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Summary of Education Law

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Summaries of Education Law

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Summary Chapter One

Law in divided into the ladder of the United States Constitution, Federal Statutes and regulations by government agencies under those statutes, State constitutions, State statutes, State administrative regulations, and local ordinances and school board policies. The courts serve as the referee between all levels, as the federal government is limited in its powers and the State is limited by the Fourteenth Amendment. Additionally, most torts and contracts are adjudicated by the Common Law based on centuries of curt decisions. Decisions by district courts are mandatory precedents for that district by can become persuasive precedents in other districts. Federal district rulings may be appealed to the twelve appellate courts and the court for the federal circuit. Since federal law is the same for the whole nation, the Supreme Court may need to reconcile differences in application. The name of the losing party in a fact finding court will appear first in the case title since that party brings the appeal. The decisions will cite facts, claims, procedural history, issues and holdings. Distinction must be made between actual ruling and dicta, reasonable additions used in explanation. Several books are used for legal citation listing the volume, reporter, and page. Supreme Court citations should use the US reporter, while the lower and State decisions will be listed in one the West Publishing Company Reporters.

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Compulsory education laws required challenging the traditional unlimited control that parents had over children in the early nineteenth century. In Pierce v. Society of Sisters 268 US 510 (1925), although the Court cited the finding of liberty rights in education of children of Meyer v. Nebraska, the court grounded its rule that States cannot force students to attend public school to meet compulsory education requirement, mostly on the Laissez Faire Court (1895-1937) Fourteenth Amendment due process grounds of the property rights of private schools.

In Wisconsin v Yoder 406 US 205 (1970), the Berger Court applied a three-prong test to declare that Amish children did not have to attend high school, citing Pierce’s allowance of an equivalence education in private schools. The court pointed out that the police power of the State could not unduly burden religious conduct, even when neutral, unless there is a compelling interest. In this case, the Court felt that the State interest in formal education over a vocational education in agriculture is cannot compel First Amendment freedom. To claim exemption from neutral laws, plaintiff must claim 1) their claim is religious 2) sincere and 3) the law would have a severe impact on their exercise of religion. Then the court considered the State claim of the strength of its interest.

Other exemptions to compulsory education would be statutory, which would put the option in the hands of a parent. Judicial exemptions such as married girls are rare today.
Admission requirements can include immunization, age and residency. Districts do not have to send children to any particular school, although race cannot be used in making a determination. Under NCLB, districts may have to allow students to transfer away from failing schools with the district.

In Meyer v. Nebraska 262 US 390 (1923) the Court held that a State cannot ban additional instruction in a language, implying that as long as compulsory requirements are meet, the State could not prevent instruction beyond them. That was affirmed in Farrington v. Tokushige 273 US 284 (1927) when the Court overturned a Hawaii law that limited and regulated after school attendance in private school. The question remains, if a sufficient State interest can prevent a topic from being taught in a private school. In State v. Whisner, th351 NE 2nd 750 (Ohio 1976), the appellate court found that a four-fifths rule for subject material in a private school effectively prohibits additional instruction. Such regulation infringes the right of “to direct the upbringing and education of their children in a manner... they deem advisable indeed essential, and which cannot say is harmful,” unless that State can demonstrate that otherwise there will not be an “a general education of high quality.” States can require private school teachers to be certified.

Home schooling does not have the same legal standing, as they could undo all compulsory education laws, but all States recognize them in one way or another. Home school children do not have rights to participate in district programs.

Although aid to religious schools is very complicated, the court found the Lemon Test 1) purpose is not to endorse or disapprove religion 2) primary effect is not to aid or inhibit religion and 3) not to entangle the sovereign with religion. Textbooks and busing were already allowed, but aid for remedial teaching has been rejected and later approved.
The neutrality doctrine was found in Muellar v. Allen 463 US 388 (1983), was used to allow income tax deductions if possible for all. It did not matter that most people who took advantage were using the law for religious schools. In Zelman v. Simmons-Harris 536 US 639 (2002), the Court held that vouchers were valid in Ohio, affirming previous cases.
Chapter Three

There have been few successful challenges to local board instituting curriculum, graduation, etc. without direct delegation from the State. Since some State have required textbooks, course content, local board will have the most control in determining the political and cultural perspectives of courses.

In Engle v Vitale 379 US 421 (1962) the Court rule unconstitutional nondenominational prayer composed by the State. In School District of Abington Township v. Schemp 374 US 203 (1963), the Court ruled opening prayers unconstitutional. “The test may be stated as follows: what are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and primary effect that neither advances nor inhibits religion.” These became the first two parts of the Lemon Test. We already saw in the second Agostini v. Felton 521 US 203 (1997), a relaxation of the excessive entanglement test from Lemon and Aguilar v. Felton 473 US 402 (1985), where the Court no longer presumed that public employee will inculcate religion simply because they are in a sectarian setting.

The display of the Ten Commandments has been disallowed. Football coaches cannot lead prayer. In Santa Fe v Doe 529 US 290 (2000) the Court disallowed authorities from allowing students to elect one to lead invocations, suggesting the use of prayer. But a district court has since allowed students to initiate prayer under a policy that only authorizes an opening or closing message. This rule seems to be the language of the
authorization, and it *legislative history*. Thus moments of silence have been unconstitutional because of past policies, mere changing of words in order to pass judicial review (Wallace v Jaffre 472 US 38 (1995). Courts have allowed moments of silence when prayer is mixed in with other activity in the language and intent.

School closings on holidays are easier because the amount of absence by teacher might pose a safety hazard for students. Holiday music is a problem dealt with in an appellate case Flory v Sioux Falls 619 F.2d 1311 (1980). The court held that policies worded to allow religious celebration with a secular purpose and effect is constitutional. Of interest is that while few would question the study of religion secularly, the court found that banning the performance of religious works would give “students a truncated view of our culture.” The court also mentioned that the ban excessive entanglement was to prevent religion from compromising its tenets because of government, which is absent in this case. The dissent asked why not study United Nations Day as a day to promote world peace and brotherhood? It must be because indeed, it does not the *religious* significance as religious holiday. The dissent said in analyzing for religious content and making judgement over its permissibility, administrators will become entangle in religion, and that elections to school boards would be fought over religion, in a new meaning of excessive entanglement.

In Epperson v Arkansas 393 US 97 (1968) the Court ruled against a law banning the teaching of evolution. Interestingly, the court said, “Arkansas did not seek to excise from the curricula of its schools and universities all discussion of the origin of man. The law’s effort was confined to an attempt to blot out a particular theory because of its supposed conflict with the Biblical account, literally read.” Is that dicta?
Courts have rejected other policies on religious ground, even though the people who pushed them might have had religious motivation, “The mere fact a governmental body takes action that coincides with the principles or doctrines of a particular religious group, however, does not transform the action into an impermissible establishment of religion.” Clayton v Place 774 F.2d 376 (8th Cir. 1989). Even disclaimers to evolution have been found unconstitutional. In Smith v. Board 827 F.2d 684 (1987 11th Cir.), the court rejected a claim that textbooks were establishing secular humanism.

I found Altman v Bedford 245 F. 3d 49 (2nd Cir. 2001) disturbing. Parents sued over their children asked to participate in an Earth Day celebration that was clearly a pagan ritual based on pantheism.

In Mozert v Hawkins County 827 F.2nd 1058 (6th Cir. 1987), parents sued so that their children would be exempt from a program that exposed them to belief contrary to their religion. The court ruled that students were only asked to discuss and interpret material not make any judgments against their religion. Parents objecting to reproductive education have been rejected. “If all parents had a fundamental constitutional right to dictate individually what the school teaches their children…” Brown v Hot 68 F.3d 525 (1st Cir. 1995). We will soon see later that school officials can ban teaching of obscene material.

In West Virginia V Barnette 319 US 624 (1943), in which the court struck down a requirement to say the Pledge, Justice Jackson wrote, “To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds. We can have intellectual individualism and the rich cultural diversities that we owe to
exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price in not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

“There is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of pinioning or force citizens to confess by word or act their faith therein…The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of a political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One’s right to life liberty and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcomes of no elections.”

The court rejected the claim that the school was dealing with student. “That they are educating the young for citizenship is a reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.”

Schools have in general been allowed much latitude in removing books from libraries, but it must follow pedagogic interests. Republicans cannot remove Democrat books. All agreed that vulgar books and not age appropriate books could be removed. In Virgil v School Board 862 F.2d 1517 (11th Cir. 1989) the court saw little reason for the
school removing certain classics deemed inappropriate, but allowed educators in making that judgement. It seems that books cannot be removed for racial purposes, most notably in blatant cases.

No Child Left Behind imposes curriculum requirements to improve test scores and to teach abstinence from promiscuity. A Guidance written by the Secretary of Education allows student prayer deemed consistent with Court decisions.

Copyright law seems be lenient to teachers provided that the purpose is educational, the copyrighted material lend themselves out to fair use, the amount is use is not the entire work, and the effect on the potential market.

The Equal Access Act 20 U.S.C. 4971 says that once schools that use federal funds allow use for non-curricular activities to one group, they must do so for another group. That Hatch Amendment 20 USC 1232h provides that all instructional material is available for parental inspection. It also prohibits students from being used to in experiment to determine political leanings and other classified material. That has been so difficult to interpret that it has had little effect.
Chapter Four

In Texas v Johnson 491 US 397 (1989), flag burning case, the Court said, “We have asked whether an intent to convey a particularized message was present and (whether) the likelihood was great that the message would be understood by those who viewed it.” The court seemed to be protecting the message conveyed by the burning of the flag. The message is political by nature. Dress and apparel by no stretch can be compared and must find some other form of precedent. The communicative content of ethnic heritage discovered by the circuit court cannot be any greater than the Supreme Court ruling that the Air Force could prevent an Jewish officer from wearing his yarmulke. I am quite surprised at the text and the Fifth Circuit for not citing this high court case.

The basic guidelines of what is obscene and can be outlawed is (a) whether the average person, applying contemporary community standards find that a work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive conduct specifically defined by the applicable state law, and (c) whether the work, as a whole, lacks serious literary, artistic, political, or scientific value. Fighting words can also be outlawed. Commercial speech can be regulated if the interest is substantial, directly advances that interest, the regulation is narrowly tailored to meet the objective.

Speech can never be regulated due to disagreement, but can be regulated for its impact and form. Form, such as loud speakers, is the easiest to regulate, and content neutral speech is easier than regulation of content. There always must be a compelling state interest. For regulations to be constitutional they must be content neutral, serve a
significant government interest, narrowly tailored and leave ample alternative means to reach the targeted audience.

In Tinker v Des Moines 393 US 503 (1969), the Court ruled that students did not leave their right to freedom of speech at the schoolhouse gate. The students were protesting the Viet Nam War. This was some vague expression of self through dress, but a concrete political statement. The text shows its lack of understanding when it asks on page 146 about the tension between Tinker on the one hand and Hazelwood and Fraser on the other hand. Besides that the message in Tinker in no way carried the imprimatur of the school, there was absolutely no concrete message in Fraser. To suppress Tinker would be to silence a political opinion.

In Trachman v Anker 563 F.2d Cir.512 (1977) the court permitted a school to ban a potentially physiologically damaging questionnaire. This and other cases dealt with the material and substantial disruption standard. In Thompson v Waynesboro 673 F Supp 1379 (1987) the court found in favor of students distributing religious material in the hallways. The school had permitted distribution of other material, so the rule was content directed.

Government property is divided into the traditional public or open forum, the public forum by designation, and the nonpublic forum. The designated forum is the hardest to regulate because there is little to argue in terms of time, manner and place to prevent speech.

In Eisner v Stanford 440 F.2d 803 (1971) the court allowed prior restraint when standards were previously determined. But Burch v Barker 861 F.2d 1149 (1988) did not allow it when there was an undifferentiated fear of disruption. This case applied to a non-
school newspaper. The school had no need to know content in advance than speech in the cafeteria.

Hazelwood 484 US 260 (1988), dealt with a school newspaper. The principal omitted offensive articles. The school does not have to promote a particular speech, which was made as part of the curriculum.

Schools cannot prevent students from writing on religious topics if within the assigned content, just because it is religious.

In Bethel v Fraser 478 US 675 (1986) the court said that the first amendment rights of students “are not coextensive with the right of adults in other settings.” The case involved lewdness of a speaker. The question arises from the two cases is, can school make viewpoint decisions to disallow speech. On page 146, the text cites Borkof v Van Wert 220 F.3d, 465 (6th Cir. 2000) that dealt with a ban on certain T-shirts, advocating drug abuse, contrary to the message of the school. Did the text forget the most important free speech case, Schenck v. United States (1919)? Holmes that, “The question in every case is whether the words used are in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.” Now, there might not have been a clear and present danger, but the shirts were advocating illegal activity. The Tinker case did not involve student advocating resisting the draft, but offered an opinion of our involvement in the war.

In Thomas v Board 607 F.2d 1043, (1979) the court said, “When an educator seeks to extend his dominion beyond these bounds (the schoolhouse), the must answer to the same constitutional commands that bind all other institutions of government.” Now,
the court did not mean that students cannot never be punished for speech outside the school, but also said, these punishments could only have been decreed by an independent impartial decision maker.” Educators are too involved.

