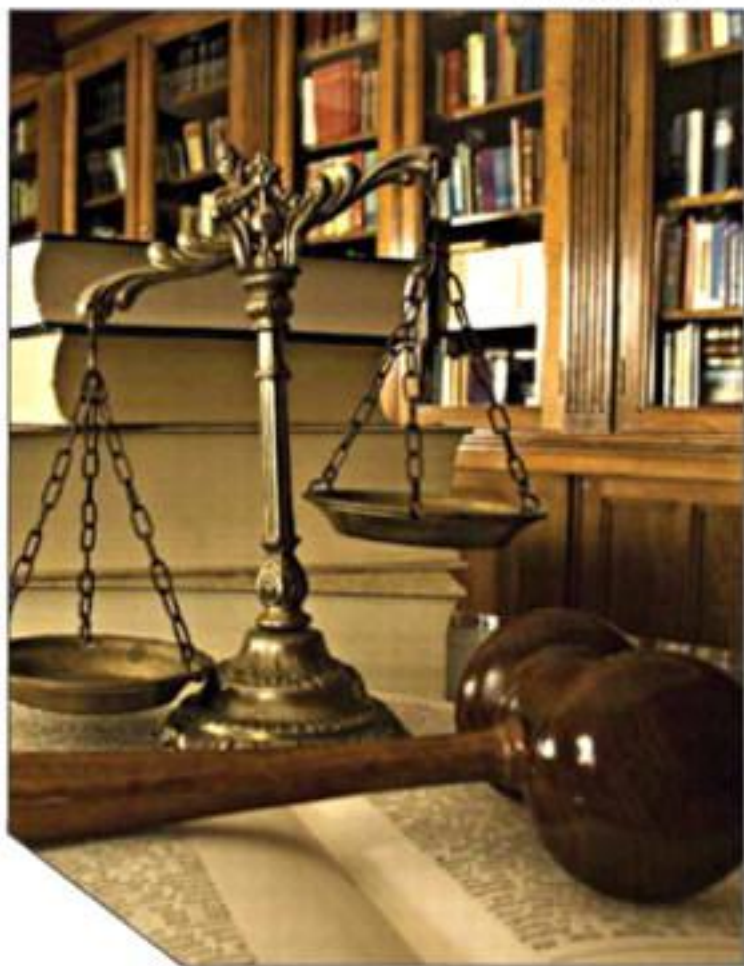


The Allyn & Bacon Educational Leadership Series

A TEACHER'S POCKET GUIDE TO SCHOOL LAW

THIRD EDITION



Nathan L. Essex

A TEACHER'S

*Pocket
Guide to
School Law*

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A TEACHER'S

Pocket Guide to School Law

THIRD EDITION

Nathan L. Essex

*Southwest Tennessee Community College
University of Memphis*

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*Dedicated to my spouse, Lorene,
and my children, Kimberly,
Jarvis, and Nathalie*

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Contents

<i>List of Cases</i>	<i>xvi</i>
<i>Preface</i>	<i>xxi</i>
<i>About the Author</i>	<i>xxvii</i>
<i>Introduction</i>	<i>xxviii</i>
CHAPTER 1	
<i>Control of Public Schools</i>	<i>1</i>
State and Local Control of Education	1
<i>State Board of Education</i>	2
<i>Local Control of Public Schools</i>	3
<i>Discretionary Powers</i>	5
<i>School Administrator's Role</i>	5
<i>Teachers as Employees of Local</i>	
<i>School Boards</i>	5
<i>School District Rules and Regulations</i>	6
<i>School Board Meetings</i>	6
<i>Guides: Control of Public Schools</i>	<i>6</i>
Practical Tips	7
Endnotes	8
CHAPTER 2	
<i>Instruction and Curriculum Standards</i>	<i>9</i>
Academic Issues	9
<i>Curriculum Standards</i>	9
No Child Left Behind Act of 2001	10
<i>Public School Choice</i>	10
Putting Reading First	11
<i>Summary and Implications</i>	11
NCLB Subgroups	14
<i>Federal Data Requirements for Report</i>	
<i>Cards Under No Child Left Behind</i>	14
Vouchers	14
Charter Schools	15

<i>Guides: Instructional Program</i>	18
Intellectual Property and Fair Use	18
<i>Copying Computer Software</i>	19
Grading and Academic Requirements	20
<i>Student Testing</i>	21
<i>Grading</i>	21
<i>Grade Reduction for Absences</i>	21
<i>Grade Reduction for Unexcused Absences</i>	22
<i>Grade Reduction for Academic Misconduct</i>	22
<i>Physical Punishment for Poor Academic Performance</i>	23
<i>Guides: Grading and Academic Requirements</i>	23
Educational Malpractice	24
<i>Guides: Educational Malpractice</i>	25
Practical Tips	26
Endnotes	27

CHAPTER 3

Religion and Public Schools **28**

Prayer, Bible Reading, and Religious Symbols	28
<i>School-Sponsored Prayer</i>	29
<i>Silent Prayer and Meditation</i>	30
<i>Prayer at School Events</i>	30
<i>School-Sponsored Bible Reading</i>	32
<i>Religious Symbols</i>	33
<i>Religious Displays</i>	33
<i>Ten Commandments</i>	34
<i>Prayer at School Board Meetings</i>	34
<i>Guides: Prayer and Bible Use in School</i>	35
Religious Activities and Holiday Programs	35
<i>Distribution of Religious Materials</i>	36
<i>Pledge of Allegiance</i>	37
<i>Guides: Religious Activities</i>	38
Practical Tips	39
Endnotes	40

CHAPTER 4

Students, the Law, and Public Schools **41**

Freedom of Expression	42
<i>The Tinker Case</i>	42
Viewpoint Discrimination	44
<i>Guides: Freedom of Expression</i>	44
Protests and Demonstrations	45
<i>Guides: Protests and Demonstrations</i>	45
School-Sponsored Newspapers	46

<i>Guides: Student Newspapers</i>	47
Censorship	48
<i>Guides: Censorship</i>	48
Dress and Appearance	49
<i>Health and Safety Issues</i>	50
<i>Controversial Slogans</i>	50
<i>Guides: Dress and Appearance</i>	51
Search and Seizure	51
<i>Reasonable Suspicion</i>	52
<i>Student Desks</i>	53
<i>Student Lockers</i>	53
<i>Book Bags</i>	54
<i>Automobiles</i>	54
<i>Personal Searches</i>	55
<i>Use of Canines</i>	56
<i>Guides: Search and Seizure</i>	56
Use of Cell Phones	57
<i>Guides: Cell Phones</i>	58
Corporal Punishment	59
<i>Reasonable Punishment</i>	60
<i>Minimal Due Process</i>	61
<i>Excessive Punishment</i>	61
<i>Guides: Corporal Punishment</i>	61
Classroom Harassment	62
<i>The U.S. Supreme Court's Decision</i>	
<i>Regarding Sexual Harassment</i>	62
<i>Guides: Classroom Harassment</i>	63
Reporting Suspected Child Abuse and	
Neglect Occurring at Home	63
Pregnant Students	64
Married Students	64
<i>Guides: Pregnant and Married Students</i>	65
Practical Tips	65
Endnotes	66

CHAPTER 5

<i>Due Process and Student Safety</i>	68
Creating Safe Schools	68
Gangs and Dress	69
<i>Guides: Gangs and Dress</i>	70
<i>School Uniform Dress Policies and Students'</i>	
<i>Rights to Freedom of Expression</i>	70
<i>Early Legal Challenges</i>	71
<i>Guides: Uniforms</i>	71
Zero Tolerance and School Safety	71
<i>Recent Zero Tolerance Practices</i>	72

Guides: Zero Tolerance	72
Bullying in Public Schools	73
Cyberbullying	73
Megan Meier Cyberbullying Prevention Act	74
Guides: Bullying	74
School Suspension	74
Discipline Involving Minority Students	75
Racial Disparities in Policy Enforcement	75
Guides: School Suspension	75
Procedural and Substantive Due Process	76
Expulsion	77
Guides: Expulsion	77
Metal Detectors	78
Guides: Metal Detectors	79
Drug Testing	79
Alcohol Use and Breathalyzers	80
Guides: Drugs and Alcohol Testing	81
Practical Tips	81
Endnotes	82

CHAPTER 6

Liability and Student Records 83

Sanctions for Violating Family Privacy Rights	84
Rights of Parents	86
Rights of Noncustodial Parents	87
Rights of Eligible Students	87
Rights of School Personnel	87
Enforcement of State and Federal Statutes	88
Family Education Rights and Privacy Act	88
Significant U.S. Supreme Court Ruling	88
Defamation by School Personnel	89
Slander	89
Libel	90
Privilege	91
Good Faith	91
Acts of Malice	91
Confidentiality Issues Involving	
School Counselors	92
Guides: Liability and Student Records	92
Practical Tips	94
Endnotes	95

