The Expanding Role of the Federal Government in Education and How It Affects the Practice of School Law

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The Evolution of Federal Involvement in Education

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Overview

From its inception, education has been highly valued in our nation. A well-educated citizenry is regarded as essential to a democratic form of government. Prior to the Constitution, the Land Ordinance of 1785 and the Northwest Ordinance of 1787 included provisions for the establishment of an education system.

Congress’ earliest educational acts involved grants of federal lands for the establishment of educational institutions and grants of money to states. Although distributions of surplus federal revenue did not prescribe use for education, states typically used these funds to help support education.

By 1918, all states had compulsory attendance laws. Early challenges to state regulation of education questioned whether parents, teachers or others were being deprived of “liberty” without due process of law under the Fourteenth Amendment. In Meyer v. Nebraska,1 the Court found a law, requiring that all subjects be taught in English and that no language but English be taught below the eighth grade, unconstitutional. Similarly, in Pierce v. Society of Sisters,2 Oregon’s compulsory attendance law, which required public school attendance, was struck down for unreasonably interfering “with the liberty of parents to direct the upbringing and education of children under their control.”3

Under its Article 1, Section 8 power to lay and collect taxes to provide for the general welfare of the United States, the Congress has assumed the power to initiate or participate in educational programming. However, because education is not mentioned as a federal power, both Congress and the courts have concluded primary responsibility for education rests with state and local governments.

In Brown v. Board of Education,4 the Court recognized “education is perhaps the most important function of state and local governments.” It continued,

“Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child
may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.”

Despite this recognition of the importance of education, in San Antonio Indep. Sch. Dist. v. Rodriguez, in the context of school finance litigation, the Court concluded education is not a fundamental right, not among the rights and liberties protected by the constitution.

While education is not considered a “fundamental right” under the U.S. Constitution, much of the work of a school attorney in the 21st century is directed or dictated by federal laws, regulations, and federal agency guidance documents, as well as by federal court decisions regarding the constitutional rights of students and teachers.

In the education arena, federal education programs, such as the Elementary and Secondary Education Act and the Individuals with Disabilities Education Act, designed originally to provide access, now demand accountability. Regulations and guidance documents promulgated under anti-discrimination laws such as Title VI, Title IX and Section 504 continue to expand rights of students, staff and others while increasing the responsibilities of school districts. Increasingly agencies are mandating “best practice” through the use of significant guidance documents or “Dear Colleague” letters.

Federal laws touch other aspects of school business, as well. There are detailed federal regulations covering school lunch programs, school bus drivers, teacher evaluations, student records and physical safety. From asbestos to pesticides, lead paint to drinking water, compliance with federal mandates is required.

In addition, school employees enjoy the protection of employment laws governing, among other things, hiring, pay, discrimination, retaliation, benefits, leave, safety, privacy and severance agreements. Notice of rights under federal laws generally must be posted in the workplace. While components of the teacher evaluation required by No Child Left Behind are abandoned in the Every Student Succeeds Act, documentation of problems with employee performance is a necessity in defending against claims of discrimination. Other types of documentation are necessary for compliance with the recordkeeping requirements in other employment laws.

Federal case law has mushroomed almost as quickly as federal regulation. Fifty years ago, the Supreme Court had yet to issue its famous pronouncement that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” While a mid-20th Century lawyer could advise a school district client on student discipline simply by looking at school board policy, and possibly a vague state statute, today’s practitioner must have a thorough knowledge of federal precedents in everything from student expressive rights to student discipline, covering not just student speech, but drug testing, suspension and expulsion, internet usage, and locker, cell phone and strip searches.

In the area of equal educational opportunity, the last fifty years began with the Supreme Court’s seminal decision in Alexander v. Holmes County Bd. Of Educ., recognizing that states had used its grant of “all deliberate speed” to delay school desegregation, and requiring immediate action. After a decade of progress in integration, the tide turned and our nation’s schools have slowly resegregated themselves, and many of our largest school districts are more segregated now than they were before Brown. In other areas, the federal courts have expanded the rights of
students, and this term, the Supreme Court will take on the rights of transgender students for the first time.

**Federal Education Programs**

**The Elementary and Secondary Education Act**

*ESEA*

The Elementary and Secondary Education Act (ESEA), the first major federal education program, created a role for the federal government in K-12 education. A piece of President Johnson’s “War on Poverty,” ESEA was intended to equalize educational opportunities for the nation's poorest children.

The 1965 law sought to target new federal funding, more than $1 billion in the first year, to areas with high concentrations of poor students. However, the law was somewhat vague when it came to strategies or processes for targeting funds to disadvantaged children. Despite its lack of strings attached to funding, the original ESEA was passed by Congress in less than 100 days. Opponents argued that the new law and funding would result in federal interference with local control of schools. Some, however, argued for a stronger federal role, including provisions for assessment of whether Title I dollars actually improved student outcomes.

*Education Consolidation and Improvement Act of 1981 (ECIA)*

Fueled by the *A Nation at Risk: The Imperative for Educational Reform* report, the federal focus on education in the 1980s shifted from access to excellence and cries for increased rigor in schools. Funding for Title I, which was renamed Chapter 1 in the 1981 reauthorization, was significantly reduced. For the first time, the 1988 reauthorization required states to define the levels of academic achievement expected for eligible students. Additionally, at the state level, identification of schools that were not making substantial progress toward raising student achievement was required.

*Improving America’s Schools Act (IASA)*

In 1989, President George H.W. Bush convened a summit of the nation’s governors and business leaders. Recommendations of the summit, calling for establishment of voluntary national standards, national tests and school choice, were presented to Congress in the America 2000 proposal, but the legislation failed to pass.

