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AUTHOR Casey, John M.
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ABSTRACT

This paper reviews the basic legal relationships and duties that affect higher education facility management with special emphasis on the relationships with students, faculty, and staff in both public and private colleges and universities. An introduction briefly reviews the development of higher education law beginning with a landmark case in 1819. This section also covers sources of higher education law and general differences for public versus private institutions. The paper notes that the basis of the law in public institutions is predominately constitutional, whereas the basis in private institutions is predominantly contractual. Section 2 looks at management and administration and covers liability, both institutional and personal, in tort, contract, and federal civil rights aspects. Section 3 addresses faculty issues including contracts, personnel decisions, and academic freedom. Section 4 concerns student related issues and covers legal status, student discipline, housing, and security. Section 5 examines institutional relations with the regulatory authority of local government entities as well as state and federal governments. Section 6 concludes by discussing some difficulties in interpreting court decisions and administrative rules and regulations and their implications for physical plant administrators. (Contains 14 references.) (JB)

# The Impact of Higher Education Law on Physical Plant Administrators

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The University of Georgia

Prepared by
John M. Casey, P.E.
Manager, Physical Plant Engineering Department

## INDEX

*OUTLINE:



*Based in general on the format of The Law and Higher Education (Kaplin, 1985).

Abstract

The legal environment in higher education is a thicket of responsibilities and potential liabilities for facility managers. Before specific exposures and legal remedies can be identified and evaluated. APPA members should be conversant with the general principles of federal and state law that govern the highly specialized field of higher education. This paper reviews the basic legal relationships and duties that affect decision makers in facility management, with special emphasis on the roles of students, faculty and staff in both public and private institutions of higher education. While certain specific case decisions are cited, the purpose of this paper is to provide an overview of general legal principles relating to higher education, so that the facility manager can spot potential legal issues and, in turn, choose an appropriate action. A basic working knowledge of the legal milieu in the academy should allow the physical plant administrator to understand more completely his or her role in our litigious society.

## I - Introduction

### a) The Evolution of Higher Education Law

The history of higher education is a fascinating topic. In recent years, this subject has expanded to its present condition as a specific area of scholarly research and publication. Imbedded in this history is the equally fascinating tale of the evolution of the law in higher education; not surprisingly, a large body of literature exists which covers and defines this specific area of legal and educational expertise. Note that "School Law", concerning the law and primary/secondary schools, is studied and reported separately from "Higher Education Law". For a complete discussion concerning school law, refer to the LaMorte (1990) book.

The first higher education case which had an impact on the academy was the famous Dartmouth College decision (Trustees of Dartmouth College v. William H. Woodward, 1819). This Supreme Court ruling not only reaffirmed the right of a corporation to protection under the Federal Constitution, but also effectively shielded private higher education institutions from legislative attempts to reshape their charters. This trial featured the eloquent words of Daniel Webster, who represented Dartmouth before Chief Justice John Marshall with the classic defense:

> It is Sir, as I have said, a small College. And yet, there are those who love it. (Crane, 1961)

The concept of college charters as contracts within a state or colony was first presented by President Clap of Yale; he effectively used this novel position to protest a threatened legislative visitation to Yale College in 1763 (Duryea, 1973).

From this Dartmouth case, the academy generally avoided significant legal entanglement until the mid-twentieth century by functioning as a

> ...Victorian gentlemen's club, whose sacred precincts were not to be profaned by the involvement of outside agents in its internal governance. Not only was the academic environment perceived as private; it was also thought to be delicate and complex. An outsider would, almost by definition, be ignorant of the special arrangements and sensitivities underpinning this environment.... The special higher education environment was also thought to support a special virtue and ability in its personnel. The faculties and administrators (often themselves respected scholars) had knowledge and training far beyond

that of the general populace, and they were charged with the guardianship of knowledge for future generations.... (This) spawned the perception that ill will and personal bias were strangers to academia, and that outside monitoring of its affairs was therefore largely unnecessary. The law to a remarkable extent reflected and reinforced such attitudes. Federal and state governments generally avoided extensive regulation of higher education...the judiciary was also deferential to higher education. In matters regarding students, courts found refuge in the in loco parentis doctrine from early English common law. (Kaplin, 1985)