In Lambs Chapel 508 US 384 (1993), religious family values viewpoint were prevented from public use. “That subject matter is not one that the District has placed off limits to any and all speakers.” In Good News Club 533 US 98 (2001), the court even allowed religious instruction after school by a private group. The Second Circuit decision upholding the exclusion of religious instruction in Bronx Household v Cmty. Sch. Dist. No. 10, 127 F.3d 207 (2d Cir. 1997), may not necessarily be called into question, as done in the text on page 153, if Lambs Chapel is understood to allow the prohibition of a whole class of subject matter.
Chapter Five Summary

Many schools are wise to develop a written code of student conduct to avoid unfairness, confusion and potential litigation.

In Neuhaus v Frederico 505 P.2d 939 (Or. Ct. App. 1973), the court ruled that a regulation on the length of boys’ hair arbitrarily regulated off-campus behavior because hair, unlike clothing, could not be modified upon returning home, beyond the scope of “some reasonable connection to the education process,” in the statute authorizing rules. The book cites challenges to boys’ hair length bases on free speech, free exercise of religion, and equal protection. Although free speech claims usually fail, Native Americans have succeeding by showing hair length relationship to their religion. The book cites Fourteenth Amendment liberty interests but fails to mention any equal protection cases that might make the strongest cause.

When the book attacks statutes excluding married students from school violating their constitutional right of privacy, it quotes in footnote number 22, Griswold v Connecticut 381 US 479 (1965), which had nothing to do with married students. “The specific guaranties in the Bill of Rights had ‘penumbras formed by emanation from those guarantees that help give them life and substance. Various guarantees create zones of privacy.’ The court created new right of privacy from the prohibition against the federal government against quartering of troops and searches and seizure, and used that ‘halo’ to force upon the States some new right of privacy. Thus, the Connecticut law banning the sale of contraceptives to married people was unconstitutional.

Vague rules can violated to Due Process Clause because they fail to provide adequate notice of what is permissible and invite bias in application. An overbroad rule
does more than necessary toward its ends and might violate substantive due process rights.

The Ninth Circuit set outlined a set of criteria for the use of force. a) The need for force b) the relation between the need and the action c) the extent of harm to the student and d) whether the action was taken in good faith or for the purpose of causing harm.

School officials are not required to give a Miranda warning. Searches of anything in plain view are legal. If students are informed in advance of possible searches, a Pennsylvania court had allowed. He Fifth Circuit allows sniff dogs to be used on property, but not on people. If a teacher forces a student to consent to a search, no right has been waived. A New York court said that the exclusionary rule does not apply to school disciplinary hearings.

In New Jersey v TLO 469 US 325, the Supreme Court ruled that the subject of a search need not be based on probable cause in schools, but on reasonableness. First one must consider “whether the action was justified at its inception,” and second, the actual search, “was reasonably related in scope to the circumstances which justified the interference in the first place.” The reasonableness standard will spare teacher and administrators the necessity of schooling themselves in the niceties of probably cause and permit them to regulate their conduct according to the dictates of reason and common sense. Thus officials in schools are not governed by rules that determine police conduct, but are not similar to parents.

TLO said nothing about sweep searches. The more intrusive the search, the more individual suspicion is required, not just searches of all students. School official conducting the most intrusive searches must make sure that a tip is not motivated by
malice. A Florida court dismisses drug charges when an official rummage through a purse initially looking for a knife, with reason, but started looking for other things.

In Board of Ed. Pottowatomie County v Earls, 536 US 822 (2002), the court upheld drug testing for all in extra curricular activity, even other than sports. The activities were optional. Even if there was not drug problem yet, the school did not have to wait for one. Probable cause “would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed.” “The fourth amendment imposes no irreducible requirement in [individualized] suspicion.” A search unsupported by probable cause may be reasonable “when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impractical.” “Fourth Amendment rights…are different in public schools than elsewhere; the reasonableness inquiry cannot disregard the schools custodial and tutelary responsibility for children.”

As in Vernonia, the context of the public school environment serves as the backdrop for the analysis of the privacy interest at stake and the reasonableness of the drug testing policy in general…(Central…is the fact that the subjects of the Policy are (1) children, who (2) have been committed to the temporary custody of the State as schoolmaster”),…(The most significant element in this case is the first we discussed; that the Policy was undertaken in furtherance of the government’s responsibilities, under a public school system, as guardian and tutor of children entrusted to its care”);… (“When the government acts as guardian and tutor the relevant question is whether the search is one that a reasonable guardian and tutor might undertake”).

The court went on to say that securing order in the school environment sometimes requires that students be subjected to greater controls than those appropriate for adults.
The safety interest furthered by drug testing is undoubtedly substantial for all children, athletes and non-athletes alike... In this context, the Fourth Amendment does not require a finding of individualized suspicion and we decline to impose such a requirement on schools attempting to prevent and detect drug use by students. “The logic of less intrusive alternative arguments could raise insuperable barriers to the exercise of virtually all search and seizure powers.”

In Goss v Lopez 419 US 565 (1975), the Court rules that students who were suspended without any chance to answer charges were denied due process rights. “The fundamental requisite of due process of law is the opportunity to be heard,” a right that has “little reality or worth unless one is informed that the matter is pending and can choose for himself whether to... contest.” At the very minimum, therefore, students facing suspension and the consequent interference with a protected property interest must be given some kind of notice and afforded some kind of hearing.” There need be no delay between the time “notice” is given and the time of the hearing. Formalizing the suspension process and escalating its formality and adversary nature many not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process.

I State Court ruled that failure to comply with his school’s attendance policy resulting in a grade reduction requires due process. Goss made it clear that suspensions less than ten days did not require formal due process. One district court held the one cannot be denied Fifth Amendment right to remain silent merely because he is a student. Justice Douglas once said that people might be silent simply because of timidity. Expulsions from school for more than ten days require “such relevant proof as adequate...
to support a conclusion of ultimate fact,” guilt more likely than innocence, not the beyond a reasonable doubt as in criminal proceedings.

The individual presenting the case should not deliberate with the school board or tribunal, as in Gonzales v McEuen 435 F Supp. 460 (1977). Extensive use of hearsay should be avoided.

Corporal punishment is permitted and do not require due process guarantees, as long as public schools are open for scrutiny. Students arguing a deprivation of right to education upon expulsion, and demanding placement into an alternative program, have not met success.
Chapter Six

The court will apply the strict scrutiny test to race and ethnicity, and fundamental constitutional rights such as speech. Government must demonstrate that differential treatment is necessary to accomplish a compelling state purpose. This can virtually never be met. The substantial relation test is applied to gender. Government, which still has the burden of proof, only needs to demonstrate that differential treatment is substantially related to the achievement of an important government purpose. The rational basis test places the burden on the plaintiff to show that differential treatment is wholly unrelated to any legitimate government purpose.

In Strauder v. West Virginia 100 US 303 (1879), the conviction of a black man was overturned because State law specifically excluded black men from jury duty. The Court held that the purpose of the Fourteenth Amendment was to exempt colored people from unfriendly legislation and discrimination implying inferiority in civil society. Notice however, in Twitchell v. Pennsylvania 1869, Twitchell, a black man, hanged after claiming that Pennsylvania denied him fifth and sixth amendment rights by moving his trial to a distant area. The Court found that his trial was no different from the trial of any other accused in the State, a facially neutral law. The State did not specifically exclude black men from jury duty, even though no blacks served on the distant jury. Take note that the State did not have to conduct trial in the district of the crime or any of the other requirements that the Bill of Rights put on the federal government. Justices who lived through the Civil War era and the passage of the Fourteenth Amendment heard both these cases. The Fourteenth Amendment did not incorporate the bill of rights.
In 1886, the Court recognized the existence of discrimination in a facially neutral law in Yick Wo v Hopkins 118 US 356 (1886). The “separate but equal” doctrine was created in a State case in Roberts v City of Boston 59 Mass. 198, 206 (1850). The Plessy Court applied that doctrine in to the Fourteenth Amendment in 1896. The burden of proof then rested with the plaintiff to show that any law was without adequate justification. In 1938 the Court first applied the strict scrutiny test in Us v Carolene 304 US 144. The usual presumption that laws are constitutional will be weakened if the legislation concerns matter prohibited by the Bill of Rights, the right to vote or to disseminate information or interferes with political organizations, or is directed toward religious or racial minorities.

Starting with ex rel. Gaines v Canada 305 US 337 (1938), the court began forcing graduate schools to take in Blacks because Negro Colleges were either nonexistent or unequal. In Sweat v Painter 339 US 629 (1950), the court ordered the admission of a Black student to the University of Texas law school since it was better than the Negro school. Yet in Korematsu v US 323 US 214 (1944), the court applied the strict scrutiny test and allowed the interment of Japanese Americans because of national security concerns. Yet, in nonracial cases such as Goecaert v Cleary 335 US 464 (1948) the court applied the rational basis test for gender discrimination.

In Brown v Board of Ed. 347 US 483 (1954), the court wrote that, “Separate educational facilities are inherently unequal.”

The text on page 214 writes “Bolling indicates that de jure segregation would be unconstitutional even if the Equal Protection Clause did not exist.” This is nonsense. There is no difference between the Due Process Clause and the Equal Protection clause.
The Fourteenth Amendment had one goal in mind, the end of discrimination. Just so that lawyers should not start dissecting the law for legal technicalities, perhaps to apply it to race and not ethnicity, Congress was not specific. The Amendment used broad terms such as Privileges and Immunities, Due Process, and Equal Protection. Due process was long understood to mean that only through the normative legal procedure could someone be punished, which really means that all are entitled to equal protection of the laws.

All intentional discrimination is de jure but unintentional discrimination is de facto and not unconstitutional. If a policy I adopted because of its discriminatory impact it is unconstitutional. If a rational decision maker should have known that it would discriminate is evidence of its intent to discriminate. One test applied is “suppose the adverse effects of the challenged government decision fell on whites instead of blacks, would the decision have been different?” In Diaz v San Jose Unified School District 733 F.2d 660 (9th Cir. 1984), the court said that if it had a compelling reason for its policies, the government would have articulated it in the first place, rather than deny that its intention was to segregate.

In Brown I, the court talked about “decrees “ that district courts will issue to remedy segregation. In Brown II 349 Us 294 (1955), the court put the burden upon defendants to establish that such time was necessary in the public interest and is consistent with good faith compliance at the earliest practicable date. In Alexander v Holmes County Bd. of Ed. 296 US 19 (1969), that the era of “all deliberate speed” was over.

The text asks on page 217, “Why would de facto separate but equal be any more possible than de jure separate but equal?” This question is based on a fallacy that
originated with the court in Swann v Charlotte-Mecklenburg Board of Education 402 US 1 (1971). The court ruled that district courts could seek racial balances, order gerrymandering of districts as remedies, order busing of pupils and further declare districts as unitary. The fallacy is in the explicit intent of the Fourteenth Amendment. Section three gives Congress the power to impose remedies for the provisions of the Amendment, not the courts. The 1964 Civil Rights Act did just that. The role of the court is to hear cases.

A social remedy is the function of the political branch of government. And yet, the present court still feels that it only has the authority to engineer with society. Thus it ruled in Grutter v Bollinger 123 S. Ct. 2325 (2003), that the achievement of a diverse student body was within the authority of Michigan, that a “critical mass” of minority students could be sought so that each should not feel that he was the spokesperson for his race, but not if the goal were to reduce the historic deficit of disfavored minorities, or to increase the number of minorities in a profession, or to remedy social discrimination. If not for the legislature, then who has the authority? How can a levelheaded observer of the history of our judiciary explain this contradiction?

In Milliken v Bradley 418 US 717 (1974) the court reversed a district court imposition of cross-district busing. The district court said that school boundaries are “no more than arbitrary lines on a map drawn for political convenience.” The high court ruled that only if the districts were drawn with regard to race, could they be dissolved by the court, not to achieve a remedy. In Milliken II, 433 US 267 (1977) the court allowed the court imposed teacher training and remedial program. In Missouri v Jenkins 495 US 33 (1990) the court overturned a court imposed property tax increase. Yet the Supreme
Court allowed an order to the local government to raise taxes.

In Gratz v Bolinger 123 S. Ct. 2411 (2003) the court overturned Michigan’s affirmative action policy that allowed twenty points on a scale of one hundred for minority admission to college. In Equal Open Enrollment 937 F. Supp. 700 (N.D. Ohio 1996) the district court found that an Ohio law that blocked the transfer of White students from a minority district. There were other methods to achieve the desired ends and the policy sent the message that White students were more valuable than nonwhite students. In Eisenberg 197 F.3d 123 (4th Cir. 1999), a transfer policy was ruled unconstitutional, “Although the transfer policy does not necessarily apply hard and fast quotas, its goal of keeping certain percentages of racial/ethnic groups within each school to ensure diversity is racial balancing.”