President Clinton continued to promote establishment of national goals and standards in the Goals 2000: Educate America Act. At the same time, Congress was working on reauthorization of ESEA in the IASA. The law required Title I students be given the same curricular opportunities as all other students and be taught in inclusive environments. Schools districts were required to identify schools not making “adequate yearly progress” and take steps to improve performance. In exchange for adopting curriculum standards and accountability
measures, states and school districts were granted greater flexibility and decision-making authority. Despite these efforts, disparities in opportunity continued, due in part to differences in the implementation of standards based reforms between and within states.

**No Child Left Behind (NCLB)**

With bipartisan support, NCLB was approved by both houses of Congress in 2001, marking a clear shift in ESEA legislation from access to accountability. NCLB mandated elaborate testing of students to measure student achievement for grade-level proficiency, but allowed states to determine what would count as “proficient” within their own state systems. The law also required states to attach corrective sanctions to the accountability measure. NCLB moved states to adopt comprehensive standards-based reforms, but standards and accountability systems continued to vary in their scope and rigor across states.

Ultimately under NCLB, by the 2013-14 school year, all students, across all subgroups (low-income, students with disabilities, and students from racial and ethnic subgroups) were expected to be proficient at grade-level in reading and mathematics. The law also addressed teacher quality, setting standards for highly qualified teachers and requiring that student performance be a factor in teacher evaluation.

Although ESEA is supposed to be reauthorized every five years, Congress did nothing to change NCLB requirements until it passed ESSA in December, 2015. However, in 2009, the Obama administration used the American Recovery and Reinvestment Act (ARRA),\(^{16}\) to push for education reforms. ARRA included School Improvement Grants (SIGs) and Race to the Top Competitive Grants (RttT) among its provisions. Money allocations for SIGs were tied to implementation of one of four federally prescribed intervention models, while RttT emphasized specific areas for reform.\(^{17}\) Prescriptive reform initiatives, such as required adoption of common core standards, were also linked in later years to state flexibility waivers from NCLB requirements.

**Every Student Succeeds Act**

On December 10, 2015, President Obama signed the Every Student Succeeds Act (ESSA)\(^{18}\), into law. The newest version of ESEA is touted as “a U-turn from its predecessor, the No Child Left Behind Act.”\(^{19}\) It requires states to adopt “challenging” academic standards, but prohibits the U.S. Secretary of Education from forcing or encouraging states to pick a particular set of standards, including the common core. ESSA mandates testing in reading and math in grades 3-8 and once in high school, and requires analysis of data broken down by subgroup. However, states have greater latitude in allowing opt-outs, using nationally recognized tests like SAT or ACT at the high school level, and determining sanctions for schools that fail to meet targets.

States must adopt accountability systems that meet federal criteria for schools at all levels, and states will determine how much individual factors count. Interventions for low-performing schools and schools where subgroups are struggling are mandated, but states and local districts have increased flexibility in how they are designed and implemented.
While the new version of the law was touted as increasing flexibility and returning control to states and local school districts, the devil appears to be in the details. Criticism of newly promulgated regulations questions whether the implementing regulations are in line with Congressional intent.

**The Individuals with Disabilities Education Act**

When enacted in 1975, the Education of All Handicapped Children Act\(^{20}\) (EACHA), aimed to provide equal access to educational programs to children with disabilities. The name was changed to the Individuals with Disabilities Education Act (IDEA) in the 1990 reauthorization of the law.

No single education law has provided more employment for school attorneys than IDEA. The law requires child find activities that result in comprehensive evaluation, the provision of a free appropriate public education pursuant to an individualized education plan, and placement in the least restrictive environment for students in specified disability categories who, as a result, need special education in order to benefit from their educational program. The law creates substantial protections for students and their parents, requiring parental and/or student participation in evaluation, identification, development of the IEP, and placement decisions. Additionally, the law affords students and their parents extensive procedural safeguards.

Over time, as with ESEA, the focus of the law has shifted from equality of access, to quality of programs (standards), to accountability for outcomes. IDEA was last reauthorized in 2004. However, in 2014 the U.S. Department of Education formally announced it was changing the way in which states and local school districts would be monitored and held accountable under IDEA. Through a letter to Chief State School Officers, the U.S. Department of Education indicated it was “implementing a revised accountability system under IDEA known as Results-Driven Accountability (RDA), which shifts the Department’s accountability efforts from a primary emphasis on compliance to a framework that focuses on improved results for students with disabilities...”\(^{21}\) It remains to be seen what the next reauthorization will bring.

Additionally, Supreme Court action could significantly change the IDEA free appropriate public education (FAPE) requirement. In 1982, in *Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*,\(^{22}\) the Court held a school met its FAPE obligation if it complied with procedural requirements in developing the program and provided an IEP “reasonably calculated” to allow the child to receive educational benefits. The *Rowley* standard is being challenged in *Endrew F. v. Douglas County Sch. Dist. RE-1*,\(^{23}\) where plaintiffs argue that the changes in IDEA and ESEA over the years, bolstered by federal guidance documents, require a higher substantive standard for FAPE. NSBA has filed an amicus brief in which it asks the court to retain the *Rowley* standard, leaving decisions on appropriate programming to states and IEP teams, so long as the program designed confers some educational benefit.
Discrimination Laws

Section 504 of the Rehabilitation Act of 1973

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of disability. The regulations promulgated under Section 504 include provisions governing employment; accessibility; preschool, elementary and secondary education; and postsecondary education.