CHAPTER 7

Individuals with Disabilities 96

Individuals with Disabilities Education	
Improvement Act of 2004 (IDEIA)	97

<i>Mandatory Requirements</i>	97
<i>Functional Exclusion of Children with Disabilities</i>	98
<i>Interpretation and Identification of Children with Disabilities</i>	98
<i>Response to Intervention</i>	98
<i>Individualized Education Program (IEP) Requirement</i>	101
<i>No Child Left Behind</i>	101
<i>Least Restrictive Environment</i>	102
<i>Equal Access to Assistive Technology for Students with Disabilities</i>	104
<i>Program Review and Changes</i>	104
<i>Education-Related Service Requirement</i>	105
<i>Inclusion of Children with Disabilities</i>	105
<i>Attention Deficit Hyperactivity Disorder and Federal Protection</i>	106
<i>Disciplining Students with Disabilities</i>	106
<i>Expulsion</i>	106
<i>Suspension</i>	107
<i>Rehabilitation Act of 1973, Section 504</i>	113
<i>Guides: Students with Disabilities</i>	113
<i>Practical Tips</i>	114
<i>Endnotes</i>	115

CHAPTER 8

<i>The Teacher and School Liability</i>	116
<i>The School as a Safe Place</i>	116
<i>Liability of School Personnel</i>	117
<i>Individual Liability</i>	117
<i>Vicarious Liability</i>	118
<i>Foreseeability</i>	118
<i>Nuisance</i>	119
<i>Intentional Torts</i>	120
<i>Mental Distress</i>	120
<i>False Imprisonment</i>	121
<i>Trespassing on Personal Property</i>	122
<i>Unintentional Torts</i>	122
<i>Standard of Care</i>	123
<i>Breach of Duty</i>	123
<i>Proximity, or Legal Cause</i>	123
<i>Injury</i>	123
<i>Defenses Against Negligence</i>	124
<i>Contributory Negligence</i>	124
<i>Assumption of Risk</i>	124
<i>Comparative Negligence</i>	124

<i>Immunity</i>	125
<i>Liability Costs</i>	125
Duties of Supervision	125
<i>Supervision Before and After School</i>	126
<i>Field Trips</i>	127
<i>Parental Consent and Written Waivers</i>	128
<i>Parent Chaperones and Liability</i>	128
<i>Guides: School Liability</i>	129
Practical Tips	130
Endnotes	131

CHAPTER 9

Discrimination in Employment **132**

Title VII: Discrimination	132
<i>Sexual Discrimination</i>	135
The Rehabilitation act of 1973 and the	
Americans with Disabilities Act of 1990	135
<i>Qualifications for Employment</i>	136
<i>Scope of Protection—Section 504 and</i>	
<i>the ADA</i>	138
<i>Guides: Americans with Disabilities</i>	138
<i>Racial Discrimination</i>	139
<i>Religious Discrimination</i>	139
<i>Age Discrimination</i>	140
<i>HIV Positive Teachers in Public Schools</i>	140
<i>Schools and Transgender Teachers</i>	141
Pregnancy and Public School Employment	141
Family and Medical Leave Act	142
<i>Guides: Discrimination</i>	143
Sexual Harassment	144
<i>Sexual Harassment of Students by</i>	
<i>School Personnel</i>	147
<i>Guides: Sexual Harassment</i>	147
Practical Tips	148
Endnotes	149

CHAPTER 10

Teacher Freedoms **150**

Substantive and Procedural Considerations	150
Freedom of Expression	151
<i>Speech Outside the School Environment</i>	152
<i>Teacher Use of Facebook and Other</i>	
<i>Social Media</i>	153
<i>Academic Freedom</i>	153
Freedom of Association	154

Political Rights	155
Dress and Grooming	156
Right to Privacy	156
Guides: Teacher Freedoms	158
Religious Freedoms	158
<i>Use of Religious Garb by School</i>	
<i>Personnel</i>	159
Title VII: Religious Discrimination	160
Guides: Title VII: Religious Discrimination	161
Practical Tips	161
Endnotes	163

CHAPTER 11

<i>Tenure, Dismissal, and Collective Negotiations</i>	164
Tenure	164
<i>Acquisition of Tenure</i>	165
<i>Nonrenewal</i>	166
Guides: Tenure	166
<i>Teacher Evaluation</i>	167
Guides: Teacher Evaluation	167
Financial Exigency (Elimination of Positions)	167
Guides: Financial Exigency	168
Dismissal for Cause	169
<i>Incompetency</i>	169
<i>Insubordination</i>	170
<i>Neglect of Duty</i>	170
<i>Immorality</i>	171
<i>Teachers and Ethical Behavior</i>	171
<i>Conduct Involving Morality</i>	171
<i>Sexual Advances Toward Students</i>	172
Guides: Dismissal for Cause	173
<i>Good or Just Cause</i>	173
Guides: Good or Just Cause	174
Collective Bargaining	174
<i>Private Sector Versus Public</i>	
<i>Sector Bargaining</i>	175
<i>State Involvement</i>	176
<i>Scope of Collective Bargaining</i>	176
<i>Impasse and Bargaining</i>	178
<i>Workers' Compensation</i>	178
Guides: Collective Bargaining	179
Practical Tips	180
Endnotes	181

APPENDIX A	
<i>Constitution of the United States</i>	183
APPENDIX B	
<i>Summary of Relevant Federal Statutes</i>	185
<i>Glossary of Relevant Legal Terms</i>	191
<i>Index</i>	197

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List of Cases

<i>Adarand Constructors, Inc. v. Pena</i>	139
<i>Adler v. Duval County School Board</i>	31
<i>Alvin Independent School District v. Cooper</i>	64
<i>Ambach v. Norwick</i>	171
<i>Bellnier v. Lund</i>	56
<i>Bethel School District v. Fraser</i>	44
<i>Blackwell v. Issaquena County Board of Education</i>	43
<i>Blaine v. Moffat County School District Region No. 1</i>	170
<i>Board of Curators of the University of Missouri v. Horowitz</i>	20
<i>Board of Directors of Lawton-Bronson v. Davies</i>	154
<i>Board of Education of Harrodsburg v. Bentley</i>	64
<i>Brown v. Board of Education</i>	139
<i>Cantwell v. Connecticut</i>	27
<i>Child Welfare Society of Flint v. Kennedy School Dist.</i>	2
<i>Cleveland Board of Education v. LaFleur</i>	141
<i>Clever v. Cherry Hill Township Board of Education</i>	33
<i>Coles v. Cleveland Board of Education</i>	34
<i>Connick v. Myers, 461, U.S. 138 (1983)</i>	152
<i>Davis v. Monroe County Board of Education</i>	62
<i>Davis v. Scherer</i>	117
<i>DeNooyer v. Livonia Public Schools</i>	159
<i>Desilets v. Clearview Regional Board of Education</i>	54
<i>Dunn and McCollough v. Fairfield Community High School District No. 225</i>	21
<i>Engel v. Vitale</i>	28
<i>Fadler v. Illinois State Board of Education</i>	172

<i>Florey v. Sioux Falls School District</i>	35
<i>Furnco Construction Corp. v. Waters</i>	134
<i>Garcetti v. Ceballos</i>	152
<i>Gilbertson v. McAlister</i>	153
<i>Gordon v. Oak Park School District No. 97</i>	121
<i>Goss v. Lopez</i>	108
<i>Guiles v. Marineau</i>	51
<i>Hazelwood School District v. Kuhlmeier</i>	46
<i>Hills v. Scottsdale Unified School District</i>	36
<i>Hogenson v. Williams</i>	22
<i>Honig v. Doe</i>	107
<i>Horosko v. Mt. Pleasant School District</i>	164
<i>In re F.B.</i>	78
<i>Jackson v. Cartwright School District</i>	120
<i>Johnson v. Beaverhead City High School District</i>	172
<i>Johnson-Loehner v. O'Brien</i>	36
<i>Jones v. Clear Creek Independent School District</i>	30, 31
<i>Jones v. Latexo Independent School District</i>	56
<i>Karr v. Schmidt</i>	50
<i>Lawrence v. Buchmuller</i>	33
<i>Lawrence v. Texas</i>	157
<i>Lee v. Weisman</i>	29
<i>Leeper v. State</i>	2
<i>Lemon v. Kurtzman and Early v. Dicenso</i>	31
<i>McDonnell Douglas Corp. v. Green</i>	134
<i>McLeod v. State, 122 So. 77 (Miss. 1929)</i>	64
<i>Massachusetts Board of Regents v. Murgia</i>	140
<i>Meritor Savings Bank v. Vinson</i>	146
<i>Minorities v. Board of Education of Phillipsburg, N.J. Commissioner of Ed.</i>	21
<i>Mitchell v. Forsyth</i>	117
<i>Morse v. Frederick</i>	51
<i>New Jersey v. T.L.O.</i>	52
<i>Newdow v. United States</i>	37
<i>North Haven Board of Education v. Bell</i>	135

