

The Law and Higher Education, Fall 2021
16:507:520

Professor Barbara Lee
Wednesdays, 5:00 – 6:30 p.m. Synchronous
Remainder of class time Asynchronous

Office hours by appt.
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Catalog Description

A survey of significant laws, court opinions, and regulations affecting public and private colleges and universities. Includes reviews of student and faculty contract and constitutional rights, federal student financial aid and civil rights laws, privacy laws, and tort law.

Course Objectives

This is a doctoral-level course that requires substantial reading and analysis of the course text, journal articles, and the decisions of state and federal courts. The course has the following general learning goals:

1. Enable the student to understand the foundational legal principles affecting the operations and leadership of colleges and universities
2. Provide the tools to equip the student to analyze a situation and identify potential legal issues
3. Enable the student to understand how to incorporate legal principles into the policy development process

Specific Learning Outcomes—Based upon ACPA/NASPA Professional Competencies

At the end of the course, the successful student should be able to:

1. Explain the basic tenets of personal or organizational risk and liability as they relate to one's work
2. Explain the differences between public and private higher education with respect to the legal system and what they may mean for students, faculty, and staff at both types of institutions.
3. Describe the evolving legal theories that define the student–institution relationship and how they affect professional practice
4. Describe how national constitutions and laws influence the rights that students, faculty, and staff have on public and private college campuses.
5. Explain the concepts of risk management and liability reduction strategies.
6. Explain when to consult with one's immediate supervisor and campus legal counsel about those matters that may have legal ramifications.
7. Act in accordance with federal and state/province laws and institutional policies regarding nondiscrimination.

8. Identify the internal and external special interest groups that influence policy makers at the department, institutional, local, state/province, and federal levels
9. Describe the public debates surrounding the major policy issues in higher education, including access, affordability, accountability, and quality.
10. Describe the governance systems at one's institution, including the governance structures for faculty, staff, and students.
11. Describe the system used to govern or coordinate one's state/province system of higher education, including community college, for-profit, and private higher education.
12. Describe the federal and state/province role in higher education

Course Requirements and Grading

The course will be delivered via Zoom and will be fully remote. In order to make the most of the limited class time, students will be expected to complete ALL assignments, including reading the written assignments, watching recorded video lectures and participating in threaded discussions, prior to each Wednesday's synchronous class. The class will be divided into two segments: a synchronous component of 90 minutes on Wednesday evenings (5:00 – 6:30 p.m.) and an asynchronous component that will involve watching pre-recorded lectures, student involvement in online threaded discussion, drafting of written course assignments, conducting research and writing the required research paper, and other assignments throughout the semester. Students will be expected to have completed the assignments for both the synchronous and asynchronous parts of the course by each Wednesday at 5:00 p.m.

The course will rely heavily on analysis of course readings, student discussion and consideration of the implications of the law for policy. Students are responsible for all assigned reading and for participation in class discussion. Evaluation of students will include:

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| Two short papers responding to a practical problem encountered by higher education administrators (six pages maximum—topic prompt is in Assignments) | 20 percent |
| Research paper on topic of student's choice (must be approved by instructor) | 60 percent |
| Presentation of research paper to class | 10 percent |
| Class participation (including participation in threaded discussions) | 10 percent |

Required Course Materials

Course Text: William A. Kaplin, Barbara A. Lee, Neal H. Hutchens and Jacob H. Rooksby. *The Law of Higher Education, Sixth Edition (Student Version)*. Jossey-Bass, Inc., 2020. ISBN 9781119271918. Court opinions are available on Westlaw; other reading assignments are posted on the course website under Modules.

Academic Integrity Policy

The Office of Student Conduct supervises issues related to violations of academic integrity (see <http://academicintegrity.rutgers.edu>). Please familiarize yourself with the university policy on academic integrity at <http://academicintegrity.rutgers.edu/academic-integrity-policy/>.

Students with Disabilities

Rutgers University is committed to the creation of an inclusive and safe learning environment for all students, and welcomes students with disabilities into all the University's educational programs. The Office of Disability Services (ODS) is responsible for the determination of appropriate accommodations for students who encounter barriers due to disability. Once a student has completed the ODS process (registration, initial appointment, and submitted documentation) and reasonable accommodations are determined to be necessary and appropriate, a Letter of Accommodation (LOA) will be provided. The LOA must be given to each course instructor by the student and followed up with a discussion. This should be done as early in the semester as possible as accommodations are not retroactive. More information can be found at www.ods.rutgers.edu. You can contact ODS at (848)445-6800 or via email at dsoffice@echo.rutgers.edu.