The text says that after Grutter and Gratz, it is doubtful that a program such as that found legal in Hunter 190 F. 3d 1061 (9th Cir. 1999) would be constitutional. The program was a laboratory to study issues of urban education.

Single gender schools in Vorchheimer 532 F.2d 880 (3rd Cir. 1976). The dissent said objected to the claim that a girls school would be opened, “the implementation of the Board’s policy excluding females …there is not option of a coeducational academic senior high school.”

Courts have since disallowed single gender schools. Title VI of the 1965 Civil Rights Act allows federal agencies to impose promulgate regulations against discrimination against schools taking federal funds, which includes private school who are immune from the Fourteenth Amendment. It allowed litigation for discrimination. Remedies cannot be sought by individuals, but by the Department of Education. Title IX o the Educational
Amendments of 1972 does similar for gender. Separate sports are allowed for contact activities and competition purposes and when a separate team available.

In Gebster v Lago 524 US 274 (1998), the Court ruled that a district is not liable for gender harassment unless an official has actual knowledge. Someone with hearsay knowledge might be held personally liable for not monitoring the party at fault.
Chapter Seven

Two cases in the early 1970’s, Pennsylvania Association for Retarded Children v Commonwealth, 334 F. Supp. 1256 and Mill v Board of Education, 343 F. Supp. 278 found that children were being excluded from public school because they had disabilities the effect was to wholly deprive them of access to publicly funded education, the government’s purpose was to save money and excluding the children was not rationally related to saving money since they were to become a bigger burden with education, and exclusion of them violated the Equal Protection Clause. Three federal laws began to make a change. The Rehabilitation Act of 1973 (REA), the Americans with Disabilities Act of 1990 (ADA), and the Individuals with Disabilities Education Act of 1975 (IDEA).

The RHA says that “no otherwise qualified individual with handicaps…shall solely by reason of her or his handicap, be excluded from participation in, be denied the benefits or, or be subjected to discrimination under any program or activity receiving federal financial assistance…” This applies to both public and private school. IT protects any person, such as students, teachers and other employees, who (i) has a physical or mental impairment which substantially limits one or more of such person’s major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment. Major activities include caring for oneself.

The ADA applies only to public institution, based on Congress Fourteenth Amendment power, that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs or activites of a public entity or be subjected to discrimination by any such entity.” Qualified person means an individual with a disability who with or without
“reasonable modification” to rules, policies or practices…meets the essential eligibility requirements for the receipt of services or participation in the program.

Under the ADA discrimination requires modifications only if they would fundamentally not alter the goods, services, facilities, privileges, advantages or accommodations provided. The Eight Circuit allowed a sports maximum age limit despite a disabled child’s advanced age in school because it would fundamentally alter the sports program. In Brookhart v. Illinois State Board of Education 697 F. 2d 179 (1979), the Seventh Circuit upheld a minimum competency test for graduation. “A student who is unable to learn because of his handicap is surely not an individual who is qualified in spite of his handicap…However, an otherwise qualified student who is unable to disclose the degree of learning he actually possesses because of the test format or environment would be the object of discrimination solely on the basis of his handicap...”

In Bercovitch 133 F 3d. 141 (1998), a student who could not behave due to a handicap was not qualified as the First Circuit wrote, because he could not meet the school’s behavioral requirements even with reasonable accommodations. The requested modification of the code amounted to a “significant alteration of a fundamental requirement of the school.”

The IDEA mandates that all children with disabilities must receive a free appropriate public education (FAPE), which means “special education and related services that are provided at public expense, under public supervision and direction without charge and are provided in conformity with the child’s individual education plan (IEP). This is whether or not parents want the services, but parent have a right to participate in the decision process and to examine all record. States have certain latitude
in applying definition of learning disability in accordance with their own statutes and regulation. States are required to locate, identify and evaluate students with disabilities, even those who have never enrolled in public school.

The Supreme Court ruled in Hendrick Hudson Central School District v. Rowley, 458 US 176 (1982), said that students do not have to be provided all services that their parents request. “State maximizes the potential of handicapped students commensurate with the opportunity provided to other children.” The basic floor of opportunity is access to specialized instruction and related services, which are individually designed to provide educational benefit to the handicapped child. Children who graduated are considered by society as educated to that grade level and access to education for handicapped children is precisely what Congress sought to provide in the Act. Instruction and services must approximate the grade levels used in the State’s regular education and must comport with the child’s IEP. It should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade. A test of whether the State complied with the procedures set forth in the Act and second whether the program is calculated so that the child receives educational benefits is asked. The courts to resolve persistent and difficult policy decisions should not replace the specialized knowledge and experience of educators. The court only asks the question of compliance but methodology is for the States.

The decision requires that the education must be a meaningful benefit. The Third Circuit said this means that it is likely to produce some educational progress not “regression or trivial advancement.” Diamond 808 F2d. 987 (1999). In Timothy W v Rochester School District 875 F. 2d 954 (1st Cir. 1989), a lower court’s denial of special
education for a “severely retarded and multiply handicapped child” was not eligible for services under IDEA because he could not benefit from special education, was reverse. The Court said that regardless of handicap, all are entitled to a public education. The impetus of the Act was the denial of certain handicapped children from public education on the ground that they were un-educationable. They must be taught not only traditional academic skills, but also basic functional life skills, and that educational methodology in these areas is not static, but are constantly evolving and improving. “Appropriate individualized educational program” cannot be interpreted as “no educational program.” Thus IDEA does not recognize the existence of children who have such severe disabilities not to benefit from some form of education broadly define.

I Rowley, the Supreme Court permitted the district to refuse a speech interpreter. In general schools can choose a less costly program over a more costly program that provides more benefits if the less costly program meets the Rowley standard. But if the expense is necessary for the student to have a meaningful educational benefit, like a full time nurse during school hours in order to attend school, the Supreme Court ruled that district must provide it (Cedar Rapids v Garret 526 US 66 (1999)).

In Garret F (468 US 883, 1984), the Court ruled that in determining whether schools are obligated “services that relate to both the health and education needs of handicapped students,” that such services must be provided only to children who require special education, be provided only if necessary to permit the child to benefit from special education (if a treatment may be administered later in the day, the school was not obligated), they must be provided only if the may be performed by a nurse or other, but not a doctor.
In Butler v Evan 225 F. 3d. 887 (7th cir. 2000), the court ruled that a child who was hospitalized for psychiatric reason was not entitled to reimbursement. “Unlike in school nursing [Garett], Nikki’s impatient medical care was necessary in itself and was not a special accommodation made necessary only to allow her to attend school or receive education.”

IDEA requires mainstreaming “to the maximum extent appropriate” the child must be educated with children who do not have disabilities. The IEP must explain the extent, if any, to which the child will not participate with nondisabled students in the regular class.” IDEA does not mandate inclusion and requires special placement if the regular classroom cannot provide an appropriate education. In Daniel 874 F.2d 1039 (5th Cir. 1989), the court made a two-part test. First, whether education in the regular classroom with the use of supplementary aid and services can be achieved satisfactorily for a given child, and secondly, in not, has the school mainstreamed the child to the maximum extent possible. The Act does not require regular educators to devote all or most of the time to one handicapped child, for that will make a regular classroom into a special education class. The only advantage, which is to the detriment of all other students, would be the special education student sitting next to a non-handicapped student. The Sixth Circuit gave more weigh to mainstreaming, and the Ninth Circuit made a four-part test. Th Fourth Circuit said that social benefits are subordinate to academic achievement (Harman 118 F. 3d. 996 (4th Cir. 1997).

Even when a major goal of residential placement is training in basic life skills, like using a fork, schools must pay for it unless an appropriate education could be provided in a nonresidential setting. The Third Circuit said that the issue is whether “full
time placement may be considered necessary for educational purposes, or whether the residential placement is a response to medical social or emotional problems.”

When students move, there is a stay-put requirement to maintain a status quo during impartial hearing. However, crossing state line, the Third Circuit, said that congress did not intend to make one state required to implement the IEP from another State without considering how consistent that IEP was with their own laws and policies.

If a student’s misbehavior is found not to be a manifestation of a disability, he may be subjected to the same disciplinary procedures. However, he must still be provided with education, a FAPE.

The Ninth Circuit wrote in Lau V Nichols, 483 F. 2d. 791 (1973) revised 414 US 563 (1974) that, “every student brings to the starting line of his educationally career different advantages and disadvantages and caused in part by social, economic, and cultural background, created and continued completely apart from any contribution by the school system.” The Supreme Court however said that “there is no equality of treatment merely by providing the students with the same facilities, textbooks, teachers, and curriculum; for students that do not understand English are effectively foreclosed from any meaningful education.” In 1974 Congress adopted the Equal Educational Opportunity Act (EEOA) which provided impart, “No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin by…the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.” In Castaneda v. Pickard 648 F.2d. 989 (Fifth Circuit 1981), the court made a three-part test. 1) The school must adopt a program “informed by an educational theory recognized as
sound by some expert in the field or, at least, deemed a legitimate experimental strategy,
2) the program must be “reasonably calculated to implement effectively the educational
theory adopted by the school,” and 3) the school must be able to show that language
barriers are being overcome. Other courts have adopted this test. The Court and a federal
grant program have sia that this is not to be interpret this “to require a State or a local
educational agency to establish….any particular type of instructional program for limited
English proficient children.”

In al cased, differential treatment must meet the requirements of the Equal
Protection Clause, this it al least be rationally related to a legitimate state goal.
Chapter Eight

The most important case concerning school finance is San Antonio Independent School District v. Rodriguez, 411 US 1 (1973). The case followed a long series of state cases such as Serrano v Priest (California, 487 P.2 1241) that used the equal protection clause of the Fourteenth Amendment, in addition to state constitutional provisions, to mandate equal financing in every school district. The United States Supreme Court ruled in Rodriguez that the strict scrutiny test should not be applied to education, as it is not a fundamental right. Therefore, if there is a reasonable basis to a finance system, then it is constitutional.

The Court noted, “The poor were clustered around commercial and industrial areas—those same areas that provide the most attractive sources of property as income for school districts.” It said, “the absence of any evidence that the financing system discriminates against any definable category of “poor” people (there can be rich and poor in a “poor” district), or that results in the absolute deprivation of education—the disadvantaged class is not susceptible of identification in traditional terms…Appellees’ suit asks this Court to extend its most exacting scrutiny to review that allegedly discriminates against a large, diverse, and amorphous class, unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts.”

When appellees claimed that education is fundamental because it prepares citizens to vote and speak, the Court answered, “We have never presumed to possess either the ability or the authority to guarantee the citizenry the most effective speech or the most informed electoral choice.” In assessing the system of local control, the court said, “No
area of social concern stand to profit more from a multiplicity of viewpoints and from a
diversity of approaches than does public education.”

In Plyer v Doe, 457 US 202 (1982), the court ruled that a state cannot exclude
illegal aliens from education. Even though illegal aliens are not a suspect classification
entitled to strict scrutiny, and that the Court in Rodriguez said that an absolute denial of
education would require strict scrutiny, the Court in Plyer applied a middle level test for
the absolute denial of education.

In Kadrmas v Dickinson Public Schools, 487 US 450 (1988), the Court upheld the
charge of a busing fee because children were otherwise free to come to school by other
means, IT did not matter if the bus was the only practical alternative.

Intrastate inequalities and economic obstacles for education do not violate the
Equal Protection Clause. Only a scheme that completely denies educations to any group
of children would be unconstitutional.

A New Hampshire court (Claremont v Governor 703 A.2d 135, 1997) said that
“there is nothing fair or just about taxing a home or other real estate in one town at four
times the rate that similar property is taxed in another town to fulfill the same purpose of
meeting the State’s educational duty.” Many state courts used their own equal protection
clauses and especially the constitutional mandate to the legislature to create public
schools to go further that Rodriguez and require equal financing. However, Pennsylvania
exercised judicial restraint in Danson v Casey, 399 A. 2d 360 (1979). “Even were this
court to attempt to define ‘thorough and efficient education’ in a manner which would
foresure the needs of the future, the only judicially manageable standard that this Court
could adopt would be the rigid rule that each pupil must receive the same dollar
expenditures…The educational product is dependent upon many factors, including the wisdom of the expenditure as well as the efficiency and economy with which available resources are utilized.” The Georgia Supreme Court agreed with Rodriguez in that “education must provide each child with an opportunity to acquire the basic minimum skills necessary for the enjoyment of the rights of speech and of full participation in the political process,” and went further “it is primarily the legislative branch of government which must give content to the term adequate.”

The Supreme Court of Kentucky in Rose v Council for better Education, 780 S.W.2d 186 (1989) overturned the whole school system and taxation and finance basis since Kentucky school had such a poor outcome and difference in districts. IT laid down the following goal for the legislature to ensure: 1) sufficient oral sn written communication kills 2) sufficient knowledge of economic social and political system, 3) sufficient understanding of governmental processes 4) sufficient self-knowledge of mental and physical wellness 5) sufficient grounding in the arts 6) sufficient training or preparation for advanced training 7) sufficient levels of skills to compete with student from other states.

