

COMPARATIVE

**SCHOOL
LAW.**

Edited by
IAN K. BIRCH & INGO RICHTER

PERGAMON PRESS

Comparative School Law

Edited by

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PERGAMON PRESS

Member of Maxwell Macmillan Pergamon Publishing Corporation

OXFORD · NEW YORK · BEIJING · FRANKFURT
SÃO PAULO · SYDNEY · TOKYO · TORONTO

U.K.	Pergamon Press plc, Headington Hill Hall, Oxford OX3 0BW, England
U.S.A.	Pergamon Press Inc., Maxwell House, Fairview Park, Elmsford, NY 10523, U.S.A.
PEOPLE'S REPUBLIC OF CHINA	Pergamon Press, Room 4037, Qianmen Hotel, Beijing, People's Republic of China
FEDERAL REPUBLIC OF GERMANY	Pergamon Press GmbH, Hammerweg 6, D-6242 Kronberg, Federal Republic of Germany
BRAZIL	Pergamon Editora Ltda, Rua Eça de Queiros, 346, CEP 04011, Paraiso, São Paulo, Brazil
AUSTRALIA	Pergamon Press (Australia) Pty Ltd, P.O. Box 544, Potts Point, N.S.W. 2011, Australia
JAPAN	Pergamon Press, 5th Floor, Matsuka Central Building, 1-7-1 Nishishinjuku, Shinjuku-ku, Tokyo 160, Japan
CANADA	Pergamon Press Canada Ltd, Suite No. 271, 253 College Street, Toronto, Ontario, Canada M5T 1R5

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First edition 1990

Library of Congress Cataloging-in-Publication Data

Comparative school law/edited by Ian Birch and Ingo Richter.—1st ed.

p. cm.

1. Educational law and legislation. I. Birch, Ian Keith Falconer. II. Richter, Ingo.

K3740.C66 1990 344'.07—dc20 [342.47] 90-43333

British Library Cataloguing in Publication Data

Comparative school law.

I. Schools. Law

I. Birch, Ian II. Richter, Ingo

342.47

ISBN 0-08-037114-0

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Introduction

There are celebrated cases in school law such as *Brown v. Board of Education* which are known to educators, lawyers and policy makers in many parts of the world. Such cases will be found cited in text-books on educational policy, school administration and constitutional law. But school law is also part of every day life in schools. Who has to pay the account for the broken window after the football match between two school teams? If marks are obviously unfair, who can ask for a review - the students, the parents? And who will make the decision - colleagues, the principal, the supervisor, the superintendent, the courts? In several countries there are handbooks of school law, written mostly for teachers and administrators, in order to help them cope with the legal problems of every day school life. But school law is strictly national, and very often even regional or local. In its application, *Brown v. Board of Education* has become known because it marked a substantial change in race relations, but its reasoning can hardly be applied outside the United States. Broken school windows and student assessment are known in most countries of the world. But schools, the school administration and the courts have to handle such cases on the basis of the body of law which exists within a particular country. They will unlikely look abroad for possible solutions.

Although school law is strictly jurisdictional, we became interested in "Comparative School Law" for two reasons:

- in many countries school law seems to be an "expanding business", and many educators feel quite unhappy at the intrusion of lawyers into "their business". So we posed the question whether there is a trend towards an increase internationally in school law,
- in some countries, legislators have been actively controlling many educational problems by way of statutory provisions; in some, the courts have played an important role in framing judicial doctrine for the operation of school systems. It became important to establish whether the development of school law has had parallels in various countries, and whether there exist important differences and, if so, why?

We did not put these questions as such to the contributors to this volume as we did not want to force them to answer questions which might be limited by the experiences in one or two particular countries. We invited the authors to discuss the school law of their countries, based on an outline which we developed, in order to provide the reader with a basis for comparison. But within that framework, all the authors were free to choose

their subject matter, and to place the emphasis on what they saw as being appropriate in their own jurisdictions : to present their "school law" in their own way. This allowed for the contributions to this volume to be both diverse and colourful. Therefore, it remained to the editors to draw their conclusions as to the present state of the relation between education and law based on this study of "Comparative School Law."