<i>Owasso Independent School District No. 1-011 v. Falvo</i>	20, 88
<i>Page v. Rotterdam-Mohonasen Central School District</i>	87
<i>People v. Dukes</i>	78
<i>Pickering v. Board of Education</i>	164
<i>Pottawatomie County v. Earls</i>	80
<i>Powers v. Plumas Unified School District</i>	56
<i>Railroad Co. v. Husen</i>	2
<i>Reynolds v. United States</i>	27
<i>Ring v. Grand Forks School District No. 1</i>	33
<i>Rochester Area School District v. Rochester Education Association</i>	178
<i>Rogers v. Akron City School System</i>	121
<i>Rusk v. Crestview Local School District</i>	36
<i>S-1 v. Turlington</i>	107
<i>Sanders v. Board of Education of South Sioux Community School District No. 11</i>	170
<i>Sandlin v. Johnson</i>	19
<i>Santa Fe Independent School District v. Doe</i>	30
<i>Sauls v. Pierce County School District</i>	172
<i>School District of Abington Township v. Schempp; Murray v. Curlett</i>	31
<i>Schroeder v. Hamilton School District</i>	134
<i>Smith v. School City of Hobart et al., Defendants</i>	22
<i>State of Michigan ex rel. v. Kies v. Lowry</i>	2
<i>Stone v. Graham</i>	33
<i>Stuart v. Nappi</i>	107
<i>Tarasoff v. Regents of the University of California</i>	93
<i>Thompson v. Southwest School District</i>	171
<i>Tinker v. Des Moines Independent Community School District</i>	42, 43
<i>Todd v. Natchez-Adams School District</i>	134
<i>Tudor v. Board of Education of Borough of Rutherford</i>	36
<i>Veronia School District v. Acton</i>	79
<i>Wallace v. Jaffree</i>	29

<i>Warner Jackson et al. v. Superintendent of Public Instruction</i>	16
<i>Weissman v. Board of Education of Jefferson County School District No. R-1</i>	172
<i>Wermuth v. Bernstein and Board of Education of the Township of Livingston</i>	22
<i>West Virginia State Board of Education v. Barnette</i>	37
<i>Zamaro v. Pomeroy</i>	56

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Preface

Teachers face numerous challenges in public schools. They are expected to exhibit excellence in teaching using best practices, to manage their classrooms effectively, to control student behavior, and to protect the health and safety of their students. The manner in which teachers perform these important duties may determine whether legal challenges will emerge. How, then, do teachers respond to legal problems they might encounter as they perform their important duties of teaching, supervising, and protecting the safety of students under their supervision? How do they know that their actions are not depriving students of their constitutional rights? How do teachers know when they are operating within the boundaries of the law? How do they demonstrate fundamental fairness in their dealings with students? *A Teacher's Pocket Guide to School Law*, Third Edition, is based on the premise that public school teachers must know the law that governs the organization and operation of schools in which they are employed.

Educators currently operate in a highly litigious society; they are constantly challenged by students and parents on a variety of issues surrounding their schools. Thus, teachers, as professionals, need to exercise discretion in making sound and legally defensible decisions that affect students under their care. The goal of this book is to provide comprehensive yet succinct and practical knowledge regarding relevant legal issues that affect teachers in public schools. The text includes a thorough discussion of the legislation that controls public schools and how such control affects public school teachers. After briefly covering landmark court cases that have shaped administrative practices in public schools, the book then covers areas such as religion, student rights, teacher freedoms, student and faculty disabilities, tenure, dismissal, and the use of social media, among other topics.

One salient feature of this text is its focus on school safety and the rights of students to due process in cases involving discipline. Tables and charts are carefully integrated into the text to amplify concepts and topics.

NEW TO THIS EDITION

The intent of the revisions in this Third Edition is to provide teachers with more in-depth information about the legal issues that affect them as they perform their duties and fulfill their responsibilities in public schools. Awareness of emerging and current legal issues will equip teachers with essential knowledge that will allow them to operate within the boundaries of educational law, thereby enabling them to avoid legal challenges as they execute their essential duties in an effective manner. This edition will ensure that teachers possess the necessary legal knowledge to enable them to function effectively.

The Third Edition includes the following additions and revisions:

CONTROL OF PUBLIC SCHOOLS

- An expanded section on local school boards that provides a comprehensive discussion of all dimensions of school board operations.
- An added section on discretionary powers of local school boards that describes the latitude granted school boards.
- An added section on the local school administrator's role in leading schools that defines their duties and responsibilities in contributing to positive student learning outcomes.

Instruction and Curriculum Standards

- The addition of a table of comprehensive guidelines covering all aspects of the Copyright Act that relate to teaching and instruction, including permissible and impermissible activities regarding fair use of copyright materials.

No Child Left Behind

- Identification of states as well as various subgroups that have received waivers. Requirements for waivers are included to facilitate greater understanding of significant components of the act.

- An added section on NCLB subgroups and the requirements they must meet in collecting and reporting assessment data.

Students, the Law and Public Schools

- An expanded section on viewpoint discrimination that provides guidance regarding permissible and nonpermissible restrictions on students' rights to freedom of expression.
- An expanded section on the position of the courts regarding the latitude that schools may or may not be granted in initiating student searches using canines.
- An expanded section on the types of dress that may be regulated by school or district policy student attire with examples of clothing worn by students that draws attention to the anatomy.

Due Process and Student Safety

- An added section on bullying in public schools to emphasize the inherent challenges teachers face in monitoring and controlling harassing and humiliating acts committed by students toward victims as well as liability challenges that may arise based on failure to respond to reports of bullying.
- An added section on cyberbullying in response to increased use of social media by students and the inherent damage to students who are victims of this type of undesirable behavior, as well as liability challenges that may arise when school personnel do not respond to these incidents.
- An added section on violence in public schools with recent statistics that illustrate the magnitude of the problem faced by school leaders and their faculties.
- A revised section on zero tolerance practices with examples of restrictions placed on students in conjunction with such policies.
- The addition of new guides on student suspension.

Teacher and School Liability

- An added section on parent chaperones and liability challenges they may face for negligence involving student supervision on field trip excursions.

Individuals with Disabilities

- An added section on multi-year IEPs, including the criteria the 15 approved states must meet to participate in the initiative, which eliminates annual reviews.

Discipline of Minority Students

- An added section on nationwide disparities involving discipline of minority students, as well as the potential legal ramifications of disparate treatment of students based on race and ethnicity.

Teachers and Ethical Behavior

- An added section on ethical behavior emphasizing the high standards of professional conduct teachers are expected to meet.

Transgender Teachers in Public Schools

- An added section on transgender teachers emphasizing teachers' freedom of choice in the context of fair treatment in the school environment, as well as their right to expect protection against gender discrimination as they fulfill their roles in public schools.

Use of Facebook and Social Media by Public School Teachers

- An added section on the use of Facebook and other social media that emphasizes the rights of students to freedom of expression within the context of acceptable and appropriate communication, as well as the responsibilities of teachers to be discreet in their use of such media, since teachers are considered by the courts as role models for students.

Religious Garb and Public Schools

- An expanded section on religious garb, with examples, that discusses teachers' religious freedoms as well as restrictions regarding their religious dress in public schools. The courts' position on this matter is also presented.

HIV-Positive Teachers in Public Schools

- An added section on the rights of HIV-positive teachers to teach if they pose no safety risk to students or colleagues, with an emphasis on the rights of HIV-positive teachers to be protected from discrimination based on their illness.

Collective Negotiations in Public Schools

- An added figure depicting the status of collective negotiations nationwide, designating states that provide coverage for all employees and states that do not, which may assist teachers with employment decisions based on this issue.
- An added map illustrating the status of charter schools in the United States.

Copyright Law and Teachers

- A revised, more comprehensive table on copyright and fair use that covers all aspects of the Copyright Act affecting teachers.

Court Cases

- The addition of relevant court cases throughout the text to provide greater guidance for teachers on the impact of court rulings on school operations.

