

Introduction: The Historical and Legal Foundations of Public Education

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KEY CONCEPTS IN THIS CHAPTER

- ❖ The Roots of Public Education in America
- ❖ Constitutional Provisions Applicable to Education
- ❖ Important Statutes Governing Education
- ❖ Case or Common Law

INTRODUCTION

Public education in America has grown significantly from its early beginnings in colonial times. What was once considered to be primarily the responsibility of the family is now a major function of governments at all levels. Currently, there are approximately 98,793 public schools¹ serving students in grades kindergarten through 12 in the 13,862 school districts in the United States.² These districts and schools serve approximately 49,300,000 students³ who are taught by 3,180,000 million teachers.⁴ Public education in this country has become a major source of expenditure at the federal, state, and local levels with over \$520 billion being spent annually⁵ at an average of \$10,889 per student.⁶ Further, although they are beyond the scope of this book, nonpublic schools and home schooling families educate in excess of another 6 million students.⁷

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Initially, the responsibility for public education was borne almost exclusively by local communities. However, during the past two centuries, state and federal governments have increasingly become involved in the running and financing of public schools.

This chapter begins with a brief overview of the history of public education from its meager beginnings as a purely local function in colonial times to the present day in which the federal government is involved in education more than ever. Next, the chapter provides a primer on the legal foundations of public education. This section includes a synopsis of the major constitutional and statutory provisions governing public education. Throughout this book the authors reference decisions by federal and state courts. Readers lacking the background knowledge of court systems should consult “Resource A: Court Systems and the Authority of Courts,” at the back of the book, which provides an overview of the organization of federal and state court systems. Readers who are unfamiliar with legal materials also may wish to consult “Resource B: Legal Resources and References,” which provides information on reading and understanding legal citations.

A BRIEF HISTORY OF PUBLIC EDUCATION IN AMERICA

When settlers first arrived on the shores of what is now the United States, the task of educating children was the responsibility of the family and was done largely at home. During these times parents taught their children the rudiments of reading, writing, and arithmetic. Much of what children were taught was based on what they needed to know in an agrarian society. Thus, boys were also expected to acquire basic vocational skills and girls learned how to run a household. As the nation developed and expanded, formal schools became more common but were largely private institutions that educated children whose parents could afford to pay tuition. Even so, the first publicly supported secondary school, Boston Latin, was founded in 1635.

In 1647, Puritans in Massachusetts enacted what became known as the “Ye old deluder Satan” law requiring towns of 50 households to provide instruction in reading and writing to their children, and towns of 100 households or more to establish grammar schools to prepare children for the universities. One main purpose of the law, and thus its name, was to combat the attempts of Satan to keep people ignorant of the scriptures. Even though this law provided for the establishment of schools, attendance was not compulsory, but rather was at parental discretion. Students generally attended school for only a few weeks during the winter; they studied in poorly equipped schoolhouses and were taught by untrained teachers.⁸

The idea of publicly financed schools did not take hold until the mid-19th century, when social reformers in Massachusetts, Connecticut, and New York succeeded in passing legislation that required school attendance and provided for tax-supported schools. Massachusetts passed the first compulsory school law in 1853, and New York followed suit one year later. Early schools, particularly in rural areas, were supported partially by property taxes and partially by tuition paid by parents. More options existed in the cities, where many schools were operated by churches.

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Education remained principally a local and state function until the mid-20th century, when Congress passed the National Defense Education Act of 1958 (NDEA),⁹ largely in response to the Soviet Union's launch of Sputnik, and the Elementary and Secondary Education Act of 1965 (ESEA),¹⁰ now reauthorized as the No Child Left Behind Act (NCLB).¹¹ These two landmark pieces of legislation sought to improve instruction in commonly neglected subjects such as science, mathematics, and foreign languages and to expand educational opportunities to students from poor families. The NDEA marked the first time the federal government directly intervened in public school policy and curricula, when Congress earmarked funds to support more intense instruction in science and mathematics. The ESEA, on the other hand, provided funds for school districts that had large numbers of children living in poverty. The legislation also funded Head Start, a program designed to help prepare low-income toddlers for school. Although these were not the first pieces of educational legislation passed by Congress, the NDEA and ESEA did mark the beginning of the federal government's increased involvement in public education. During this period many school officials began to see public education as the key to individual success and the nation's prosperity.