The principal case which affirmed the in loco parentis doctrine, which gave colleges the same control over students that parents had over minor children, was Gott V. Berea College (1913). Adherence to this concept was one of the principal shields that insulated the academy from the outside world. This tradition of higher education institutions remaining essentially free from litigation continued until after World War II. At that juncture, profound changes in the relationship between academia and the law evolved from the tremendous expansion of higher education and its mission in the United States. Since that time, it seems that virtually every aspect of the academy has been involved in legal and regulatory disputes.

b) Sources of Higher Education Law

According to Kaplin, higher education law "...isno longer simply a product of what the courts say, or refuse to say, about educational problems." He suggests that modern law is derived from many sources:

1. Federal and State constitutions;
2. Statutes;
3. Administrative rules, regulations and adjudications;
4. Case Law;
5. Institutional rules, regulations and contracts;
6. Academic customs and usages.

Since the federal constitution does not mention education, direct constitutional involvement in higher education law is present only at the state level. However, individual liberties associated with higher education are protected by the federal Constitution, and the federal government plays a significant role in higher education through an extension of the "general welfare" clause of Article I, a "catch-all" clause which covers matters not specifically protected under the Constitution. Many states, including Georgia, provide for higher education in their constitution.

Statutes are laws enacted by federal, state and local governments; for higher education, the states enact a majority of these statutes. Unless challenged, courts will presume a statute is constitutional and enforce it. In Marbury v. Madison (1809), Justice John Marshall held that a new law enacted by the federal government was unconstitutional, thereby overriding the Congress and establishing the United States Supreme Court as the final interpreter of the Constitution. For this reason, the most important legacy of a presidency is often the appointment of supreme court justices, since, "The law in the United States is whatever the nine robed justices in Washington say it is" (Young, 1988).

According to Kaplin, "...themost rapidly expanding sources of post-secondary education law are the directives of state and federal administrative agencies...agency directories are often published as regulations that have the status of law and are as binding as a statute would be. But agency directives do not always have such status. Thus, in order to determine their exact status, administrators must check with legal counsel when problems arise" (Kaplin, 1985). In addition, some administrative agencies are given the power to adjudicate disputes concerning their regulations. This body of law, generally referred to as administrative law, is an iceberg waiting for the educational

Titanic to pass nearby.

Case law refers to the legal principles that are derived from usage and custom, or from court decisions affirming such usages or customs. Case law is contrasted with the law created by and resulting from constitutions and statues, including court interpretations involving these services (Johnson, 1969).

Institutional rules, regulations and contracts are subject to the sources of law - constitutional, administrative, and case - mentioned above. Each institution of higher education "...mayestablish adjudicatory bodies with authority to interpret and enforce rules and regulations. When such decision-making bodies operate within the scope of their authority under institutional rules and regulations, their decisions also become part of the governing law in the institution" (Kaplin, 1985).

Law developing from academic custom and usage "...byfar the most amorphous source of post-secondary education law, comprises the particular established practices and understandings within particular institutions. It differs from institutional rules and regulations in that it is not necessarily a written source of law and, even if written, is far more informal; custom and usage may be found...inpolicy statements from speeches, internal memoranda...(it is) sometimes called 'campus common law'...."(Kaplin,1985).

c) Public Versus Private Institutions

Higher education in the United States is considered unique in the world because of the number and diversity of its institutions. A basic legal differentiation can reduce these over 3,000 schools into two categories - public and private. Virtually all institutions today receive some form of state or federal money; in this sense, there are few if any truly private schools in operation. This public-private dichotomy is generally recognized by the law, however, in the types of rules and source of authority under which each institution operates. Black and Gilson cover this point well:

> The relationship of a private college to the law is generally established by a charter. The purposes of the institution and its method of governance are defined by this charter, and accompanying by-laws which provide operating principles. The charter may be issued by the state, and describe the laws under which private institutions are operated.
>
> Constitutional guarantees - free speech, due process, equal protection, freedom of assembly, of the press, and from unreasonable search and seizures - are not guaranteed on private college campuses. The language of the constitution limits enforcement of these provisions to 'state' action. Only where there is a showing of state action in private education will there be a finding of constitutional protections for individuals. What constitutes state action has been widely litigated in recent years. Most recently, the Civil Rights Restoration Act of 1988 has reestablished governmental controls in private institutions receiving governmental support, overturning the earlier limiting decision of Grove City v. Bell (1984) in the U S. Supreme Court.
>
> The status of public institutions is determined by the states. In establishing the college or university, institutional rights and responsibilities are enumerated or delegated. State laws control the extent to which public colleges operate 'independently', and establish the nature of the legal relationships between the schc l and its students, and the school and its employees.
>
> Because of the obvious 'state' involvement in public higher education, full constitutional protections are extended to the campus setting.

...In summary, the nature of an institution (public or private) can have great bearing on legal entanglements. The important legal distinctions between the authority of public and private colleges and universities need to be understood before applying legal principles and developing legal responses (Black, 1988).

The bottom line in the public versus private distinction is this: the basis of the law in public institutions is predominately constitutional, whereas the basis in private institutions is essentially contractual.

## II - Management and Administration

### a) Institutional Liability

Kaplin suggests that an institution has three main areas of potential liability. These are 1) institutional tort liability, 2) contract liability and 3) federal civil rights liability.

#### 1. Institutional Tort Liability

A tort is a civil wrong, other than a breach of contract, for which the courts will allow a damage remedy. In higher education, the two most common torts which result in litigation involve negligence and defamation. While an institution is not subject to liability for every tort of its trustees, administrators and other agents, it will generally be held liable for torts committed by them within the scope of the institutions authority and control. Public institutions may escape liability by using sovereign immunity protection; the extent and nature of this protection varies from state to state. Private institutions may attempt to invoke a "charitable immunity" defense, but this may have little if any merit in the eyes of the court.

According to Young (1988), negligence torts are based on a failure to maintain an acceptable standard of conduct for the protection of others. To "prove" negligence, four elements must be present:

1) A duty requiring one to conform to standards.
2) Failure on the part of the person to conform.
3) A reasonable close causal relationship between the negligent conduct and an injury.
4) Actual loss or damage.

Regarding duties, Young (1988) also indicates that educators, in addition to the duty of each citizen to act as a reasonable and prudent person, must also assume the duties to provide adequate supervision for students, to provide proper instruction, and to see that equipment and facilities are kept in a reasonable state of repair. Weeks (1982) similarly describes the potential liability for an institution resulting from improper maintenance of the campus buildings, grounds and equipment. Black (1988) reminds us that a trust or fiduciary relationship is also established where a college is seen as knowing what is needed for education and knowing in what environment education takes place. Clearly, the academy has many duties to uphold.

The second form of institutional tort liability concerns defamation, which is considered an "intentional" tort, along with assault, battery and other mean-spirited actions. Defamation is a tort that holds someone up to hatred, contempt, ridicule and disgrace; it can be expressed in either written (libel) or oral (slander) form and must show that damage resulted from the defamation (Young, 1988). The matter must have been communicated to a third party, and must have been capable of defamatory meaning and understood as referring to the plaintiff in a defamatory sense. One of the principal defenses against defamation suits concerns the conditional privilege of fair comment and criticism; in addition, public institution officials are often accorded executive or

administrative privileges "...tofree public officials from intimidation in the discharge of their duties....(Kaplin, 1985). Public figures, like a College President or Football Coach, would have great difficulty winning a defamation case, since defamation of a public figures must be "...writtenwith gross disregard for the truth and with malice" (Young, 1988).