School boards have no inherent authority to tax. They are only authorized by the legislature and often for specific purposes. The Washington Court in 1912-1921, ruled that school districts could build playground and gymnasiums because they were connected with education, but not a medical clinic, even for pupils.
In Keyishian v Board, 385 US 589 (1967), the Supreme Court that a teacher can be dismissed for “specific intent to further the unlawful aims of an organization,” but not for “mere membership” or even knowledge of the organization’s unlawful goals. Nevertheless, oaths of affirmations, such as those to defend the Constitution, and to oppose the overthrow of the government, are permissible, but negative oaths, that one has never been a member of an organization are impermissible (logically follows Keyishian). State requirements that teachers who are eligible gain citizenship have been upheld.

In a Fifth Circuit case, the refusal to hire a teacher for summer employment because of support for a losing school board candidate was overturned. Policymaking administrators probably can be replaced if their policies differ from those of the board. In Castle v Colonial School District, 933 F. Supp. 458 (E.D. Pa. 1996), a federal district court prohibited enforcement of a school board policy prohibiting employees from engaging in political activities on school property at any time. However, because of conflicts of interest, teachers might be prohibited from becoming school board members. Mandatory leaves of absence for teachers in political office are not legal unless part of a general requirement time consuming forced leave.

In Pickering v Board, 391 US 563 (1968), the Court ruled that a teacher cannot be dismissed for advocating positions of public interest, not personal matters affecting only that teacher. “Teachers are as a class the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the school should be spent. Accordingly, it is essential that they be able to speak out freely on such
questions without fear of retaliatory dismissal.” Also, Pickering issued untrue statements, without malice. The board could have easily refuted them without his dismissal.

The Court also ruled in another case Givhan 439 US 410 (1979), that the speech need not be made in a public forum to receive First Amendment protection. However, in Connick v Meyers 461 US 138 (1983), an assistant district attorney was dismissed for circulating a questionnaire soliciting support of her criticism of her superiors. It was only personal grievances, not public policy. “The First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs.” The Court said that how much disruption need be tolerated by a public employers such be determined by the importance of the issue, the likelihood of disruption, and he degree and nature of disruption.

In Rankin v McPherson, 483 US 378 (1987), the Court ruled that a constable had to be reinstated after being fired for commenting that an assassin should have not missed the President. The comment was not made in a context that would bring discredit upon the office nor did the constable serve in a confidential or policymaking role. In Waters v Churchill, 511 US 661 (1994), a nurse in a public hospital was dismissed for private statements of grievances after an investigation. The Court said that “government employees should be allowed to use personnel procedures that differ from the evidentiary rules set by courts, without fear that these differences will lead to liability,” even if a court might have found differently. Even speech addressing matters of public concern might be grounds for dismissal if a substantial showing of disruption can be made.

In the case of teachers making a speech not as part of a lesson, it has to be public concern and the potential for disruption much be less than the speaker’s interest. Public
concern usually covers school curriculum and program, safety and well being of students, collective bargaining issues, alleged corruption, and issues that are already subjects of widespread public discussion.

The Seventh Circuit found in Varga 272 F. 3d 964 (2001), “The First amendment does not prohibit the discharge of a policy making employee when that individual has engaged in speech on a matter of public concern in a manner that is critical of superiors of their stated policies.” Policy makers have a greater potential for causing a disruption.

School officials may not seek to stifle criticism by requiring it to go exclusively through “channels.” There should be an adequate set of record to accompany an adverse administrative action against a teacher or employee, to show that someone was dismissed for incompetence, and not for any protected speech.

In Millikan, 611 P.2d 414 (Wash. 1980), a state court said, “Course content is manifestly a matter within the board’s discretion.” As for instructional methods, “Teachers should have some measure of freedom in teaching techniques employed.” Many courts could cite Hazelwood, which allowed the stopping of printing material in a student newspaper, as a doctrine that schools may control school sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns. Boards can thus prevent teachers from allowing profanity and immoral subjects in plays. But, due process requires that districts should have a previously written policy banning such practices before dismissal. In Mailloux 323 F. Supp 1387 (D. Mass) and 448 F.2d 1242 (1st Cir. 1971), a school teacher who was dismissed for writing profanity on the board was reinstated because, the state may suspend or discharge the teacher for using that method (of instruction) but it may not resort to such drastic sanctions unless
the state proves he was put on notion either by regulation or otherwise that he should not use that method.” However, in Krizek, 713 F. Supp. 1131 (N.D. Ill. 1989) the firing of a teacher that showed R rated movies was upheld because it rose legitimate pedagogic concerns.

In E Hartford, 562 F.2d 856 (2nd Cir. 1977), the court upheld a policy requiring the wearing of professional attire such as a tie. “As public servant in a special position of trust, teacher may properly be subjected to many restrictions in their professional lives which would be invalid if generally applied.” The dismissal of a teacher who refused to stop wearing short skirts was upheld. However, a rule prohibiting beard was overturned (Conard v Goolsby, 350 F Supp 713 N.D. Miss. 1972).

Districts often have policies that prohibit relatives or married couples from working together. A principal’s contract was not renewed because he married a teacher. In Hollenbaugh v. Carnegie Free Library, 439 US 1052 (1978), the Court refused to hear a case where two library employees were dismissed for living together in open (notorious) adultery. Several courts have protected unwed mothers from dismissal, despite claims that they are bad influences. A court upheld the dismissal of a teacher revealed that he is a fag. One court said it violated the Fourteenth Amendment. Several cases have upheld dismissal for open fag acts or fag advances.

In Lawrence v Texas, 123 S. Ct. 2472 (2003), the Court threw out the Texas law against sodomy. The book concludes that a teacher cannot thus be dismissed for engaging in illegal conduct if he practices the said act.
The Fifth Circuit upheld a policy that dismissed employees for substantial outside employment. The Supreme Court in McCarthy, 424 US 645 (1976) upheld a requirement that employees live within a district.

The First Circuit wrote that any psychiatric examination unrelated to the welfare of students would violate privacy rights.

Although all states have open records laws, records regarding an ongoing investigation and some personnel files may be covered by an exception. Employee can invoke Fifth Amendment rights against superiors if they think that a criminal investigation will ensue.

Title VII of the Civil Rights Act of 1964 forbids discrimination in public and private employment on the basis of race, gender, color, religion, or national origin. The Pregnancy Discrimination Act of 1978 prohibits discrimination on the basis of pregnancy and childbirths and related conditions. The Equal Employment Opportunities Commission (EEOC) is charged with the federal laws.

Over Disparate Treatment of an Individual (DTI) is when an employer openly bases a difference in treatment on race or gender. However, Title VII explicitly permits a bona fide occupational qualification. Some DTI cases involve complaint against Affirmative Action. In McDonald Douglas Corp. v Green, 411 US 792 (1973), the Court said, 1) the complainant must carry the burden of establishing a prima facie case (a case that will prevail if no rebuttal) of racial discrimination by showing that he is a member of a racial minority, he applied for a job that the employer wanted applicants for, despite qualifications he was rejected, after the rejection, the position remained open. 2) The burden then goes to the employer to articulate some legitimate nondiscriminatory reason
for rejection. 3) Then the employee must show that the reason is a mere pretext in intentional wrongdoing.

In Johnson, 480 US 616 (1987), a male bus driver was denied promotion because of gender reverse discrimination. The Court rejected his claim under Title VII because it was only one part of the decision, and employer was trying to correct an imbalance in the industry. But in another case brought under the Equal Protection Clause, Wygant, 476 US 267 (1986), the court ruled the opposite. “First, any racial classification must be justified by a compelling government interest” Second, the means chosen by the State to effectuate its purpose must be ‘narrowly tailored to the achievement of that goal.’” In that case, white teachers were laid off before blacks with less seniority based on a union contract. There was a need for more minority teachers in a minority district. There had to be prior discrimination, not just an imbalance. The test should be “between the racial composition of teaching staff and the racial composition of the qualified public school teacher population in the relevant labor marker.’ Prior discrimination must be shown for race-based remedies. “But as the basis for imposing legal remedies that work against innocent people, societal discrimination is insufficient and over expansive.” The end of discrimination comes form Brown, but also public employees must keep accordance with the Fourteenth Amendment, which is to “do away with all governmentally imposed discrimination based on race…must ensure that before it embarks on an affirmative action program, it has convincing evidence that remedial action is warranted. That is, it must have sufficient evidence to justify the conclusion that there has been prior discrimination.”
The Court noted that “hiring goals may burden some innocent individuals, the simply do not impose the same kind of injury that layoffs impose. Denial of a future employment opportunity is not as intrusive as loss of an existing job…While hiring goals impose a diffuse burden, often only foreclosing one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives…Other less intrusive means of accomplishing similar purposes—such as the adoption of hiring goals—are available.”

The Court clarified the contradiction with Johnson in Richmond 488 US 469 (1980). 1) There must be prior discrimination by the very employer 2) it is necessary to correct past discrimination and neutral polices will not work and 3) narrowly tailored not to harm innocent people or aid people who have not been discriminated against.

Covert DTI cases follow the three-prong McDonald Douglas framework. In Ridler v Olivia 432 N.W. 2d 777 (Minn. Ct. App. 1988), the application of a male chef with experience was rejected in favor of a female with not experience. The board claim, that since she substituted, she had a better qualification. That was a mere pretext since substitution was not even on the application. He showed discrimination in the workplace where there were no males.

Retaliatory discharge is when someone is fired for asserting legal rights. Mixed motive DTI is when there are other reasons in addition to race in a hiring decision. When the employer is able to show that the same action would have been taken in the absence of the impermissible motivating factor, the court still many not order reversal of the challenged action, only cessation of the impermissible practice and attorney fees.
Disparate Pattern of Practice is when policies have a disparate impact on a group. Cases might “involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity.” They are not violations of the Fourteenth Amendment but are violations of Title VII. The hiring practice must be significantly different that the pool of applicants. Once a prima fascia claim is made, the employers can show that it is consistent with business necessity. The plaintiff can dispute that by demonstrating other means without excessive costs that do not have a disparate impact on a group.

In Richardson v Lamar, 729 F. Supp.806 and 935 F. 2d 1240 (11th Cir. 1991), an African American was dismissed for not passing a teacher test. Although the district was protected from DTI treatment, since rehiring her would have allowed her to have tenure without a certificate, she successfully showed a disparate impact by Alabama’s test. Only 41% of Blacks passed it while 91% of Whites passed. Since the court found that the test was unrelated to job qualification, it could not be used as a condition of employment. Several other cases have been successful.

The Equal Pay Act requires equal pay to men and women for a similar job done. Job descriptions cannot be used to justify unequal pay, but seniority, merit, quality and quantity of production can.

Title VII defines promiscuous harassment as unwelcome advances when submission is a term of employment, basis for decisions affecting an individual, or unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment. Non-promiscuous jokes are not harassment. Also failure to conform to gender roles, such as an effeminate male may be
prohibited to harass, but if the person has a deviant orientation, then he may not be protected by many courts.

Quip-pro-quo harassment is when an employee is asked to exchange promiscuity for a job benefit. Hostile environment, either promiscuous or racial, entails the claim that an employee was subjected to an environment because of race or gender. It can be if the conduct is “sufficiently severe or pervasive to alter the conditions of the victim’s employment and create and abusive working environment, offensive to the victim and a reasonable person would have also been offended by the conduct.

To determine severity, courts consider the nature of the conduct, touching is worse than verbal, frequency of the conduct, and period of time in which it occurred. Districts can be sued, but not the perpetrators themselves. The Supreme Court ruled in Burlington Indus 118 S. Ct. 2257 (1998), “An employer is subject to vicarious liability for an actionable hostile environment created by a supervisor with immediate authority over the employee…No affirmative defense is available…when the supervisor’s harassment culminates in a tangible employment action…when no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages…a) that the employer exercised reasonable care to prevent and correct promptly any sexually (sic) harassing behavior, and b) that the plaintiff employee unreasonable failed to take advantage of any preventive or corrective opportunities provided by he employer or to avoid harm otherwise.

Schools would be wise to publicize harassment policies. The Court has not yet ruled on harassment by colleagues. Also individuals can be held liable as in the case of a
principal that took away art supplies from an intern, Monar v Booth 229 F.3d 593 (&th Cir. 2000).

In Cooper v Eugene Schools, 723 P.2d 298 (Ore. 1986) and to 480 US 942 (1987), a state law that prohibited teachers from wearing “religious dress while engage in performance of the duties as a teacher” was upheld. The court pointed out unobtrusive symbols would not be grounds for firing. Teachers cannot reject the curriculum based on religious belief. Teachers taking off for religious reasons are protected, but schools need not pay for that time. In Pinsker v Joint Dist. No.281 of Adams and Arapahoe Counties, 735 F. 2d 388 (19th Cir.1984), a Jewish teacher petition for the right to use other types of leave than personal for religious purposes. The court ruled that the loss of a day’s pay for time not worked did not constitute a substantial pressure to modify behavior; the school’s policy did not constitute an infringement of religious liberty. The California Supreme Court ruled that it was a violation of the state constitution to dismiss a teacher for being absent without permission in order to observe a religious holiday (Rankins v Comm’n 593 P.2d 852, 1979). Title VII protects against religious discrimination. Employee beliefs will not be protected if they are mere lifestyle preferences. Also, a man lost a claim to not work on Sunday when it was shown that he worked in the past on Sunday. Courts will tolerate the growth of religion over time.