Unique features of the book are the guides and practical tips covering an array of major issues faced by teachers. These are designed to assist school personnel, especially novice teachers, in achieving success in their employment positions. Guides and practical tips provide readers pertinent information to direct their day-to-day decisions as they face a wide range of legal challenges within their schools. The book concludes with appendices that include relevant constitutional provisions, carefully selected annotated federal statutes, and an abbreviated glossary of important legal terms to assist the reader and provide relevant background. *A Teacher's Pocket Guide to School Law*, Third Edition, provides a practical and useful resource guide for teachers and other school professionals to increase their knowledge and understanding of the complex legal issues affecting their organizations. This resource will enable preservice teachers, in-service teachers, college and university teachers, education faculty and supervisors, policy makers, and central office supervisors in public schools to perform their respective duties efficiently and effectively within the boundaries of constitutional, statutory, and case law.

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Introduction

The United States is a nation grounded in law, and public schools operate within the boundaries of established law. Public school law covers a wide array of subject matter that directly affects the organization and administration of public schools. Consequently, school officials must know the law and its impact on the daily operation of schools. Whereas a significant body of law relates specifically to education, a greater body of law regulates the operation of government. Because education is a function of state government, these laws directly affect public school systems.

Enacted law is derived from federal and state constitutions, as well as from federal and state statutes. Common law, or case law, the most prevalent source of legal authority, is derived from court decisions. Judicial decisions play a significant role in the management and operation of public schools. Decisions by the courts frequently alter school district policies and practices. Therefore, it is incumbent on educators and school officials to know the law and to operate within the parameters established by case law. For example, parental rights and responsibilities involving their children, tort liability, and essentials of contracts are based on common-law doctrine.

Law reflects the social and political patterns of society. Thus, court decisions should be examined in the context of the prevailing social and political climate that existed when the decision was rendered. Additionally, some courts are liberal, whereas others are conservative in their rulings, depending on their composition. Additionally, law is a dynamic field of study that requires school personnel to remain current in developments that affect the operation of schools.

Because school law is a generic field of study that covers a broad range of subject matter, it is vitally important that school personnel be well versed in the basic legal concepts supporting school law and be able to apply legal concepts to practices in public schools.

Chapter 1 provides the legal framework within which public schools operate and includes sources of law such as the federal and state constitutions, federal and state statutes, and the U.S. system of courts. Emphasis is placed on the important role these sources play in shaping policies, rules, and regulation for the operation of public schools.

Chapter 2 covers instruction and curriculum issues, as well as federal statutes that affect the instructional program. School vouchers and charter schools are also discussed, along with academic prerogatives involving teachers.

Chapter 3 addresses religion in public schools. The chapter identifies religious issues that bear on public schools, with an emphasis on the separation of church and state, the principle of neutrality, and the basic tenets of the First Amendment with respect to religious rights and freedoms of students.

Chapter 4 provides an overview of the constitutional rights of students in public schools and the relationship between school personnel and students with respect to student freedoms. Emphasis is placed on the need for reasonableness in the making of school rules and regulations pertinent to the personal rights and freedoms of students.

Chapter 5 includes a focused discussion of the due process rights of students, in the context of establishing safe schools where teachers can teach and students can learn. Gang violence is discussed, including measures that school personnel may take to minimize violence in public schools.

Chapter 6 covers the privacy rights of public school students and their parents. Measures are discussed that are necessary to protect the confidentiality of student records, as well as liability challenges involving defamation that may emerge when students' privacy rights are violated.

Chapter 7 addresses individuals with disabilities and the legal requirements that must be met regarding the educational needs of students with disabilities. Relevant issues involving placement, related services, and the due process rights of students with disabilities and their parents are discussed.

Chapter 8 provides a discussion of school liability and teachers' duties to protect students from foreseeable harm. Defenses to liability are discussed, as is liability based on failure to meet the proper standard of care in instructing and supervising students.

Chapter 9 addresses discrimination in employment issues and the rights that are afforded teachers under the Fourteenth Amendment with respect to fairness in the

employment process. Federal statutes are discussed that provide protection against employment discrimination in public schools.

Chapter 10 covers the rights and freedoms to which public school teachers are entitled in the school environment, along with reasonable restrictions that school officials may place on teachers under certain conditions.

Chapter 11 discusses teacher employment issues involving tenure, dismissal, and collective negotiations, along with the legal requirements that are necessary to protect teachers. Property rights regarding tenure, due process provisions, and liberty interests involving untenured teachers are addressed.

Control of Public Schools

STATE AND LOCAL CONTROL OF EDUCATION

Public education is a federal interest, a state function, and a local responsibility. A federal interest is manifested through the passage of various federal statutes, such as Title I, Goals 2000, the Educate America Act of 1994, Education for Disabled Students, and No Child Left Behind, that affect the operation of public schools. These statutes are designed to create educational opportunities for students and to improve the quality of public education by creating greater accountability for achieving desired educational outcomes. The Tenth Amendment to the U.S. Constitution provides that the powers “not delegated to the United States by the Constitution nor prohibited by the Constitution to the states are reserved to the states respectively and to the people.” Thus, by virtue of the Tenth Amendment, the control of education is vested in the states and the people. The responsibility for the operation and control of public schools resides with the state. Unless restricted by state constitutions, state legislatures have the authority to govern public schools. Most state constitutions refer to the legislature as maintaining responsibility for public education. Although the state legislature has ultimate control over public schools, its control is not unrestricted but is subject to review by state and federal courts to ensure that the constitutional rights of citizens are protected.

The state legislature has plenary power to establish schools and to develop a unique system of public schools. This legislative power was illustrated in a very early Michigan decision wherein the U.S. Supreme Court held that the legislature has entire control over the

- schools of the state,
- division of the states into districts,

- conduct of the schools, and
- qualifications of teachers.¹

The subjects to be taught within each state are all within the state's control.² The power of the state to control education is derived from the state's police power, which presumes that the state is responsible for the health, safety, and welfare of its citizens. The police power of a state extends to the protection of the lives, limbs, health, comfort, and quiet of all persons and to the protection of all property within the state.³ State legislatures have the authority to govern education, and this authority involves both the legislative and executive branches of government and includes regulations that promote domestic order, morals, health, and safety.⁴

Students who enroll in public schools are subject to state laws and local regulations governing the operation of public schools. The state's police powers provide the state the authority to control education, including such matters as requiring compulsory attendance and immunization for children attending public schools. The state's police powers allow it to formulate rules and regulations designed to protect the health, safety, and well-being of all citizens. It is within this context that children are provided a free public education. Local school boards are delegated responsibility for the daily operations of schools within their districts and are subject to federal and state laws and state board of education policy, as well as federal and state constitutional mandates. The local school board is responsible for formulating school district policy that enables the district to operate effectively and efficiently in achieving its goals. Thus, federal, state, and local entities have established the context for public education in the United States.

State Board of Education

State boards of education are generally established by the state legislature. Normally, members are elected by popular vote and represent respective districts throughout the state. The board is responsible for policy development, general supervision, and control of public schools throughout the state. The board also appoints the chief state school officer.

Chief State School Officer

The chief state school officer is probably the most influential professional educator within the state. Appointed by the state board of education to a set term, the chief state school officer is usually the chief executive officer of the board.

His or her primary duty is to execute the educational policies of the state board of education and oversee the operations of public schools within the state to ensure their compliance with state board policy.

State Department of Education

The state board of education is authorized by the legislature to employ, upon recommendation of the chief state school officer, the professionals necessary to execute the policies of the board to facilitate the effective operation of public schools throughout the state. Although there are variations among states, most state departments consist of divisions of administration and finance, federal programs, disability services, student services, academics, legislation, research and evaluation, charter schools, teacher and leader effectiveness, professional standards, audits, and management, among others. The department provides services and support to local school systems in virtually all aspects of local school district operations.

Local Control of Public Schools

Local school boards, created by state statute, are expected to execute state and federal laws and state board policy governing the operations of schools under their jurisdiction. They also raise revenue through tax levies and school bonds to construct and maintain facilities, and to purchase equipment, supplies, and other items essential to the operation of schools. Although school board members act as agents of the state, they represent the district electors, parents, citizens, and communities they serve.

School board members are considered to be state, not local, officials because the education function is categorized as one of statewide responsibility. Local school board members are generally elected or appointed and hold office by virtue of legislative enactment. The state legislature also prescribes their powers, which may be broadened or limited at the legislature's discretion. Local board members may be required to meet certain residency requirements to qualify for election or appointment to the board of education.

Local school boards exercise powers, either implied or specified, to manage school districts, including rendering decisions regarding curriculum, although the legal authority for defining the curriculum of public schools resides with the legislature. Based on constitutional provisions, in a few states this duty is shared between the legislature and the state board of

education. The legislature may, at its discretion, prescribe the basic course of study and determine testing standards and graduation requirements. In most cases, state legislatures delegate curriculum matters to state boards of education and, most important, to local school districts. Local school boards are granted statutory powers that are essential to achieving their purpose. To a large degree local boards are delegated the authority to render decisions regarding curriculum and instruction within their districts, such as choosing and regulating curricula and course offerings, and determining curricula that are best suited for students. Local boards also make decisions regarding books and other educational tools including technology utilization. Based on delegated powers, many local school districts have established local school-based management councils that are empowered to make decisions in matters regarding curriculum and instructional practices, textbook selection, and choice of instructional materials. Local school boards are authorized to employ and dismiss personnel, construct buildings, and provide district-wide transportation.