For elementary and secondary schools, the Section 504 regulations go beyond the “reasonable accommodation” requirements, established in regulation and case law, for employment and postsecondary education, creating a right to a “free appropriate public education” at the elementary and secondary education level. The regulations also require procedural notice, evaluation, placement and due process rights, less comprehensive, but akin to those found in IDEA.

Through letters and guidance documents, the U.S. Department of Education’s Office for Civil Rights (OCR) has gone beyond its regulatory requirements and mandated parental consent to evaluation under Section 504, in many ways turning Section 504 into a mini-education program without funding, rather than an anti-discrimination law, particularly when applied to students who qualify under Section 504, but not under IDEA. For example, in just the last five months of last year, OCR issued the following guidance documents on disability discrimination:

- Dear Colleague Letter on the Rights of Students with Disabilities in Public Charter Schools
- Dear Colleague Letter on the Use of Restraint and Seclusion in Schools
- Dear Colleague Letter on the Prevention of Racial Discrimination in Special Education
- Dear Colleague Letter on ADHD Guidance
- “Parent and Educator Resource Guide to Section 504 in Public Elementary and Secondary Schools” and

Guidance documents, such as these, and others on Bullying or Participation in Extracurricular Activities, frequently are based on best practice, at worst creating enforcement standards that far exceed statutory mandates; at best creating considerable confusion about what the law actually requires.

Title IX of the Education Amendments of 1972

Title IX was enacted as a comprehensive way to attack sex discrimination in education. It prohibits any recipient of federal education funds from discriminating on the basis of sex in any of its programs. Most famously known for its role in improving the status of girls’ and women’s athletics, Title IX has been expanded to cover a myriad of other concerns.

Just as Title VII was interpreted by the courts to cover harassment on the basis of sex, the courts have used a similar analysis with Title IX. The Supreme Court has held that Title IX protects against sex harassment both from school staff and from other students. OCR, which has become well-known (or, possibly, infamous) for expanding its jurisdiction over the past eight
years, has now rejected the Supreme Court’s requirement that a school district must be “deliberately indifferent to known acts of harassment.” Instead, OCR claims, through its right to interpret its governing statute, that schools will be liable any time they “know or reasonably should have known” of possible sex-based harassment.

Additionally, OCR has used Title IX to address a wide variety of issues not apparent on the face of the legislation. Many of the problems OCR identifies are serious -- sexual assault on college campuses, discrimination on the basis of sexual orientation and, most recently, issues relating to gender identity. However, the basis for OCR’s jurisdiction and the extent of its “guidance” requirements, raises serious concerns of government overreach. OCR typically does not address these issues through regulation, which allows it to bypass the requirements for notice and comment before agency rule-making. Instead, it simply issues “guidance” documents. Originally, these were letters to individuals, such as “Letter to Zirkel,” which OCR used to announce a requirement for stay-put in certain 504 and IDEA matters. Now, OCR simply sends out a mass mailing to all school superintendents, whom they address as “Dear Colleague.” Dear Colleague Letters, known as “DCLs”, have been issued in the last several years on topics ranging from sexual violence to single-sex classrooms, from bullying to student discipline standards, and from after-school sports to the rights of transgender students.

OCR’s practice will likely be the primary focus of the Supreme Court’s concern as it hears GG v. Gloucester County this term. The issue in that case is whether the courts have correctly applied the doctrine known as “Auer deference,” in which a court is to defer to any agency’s interpretation of its own statute when that statute is ambiguous. In GG, the lower courts deferred to OCR’s determination that “sex” is an ambiguous term, and could include gender identity. Whether the change of administration will affect OCR’s position is, at the time of this writing, unknown.

For any practitioner, therefore, it is not enough simply to read Title IX and its implementing regulations. To understand what OCR requires, it is essential to become familiar with the guidance documents and court decisions. OCR’s website contains all of its guidance documents, including the many DCLs.

**Title VI of the Civil Rights Act of 1964**

Title VI of the Civil Rights Act of 1964 is the educational counter-part to the more famous part of this law – Title VII. Title VI prohibits any recipient of federal aid (including all public schools) from discriminating on the basis of race, color or national origin. The Department of Education includes issues relating to English Language Learners within the scope of Title VI, along with discrimination among other identifiable groups, whether or not they are typically considered nationalities, such as Hindus, Jews, and Sikhs.

Under Title VI, OCR routinely investigates complaints relating to overcoming language barriers, such as: ESL (English as a Second Language) services, allegations that school documents and notices are not translated for non-English speaking parents, and failure to provide translators at school meetings, especially student discipline and IEP meetings.
As with Title IX, OCR has used Title VI to expand its authority over the treatment of students generally. It has issued DCLs addressing student harassment (including student-to-student harassment), bullying, and disparate imposition of discipline on minority students.\(^{31}\) In general, OCR imposes high burdens on school districts to ensure that minority students are not being harassed or bullied, and are not being disciplined at higher rates or with higher levels of punishment, than non-minority students. These are clearly serious concerns, and it is important that they be addressed to ensure equal access to education. The research being done in the area of disparate discipline is particularly troubling, and can have life-long consequences.\(^{32}\) The issue for practitioners, however, is that much of the current “law” cannot be found in either the statute or the regulations. Instead, it is critical that school lawyers review the OCR guidance documents, as they are frequently the only clear statement of the Department’s position on a given issue.

