

SCHOOLS AND THE LAW

Fifth Edition

by E. Edmund Reutter, Jr.

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Irving J. Sloan

General Editor

1981

OCEANA PUBLICATIONS, INC.

Dobbs Ferry, New York

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Fifth Edition

Library of Congress Catalog Card No. 81-80361

ISBN: 0-379-11139-X

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Chapter I

OVERVIEW OF LEGAL FRAMEWORK FOR THE PUBLIC SCHOOLS

"Today, education is perhaps the most important function of state and local governments. 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." Thus in 1954 spoke the Supreme Court of the United States.

In the United States, differing from almost every other country of the world, the national government has no direct control or authority in the field of public education. Since education is not mentioned in the federal Constitution, under the *Tenth Amendment* it becomes one of the powers reserved to the states. The states have established local school districts with boards of education to operate the schools.

The concept of a free public school for all the children, however, was not very well developed when the United States became a nation. Early court decisions influenced a recognition of the legal purpose of the public school as the development of a citizenry capable of participating effectively in self-government. As public education evolved, it became from a legal point of view as much a duty of children

to submit to instruction as a right that they had. The right of the government is limited, however, to requiring that children study certain subjects; it cannot demand that all children attend a public school. This is one of many situations involving education in which the rights of the state come into conflict with the rights of individuals, in this instance, parents. The federal Constitution, as interpreted by the Supreme Court, gives to parents the right to select where and how their children are to be educated so long as minimum essentials within the prerogative of the state to establish are observed.

Each state has established a public school system unique in some respects from those in other states. Yet, despite great diversity, often in important items, the similarities among the states on fundamental concepts are striking. The variations are more often those of form, rather than of substance, and more commonly of degree, rather than of basic approach. It becomes obvious from legal study that the states have tremendously influenced one another, and although each has gone its own way, rare is the situation in a state which has no counterpart in other states. Exceptions exist to every attempted generalization; yet frequently "the exceptions tend to prove the rule."

The following chapters are devoted to specific aspects of the law affecting public schools. By "the law" is meant all of the rules and arrangements recognized by the courts. A part of the law is written and available in codified form. There is a hierarchy of "legislation" applying to the public schools. No act of a body lower in the system can be inconsistent with higher authority properly exercised. The federal Constitution heads the list, followed by federal statutes, state constitution, state statutes, regulations of the state-level educational agency, and regulations of local-level school authorities.

Most of the law, however, is not available in a precisely organized pattern. This is the so-called "common law." It is found in court opinions through the years as judges have resolved controversies and recorded their reasoning. It is

this part of the law that frequently gives operational meaning to written regulations and that comes into play when written rules do not exist on a point.

In the United States there are two systems of courts: state courts and federal courts. State courts decide most cases involving public education. Some of those involving the United States Constitution are tried in federal courts. Appellate courts exist in each system to consider appeals from decisions of lower courts. Federal courts and the Supreme Court of the United States are becoming increasingly involved in educational matters as more and more litigants claim violations of various rights protected by the federal Constitution.

On the basis of concrete cases decided by courts through the years it is possible to find a degree of guidance as to what the law on an unadjudicated point is likely to be. Predictions are fraught with peril but, as with most things, there are levels of skill based on study and intelligence.

No other function of government has been separated legally from the main stream as has public education. Although generally true on the state level, it is most pronounced on the local level. Public education, almost universally throughout the country, is kept closer to the control of the people than other aspects of government. In about nine of ten school districts in the land the board of education is directly elected by the voters. The common situation is for local voters to elect two governing boards—one for general local government and one for the public schools.

As amplified in subsequent chapters, local boards of education enjoy wide discretionary powers. The states have not, however, relinquished their legal responsibility for education to local units. Local members of school boards are considered to be state, rather than local, officials. School buildings in legal contemplation are state property. Some states have accentuated the uniqueness of the public education function by establishing local school districts with boundaries distinct from municipal divisions. But even where boundaries are the same, school boards to differing extents are independent of control by officers of general government.

Public schools are public in the several senses of being open to all the children, of being financed by public funds, and of being subject to public control of policies. Citizens as individuals and as groups can influence educational policy in ways other than election of board members. Meetings of boards of education generally are open to the public. Regardless, the transactions are of public business, and the records are open to the public. Also, frequently citizens have a direct voice in determining expenditures.

The right of a parent to control the education of his child is deeply engrained in the common law. Judicial precedent dictates that legislation which changes the common law is to be narrowly construed. Parents' rights must yield only where their exercise impairs the general welfare.