2. Institutional Contract Liability

A contract is an agreement, based on an offer and acceptance, between two or more competent persons (principals) for legal consideration on a legal subject matter in a form required by law (Young, 1988). Kaplin summarizes the liability incurred by a higher education institution regarding contracts:

> The institution may be characterized as 'principal' and its trustees, administrators and other employees as 'agents' for purposes of discussing the potential liability of each on contracts transacted by an agent for, or on behalf of, the institution. The fact that an agent acts with the principal in mind does not necessarily excuse the agent from personal liability, nor does it automatically make the principal liable. The key to the institution's liability is authorization; that is, the institution may be held liable if it authorized the agent's action before it occurred, or subsequently ratified it. However, even when an agent's acts were properly authorized, an institution may be able to escape liability by raising a legally recognized defense such as sovereign immunity (Kaplin, 1985).

The combination of contract law and agency law principles make institutional liability in contracts a very complex subject indeed. Most authors suggest that each post-secondary institution should carefully and precisely delineate the contracting authority of each of its agents.

3. Institutional Federal Civil Rights Liability:

Kaplin suggests that, while complicated, tort and contract liability for institutions, generally based on State statutes, are relatively stable areas of higher education law. In contrast, institutional federal civil rights liability is inchoative, having undergone a complex evolutionary development in recent years. While there are other federal civil rights laws, the institution's potential civil rights liability stems mainly from the Civil Rights Law of 1871, Statute Section 1983, which reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

This statute appears to be limited to "state action", thereby excluding private institutions. In addition, the term "person" is not defined in Section 1983; private colleges are generally considered as "persons" but, having been excluded under the "state action" provision, are effectively removed from this act. Thus, only public institutions appear to be affected by "Section 1983" However, other federal civil rights laws may be applicable to both public and private institutions; higher education administrators should monitor the ongoing effects of "Section 1983" in order to be informed concerning potential additional federal involvement in higher education law.

b. Personal Liability

Obviously, personal liability exposures are similar to those indicated above for institutions, since individual actions are necessary to obtain institutional involvement.

1. Personal Tort Liability:

According to Weeks, "...personal liability for damages due to negligence may exist for individuals, such as trustees, officers, faculty, staff and students if they:

1) Actually performed the negligent act or failed to take required action;
2) Participated in it; or,
3) Directed that it be done or not done.

In other words, to be personally liable, a person must be directly involved. It is not enough merely to be in a chain of command, where, in fact, another person is responsible for the negligence. If the negligent action were beyond the person's scope of employment, the individual would be personally liable, but the institution would not be liable. If the action was taken within a person's scope of authority both the individual and the institution could be exposed to liability" (Weeks, 1982).

Public institutions appear to offer more protection to individuals involved in torts, since both "official" and "sovereign" immunity may be used as a defense. However, recent court decisions involving a university hospital psychiatrist's failure to warn an individual threatened by a patient (Tarasoff v. Regents of the U. of California, 1976), and the rejection of another university hospital doctor's claim of sovereign immunity regarding negligent practice (James v. Jane, 1980), confirm what should be intuitively obvious - courts will not allow individuals to escape personal liability if the individuals clearly failed to exercise due care in discharging their duties.

2. Personal Contract Liability:

Similarly, "...a trustee, administrator or agent who signs a contract on behalf of any institution may be personally liable for its performance if the institution breaches. The extent of personal liability depends on whether his or her participation on behalf of the institution was authorized" (Kaplin, 1985).

3. Personal Federal Civil Rights Liabilities:

The provisions of "Section 1983" of the Civil Rights Act of 1871, discussed hereinbefore, seem more appropriate for individual liability, based on the fact that the "person" of Section 1983 can be construed as an individual trustee, administrator or employee. Even so, the courts have recognized qualified immunity from this liability for certain public officers and employees. However, the changing state of the law under both Section 1983 and the Eleventh Amendment (regarding immunity) requires higher education officials to remain ever vigilant, since there is no reason to believe that these will insulate all individuals in every instance (Kaplin, 1985).

