

An Overview of Nevada Public Higher Education Law

BY DIANE WELCH, ESQ.

Higher education law is a dynamic practice area. This article provides general information about the Nevada System of Higher Education (NSHE) and some common issues that make higher education law unique.

Constitutional Roots

The Nevada Constitution established a “State University” in 1887 controlled by an elected Board of Regents. (Nev. Const. Art. 11, §4.) Since its creation, the state university has grown into the NSHE, which is comprised of eight institutions. These include two universities, one research institute, one state college and four community colleges. Imbedded in these institutions are two medical schools, a dental school and a law school.

The Nevada Supreme Court has upheld NSHE regulations as possessing

statutory authority. *State ex rel. Richardson v. Board of Regents*, 70 Nev. 144, 261 P.2d 515 (1953). If ratified in the 2020 general election, Assembly Joint Resolution 5 would amend the Nevada Constitution to remove the provisions governing the election and duties of the Board of Regents and replace them with legislative governance. (2017 Statutes of Nevada, Pg. 4580.)

The Role of NSHE Counsel

NSHE institutions graduated more than 12,000 students in spring 2019 alone. The supporting role of NSHE counsel is vital to the success of these institutions as they grow to meet demand.

NSHE counsel handle various issues, from employment law, contract matters, litigation and areas unique to each institution. For example, the presence of student housing or Greek organizations increase matters involving student services and adherence to the Fair Housing Act and Americans with Disabilities Act. The workload for counsel at research institutions include intellectual property,

research ethics, grants and research partnerships. All institutions have significant transactional work, but this increases for institutions with sports arenas and entertainment venues.

NSHE counsel must be familiar with all of these areas, but the level of concentration necessarily changes with each institution.

Common Issues in Higher Education Law

The following is a quick overview of common issues faced by NSHE counsel:

- **Different Employees, Different Rules**

NSHE employees comprise classified state employees, professional or “unclassified” employees that include faculty and administrators, temporary adjunct faculty and other part-time workers. Governing regulations differ depending on employee

Academic Mall at the University of Nevada, Las Vegas
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type. NRS Chapter 284 and the Nevada Administrative Code govern classified employees. This includes an administrative law process for resolving grievances and appealing discipline, with the Employee Management Committee serving as the final authority. The NSHE Code provides the personnel policy for professional employees and is incorporated into each employee contract. Collective bargaining agreements exist for academic faculty at several institutions and provide further compliance requirements. Colleges and universities also operate using principles of shared governance, which require collaboration between the administration and faculty representatives on issues of policy and governance. Further, the doctrine of academic freedom applies and precludes interference in the pedagogy used by academic faculty.

This complex dynamic is unique to higher education. Wise legal counsel must bear this in mind when dealing with any higher education institution.

- **Student Issues**

Nevada public institutions are subject to federal regulations affecting students, financial aid, education records, discrimination and much more. The U.S. Department of Education (ED) is responsible for implementing many of these regulations, and it periodically issues written policy and guidance documents.

The Family Education Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g; 34 CFR Part 99, is a federal law protecting the privacy of student education records. It is administered by ED and applies to schools receiving federal funds, both K-12 and post-secondary. Subject to certain exceptions, institutions may not release education records without written permission from the student.

Equal access goes beyond physical access to facilities. The law requires that websites and online course content be fully accessible to students and others with disabilities.

Certain “directory information” is considered public unless a student requests nondisclosure in writing. FERPA questions from faculty are common, and other FERPA considerations frequently arise due to subpoenas and background checks.

The Office for Civil Rights (OCR) falls within ED’s purview and ensures equal access to education by enforcing anti-discrimination laws at institutions receiving federal funding. NSHE institutions receive federal funds through grants and student financial aid. The laws enforced by OCR include Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972 (Title IX), and Title II of the Americans with Disabilities Act of 1990 (ADA). OCR investigates complaints, and violations are often resolved through facilitated resolution agreements to avoid further sanctions. This process does not preclude lawsuits, but OCR does not act as an advocate.

