambridge, MA: Harvard University, Institute for Educational Management
- Fried, J. (Ed.). (1997). *Ethics for Today's Campus: New Perspectives on Education, Student Development, and Institutional Management*. New Directions for Student Services #77. San Francisco: Jossey-Bass.
- Garner, R. (1994). *Beyond morality*. Philadelphia: Temple University Press.
- Gehring, D. D. (2001, Summer). [The Objectives of Student Discipline and the Process That's Due: Are they Compatible](#) . *NASPA Journal*, Vol. 38, no.4,
- Gilligan, C. (1982). *In a different voice*. Cambridge, MA: Harvard University Press.
- Hendrickson, R., and Mangum, R. (1977). *Governing board and administrator liability*. Washington, DC: ERIC-AAHE Clearinghouse on Higher Education.
- Hoekema, D. A. (1994). *Campus rules and a moral community: in place of in loco parentis*. Lanham, M.D.: Rowman & Littlefield.
- Hollander, P. (1978). *Legal handbook for educators*. Boulder, CO: Westview Press.
- Jonas, H. (1984). *The imperative of responsibility*. Chicago: University of Chicago Press.
- Kibler, W. L. (Ed.). (1998). *The state of student judicial affairs: current forces and future challenges*. College Station, TX: The Association for Student Judicial Affairs, Inc.
- Kohlberg, L. (1981). *The philosophy of moral development*. San Francisco: Harper and Row.

- Long, Jr., E. L. (1992). Higher education as a moral enterprise. Washington, D.C.: George Washington University Press.
- May, W. W. (1990). Ethics and higher education. New York: American Council on Education and Macmillan Publishing Company.
- Miser, K. M. (1988). Student affairs and campus dissent: reflection of the past and challenge for the future. Washington, DC: National Association of Student Personnel Administrators, Inc.
- Noddings, N. (1984). Caring: A feminine approach to ethics and moral education. Berkeley, CA: University of California Press.
- Paterson, B. G. & Kibler, W. L. (Eds.). (1997) The administration of campus discipline: student, organizational and community issues. Asheville, NC: College Administration Publications, Inc.
- Pavela, G. (1985). The dismissal of students with mental disorders: legal issues, policy considerations and alternative responses. Asheville, N.C.: College Administration Publications, Inc.
- Piper, T. R., Gentile, M. C., Parks, S. D. (1993). Can ethics be taught? Boston: Harvard Business School.
- Ponterotto, J. G., Lewis, D. E., Bullington, R. (1990). Affirmative action on campus. San Francisco: Jossey Bass Publishers.
- Purpel, D. E. (1989). The moral and spiritual crisis in education. New York: Bergin & Garvey.
- Sloan, D. (Ed.). (1980). Education and values. New York: Teachers College Press.
- Thompson, D. L. (Ed.). (1991) Moral values and higher education. New York: Brigham Young University.
- Wilsher, B. (1990). The moral collapse of the university. Albany, N.Y.: State University of New York Press.

### **Cases and Statutes of Interest**

- Anthony v. Syracuse, 231 N.Y.S. 435 (N.Y. App. Div. 1928). - In Loco Parentis
- [\*Burton v. Wilmington Parking Authority\*](#), 365 U.S. 715 (1961). – Equal Protection and State Action – Impact of use of Public facilities by discriminatory private vendor
- Dickey v. Alabama State Board of Education*, 273 F. Supp. 613 (M.D. Ala. N.D. 1967).
- Powe v. Miles*, 407 F. 2d 73 (2nd Cir. 1968). – Public/private distinctions in disciplinary codes
- [\*Tilton v. Richardson\*](#), 403 U.S. 672 (1971). – Religious Use of Public Facilities

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

*Gabrilowitz v. Newman*, 582 F. 2d 100 (1st Cir. 1978). – Right to Counsel in Disciplinary Hearings

[Widmar v. Vincent](#), 454 U.S. 263 (1981). – Public forum, use of public facilities by religious groups