Assignments

9/1/21

Unit One: Introduction to the course

Structure of higher education regulation; public/private differences; governance

Assignment for 9/1/21

Text, pp. xlv-liv; 3-28; 38-40

Lectures:

Structure and Regulation of Higher Education

Primary Areas of Regulation of Higher Education

Conducting Legal Research

Basics of Legal Research

Introduction to the Federal Court System,

<https://www.justice.gov/usao/justice-101/federal-courts>

Research paper guidelines

Barbara A. Lee. "Fifty Years of Higher Education Law: Turning the Kaleidoscope." 36 *Journal of College & University Law* 649 (2010).

Asynchronous Assignment for 9/1/21

None

9/8/21

No class (Monday classes meet tonight)

9/15/21

Unit Two: Tort liability issues

Premises liability; on-campus injuries; off-campus injuries
Student activities; student suicide; outreach programs
Educational malpractice; defamation

Assignment for 9/15/21 (posted in Module 2)

Text, pp. 93-125

Lectures:

Tort Law Overview
On and Off Campus Injuries
Special Relationship
Defamation in Higher Education

Michael R. Pfahl, “Enhancing Enforceability of Exculpatory Clauses in Education Abroad Programming through Examination of Three Pillars,”
46 Journal of College & University Law 93 (2021)

Nguyen v. MIT, 96 N.E.3d 128 (Mass. 2018)

Regents of University of California v. Superior Court, 413 P.3d 656 (Cal. 2018)

Asynchronous Assignment:

Threaded discussion responding to “Alice at the Fort” (students are expected to post early in the period between classes and to respond to the posts of classmates—at least three substantial posts in all for each assignment.) In Canvas under “Assignments”

9/22/21

Unit Three: Employment issues

Collective bargaining, employment discrimination

Assignment for 9/22/21

Text, pp. 137-146, 162-213

Lectures:

Collective Bargaining Basics
Nondiscrimination Law Overview
Stereotyping, Sexual Orientation & Gender Identity

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)

Bostock v. Clayton County, 140 S. Ct. 1731 (2020)

Asynchronous assignment:

Threaded Discussion responding to “Professor Thomas and the New Chair” (students are expected to post early in the period between classes and to respond to the posts of classmates—at least three substantial posts in all for each assignment.) In Canvas under “Assignments”

9/29/21

Unit Four: Special issues in faculty employment

Tenure; academic freedom; role of AAUP; termination

Assignment for 9/29/21

Text, pp. 239-255; 260-294; 295-356

Lectures:

Academic Freedom and Faculty Free Speech

Academic Freedom in Teaching

Faculty Tenure and Promotion Decisions

AAUP 1940 Statement on Academic Freedom and Tenure

AAUP Statement on Professional Ethics

Garcetti v. Ceballos, 547 U.S. 410 (2006)

Meriwether v. Hartop et al., 992 F.3d 492 (6th Cir. 2021)

Short paper #1 due by 7:15 p.m. on 9/29/21

Asynchronous assignment

Threaded discussion responding to “Toxic Environment” (students are expected to post early in the period between classes and to respond to the posts of classmates—at least three substantial posts in all for each assignment.) In Canvas under “Assignments”

10/6/21

Unit Five: Affirmative action in admissions

Assignment for 10/6/21

Text, pp. 392-446

Lectures:

Affirmative Action in Admissions

Affirmative Action Lawsuit Against Harvard

Students for Fair Admissions v. President and Fellows of Harvard

College, 980 F.3d 157 (1st Cir. 2020)

Asynchronous assignment

Threaded discussion responding to “Advice for Harvard” (students are expected to post early in the period between classes and to respond to the posts of classmates—at least three substantial posts in all for each assignment.) In Canvas under “Assignments”

10/13/21

Unit Six: Citizenship status; DACA; financial aid issues

Assignment for 10/13/21

Text, pp. 449-473

Lectures:

Financial Aid Overview

Noncitizens and DACA

Michael A. Olivas, *Perchance to Dream: A Legal and Political Analysis of the DREAM Act and DACA*, (2020), Chapter Five, pp. 59-86

Asynchronous assignment

Threaded discussion responding to “Universal Service?” (students are expected to post early in the period between classes and to respond to the posts of classmates—at least three substantial posts in all for each assignment.) In Canvas under “Assignments”

10/20/21

Unit Seven: Student Academic Issues

Assignment for 10/20/21

Text, pp. 545-577; 599-620

Lectures:

Student Challenges to Academic Decisions

Academic Dismissals

Emeldi v. University of Oregon, 698 F.3d 715 (9th Cir. 2012)