Title VII permits religious schools to discriminate in hiring on the basis of religion but not gender or race. Title VII requires accommodation of “all aspect of religious observation and practices as well as belief, unless an employer demonstrates that he is unable to accommodate an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s
business. An inference of discrimination will be drawn if an employer asks about accommodation and then rejects the application. Again, unpaid leave, the Court ruled that a reasonable accommodation is not necessarily the accommodation that the employee would prefer.

The ADA prohibits discrimination against employees “because of the …disability of an individual with whom the employee is known to have a relationship or association.” But this only applies to hiring. The law does not require a reasonable accommodation. A person who is a direct threat to others is not covered by the ADA. School districts may not require applicants to undergo medical examinations before making a job offer, although they may require one after an offer. Section 504 of the Rehabilitation Act of 1973 also protects handicapped individual in federal funded institutions. Employee can choose the cheapest accommodation. A district need not pass over someone more senior to accommodate the lightening of responsibilities of someone with a disability.

Age requirements do not trigger strict scrutiny, so a mandatory retirement policy might not violate the Fourteenth Amendment. However, the Age Discrimination Employment Act of 1978 (ADEA) prohibits people above forty from discrimination on the basis of age. The courts are split on whether a disparate impact case can be brought. Usually older employees make more money. If hiring decisions are made based on a reasonable basis, not to hire experienced teacher to save money, the money indicative of experience rather than age, then there is not discrimination. When voluntary early retirement plans are made. They must be based on legitimate reasons, not because of age. Retirement benefits can be keyed to age if they are based on costs, not just age. Laying off older workers to save money is not legal.
Chapter Ten

Teachers need a state certificate to be eligible to teach in public schools. The certificate can be revoked for good cause followed by procedures spelled out by the State. Many states require that grounds for revocation be connected to teaching effectiveness. Under the No Child Left Behind Act, schools receiving federal funds must have highly qualified teachers as defined by the state.

Refusal to accept an assignment within a certification is grounds for dismissal. Similarly is refusal to do lawful extra-duty assignments reasonably related to the job of teaching. Schools also enjoy broad discretion to transfer teachers. If a transfer is a demotion, it can only be done in compliance with state law.

Half of all states require that provisional and tenured teachers who will not be subject to contract renewal to be notified in writing with reasons and other procedural protections. Failure to follow through can result in a teacher obtaining tenure by default.

Tenured teachers can only be dismissed for cause. Unlike a provisional teacher, they cannot be dismissed because the Board thinks a better teacher can be found. They can be dismissed for incompetence such as lack of knowledge of the subject matter, inability or failure to impart the curriculum, failure to work effectively with parents, colleagues and supervisors, and failure to maintain adequate discipline or to supervise students.

School citizenship groups can refer to insubordination or neglect of duties. But a Kentucky court held that a teacher could not be dismiss for the merely vague charge of failing to “cooperate” with the principal. Teachers may be dismissed on ground of “immorality” such a lying about their use of sick leave, or helping students cheat.
Incapacity relates to the mental or physical inability to teach. Role model falls into three categories: teachers convicted or accused of violating criminal law, teachers engaging in non criminal extra marital acts, and teachers committing other non criminal acts condemned by the school board such as lying.

Generally, courts do not allow dismissal unless a connection between criminal behavior and teaching effectiveness can be established. The West Virginia Supreme Court ruled that for a teacher to be fired for an act committed while away from the job, whether the conduct must have directly affected the teacher’s job performance or the notoriety surrounding the teacher’s conduct must have significantly affected the teacher’s ability to perform teaching duties.

In Bertolini v Whitehall City School District Board of Education, 744 N.E. 2d 1245 (Ohio Ct. app. 2000), the court reinstated a superintendent who was dismissed for having an adulterous affair with a married school employee. The court specifically rejected that he was a bad role model and the negative perception he gave. The court wrote that to rely upon the role model argument “would open the door to allow other teachers to be terminated because of race, religion, political beliefs and/or ---- orientation simply because the teacher was not the type of role model parents want their children to have.”

Here is the actual statement: Even if evidence was shown that appellant's colleagues had a "negative perception" of him because of the "rumors of an affair," this is not sufficient evidence to justify his termination. Additionally, if we were to allow the reasoning that appellant should have been terminated simply because his affair with a colleague made him not "the type of role model parents want their children to have," this
would open the door to allow other teachers to be terminated because of race, religion, political beliefs, and/or sexual orientation simply because the teacher was not "the type of role model parents want their children to have." Because of the potential abuse of this standard, we do not believe that this standard should be used.”

This is the allegation: In May 1997, appellant was hired by the Whitehall City School District Board of Education ("board") to be the associate superintendent for Whitehall City Schools ("Whitehall"). Appellant previously held the position of superintendent of the Leetonia School District ("Leetonia"). While working at Leetonia, appellant became acquainted with Patti Woods who was also employed by Leetonia. Even though appellant and Woods were married to other individuals, from July 1997 to November 1997, the two began a sexual relationship. After the board hired appellant, Woods applied for the position of secretary to appellant. She was interviewed by several individuals but was not interviewed by appellant. The individuals responsible for hiring determined that Woods was overqualified to be a secretary, so she was offered the position of EMIS coordinator with Whitehall. As EMIS coordinator, Woods' supervisor was Donald Moore. Moore's supervisor was appellant. Woods moved to Columbus but her husband remained in Columbiana County. Woods and her husband later divorced.

Woods stated in a hearing held before a referee that she had a good relationship with appellant and his family when she first began working for Whitehall. Woods had a key to appellant's home and took appellant's daughter home from school. Appellant had a key to Woods' condominium. Woods testified that around November 3, 1997, she attempted to end the romantic relationship with appellant but desired to remain good friends. Woods agreed with the statement that her "relationship with [appellant] and his
family continued to be fairly close after [their] physical relationship ceased, at least for a period of time." On November 9, 1997, shortly after Woods ended the romantic relationship with appellant, a conference was held for Ohio school superintendents and school board members. At the conference, appellant was required to assist Dr. James Crawford, the superintendent of Whitehall. However, appellant became drunk the first night and failed to attend the remainder of the conference.

This is ridiculous. The crime of adultery speaks for itself. Race and religion are legally protected. What is the logical connection between dismissing one for engaging in criminal behavior with another employee and race and religion? Race and religion are protected by the constitution and federal law. How would sanctions again the adultery lead to requiring teachers of a certain race or religion?

If notoriety surround a teacher’s conduct has led to a loss of respect from student or community member, the notoriety must have occurred as a result of the conduct itself and not because the board publicized the conduct. If a teacher has illicit relations with a minor, he can be punished even if the relations were many years in the past. School district can make condition of work intolerable to make someone want to quit. “Constructive discharge” is frowned upon by courts as a violation of due process. It is hard for the accused to get a hearing to rescind an action unless they show a significant degree of coercion that led to their voluntary resignation.

School officials serve best and are less likely to be found on the losing side of a lawsuit when they act on the basis of professional standard and statutory requirements and not out of personal pique or political pressure to dismiss someone. Firing a teacher
who is incompetent rarely results in litigation, but firing for lifestyles and personal animosity often does.

In In re Proposed termination of James E Johnson, 451 N.W. 2d 343 the dismissal of a teacher was sustained. Specific instructions were provided to change teaching methods and classroom methodology. The court said that the assignment of grade might be entitled to first amendment protection. A district directive not to deviate more than two percent from distributions in other similar classes was inappropriate.

One of the most brilliantly decided cases was Youngman v Doerhoff, Missouri Court of Appeals, 890 S.W.2d 330 (1994). A teacher hugged and kissed students to give them support. He was accused of misconduct. The Board focus “is exclusively on CC’s (the student) reaction to Teacher’s conduct—ie. CC interpreted the conduct as a --- advance,; CC was offended; CC was afraid; CC reasonably perceived the conduct as “—harassment”; Teacher’s conduct was not solicited or welcomed by CC…The Board dismissed him yet the court found that the Board only “focused exclusively on the offensiveness of the conduct to CC strongly corroborates our conclusion that the Board accepted Teacher’s explanation that his action were motivated by a sense of caring and concern for CC and were an attempt to comfort him…The term “immoral conduct” is sufficient to provide the constitutionally required fair warning if, and only if, it is strictly construed to encompass only conduct which permits the inference of a conscious disregard of established moral standards. So construed, the consciousness of wrongdoing serves as notice…Just as one can never be accidentally or unwittingly be dishonest, immoral conduct requires at least an inference of conscious intent.”
In Board of Ed of Long Beach, Supreme Court of California, 566 P.2d 602 (1977), a teacher was arrested for deviant conduct in a public restroom, although not convicted. The court said, “we have previously held that the determinative test was fitness to teach; the terms “immoral” or “unprofessional conduct” are so broad and vague that, standing alone, they could be constitutionally infirm; hence the proper criterion is fitness to teach…The courts uniformly hold the ‘where two r more inferences reasonably can be drawn from the facts, an appellate court is without power to substitute its deductions for those of the trial court.” In this case, the trial court reinstated the teacher.

In Krizek, 713 F. Supp. 1131 (1989), the Federal District Court of the Northern District of Illinois, considered the dismissal of a teacher for showing an R rated movie that showed improper scenes. The court said the First Amendment freedom in not for the benefit of the teacher, Employers are free to restrict the expression of their employees in the conduct of their work. For example, a newspaper editor may order a reporter not to write the article that the reporter wants to write. The editor may tell the reporter ‘if you want to express a different view, do it on your own time.’ Rather the protection is primarily for the benefit of the student, and as a result, society in general. In a sense, it protects the student’s ‘right to hear.’ Public schools perform a vital function in our society. That function has two key aspects. First, a public school system strives to develop inquisitive minds and interdependent thought. Second, a public school system provides intellectual and moral guidance, and transmits the more of the community. The second function justifies the imposition of limitations in teacher’s classroom expression. However, the first function cannot be achieved unless the individual teachers are given
some measure of academic freedom. Therefore, the limitations placed on teachers’
expression must themselves be limited.”

“If the school has banned the film, the teacher would have had no First
Amendment right to show the film because the school’s decision was within its right to
control the curriculum…(to require written rules for every case) would be impossible for
a school to proscribe…The court found that defendants failed to demonstrate that
assignment (in another case) was not appropriate reading and was disruptive. This court
finds that while the outcome of these cases may well have been appropriate, the standard
of review state do not provide for sufficient deference to the judgement of the school
administration…to forbid a teacher from using a particular item in the classroom is less
restrictive of teacher’s creativity and experimentation than a requirement of ‘appropriate
judgement.’ Such a vague standard has the effect of forcing teachers to guess what is
permissible, thus encouraging teacher to avoid innovation and to take the safe, standard
route…the court adopts the following standard of review: was it reasonable for the school
not to enter into a new one year contact with the teacher for showing the film…the court
finds that the extent of the vulgarity and sexual explicitness in the film was such that it is
likely that the evidence will demonstrate that the school could reasonably have
determined that its showing was a serious indiscretion.”

A Nebraska teacher who disciplined his students discipline by his board for
violating the state law against corporal punishment cited a Supreme Court ruling and
argued that “due process requires that [a rule] supply 10 a person of ordinary
intelligence a reasonable opportunity to know what is prohibited and 2) explicit standard
for those who apply it…The test is whether the defendant could reasonably understand
that his conduct was proscribed by the statue.” The court ruled that the law did not
defined corporal punishment so vague as to violate due process when he “slapped” a
student on back of the head in frustration.

Two cases stand out in dismissal of a teacher (professors) and due process. In
Board of Regents v Roth 408 US 564 (1972) a teacher was not rehired after one year of
teaching without a statement of reasons. He lost his case. But in Perry v Sinderman, 408
US 593 (1972), a teacher who had been in a system for ten years with a written policy
and long standing practice of rehiring its teachers. Also, the college issued a press release
setting forth allegations of insubordination, infringing on a liberty interest in maintains
reputation in addition to his property interest of retaining a job that he had every
expectation of keeping. The court however in Roth stated, “abstract need or desire’ or
“unilateral expectation” is not enough to establish a property right.

Personnel actions taken in retaliation for speech activities require due process,
“whether or not the speech or press interest is clearly protected under substantive First
Amendment standards,” the court said in Roth. Action that might seriously damage a
teacher’s reputation or standing within the community or impair prospects for future
employment also may be viewed as deprivations of liberty requiring due process.
Charges of intoxication, racism, and mental instability have be fund sufficiently
stigmatizing to require due process (McKnight 583 F. 2d 1229 3rd Cir. 1989 and other
cases). Allegations of poor job performance such as incompetence, inadequacy, and
insubordination have not been found to require due process, Gray 520 F. 2d 803 9th Cir.
1975).
In Cleveland v. Loudermill, 470 US 532 (1985), the court said the minimum constitutional requirements are similar to a student, “The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer’s evidence, and an opportunity to present his side of the story.” The Eight Circuit ruled (Winegar 20 F. 3d 895 1994) that the suspension and transfer of a teacher for possible child abuse implicated both property and liberty interests thereby requiring an opportunity to present evidence and cross-examine adverse witnesses.