[R.A.V. v City of St. Paul](#), 60 L. W. 4667 (1992). – Freedom of Speech – Cross Burning/ Hate Speech/Fighting words/penalty differentiation

*Iota Xi Chapter of Sigma Chi Fraternity v. George Mason University*, 993 F. 2d 386 (4th Cir. 1993). – Freedom of Speech/speech codes

*Gay Student Services v. Texas A & M University*, 737 F. 2d 1317 (5th Cir. 1984). Student Organization Recognition

*Good v. Associated Students of University of Washington*, 542 P. 2d 762 (Wash. 1975). Student Activity Fees, organizational Recognition

[Tarasoff v. Regents of University of California](#), 551 P. 2d 334 (Cal. 1976). Tort Liability of counselors

[Bob Jones University v. United States](#), 461 U.S. 574 (1983). Tax exemptions, access of public funds to religious organizations

[Gebser et al. v. Lago Vista Independent School District](#), 118 S. Ct. 1989 (1998). – Sexual Harassment

[Schaer v. Brandeis University](#), Case No. SJC-08198, (Supreme Judicial Court of Massachusetts, September 25, 2000) – Contract Law and Student Discipline at private college

[Defunis v. Odegaard](#), 416 U.S. 312 (1974). – Affirmative Action

*Podberesky v. Kirwan*, 38 F.3d. 147 (4<sup>th</sup> Cir. 1994)

[Adarand Construction, Inc. v. Pena](#), 115 S. Ct. 2095 (1995). – Sexual Harassment

*Henson v. Honor Comm. of Univ. Va.*, 719 F.2d 69 (4th Cir. 1983). – Due Process

*Moore v. Student Affairs Comm. of Troy State Univ.*, 284 F. Supp. 725 (N.D. Ala. 1968). – Search and seizure

*New Jersey v. T.L.O.*, 469 U.S. 325 (1985) – Public School Student right to privacy

[O'Connor v. Ortega](#) - 480 U.S. 709 (1987) – Public Employee's right to privacy

*Esteban v. Central Mo. State College*, 290 F. Supp. 622 (N.D. Mo. 1968); 415 F.2d 1077 (8th Cir. 1969). – Due Process

[NLRB v. Yeshiva](#), 444 U.S. 672 (1980). – Are faculty managers? Unionization of faculty

[Davis v. Monroe County Bd. Of Ed.](#) (97-843) 526 U.S. 629 (1999)

## **Title VII of the Civil Rights Act of 1964**

### **Sexual Harassment in Employment**

[Meritor Savings Bank v. Vinson](#) - 477 U.S. 57 (1986).

[Faragher v. Boca Raton](#) (97-282) 1998 United States Supreme Court

[Owasso Independent School District no. 1-011. v. Falvo](#) (Case no. 00-1073, 2002)- FERPA and what "maintained" means in the legal context.

[Grove City v. Bell](#), 465 U.S. 555 (1984)

**The Civil Rights Restoration Act**, P.L. 100-259 (1987); 102 Stat. 28 (1987).

## **Americans with Disabilities Act of 1990**

### **Section 504 of the Rehabilitation Act of 1973**

## Course Calendar

### 1. September 1, 2005

**Course Introduction**, Review of syllabus - Gregory, Description of how to “brief” a case (Example brief provided) – Kalagher, Virtually all of your research may be done on the LexisNexis Academic Database, which is accessible through the Library at <http://www.lib.odu.edu/resources/databases/l/index.htm>

[Marbury v. Madison](#) – 5 U.S. 137 (1803) – Separation of powers.

[Trustees of Dartmouth College v. Woodward](#) –17 U.S.518 (1819) Right to establish private colleges.