Stacy Patton, “Former Graduate Student’s Gender Discrimination Case is Dismissed,” *Chron. Higher Educ.* 12/6/13, available at

<https://www.chronicle.com/article/former-graduate-students-gender-discrimination-case-is-dismissed/>

Topic paragraph and rough outline of research paper due by 7:15 p.m. on 10/20/21

Asynchronous assignment

Threaded discussion responding to “Last Minute Changes” (students are expected to post early in the period between classes and to respond to the posts of classmates—at least three substantial posts in all for each assignment.) In Canvas under “Assignments”

10/27/21

Unit Eight: Student organizations; nondiscrimination policies and First Amendment

Assignment for 10/27/21

Text, pp. 693-699; 708-742

Lectures:

Student Organizations and Nondiscrimination
Fraternal Organizations

InterVarsity Christian Fellowship/USA v. Univ. of Iowa, ___F.4th ___,
2021 WL 3008743 (8th Cir. 7/16/21).

Halmon v. Lane College, 2020 WL 2790455 (Tenn. Ct. App. May 29,
2020)

Short paper #2 due by 7:15 p.m. on 10/27/21

Asynchronous assignment

Threaded discussion responding to “Duelling Nondiscrimination”
(students are expected to post early in the period between classes and to
respond to the posts of classmates—at least three substantial posts in all
for each assignment.) In Canvas under “Assignments”

11/3/21

Unit Nine: Student discipline; student free speech; FERPA

Assignment for 11/3/21

Text, pp. 621-692; 527-543

Lectures:

Student Discipline
Student Free Speech
FERPA

Mahanoy Area School Dist. v. B.L., 141 S. Ct. 2038 (June 23, 2021)

Tatro v. University of Minnesota, 816 N.W.2d 509 (Minn. 2012)

Erwin Chemerinsky and Howard Gillman, *Free Speech on Campus*,
chapter 5.

Asynchronous assignment

Threaded discussion responding to “Free Speech vs. Academic Program
Rules” (students are expected to post early in the period between classes
and to respond to the posts of classmates—at least three substantial posts
in all for each assignment.) In Canvas under “Assignments”

11/10/21

Unit Ten: Religious college and universities

Assignment for 11/10/21

Text pp. 40-55; 213-219; 233-239; 356-359

Lectures:

Religious College and Universities
Ministerial Exception

Amanda Bryk, “Note: Title IX Giveth and the Religious Exemption

Taketh Away: How the Religious Exemption Eviscerates the Protection Afforded Transgender Students Under Title IX.” *57 Cardozo Law Rev.* 751 (2015)

DeWeese-Boyd v. Gordon College, 163 N.E.3d 1000 (Mass. 2021)

Asynchronous assignment

Threaded discussion responding to “Religious Colleges” (students are expected to post early in the period between classes and to respond to the posts of classmates—at least three substantial posts in all for each assignment.) In Canvas under “Assignments”

11/17/21

Unit Eleven: Title IX

Assignment for 11/17/21

Text, pp. 577-599; 861-879

Lectures:

Title IX Overview and Athletics

Sexual Harassment and Assault

OCR Title IX interpretation re: sexual orientation and gender identity

Gebser v. Lago Vista Independent School District, 524 U.S. 274 (1998).

Davis v. Monroe County Board of Education, 526 U.S. 629 (1999)

Doe v. Baum, 903 F.3d 575 (6th Cir. 2018)

Asynchronous assignment

Threaded discussion responding to “Title IX Expansion” (students are expected to post early in the period between classes and to respond to the posts of classmates—at least three substantial posts in all for each assignment.) In Canvas under “Assignments”

11/24/21

No class

Please note that there are two classes next week—one on

Monday November 29th and one on Wednesday December 1. This is mandated by the University’s academic schedule

11/29/21

Unit Twelve: Athletics

Assignment for 11/29//21

Text pp. 762-803

Lectures:

Athletics

NCAA Challenges

Northwestern University and College Athletes Players Association (on Canvas course website under Module 12)
NCAA v. Alston, 141 S. Ct. 2141 (2021) (syllabus only, on Canvas course website under Module 12)

Draft of research paper due at 7:15 p.m. tonight and posted to Class website

Asynchronous assignment
None

12/1/21 Presentations of research papers

Assignment for 12/1/21

Read research papers scheduled to be presented on 12/1/21

12/8/21 Presentations of research papers

Assignment for 12/8/21

Read research papers scheduled to be presented on 12/8/21

12/15/21 **Final draft of research paper due to instructor today by 7:15 p.m.**