## III - Faculty

The higher education law applicable to faculty members will be discussed generally from the perspectives of contracts (the basis for faculty employment), personnel decisions (the most active and muddled area in today's society), and academic freedom. For a complete discussion concerning faculty law, refer to the Hollander (1985) book. It is important to bear in mind that the public versus private nature of a particular institution, along with its unique rules and regulations, must be considered when reviewing these general discussions.

a) Contracts

Faculty members in the academy are generally retained as tenured or non-tenured employees. Faculty members who earn and or gain tenure have a contract with the institution which

essentially guarantees lifetime employment, except that the faculty member may be dismissed for extremely grave reasons or extenuating circumstances. In effect, tenure grants to a faculty member due process, including sufficient notice to prepare a defense and the right to a hearing, in a dismissal action. On the other hand, non-tenured faculty are generally retained on a yearly contract basis, with no right to, or guarantee of, renewal at the end of the contract term. Non-tenured faculty are not due an excuse or reason from the institution if another contract is not offered to them (Young, 1988). The concept of tenure as a property right which may be altered only for cause has been upheld by the Supreme Court (Perry v. Sinderman, 1972); similarly, the absence of a property right to continued employment for a non-tenured faculty member with a one-year contract was confirmed (Board of Regents v. Roth) by the Court in the same year (Zirkel, 1988).

Kaplin suggests that the legal relationship between a college and its faculty is very complex, involving not only contract law but also labor relations, employment discrimination and, in public schools, constitutional and public employment law. He also indicates that the legal principles and laws discussed for faculty are generally applicable to non-faculty employees as well. However, he also reminds us that courts and administrative agencies treat faculty differently than other employees, based on the unique characteristics of institutional customs and practices regarding faculty, and academic freedom principles that protect faculty but not all other employees (Kaplin, 1985).

b) Personnel Decisions

The present status of faculty personnel decisions is best summarized by the following:

> In today's litigious society, no decisions made by higher education administrators are more fraught with the potential for lawsuits than those decisions concerning non-renewal and dismissal for cause. The individual administrator is not shielded from being personally liable when an employee's right have been violated.... Employees of higher education institutions are subject to dismissal for cause, but legal and institutional standards for determining 'cause' are varied. Incompetence, neglect of duty, insubordination, immorality or unethical conduct, have been the most prevalent bases for such dismissals, yet these terms are ambiguous and subject to conflicting interpretation in particular circumstances (Beckham, 1986).

Note that the Beckham book uses the term "faculty/staff" in its title; here is more evidence that non-faculty employees and supervisors are, with the exceptions listed in the preceding section, in essentially the same legal boat as the faculty.

c) Academic Freedom

The concept of academic freedom is an essential but sometimes over-stressed component of the modern higher education institution in the United States. While difficult to define in legal terms, the courts have placed purely academic matters under complete control of the institution involved, and have taken a "hands-off" attitude toward academic matters. The classic Sweezy v. New Hampshire (1956) Supreme Court case produced the following:

> It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university - to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study (Quoted in Black, 1988).

Other court cases have shown that academic freedom will not be recognized if the rules and regulations of the institution are not followed by the faculty member. Obviously, the courts realize

that a certain action, while academically elegant, may not take place if legitimate and reasonable factors preclude it. For example, the astronomy professor's cry of "academic freedom", along with a demand to shut off the central steam plant boilers because its smoke was interfering with his telescope observations, should fall on deaf ears.

## IV - Students

The higher education law applicable to students will be discussed generally from the perspectives of a student's legal status, student discipline, housing, and security. For a complete discussion concerning student law, refer to the Young (1986) book. As mentioned before concerning faculty, it is important to remember that the public versus private nature of an institution, along with its unique rules and regulations, must be considered when reviewing these general discussions.

### a) Legal Status

According to Kaplin, "the legal status of students in post-secondary institutions changed dramatically in the 1960s, and is still evolving. For most purposes, students are no longer second class citizens under the law. They are recognized under the federal Constitution as 'persons' with their own enforceable constitutional rights. They are recognized as adults, with the rights and responsibilities of adults, under many state laws" (Kaplin, 1985). The case most generally cited in this new student status is Dixon v. Alabama (1961), which not only established the right of a student in a tax-supported institution to procedural due process, but also implicitly rejected the in loco parentis concept which gave colleges control over students that parents had over minor children (Young, 1986 and Kaplin, 1985). Essentially, the legal relationship between the student and the institution involves contract, fiduciary, and constitutional elements. The contractual theory is probably the most applicable in today's society; under this the student agrees to abide by the rules, regulations and standards set down and published by the institution, and in return the institution will offer a degree to those who meet the established standards. In addition, at public institutions the courts have defined the student-college relationship more in terms of a private citizen to a governmental body, stressing the constitutional rights of the student (Young, 1988).

