Rutgers University Graduate School of Education

The Law and Higher Education, Fall 2018
15:230:606:02
Three credits

Instructor: Robert (Bob) Kim
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Tuesdays, 4:30-7:30 pm
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Seminar

*Required Course Materials*

Course Text: Stuart Biegel, Robert Kim, Kevin Welner. Education and the Law, 4th ed. (2016). Available at the RU Bookstore. Supplemental cases and materials are posted in Resources folder of course website (Sakai) at https://sakai.rutgers.edu/x/FpVrwR

Course Requirements and Grading

The course will rely heavily on student discussion, and on analysis of caselaw and hypothetical scenarios. Students are responsible for all assigned reading below and for participation in class discussion. Evaluation of students will include:

Team “oral argument” presentations – 10/2 and 10/9 20 percent
Short in-class mid-term quiz (one hour) – 11/6 20 percent
10-12 page research paper (40%) and presentation/revision (10%) 50 percent
  • Research paper topic and outline due on 10/15, 11:55pm (via Sakai)
  • Research Paper due on 11/16, 11:55pm (via Sakai)
  • Research Paper revision due on 12/10, 11:55pm (via Sakai)
  • Research Paper Presentations on 12/11 and 12/18
Class participation/attendance 10 percent

Class Policies

• Attendance at all regularly scheduled meetings of this course is expected; having more than one unexcused absence will result in a lower class participation grade.
• Be on time. Inform the instructor if you will be absent on a future date; please do not contact the instructor on the day of class if you will be late.
• You will be permitted to make-up required exercises and examinations missed as a result of excused absences. University policy recognizes the following are valid excused absences: (1) Illness requiring medical attention; (2) Curricular or extracurricular activities approved by the faculty; (3) Personal obligations claimed by the student and recognized as valid; (4) Recognized religious holidays; (5) Severe inclement weather causing dangerous traveling conditions; and permits students to make up work missed
for these circumstances. Students who miss examinations and other in-class exercises because of excused absences only are entitled to make them up (in any reasonable manner that may be determined by the instructor). Please provide documentation to the instructor for any absences you claim to be excused.
- Be prepared to participate actively in class.
- Except for quizzes or presentations, refrain from using laptops or smartphones in class. The only exception is when you need to view an assigned material as part of class discussion with your laptop.
- Be respectful of others’ views in class; express disagreement in a professional manner.
- Submit assignments on time; submit them early if there is a possibility of last-minute technical issues or other interruptions; late assignments will not be accepted.
- Please sign up for office hours through Sakai to meet with the instructor at least once during the semester. And don’t hesitate to meet with the instructor if you have any questions, concerns, or thoughts about this class or any topics raised during class; this is your opportunity to learn.

Catalog Description

Legislative, judicial, and administrative sources of law affecting institutions of higher education; focuses on the legal implications of administrative decision making in such institutions, issues of educational and employee equity, and strategies for avoiding legal problems.

Course Objectives

This is a graduate-level course that requires substantial reading and analysis of both the course text 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 administration of higher education
2. Provide the tools to equip the student to analyze a situation, identify potential legal issues, and incorporate legal principles into policy development and decision-making
3. Understand the relationship between the law and concepts of equity, access, and social justice in higher education

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. Maintain an appropriate degree of confidentiality that follows applicable legal and licensing requirements, facilitates the development of trusting relationships, and recognizes when confidentiality should be broken to protect the student or others.

5. Describe how federal and state constitutions and laws influence the rights that students, faculty, and staff have on public and private college campuses.

6. Explain the concepts of risk management and liability reduction strategies.

7. Explain when to consult with one’s immediate supervisor and campus legal counsel about those matters that may have legal ramifications.

8. Act in accordance with federal and state/province laws and institutional policies regarding nondiscrimination.

9. Describe how policy is developed in one’s department and institution, as well as the local, state/province, and federal levels of government.

10. Identify the major policy makers who influence one’s professional practice at the institutional, local, state/province, and federal levels of government.

11. Identify the internal and external special interest groups that influence policy makers at the department, institutional, local, state/province, and federal levels.

12. Describe the public debates surrounding the major policy issues in higher education, including access, affordability, accountability, and quality.

13. Describe the governance systems at one’s institution, including the governance structures for faculty, staff, and students.

14. 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.