Unfortunately, since public schools in many areas of the country were still segregated by race midway through the 20th century, educational opportunities were not fully available to all children during this time. That began to change in the second half of the 20th century when public schools became instrumental in assuring equal opportunity to all citizens. Initially, change came about through court orders, but further change was instituted through federal legislation. In 1954, in its landmark school desegregation ruling, *Brown v. Board of Education (Brown)*, the Supreme Court characterized education as "perhaps the

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most important function of state and local governments.”¹² Chief Justice Warren, writing for the unanimous Court, pointed out that education was necessary for citizens to exercise their most basic civic responsibilities:

In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the State has undertaken to provide it, is a right that must be made available to all on equal terms.¹³

Two decades later, in *Lau v. Nichols*,¹⁴ the Supreme Court insisted that the failure to provide remedial English language instruction to non-English-speaking students violated Section 601 of Title VI of the Civil Rights Act of 1964.¹⁵ The Court held that denying such students the chance to receive remedial instruction denied them meaningful opportunities to participate in public education. The Court emphasized that recipients of federal funds were bound by Title VI of the Civil Rights Act of 1964, and a Department of Health, Education, and Welfare regulation required public school systems, as recipients of federal assistance, to take affirmative steps to rectify language deficiencies.

Federal involvement in public education reached a new height one year later in 1975 when Congress passed the Education for All Handicapped Children Act,¹⁶ currently known as the Individuals with Disabilities Education Act (IDEA).¹⁷ This landmark legislation mandated that all states provide a free, appropriate public education in the least restrictive environment for all students with disabilities between the ages of 3 and 21. The IDEA required school officials to develop individualized education programs for all students with disabilities who required special education and related services. The IDEA also provided parents with unprecedented rights and created an elaborate system for the resolution of disputes that might develop over the provision of special education services. The IDEA not only opened the doors of our public schools to children who had previously been excluded but also provided a guarantee that the education they received would be meaningful.

The 1983 publication of an extensive report on the condition of the country’s public schools, *A Nation at Risk: The Imperative for Educational Reform*, generated much interest and controversy.¹⁸ This report suggested that students from other developed countries outperformed U.S. students on international measures. In response, most states implemented educational reform laws that mandated more frequent testing of students in core academic subjects and that increased state-mandated curriculum requirements. This led to the passage of the No Child Left

Behind Act (NCLB)¹⁹ almost two decades later. The key purposes of the NCLB are to improve the academic achievement of students, assure that students are taught by highly qualified personnel, make school systems accountable for student achievement, require school systems to use effective, research-based teaching methods, and afford parents choices in educational programs.²⁰ The NCLB provides for accountability through annual testing and the use of proven instructional methods.²¹ It represents the federal government's most extensive involvement in public education to date. Even so, the NCLB affords states flexibility in terms of setting standards, choosing tests, and spending federal dollars, but the states must show results.

LEGAL FUNDAMENTALS OF EDUCATION

There are four sources of law in the United States: constitutions, statutes, regulations, and judicial opinions. These sources exist at both the federal and state levels. A constitution is the fundamental law of a nation or state, while a statute is an act of a legislative body—a law enacted by Congress or another legislative body.²² Statutes must be consistent with their controlling constitutions. Inasmuch as most statutes are general mandates, they are typically supplemented by implementing regulations or guidelines written by officials in the agencies that are charged with their implementation and enforcement. Regulations are thus more specific than the statutes they are designed to implement, because they interpret legislative intent as to how laws should work in practice. Constitutions, statutes, and regulations are all subject to judicial interpretation. The many court decisions applying constitutions, statutes, and regulations to specific situations compose a body of law known as *case law* or *common law*. Judicial opinions rely heavily on the concept of *binding precedent*, or the theory that a ruling of the highest court in a jurisdiction is binding on all lower courts in that jurisdiction. Cases from other jurisdictions that are of no binding effect are referred to as *persuasive precedent*, meaning that courts are free to consult the judgments of other courts but are not bound to follow their holdings.

