CHAPTER 1

An Introduction to Education Law, Policy and Rights in the United States

Education Law impacts some of the most volatile controversies of our times. Almost every education-related legal dispute is accompanied by important public policy considerations. These considerations include not only the general policy context for the dispute, but also the policy implications of any proposed resolution. Thus it is not surprising that a rich body of Education Law scholarship can be identified, with cutting-edge literature continuing to be published in legal and education journals, plus significant books being written about these issues on a regular basis.

The primary focus of the field is public education, with issues spanning both the pre-K–12 and the higher education sectors. In this book, except as regards to issues where pre-K and higher education intersect with K–12 issues, we focus almost exclusively in the K–12 realm.

The status of the education system in the United States has been much chronicled, including by those concerned about ensuring U.S. students have the necessary skills to participate fully in our democracy and for the evolving workplace. The educational system is also the main focus for those committed to closing the continuing gap in educational opportunities and achievement between students of different racial, ethnic and socioeconomic backgrounds. In short, education continues to be a central and urgent area of concern for political leaders, policy makers, and communities across the nation, with complex legal issues comprising an integral part of almost every area of education today.

COMPONENTS OF EDUCATION LAW IN THE UNITED STATES

Education Law is an interdisciplinary field, and education-related cases can generate issues in a number of traditional legal areas simultaneously. A large

percentage of the disputes fall within the category of constitutional law, and other areas that might be implicated include criminal law, torts (harms that can lead to a civil—i.e., non-criminal—judgment), and remedies. In addition, particularly in the employment context, issues of contract law may arise. Many cases call upon courts to engage in statutory interpretation—attempting to make sense of, and then apply, a law passed by a state or federal legislature. Unless a controversy is specifically covered by statute, the relevant legal principles are typically the same at both the K–12 and the higher education levels. Yet these principles are often applied in very different ways depending on the setting and the age of the students.

The rules that apply to teachers and schools in K–12 settings in the United States may be depicted in the following manner, with each level of rules being influenced by the succeeding levels:

Classroom-level (teacher-driven curriculum, rules, and decisions)
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School-level (administrator-driven decisions on instruction, budget, and personnel)
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Local/district-level (municipal-, school board- or superintendent-driven ordinances, policies, budgets, and decisions)
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State law and policy (state constitution, statutes, regulations, and policies on mandatory public schooling, budgets, teacher qualifications, civil rights, curriculum, and instruction)
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Federal law and policy (U.S. Constitution; federal statutes, funding, and programs; federal regulations; guidances related to accountability, safety, civil rights, and disadvantaged students)

Pursuant to the principle of judicial review, laws and other rules and actions are not enforceable if they violate a constitution. A federal law can be found unconstitutional under the U.S. Constitution; a state law can be unconstitutional under either that state's constitution or the U.S. Constitution. Similarly, a state law is not enforceable if it violates federal statutory law, pursuant to the U.S. Constitution's Supremacy Clause and the principle of federal preemption.[1]

Throughout the twentieth century, most rules governing schools and teachers remained at the state and local levels. Then, with the passage of the No Child Left Behind Act by Congress in 2001 (NCLB), the dynamic shifted, with the federal government playing a more central role in public education by defining the obligations of state and local education agencies and establishing substantial penalties for failure to comply. The story of the federal role in education continues to unfold, with the passage in 2015 of a new federal law, the Every Student Succeeds Act (ESSA), which retained substantial elements of NCLB while returning some authority over decision making back to state and local education agencies (see Chapter 8 for a more detailed discussion of ESSA). Even after ESSA, it is likely that the nation will remain in search of the appropriate federal role, balancing concerns about over-reaching with a legitimate federal interest in equity and in the quality of education that students receive, irrespective of their race, national origin or family income, or the district or state in which they attend school.

