

SCHOOL LAW FOR THE ALABAMA SUPERINTENDENT

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The University of Alabama College of Education

**Dr. Dave Dagley
Professor, The University of Alabama**



Dr. Thomas R. Bice, Superintendent



Dr. Peter Hlebowitsh, Dean

**Dr. Richard L. Rice, Jr.
Alabama Superintendents' Academy**

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TABLE OF CONTENTS EDUCATION LAW

	(Issues)	(Topic Headings)	(Page)
32	Organizational	Federal Government	1
33	Organizational	State Government	10
34	Organizational	County and City Boards of Education	24
35	Organizational	Superintendents	42
36	Organizational	Associations	49
37	Organizational	Liability and Immunity	53
38	Organizational	Church and State Relations	60
39	Employment	Certification	73
40	Employment	Recruitment	77
41	Employment	Contract Rights	81
42	Employment	Adverse Employment Actions	98
43	Employment	Teacher Accountability	111
44	Employment	Employment Records	113
45	Employment	Copyright	117
46	Employment	Discrimination	122
47	Employment	Constitutional Rights	132
48	Employment	Public Forum Doctrine	137
49	Student	Conduct Regulations	140
50	Student	Suspensions and Expulsions	143
51	Student	Disciplinary Transfers	146
52	Student	Corporal Punishment	149
53	Student	Search and Seizure	153
54	Student	Academic Sanctions	157
55	Student	School Safety and Health	159
56	Student	Attendance and Instructional Issues	165
57	Student	Classification Practices	171
58	Student	Students with Disabilities	177
59	Student	Constitutional Rights	186

EXPANDED TABLE OF CONTENTS EDUCATION LAW

ORGANIZATIONAL ISSUES

32 Federal Government.....	1
▪ Provisions of Federal Constitution Impacting Public Schools.....	1
▪ Legislative Branch and Statutory Law	7
▪ Executive Branch and Regulatory Law.....	8
▪ Judicial Branch and Common Law.....	8
33 State Government.....	10
▪ State Constitution and Public Schools.....	10
▪ State Legislature and Statutory Law.....	12
▪ State Court System	13
▪ Attorney General	14
▪ State Board of Education	15
▪ State Superintendent of Education.....	16
▪ State Department of Education	18
▪ State Tenure Commission.....	18
▪ State Ethics Commission.....	19
▪ Alabama Educator Code of Conduct.....	23
34 County and City Boards of Education.....	24
▪ Overview.....	24
▪ Organizational Matters	24
▪ Powers and Duties	26
▪ Relationship with Superintendent and Chief Financial Officer.....	27
▪ School Board Member Training and Principles of Governance.....	28
▪ Location of Central Office.....	28
▪ Consolidation and Annexation.....	29
▪ Ownership and Control of Property	30
▪ Agreements	32
▪ Instructional Matters	33
○ Attendance Zones.....	33
○ Grading and Standardization	33
○ Courses of Study	33
○ Promotion	34
▪ Employment Matters.....	34
○ Appointment	34
○ Causes of Dismissal	34
○ Vacations and Leaves	35
▪ Quadrennial Census.....	36
▪ Reporting Requirements.....	36

- The Alabama Open Meetings Act..... 37
 - Notice Requirements 38
 - Requirements During a Meeting 38
 - Executive Sessions..... 39
 - How to Call an Executive Session 40

- 35 Superintendents..... 42
 - Relationship with School Board 42
 - Qualifications and Certification 42
 - Powers and Duties 44
 - Building Programs and Consolidation 45
 - Attendance and Instructional Matters 46
 - Conferences and Institutes..... 46
 - Quadrennial Census..... 47
 - Reporting Requirements..... 47

- 36 Associations..... 49
 - Discretionary and Ministerial Authority 49
 - Alabama Association of School Boards..... 50
 - Cooperative Agreements..... 50
 - Risk Management Cooperative 51
 - Alabama High School Athletic Association..... 51
 - Information Technology Joint Purchase Agreements..... 52
 - Materials, Equipment, and Supplies Joint Purchasing Agreements 52