The particular brief we put to the contributors was to provide a succinct analysis of school law in their respective countries based on the following themes:

- Sources of School Law
- Legal Structure of School Systems
- School Administration
- Duties and Rights of Parents
- Duties and Rights of Children
- Duties and Rights of Teachers
- Discipline
- Negligence or Malpractice

These themes were further broken down - as a guide to the contributors - to provide as informative a study as was possible. Obviously restraints had to be imposed in terms of length, but as to style and presentation the editors have interfered little. Apart from the fact that the contributors are scholars in their own right, it was important in so jurisdictionally a based study that each country was presented in its own English-speaking style, idiom and referencing system. Care has been taken, however, to modify some legalisms in the general text, such as in the case of gender and number. In quotations and summaries of quotations, the text has been retained (noting in most jurisdictions that, under the laws of interpretation which apply, "he" includes "she" and the singular the plural).

The question of the choice of countries exercised us considerably. On the one hand, there are "families of law" in the world and the absence of any one of these was a matter of concern: on the other hand it was necessary to identify countries with something of a developed system of school law, and with an author able to contribute a chapter to an international study to be published in English and to be presented mainly to an English-speaking market. This volume is the result and we regret that, despite our best efforts, the range was not still wider than it is.

We thank the contributors to this volume and those who assisted in its production. In the latter connection, Mrs Zan Blair of the Department of Education at The University of Western Australia is deserving of special mention for her work in preparing the manuscript, along with her colleagues, Jenny Foo, Dianne Pitschel, Carol Thomason and Robyn Wilson. In particular, we thank Professor Neville Postlethwaite at the

University of Hamburg, who encouraged us to turn an idea into reality and the publisher who has taken some risk in publishing in an area so jurisdictionally discrete.

Ian Birch
Ingo Richter

Table of Contents

1.	Notes on Contributors	vii
2.	Introduction	ix
3.	Chapter 1 : The United States of America <i>Betsy Levin</i>	1
4.	Chapter 2 : England and Wales <i>John Partington</i>	85
5.	Chapter 3 : West Germany, Switzerland and Austria <i>Ingo Richter</i>	119
6.	Chapter 4 : Australia <i>Ian Birch</i>	139
7.	Chapter 5 : Canada <i>A Wayne Mackay and Lyle Sutherland</i>	170
8.	Chapter 6 : India <i>R P Singhal</i>	255
9.	Chapter 7 : Israel <i>Stephen Goldstein</i>	275
10.	Chapter 8 : Japan <i>Koji Aoki</i>	317
11.	Chapter 9 : European Communities <i>Ingo Richter</i>	337
12.	Chapter 10 : Law and Education - Education and Law <i>Ingo Richter and Ian Birch</i>	350

Chapter One: THE UNITED STATES OF AMERICA

(Betsy Levin)

INTRODUCTION

It is necessary to understand the context in which law has developed in the United States before examining the details of school law in the United States. The United States of America is a federation with a written constitution and judicial review. Under the federal constitution, the Federal Government was granted limited national powers. The Tenth Amendment of the United States Constitution reserves all powers to the states that are not specified in the Constitution. The Constitution does not grant federal authority over education. Since the federal constitution does not directly refer to education, the principal responsibility for education is lodged with the fifty state governments.

Although the United States Constitution does not specifically mention education, it does place restraints on the actions of school authorities inasmuch as the Constitution affects the interactions among all state and local institutions of government and people. Running throughout our history has been a concern for abusive governmental power. Coupled with this has been the attention paid to guarantees of individual liberties and rights in the Bill of Rights to the Constitution. The adoption of the Fourteenth Amendment following our Civil War led to the extension of the Bill of Rights to the state governments. Thus, while the Bill of Rights was initially addressed only to the national government, the Fourteenth Amendment's Due Process Clause has been read to extend most of the rights embodied in the Bill of Rights to individuals against state governments and their subdivisions, which includes state and local school boards.