Recently, private institutions have extended basic constitutionally-mandated rights to their student body members even though they are not strictly required to do so. As a result, all students can generally expect that their basic rights as adult citizens will be honored, and that prudent administrators will afford them "procedural due process", which is really just a fancy name for basic fairness.

### b) Student Discipline

Generally, as Young reports, the courts have been reluctant to interfere in controversies arising between students and institutions of higher education. This "hands off" policy was confirmed by the federal Supreme Court (Hamilton v. Regents, 1934), which declared that administrators possessed inherent authority to establish standards for their internal organization and governance. Faced with an increased number of disputes involving students and their institutions, this policy has been relaxed, and courts are not reluctant to intervene where clear violations are seen. A judicial statement, prepared by the U.S. District Court for the Western District of Missouri in 1968, summarizes the basic limits of institutional authority over student discipline in public schools; private institutions may also follow these guidelines, even though they are not legally required to do so.

All institutions are encouraged to establish systems for the resolution of disputes concerning students. Such systems, according to Kaplin, should include written procedures, standards and enforcement provisions concerning complaints both by and against students. Additionally, codes of conduct published by the school should be clear, respecting First Amendment Rights and rules of

basic fairness. Finally, student judicial systems that adjudicate complaints of student misconduct must be very sensitive to procedural due-process safeguards (Kaplin, 1985).

c) Housing

The legal thicket is especially dense in student housing considerations. Often, conflicting rights cause legal confrontations. Recently, the right of the individual under the Fourth Amendment of the Constitution, which prohibits unreasonable search and seizures, has collided with other constitutional, statutory and contractual rights of the institution. In addition, requiring on-campus residency raises other issues, including "classification" considerations under the equal protection clause of the Fourteenth Amendment; dormitory visitation privileges have also been challenged on constitutional grounds.

As Young explains, housing officials have the right to promulgate and enforce reasonable rules and regulations for the maintenance of good order and discipline in dormitories. Housing contracts typically spell out these specific regulations, and their enforcement should be fair and reasonable (Young, 1985).

Finally, Black correctly argues that since dormitories concentrate students in relatively small living areas, fires in these buildings represent a greater danger to life than in most other campus buildings (Black, 1988). Administrators have a clear duty to protect student housing buildings to a greater degree than a typical classroom building, and residents in the dormitories have a right to expect such additional care.

d) Security

Students have a legal right to be reasonably safe and secure on campus, and institutions have a duty to provide campus security for these students. Recent court cases have held the institution liable for security breaches, or failure to have security measures in place, which resulted in death or injury to students. Based on an unfortunate incident at a private Eastern college, there is a nationwide movement to force higher education institutions to report crime statistics to prospective students. In addition, campus wide security, especially regarding housing buildings and other areas (library, night school buildings, student unions, etc.) subject to after-dark occupancy, has become a major topic for evaluation and planning. Security is a concern which, while primarily focussed on the student, involves all who frequent the campus, including visitors and guests.

One case which alerted the academy to security problems was Duarte v. State of California (1979). A female student was raped and murdered in her dormitory room, and the suit was filed by the student's mother. In finding for the plaintiff, the court allowed three legal theories to rule, as reported by Kaplin:

1. Insofar as a university knows that there is a high incidence of crime on campus, it is obligated as a landlord (under tort law) to take reasonable protective measures to prevent outside assailants from intentionally causing harm to students residing in its dormitories.

2. Under contract law with the University as the landlord and the student as the tenant, failure to provide a dormitory reasonably safe from intruders would breach a "covenant of habitability" implicit in the lease, and thus constitute a breach of contract by the University.

3. Under the theory of negligent representation (under tort law) the University could be liable if persons in authority falsely represented that the campus was reasonably safe for female students.