To satisfy constitutional and statutory requirement, notice must be given sufficiently in advance of hearing and be sufficiently precise to allow the preparation of a defense. One case found that charges of not cooperating with a principal were not adequate. Charges of incompetence are not adequate notice. Careful crafting of charges is important because the hearing may not consider charged not listed in the notice of evidence not relevant to those charges. Due process also requires impartial decision makers.

In Hortonville 426 US 482 (1976), the Supreme Court heard Wisconsin case because the State Supreme Court used the due process clause of the Fourteenth Amendment. That court relied on Morrisey v Brewer 408 US 471 (1972) that “it would seem essential, even in cases of undisputed or stipulated facts, that a impartial decision maker be changed with the responsibility of determining what action shall be taken on the basis of those fact.” In Hortonville, teacher admitted to breaking state law by striking, they only claimed that the Board was impartial in determining to fire them. The Supreme Court said that “The Fourteenth Amendment permits a court to strip the Board of the otherwise unremarkable power the Wisconsin legislature has given it only if the Board’s
prior involvement in negotiating with the teachers means that it cannot act consistently
with due processs. Due process, as this Court has repeatedly held, is a term that ‘negates
any concept of inflexible procedures universally applicable to every imaginable
situation’…But even if the property interest claimed here is to be compared with the
liberty interest at stake in Morrissey, we not that both ‘the risk of an erroneous
deprivation’ and ‘the degree of potential deprivation’ differ in a qualitative sense and in
degree from those in Morrissey.”

Hoternville this tolerates prejudgments on constitute sufficient grounds for
dismissal or other policy matters, but prejudgment for the fact or outcome of a case
violates due process, Stanton v Meyers 552 F. 2d 908 (10th Cir. 1977). Court will
disqualify decision makers when there is actual bias or prejudice, Bias on the part of one
member is enough to taint the entire process. When those prosecuting a case join in its
deliberations, they get a second chance without rebuttal. Court have split on this troubling
issue. Many laws allow consul for teachers, but without any statue, a majority of courts
allow it. Courts also allow teachers a right to cross-examine witnesses. Many statutes
allow the right to appeal to the State commissioner of education. Courts will not hear
cases until all administrative remedies have been exhausted.

Teachers can sue a district for negligence r another tort only for injuries that are
not eligible for redress under “worker compensation,” which pays less than torts.
Workers compensation is the only remedy for simply negligence in most states. The
injury must be 1) by accident 2) arising our of  and 3) in the course of employment. Even
routine tasks such as lifting textbooks can be covered. Also even if preexisting conditions
are aggravated by work, workers are covered. However, unless the employer acts
unreasonably, claims for stress are usually denied. Also, if the stress is from one's own mismanagement, the worker will lose.

Once an accident is proven, a teacher must prove that it arose out of the job of teaching. Did the doing the job increase the probability of injury? The final element is to prove that it happened in the course of employment. Teachers injured while driving to work are not covered, but once they reach the parking lot, coverage begins. However, disobeying the law will mean a loss of coverage.

In most states, workers compensation works outside of the regular court system, but through an administrative agency. All states require the employee to promptly notify the employer of any injury and establish time limits and procedures for filing claims. Failure will result in denial. No punitive damages are awarded.

Because the risk of litigation is very high, firing should comply with the letter and spirit of all relevant law.

Chapter 11 Summary

Collective bargaining in the public sector came more slowly than in the private sector because government decisions should be democratically controlled and collective bargaining was considered an unlawful delegation of governmental authority. It was criticized for skewing the normal political process in favor of one interest group to the disadvantage of others. Today, state collective bargaining laws impose on employers a duty to bargain with a union in good faith. The employer cannot take unilateral action on certain categories on issues if the employees union wants to negotiate them.
To bargain collectively, the bargaining unit must be defined. Employees should be divided into as few separate bargaining units as possible and a bargaining unit should include only members who share a “community of interest.” When employees have different interests, the union cannot represent all its members fairly.

Many states established a public employment relations board (PERB) with power to resolve disputes relating to union representation in education. Once a contract is accepted by the union and board, each teacher can decide whether to accept. A teacher may resign without professional consequence within a designated period.

State laws establish a set of rights and duties regarding union representation of school employees and collective bargaining. Violations can result in firings or injunctions.

Without a state law, in McLaughlin v Tilendis, 393 F.2d 287 (1968), the Seventh Circuit ruled that the First Amendment prohibits any state or school district to forbid its teachers from joining a union or to dismiss those who do. The courts rejected the argument that unions sometimes engage in illegal activities, such as strikes. It relied on the important distinction between membership in an organization and participation in the illegal activities that the organization may advocate or sponsor. It relied on a Supreme Court ruling that, “‘those who join an organization but do not share its unlawful purposes and who do not participate in its unlawful activities surely pose no threat, either as citizens or as public employees.’ Even it this record disclosed that the union was connected with unlawful activity, the bare fact of membership does not justify charging members with their organization’s misdeeds. A contrary rule would bite more deeply into
associational freedom than is necessary to achieve state interests, thereby violating the
First Amendment.”

Unions and their members are free to exercise their constitutional rights to try to
influence their employer, but there is no provision that requires a government employer
to engage in collective bargaining. Some states ban collective bargaining by public
employees. Even in states that allow it, there is no constitutional right to select the union
that will represent individuals.

The Fifth Circuit allowed limiting school grounds to union organizers that were
not school employee but said that teachers could not be precluded from using the school
mail system and bulletin boards for that purpose. Picketing enjoys some First
Amendment protection, but courts will allow its prohibition when done with force or in
an illegal strike.

States define what is a strike. Kansas defines s strike as any “action taken for the
purpose of coercing a change in the terms and conditions of professional service or the
rights, privileges, or obligations thereof, through any failure by concerted action with
others to report to duty including, but not limited to, any work stoppage, slowdown, or
refusal to work.” About half the states do not permit any organized work stoppage by
teachers. In states where statutes or common law give teachers the right to strike, the
board may not retaliate against strikers if the strike is conducted in accordance with the
law. In ten states, teachers have a full right to strike, but the board could still ask for a
court injunction if the strike creates a significant threat to public safety, or is otherwise
seriously detrimental to the public welfare.
In Armstrong Educational Association, Commonwealth Court of Pennsylvania, 1972291, A.2d 120, the court cited Section 1'003 of Act No. 195 that provided that an injunction may not issue… “Unless the court finds that the strike creates a clear and present danger or threat to the health, safety, or welfare of the public.” That court quoted from the DC District Court in Communist v Subversive Activities Council 223 F.2d 531 (1954), “the clear in that epigram is not limited to all threat indubitable etched in every microscopic detail. It includes that which is not speculative, but real, not imagined but actual. The Present in the epigram is not restricted to the climatically immanent. It includes that which exists as contrasted with that which does not yet exist and that which has ceased to exist.” Thus the court ruled that an injunction should not be issue because the board feared not completing the school year by the time specified by the state. There were still many available makeup days. “We must hold, however, that the proper purpose of an injunction under Act No. 195 is to avert present danger, not to prevent danger which may never occur, if it does occur, at some future time before which the grievances concerned can reasonably be expected to be settled.”

A majority of state courts have held that a hearing prior to the dismissal of illegally striking teachers is not constitutionally required.

In Madison v Wisconsin Employment Commission, 429 US 167 (1976), the court ruled that a school board was not correct in denying a nonunion teacher the right to speak at a public meeting. But in Minnesota v Knight, 465 US 271 (1984), the court however, did not force a school board to allow nonunion members in a “meet-and-confer” session. No one has a constitutional right to speak in a nonpublic forum, even people directly
affected by the issues under consideration. To hold otherwise would require revision of the procedures of every government body from Congress to school boards.

The Court has recognized that the use of required union dues by all teachers to finance public candidates and doctrines against the will of teachers not in a union presented “questions of the utmost gravity.” But as long as union moneys act to promote the cause which justified bringing the group together, the individual cannot withdraw his financial support merely because he disagrees with the group’s strategy. “Whether these representatives accede to a union’s demands will depend upon a blend of political ingredients, including community sentiment about unionism generally and the involved union in particular, the degree of taxpayer resistance, and the views of voters as to the importance of the service involved and the relation between the demands and the quality of service.” The court pointed out that it is arguable that “permitting public employees to unionize and a union to bargain as their exclusive representative gives the employees more influence in the decision making process than is possessed by employees similarly organized in the private sector.”

“Public employees are not basically different from private employees; on the whole, the have the same sort of skills, the same needs, and seek the same advantages. The uniqueness of pubic employment is not in the employees nor in the work performed; the uniqueness is in the special character of the employer…the differences between public and private sector collective bargaining simply do not translate in First Amendment rights.” However, nonunion employee may “constitutionally prevent the union’s spending a part of their required service fee to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining
representative…The fact that appellants are compelled to make, rather than form making, contributions for political purposes works no less an infringement of their constitutional rights.”

The courts have invalidated rebate schemes on dues given the availability of alternative arrangements, such as the reduction of dues in advance or the use of interest bearing accounts. “The union cannot be allowed to commit dissenter’s funds to improper use even temporarily,” the court ruled in Ellis 466 US 435 (1984). Unions also cannot charge for costs of general organizing efforts and litigation not involving the negotiation of agreements or the settlement of grievances. The courts drew a distinction in Ellis, “whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues.”

In Lehnert v Ferris 500 US 07 (1991), the Court gave three guidelines. TO be included in a agency fee and activity must be germane to collective bargaining, be justified by the need for labor peace or to avoid free riders, and not significantly ass to the burden on free speech already imposed by the agency-shop agreement.

State define the scope of bargaining, which subjects must be negotiated and which may not. Inmost states, the criteria for the evaluation of teachers are nonnegotiable, but the procedures for evaluation are mandatory.

State statutes imposed a duty of fair representation on the union. A New York court (United teachers v Seaford, 414 N.Y.S.2d 207, N.Y. App. Div. 1979) wrote, “The bargaining agent has the duty to service the interests of all members of a unit without hostility or discrimination toward any, to exercise its discretion with complete good faith
and honestly, and to avoid arbitrary conduct…The deliberate sacrifice of a particular employee as consideration for other objectives must be a concession the union cannot make.”

Unions have a duty to bargain in good faith. In Montgomery V Board 354 A.2d 781 (Md. 1976), the court wrote, “Somewhat paradoxically, perhaps, the cases suggest that a desire to reach an agreement constitutes good faith bargaining, and conversely that a desire not to reach an agreement is bad faith; condemned is a predetermined resolve not to budge from an initial position and required is a serious attempt to resolve differences and reach a common ground…and a party merely going through the motions with a predetermined resolve not to budge from an initial position (is not good faith).”

In Grievance arbitration, a party can chose to undergo the grievance provision of a contract or go to the courts.

Individual contracts have the following five element: a) manifestation of mutual consent b) consideration c) competence of parties d) legality of the subject and e) satisfaction of statutory requirements for formation of a contract.

If an offer came in the mail, the acceptance is moment the offeree (the person who gets the offer) puts a stamp and mails the acceptance back. Contracts can be withdrawn until acceptance. Consideration is legal detriment, the obligation, and legal benefit, the payment. Statutory requirements are such as that the board may not delegate its power to make contract to the superintendent or another employees. Contracts are not enforceable until board approved.
In one case, Davis v Board 312 N.E.2d 335 (Ill. App. Ct. 2974), the court ruled that teachers who did agree to a new contract would be paid retroactively under the new salary schedule, whereas teachers who did not agree were to be paid under the terms of the previous years salary schedule.

In Botineau v Currie, Supreme Court on North Dakota, 1977, 259 N.W.2d 650, the court allowed a teacher who resigned to avoid paying a breech of contract penalty because her agreement was only verbal, but not an actual acceptance. In a Florid case, Gainey v Board 387 So. 2d 1023 (Fla. Dist. Ct. App. 1980), a teacher told her principal that she wanted an additional year of leave and he hired a new teacher. She changed her mind and the court ruled that she did not relinquish her position.

Handbook might be considered part of a contract but if districts reserve the right to change them, they are not part of the contract.