The local board of education is the legal entity for school districts. The board acts as a corporate body. No single board member has authority outside that of the board as a whole. The local board of education is a policy-making body that has the responsibility to adopt policies and procedures for the organization and administration of schools within the district. School district policies are generally based on state statute. School leaders have the responsibility to execute these policies. The relationship between the board of education and its district leader is best described as a legislative–executive relationship. The board formulates policies, and the superintendent executes them. Because policies provide direction and guidance for teachers, it is imperative that teachers understand and adhere to policies that affect their professional duties. If the legality of a policy is challenged, the burden rests with the school district to defend its policy. However, lack of awareness of school and district policies does not protect teachers who commit policy violations. Teachers may be disciplined, based on the seriousness of the policy violation; penalties may include dismissal for acts that are contrary to board policy.

School boards may hold executive sessions to discuss sensitive matters such as employee discipline, contract issues, or consultation with attorneys. Only board members may attend these meetings. The intent of such meetings is to protect the confidentiality of sensitive information or of information that may damage a person's good name or

reputation. Consequently, all items discussed during executive sessions are confidential and should not be divulged by board members.

Discretionary Powers

The school board may exercise discretionary powers based on its judgment and is restricted only by statutory requirements. Examples of discretionary powers include establishing the school calendar, purchasing school buses, determining the location of school buildings, and adopting a salary schedule that exceeds the state's minimum salary schedule.

School Administrator's Role

The role of the local school administrator may vary from school to school, but most administrators are responsible for the day-to-day operation of their school. One of their top priorities is evaluating the success of the instructional program as well as teacher performance and effectiveness. The school administrator in conjunction with teachers is responsible for maintaining a safe and orderly learning environment where teachers teach and students learn. Additionally, the administrator ensures that instructional and curricula goals are achieved. Supervision, evaluation, and support of faculty are critically important to achieving desired goals of the school. The school leader generates tenure and dismissal recommendations, allocates adequate resources to achieve the school's instructional goals, oversees school curricula and extracurricular activities, and serves as an ambassador for the school and the district.

Teachers as Employees of Local School Boards

School districts are public corporations. Teachers are public employees who are employed by local boards of education in a contractual relationship and are agents of the school district in which they are employed. The board of education is the only entity that has the legal authority to employ or dismiss school personnel. In some instances, principals recommend teachers for employment positions within their respective schools to the superintendent of schools, but these recommendations carry no legal standing until the board of education approves the superintendent's recommendation. The superintendent has the prerogative to accept or reject a principal's recommendation. The board may also reject the

superintendent's recommendations as long as the rejection is nondiscriminatory and based on defensible criteria. Employment rejections that are arbitrary or capricious will not be upheld by the courts.

School District Rules and Regulations

Boards of education have the implied power to formulate and enforce rules and regulations necessary to facilitate the efficient operation of schools within the district. School board rules and regulations must be reasonable and consistent with state and federal constitutional provisions, but it is often difficult to determine the reasonableness of rules. The courts generally presume that the board's actions are reasonable. Since reasonableness is presumed, the burden of proof resides with the party who challenges board rules.

The presumption of reasonableness is established by the courts, based on the view that the role of the courts is not to make policy. However, the courts will not hesitate to review school rules and regulations when substantive challenges arise. A court will then determine whether the rules and regulations are arbitrary, capricious, or in violation of the constitutional rights of school personnel or students. A reasonable exercise of administrative authority will generally receive support by the courts.

School Board Meetings

School board meetings, as well as minutes of these meetings, are open to the public. Any citizens, including teachers, who desire to do so may attend board meetings. Most states have adopted "sunshine," or open-meeting, laws designed to ensure that the public is informed on matters of public interest. The only exception to open meetings occurs when the board meets in executive session to discuss matters pertaining to personnel issues and other sensitive legal subject matter.

GUIDES

Control of Public Schools

1. The federal government has an interest in public education through the enactment of statutes designed to improve education.
2. Public schools are state controlled by virtue of the Tenth Amendment to the U.S. Constitution.
3. The state legislature has complete authority to govern public schools, including, but not limited to, teacher

qualifications, curriculum matters, funding, and student graduation requirements.

4. Each state has police power, which creates a responsibility to protect the health, safety, and welfare of its citizens.
5. The power to control education is derived from the state's police powers.
6. School boards have specific or implied powers to administer schools within their districts.
7. Local school board members are considered to be state officers because education is a state function.
8. The school board as a policy-making entity has responsibility for guiding the district through development of legally defensible policies and procedures.
9. The local school board is the only entity that has the legal authority to employ or dismiss school personnel.
10. Teachers are public employees whose responsibilities are defined in a contractual relationship with the local school board.
11. Teachers have a leading responsibility to become familiar with and execute school or district policies, rules, and regulations.
12. Inadequate knowledge of policy is not a justifiable defense for teachers who violate policy.
13. Teachers may be disciplined, including being dismissed, for policy violations, according to the seriousness of the violation and its impact on the district.

PRACTICAL TIPS

Do:

1. Understand the rights and responsibilities associated with your teaching position. Awareness of your rights will provide guidance and direction and allow you to successfully execute your professional duties effectively.
2. Become familiar with school and district policies. Lack of knowledge will not provide relief from discipline for failure to perform your assigned duties and responsibilities.
3. Attend school board meetings periodically and become familiar with the issues and challenges faced by your district. Such familiarity may assist you in meeting district expectations successfully.
4. Understand your employment status as an agent of your school district, and understand the source of authority that you possess in your teaching position. Employment knowledge will allow you to operate within the boundaries of acceptable practice within your district.

Do not:

1. Ignore the governance structure of your school and district. It is necessary to follow the chain of command as you address issues and challenges that affect your employment position.
2. Violate school or district policies. Failure to adhere to these policies may form grounds for dismissal, depending on the consequences related to the violation.
3. Fail to recognize the type of behavior that is expected of teachers, who must exercise sensitivity regarding the professional image associated with teaching. Expectations may vary with the community in which you are employed.
4. Underestimate the importance of membership in local and national professional associations. They provide enormous benefits in all aspects of the teaching profession, including liability coverage.

ENDNOTES

1. *State of Michigan ex rel. Kies v Lowry*, 199 U.S. 233, 26 S. Ct. (1905).
2. *Child Welfare Society of Flint v. Kennedy School Dist.*, 220 Mich. 290, 189 N.W. 1002 (1922).
3. *Leeper v. State*, 103 Tenn. 500, 53 S.W. 962 (1899).
4. *Railroad Co. v. Husen*, 95 U.S. 465 (1877).

Instruction and Curriculum Standards

ACADEMIC ISSUES

Curriculum Standards

The term *curriculum* generally encompasses the range of courses taken by students, but in specific programs it also describes the teaching, learning, and assessment processes involved in a given course of study. Minimal curriculum standards in public schools are established by state statute. In almost all cases, certain courses and minimum achievement standards are determined through state statute, as well. Local school districts may establish other curriculum standards so long as they do not contradict state requirements. However, Article VI of the U.S. Constitution—the *Supremacy Clause*—specifies that all laws and treaties made by the federal government shall be the supreme law of the land. The supremacy clause allows the federal government to enact laws that prevail over conflicting or inconsistent state exercise of power. Thus, the federal government formulates statutes that apply to public schools. For example, federal aid programs specify certain standards that states must meet to receive federal funds. Courts are very reluctant to intervene in matters involving public school curricula, on the basis that states retain the authority to establish curriculum standards as long as they do not infringe on federal statutes.

The legal authority for defining curriculum resides with the state legislature. In some states, this duty is shared between the legislature and the state board of education. The

legislature may, at its discretion, prescribe the basic course of study, testing standards, and graduation requirements for students, as well as the testing standards for teachers. Virtually every state has developed academic standards to facilitate student achievement, and states are increasingly assuming responsibility for identifying the essential knowledge and skills that students must possess to become productive citizens. Supplemental services are provided by a number of states to assist students in meeting their academic needs. In fact, the Elementary and Secondary Education Act of 1965 (ESEA) requires that schools failing to make adequate progress for two consecutive years or more use a portion of their Title I funds to allow low-income students to enroll in supplemental services. This act is revised every 5 to 7 years. The eighth revision passed by Congress in 2001 and signed into law in 2002, the No Child Left Behind (NCLB) Act, was designed to close the achievement gap between disadvantaged and minority students and their peers and to create greater accountability in education.