**The Involvement of the Federal Courts in Education**

**Student Discipline**

Fifty years ago, no one would have considered student discipline to be a matter of federal concern. As the courts had been saying for many years, the governance of schools was largely a matter of state, not federal law.\(^{33}\) In 1975, however, the Supreme Court considered, for the first time, whether students had due process rights in school. In *Goss v. Lopez*,\(^{34}\) the Court answered that question in the affirmative, holding that students were entitled to notice and an opportunity to be heard before even a short-term suspension (and, impliedly, that they were entitled to more extensive due process rights for a longer removal, such as expulsion). Over the course of the last 42 years, since *Goss*, the Supreme Court has revisited the topic of student discipline numerous times, expanding the rights of students in many areas. In *New Jersey v. TLO*,\(^{35}\) the Court held that the Fourth Amendment applied to student searches. Although neither probable cause nor a warrant is required, the school’s search of a student’s private belongings must be justified at its inception and reasonable in its scope in order to pass constitutional muster. And, in *Safford Unified Sch. Dist v. Redding*,\(^{36}\) the Court found that a strip search of a middle school student accused of giving prescription-strength ibuprofen to another student did not meet that standard. The Supreme Court has yet to consider the constitutional implications of searching student technology, such as cell phones, tablets and other personal devices that students bring to school, but its decisions in cases such as *Riley v. Cal.*,\(^{37}\) suggest that stricter constitutional limits will apply.\(^{38}\)

As a result of these decisions, litigation in the area of student discipline has mushroomed in the last fifty years. In the 1960s, a suspended or expelled student generally had no recourse beyond an appeal to the local school board. Today, expulsions often lead students and school districts to federal court, sometimes within a matter of days. Attorneys for students often seek a Temporary Restraining Order or a Preliminary Injunction, asking the court to return a student to class while the case challenging the constitutionality of the discipline proceeds. School lawyers must continue to educate their clients on the complex and changing requirements imposed by the courts in the areas of search and seizure and due process.
Student Expression

In two years, we will celebrate the fiftieth anniversary of *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, the seminal student free speech case. Of course, the Court had recognized student’s right to freedom of speech earlier, in *W. Va. St. Bd. of Educ v. Barnette*, when it held that students had a constitutional right not to be compelled to recite the Pledge of Allegiance. But it was *Tinker* that ushered in the modern era of student expressive rights. *Barnette* had simply allowed students to refuse to speak, *Tinker* affirmed their right to make their voices heard.

*Tinker* has now been joined by *Bethel*, *Hazelwood* and *Morse* as the basic framework for all student speech claims, setting some general limits on a school’s ability to discipline students for individual expressive activity. However, as in the student discipline area, the most difficult questions today lie in an area that simply did not exist fifty years ago – cyberspace. What students can say online, whom they can reach, and when they can access their online identities all raise questions that are still seeking definitive answers in the courts. The Supreme Court has yet to tackle these issues, refusing to grant certiorari in *Layshock ex rel. v. Hermitage Sch. Dist.*, the Third Circuit case that raised these issues squarely.

Equal Educational Opportunity

Equal opportunity for students, regardless of race or national origin, would have been touted as one of the great advancements in public education if this conference had been held 25 years ago. In the 60s and 70s, the courts began to take seriously the promises made in *Brown v. Bd. of Educ.* In cases such as *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, the Court laid out a clear statement of the breadth of federal authority to remedy segregation. However, within a generation, the tide had turned. Later cases began to limit the authority and the length of control federal courts could retain. In addition, in its decision in the combined cases of *PICS v. Seattle School District No.1* and *Meredith v. Jefferson Cy. Bd. of Educ.*, the Supreme Court struck down affirmative action programs that sought to promote diversity and integration in K-12 education.

The results are staggering. Today, few public school students attend racially integrated schools. Indeed, many of the nation’s largest school districts are profoundly segregated. In Chicago, fewer than 10% of all public school students are white. In New York City, by 2010, almost 80% of the public schools in the city had a minority population exceeding 80%. As a nation, race relations continues to be one of our biggest challenges, and the rhetoric in the most recent Presidential election highlights the gulf between many of our citizens. Continuing to isolate students from exposure and interaction with students who are racially and ethnically different from themselves could well exacerbate this problem.

In addition, schools and districts with high minority student populations often suffer from a lack of financial resources, physical plant maintenance and access to high-quality teachers. In some cases, the allegations include an inability to provide even minimally acceptable educational services. *Gary B. v. Snyder*, filed this past fall, makes this argument in challenging the constitutionality of the Detroit Public Schools. In 1973, in *San Antonio Indep. Sch. Dist. v. Rodriguez*, the Supreme Court held that education was not a “fundamental right” and therefore state educational laws would not be reviewed under a “strict scrutiny” standard. The Court noted, however, that it might have considered the matter differently if the plaintiffs had claimed
“that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.” Gary B. makes just this claim, arguing that the Detroit Public Schools has so failed its educational mission that its students do not receive an education sufficient to make many of them even just functionally literate. On this basis, the plaintiffs are asking the Court to find that the State of Michigan has violated the students’ constitutional rights, entitling them to damages and injunctive relief. If Gary B. is successful, the case could mark the resurgence of federal involvement as a matter of constitutional justice.

The rise, and then the fall, of federal court involvement in the area of equal educational opportunity for minority students has cast the longest shadow over the progress in public education during the last fifty years. We will wait to see if the pendulum swings back again.

**Miscellaneous Laws – Students**

**Records and Privacy**

A trio of federal laws protect privacy rights of students and parents in K-12 educational institutions.