Constitutions

In addition to the U.S. Constitution, each state has its own constitution. State constitutions must be compatible with the provisions of the federal Constitution and typically deal with many of the same topics. State constitutions do, however, address many functions not covered by their

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federal counterpart. Thus, education is considered to be a function of the states insofar as education is not mentioned in the federal Constitution. The Tenth Amendment reserves to the states all powers not delegated to the federal government, as long as those powers are not prohibited by the Constitution. In fact, the Supreme Court went so far as to declare that

Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.²³

Even so, many aspects of the federal Constitution have a direct impact on the daily operations of our public schools.

Federal Constitution

The sections of the Constitution that are generally implicated in litigation involving the public schools are those protecting individual rights. As much of the school-related litigation over the past several decades has shown, teachers and students do not surrender their individual rights when they enter school buildings. In addition to the body of the Constitution, its first ten amendments, adopted as the Bill of Rights in 1791, play a major role in the daily lives of teachers, students, and their school systems. The following provides a thumbnail sketch of key clauses and amendments, most of which are discussed in more detail later in this book.

General Welfare and Spending Clause.²⁴ Although education is largely a state function, over the years the federal government has had its hand in educational matters. In recent years Congress has enacted a great deal of far-reaching legislation that has imposed conditions and standards on the public schools. The federal government derives its authority to pass such legislation from Article I, Section 8, which gives Congress the power to collect taxes, pay debts, and provide for the common defense and general welfare of the country.

Contracts Clause.²⁵ Article I, Section 10 of the Constitution, known as the Contracts Clause, prohibits states from passing laws impairing the obligation of contracts. The Contracts Clause essentially prevents state

legislatures from passing laws that change the provisions of teachers' contracts or collective bargaining agreements regarding tenure, salaries, or even retirement benefits. Yet, this does not prohibit state legislatures from changing laws if they do not implicate contracts. For example, states are generally free to alter teacher licensure or certification requirements.

First Amendment.²⁶ The First Amendment provides basic freedoms and has been the subject of much litigation in education, involving both teachers' and students' rights. Although the wording of the First Amendment indicates that it applies to Congress, it has been extended to the states by way of the Fourteenth Amendment. According to the First Amendment,

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

The religion clauses of the First Amendment have significant implications for teachers regarding their rights to practice their religion. For example, cases have come before the courts on topics as varied as teachers being able to take time off from work for religious observances, their rights to wear religious garb when working in public schools, and bans on proselytizing in class.

A long line of case law has clearly established that teachers do not lose their constitutional rights as citizens simply because they are public employees. To this end, the Supreme Court clearly stated that neither students nor teachers "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."²⁷ Still, there has been much litigation over teachers' rights to speak out or write letters to the editors of local newspapers regarding matters of public concern. However, some restrictions can be placed on teachers' free speech rights, particularly if the speech can result in disrupting the educational environment. The final clause of the First Amendment, which grants the right to assemble and petition the government, has many implications for teachers' associations or unions.

Fourth Amendment.²⁸ The Fourth Amendment, which prohibits unreasonable searches and seizures, has been the subject of much litigation involving student discipline. Moreover, it offers privacy protections to teachers. Specifically, the Fourth Amendment states,

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The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Although most of the litigation under the Fourth Amendment in a school setting has involved students, it has implications for teachers as well, particularly regarding their expectations of privacy in such areas as drug testing.