(Kaplin, 1985)

## V - The Community

All institutions are subject to the regulatory authority of one or more local government entities. This "town and gown" relationship can run the gamut from peaceful coexistence to outright hostility. As Kaplin points out, local governments have sometimes maintained highly controversial positions concerning University research; Cambridge attempted to regulate recombinant DNA research at both Harvard and M.I.T. in the late 1970s, and both Ann Arbor and Cambridge attempted to prohibit nuclear weapons research in the mid 1980s.

Under the law, a local government can only exercise the authority that has been given it by the state; generally, local governments with "home rule" powers will have more authority than those whose functions are narrowly proscribed by the state. Private institutions will probably be more carefully bound by local regulations, since public colleges are more heavily regulated by the state and thus more likely to have local authority preempted. Sovereign immunity also protects the public institution, since this doctrine holds that a state agency, as an arm of the state government, cannot be regulated by a lesser governmental authority. Zoning ordinances, rights of private property owners, taxation and student voting in local elections are community legal problems that will continue to add spice to the town-gown dichotomy in both public and private colleges for many years.

### b) State Government

State governments can claim for themselves all the power not denied them by the federal Constitution or their own constitution; thus, the states have the greatest reservoir of legal authority over post-secondary education (Kaplin, 1985). States vary in their involvement in higher education; each tends to add a certain twist to the control and autonomy given to Regents, Coordinating Boards and individual public institutions. Generally, all state governments control federal funds that are "given"to the state for higher education. State governments also control the coordinating boards and various professional and occupational licensure boards, so that private institutions are often bound by the state. Many state governments provide tuition assistance to students in private colleges within that state, a fact that further blurs the distinction between public and private institutions. As mentioned previously, the states are the source of many statutes concerning higher education, and many of these laws are unique to that state. Aside from the general distinction of statutorily versus constitutionally based public institutions, the legal relationship between the state and institutions of higher education varies considerably from one college to the next.

### c) Federal Government

The Constitution of the United States does not mention education, so theoretically the federal government has no direct power over education. However, as Kaplin indicates, many federal constitutional powers - particularly spending power, taxing power, commerce power, and civil rights enforcement power - are broad enough to extend to many matters concerning education. In addition, specific federal regulations which bind the academy include the Occupational and Safety Health Act of 1970 (OSHA), Labor-Management Relations Act (for private institutions), The Fair Labor Standards Act (minimum wage, etc.), the Employment Retirement Income Security Act of 1974 (ERISA - prevents pension fund abuse), and the myriad of employment discrimination laws, especially Title VII of the Civil Rights Act of 1964 which is enforced by the Equal Employment Opportunity Commission (EEOC). Regarding the latter, the significant Griggs v. Duke Power case celebrated its twentieth birthday this year; this case not only confirmed that "disparate treatment" discrimination (intentional, prejudiced, using different standards for different groups) is illegal, but also established "disparate impact" discrimination (unintentional, neutral, color blind, using same standards but with different consequences for different groups) was also illegal (Ledvinka, 1982).

This finding is one of the bases for the "quota" arguments that have surfaced from time to time in the Bush Administration.

There are three other specific federal regulations which are particularly important to the academy concerning access for the handicapped. These three federal statutes include the Architectural Barriers Act of 1968, which mandated that federally funded projects be made accessible to handicapped individuals, and sections 503 and 504 of the Rehabilitation Act of 197., which mandates as a condition of eligibility for federal funds equal employment opportunity for handicapped individuals, affirmative action with respect to known handicapped applicants and employees, and prohibits discrimination against qualified handicapped individua' (Weeks, 1982).

Finally, hiring procedures used by institutions for new faculty and staff must be especially sensitive to federal regulations, contract law, and interpersonal dynamics to a degree never before experienced in human history. For a complete discussion concerning this especially intense area of the law, refer to the Higgins (1987) book.