The political/legal culture of the United States helps to explain the role that the Constitution and courts have played in education. This political/legal culture means that parents are more ready to assert what they believe to be their legal rights against professional educators, and courts are more ready to enforce these rights, than in many other countries. Moreover, since our society is a very diverse society, there is more disagreement over who is to decide which values to inculcate in our youth than there is in a more uniform society. These disputes have often ended up in the courts in the guise of disputes over constitutional principles. Thus, an understanding of the role that the US Constitution and the courts have played is essential to understanding the development of elementary and secondary education law

in the United States.

1. SOURCES OF SCHOOL LAW

1.1 The Common Law

A number of legal concepts in the United States are based on common law doctrines. Various aspects of schooling are covered by common law -- in particular contracts and torts.

1.2 Constitutional Bases of School Law

1.2-1 THE FEDERAL CONSTITUTION

As noted in the introduction, there is little direct federal constitutional authority for school law. Education in the United States is thus primarily a state function. Although there is no direct federal responsibility for education under the Constitution, the federal government plays a significant if small role in education, and the federal Constitution is authority for the exercise of this role. Congress has enacted laws providing federal grants-in-aid of various kinds to state and local education agencies, as well as laws protecting the civil rights of various categories of students. Since the federal government is one of specific enumerated powers, there must be some authority in the Constitution of Congressional action. The constitutional authority for Congress to enact grants-in-aid and civil rights statutes lies in Article I, Section 8, Clause 1 of the constitution, known as the Taxing and Spending Clause. This clause, which states that "the Congress shall have power to lay and collect taxes ... to pay the debts and provide for ... general welfare of the United States ...", has been interpreted as permitting Congress to appropriate funds for educational programmes and to attach various conditions and mandates to the receipt of those federal funds.¹

Constitutional authority for the many civil rights mandates enacted by Congress may also lie in Section 5 of the Fourteenth Amendment, which provides that Congress has the "power to enforce, by appropriate legislation, the provisions" of the Equal Protection and Due Process Clauses.

In addition to providing authority for legislative and executive branches of the federal government to act in the area of education, the federal Constitution also is a source of positive law applied by both federal and state courts to constrain actions by government authorities, whether federal, state, or local. Although there are a number of other provisions in the Constitution that may affect education, such as the Contracts Clause, Article 1, Section 10, which provides that "no state shall ... pass any ... law impairing the obligation of contracts", most of the constitutional provisions that may constrain the actions of school authorities and of state legislatures

lie in the following amendments:

First Amendment. The First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press" Each of the phrases emphasized in the foregoing amendment has been the source of extensive litigation concerning the extent to which it constrains the educational enterprise, on the one hand, and, on the other hand the extent to which the protection afforded teachers, students, or parents is circumscribed by the special characteristics of the school environment.

Fourth Amendment. The Fourth Amendment, which protects persons and their possessions from unreasonable searches and seizures, generally requires a warrant that is issued upon a finding of probable cause. Litigation has ensued regarding the scope of the rights of teachers and students while on school premises and the constraints on officials in terms of gathering evidence that a crime or an infraction of a school rule has occurred.

Fifth Amendment. The Fifth Amendment provides, in part, that "no person shall ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation". The first clause is primarily invoked to constrain the federal government from acting to deprive individuals of a liberty or property interest without due process of law and, as to the federal government, has been interpreted as being analogous to the Equal Protection Clause of the Fourteenth Amendment. The second clause is relevant when states or local school boards attempt to acquire property for school building sites.

Eighth Amendment. The Eighth Amendment, which prohibits the infliction of "cruel and unusual punishments", has been invoked in legal challenges to corporal punishment.

Although all of the foregoing amendments apply, by their terms, solely to the national government, through a series of court decisions, each has been applied to state and local officials through the due process clause of the Fourteenth Amendment.

Fourteenth Amendment. The provisions of the Fourteenth Amendment that are particularly relevant to education are "no state shall ... deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws". This latter provision, in the context of education, is the basis for claims to equal educational opportunities.

While there is no specific amendment addressing rights of privacy and personal autonomy, these rights are said to be lodged in the First, Fourth, Fifth, Fourteenth, and perhaps other amendments.