Fifth Amendment.²⁹ The Fifth Amendment is best known for protections against self-incrimination and double jeopardy for those accused of crimes. Even so, there is much more to the Fifth Amendment, which reads in part,

No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The second clause of the Fifth Amendment provides due process protections for parties to federal actions. It is important to note that it does not apply to state actions; however, as shown below, the Fourteenth Amendment includes a Due Process Clause applicable to the states. In the school context, the last clause, which prohibits the taking of private property for public use without fair compensation, is significant. In this respect the Fifth Amendment may come into play when private property needs to be acquired for educational purposes, such as with the taking of land by eminent domain for building a new school.

Ninth Amendment.³⁰ The Ninth Amendment simply states that “the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” While this amendment has been interpreted to prevent the expansion of the powers of the federal government, it also frequently has been interpreted to imply personal privacy rights.

Tenth Amendment.³¹ When the founding fathers wrote the Constitution, there were many compromises between those who wanted a strong federal government and those who advocated states’ rights. The Tenth Amendment was included in the Bill of Rights to preserve the powers and

governmental functions of the states. Specifically, the Tenth Amendment provides that the “powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” Insofar as education is a function not addressed in the federal Constitution, it is left to the states by the terms of the Tenth Amendment.

As will be shown later in this chapter and throughout this book, this does not mean that the federal government lacks any authority to become involved in the process of education. In fact, in recent years a significant amount of federal legislation has had a profound impact on the daily operation of public schools. Further, under the General Welfare and Spending Clause of the federal Constitution, Congress may pass legislation and attach conditions to the states’ acceptance of funds under that legislation as long as it makes its intent known in clear and unambiguous terms.

Eleventh Amendment.³² The concept of sovereign immunity as established in common law did not find its way into the original articles of the Constitution. This oversight was rectified with the enactment of the Eleventh Amendment, which affirms that

the Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by Citizens or Subjects of any Foreign State.

The Eleventh Amendment’s grant of sovereign immunity has been interpreted as granting states and state officials immunity from suit by their own citizens. However, Congress can abrogate a state’s immunity to suit as long as it does so explicitly in clear and unambiguous language. States also may waive their Eleventh Amendment immunity. In this respect, states may be considered to have waived their immunity under an act of Congress by accepting federal funds provided under the legislation.

Fourteenth Amendment.³³ The Fourteenth Amendment includes a Due Process Clause similar to that in the Fifth Amendment except that it applies to the states. Equally important to education is the amendment’s Equal Protection Clause. The amendment reads, in part,

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protections of the laws.

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It is important to understand that there are two types of due process: substantive and procedural. Substantive due process refers to the notion that a law must have a function within the rightful power of the government and be judiciously related to the achievement of that goal. Procedural due process, on the other hand, refers to the process of informing charged individuals about what they are accused of and giving them the opportunity to defend themselves before an impartial decision maker.

The right to due process has many implications for teachers, especially within the employment context. For example, when facing discharge, tenured teachers have the right to be notified of the reasons for their contemplated dismissal and to be given the opportunity to respond, generally during an impartial hearing. Teachers who are not tenured ordinarily lack this protection, since they have yet to achieve the substantive due process rights that would afford them full procedural due process.

The last part of the Fourteenth Amendment, the Equal Protection Clause, conveys the principle that people in similar circumstances should be treated similarly. Thus, any differences in how individuals are treated must be based on legitimate criteria that are not prohibited by law. The Equal Protection Clause has been prominent in much of the discrimination litigation in education, such as *Brown*. As will be shown below, federal statutes have corrected disparities in how individuals are treated. Prime examples are the statutes that have been passed to afford greater opportunities to individuals with disabilities in terms of both educational and employment opportunities.

State Constitutions

All states have constitutions of their own that grant rights and privileges similar to those found in the federal Constitution. Nevertheless, state constitutions usually address many areas not covered by the national document, such as education. Under what is known as the Supremacy Clause of the federal Constitution, conflicts between federal and state constitutional provisions (or federal and state laws for that matter) are resolved in favor of the federal mandate. The purpose of most state constitutions is to define the powers of the state legislatures. In that respect, state constitutions often spell out what a state legislature must do, may do, and may not do.