Legislatures can change terms of the contract, as contract are made according to law. In 1991, in response to severe budget crises, the City of Baltimore reduced teacher pay by one percent in violation of a contract. Teacher sued under Article 1 Section 10 of the federal constitution that states may not pass a law “impairing the obligations of contract.” In rejecting the claim, the court (Baltimore Teachers Union v Mayor of Baltimore, 6 F.3d 1012, Sth Cir. 1993) ruled that the contract clause is not an absolute bar to modification of a state’s financial obligations. Unilateral contract modification must be “reasonable and necessary to serve an important public purpose.” Baltimore made many attempt unsuccessfully and abandoned its plan at the first opppirtun8ity.
Chapter Twelve

Whereas criminal law is to punish a wrongdoer, tort law seeks to provide restitution to an injured party. An intentional mean that a person desires to bring about the consequences of an act or believes that the consequences are almost certain to result from it. Battery is the intentional, unwanted, and offensive touching of another person’s body with the intent to cause the other to suffer the contact. A contact is viewed as offensive if it would be offensive to a reasonable person. Whereas battery protects bodily integrity, assault protects peace of mind. An assault is an action that has the intent to place another in reasonable apprehension of imminent bodily harm or offensive contact. Assault typically precedes battery, but can end without a battery. False imprisonment is the intentional confinement of a person within a fixed space. The person must be conscious of the confinement or harmed by it. The restraint can be accomplished by indirect methods such false assertion of authority or such as holding a wallet to prevent departure of the owner. Intentional infliction of mental distress permits people who have been subjected to extreme conduct to sue for damage to peace of mind. Loss of consortium is damage to the relationship between parent and child that can accompany it. The Eighth Circuit in Costello, 266 F.3d 916 (2001) said, “To constitute intentional infliction of emotional distress, a plaintiff must show 1) that there has been intentional or reckless conduct, 2) the conduct was so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and is to be regarded as atrocious and utterly intolerable in a civilized country, and 3) that the conduct caused emotional distress so severe that no reasonable person should be expected to endure it.”

The privilege of discipline allows parents and teachers to use reasonable force including corporal punishment for the discipline and control of children. A Texas court
found that state law allowed corporal punishment only when necessary to enforce compliance with a proper command issued for the purpose of controlling, training or educating the child or to punish the child for prohibited conduct. It found that a football coach was not privileged to use physical violence for purposes of instruction and encouragement (Hogenson, 542 S.W.2d 456, Tex. App. 1976).

Consent by the plaintiff to the tortuous conduct of the defendant generally precludes liability. The privilege of self-defense and defense of others allow the reasonable use of force against unprivileged battery or other bodily harm that one reasonably believes is about to be intentionally inflicted by another. A majority of states allow a person to stand and fight when threatened even if flight is possible. The privilege of self-defense ends when the assailant has been disarmed or defeated withdraws or gives up.

The six elements of defamation are false facts, harm, publication, clear reference, standard of fault, and no privilege. Libel is written defamation and slander is spoken. False facts must be a significant misrepresentation or inaccuracy, something more than a minor error or technical untruth. Opinions are immune. Verbal abuse, hyperbole and humor convey opinions. However, mixed opinions are when the opinions imply a fact, are defamations. The Supreme Court has ruled that when the statement involves a matter of public concern, the plaintiff must private that it was false. In cases of non-media defendants, many states require the defendant to prove the truth of a statement. Many states are now putting the burden on the plaintiff to prove that a statement is false.
Harm is caused to the plaintiff’s reputation or standing in the community. Statements may be defamatory per se and assumed to cause harm. They may be defamatory per quod if it can be shown that the statements caused harm.

Publication is when a statement is intentionally communicated by the defendant to someone other than the plaintiff. A person who has even repeated a statement citing the original source has satisfied this element. So has anyone who assisted in communication such as a publisher. If someone eavesdrops and communicates a statement made by the defendant to the plaintiff, the defendant is not liable. A theory of compelled self-publication has recently emerged. When defamatory statements explaining dismissal are made to a terminated employee, the employee will be forced to repeat them when seeking reemployment and publication is assumed, even though the statements were only between the defendant and plaintiff.

There must be a clear reference to the defamed person. He does not have to be named; inference in an alleged work of fiction in which the plaintiff is recognized as a character is enough.

Standard if fault depends on the status of the plaintiff in the community, the topic, and specificities of state law. If the plaintiff is a public official, defamation can only be found if the defendant knew the falsity of the statement or spoke with reckless disregard for the truth. Actual malice also applies to celebrities and communication by individuals who voluntarily involve themselves in matters of public concern. In cases involving private individuals, most states require only a showing of negligence, carelessness about whether the statement was true.
Most courts would probably agree that a superintendent is a public official. In one case, a principal was ruled to be a public official. Courts are split as to whether teachers and coaches are public official.

Absolute privilege concerns statements made in judicial or legislative proceedings, even when there is malice. Superintendents in some states have absolute privilege in the course of their duties. Statements made between husband and wife while alone and statements made with consent of the person spoken about have absolute privilege. Broadcasters are immune when a candidate for public office makes a defamatory statement over the air.

Qualified privilege can be forfeited when the speaker goes beyond the scope of the privilege for reasons other than that which the privilege was created and speaks with intent to cause harm. A common standard is when the defendant knows a statement to be false or had no reasonable grounds for believing it to be true. The defendant must invoke the privilege and the plaintiff has the burden of proving that it was abused. Qualified privilege is meant to protect communication to someone who may act in the public interest, such as from one public official to another regarding duties and evaluations within an organization. It may protect fair comment on public matters and communications made in the interest of a third party, such as in some states, post-employment letters of reference. The trend is to extend only qualified immunity to local government bodies and school board members and superintendents. Some states give parents absolute immunity when airing complaints against a teacher at a school board meeting. Some states give only qualified immunity.
The fair report privilege may be invoked at school board meetings and other forum of debater over educational issues. It protects fair and accurate reports of government proceedings and even nongovernmental proceedings that deal with matters of public concern. Even if the defendant knows statements are false, if they are reporting proceedings, they are not liable. If the report is substantially inaccurate or unfair, then the privilege is lost.

Recommendation letters made in good faith have qualified privilege. Most defamation suits in education involve such reference letters. Minor inaccuracies and inadvertent errors of fact will not support a finding of defamation. False and malicious recommendations that prevent and applicant from securing a job can lead to a tort known as intentional interference with prospective contractual relations. This can also be criminal in some states under anti-blacklisting statutes. In theory, not disclosing negative information can lead to negligent nondisclosure or negligent misrepresentation. It is hard to win in practice. The California Supreme Court said in Randi W 929 P.2d 582 (Cal. 1997), “The writer of a letter of recommendation owes to third persons a duty not to misrepresent the facts in describing the qualification and character of a former employee, if making these misrepresentations would present a substantial foreseeable risk of physical injury to third persons.”

Invasion of privacy can be an inappropriate use of a name for gain, unreasonable intrusion in someone’s seclusion, unreasonable publication of private facts in a highly offensive way, or unreasonable publication that places someone in a false light in the public’s eye. School officials should be careful to inform only those who have a need to know that a teacher or student has AIDS. Not every issue that a person wants to keep
secret is included. Teachers involved in an alcohol incident and made public by official was not liable since disciplinary records are public record. The West Virginia Supreme Court ruled that random drug testing of employee was invasion of privacy. The law recognizes a privilege to disclose private facts such as a teacher who discloses private information to another teacher or a new school on a need to know basis.

The Family Education Rights and Privacy Act or 1974, often called the Buckley Amendment, allows parents access to records and hearing for adjustments. Personal instruction records that teacher keep in their sole possession and shown only to substitute teachers are not included. The Court in Owasso 534 US 426 (2002) ruled that letting students grade each other’s tests is not a violation. Record may be sent to another school but parents must be notified. Records may be released personally identifiable records in connection with an emergency to appropriate parties to protect health or safety. Records may also be shown to state and federal education agencies for research and statistical purposes. The act does not create a right of action but can lead to the withholding of federal funds. Educators may be liable also for statements in records that are libelous or invasions of privacy.

The duty to report suspected incidents of child abuse extends to health practitioners and those involved with children. Reports must be made to a specifically designated state agency. In some states, the law also requires that school employees notify the person in chard of the school of a designated agent who then becomes responsible for making the report, anticipating that each school will develop an internal system for processing child abuse reports.
Because of its importance, the law grants immunity from civil and criminal liability to people who report child abuse. Still, educators often hesitate to make reports, which may be a misdemeanor and be action for liability. When making a report, an effort should be made to repeat accurately what the child and other people interviewed actually said.

A finding of negligence is only after the plaintiff fails to establish the existence of each of the following four elements: 1) The defendant owed a legal duty of a standard of care to the plaintiff 2) the defendant failed o live up t that standard of care 3) the defendant’s behavior resulted in harm to the plaintiff and 4) the plaintiff sustained actual injury that can be measured in monetary terms.

Negligence can be found only in connection with behavior that “falls below the standard established by law for the protection of others against unreasonable risk to harm,” that of a reasonable person acting prudently in light of the circumstances. Because teachers have inherent in their jobs certain responsibilities and skills, they are held to a higher standard of behavior than ordinary citizens. They are expected to do a better job at protecting students from injury than an average reasonable person. If a teacher has a physical disability, the standard of conduct with be that of a reasonable teacher with a like disability.

A district may be held liable for injuries to students off school grounds if the student was able to leave the school because of negligent supervision. It might have a duty to non-students to supervise students driving out of the parking lot in a manner dangerous to others. If educators voluntarily supervise students that arrive early of stay late, their higher standard of care still applies. A principal was held liable for entrusting a
physical education program to an inexperienced teacher without providing closer supervision and for not developing a plan for the new teacher when a student was injured (Larson, 289 N.W.2d 112 Minn. 1979).

Generally, the determination of whether an educator’s conduct fell below the standard of care turns on the question of whether the educator should have foreseen the resulting injury. The absence of a teacher when an injury occurs in itself is not proof of breach of duty. School are not required to supervise every student every minute, although the longer that students are left alone, the more likely the finding of breach of duty. Students must be properly instructed in the performance of potentially dangerous activities in advance. The likelihood of breach of duty is increased if a state lae, regulation. Or a school’s own policy is violated.

Legal cause requires causation in fact the injury be a result of the negligent party’s act and proximity of cause that the act be sufficiently connected to the injury to be considered its cause. A widely used test is the but-for requirement, that a person’s behavior is the cause of an injury if the injury would not have occurred but for the behavior. Defendants are liable even is their actions lead to injury through intervening causes if they were foreseeable. A teacher could foresee that a misbehaving child might push another child and should not leave a lit candle on her desk. A school in a high crime area can foresee that an intruder can enter the school and should lock doors.

Most courts do not permit recovery for emotional distress unless accompanied by physical injury or consequences.

Contributory negligence on the part of the plaintiff below a reasonable standard, historically and in some states today, will bar any recovery of damages, not matter how
slight the plaintiff’s own negligence. The standard of care children own themselves
deepends on their age, experience and capacities. Comparative negligence has replaced the
doctrine and allows the plaintiff to recover damages proportional to the plaintiff’s fault.
Some states bar recovery if the plaintiff’s negligence is more than fifty percent or greater
than the defendant’s.

Assumption of risk is when a plaintiff relieves the defendant of liability by
expressly or implicitly recognizing a danger and voluntarily assuming the risk. Releases
from liability must be voluntary and knowingly executed and specifically indicate what
fault is being waived. Ambiguity will be interpreted against a school district. Some courts
have said that although waivers may block parents from suing, they do not block suits by
an injured child himself. But, this can show that the parents agreed to expose their
children to the dangers normally associated with an activity.

The law of negligence does not require that school be insurers against all harms
that come to students. The have a duty to provide safe shops, laboratory and gym
equipment and proper instruction and warnings regarding the performance or potentially
dangerous tasks. If supervision is undertaken when not required by law, it must still meet
legal standards of adequacy.

In Barbin v State, Court of Appeals of Louisiana, 1987 (506 So.2d 888), the court
found a teacher 80% liable for injuries to a student using a saw without the protective
guard. The school had been informed of the damage to the equipment but did not repair
it. It was found 20% liable. In Broward County School Board v Ruiz, District Court of
Appeals of Florida, Fourth District, 1986 (493 So. 2d 474), the court said, “To prevail on
a theory of negligent supervision by a teacher, a plaintiff must establish 1) the existence
of a teacher-student relationship giving rise to a legal duty to supervise, 2) the negligent breach of duty by the teacher, and 3) the proximate causation of the student’s injury by the teacher’s negligence.” A student injured while waiting for a ride in outside the cafeteria without supervision after school. He was allowed to stay after to get his picture taken with a sports team. The coach remained busy with the team and could not supervise him. “The question is whether the absence of any supervisory personnel in the cafeteria area at the time of the beating constituted actionable negligence. In other words, did the school have a duty to provide some form of security in this area to prevent incidents from occurring?…Two distinct standard have developed. The first hold that a teacher’s absence leading to an injury to one student by another can be the proximate cause of the injury only if the injury could not happen while the teacher was present…The second, and more reasonably supported, hold that certain student misbehavior is itself foreseeable and therefore is not an intervening cause which will relieve principals and teacher from liability for failure to supervise…Roughhousing and hazing at a high school club initiation is behavior which is not so extraordinary as to break the chain of causation between the school’s failure to supervise and the injury to the student…In Gibson 386 So. 2d 520 (Fla. 1980), which finds an intervening cause foreseeable when ‘in the field of human experience the same type of result may be expected again.’ …no supervision was provided at the time and place of the assault and that such supervision, if provided, would have prevented the assault from occurring.”