15. Describe the federal and state/province role in higher education.

16. Explain the advantages and disadvantages of different types of decision making processes (e.g., consensus, majority vote, and decision by authority).

17. Identify and then effectively consult with key stakeholders and those with diverse perspectives to make informed decisions.

**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 welcomes students with disabilities into all of the University's educational programs, including this course. In order to receive consideration for reasonable
accommodations, a student with a disability must contact the appropriate disability services office at the campus where you are officially enrolled, participate in an intake interview, and provide documentation: https://ods.rutgers.edu/students/documentation-guidelines. If the documentation supports your request for reasonable accommodations, your campus’s disability services office will provide you with a Letter of Accommodations. Please share this letter and discuss any accommodations with me as soon as possible. To begin this process, please complete the Registration form on the ODS web site at: https://ods.rutgers.edu/students/registration-form.

SYLLABUS CONTINUES ON NEXT PAGE
Assignments

* For the cases assigned, please be prepared to articulate the legal issue or problem being contested, the essential facts in the case, and how the court decided the case (the “holding”)
* Please prepare for discussion the hypothetical problems in the textbook that are specifically mentioned in the syllabus assignments for each class; you can skip problems in the textbook that are not specifically mentioned in the syllabus.
* Find supplemental readings for class on the Sakai course website (resources folder): [https://sakai.rutgers.edu/x/CtEoEt](https://sakai.rutgers.edu/x/CtEoEt)
* This syllabus may be adjusted during the semester; watch for announcements.

September 4, 2018  Course Introduction/Overview of Higher Education Law (Class 1)
* This class only to be taught by Professor Ben Justice

Assignment/reading for this class:
- Before the first class, fill out the brief self-introduction form (“Introductions” in Sakai Resources Folder) and email it to Bob Kim and Ben Justice at r.kim@rutgers.edu and ben.justice@rutgers.edu.
- Chapter 1 of Textbook, pp. 1-9 (no need to review Problem on p. 10)
- Black v. Sullivan (Supp. Reading)
- Pell Institute Summary of Equity and Access in Postsecondary Education (2018) (Supp. Reading) – especially the Intro and Setting the Stage, and graphs and surrounding text on pp. 18, 22, 39, 49, 82, 99

Topics for discussion
- Introductions
- Purpose of this class and overview of syllabus
- The relationship between law and higher education
- The relationship between law and equity/social justice
- Reading a legal case (we will also discuss this more next week)

Legal and policy questions to be discussed:
- What are the sources of law and policy in the United States governing educational institutions?
- What areas of higher education are impacted by the law?
- What is the status of student access to and equity in higher education, and how can the law play a role in postsecondary access and equity?
Assignment/reading for this class:

- If you have a laptop, bring to class (to discuss Westlaw); ensure beforehand that you can access Westlaw:  
  http://www.libraries.rutgers.edu/indexes/westlaw

- Prepare to discuss one example of a legal question or issue that YOU have encountered OR expect to encounter as a student, employee, or student affairs adviser at Rutgers

- **Approaching Primary Legal Materials** (Supp. Reading)
  
  Peruse the following and bring questions for the instructor
  
  - https://legaldictionary.net/civil-law/
  - https://legaldictionary.net/common-law/
  - https://legaldictionary.net/constitution/
  - https://legaldictionary.net/tort-law/
  - https://legaldictionary.net/contract-law/
  - https://www.law.cornell.edu/citation/

Topics for discussion

- Review Class #1 and class syllabus
- Review legal concepts
  - Sources of law and policy
  - Jurisdiction
  - Areas of law
  - Statutes
  - University policy
  - Public v. private institutions
- Reading a legal case (Part II): review *Black v. Sullivan*
- Understanding legal citations
- Using Westlaw database
- Introduction to campus safety and the law of torts

Legal and policy questions to be discussed:

- What is the difference between law and policy? What are sources of law and policy at Rutgers?
September 18, 2018  **Campus Safety; Making an Oral Argument Presentation (Class 3)**

Assignment/reading for this class:

- Chapter 2 of textbook, Intro (p. 11) and Sec. B (pp. 48-74)
  - Problem 5 – prepare a 2-3 minute “oral argument” on behalf of student and 2-3 minute “oral argument” on behalf of university
  - *Kavanagh v. Trustees of Boston Univ.*

- *Orzech v. Fairleigh Dickinson Univ.* (Supp. Reading)

- [https://lawyerist.com/how-to-prepare-for-oral-argument/](https://lawyerist.com/how-to-prepare-for-oral-argument/)


Topics for discussion:
- Torts: liability for intentional and negligent acts causing injury
- New Jersey-specific charitable immunity from liability
- Making an oral argument

Legal and policy questions to be discussed:
- What steps *must* college administrators take to protect people from injury or death on or around their campuses? What steps *should* they take?
- How does law get argued in a court (oral advocacy)?