NO CHILD LEFT BEHIND ACT OF 2001

On January 8, 2002, President George W. Bush signed NCLB into law. NCLB is considered to be the most sweeping reform since the ESEA was passed in 1965. The law technically expired in 2007 and the House recently voted to overhaul it and reverse some of its provisions. NCLB redefines the federal government's role in K–12 education and is based on four principles:

- stronger accountability for results,
- increased flexibility and local control,
- expanded options for parents, and
- an emphasis on teaching methods that have been proven to work.

Public School Choice

Public school choice, supplemental education services, and collective bargaining agreements fall under the accountability provisions in the Title I program. Under NCLB, each state must establish a definition of “adequate yearly progress” to determine the achievement of each school within the district and must identify for improvement any Title I school that fails to meet the state's definition of adequate yearly progress for two consecutive years or more. These schools,

with technical assistance from their school districts, must develop and implement improvement plans incorporating various strategies to strengthen instruction in core academic subjects and address specific issues that contributed to the school's failure. These schools must also provide public school choice and supplemental education services.

Waivers have been granted to 32 states and to the District of Columbia. Eight of the 32 states have conditional status, meaning that they have not entirely satisfied the administration's requirements, and their plans are under review. In exchange for waivers, states had to agree to a plan that included parts of the Obama administration's proposal for reauthorizing ESEA—the College and Career-Ready Standards and Assessments—as well as grading teachers using students' standardized test scores as one criterion. Under this agenda, only 15% of each state's lowest performing schools would be penalized.

In general, a school district is required to provide all students enrolled in any Title I elementary or secondary school identified for improvement the option to transfer to another public school in the school district—which may include a public charter school that has not been identified for improvement. This choice requirement applies unless state law specifically prohibits it, according to a key policy letter from the secretary of education in 2002.

PUTTING READING FIRST

NCLB fully implements President Bush's Reading First initiative. The act is committed to ensuring that every child can read by the end of third grade. To accomplish this goal, the Reading First initiative is expected to significantly increase federal investment in scientifically based reading instruction programs in the early grades. This initiative is also expected to reduce the number of children identified for special education services due to a lack of appropriate reading instruction.

Summary and Implications

Increased Accountability

- **Increased Accountability for Ensuring Progress:** Each state will implement a statewide accountability system that will be effective in ensuring that all districts and schools make adequate progress. The accountability system includes rewards and sanctions.

- **Limitations on Leaving Students Behind:** Students cannot be left behind because of
 - a. race or ethnicity,
 - b. disabilities,
 - c. limited English proficiency, or
 - d. economic status (disadvantaged).
- **Increased Accountability for Student Performance:** States, districts, and schools that improve achievement will be rewarded. Failure will be sanctioned. Parents will know how well their child is learning. Schools are held accountable for their effectiveness with annual state reading and math assessments in grades 3–8.
- **A Focus on What Works:** Federal dollars will be spent on effective research-based programs and practices. Funds will be targeted to improve schools and enhance teacher quality.
- **Reduced Bureaucracy and Increased Flexibility:** Additional flexibility will be provided to states and school districts, and flexible funding will be increased at the local level.
- **Empowerment of Parents:** Parents will possess more information regarding the quality of their child's school. Students in persistently low-performing schools will be provided a choice to enroll in a high-performing school.

Participation

- Students with disabilities who undergo alternative assessment must participate in the assessment process.
- Up to 2% (approximately 20% of students with disabilities) of students with proficient and advanced scores from alternative assessment based on modified academic achievement standards may be included in calculating adequate yearly progress.
- Schools and districts must average a 95% participation rate for all students over a 2-year period.

Adequate Yearly Progress

- The same high academic achievement standards will be applied to all students.
- There should be continuous and demonstrated academic improvement for all students.
- Separate measures and annual achievement objectives may be used for all students, including students from all racial and ethnic groups, economically disadvantaged students, students with disabilities, and students with limited English proficiency.

Teacher Quality

- All core academic teachers were required to be highly qualified by 2005–6.
- Core academics includes
 - a.** English, reading, or languages;
 - b.** mathematics, science, foreign languages, civics, and government; and
 - c.** economics, arts, history, and geography.

Qualified Teachers

The following measures were used in part to assess qualified teachers:

- a teacher's license,
- a passing score on a test, and
- content area knowledge:
 - a.** academic major or graduate degree in content area,
 - b.** credits equivalent to academic major (24 hours), and
 - c.** a passing score on a test such as Praxis.

Paraprofessionals

Paraprofessionals must meet *one* of the following requirements:

- 2 years of higher education,
- an associate's degree,
- ParaPro Assessment (a competency measure for reading, writing, and math),
- a high school diploma or its equivalent.

Students

Each group of students should meet or exceed annual objectives, with the following exceptions:

- a.** There should be a 10% reduction from the prior year in the number of students who are below proficiency standards.
- b.** Other indicators may be used to measure progress for subgroups.

Restructuring (Corrective Action)

If a school fails to make adequate yearly progress after one full year of corrective action, the district must

- a.** continue to make public school choice available,
- b.** continue to make supplemental services available, and
- c.** prepare a plan to restructure the school.

Alternative Governance

By the beginning of the following school year, the district must implement *one* of the following alternatives:

- a. reopen the school as a public charter school;
- b. replace all or most of school staff, including the principal;
- c. enter into a contract with an entity, such as a private management company with a proven record of effectiveness, to operate the school; or
- d. submit to state takeover.

NCLB SUBGROUPS

Federal Data Requirements for Report Cards Under No Child Left Behind

Broadly speaking, all states and Local Education Agencies (LEAs) must collect and report information on their academic assessments in reading/language arts and math (and science beginning in 2007–8), Adequate Yearly Progress (AYP) results, and teachers' qualifications. Many of these data elements must be disaggregated by federally defined subgroups, necessitating the collection of student demographic information. A full discussion of federal NCLB Report Card requirements can be found in the nonregulatory guidance issued on September 12, 2003, by the U.S. Department of Education (at <http://www.ed.gov/programs/titleiparta/reportcardsguidance.doc>). Annual federal NCLB Report Card reporting requirements for Title I, Part A, recipients are summarized in the following table.

VOUCHERS

Although the use of government-administered vouchers has increased over the past two decades, they have not received strong support from public school teachers, parents, or the general public, particularly in cases where funds allocated for vouchers compete with public school funding. Educational funding channeled to families allows them to choose where their children will attend school. The theory behind vouchers is that parental choice will trigger competition between public and private schools, which will result in improved education for all children. Among the concerns of public school officials are that vouchers tend to create a heavy reliance on the government, and they generate additional regulations and governmental intervention in educational policy.

One of the High Court's arguments for choice in public education is the degree to which the public schools have already introduced elements of choice—international baccalaureate programs, magnet schools, “fundamental” schools, alternative schools, and charter schools. School districts in Milwaukee, Wisconsin, and Cleveland, Ohio, offer voucher programs. The Florida legislature has passed voucher legislation that, its proponents believe, will serve as a model throughout the nation. Dozens of other cities and states are actively engaged in debates on the subject.

In a significant ruling, the Supreme Court of Wisconsin held that the expanded Milwaukee voucher program, which allowed 15,000 children to attend any private school, including religious schools, does not violate either state or federal constitutions.¹

CHARTER SCHOOLS

According to the U.S. Department of Education, charter schools are public schools that emerge through a contract with a state agency or a local school board. The charter establishes the ground rules regarding the operations of the school. The first charter school was created in Minnesota in 1992. Since then, 41 other states and the District of Columbia have established charter schools. The primary advantage of charter schools is autonomy over their operations; they are relieved of rules and regulations that govern other public schools. In exchange for flexibility, charter schools are held accountable for achieving outcomes established by the charter, which include student achievement as a primary goal. The charter school concept is sound. Proponents of charter schools suggest that they encourage innovation and creativity without bureaucratic barriers, in exchange for measurable and positive student learning outcomes. Charter schools have become more flexible in adapting to the educational needs of individual children. There are more than 5,600 charter schools across the country, educating over 2 million children. The charter school movement is considered to be dynamic and strong, with many successes, as well as ongoing challenges regarding facility problems, deregulation, state and local resistance, and inadequate funding. States with established charter schools are listed in Figure 2.1.

TABLE 2.1 Local-Level Student Achievement Data

An LEA must include the data elements associated with student achievement detailed below on its local report card. Except as otherwise indicated, the LEA must report student achievement data on the State's assessments in reading/language arts, mathematics, and science. The LEA must report this information for the LEA as a whole and for each school served by the LEA.