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Most state constitutions have sections that require the state legislature to provide for the establishment, maintenance, and support of a system of public schools. The Ohio Constitution is typical in this respect:

The general assembly shall make provisions, by taxation, or otherwise, as with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the State; but, no religion or other sect or sects, shall ever have any exclusive right to, or control any part of the school funds of this state.³⁴

The term “thorough and efficient” appears in many state constitutions to describe the types of systems to be established. Further, as with Ohio, many states include clauses to make sure that public or common schools are free from religious influence. This provides an example of an acceptable difference that can occur between the federal Constitution and its state counterparts. While some forms of aid to students attending sectarian schools are allowed under the Establishment Clause of the First Amendment, state constitutions may place further restrictions on such aid.

Statutes and Regulations

A statute is an act of a legislative body, such as a law enacted by Congress or a state legislature.³⁵ All statutes, either federal or state, must be consistent with the constitutions within their jurisdictions. Inasmuch as statutes only provide general mandates without specifying how those mandates are to be implemented in actuality, most are accompanied by regulations or guidelines issued by the agencies responsible for their execution and enforcement. Regulations are thus more specific than the statutes they are designed to implement, because they interpret legislative intent as to how the laws should work in practice.

As noted, under the Tenth Amendment, education is reserved to the states. Nevertheless, Congress has the power to enact laws under the General Welfare and Spending Clause of Article I, Section 8 of the Constitution by offering funds for purposes that it believes will serve the public good. Over the years Congress has enacted a series of statutes, such as the NCLB, that have provided funds to states and school districts to put certain mandates into practice. By accepting the funds under these statutes, states and school districts become bound by the terms of the statutes. For example, states receiving federal financial assistance under the NCLB must take steps to improve academic achievement by instituting reforms such as using teaching methods that are research based and that have been proven effective.

Over the years Congress has enacted a series of statutes, such as the No Child Left Behind Act, that have provided funds to states and school districts to put certain mandates into practice.

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Regulations promulgated by the U.S. Department of Education, in addition to those from other federal and state administrative agencies,

Regulations carry the full force of the law and are presumptively valid unless or until courts strike them down as conflicting with the underlying legislation.

afford executive officers the means to implement statutes by carrying out their full effect. In other words, while statutes set broad legislative parameters, regulations allow administrative agencies to provide details to satisfy the requirements of the law. For example, statutes may set the number of days that children must

attend school to satisfy state compulsory attendance laws, while regulations fill in such details as how long class days should be and what subjects students must study. Regulations carry the full force of the law and are presumptively valid unless or until courts strike them down as conflicting with the underlying legislation.

Civil Rights Statutes

Congress has enacted many statutes to protect the civil rights of individuals. These laws prohibit discrimination in areas including employment on the basis of characteristics such as race, color, national origin, ethnicity, gender, age, and disability. Some of these statutes, such as the Civil Rights Act of 1964, specifically target recipients of federal funds.

Title IV of the Civil Rights Act of 1964.³⁶ Title IV of the Civil Rights Act of 1964 requires public school boards to desegregate their districts while prohibiting officials from making student assignments based on a student's race, color, religion, or national origin. Congress enacted Title IV both to provide an enforcement mechanism for *Brown* and to authorize the withdrawal of federal funds from programs that practiced discrimination.

Title VI of the Civil Rights Act of 1964.³⁷ Title VI of the Civil Rights Act prohibits recipients of federal funds, including public school systems, from discriminating against individuals on the basis of race, color, or national origin. If recipients of federal funds violate Title VI, they are subject to litigation by the U.S. Department of Justice, as often occurred during the era of desegregation, or the threat of the future loss of those funds or other actions by the U.S. Department of Justice.