1.2-2 STATE CONSTITUTIONS

State constitutions form the basic law of the fifty individual states, although they are subject to the supremacy of the federal Constitution and federal statutes. Every state has a constitutional provision providing for education. These constitutional provisions generally vest state legislatures with broad authority over education, permitting the state legislatures to regulate both public and private schools. In addition, every state has a constitutional provision making education compulsory.

1.3. Specific School Law Sources -- Legislation

1.3-1 FEDERAL LEGISLATION

As noted in Section 1.2-1, Congress, under the Taxing and spending Clause of the US Constitution, has authority to enact legislation that affects education. In enacting education legislation Congress has had one of the following three goals in mind: (1) Congress has concerned itself with issues of national priority that might be shortchanged by the states with their more parochial interests. (2) Congress has been concerned with incentives for the improvement of education and for encouraging innovation and research. (3) Congress has taken a major role in the protection of civil rights as related to education. Examples of statutes designed to effect each of these goals follow.

(1) Educational issues of national priority or concern.

National priorities are determined by Congress, not by the other two branches of the federal government. One of the earliest examples of an education law enacted to meet a perceived matter of national concern is the Federally Impacted Areas Aid law.² In the late 1930s, with the military build-up prior to World War II, large numbers of military and civilian employees working on military bases had children who needed to be educated. School districts either charged these children high fees or refused to admit them into their schools. The forerunner of the current Impacted Areas Aid law was thus enacted to help offset the impact on school districts due to the presence of military bases or other federal installations.

Another illustration is the National Defense Education Act, enacted in 1958. This law was passed following the outcry that arose when the USSR first launched the satellite Sputnik in 1957. Questions were raised about the adequacy of the science and math training that our students were receiving compared to students in Russian schools. This occurred at the height of the Cold War, and the issue was seen as one of the adequacy of our national security. The purpose of the law, as stated by Congress, makes it clear: "[S]ecurity of the Nation requires the fullest development of the mental

resources and technical skills of its young men and women."³ The federal government, through this Act, was to provide assistance "to insure trained manpower of sufficient quality and quantity to meet the national defense needs of the United States".⁴

Title I of the Elementary and Secondary Education Act was enacted in 1965 also to address a matter of national concern -- the permanent underclass of poor people.⁵ Compensatory education was seen as a way of breaking the poverty cycle, helping the individual, but also helping society by increasing the gross national product, lessening welfare costs and the cost of crime, etc.

Other examples include the Arts in Education Act of 1978, justified as follows: "[A]rts should be an essential and vital component of every student's education; the arts provide students with useful insights to all other areas of learning; and a Federal programme is necessary to foster and maintain the interrelationship of arts and education;"⁶ and the Metric Education Act of 1978, to encourage the adoption of metric education programmes in school districts throughout the nation.⁷ In addition, there are countless programmes of institutional assistance, such as the Law School Clinical Experience⁸ and the Higher Education Facilities Loans for Construction and Renovation.⁹

(2) Incentives for improvement of education.

Congress has enacted a number of laws concerned with improvement and innovation in education. Such acts include the Improving Local Educational Practices Act¹⁰ and the Strengthening State Education Agency Management Act.¹¹ One important area in which Congress has acted is with respect to the collection and analysis of educational statistics. The National Center for Educational Statistics and the National Assessment of Educational Progress make important contributions to our understanding of education and its effectiveness. Individual states do not have the same capacity to collect and analyze data as does the federal government.

(3) Protection of civil rights.

An important function of the federal government is to protect the civil rights of minority and disadvantaged pupil populations. Congress has taken at least two approaches: through direct mandates -- i.e., the civil rights statutes, and through grant-in-aid or programme statutes.

Civil rights statutes are enacted by Congress in accordance with its authority under the Taxing and Spending Clause and also under Section 5 of the Fourteenth Amendment. Such statutes are usually brief and without much detail. The civil rights statutes relating to education direct the appropriate federal agencies to promulgate regulations to implement the statute's objectives, but there is usually not much guidance in the statute

itself, nor is the legislative history very clear. Under these statutes, no federal funds are appropriated. However, the sanction for violating the statute or its implementing regulations is to withhold all federal money going to the programme or activity in which the discrimination occurred.