In Hoyem v Manhattan Beach City School District, Supreme Court of California, 1978 (585 P.2d 851), a student was injured when is left a summer school without permission. The defendant claims that the place of injury exonerated them. “In Dailey v
Los Angeles Unified School District (1970) 470 P, 2d 360, 363, declaring that “California law has long imposed on school authorities a duty to supervise at all time the conduct of the children on school ground and to enforce those rules and regulations necessary to their protection...we neither impose a new duty on school districts nor in any way extend the well-established rule reiterated in Dailey; we merely reaffirm that school districts must exercise reasonable care in supervising their pupils while the pupil are on school premises. A district may be held liable if its breach of that duty proximately causes a student’s injury.” Thus, the failure of supervision was on the school grounds proximate to the injury. “…the Legislature was principally concerned with limiting a school districts liability for injuries to pupils while children were either going to school or coming home after school…Neither the mere involvement of a third party’s wrongful conduct is sufficient in itself to absolve the defendants of liability, once a negligent failure to provide adequate supervision is shown.” The school does not have to be a prison, but must exercise reasonable care. The mother of the defendant could not recover damages from the shock of seeing her child in the hospital, “the shock must also result from a direct emotional impact on the plaintiff caused by sensory and contemporaneous observance of the accident.”

To establish that a school district should be held liable for negligent hiring or retention of an employee, an injured plaintiff must establish three points. 1) the person who caused the injury was unfit for hiring or retention or was only fit for the position if given more supervision than was actually provided, that it was the legal cause of injury, and that the employer knew of should have known of the employee’s lack of fitness. An employer will not be held responsible if it cannot be established that the employer should
have known about its employee’s propensity for wrongdoing. Some states have statutes that require inquiring about arrests and conviction of prospective employees. Some require fingerprinting for screening.

Respondeat superior is the doctrine of vicarious liability. The main issue is whether the act occurred within the scope of employment. A school district or employer cannot avoid liability by forbidding in advance what was done or by ordering the employee to act carefully. An act must be required by employment or incident to duties or reasonably foreseeable. A custodian who molested a student was “in no way related to mopping floors, cleaning room, or any of the other tasks that are required of a school custodian.” He was motivated for personal ends, not the purposes of the job. The court defined foreseeability.. "whether the employee’s act is foreseeable in light of the duties the employee is hired to perform (Alma W 176 Cal. Rptr. 287, Cal Ct. App. 1981).” Many courts will not hold district liable for teacher’s promiscuous abuse of students if the district was justifiable unaware of the abuse because promiscuity is outside the scope of a teacher’s job. It still may be liable under federal law.

Parents are generally not vicariously liable for act of the ir children more than a nominal amount unless directed or encouraged. “More broadly the parent who has notice of a child’s dangerous tendency or proclivity must exercise reasonable care to control the child for the safety of others, and the parent who ignores the child’s tendency to beat other children… may be held responsible in failing to exercise control. (Keeton).” Parents will not be held responsible for general incorrigibility and bad education or a nasty disposition. The parent may be under the duty to warn others.
A trespasser is a person who enters the property of another without permission or privilege to do so. The owner is not liable to the trespasser for failure to exercise reasonable care to make the property safe or to conduct business on the property in a way that would be safe for the trespasser. The owner is not permitted intentionally to inflict injury by setting a trap. He must refrain from wanton conduct toward the trespasser.

A licensee is anyone who has a privilege, tacit or explicitly consent, to enter on property. They include social guests, salespeople, and people who have business dealing with employees of the owner or possessors of the land. Outside groups meeting at a school would fall into this category. So would spouses of teachers entering the school for legitimate reasons. Most courts treat trespassers similar to licensee if their presence is known. The duty to licensees is to warn them or otherwise protect them from unreasonable risks of which the owner is aware but the licensee is not aware. Licensee must assume the risks associated with hazards unknown to the owner.

An owner must protect child trespassers from an attractive nuisance. This doctrine holds that the owner is liable if he knew or should have known that children were likely were to trespass on the place where the harm occurred, knew or should have known that conditions on the property posed an unreasonable risk to children, because their age who would not be aware of the risk, the usefulness to the owner in maintaining the risk and the cost in eliminating it were slight as compared to the risk to children and the owner failed to exercise reasonable care to eliminate the risk or protect the children. Some stases require that the owner is only liable I the child was attracted on the property by the same condition that injured him.
Some courts will not hold schools responsible for injuries to trespassing children caused by risks that they can understand and appreciate was as falling off a rook. The classic attractive nuisance is a swimming pool or trampoline.

An invitee may enter land as a business visitor or as a public invitee. People using public playgrounds and other free public events are public invitee. Business invitees are clients, drivers, people seeking employment and those doing work. Invitees have a legal expectation that the property will be made safe for them. Owners must not only protect invitees against hazard that they know about but also form hazards that the owner could have discovered by careful inspection of the property. Nevertheless, the duty is not that of an insurer of absolute safety. Reasonable prudence, like warning people about a mopped floor, is the standard.

The standard rule is that the owner has no responsibility to protect the invitee against hazards that are known or obvious to entrants. However, many courts have in recent years have added, “unless the possessor should anticipate the harm despite such knowledge of obviousness.” A licensee or invitee might see a hole but be distracted and fall.

The duty of self-care depends on the age, maturity and experience of a child. Some states have adopted recreational use statues that protect landowners from liability when inviting members of the public to use their land for free, unless there is wanton negligence. Schools are not included in these laws.

Courts in some states that rely on common law of statutory standards for slips on ice or snow hold that there is no duty to protect entrants against natural accumulation of snow and ice, as long the accumulation was not artificial. In other state courts without the
natural accumulation standard, snow and ice cases are treated as any other tort. Courts must decide upon the fierceness of the storm, the length of interval between its end and the accident, the obviousness of the hazard, whether the plaintiff was expected to be carrying a vision obscuring object, efforts taken to alleviate the hazard, the adequacy of lighting, and whether a warning was provided.

More than twenty states have abolished the categories of entrants and decide cases like other negligence cases based on the reasonableness of the owner’s action in light of foreseeability of the injury. This can make a difference in a case where a student voluntarily uses as school field for a workout. In some state he is a licensee and cannot collect damages for hazards that the school was unaware. But in the other states, if the school’s inspection and maintenance of the field was not adequate, he could collect damages.

Education malpractice has rarely succeeded. Schools have no statutory or common law duty to perform up to professional standard and public policy will not recognize education malpractice as a cause of action. There may be other theories to hold a teacher accountable for willful malice.

Sovereign immunity historically protects state governments form suits. A common exception includes activities deemed proprietary, those things done as an owner rather than a government. Some states classify fee-charging activities as proprietary. A distinction is drawn between discretionary and ministerial acts. Discretionary acts involve planning and judgment and are immune from liability in some jurisdictions. Ministerial acts require no judgement, just following a prescribe task can lead to action. There is a trend to limit sovereign immunity.
Judges and legislators have absolute immunity even if performed in bad faith, as do school board members as individuals. School officials and employees may also enjoy qualified immunity for acts performed without bad faith or malice and only for discretionary acts. Thus a judgement not to inform parents of a student’s suicidal tends might be discretionary (Killen 547 N.W.2d 112 Minn. App. 1996), but a principal who did not provide adequate supervision of a gym instructor was ministerial (Larson 289 N.W.2d 112 Minn. 1979). Concerning school violence and the hiring and assigning of guards, the trend is that they are discretionary acts. School official still may be liable for the negligent execution of school safety policies. States have recently been legislating distinction between discretionary and ministerial acts, in addition to within or without employment, and curricular and non curricular. A Connecticut statue provides that the qualified immunity doctrine will not protect an official in circumstances when it is apparent that a failure to act would be likely to subject an identifiable person to imminent harm.

There are also statutes of limitation and notice of claim requirements to give the defendant a chance to investigate and prepare a defense and to take steps to prevent repetition of an accident. Some states require that school district indemnify their employees from personal monetary liability for torte committed in the scope of their employment. They still may be sued, but the school pays. Malicious and unauthorized conduct is not included.

Section 1983 of the federal codes says, “Every person who, under color of any statute, ordinance, regulation, custom or usage in any State or Territory or the District of Columbia…to the deprivation any rights, privileges, or immunities secured by the
Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress.” A teacher received damages for dismissal in violation of free speech and due process rights after administrators concocted false evaluations and delayed a hearing, in part for defending another educator would had been fired (Burnaman 445 F.Supp.927 S.D. Tex.1978). Section 1983 has also been used to collect damages for substantive liberty rights such as bodily integrity. Hitting a student has not been found cause under it. It applies to violations of rights protected by federal anti discrimination and other statutes. However, some statutes have their own system of remedies that preclude use of Section 1983.

Section 1983 can be used only against people whose actions are “fairly attributable” to the state. It is reasonably clear that school employees that act in furtherance of their job-related duties or goals are acting under color of the state. Courts are split on whether employee who do things unrelated for personal reasons, like assaulting a student while “on the clock.” A successful Section 1983 suit against a school employee is less likely for acts committed away from school at a time when the employee is not being paid. Even when under the color of the state, employees can only be held liable for the deprivations of rights that they actually caused. A principal who wrongfully fires teacher under the orders of other school officials cannot be sued. The Supreme Court has given qualified immunity as long as an official acted in good faith and did not violate a clearly established statutory or constitutional right that a reasonable person in that position would have known. The official must raise any request for qualified immunity in Section1983 and he bears the burden of showing that it applies. For example, the Eleventh Circuit found that it was reasonable for school officials to know
that strip-searching two student twice to find money to know that it was a violation of the Fourth Amendment (Jenkins 95 F.3d 1036 1996).

In Jefferson V Ysleta Independent School District, United States Court of Appeals for the Fifth Circuit, 1987, 817 F.2d 303, a student was tied to a chair for one and a half days and denied access to the bathroom as part of an instructional technique imposed by school policy, not as a punishment. “Even if this was punishment, it would not necessarily be protect conduct, for as we noted in Woodard v Los Fresnos Independent School District, 732 F.2d 1243, 1246 (5th Cir. 1984), “Corporal punishment is a deprivation of substantive due process when it is arbitrarily, capriciously, or wholly unrelated to the legitimate state goal of maintaining an atmosphere conducive to learning.”

Section 1985 can be used to sue school official for conspiracy to deprive others of their rights to equal protection of the laws. It was used against school officials who worked together to prevent parents from pursuing damages for molestation of their daughter by lying and telling them that they would be exposed to a suit for defamation and cause a problem for their other child (Larson v Miller, 55 F.3d 1343 8th Cir. 1995). Under Section 1986 school official who have the power to prevent a conspiracy prohibited under Section 1885 may be held liable.

The Supreme Court has held that supervisor can be held liable under Section 1883, but not simply because they are supervisors, but it they also permitted or encouraged a violation of a right. Also, they may be liable for inadequate supervision of training of subordinates who violate rights. The lower courts are divided on the standard. Some have required a “deliberate indifference,” but this has different meaning from
circuit to circuit. The First Circuit requires a finding of “supervisory encouragement, condonation or acquiescence” or “gross negligence.” The chances of a supervisor being found liable increase with evidence of prior similar incidents and that he was aware of, the recency of the incident and the shortness of the time period over which they were spread, the inadequacy of response to prior incidents, the inadequacy of response to the litigated incident, and efforts to cover up or suppress complains, and the strength of the proof that the supervisor’s response is causally linked with the plaintiff’s injury.

The Supreme Court has ruled that Section 1983 could be used to bring suit against districts that otherwise would enjoy immunity. However in Monell 436 US 658 (1978), the court said that mere employment cause liability. The must be the following four conditions; 1) Either the wrongful act was undertaken pursuant to a custom of formal policy or that the individual who committed it was an official with final policy-making authority or an official with that authority ratified a subordinate’s wrongful act. In a case where a principal and an assistant principal discouraged pursuit of charge of promiscuous assault and did not confront teachers accused was enough to show that the principal and assistant principal established a climate that was the cause of the assault. 2) A school official with authority to take correction action had actual notice of the act and was deliberately indifferent. Inadequate training and inadequate hiring practices may be grounds. A district with a widely publicized strip search was found liable after a second one happened without any training or corrective action. 3) Affirmative acts of the district expose plaintiffs to dangers they would not be exposed to otherwise. Assigning a student with known violent tendency to an inadequately trained teacher is an affirmative step that can lead to liability. 4) A school is part of a state-run correction facility or other
involuntary custodial arrangement and it fail to protect against injury by another student or a third party. Several federal courts have said that this condition of liability does not apply in ordinary public schools.

Plaintiffs suing under Section 1983 are only entitled to collect nominal damages unless they can show actual loss, not to be based on the value of the right violated but actual injuries. Plaintiff may be able to obtain punitive damages against plaintiffs that act with malice. Punitive damages will not be held against a school district because it would only punish taxpayers, and that only individuals, not government agencies can act with malice (City of Newport v Fact Concepts, Inc., 453 US 247, 1987). Even with these limitations, plaintiffs can still win large awards.

Intentional torts in education are usually, battery, assault, false imprisonment, and intentional infliction of mental distress.

Excellent summaries with additional materials. Summaries grade: 100%