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The Rights of Disabled Students

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For Rohan. May you see that everyone has a good school.
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The animating theme of this book is educational equality. My intent was to give as much depth, sophistication, and treatment to issues of educational equality as I could while still covering the key doctrines and issues surrounding other major areas of education law. The second premise of the book is in regard to the method of delivery. Having taught using various types of casebooks and querying students and faculty about their experiences, I have found that casebooks tend to fall into one of three categories: books that students like and professors quickly grow bored of, books that professors love but many students cannot comprehend (or do not work hard enough to comprehend), and books that professors start out liking well enough but grow to love because students like them and the book contains enough stimulating material to keep the professor interested. My intent was to create a book that falls in the third category. My hope is that it does.

The book tries to achieve this goal, first, by being readable and comprehensible, particularly for students. Toward this end, the book contains a generous amount of narrative. Nearly every case in the book is preceded by an introductory narrative. Those narratives forecast the issues the upcoming case will address and how they fit into the broader legal and policy framework. In other instances, the narratives may substitute for a case excerpt, synthesize an area of the law, or explore a crucial idea not fully resolved in the cases. With casebooks that do it well, these narratives ensure that students do not overlook the important aspects of a case or subsection of the book. While not always enlightening to the professor, these sections allow the professor to cover the material more efficiently in class, spending less time on background lectures and more time on higher level discussion.

The questions and notes following the cases are a supplement to those narratives. The first few notes and questions following cases are designed to reinforce the same issues and doctrines that were forecast in the narrative. Between the narrative, the case itself, and the first few notes and questions, most students should have a firm grasp of the core law of the case. The remainder of the notes and questions explore more subtle issues, critique them where appropriate, and introduce students to new and provoking ideas. It is in these latter notes and questions that professors are likely to be most excited. Students are also more capable of engaging these more sophisticated notes because they will have already received a firm foundation from the preceding materials.
Beyond narrative, cases, notes, and questions, the book includes numerous hypothetical problems. Students increasingly demand more practical applications for their learning, and some professors teach almost exclusively through problems. Because I see the pedagogical value regardless of the consumer demand, at least one problem appears in each major section of the book, which amounts to a problem roughly every 20 pages. About half of the problems are short fact patterns similar to those students might see as a short essay on a final exam. Another quarter of the problems are more in the nature of exercises that ask students to perform some task, such as looking up their state’s statutes on a particular issue and answering basic questions about them. There are also a few select problems that can be as complex or simple as the professor chooses. The professor could use them as a writing assignment or just ask students to brainstorm the problem in class. To my surprise, students are often eager for the opportunity to complete one of these complex problems as a writing assignment and regularly remark that the school finance assignment, in particular, is the most rewarding and instructive experience in the class, most likely because they get a chance to connect it to their own lives.

The final materials found in the book are key secondary sources. Like the narrative essays, these secondary materials help students realize the full impact of legal doctrine, as well as the questions courts have not resolved. Some secondary materials go beyond doctrine. Education cases as much as, if not more than, any other area of the law are not easily decided on the law and the basic facts of the case. Whether an educational policy causes harm or violates the law is frequently intertwined with pedagogical, cultural, and social science questions. Thus, to understand education law, students need some basic understanding of the empirical data and social science in the area. Likewise, most of us hold assumptions—some true, some false—about how education “works” or what makes a “good” school. Secondary materials test these myths and help dispel them where appropriate. Like hypothetical problems, they can also help students connect abstract concepts with concrete realities.

The substantive content of the book is organized into three major parts: equality, fairness, and reform. The first part focuses exclusively on educational equality, which the introductory chapter posits as the primary challenge and motivator of modern education law. Beyond framing the challenge of equality, the first chapter also serves as an introduction to education law in general. The introductory chapter is followed by five more chapters, each of which covers a discrete category of inequality or disadvantage: race, poverty, ethnicity/language status, gender, and disability. Another chapter on homelessness is also available on the casebook’s website at www.aspenlawschool.com/books/education_law, but was not included in the printed text due to space constraints.

Each of the equality chapters stands on its own. A professor could easily choose to cover only some of them, or cover them in a different order. With that said, the chapters have an intentional ordering and interconnectedness, so that they build upon one another to create a steady progression through the concept of equality. Brown v. Board and the question of race are the foundation of equal educational opportunity theory and thus come first. Poverty and
school finance follow because race and poverty disadvantage so closely overlap in our schools. Moreover, poverty, like race, is one of the primary determinates of the educational opportunities that students receive. Situating poverty immediately following race creates a solid foundation for the rest of the book. The chapter on ethnicity, language status, and immigration comes next, as these student populations often share the challenges of race and poverty inequality. The chapter, however, also clearly alerts readers to the distinct and additional complexity and inequality that language and immigration barriers pose. One could think of these three chapters as comprising a subunit, as the categories of disadvantage addressed in these chapters are intertwined.