Gott v. Berea College, 156 Ky. 376, 161 S.W. 204 (1913) – In Loco Parentis

[Moose Lodge No. 107 v. Irvis](#), 407 U.S. 163 (1972). – State Action

Recommended reading:

Kaplin Chapter 1, Pp. 1-20, 45-61

### 2. September 8, 2005

**Introduction to the Foundations of Higher Education Law, Introduction to Legal Research materials** - We will meet in Room 163 of the library to meet with Ms. Nancy Schafer who is the research librarian for the College of Education. She will go over how to use the LexisNexis database, other helpful databases and give us a tour of the government documents section of the library. Seann will also discuss resources for legal research. We will discuss where Higher Education Law comes from, the structure of the court system and then discuss the following cases:

#### **The First Amendment**

#### **Speech**

[Tinker v. Des Moines Independent School District](#) – 393 U.S. 503 (1969) – Symbolic Speech

[Doe v. Michigan](#) - 721 F. Supp. 852 (E.D. Mich. 1989)

UWM Post v. Board of Regents of the University of Wisconsin 774 F. Supp. 1163 (E.D. Wis. 1991)

Recommended Reading: The College and its Leaders, Administrators and Staff – Kaplin Chapter 2 pp. 76- through 2.2 on p. 80, 2.2.2 on p. 87- to 2.3.3 on p. 114.

### **3. September 15, 2005      First Amendment**

#### **Press**

[Hazelwood School District v. Kuhlmeier](#) – 484 U.S. 260 (1988) – Prior Restraint and Freedom of the Press

[Kincaid v. Gibson](#) - 99a0322p.06 (6th Circuit, 1999) – Freedom to distribute College Yearbook - [http://www.belcherfoundation.org/kincaid\\_v\\_gibson.htm](http://www.belcherfoundation.org/kincaid_v_gibson.htm)

Hosty v. Carter – No. 01-4144 (7<sup>th</sup> Circuit, 2005) – Freedom of the Press in College Newspapers - <http://www.ca7.uscourts.gov/op3.fwx?submit1=showop&caseno=01-4155.PDF>

#### **Assembly**

Sword v. Fox – 317 F.Supp. 1055 (1970) – Time, place and manner restrictions on Appeal

Sword v. Fox - 446 F.2d 1091; 1971 U.S. App. (4th Cir.)

### **4. September 22, 2005      Bickel and Lake, Chapters 1 - 4 Institutional Liability**

Jain v. State, 617 N.W.2d 293 (Iowa, 2003)

Schlieszler v. Ferrum College, 233 F. Supp. 2d 796 (W.D. VA 2002)

Shin v. MIT - <http://chronicle.com/free/v51/i49/49a00101.htm>

### **5. September 29, 2005      Bickel and Lake, Chapter 5 - 7 Institutional Liability**

#### **Religion**

[Lemon v. Kurtzman](#) – 403 U.S. 603 (1971) – Establishment Clause - Separation of Church and State

[Rosenberger v. Rectors and Visitors of the University of Virginia](#)- 515 U.S. 819 (1995) - First Amendment Establishment Clause

Recommended Reading: The College and Faculty – Kaplin Chapter 3, pp. 150 - to 3.1.2 on p. 157; 3.1.4 on p. 159 - to 3.1.6 on p. 164; p. 197, 3.3 to the end of the first full paragraph on p. 203; 3.3.4.3 on p. 242 to 3.3.5 on p. 247; 3.7.2 on p. 306 to end of p. 315.

Recommended Reading: Kaplin pp. 126 - to 2.4.3 on p. 132

## **6. October 6, 2005                      First Amendment**

### **Academic Freedom**

Sweezy v. New Hampshire – 354 U.S. 234 (1957)

[Keyishian v. Board of Regents](#) – 385 U.S. 589 (1967) – State Government and the powers of Trustees

[Urofsky v. Gilmore](#) 98-1482, (4th Circuit, 2000)

### **Fourth Amendment Search and Seizure**

[Washington v. Chrisman](#), 455 U.S. 1 (1982) – Plain View Residence Hall Search

Duarte v. Commonwealth, 12 Va. App. 1023, 1026, 407 S.E.2d 41, 42 (1991) – private college campuses and the 4th Amendment

Recommended Reading: The College and Students – Kaplin Chapter 7 , p. 371 to 4.2.4 on p. 382; 4.2.5 on p. 400 to the end of the second full paragraph on p. 405.