September 25, 2018  **Freedom of Expression; Morality, Values and Education (Class 4)**

Assignment/reading for this class:

- Chapter 3 of textbook: Intro, Sections A, E, F
  - *Healy v. James*
  - *Rosenberger v. Rector*

- *Rutgers 1000 Alumni Council v. Rutgers* (Supp. Reading)

- *State v. Schmid* (Supp. Reading)
• Chapter 13 (Intro; Section C(1))
  o Rosenberger v. Rector (revisited)
  o Christian Legal Society (Hastings) v. Martinez
  o Keeton v. Anderson-Wiley

Topics for discussion:
• Free Speech
• Freedom of Religious Expression
• Speech vs. Harassment
• Participation in Student Organizations

Legal and policy questions to be discussed:
• What is the boundary between permissible freedom of expression and impermissible conduct on college campuses?
• How do the principles of freedom of expression/belief and equality intersect in higher education settings, and how should colleges resolve tensions between these principles?
• How do civil liberties and issues of morality intersect on college campuses?

October 2, 2018

Oral Argument Presentations in Pairs/Groups
Peer Harassment; Sexual Harassment/Sexual Violence (Class 5)

Assignment/reading for this class:
• Chapter 4 of textbook: Intro, Sections A(1), B(1), B(2)
  o Tarasoff v. Regents of Univ. of Cal.
  o Davis v. Monroe Cnty. Bd. of Ed.
  o Lance v. Lewisville Indep. Sch. Dist.

• Ramser v. Univ. San Diego (Supp. Reading)

Groups 1-3 to Give Oral Arguments

Topics for discussion
• College’s duty to protect against harassment/violence
• Sexual harassment and sexual violence
• Disability harassment

Legal and policy question to be discussed:
• To what extent are colleges liable for harassment or violence among students? What should they do to prevent or remediate harassment and violence?
October 9, 2018  

**Oral Argument Presentations in Pairs/Groups**  
**Gender- and LGBT-Based Harassment (Class 6)**  

Assignment/reading for this class:  
- Chapter 4 of textbook: Section B(3)  
  - Nabozny v. Podlesny  
  - Flores v. Morgan Hill  
  - OCR Investigation of Tehachapi Sch. Dist.  
- L.W. v. Toms River Regional School District (Supp. Reading)  
- OCR Guidance on Bullying and Harassment (2010) (Supp. Reading)  

Groups 4-6 to Give Oral Arguments  

Topics for discussion  
- Guidelines for Research Papers – *outlines due 10/15*  
- Gender/Sexual Orientation-Based Harassment  

Legal and policy questions to be discussed:  
- How does the law and policy address LGBT students? How does federal and state law differ in this regard?  

*Research Paper Topics/Outlines Due on October 15, 11:55pm*  

October 16, 2018  

**Student Privacy (Class 7)**  

Assignment/reading for this class:  
- Chapter 5 of textbook: Intro, Sections A(1), A(2) (through p. 299), B(1), C(1)  
  - New Jersey v. TLO  
  - Safford v. Redding  
  - Problem 27  
- Hill v. NCAA excerpt (Supp. Reading)  
- Krebs v. Rutgers (Supp. Reading)  
- Justice for All v. Faulkner excerpt (Supp. Reading)  

Topics for discussion:  
- FERPA/student records  
- Search and seizure  
- Drug testing  
- Privacy and technology  
- Privacy and free speech
Legal and policy question to be discussed:
- What rights do postsecondary students have to informational, residential, possessory, and bodily privacy? And to anonymity?

