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# Law, Policy, and Higher Education

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**Philip T.K. Daniel**

William and Marie Flesher Professor of Educational Administration  
*Adjunct Professor of Law*  
The Ohio State University

**E. Gordon Gee**

*President*  
*Professor of Law*  
The Ohio State University

**Jeffrey C. Sun**

*Associate Professor, Department of Educational Leadership*  
*Affiliate Faculty, School of Law*  
University of North Dakota

**Patrick D. Pauken**

*Vice Provost for Governance and Faculty Relations*  
*Secretary to the Board of Trustees*  
*Associate Professor of Educational Administration and Leadership Studies*  
Bowling Green State University

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**Editorial Offices**

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MATTHEW  BENDER

# Dedication

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I dedicate this book to my granddaughter, Maya Naomi Kanai Daniel, who constantly informs me about how to live a smarter and more enjoyable life.

— Professor Daniel

For Rebekah, and her new family, who are bringing light into my life.

— President Gee

For Ruth and Gary Sun, the two people who inspired me to pursue and share knowledge for the greater good

— Professor Sun

To my best and favorite teachers — my parents Patricia and Raymond Pauken — who taught me that education is not only great for the mind, but also great for the heart.

— Professor Pauken



# *PREFACE*

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The authors chose to title this textbook, *LAW, POLICY, & HIGHER EDUCATION: CASES AND MATERIALS*, with purpose. The research contained in the pages herein not only presents primary materials such as cases, statutes, and regulations, but also secondary sources regarding legal issues that colleges and universities, students, faculty, accreditors, and other related entities face. The discourse also examines the interchange between policy and the law such as, for example, how cases impact the treatment of students' rights and responsibilities or how statutes alter university research activities. In our discussions, we have adopted an intentional and carefully delineated approach weighing considerations of societal forces (i.e., political, economic, cultural, and technological) balanced against the institutional core mission of a college or university. For instance, how do technological innovations alter the ownership rights of faculty who teach online courses, which are recorded? To what extent does a state's expectation that public colleges and universities serve as the region's economic engines alter the contractual relationships for faculty and students in university-business partnerships?

The topics chosen, broken down into 13 designated chapters, raise current issues for faculty, students, attorneys, higher education administrators, policymakers, and other participants in the higher education enterprise. The cases that have been highlighted present questions that can be examined from several perspectives. For example, consider a case involving a student assault on campus. As an administrator, how would a court's holding affect the way official institutional policy is formed in regards to on-campus criminal activity? If in the role of an attorney for a student-plaintiff who was attacked in a university residence hall, with what causes of action would you proceed? As a faculty member sitting on the university senate's "Student Safety" committee, how would this case's decision impact recommendations you submit to the committee? Each chapter has been drafted to educate students in a variety of ways, regardless of whether their ultimate desired career is in administration, in-house university counsel, policy-making, general law practice, or a professorship at a higher education institution.

Specifically, the chapters examine the law and policy issues that are on the forefront of higher education, ranging from intercollegiate athletics to individuals with disabilities, academic integrity measures, and intellectual property — particularly in terms of commercialization. For instance, the topic of students with disabilities reflects an area that has grown substantially in the past decade. This occurrence is not surprising when one looks at the raw numbers. During the 1997-1998 school year, there were 428,280 students with disabilities attending U.S. colleges and universities. Slightly more than a decade later, that number grew to 707,000 students during the 2008-2009 school year. With such a dramatic increase in the enrollment of students with disabilities, courts and policymakers were forced to adapt, leading to new case law and policies. In addition, several other indicators suggest that the legal and policy issues pertaining to students with disabilities are expected to grow. In 2008, the Americans with Disabilities Act was significantly modified, and according to a 2011 U.S. Department of Education Report, the college enrollments of students with disabilities is expected to continue to increase. Thus,

## *PREFACE*

the topic lends itself to examination and consideration in terms of the laws and policies associated with supporting students with special needs that will undoubtedly aid students in the future. Similar examples also exist for matters addressing intercollegiate athletics (e.g., the financial commitment of college athletics and its alleged treatment of athletes as commodities), academic integrity measures (e.g., academic standards required to compete in a global society and the legal boundaries in which policymakers have to legislate those mandates), and intellectual property (e.g., commercially valued products and services that spur academic innovation, but require university resources). All of these issues have evolved over the past few decades and will continue to do so. Often there is a lag between the pronouncement of new legal standards and the adaptation of policymakers to the newly articulated mandates. Thus, students will find themselves in the midst of two discussions: First, with regard to clearly established doctrine, how has higher education changed for the better or worse in response to the confines of the law? Second, in terms of new, progressive legal initiatives, how will university and college administrators make adjustments in our evolving reality? What correlating policy changes may ensue as a result of not only the changes in legal standards, but also the changes in the economic environment?

Along with groundbreaking case law and research, the textbook also provides students with basic, foundational knowledge that is imperative to succeeding as a professional in the world of higher education. For instance, students will be introduced to the elements of a negligence cause of action, along with a detailed analysis of the different duties often imposed on university administrators and faculty. Students will be exposed to the workings of Institutional Review Boards and the purposes they serve within the university's research protocols. Further, students will confidently be able to articulate the requirements a college or university must meet in order to be granted tax-exempt status as a charitable institution. These legal foundations are just a sampling of the important groundwork set forth in this textbook.

In sum, this compilation fills a gap in the market for casebooks on higher education law, as the materials presented lend themselves to timely and important discussions of both law and policy issues. Chapters 1 and 2 provide an overview of higher education with respect to the laws and policies that shape its roles and responsibilities in society. Chapters 3 and 4 examine the college's employment relationship with faculty and staff. Chapters 5, 6, and 7 explore the rights and responsibilities of students. Chapter 8 addresses how the university affects and is affected by the intercollegiate athletic enterprise. Chapters 9, 10, and 11 present the influence and impact of government regulations as well as higher education's efforts to shape policies that further institutional aims and manage university resources. Chapter 12 addresses issues of intellectual property, especially involving faculty, but with an eye on public/private partnerships, ownership, and commercialization of research. Chapter 13 presents an exposé of persons with special needs, a largely overlooked and underserved population within the university.

The authors extend appreciation for the valuable research assistance of Christopher Montgomery, Jillian Wolosiansky, Rachel Kepley, Seth Chodosh, Geoffrey Saxe and Joel



## *PREFACE*

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Philip T.K. Daniel

E. Gordon Gee

Jeffrey C. Sun

Patrick D. Pauken



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