## **7. October 13, 2005 -                      14th Amendment**

### **Equal Protection - Affirmative Action**

[Bakke v. Bd. of Regents of the University of California](#) – 438 U.S. 265 (1978)

[Hopwood v. Texas](#), 78 F.3d 932 (5th Cir. 1996)

[Grutter v. Bolinger](#) - (Case Number 02-241) 288 F.3d 732, affirmed

[Gratz v. Bollinger](#) (Case number 02-516) Reversed in part and remanded

## **8. October 20, 2005 - Due Process**

### **Faculty**

[Board of Regents of State Colleges v. Roth](#) – 408 U.S. 564 (1972)– Rights of non-tenured faculty

[Perry v. Sinderman](#) – 408 U.S. 593 (1972) – Due Process rights of tenured faculty

Recommended Reading: Kaplin Chapter 3, pp. 150 - to 3.1.2 on p. 157; 3.1.4 on p. 159 - to 3.1.6 on p. 164; p. 197, 3.3 to the end of the first full paragraph on p. 203; 3.3.4.3 on p. 242 to 3.3.5 on p. 247; 3.7.2 on p. 306 to end of p. 315.

### **Students**

## **Discipline Decisions**

General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education - 455 F.R.D. 133 (W.D. Mo. 1968)

[Goss v. Lopez](#)– 419 U.S. 565 (1975) – Due Process

[Dixon v. Alabama State Board of Education](#) – 294 F.2d 150 (5th Circuit, 1961) –14th Amendment Due Process

## **9. October 27, 2005**

### **Academic Decisions**

[Board of Curators of the University of Missouri v. Horowitz](#) – 435 U.S. 78 (1977) – Due Process in academic decision-making

### **The College and the Federal Government –**

#### **Federal Statutes**

[Family Educational Rights and Privacy Act Statute](#)

[Regulations](#)

[United States v. Miami University and the Ohio State University](#) - Case no. 00-3158, 6th Cir., June 27, 2002). Are student discipline records, educational records under FERPA?

[Gonzaga University v. Doe](#) - (Case no. 01-679, 2002). - Use of 20 USC § 1983 as a mechanism to seek money damages under FERPA

[Clery Campus Safety Act](#)

### **Title VI of the Civil Rights Act of 1964**

Kaplin Chapter 7 - pp.711 to 7.2.2 on p. 716; 7.2.6 on p. 724 to 7.2.6.2 on p. 726; 7.2.10 on p. 748 to 7.2.10.5 on p. 753; 7.2.17 on p. 773 to 7.3.2 on p. 782;

## **10. November 3, 2005**

### **Title IX of the Education Amendments of 1972**

United States Department of Education, Office of Civil Rights. Clarification of intercollegiate athletics policy guidance: The three-part test.

<http://www.ed.gov/about/offices/list/ocr/docs/clarific.html>

<http://www.ed.gov/about/offices/list/ocr/publications.html#TitleIX>

## USA Patriot Act

### **Student Activities and Student Organizations**

[Healy v. James](#) – 408 U.S. 169 (1971) – Student Organizations/Free speech

[Rosenberger v. Rectors and Visitors of the University of Virginia](#)- 515 U.S. 819 (1995) - First Amendment Establishment Clause

[Board of Regents of the University of Wisconsin System v. Southworth](#) –No. 98—1189 Decided March 22, 2000 – Use of student activity fees

- 11. November 10, 2005**      Research Paper Presentations and Discussion (Prepare for a presentation of at least one half hour per paper). Papers 1 through 5
- 12. November 17, 2005**      Research Paper Presentations and Discussion (Prepare for a presentation of at least one half hour per paper). Papers 6 through 10.
- 13. November 24, 2005**      No Class Due to Thanksgiving Break
- 14. December 1, 2005**      Research Paper Presentations and Discussion (Prepare for a presentation of at least one half hour per paper). Papers 11 through 15.
- 15. December 8, 2005**      Research Paper Presentations and Discussion (Prepare for a presentation of at least one half hour per paper). Papers 16 through 21. Exam given out to be returned by December 15, 2005

This syllabus is a work in progress. Class discussion topics and readings may change as necessary