Title VII of the Civil Rights Act of 1964.³⁸ Title VII of the Civil Rights Act of 1964 is designed to provide equal employment opportunity by prohibiting workplace harassment and discrimination. Title VII covers private employers as well as government agencies and educational institutions that

have 15 or more employees. Title VII prohibits discrimination on the basis of race, color, national origin, religion, and sex and has been extended to prohibit discrimination on the basis of pregnancy. Even so, employers may treat individuals differently on account of their traits if a trait constitutes a bona fide occupational qualification. Therefore, officials in religious schools may require employees to belong to the faiths that operate their schools.

Title IX of the Education Amendments of 1972.³⁹ Title IX prohibits discrimination on the basis of sex in any program or activity receiving federal financial assistance. Congress enacted Title IX to eliminate sex discrimination in schools and other educational institutions. Initially best known for providing parity in sports and athletic programs, Title IX also protects students from sexual harassment at the hands of teachers and their peers. Title IX prohibits discrimination due to sex in a wide range of services and activities, such as admission to programs, athletics, and financial assistance. Like other civil rights statutes, Title IX applies to recipients of federal funds, and its enforcement mechanism authorizes the withdrawal of funding from institutions when violations are found. At the same time, the Supreme Court has interpreted Title IX as authorizing private causes of action for monetary damages by students when they can prove that they were victims of intentional discrimination.⁴⁰ Interestingly, while Title IX protects students from discrimination based on sex, aggrieved teachers generally must seek redress under Title VII.

Section 504 of the Rehabilitation Act of 1973.⁴¹ Section 504 prohibits recipients of federal funds from discriminating against individuals with disabilities in their programs or activities. Section 504 was the first civil rights legislation specifically guaranteeing the rights of individuals with disabilities. Section 504's antidiscrimination provisions against individuals with disabilities in programs receiving federal funds are similar to those in Titles VI and VII of the Civil Rights Act of 1964.⁴²

Americans with Disabilities Act.⁴³ The Americans with Disabilities Act (ADA), passed in 1990, extends the reach of Section 504 by prohibiting discrimination against individuals with disabilities in the private sector as well as the public sector. The ADA's impact on schools is most significant in the areas of reasonable accommodations for employees and academic program accommodations for students.⁴⁴

Age Discrimination in Employment Act.⁴⁵ The Age Discrimination in Employment Act (ADEA), enacted in 1967, prohibits discrimination against individuals 40 years of age and older. The ADEA's antidiscrimination

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provisions are substantively similar to those found in Title VII of the Civil Rights Act of 1964. The ADEA applies to employers with 20 or more employees and protects older workers in areas such as hiring, compensation, benefits, transfers, promotions, demotions, and dismissal. As with Title VII, age may be a factor when it is a bona fide occupational qualification. By way of illustration, for reasons of public safety, school boards⁴⁶ may institute policies that place restrictions on older bus drivers.

Individuals with Disabilities Education Act

The Individuals with Disabilities Education Act (IDEA)⁴⁷ (formerly the Education for All Handicapped Children Act⁴⁸) was first enacted in 1975. The IDEA mandates a free, appropriate public education (FAPE) in the least restrictive environment (LRE) for all students with disabilities between the ages of 3 and 21 based on the contents of their individualized education programs (IEPs). School officials must develop IEPs in conferences with students' parents for any children who require special education and related services. The IDEA specifies how IEPs are to be developed and the elements they must contain. Additionally, the IDEA includes elaborate due process safeguards to protect the rights of students and ensure that its provisions are enforced. As part of the IDEA's funding formula, which allows all school districts to qualify for funds, boards receiving funds are subject to rigid auditing and management requirements.⁴⁹

No Child Left Behind Act

One of the more controversial federal education laws enacted in recent memory is the No Child Left Behind Act (NCLB)⁵⁰ that was passed in 2002 as an extension of the Elementary and Secondary Education Act of 1965.⁵¹ The key elements in the NCLB are to improve the academic achievement of students who are economically disadvantaged; assist in preparing, training, and recruiting highly qualified teachers; provide improved language instruction for children of limited English proficiency; make school systems accountable for student achievement, particularly by imposing standards for annual yearly progress for students and districts; require school systems to rely on teaching methods that are research based and that have been proven effective; and afford parents better choices while creating innovative educational programs, especially where local school systems are unresponsive to parents' needs.⁵²