EFFECTING LASTING CHANGE IN EDUCATION, AND THE LIMITS OF THE LAW

Changes in normative values and beliefs, and changes in relative political power among different constituencies, are much more difficult to initiate and sustain than are more technical or organizational changes. Particularly when change is sought with regard to how institutions operate and how educators act on a day-to-day level, these complexities can make it very difficult to effect any sort of lasting transformation. It is therefore important to recognize that victories in the legal arena do not necessarily translate into substantive and effective change in the education arena. Indeed, a legal victory is often just one of many steps that may be necessary before stated goals are actually accomplished.

Another obstacle to lasting change is that the persons with the ability to actually make the changes may not be aware of what needs to be done. Depending on the reform, many people may need to be informed of a legal requirement, and many levels of bureaucracy may be implicated. In addition, education officials responsible for monitoring relevant activity and enforcing compliance may be overburdened. They have so many other responsibilities that it may unrealistic or impossible to do all that is being asked of them.

Accordingly, an education-related law may be "on the books," but there may be no effective mechanism in place for its enforcement. Even if strategies are developed and implemented to address compliance with court orders, decrees,

statutory mandates, and regulatory requirements, these strategies may prove ineffective. For example:

- Funding or training may be unavailable to fully implement the strategies.
- The decentralized system of governance at both the pre-K–12 and postsecondary levels may complicate or prevent the widespread implementation of particular strategies.
- Self-reporting mechanisms can lead to incomplete or even incorrect depictions of what is actually taking place.
- Sanctions, if implemented, may do more harm than good by taking away resources from or interrupting the delivery of education in the highest-need schools.
- External monitoring, if required, may be resisted, obfuscated, or even blocked—sometimes in subtle ways that are difficult to discern.
- Independent reports documenting failure to act or even a lack of compliance may end up sitting on the proverbial shelf, gathering dust in an agency or a court clerk's office, as months and years go by.
- Motions to enforce provisions of court orders or decrees pursuant to findings in legally mandated reports may be denied by courts, perhaps because of concerns about separation of powers between the branches of government or justiciability (a term that encompasses circumstances such as when parties do not have standing to be before the court, or when the issue before the court is not "ripe" for judicial review or is "moot" because there is no live controversy to be decided).
- Political forces may compromise the ability of well-meaning people to act.

None of these examples should discourage continued efforts to use the legal system to shape educational policy and improve quality of life for those involved. Indeed, much has changed in education as a result of efforts by members of the legal community. Education-related litigation has led to noteworthy victories, and statutes and other sources of law have resulted in substantial change to the nation's school system. Many of the most beneficial and lasting changes are the result of attorneys and educators working together to make those changes happen.

The law alone, without robust activity and dialogue in our schools and communities to cement legal victories, is insufficient to create lasting change in our education system.

In addition, the mentions in this book of regulatory and non-regulatory guidance, primarily from the Obama administration, should be read and understood in the context of a newly elected President Trump, who will have broad discretion to change or influence these areas. The Trump administration may also influence education policy and law in other ways, through cabinet appointments, judicial appointments, budgetary requests to Congress, and working with Congress to change existing statutes and grant programs.

IS THERE A RIGHT TO AN (EQUITABLE, HIGH-QUALITY) EDUCATION IN THE UNITED STATES?

This book explores the rights of students and educators in different contexts within schools. It also examines the rights of students of particular backgrounds to an education that is equal or comparable to that provided to their peers. But this prompts a preliminary legal question: Is there a right to an education in the first place?

In many nations—including Australia, Finland, South Korea, Switzerland, and the United Kingdom—this right is indisputable, established within federal constitutions or law. In the United States, this is not the case. The U.S. Constitution does not specifically mention education, and the U.S. Supreme Court, in a 5–4 decision in *San Antonio Independent School District v. Rodriguez* in 1973, held that education is not a fundamental right under the Fourteenth Amendment.[2]

Yet, notwithstanding the *Rodriguez* decision, many of the legal disputes that reach the courts in the United States continue to directly or indirectly implicate the right to an education; while there is ongoing disagreement over its parameters, there is broad agreement that some forms of such a right (or rights) exist. For instance, many U.S. Supreme Court cases have determined—particularly under the First, Fourth, and Fourteenth Amendments—that students have the right to certain protections and guarantees in an education setting. On occasion, the Court even speaks very precisely about both the content and the quality of the education that is expected, especially at the K–12 level.