From the perspective of the law, perhaps the point at which the individual citizen can exercise most influence is through what is known as a taxpayer's suit. This type of legal action arises when a taxpayer sues on the ground that an action is beyond the power of the body involved or that it represents an abuse of discretion in that a recognized power is being unreasonably or arbitrarily exercised. The element of spending public money generally is present, although in many instances the alleged improper expenditure is somewhat remote from the main issue.

Two of the most common suits broadly affecting educational matters are those where the intent is to require a governmental body or official to carry out a function that is alleged to be a duty, and those where it is sought to halt or to prevent some action that is alleged to be unauthorized by law. The complaint of one taxpayer can be sufficient to activate the courts to examine a situation and to enunciate the law on the point. The fact that the overwhelming majority of affected people may approve a challenged action has no effect on its legality. Neither does the fact that a practice has been unquestioned legally over a long period of years.

The following chapters present the law as it is. There are methods of changing any aspect which is felt to be inconsistent with the best interests of the nation.

Chapter II

THE FEDERAL GOVERNMENT AND EDUCATION

Despite the fact that education is not mentioned in the Constitution of the United States and, therefore, is not a function of the federal government, that governmental level has exercised considerable influence in the development of the American public school system. This influence has been both direct and indirect and has increased as the years have gone by. The proper role of the federal government in connection with public education has been widely discussed in the past and is of growing importance at the present.

Legislative Branch (Congress)

Congress has exercised over the years much direct influence through its constitutional power "to lay and collect taxes . . . to pay the debts and provide for the common defense and general welfare of the United States." Actually the extent of this power in relation to public education is judicially uncertain. There has been no direct judicial test involving specifically education. However, the interpretations of the Supreme Court of the United States in related areas give rise to the belief that Congress does indeed have the power to provide federal financial aid to education. Also it would appear difficult to argue at the present time that public education is not connected with "the general welfare of the United States" as a whole.

A series of decisions by the Supreme Court of the United States in the 1930's resolved a persistent argument about the federal taxing and spending power in favor of the interpretation that it pertains not only to the specific legislative fields

set out for Congress, but to any field that would promote the general welfare. In sustaining the old-age benefits article of the Social Security Act as a permissible area for Congressional spending for the general welfare, the Court said: "The discretion [as to whether a particular expenditure could be justified under the welfare clause], however, is not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment Nor is the concept of the general welfare static. Needs that were narrow and parochial a century ago may be interwoven in our day with the well-being of the nation. What is critical or urgent changes with the times."

The first instance of federal-level legislation in the area of the public schools took place even before the federal Constitution was adopted. The Ordinances of 1785 and 1787 provided for land grants to the states from the public domain for the "maintenance of public schools" and stated the policy that "religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall be forever encouraged." These acts gave impetus to the development of school systems in many states.

The Morrill Act of 1862 was crucial in the founding of the so-called "land-grant" colleges, originally established for the major purpose of teaching agricultural and mechanical arts. In 1917 federal aid to support vocational education in public secondary schools was instituted. In 1946 the federal government enacted the National School Lunch Act which has been instrumental in the development of improved lunch programs for children in non-public as well as public schools. All three of these operations in somewhat modified forms continue to receive financial support from the federal government.

There also have been several instances of Congressional action of a short term nature. During the depression years of the 1930's much federal money was spent on educational activities in connection with such programs as those of

the Civilian Conservation Corps and the National Youth Administration. The "G.I. Bill" following World War II and acts following the Korean and Vietnam Wars provided grants directly to students in connection with their educational programs either in high school or on the college level. Federal aid has been provided for public school education in those communities burdened excessively by increases of enrollments due to concentrations of population brought on by the presence in the area of federal military and defense installations. The 1958 National Defense Education Act was aimed at strengthening certain areas of education. This act provided grants to institutions and students pursuing certain types of programs, chiefly in the areas of foreign languages, mathematics, science, and counseling.

The most comprehensive federal legislation pertaining to the public schools was the Elementary and Secondary Education Act of 1965. This act introduced a new focus for federal money—poverty. Funds were made available to school districts for special programs designed to meet the needs of children in attendance areas containing concentrations of low income families. The act also provided funds for improved instructional materials and for developing innovative ideas.

The Education for All Handicapped Children Act of 1975 provided that the federal government would financially assist states in supplying for handicapped children a "free appropriate public education which emphasizes special education and related services designed to meet their unique needs." The Act required states as a condition of qualification for funds to establish detailed procedures for identifying such children, for developing "individualized education programs" for them, for involving parents in the process, and for various related matters.