State Statutes

Most of the laws directing the day-to-day operation of public schools are state statutes. While state legislatures are subject to the limitations of federal law and of state constitutions, they are relatively free to establish and change their own systems of education. The law is well settled that state and local school boards, administrators, and teachers have the authority to adopt and enforce reasonable rules and regulations to ensure the smooth operation and management of schools. Even so, rules and regulations are subject to the same constitutional limitations as statutes passed by legislative bodies. Accordingly, if it is unconstitutional for Congress or state legislatures to enact laws violating the free speech rights of children, it is also impermissible for school administrators to do so by creating rules that apply only in their school buildings. Thus, while school officials have the authority to institute their own rules, their rules may not violate students' constitutional rights. It is also significant to note that legislation or rule-making on any level, whether federal or state, cannot conflict with a higher authority.

The law is well settled that state and local boards of education, administrators, and teachers have the authority to adopt and enforce reasonable rules and regulations to ensure the smooth operation and management of schools.

Case or Common Law

Another source of law that significantly influences the daily operation of public schools is case law, also known as judge-made or common law. Common law refers to judicial interpretations of legal questions. Judges “interpret the law” by examining issues that may have been overlooked in the legislative or regulatory process or that may not have been anticipated when statutes were enacted. The Supreme Court, in the landmark case of *Marbury v. Madison*,⁵³ asserted its authority to review the actions of other branches of government. Although there is an infrequent tension between the three branches of government, the legislative and executive branches generally defer to judicial interpretations of their actions. Of course, whether judges are interpreting or making laws is subject to a great deal of controversy and often comes down to an individual's judicial perspective.⁵⁴

A major tenet of common law is the concept of precedent, or the proposition that a majority ruling of the highest court in a given jurisdiction is binding on all lower courts within its jurisdiction. Accordingly, a ruling of the Supreme Court is binding throughout the nation, while a decision of a state's high court is binding only in a given state. Persuasive precedent, a ruling from another jurisdiction, is actually not precedent at

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all. Put another way, when courts in one state seek to resolve novel legal issues, the judges typically review precedent from other jurisdictions to determine whether those jurisdictions have addressed the same legal question, so that the judges might rely on that opinion for guidance. However, since courts are not bound to follow precedent from different jurisdictions, these cases remain persuasive in nature.

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executive or administrative agencies develop sets of regulations to provide guidance on implementing statutes passed by legislative bodies. Even though these regulations provide significant guidance on how the law is to be put into operation, all possible scenarios

cannot be fully anticipated. Thus, conflicts arise over how specific aspects of the statute are to be applied. Insofar as the resulting case law provides even more guidance because of the concept of precedent, the analysis and study of judicial opinions can provide valuable insight into how laws are to be applied to everyday situations.

SUMMARY AND RECOMMENDATIONS

Public education in America has evolved during the past four centuries as the country has moved from being a largely agrarian society to the industrial-technological economy of today. During this time education moved from being primarily the responsibility of the family to a major function of local and state governments. Although education is primarily a state responsibility, during the last century the federal government has increasingly become involved in public education.