October 23, 2018  
**Equal Educational Opportunity on the Basis of Race or National Origin - Affirmative Action, Desegregation, Immigration/Undocumented Students (Class 8)**

Assignment/reading for this class:
- Chapter 6 of textbook: Sections A, C (Intro, 1, 2 [through p. 383]) D; E(6)
  - *Brown v. Board*
  - Problem 30
  - *Grutter v. Bollinger*
  - *Fisher v. Univ. of Texas*
  - *Plyler v. Doe*
  - *League v. Wilson*
- Read case: *Fisher II* case excerpt (Supp. Reading)
- Read DREAM Act of 2017 excerpt (Supp. Reading)

Topics for discussion
- Racial equity in education
- Postsecondary desegregation
- College admissions and affirmative action
- Undocumented students/DREAM Act
- Discuss Mid-Term Quiz

Legal and policy question to be discussed:
- In what respects are students protected from discrimination on the basis of race or national origin in higher education?

October 30, 2018  
**Equal Educational Opportunity on the Basis of Sex: Athletics, Admission, Transgender Students (Class 9)**

Assignment/reading for this class:
- Chapter 6 of textbook: Section F(1, 2(a),3)
  - *Neal v. Bd. of Trustees*
  - *United States v. Virginia*
  - *Doe v. Yunits*
- OCR Resolution - Rutgers University (Supp. Reading)
• Find and read Rutgers University policy on Title IX/sex discrimination (including sexual harassment/assault and grievance process)

Topics for discussion:
• Gender equity in education, admissions
• Title IX athletics
• Transgender student rights
• MID-TERM QUIZ PRACTICE

Legal and policy question to be discussed:
• How are colleges responsible for providing equal opportunity and nondiscrimination on the basis of sex in higher education? What are Rutgers’ policies and procedures surrounding Title IX discrimination?

November 6, 2018  Educational and Institutional Quality (Class 10)

*Mid-Term Quiz*

Assignment/reading for this class:
• Chapter 7 of textbook: Section C
  o Professional Massage Training Ctr. v. AACSC
  o APSCU v. Duncan
• Read Textbook Chapter 7 Supplement (Supp. Reading)
  o Primer on Higher Education Act
  o ACICS v. DeVos

Topics for discussion:
• College accreditation
• College quality, accountability, improvement
• Higher Education Act
Legal and policy question to be discussed:
• What laws hold colleges accountable for improving and for maintaining a level of quality? How stringent should those laws be?

November 13, 2018  Students with Disabilities: Admission, Accommodations, Equity of Opportunity (Class 11)

Assignment/reading for this class:
• Chapter 11 (all)
• Southeastern v. Davis
• Pushkin v. Univ. of Colo.
• Knapp v. Northwestern Univ.
• Breimhorst v. ETS
• Enyart v. Nat’l Conf. of Bar Examiners

Topics for discussion:
• Admissions
• Access/Equity of Opportunity
• Accommodations
• ADA; IDEA; Section 504 of the Rehabilitation Act

Legal and policy question to be discussed:
• What legal and policy issues pertain to students with disabilities in higher education?

*Research Paper Due on November 16, 11:55pm*

~NO CLASS ON NOVEMBER 20~

November 27, 2018  Discipline of Students - Due Process Issues (Class 12)

Assignment/reading for this class:
• Read Cases: Bd. of Curators, Univ. of Miss. V. Horowitz; Univ. of Michigan v. Ewing; and Kadakia v. Rutgers (ALL Supp. Readings)

Topics for discussion:
• Research Paper presentations on Dec. 11 and 18
• What is due process?
• Student misconduct/discipline hearings on campus
• Sexual harassment/sexual assault hearings on campus

Legal and policy question to be discussed:
• What are the rights of students who face penalties or expulsion?

December 4, 2018  Rights of Educators – Tenure, Academic Freedom, Employment Discrimination (Class 13)

Assignment/reading for this class:
• Chapter 14 of textbook – Sections A(1), B, D (intro and 3), E
  o Perspectives on Labor Relations in Public Education
  o Perry v. Sindermann
  o Urofsky v. Gilmore
• Read Cases: Bennun v. Rutgers and Sweezy v. NH (Supp. Readings)
• Read Academic Freedom and Free Speech at a Public University – Rutgers Presentation (April 2017)) (Supp. Reading)

Topics for discussion:
• Research Presentations on Dec. 11 and 18
• Teacher tenure
• Academic freedom
• Employment discrimination

Legal and policy question to be discussed:
• What are the free speech, due process, and civil rights of postsecondary faculty and employees?

*Revision of Research Paper Due on 12/10/18, 11:55pm*

December 11, 2018  Student Presentations (Class 14)
December 18, 2018  Student Presentations (Class 15)

# END #