Title IX prohibits education institutions that receive federal funding from discriminating based on sex. It applies to all public K-12 and post-secondary institutions, and it has broadly expanded over the past decade. Along with complaints of unequal access to education and athletic opportunities, OCR investigates complaints of sex discrimination, including sexual harassment and sexual violence. The law dictates that every institution appoint a Title IX coordinator to internally receive and investigate complaints. If the outcome is that sexual harassment occurred, the school must take immediate steps to end the harassment, prevent its recurrence, and remedy its effect on the victim’s education and related activities.

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Mathewson-IGT Knowledge Center at the University of Nevada, Reno
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Providing ADA accommodations is vital to equal access to education for disabled students. Section 504 of the Rehabilitation Act of 1973 prohibits discrimination against disabled individuals in programs and activities that receive federal funds from the ED. 29 U.S.C. § 794 (Section 504). The OCR enforces Section 504 at public institutions.

Equal access goes beyond physical access to facilities. The law requires that websites and online course content be fully accessible to students and others with disabilities. Additionally, disabled students may need specific classroom accommodations. Higher education is not subject to the Individualized Education Plans used for students in K-12.

Rather, NSHE institutions have disability resource offices staffed by specialists who meet with disabled students and tailor accommodations for specific classes. Typical services include testing accommodations of extended testing time or a quiet testing environment. Classroom accommodations may include an interpreter, note taker or adaptive equipment to allow the student to receive information on par with other students.

Legal counsel play an important role in student accommodation when an instructor and student cannot agree on what is appropriate. Litigation often hinges on whether requested accommodations are reasonable. Courts have found that accommodations in higher education are unreasonable when

they require a “fundamental alteration” to an academic program.

- **BLM Land Patents**

Many NSHE institutions sit on land conveyed by land patents from the Bureau of Land Management, which were issued for specific use as a college or university campus. These patents are important when a campus expands or plans significant changes. Federal land patents preclude granting easements or other ownership interest. Further, significant modifications require BLM approval and a revised development plan. Counsel plays a critical role in advising on growth and expansion, and he or she must be adept at drafting agreements that allow desired access while obtaining BLM approval.

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- **Immunity from Liability**

Under the 11th Amendment, NSHE and other state entities enjoy sovereign immunity against private lawsuits in federal court. Nevada has waived most of its sovereign immunity pursuant to NRS 41.031, but exceptions remain that shield NSHE employees and officials from civil liability for decisions and actions taken as part of their job duties.

The immunity described in NRS 41.032(2) protects NSHE employees from liability “[b]ased upon the exercise or performance or the failure to exercise or perform a discretionary function or duty ... whether or not the discretion involved is abused.” Qualified immunity shields government officials and employees from civil liability if sued in their individual capacities for actions within their discretionary authority while acting under color of law. This defense applies if the individual’s conduct has not violated clearly established statutory or constitutional rights of which a reasonable person

would have known. *See Pearson v. Callahan*, 555 U.S. 223 (2009). NSHE police officers have immunity under NRS 41.0336, which protects them from liability for negligent acts or omissions unless they affirmatively caused the harm or made a promise or representation to the victim’s detriment.

- **Self-Insured**

The Nevada Attorney General’s Office (AG) provides legal representation for most state agencies. By contrast, NSHE counsel report directly to the institution’s president and the NSHE chief counsel. Yet ties to the AG’s office are evident in the requirement to serve process on both the head of NSHE and the AG. *See* NRS 233B.130(2). Further, the AG Tort Claim Unit is responsible for payment of claims against NSHE.

All NSHE institutions are “self-insured” as participants in the Tort Claim Fund, and each institution pays a premium for coverage. The

Tort Claims Office resolves most property and personal injury claims before they reach the institution’s legal office. During litigation, the tort claims manager participates in settlement conferences, mediations, and early neutral evaluation hearings, and he or she must approve any settlement offer. The tort claims manager is a licensed attorney from the Nevada Attorney General’s Office.

The diversity of legal issues involved in Nevada higher education law make this a fascinating practice area. **NL**



DIANE WELCH is assistant general counsel for the College of Southern Nevada and has been part of the Nevada System of Higher Education for 20 years. She attended the UNLV Boyd School of Law, and she is an active member of the Southern Nevada Association of Women Attorneys, serving as its president from 2016 to 2018.



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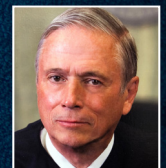
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