Over the course of this history, Congress, state legislatures, and administrative agencies have enacted almost countless laws and regulations addressing education. These enactments impact the daily lives of teachers by regulating their employment status while spelling out their instructional duties. As time goes on, education is becoming more regulated, as the federal government continues to assume a greater role in the daily operations of schools, and states pass educational reform measures. Increasingly, teachers are finding that the laws affecting their jobs are becoming more complex. Add to this the thousands of judicial opinions that are handed down each year on education-related issues, and it is easy to see why teachers must develop an awareness of their legal rights and responsibilities in the area known as school or education law.⁵⁵ In this respect, we offer the following recommendations:

- Teachers should become familiar with federal and state education laws, particularly those relating to their employment and instructional responsibilities. In this respect, a major federal law, the No Child Left Behind Act, was scheduled to undergo reauthorization as this book was being written. Teachers should pay close attention to any changes that may be enacted, particularly those pertaining to professional qualifications, overall standards, and student testing requirements.
- Since the law is constantly evolving, teachers should develop a means to remain up to date on the issues presented in this book. To do so, teachers should supplement this book by attending workshops on school law offered by their professional organizations, teachers' associations, or local schools of education and by regularly visiting websites providing information on education law.
- Although courses in school law are not required by most graduate programs in education, except those leading to licensure as an administrator, teachers seeking graduate degrees should consider taking such a course as an elective to help themselves become better informed.
- If in doubt, ask. Since school administrators are generally fairly well versed in school law, as are teachers' association officials, teachers should seek information before acting on matters with legal consequences.
- Teachers should seek competent legal counsel in situations that may lead to litigation. Most teachers' associations provide a degree of legal protection to their members as a benefit.

FREQUENTLY ASKED QUESTIONS

Q. If education is not mentioned in the U.S. Constitution, why is it necessary to become familiar with constitutional provisions?

A. As the Supreme Court stated in *Tinker v. Des Moines Independent Community School District*,⁵⁶ neither students nor teachers lose their constitutional rights when they enter schools. Teachers, therefore, need to be aware of their own constitutional rights as well as those of their students. Knowledge of their own rights should help to prevent those rights from being unfairly violated. Knowledge of students' constitutional rights can help to prevent teachers from violating their students' rights and, we hope, avoid legal action as a result.

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Q. Are there limitations on teachers when they seek to exercise their constitutional rights in schools?

A. Just as someone may not yell "fire" in a crowded theater when no fire is present and later claim it was a protected act of free speech, school boards may limit the free speech rights of teachers and students under certain circumstances. Thus, restrictions may be placed on the rights of both students and teachers due to the unique nature of our educational systems. These restrictions and limitations are discussed in later chapters of this book.

Q. Is it necessary to understand the court systems in order to understand school law fully?

A. No, but it helps. For example, in order to understand fully how a new court case can affect a school, an individual teacher, or a group of teachers, it is important to understand its full reach. The significance of a given case very much depends on the jurisdiction and level of the court. Lacking a full understanding of the court systems, it is difficult to analyze how a case impacts a school or teacher. Resource A at the end of this book provides additional guidance on the levels and jurisdictions of courts and how their decisions affect education.

Q. If education law is continuing to evolve, how is it possible for a teacher to keep up with changes?

A. Professional organizations and teachers' associations are generally a good source of information about new developments in school law. Teachers should read the monthly publications and literature put out by these groups. For example, the newsletters of many organizations contain regular columns on legal issues. If your organization or association does not regularly provide information on legal issues, as a member you should encourage it to do so. In addition, many websites provide useful information and updates on developments in education law. Resource C at the end of this book provides guidance on additional sources of information that can be used to remain current.

WHAT'S NEXT

The second chapter continues the discussion of the legal foundations of education by covering the topic of school governance and how it affects teachers. Specifically, this chapter provides additional information about the expanding role of the federal government along with laws regulating

state and local educational agencies. The chapter also includes a section on school finance and the use of school property.

ENDNOTES

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13. *Id.*

14. 414 U.S. 563 (1974).

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16. Education for All Handicapped Children Act, 20 U.S.C. § 1400 *et seq.* (1975).

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27. Tinker v. Des Moines Independent Community School District, 393 U.S. 503 at 506 (1969).

28. U.S. Constitution, Amendment IV.

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46. School boards are also known by other names, such as school committees, boards of education, boards of directors, or boards of trustees. For the sake of simplicity, the term *school boards* will be used throughout this book to signify the governing body of local education agencies or school districts.

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