Data element	All Students	Major racial & ethnic groups	Students with disabilities ¹	English Learners (EL) ²	Econ. disadvantaged	Migrant	Gender	Combined subgroups ³
Participation Rate on State Assessments								
Percentage of students not tested for each subject assessed ⁴	✓	✓	✓	✓	✓	✓	✓	✓
Number of recently arrived EL students exempted from the reading/language arts assessment				✓				
Student Achievement on State Assessments								
Student achievement at each academic achievement level for each subject assessed ⁵	✓	✓	✓	✓	✓	✓	✓	✓
Most recent 2-year trend data in student achievement for each subject and grade level assessed	✓							

TABLE 2.1 (continued)

LEA achievement compared to State achievement	✓	✓	✓	✓	✓	✓	✓	✓
School achievement compared to LEA and State achievement	✓	✓	✓	✓	✓	✓	✓	✓
Student Achievement on State NAEP								
Percentage of students at each achievement level in the State on State NAEP in reading and mathematics for grades 4 and 8	✓							
Participation rates for EL students and students with disabilities in the State on State NAEP			✓	✓				

¹Includes results for all students with disabilities under IDEA, including results on alternate assessments based on grade-level, modified, or alternate academic achievement standards. Does not include results for students covered under Section 504 of the Rehabilitation Act of 1973 but not covered by IDEA. Does not include former students with disabilities.

²Does not include former English Learners.

³Only relevant for LEAs in certain States that receive ESEA flexibility. An LEA in such State should identify what students comprise each combined subgroup.

⁴In the alternative, an LEA may report the percentage of students tested.

⁵An LEA must report student achievement data for each academic achievement level of the State assessment system and should use the academic achievement level “labels” associated with that system.

Source: *State and Local Report Cards: Questions and Answers*, U.S. Department of Education, February 28, 2013; <http://www2.ed.gov/programs/titleiparta/rptcard2282013.pdf>

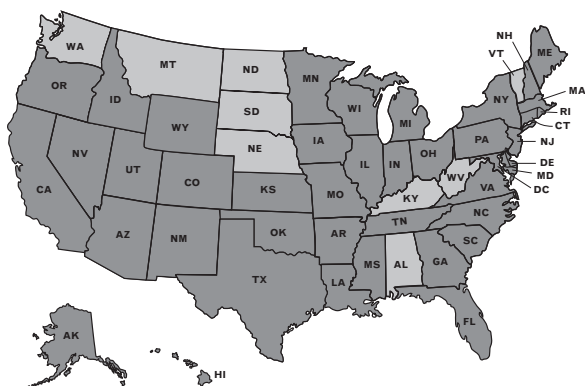


FIGURE 2.1 States with charter schools.

(Source: © Copyright 2006–12, The National Alliance for Public Charter Schools. 1101 Fifteenth Street, NW, Suite 1010, Washington, DC 20005. (202) 289-2700. Use of this material is by permission of the publisher; <http://publiccharters.org/>.)

GUIDES

Instructional Program

1. The state legislature has a responsibility to provide schooling, at public expense, for all children within the state.
2. The legal authority for defining curriculum resides with the legislature.
3. Courts typically do not intervene in curriculum matters, because each state retains the authority to establish curriculum standards. The courts will intervene only if legitimate constitutional issues emerge.
4. All schools should be held accountable for ensuring that the achievement gap between disadvantaged or minority students and their peers is closed, under the NCLB Act.
5. Vouchers and charter schools are designed to improve student achievement by providing choices for students and parents.

INTELLECTUAL PROPERTY AND FAIR USE

Intellectual property covers four basic areas: patents, trademarks, designs, and copyrighted materials. The Copyright Act of 1976 prohibits unauthorized use of copyrighted material

for profit or public display without appropriate payment to or permission from the copyright proprietor. Under the act, the owner of a copyright has the exclusive rights to do and to authorize any of the following:

1. to reproduce the copyrighted work in copies or phonorecords;
2. to prepare derivative works based upon the copyrighted work;
3. to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership or by rental, lease, or lending;
4. in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and
5. in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

The Copyright Act specifies four factors that should be used to determine fair use:

1. purpose or use relative to whether use is commercial in nature or for nonprofit, educational purposes;
2. nature of the work;
3. amount of material extracted from the work in relation to the work as a whole; and
4. impact of the use on the potential market in relation to the value of the copyrighted work.²

Copying Computer Software

Copyright laws also affect computer software. Teachers should not reproduce copies of software for students from an original program to serve as a backup copy, because such reproduction is prohibited under the Copyright Act. Most school districts purchase site licenses to provide legal protection for the use of software. This license is a contractual agreement with a software company that allows use of educational software for a negotiated fee. Under the contractual agreement, a reasonable number of copies may be reproduced for educational purposes. Laws also apply to the use of copyrighted multimedia. Table 2.2 provides information regarding fair use.

TABLE 2.2 Copyright and Use of Media



TECHNOLOGY & LEARNING

Copyright and Fair Use Guidelines for Teachers

This chart was designed to inform teachers of what they may do under the law. Feel free to make copies for teachers in your school or district, or download a PDF version at

www.techlearning.com. More detailed information about fair use guidelines and copyright resources is available at www.halldavidson.net.

Medium	Specifics	What you can do	The Fine Print
Printed Material (short)	<ul style="list-style-type: none"> Poem less than 250 words; 250-word excerpt of poem greater than 250 words Articles, stories, or essays less than 2,500 words Excerpt from a longer work (10 percent of work or 1,000 words, whichever is less) One chart, picture, diagram, or cartoon per book or per periodical issue Two pages (maximum) from an illustrated work less than 2,500 words, e.g., a children's book 	<ul style="list-style-type: none"> Teachers may make multiple copies for classroom use, and incorporate into multimedia for teaching classes. Students may incorporate text into multimedia projects. 	<ul style="list-style-type: none"> Copies may be made only from legally acquired originals. Only one copy allowed per student. Teachers may make copies in nine instances per class per term. Usage must be "at the instance and inspiration of a single teacher," i.e., not a directive from the district. Don't create anthologies. "Consumables," such as workbooks, may not be copied.
Printed Material (archives)	<ul style="list-style-type: none"> An entire work Portions of a work A work in which the existing format has become obsolete, e.g., a document stored on a Wang computer 	<ul style="list-style-type: none"> A librarian may make up to three copies "solely for the purpose of replacement of a copy that is damaged, deteriorating, lost, or stolen." 	<ul style="list-style-type: none"> Copies must contain copyright information. Archiving rights are designed to allow libraries to share with other libraries one-of-a-kind and out-of-print books.
Illustrations and Photographs	<ul style="list-style-type: none"> Photograph Illustration Collections of photographs Collections of illustrations 	<ul style="list-style-type: none"> Single works may be used in their entirety, but no more than five images by a single artist or photographer may be used. From a collection, not more than 15 images or 10 percent (whichever is less) may be used. 	<ul style="list-style-type: none"> Although older illustrations may be in the public domain and don't need permission to be used, sometimes they're part of a copyright collection. Copyright ownership information is available at www.loc.gov or www.mpa.org.
Video (for viewing)	<ul style="list-style-type: none"> Videotapes (purchased) Videotapes (rented) DVDs Laserdiscs 	<ul style="list-style-type: none"> Teachers may use these materials in the classroom. Copies may be made for archival purposes or to replace lost, damaged, or stolen copies. 	<ul style="list-style-type: none"> The material must be legitimately acquired. Material must be used in a classroom or nonprofit environment "dedicated to face-to-face instruction." Use should be instructional, not for entertainment or reward. Copying OK only if replacements are unavailable at a fair price or in a viable format.
Video (for integration into multimedia or video projects)	<ul style="list-style-type: none"> Videotapes DVDs Laserdiscs Multimedia encyclopedias QuickTime Movies Video clips from the Internet 	<ul style="list-style-type: none"> Students "may use portions of lawfully acquired copyright works in their academic multimedia," defined as 10 percent or three minutes (whichever is less) of "motion media." 	<ul style="list-style-type: none"> The material must be legitimately acquired (a legal copy, not a photocopy or home recording). Copyright works included in multimedia projects must give proper attribution to copyright holder.
Music (for integration into multimedia or video projects)	<ul style="list-style-type: none"> Records Cassette tapes CDs Audio clips on the Web 	<ul style="list-style-type: none"> Up to 10 percent of a copyright musical composition may be reproduced, performed, and displayed as part of a multimedia program produced by an educator or students. 	<ul style="list-style-type: none"> A maximum of 30 seconds per musical composition may be used. Multimedia program must have an educational purpose.
Computer Software	<ul style="list-style-type: none"> Software (purchased) Software (licensed) 	<ul style="list-style-type: none"> Library may lend software to patrons. Software may be installed on multiple machines, and distributed to users via a network. Software may be installed at home and at school. Libraries may make copies for archival use or to replace lost, damaged, or stolen copies if software is unavailable at a fair price or in a viable format. 	<ul style="list-style-type: none"> Only one machine at a time may use the program. The number of simultaneous users must not exceed the number of licenses; and the number of machines being used must never exceed the number licensed. A network license may be required for multiple users. Take aggressive action to monitor that copying is not taking place (unless for archival purposes).
Internet	<ul style="list-style-type: none"> Internet connections World Wide Web 	<ul style="list-style-type: none"> Images may be downloaded for student projects and teacher lessons. Sound files and video may be down-loaded for use in multimedia projects (see portion restrictions above). 	<ul style="list-style-type: none"> Resources from the Web may not be reposted onto the Internet without permission. However, links to legitimate resources can be posted. Any resources you download must have been legitimately acquired by the Web site.
Television	<ul style="list-style-type: none"> Broadcast (e.g., ABC, NBC, CBS, UPN, PBS, and local stations) Cable (e.g., CNN, MTV, HBO) Videotapes made of broadcast and cable TV programs 	<ul style="list-style-type: none"> Broadcasts or tapes made from broadcast may be used for instruction. Cable channel programs may be used with permission. Many programs may be retained by teachers for years—see Cable in the Classroom (www.ciconline.org) for details. 	<ul style="list-style-type: none"> Schools are allowed to retain broadcast tapes for a minimum of 10 school days. (Enlightenedriders holders, such as PBS's <i>Reading Rainbow</i>, allow for much more.) Cable programs are technically not covered by the same guidelines as broadcast television.