*Family Educational Rights and Privacy Act*

The Family Educational Rights and Privacy Act\(^{50}\) (FERPA) grants parents and eligible students the right to access their educational records, the right to seek amendment of information contained in those records if it is inaccurate or misleading, and the right to prevent disclosure of personally identifiable information contained in educational records without their consent, except in limited circumstances. Effective policies in this area are essential. The law also requires school districts to provide parents and students with annual notice of the rights under the law, and allows for complaints of violations of FERPA to be filed with the Family Policy Compliance Office of the U.S. Department of Education.

There is no private right of action under FERPA.\(^ {51}\) Schools that fail to “effectively inform” parents and eligible students of their rights under FERPA, that have a policy of denying, or effectively preventing access to records or affording a hearing to amend records, or that have a policy or practice of permitting disclosure of personally identifiable information, other than directory information, contained in student records without appropriate consent or statutory authority risk withholding of federal education program funding.

Schools have grappled with privacy issues concerning health information about students. Generally, health information contained in student records is governed by FERPA, not HIPAA.\(^ {52}\)

*Protection of Pupil Rights Amendment*

The Protection of Pupil Rights Amendment\(^{53}\) (PPRA), is also known as the Hatch Amendment, the Grassley Amendment and the Tiahrt Amendment, depending on the reauthorization. The
law, often interpreted as creating greater rights than contained in its provisions, does the following:

- Restricts surveys, analysis or evaluation of students in eight areas,
- Places requirements on the administration of marketing surveys to students,
- Allows parental access to most curricular materials, and
- Restricts physical examinations of students.

The law contains notice requirements and requires schools, in consultation with parents, to develop policies in these areas. Parents or eligible students who believe their rights under PPRA have been violated may file a complaint with the Family Policy Compliance Office of the U.S. Department of Education.

**Children’s Online Privacy Protection Act**

The Children’s Online Privacy Protection Act (COPPA) imposes requirements on operators of websites or online services directed to children under 13 years of age. For answers to questions about the application of COPPA to schools, see the Federal Trade Commission website and its frequently asked questions document.

**Safety and Security**

**Children’s Internet Protection Act (CIPA)**

The Children’s Internet Protection Act of 2000 imposes requirements on any school that receives funding for Internet access or internal connections from the E-rate program, which provides discounts on telecommunication services, Internet access, and internal connections. Under CIPA, schools must adopt and implement Internet safety policies which address:

- Technology protection measures that block or filter Internet access to pictures that are obscene, child pornography, or harmful to minors;
- Access by minors to inappropriate content on the Internet;
- The safety and security of minors while using e-mail, chat rooms or any form of electronic communication;
- Unlawful activities such as hacking by minors;
- Unauthorized disclosure, use, or dissemination of personal information regarding minors; and
- Measures restricting access by minors to materials deemed harmful to them.

Amendments contained in the Protecting Children in the 21st Century Act require schools to educate students about appropriate online safety, including cyberbullying and interacting with others on social networking sites and in chat rooms.

**Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act)**
The U.S.A. PATRIOT Act was enacted because of national security concerns in response to the 9/11 terrorist attacks. For school purposes, it amended FERPA and allowed for FISA warrants and access to student or employee records without notice or consent in investigations linked to suspected terrorist activity.

**Student Clubs**

*Equal Access Act*

The Equal Access Act prohibits secondary schools from denying access to school facilities to student groups based on the activities of the student group. It requires secondary schools to allow a student-initiated, student-led group to use school facilities for meetings if it creates a limited open forum by allowing other non-curriculum related student groups to meet during non-instructional time. Originally designed to accommodate religious student groups, today most lawsuits involve LBGTQ student groups.

With regard to religious student groups, the law places restrictions on employee involvement with the activity. While school staff can supervise use of the school facility, the law prohibits participation in religious activities with the students.

The Boy Scouts of America Equal Access Act was included within the provisions of NCLB. It prohibits schools from denying space for scouting activities if a school allows other student groups to use school facilities before or after school.

**Student Discipline**

*Gun Free Schools Act*

The Gun Free Schools Act of 1994 mandates states enact laws requiring school districts to adopt and implement policies requiring a one year expulsion of any student bringing a firearm or certain other types of explosives to school. Although zero tolerance discipline policies have been widely criticized, statutory mandates remain in place.

*Individuals with Disabilities Education Act*

IDEA contains extensive procedural safeguards in the area of student discipline.

**Homeless Students**

*McKinney-Vento Education for Homeless Children and Youth Act*

The McKinney-Vento Education for Homeless Children and Youth Act was originally enacted in 1987 to address issues faced by homeless youth, particularly access to education services. The law attempts to eliminate barriers and affords homeless students rights in the areas of enrollment,
transportation, access to education services and programs, health and social services. Schools must have a homeless liaison and immediately enroll homeless students, even if they do not have the information generally required for enrollment. Students must remain in their school of origin, to the extent possible, with schools providing any transportation necessary.

The law was recently amended by the Every Student Succeeds Act. New provisions expand the duties of the homeless liaison, require states to identify and eliminate barriers that prohibit homeless students from receiving full or partial credit for completed coursework and require school districts to ensure homeless students are involved in college and career ready activities. Additionally, the amendments extend several of the protections afforded homeless students, particularly the ability to remain in the school of origin, to children in foster care.

**Miscellaneous Laws—Other**

**School Lunch and Nutrition Laws**

Signed into law by President Harry Truman in 1946, the Richard B. Russell National School Lunch Act gave efforts to assist school lunch programs permanent status and authorized appropriations. The Child Nutrition Act of 1966, extended the program, codified a special milk program originally enacted in 1954 and piloted the school breakfast program. The breakfast provisions were extended in 1968. The Fresh Fruit and Vegetable Program, piloted in 2002, has been expanded nationwide in selected schools in all states. Shortly thereafter, amendments established national guidelines and criteria for determining eligibility for free or reduced lunch prices, a task previously delegated to local school districts. The school lunch laws contain strict confidentiality provisions regarding eligibility for free or reduced lunch prices.