One of the most widely recognized rights in this context is the right to equal educational opportunity. In *Brown v. Board of Education*, the Court held that under the Equal Protection Clause "the opportunity of an education . . . where the state

has undertaken to provide it, is a right which must be made available to all on equal terms."[3] Most commentators and jurists have determined that this language validates a "right" to some form of "equal educational opportunity," with the subsequent debates centering on the definition of the term and on the extent to which a legal system can require or enforce equality of opportunity.

Indeed, the controversy regarding the parameters of the right has been at the center of many school-related disputes. Although not always mentioned explicitly, "denial of equal opportunity" has typically been a central, underlying concern in Fourteenth Amendment litigation that involves such volatile areas as school desegregation, school finance, the rights of students with disabilities, standardized testing, and bilingual education.

At the state level, additional rights have been recognized under individual state constitutional provisions guaranteeing the availability of public education until a certain age, with at least eight state supreme courts even deciding that education is a fundamental or substantial right under their own constitutions.[4] In addition, state courts have sometimes recognized broader protections for individual rights in this area, protections that go beyond the federal baseline.

In addition to the decisions of state courts, state legislatures have delineated rights for students in the area of education, again beyond the federal baseline. These rights have included, but are not limited to, protection against discrimination and mistreatment on the basis of race, ethnicity, gender, age, disability, religion, and lesbian, gay, bisexual, and transgender (LGBT) status.

Consider the following hypothetical, which takes place in the fictional state of Eldorado. Given the range of protections and guarantees that are available for students, what are your initial reactions to the questions presented?

PROBLEM 1: THE FUNDAMENTAL RIGHT TO AN EDUCATION

The Rainbow Ridge Unified School District in the State of Eldorado grants permission to the Nanotech Valley Consortium to establish five schools for economically disadvantaged students. As envisioned, these schools would serve as models for the integration of digital learning into the daily education program. Yet once the schools are opened they are not only plagued by inconsistent connections, but they are constantly in the process of repairing unreliable equipment (much of it donated and relatively outdated). In addition, the faculty appears to have abandoned the teaching of basic skills in favor of

an Internet-based curriculum that emphasizes self-paced and autonomous analysis, synthesis, and creative problem solving for large portions of each school day.

When the state-mandated standardized test results are released the following summer, the students in all five schools score—on the average—in the 35th percentile in reading and in the 38th percentile in math (based on national percentile rankings). A group of parents, infuriated by these test results and by what they perceive to be a second-rate education for their students, consult you for the purpose of filing a lawsuit on the grounds that their children's *fundamental right to an education* has been violated.

The Eldorado State Constitution contains a provision stating: "The General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the State." The city of Rainbow Ridge, in which the district is located, has an ordinance stating: "All persons who demonstrate proof of residency within the corporate boundaries of the township of Rainbow Ridge shall, regardless of citizenship or immigration status, be entitled to matriculate their children in one of Rainbow Ridge's outstanding, award-winning public schools."

What arguments might you consider setting forth? What additional factual information might you wish to obtain? What would be an appropriate remedy under the circumstances? Or would you even consider taking such a case? Why?

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1 Keith E. Whittington, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN US HISTORY (2009).

2 San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

3 Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

4 *See* Patrick Stickney, *New Jersey, Washington and the Right to Education in the United States*, PENN. ST. L. REV. BLOG (Feb. 28, 2016), http://www.pennstatelawreview.org/. The eight states are Arkansas, California, Connecticut, New Jersey, New York, North Carolina, Washington, and Wyoming.