Sources: United States Copyright Office Circular 22 Sections 107, 108, and 110 of the Copyright Act (1976) and subsequent amendments, including the Digital Millennium Copyright Act; *Fair Use Guidelines for Educational Multimedia*;

cable systems (and their associations); *Copyright Policy and Guidelines for California's School Districts*, California Department of Education.

Note: Representatives of the institutions and associations who helped to draw up

many of the above guidelines wrote a letter to Congress dated March 19, 1976, stating: "There may be instances in which copying that does not fall within the guidelines stated [above] may nonetheless be permitted under the criterion of fair use."

Source: Use of this material is by permission of the publisher;
<http://www.halldavidson.net>.

GRADING AND ACADEMIC REQUIREMENTS

Courts traditionally have been reluctant to interfere in cases involving academic matters. The prevailing view of the courts is that professional educators are better prepared to render decisions regarding academic issues, particularly those involving student evaluation. Requirements regarding progress from one grade to another typically are not reviewable by the courts unless there is substantial evidence of unreasonableness. For example, the Fourth Circuit Court of Appeals refused to intervene in the failure of a school district to promote to the third grade students who failed to pass a reading level test.³ The court respected the educational judgment of professional educators, even though the students' intelligence indicated that they were capable of reading at the third-grade level. The students could not be promoted until they demonstrated mastery of the requisite reading skill. One court observed that academic matters by their very nature are more subjective and evaluative than typical issues presented in disciplinary decisions, and such academic judgments should be left to professional educators.⁴

Student Testing

It is well established that the state has the authority to promulgate promotion and graduation requirements. Educators are provided considerable discretion in matters relating to appropriate academic requirements. Often, standardized tests are used to determine student competencies. If the measures are reasonable and nondiscriminatory, they will generally be supported by the courts. Generally, courts are not equipped to evaluate academic performance issues.⁵ Thus, the courts limit themselves to addressing issues relating to due process, discriminatory impact, and arbitrary or capricious acts by school personnel. Therefore, the state's authority to develop and assess student performance standards is not debatable.

Grading

The courts have consistently held that educators are highly qualified to assess student progress and assign grades accordingly so long as the standards on which grades are assigned are properly documented, and school and district grading policies are followed. There is no basis for court scrutiny or intervention, as cited in *Owasso Independent School District v. Falvo*.⁶ In that case the courts upheld the

practice of students' scoring one another's papers as the teacher explained the correct answer to the entire class. Although peer grading was supported in this case, this process should be avoided, since teachers are responsible for evaluating students and for assigning grades.

Grade Reduction for Absences

Excessive student absenteeism poses a challenge for school officials, who often resort to grade reductions as a means to curb this problem. Courts will generally support reasonable policies regarding grade reduction for excessive absences if the policies do not conflict with state statute. School district policy should provide guidance for teachers on this issue.

Grade Reduction for Unexcused Absences

School rules that penalize students academically for unexcused absences, or truancy, are not uncommon. Courts have been more supportive of schools regarding this type of rule than one that mandates grade reduction based on general misconduct. In fact, courts have been quite consistent since the mid-1970s in ruling against school districts for grade reduction related to misconduct. However, school districts must be certain that their rules in the area of truancy are carefully defined. The following case illustrates this point.

In a New Jersey school district, school board policy mandated that a student receive a zero in all subjects on those days he or she was truant from school. The student could make up any tests missed on such days, but the zero had to be used when grades were averaged for the term. In ruling for the student who challenged the rule, the New Jersey Commissioner of Education found the penalty to be excessive.⁷ In some instances a student could receive a failing grade in a class for even a single absence. A major reason the school board lost its case appears to be the severity of the penalty rather than the use of grade reduction in general.

Grade Reduction for Academic Misconduct

A number of school districts have formulated policies requiring grade reductions for misconduct. The courts' position regarding such grade reduction is illustrated in the following case.⁸

Two students participated as guitar players in the high school band program. The band director forbade band members to deviate from the planned musical program during band performances, and specifically forbade guitar solos during the performances. In direct defiance of those rules, the two students played two unauthorized guitar pieces at a band program. Consequently, both students received an F for the band course, and that grade prevented one student from graduating with honors. Both students appealed the district court's decision, which favored the school. The court concluded that the school's actions violated no right under federal civil rights statutes.

In yet another case, in Indiana, a student's grade was reduced as punishment for alcohol-related misconduct. The student's parents brought suit against the district, which then moved for summary judgment. The district court held that a high school rule mandating a 4% reduction in grades for each day a student was suspended for alcohol use during school hours was invalid and a violation of substantive due process. The court stated further that the policy was arbitrary, and the school failed to demonstrate a reasonable relationship between the use of alcohol during school hours and a reduction in grades.⁹ In an earlier case, the New Jersey Commissioner had ruled that the use of grades as punishment is usually ineffective in producing the desired results and is educationally indefensible. "Whatever system of grades a school may devise will have serious limitations at best, and it must not be further limited by attempting to serve disciplinary purposes also."¹⁰

Physical Punishment for Poor Academic Performance

Physical punishment of public school students for failure to maintain acceptable academic standards has not received support by the courts. Courts have consistently ruled against teachers' and school officials' use of physical punishment when the student's behavior did not involve improper conduct. For example, one court ruled against physical punishment of a student who failed to perform at an athletically desired level, even though the coach considered the punishment to be instructive and a source of encouragement to the student.¹¹ U.S. courts have consistently held that public school students should not be physically punished for conduct not related to disciplinary infractions. Furthermore, students should not be physically punished for failure to complete homework or other assignments. School officials

may adopt policies calling for academic penalties such as a loss of credit for failure to meet academic assignments, but under no circumstances should physical punishment be inflicted in cases involving academic matters. Corporal punishment for nonacademic misbehavior by students continues to be supported by the courts; however, its use can lead to allegations of cruel and excessive punishment and should be avoided if possible.

GUIDES

Grading and Academic Requirements

1. Competency tests are supported by the courts when there is no evidence of discriminatory intent.
2. Lowering of academic grades as a punitive measure for misbehavior is illegal and indefensible.
3. Students may be penalized academically for unexcused absences or truancy if state statute permits. However, policies in this area should be carefully drawn to ensure fairness.
4. Physical punishment for poor performance has not been supported by the courts. Corporal punishment, when used, must be associated with improper conduct.

EDUCATIONAL MALPRACTICE

Over the last three decades, lawsuits on the grounds of educational malpractice have emerged as a formidable threat to educators. Parents are increasingly bringing suits on behalf of their children, alleging that teachers were either negligent or incapable of providing competent instruction or of properly placing or classifying their children. In these cases, students have charged that they suffered academic injury by being denied the full benefits of a proper education.

Although numerous suits have been filed, to date no case has been won by parents or students. However, with the emergence of school-based management, national teaching standards, the NCLB Act, greater teacher accountability, and emphasis on professionalism in education, the prospect of a successful malpractice challenge may be greatly heightened.

Educational malpractice generally is considered to be any unprofessional conduct or lack of sufficient skill in the performance of professional duties by an educator. It represents a different type of injury to students: an injury that is not physical—but emotional, psychological, or educational—and