Driven by increasing levels of child obesity, the Child Nutrition Act Reauthorization of 2004 focused on promoting healthy diets, nutrition education and physical activity. Lawmakers purported to preserve local control by requiring local wellness policies, designed and implemented at the local level. The Healthy, Hunger-Free Kids Act of 2010 focused on improving child nutrition, and the development of healthy food standards.

**Transportation Laws**

The Commercial Motor Vehicle Safety Act of 1986 created the commercial driver’s license, requiring drivers of certain vehicles, including buses carrying more than 16 passengers, to obtain a commercial driver’s license. The Omnibus Transportation Employee Testing Act of 1991 mandated school districts implement and maintain a drug and alcohol testing program for any school bus driver required to have a commercial driver’s license. The law prohibits drivers from alcohol possession or use on the job, use during the four hours before performing safety-sensitive functions, having prohibited levels of alcohol in their systems while on duty or performing safety-sensitive functions, and use for eight hours after an accident or until post-accident testing occurs, whichever occurs first. The drug testing program must include pre-employment, post-accident, reasonable suspicion, random, return-to-duty and follow-up testing.
Pre-School Programs

While not a program run by the U.S. Department of Education, the Federal Head Start program, under control of the U.S. Department of Health and Human Services, plays a significant role in preparing eligible children and their families with early learning opportunities. Public school districts that run Head Start programs in some localities must become familiar with its myriad of requirements. In other situations, schools generally work cooperatively with Head Start programs to ensure school-readiness for children who will transition to the public schools.

Federally-funded pre-school opportunities also exist under IDEA’s infant and toddler and 3-5 year-old Part C programs.

Federal Employment Laws

From background checks to required provisions in severance agreements for waiver of claims under the Age Discrimination in Employment Act, federal law governs nearly every aspect of public employment.

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Age Discrimination in Employment Act of 1967 (ADEA)\(^{80}\) applies to employers of 20 or more employees and prohibits discrimination on the basis of age for employees age 40 or older. In 1990, the Older Workers’ Benefit Protection Act of 1990 (OWBPA)\(^{81}\) added provisions governing the contents of severance agreements and required procedures in order to effectuate a waiver of ADEA claims in such agreements.

Americans with Disabilities Act of 1990 (ADA)\(^{82}\) prohibits discrimination on the basis of disability in employment, public services, public accommodations and telecommunications.
After its enactment, courts struggled with questions about whether an individual was a qualified individual with a disability under the law. Case law at the Supreme Court level that was favorable for employers and schools was overturned by the **ADA Amendments Act of 2008**, which significantly broadened coverage of the ADA. The law applied changes in definitions and their interpretation to Section 504, as well as the ADA.

Detailed regulations governing ADA in elementary and secondary schools have not been promulgated. Instead, OCR has read the Title II ADA regulations to incorporate the Section 504 regulations for elementary and secondary school students.

The **Electronic Communications Privacy Act of 1986** (ECPA) applies to monitoring of school e-mail and telephone systems. Title I of the EPCA prohibits unlawful, intentional interception of wire, oral and electronic communications including employee e-mail. Title II prohibits unlawful intentional access to such communications while they are in electronic storage. Victims of illegal surveillance may be entitled to actual and punitive damages. However, exceptions in the law may allow a school to monitor employee e-mail or phone calls on the school computer or telephone systems. The federal law allows for interception or retrieval of stored communications when one of the parties has given prior consent to the monitoring. Mere disclosure of a monitoring practice is probably insufficient to constitute consent. However, a statement signed by the employee, indicating he or she has read the policy and agrees to the terms of the policy is probably the best practice, and will likely make proving consent easier if monitoring is challenged.

**Equal Pay Act of 1963** (EPA) is part of the Fair Labor Standards Act. Enacted as part of the Kennedy New Frontier program, the law prohibits sex-based wage discrimination between men and women in the same establishment who perform jobs that require substantially equal skill, effort and responsibility under similar working conditions.

In conducting certain types of background checks on potential new hires, schools may need to consider the requirements of the **Fair Credit Reporting Act** (FCRA), a federal law designed to protect the privacy of consumer report information and to ensure the information supplied by consumer reporting agencies is as accurate as possible. The FCRA applies only to credit reports and credit reporting agencies. If a school hires an outside agency or a private investigator to check references or verify information about a prospective employee, the investigator hired by the school district would be a “consumer reporting agency,” and any communication to the district reporting on an employment applicant would be a consumer report subject to the FCRA. FCRA does not apply to criminal background checks done through a state or federal bureau of investigation, nor does it apply if internal school employees conduct the investigation and the information gathered is from references or former employers.

FCRA was amended by the **Fair and Accurate Credit Transactions Act** (FACTA) in 2003. Under the amendments, schools must comply with the address discrepancy provisions and may have to implement an identity theft prevention program if they meet the definition of a creditor under the law.

The **Fair Labor Standards Act** of 1938 (FLSA) established minimum wage and overtime pay requirements. Unless employees meet one of the statutory tests for “exempt” status, employees...
must be paid overtime at a rate of one and a half times their regular rate of pay for hours worked over 40 in a work week. Under certain conditions, compensatory time can be used in lieu of paying overtime. Accurate classification of employees is essential.