Chapter 5 addresses gender. This chapter is the most distinct of the equality chapters. Certainly, gender overlaps with other forms of inequality, particularly for African American males, for instance. But in many respects, the chapter is set up as a comparison to other forms of discrimination, rather than an additional or corollary form of discrimination. The chapter asks students to struggle with questions of whether sex-segregated education is the same as race-segregation, whether gender discrimination should be subject to the same level of scrutiny as race, and whether differential treatment based on gender is motivated by stereotypes just like race is or some gender differences require different treatment. This chapter also offers a key point of contrast because the law has been more successful in furthering gender equality than in other paradigms. Students can examine why the law has been more successful with gender, while at the same time recognizing that gender equality still has its limits.

The final equality chapter, disability, is likewise distinct and provides another new counterpoint to the preceding chapters. While stereotypes and unwarranted disparate treatment of students with disabilities is a reality, much of the challenge with disability law is not to secure perfectly equal treatment, but to secure equal results through accommodation and differential treatment. In other words, the chapter asks whether equality for disabled students requires unequal treatment. If so, the chapter opens students to the possibility of reevaluating the major question from Chapter 1: what does equal educational opportunity mean? If not, it still pushes students to consider the complexity of the concept.

The second thematic part of the book addresses students’ rights outside of the equality context. This section is built on the theme of fairness, which is equally applicable to all students. It includes chapters on student discipline, free speech and religion, along with a chapter that explores how discipline, speech, and religion intersect with the curriculum. True to the theme of the casebook, these chapters, where appropriate, point out where they intersect with equality concerns. The discipline chapter, in particular, emphasizes the racial inequalities that arise in discipline policy.

It is also worth emphasizing that the driving goal of the free speech, religion, and curriculum chapters is clarity of organization and doctrine. The perpetual application problem for students, professors, and courts in these areas is to move beyond the threshold question of whether the problem implicates the First Amendment. That question is easy enough to resolve. More
challenging is the question of which precise strand of First Amendment law a factual scenario implicates. Rather than blending sub-strands of first amendment law, these chapters do their best to distinguish and frame them. Most notable is the fact that the free speech and religious freedom challenges to school curriculum are treated in their own chapter, as opposed to in conjunction with what one might call pure free speech or religious challenges.

The third part of the book is a recognition that education law is quickly and regularly changing in response to constant reform efforts over the past few decades. Much of that change has come through the increasing federal role in education and its primary vehicle: the Elementary and Secondary Education Act. Chapter 11 is devoted entirely to the federal role in education, along with a centerpiece of that reform, standardized testing. The book’s final chapter addresses reforms designed to offer students and families alternatives to traditional public schools: charter schools, vouchers, and homeschools. Each of these alternatives raises issues of educational equality, authority, and adequacy, which Chapter 12 explores in full. The chapter also offer students and professors the opportunity to close the course by considering the question of what is “public” education and what should it look like.

Now for caveats and apologies. First, the book’s thematic approach admittedly does not devote specific individualized attention to the discussion of teachers’ rights and basic school district operations, although the book does address both at various points. The first chapter, in particular, addresses school district authority and responsibility. The curriculum chapter addresses teachers’ rights in the classroom, and the reform chapters discuss issues of teacher quality and evaluation. Nonetheless, I would have liked to have done more with teachers in particular, but space limitations did not allow it. My intent in the next edition is to do more, even if it means a divergence from the thematic structure of the book.

Second, the case reprints in the book are what publishers like to call “tightly-edited.” For my purposes, that means that internal citation, tangential discussions, detailed procedural history, and overstated arguments are significantly redacted. It also means that dissents and concurrences are not always reprinted and, when they are, they are often edited to emphasize their major points. The casebook does include some long case reprints and dissents, but I had to avoid making that the general rule. No doubt, important and thought provoking language has been lost. In the end, I redacted cases more than I would have wanted, but it was only with dozens of passes through each case that I slowly and incrementally made the hard choice of where and what to cut. The upside is that by carefully editing cases I was able to include more cases and secondary materials than otherwise would have been possible. These additional materials ultimately provide students with more breadth, which fosters its own type of depth.

Finally, as the title and theme of this book convey, I am biased toward more equality, full equality, and the law’s role in making that a reality. But as the problem in the introductory chapter will make obvious, equality is often a concept whose meaning is based on the eyes of the beholder, and it is not always clear who is responsible for defining it. With this in mind, I recognize
this book would be inappropriate and a failure if it insisted on my view of equality and did not allow other professors and students to explore their own. I have tried my best to create that space within reason, but I would be a fool to suggest my biases do not come through in places. The real check on both my and the readers’ biases is the book’s continual effort to ask readers to critically evaluate every case, opinion, and source, regardless of its position.

Derek Black
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