Furthermore, sight should not be lost of the large sums of money spent by Congress in connection with educational activities not directly associated with the public educational system. Examples include education programs for farmers, immigrants, government employees, members of the Armed

Forces, American Indians, and underdeveloped countries.

The issue of federal control is closely tied to federal financial grants. The Supreme Court of the United States has considered cases involving federal regulation or control through taxation of matters reserved to the states (as is education). Such use of federal taxing power has been declared unconstitutional in a series of cases, the best known, perhaps, involving the Agricultural Adjustment Act of 1933. This does not mean, of course, that Congress cannot set up any controls at all. Rather, it means that the primary purpose of the legislation cannot be regulation of such matters.

The amount of control exercised by the federal government in its various undertakings affecting education ranges from no regulation or control in the Ordinance of 1785 and almost none in the land-grant college appropriations to more extensive control in connection with vocational education and to virtually complete control in the National Youth Administration Program. Although these acts have not been judicially challenged, it seems apparent that in none was control of education a purpose superseding that of promoting the general welfare.

To assess fully the role of Congress in relation to education, the amount of money placed into programs must be examined as well as the wording of the legislative goals for the programs. For example, problems have arisen because the large expenditures required of states and local school districts to comply with the extensive federal mandates of the Education for All Handicapped Children Act have not been offset by federal funds. Also important to consider is the specificity of regulations promulgated for a program by the administrative agency and the amount of paperwork required to demonstrate compliance with the regulations. For example, the administration of prohibitions against various types of discrimination in federally aided programs has been a source of substantial controversy.

Congress has also influenced public school education through inquiries and hearings, which have been conducted on several occasions since World War II for the purpose of

investigating whether there is need for federal legislation. The most far reaching hearings were those conducted by the House Committee on Un-American Activities and the Senate Judiciary Sub-committee on the subject of subversion in the education process. Investigations conducted by Congress into such areas as student unrest, use of narcotics, and problems of poverty have had an effect on public school educational policies. The fact that education is a state function apparently does not bar Congressional committees from conducting investigations into this area with the rationale that legislation for the general welfare is contemplated.

Executive Branch

The executive branch of the federal government is given differing amounts of authority in connection with the administration of the various acts of Congress. The most direct influence on education is exercised in those instances in which the executive branch has the power to approve certain state or local programs before federal money can be forthcoming. Less direct influence emerges from general executive rule-making power in connection with legislation. Educational policy has been affected by reports of White House Conferences and Presidential Advisory Committees set up in connection with general or specific goals of education or with federal relations to the states.

Since 1867 there has been in the executive branch of the federal government an agency with a primary function involving public education. In 1980 the unit's name was changed from United States Office of Education to United States Department of Education and its head's title became Secretary of Education rather than Commissioner of Education. The Secretary is now a member of the President's Cabinet. From 1953 to 1980 the Office of Education had been part of the Department of Health, Education and Welfare. The President always has appointed the head of the education agency.

The federal statute in 1867 stated that the office was created to collect statistics and facts, diffuse information respecting

education to "aid the people of the United States in the establishment and maintenance of efficient school systems," and "otherwise promote the cause of education throughout the country." Through leadership and service, rather than through authority, the office has exercised varying degrees of influence on American education during its history. Its power has been increasingly enhanced as relatively more federal attention has been given to education, both with new programs and with bars to various forms of discrimination in activities receiving federal funds.

Not only are more programs being administered through the Department of Education, but more authority in the administration of federal grants is being invested in that office. Educators are markedly divided, as are political figures, regarding the appropriate amount of power to place in the Department. The issue involves both that agency relative to other agencies in the federal government and that agency relative to the states.

The legal point cannot be overemphasized that, except in connection with a federal statute which may vest certain powers in the Department in connection with the provisions of that statute, the office has no authority over the conduct of the public schools within the several states. Practically, however, the power to withhold funds forms the basis of substantial influence.

Judicial Branch

The Supreme Court of the United States has had a far greater influence on the course of public education than is generally realized. Even though education itself is not mentioned in the federal Constitution, many of the amendments to the Constitution involve problems directly associated with it. Also, the provision within the Constitution prohibiting any state from impairing the obligations of a contract has been a factor in many cases involving education which have come before the Supreme Court through the years.

The "religion" clause of the First Amendment has been the