As originally enacted, the Family and Medical Leave Act (FMLA)\(^94\) required employers to allow employees to take unpaid leave of up to 12 weeks for the birth or adoption of a child, for a personal serious medical condition, or for taking care of certain relatives with serious medical conditions. In 2009 and again in 2010, the law was amended to address family and medical leave for the families of service members. The first addition allows FMLA leave to be taken for a qualifying exigency when a spouse, child or parent is on active duty or called to active duty as a member of the National Guard. The second addition allows for military caregiver leave of up to 26 weeks to care for a service member who was injured while serving on active military duty.\(^95\)

The Genetic Information Nondiscrimination Act of 2008 (GINA)\(^96\) prohibits discrimination based on genetic information with respect to health coverage and employment.\(^97\)

The Health Insurance Portability and Accountability Act of 1996 (HIPPA)\(^98\) establishes standards for the privacy and security of health information.

The Immigration Reform Control Act of 1986\(^99\) prohibits employers from knowingly hiring unauthorized aliens. It also prohibits discrimination against an individual on the basis of national origin or citizenship status. The law requires employers to complete what is now known as the I-9 form, to verify identity and employment authorization of new hires.

The Lilly Ledbetter Fair Pay Act of 2009\(^100\) superseded the Supreme Court decision in Ledbetter v. Goodyear Tire & Rubber Co.\(^101\) and provides that a violation of anti-discrimination laws, such as Title VII, ADEA and the ADA, occurs each time a worker receives a discriminatory paycheck.

The Patient Protection and Affordable Care Act (ACA or “Obamacare”)\(^102\) is the federal law, signed by President Obama, which enacted comprehensive health insurance reforms, designed to increase the availability, affordability and quality of health coverage for all. With calls for “repeal and replace” it remains unclear which provisions of this law, if any, will remain in effect under the Trump administration.

The Pregnancy Discrimination Act (PDA)\(^103\) prohibits discrimination on the basis of pregnancy, childbirth or medical related reasons.

The Occupational Safety and Health Act of 1970\(^104\) created the Occupational Safety and Health Administration and authorized it to promulgate regulations on workplace health and safety, designed to protect workers from a wide range of hazards. State and local government workers are not covered by the federal OSHA, but have the Act’s protections if they work in those states that have an OSHA-approved state program.

Title VII of the Civil Rights Act of 1964\(^105\) prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin. It prohibits both intentional discrimination (disparate treatment) and discrimination that occurs when facially neutral practices have a disproporionately adverse effect on a protected class (disparate impact). It covers discrimination
in hiring, compensation, promotion, discipline, and dismissal, as well as fringe benefits and other terms and conditions of employment.

The **Uniformed Service Employment and Reemployment Rights Act** of 1994 (USERRA)\(^{106}\) protects civilian job rights and benefits for veterans and members of the reserve. It allows for an individual to have reemployment rights for an absence for military reasons of up to five years, so long as notice and timeline requirements are met.

**Practice Tips**

- Always look at federal law, even when you think state law covers an issue. Because plaintiffs are continually trying to expand the range of federal constitutional protections, assume that any dispute with a student, employee or even disgruntled community member could include at least one potential federal claim.
- Especially when dealing with OCR, be aware that most requirements are found neither in the statute nor in the regulations. You must search through the “non-regulatory” guidance documents that OCR routinely issues.
- Remember to consider both statutory and constitutional protections when dealing with any type of student discipline matter, especially when the conduct includes anything that could be characterized as speech, including claims of symbolic speech.
- If there are federal claims, or even if a complaint could be read as possibly raising federal claims, consider removing the case to federal court. There is a very limited timeframe for removal, and filing a substantive pleading in state court will waive removal, so removal must be considered immediately upon receipt of the complaint.

- Maintain documentation with OCR or other federal agencies in mind (even if they do not come in, you will be better prepared for any type of litigation or administrative review).
- Maintain documentation of problems with employee performance in anticipation of employment discrimination or first amendment complaints.
- Encourage your clients to train their employees on pertinent provisions of federal law.

  - Principals or HR directors must know how to investigate harassment complaints, or recognize when to ask the superintendent to call the school attorney.
  - Building and grounds personnel must know what they can and cannot do to comply with federal environmental laws.
  - HR directors must understand the plethora of federal employment laws governing leave, overtime, exempt and non-exempt status, safety, privacy, background checks, etc.
  - Building principals and deans must be trained regularly on student discipline protections, including search and seizure and notice requirements.
  - IEP teams should receive regular training, and the forms that the team uses should be reviewed regularly to make sure that the proper information is being obtained, and used in the most effective way.
If clients seem reluctant to engage in regular training, remind them that agencies enforcing federal discrimination laws require training.

- Make sure your clients have appropriate policies in place.107
- Make sure your clients understand and comply with the notice and recordkeeping requirements of federal laws.108
- Federal procedure, evidence and privilege laws are often different from state laws, so make sure you are aware of the differences as you move forward. Always assume that you will be litigating in the less favorable forum, and plan accordingly. It is better to be pleasantly surprised.

Conclusion

This paper is simply an overview, demonstrating some of the myriad ways in which federal statutes, regulations and case law impact virtually all areas of school law. As a new administration begins in Washington, we cannot predict which of these laws will be amended, repealed, ignored or enforced with more vigor. If history is any guide, however, schools will face challenges in new areas, ones we cannot even yet predict, and school law will continue to have a distinctly federal flavor. Whether this is good or bad as a matter of policy is open to debate, but one thing is clear – the volume and complexity of federal involvement will insure that school lawyers remain busy for the foreseeable future.