The grant-in-aid or programme statute, in the area of protections for special pupil populations, can be of several kinds. One type of programme statute is premised on implementing notions of social justice beyond the constitutionally-required minimum of the Equal Protection Clause. Title I of the Elementary and Secondary Education Act, which provided compensatory education programmes for economically disadvantaged children, was clearly of that type. Another type of programme statute is designed to assist state educational agencies or local educational agencies in complying with constitutional or civil rights requirements, including those mandated by courts. The third type of programme statute can mandate requirements that are not unlike those developed under civil rights statutes. The Education for All Handicapped Children Act is an example.¹²

Grant-in-aid statutes are generally much more detailed than civil rights statutes so that the regulations promulgated by the Executive Branch, rather than defining the right to be protected and what constitutes violations of that right, merely fill in the interstices of the statute. Funds are appropriated under these statutes to both states and local school districts to encourage development of programmes to assist special pupil populations. The authority for enacting these statutes comes from the Taxing and Spending Clause of the Constitution, and the clause has been interpreted as permitting conditions to be attached to the receipt of the funds. Violation of the conditions included in the statute or regulations affects only the funds under that programme. And, indeed, states or localities can refuse to take the money and not be obligated to comply with any of the conditions.

1.3-2 STATE LEGISLATION

The level of government that has primary authority over education is the state, and the basic source of school law is found in statutes enacted by state legislatures. While the power is plenary, the state legislature is subject to restrictions in the federal Constitution, federal law, and the state's own constitution. In some states, the laws related to education can run to multiple volumes in the state's codified laws.

1.4 Specific School Law Sources: Administrative Regulations

1.4-1 FEDERAL REGULATORY AUTHORITY

The US Department of Education is the agency in the Executive Branch of the federal government that has responsibility for promulgating regulations to implement the education statutes enacted by Congress. However, there are a range of activities that are encompassed by this role. In drafting regulations implementing civil rights statutes, the agency has to determine

what constitutes compliance. As noted earlier, Congress usually provides very little detail in the statute about what constitutes discrimination, and the legislative history provides little help. Thus the agency, in fleshing out the often rather cryptic civil rights statutes, actually is making policy. The agency is also responsible for enforcing the statute and regulations once they have been promulgated and thus it monitors and seeks to achieve compliance in specific cases. Thus, on the one hand, the agency determines what constitutes compliance generally, and then on the other, it decides in specific cases whether or not an educational institution has violated what the Department of Education has determined to be a protected right.

The Department also has to develop criteria for the distribution of funds appropriated under programme statutes, particularly when criteria are not spelled out in any detail by the statute. Then the agency is responsible for monitoring compliance with the various conditions in programme statutes, which can be either substantive or fiscal.

The development of regulations is an interactive process. For example, Congress may enact a law, leaving it to the federal agency to develop regulations for implementing that law. An individual may sue in court, challenging the application of the regulation. The court will interpret the statute and either uphold or strike down the regulation as within the intent of the statute. In some cases, before the federal agency has had an opportunity to promulgate a regulation, an individual will bring a case to court seeking an interpretation of the law, and the federal agency may be required by the court to promulgate a particular kind of regulation.

Another role that the Department plays is the stimulation of research through grants and contracts. In these cases, Congress, by and large, has charged the agency with supporting research but has not specified in any detail the nature of the research to be supported. The agency is also responsible for disseminating the results of the research that it encourages and supports.

Finally, the Department of Education has played some role in providing technical assistance of various kinds to local school districts and to states.

1.4-2 STATE REGULATORY AUTHORITY

At the state level, the legislature often delegates to the state superintendent and the state educational agency the authority to adopt regulations to implement the general statutes on education.

1.5 Specific School Law Sources: Judicial Decisions

Both state and federal courts have authority over education. The state courts have broad jurisdiction over issues of law affecting education, whereas federal courts are limited to those issues that arise under the