## VI - Conclusions

### a) Interpretation of Court Decisions

This vast array of potential legal energy has spawned an inordinate number of law suits affecting colleges and universities. Much of this litigation is the direct result of the often ambiguous and constantly changing legal environment in modern society. The effects of court decisions on institutions and individuals will vary, depending on the jurisdiction of the court involved and the extent to which both sides in the case have exhausted all rights of appeal. As Young pointed out:

> Obviously, while the decision of an individual state supreme court would generally be applicable to colleges and universities within the state, that decision has no bearing on institutions in other states. The readers, however, would be well advised to monitor decisions from other states to be alerted to issues which may arise in their own state and to analyze the reasoning of the court for principles which might be applicable to the issues generally.
>
> It should be noted that a decision of the United States District Court applies only to that particular district, and a decision of the United States Court of Appeals applies only to that particular circuit. There are a multitude of Districts but only twelve judicial circuits (Young, 1985).

Regarding the latter concerning federal courts, it should be noted that SRAPPA member states fall into four judicial circuits:

| | |
|---|---|
| Fourth - | North Carolina, South Carolina, Virginia and West Virginia |
| Fifth - | Louisiana and Mississippi |
| Sixth - | Kentucky and Tennessee |
| Eleventh - | Alabama, Georgia and Florida |

### b) Interpretation of Administrative Rules and Regulations

As indicated before, the most rapidly expanding sources of higher education law are the directives of Federal and State Agencies; in many instances, new regulations and directives have the status of law and are as binding as statutes. It is imperative that each institution of higher education keep abreast of changes that affect the legal status and requirements of all faculty, staff and administrative employees. However, few institutions can afford the expenditures necessary to

monitor all state and federal directives. For this reason, the academy must rely on the various Associations to perform most of this work on at least the federal level. The June 1991 edition of the APPA Newsletter indicated that the Association has created a new staff position to assist in easing the federal (and state) regulatory demands placed upon the limited resources of colleges and universities, and to represent more effectively the needs and concerns affecting higher education facilities. Other associations like NACUBO, SCUP, and CUPA have also promoted closer liaison with regulatory agencies, but none has been as active and successful as APPA in alerting its members to new regulations. The addition of this new public relations staff position should greatly enhance the ability of APPA to help facility managers cope with the regulatory problem.

Regarding the APPA involvement in monitoring federal and state regulations, members of the Association should make sure that they have copies of Regulatory Compliance for Facility Managers and Case Studies in Environmental Health and Safety; each publication is described in the Association's list of Publications in Facilities Management for 1991. In addition, members should obtain the forthcoming APPA publication Guidelines for Campus Accessibility, which was summarized in the Spring 1991 edition of Facilities Manager; the federal accessibility regulation Section 504 requires all public accommodations to be accessible by the target date of January 26, 1992.

c) Implications for Physical Plant Administrators

Physical plant administrators are deeply implicated and entwined in the legal problems of higher education. From asbestos to PCBs to wetlands, there are very few activities left which are free from legal landmines. Facility managers must realize that it is no longer sufficient to keep your nose to the grindstone and continue to keep the institution running. Judges and juries take a dim view of activities which injure, or discriminate against, individuals and the public, especially when these actions occur in a university setting. Each higher education institution is a microcosm of the legal world, with every possible liability exposure capable of surfacing at any moment.

Comforting thoughts like "indoor air quality will be the next big growth area for the law" notwithstanding, there are positive steps that APPA institutions can take to head off much of the legal posse at the pass. These actions include:

1. Subscribing to journals or environmental scanning services which specialize in higher education law.

2. Coordinating employer/employee relations with staff or consultants who are proficient in personnel administration law.

3. Coordinating operation, maintenance and construction activities with professional staff or consultants who are conversant with the latest building and safety codes and regulations.

4. Continuing promotion of information exchange through state and regional groups (like SRAPPA) concerning the legal aspects of higher education that affect facility managers.

5. Continuing promotion and support of the national APPA program, as recently expanded through the addition of a permanent staff member, for monitoring federal and state regulations.

Finally, each institution should designate one individual to set up and maintain all publications and records necessary to monitor and insure compliance with each new regulation that affects physical plant managers. At a large institution, this position may require a full-time employee

with access to expertise in engineering, personnel and legal areas. In any event, if facility managers fail to pay attention to potential legal problems, they can be assured that many meetings in the future will end on this note: "See you in court...."

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