ENDNOTES

1 262 U.S. 390 (1923).
2 268 U.S. 510 (1925).
3 Id. At 534.
5 Id. At 493.
7 In Gary B. v. Snyder, filed in September, 2016 in the Eastern District of Michigan, a group of students is asking the Court, among other things, to reconsider Rodriguez, or at least to find that “basic literacy” is a fundamental right. The complaint alleges that the Detroit Public Schools are so inadequate that the plaintiffs’ federal rights have been violated.
8 COSA compiles and updates a list of federal guidance documents on a regular basis. The most recent version of this list can be found at https://cdn-files.nsba.org/s3fs-public/reports/Federal%20Agency%20Guidance%20(Sept%20%202016).pdf?ekGNSqDiNMRxPQC57x6EPTbX6jRQKsPA.
9 20 U.S.C.Ch. 70.

11 Significant guidance document- as defined in the Section I(4)(a) of the GGP Bulletin, a guidance document disseminated to regulated entities or the general public that may reasonably be anticipated to:

- Lead to an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
- Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
- Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866, as further amended.


17 RttT emphasized the development and adoption of common standards and better assessments; the expansion of the number of high quality charter school; the development of data systems to link student growth and achievement to teachers and administrators; and an increase in teacher and school leader effectiveness.


23 708 F.3d 1329 (10th Cir. 2015), cert. granted, ___ U.S. ___ (9/29/16).

24 For a full list of all guidance documents on disability discrimination go to https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/disability.html.
The statute provides: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance…” 20 USC 1681(a).


Id.


The home page can be found at: https://www2.ed.gov/about/offices/list/ocr/index.html.

While all of these categories of discrimination are also prohibited by the Equal Protection Clause, Title VI gives the Department of Education, and OCR, the authority to enforce these prohibitions through regulation and enforcement action. As with Title IX, discussed above, OCR typically uses DCLs, rather than the regulatory process, to issue its positions and impose its requirements on public schools.

See, eg, DCL, Disparate imposition of discipline (1/8/14).


See, e.g. Epperson v. Arkansas, 393 US 97 (1968) (“By and large, public education in our Nation is committed to the control of state and local authorities.”).


In Riley, the Supreme Court struck down the warrantless search of a cell phone seized during the suspect’s arrest. The Court noted that cell phones function as “microcomputers” and contain large amounts of personal data, and that individuals therefore have a much higher expectation of privacy in them.


310 US 624 (1943).


20 U.S.C. §1232g.


For more information on this topic, see, Joint Guidance on the Application of the Family Educational Rights and Privacy Act (FERPA) and the Health Insurance Portability and Accountability Act (HIPAA) to Student Health Records, U.S. Department of Health and Human Services; U.S. Department of Education (November 2008).

20 U.S.C. §1232h.

Those areas include:
1. political affiliations or beliefs of the student or the student’s parent;
2. mental or psychological problems of the student or the student’s family;
3. sex behavior or attitudes;
4. illegal, anti-social, self-incriminating, or demeaning behavior;
5. critical appraisals of other individuals with whom respondents have close family relationships;
6. legally recognized privileged or analogous relationships, such as those of lawyers, physicians, and ministers;
7. religious practices, affiliations, or beliefs of the student or student’s parent; or,
8. income (other than that required by law to determine eligibility for participation in a program or for receiving financial assistance under such program).


In the 1997 amendments to IDEA, Congress codified many of the procedural requirements in the disciplinary arena that had been initially set forth by the Supreme Court in Honig v. Doe, 484 U.S. 305 (1988).


42 U.S.C. §1758(b)(6). The statute also specifies a fine of not more than $1,000 or imprisonment of not more than 1 year, or both, for unauthorized disclosures of free and reduced price meal or free milk eligibility information.


For more information in this area see Stone, Sarah Motley, “Understanding Federal School Bus Driver Regulations,” Inquiry & Analysis (October 2012).


18 U.S.C §2511.


93 To be exempt, an employee must meet both a salary test (except for teachers) and must qualify as an executive, administrative, learned professional, creative professional or certain type of computer professional under one of the duties tests. Attempts to amend the regulations to increase the required salary level from $455 per week or $23,550 per year to $913 per week or $47,476 per year remain enjoined by a court order.


95 For more information on these amendments, see Dinsmore, Nancy, “2010 Defense Act Expands FMLA Coverage for Military Families,” Inquiry & Analysis (April 2010).


103 42 USCA § 2000e.


105 COSA publishes a list of required annual notices on a yearly basis. The most recent version of the chart can be found at https://cdn-files.nsba.org/s3fs-public/reports/2016%20Annual%20Policies.pdf?TvLu1tXBuEF3PRjZeXz89QAcWMkC7l_3..

106 The COSA chart of record retention requirements can be found at https://cdn-files.nsba.org/s3fs-public/reports/Record_Retention_Requirements_Chart_2011.pdf?4KjizzBnuRTPp_.qF55D0ejewkpPfdxal..
Appendix 1: Federal Environmental Laws

The following laws often contain requirements that apply to public schools. In this area, it is imperative school personnel in charge of buildings and grounds, construction projects, food service programs, cleaning and maintenance, are familiar with legal requirements and have adequate training on compliance with the laws that have an impact on how they perform their jobs.

Federal Water Pollution Control Act and the Clean Air Act, 33 USCA § 1251, et seq., June 30, 1948, ch. 758, 62 Stat. 1155


Comprehensive Environmental Response, Compensation & Liability Act, 42 USCA § 9601, et seq.