- 37 Liability and Immunity 53
 - Intentional Torts..... 53
 - Assault 53
 - Battery 53
 - False Imprisonment 54
 - Defamation 54
 - Intentional Infliction of Emotional Distress 54
 - Privacy Claims 54
 - Intrusion on Seclusion..... 55
 - Publicizing Private Facts 56
 - False Light Privacy..... 56
 - Appropriation of Name or Image 56
 - Non-intentional Torts 57
 - Negligence..... 57
 - Constitutional Torts 58
 - Governmental Immunity 58
 - Eleventh Amendment Immunity 59

- 38 Church and State Relations 60
 - Constitutional Provisions 60

- Establishment Clause Legal Tests 61
- Lemon Test 61
- Endorsement Test 62
- Coercion Test 63
- Which Test? 63
- Exception(s) to Establishment Violations 63
- Free Exercise Clause Legal Tests..... 64
- Applications 66
- Alabama Statutes Related to School Prayer 66
- Permissible and Impermissible Situations 68

EMPLOYMENT ISSUES

- 39 Certification 73
 - Certification as Showing of Legal Competency to Contract..... 73
 - Criminal Background Checks 73
 - Teacher Testing 74
 - Interstate Agreements 74
 - Authority over Certification 74
 - Approaches to Certification 74
 - Revocation and Suspension of Certificates..... 75
 - Duty to Report Adverse Employment Actions..... 76

- 40 Recruitment 77
 - Authority to Employ 77
 - Placement System 77
 - Posting Requirements 77
 - Appointment 79

- 41 Contract Rights 81
 - Common Law Requirements 81
 - Statutory Requirements 82
 - Appointment 83
 - Extended Contracts 83
 - Part-Time Contracts..... 84
 - Extra Duty Contracts..... 84
 - Sick Leave 85
 - Leave of Absence 86
 - Transportation..... 87
 - Students First Act of 2011 87
 - Repeal of Teacher Tenure Act and Fair Dismissal Act 87
 - Employees 87
 - Teachers..... 88
 - Classified Employees 89
 - Evaluation of Classified Employees..... 90

o	Obtaining Tenure or Nonprobationary Status	90
▪	Tenure for Teachers	90
o	Nonprobationary Status for Classified Employees.....	91
o	Other Provisions Regarding Receiving Tenure or Nonprobationary Status.....	92
o	Termination of Contract by Teacher	93
o	Transfer Teachers and Classified Employees	93
o	Transfer of Probationary Teachers and Probationary Classified Employees.....	93
o	Transfer of Tenured Teachers.....	94
o	Transfer of Nonprobationary Classified Employees.....	96
o	Contract and Probationary Principals	97
42	Adverse Employment Actions	98
▪	Students First Act of 2011	98
o	Statutory Causes for Termination	98
o	Contract Termination for Probationary Classified Employees	99
o	Contract Termination for Probationary Teachers.....	100
o	Contract Termination for Tenured Teachers and Nonprobationary Classified Employees	101
o	Hearings	102
o	Notice of Governing Board Action	103
o	When Pay and Benefits are Stopped	103
o	Appeals and Review	103
o	Lesser Penalties	105
o	Administrative Leave	105
o	Denial of a Hearing.....	105
o	Termination Upon Revocation of Teaching Certificate	106
o	Reduction in Force.....	107
o	Transition Between Old Tenure Laws and the Students First Act	107
▪	Probationary and Contract Principals	108
o	Probationary Principals.....	108
o	Contract Principals.....	109
43	Teacher Accountability	111
▪	Teacher Testing	111
▪	Teacher Evaluation	111
▪	Graduation Examinations	111
▪	School Grading System.....	111
▪	State-Takeover for Academic Reasons.....	112
▪	Educational Malpractice	112
44	Employment Records	113
▪	Relationship Between Employment Records and FOIAs	113
▪	Alabama's Open Records Act	113
▪	Personnel Records of Educational Employees	114

45	Copyright	117
	▪ Copyrights	117
	▪ Subject Matter of Copyright	117
	▪ Public Interest in Copyright.....	118
	▪ Requirements for Copyright.....	118
	▪ Work for Hire Rule.....	119
	▪ Actions for Infringement and Remedies	119
	▪ The Fair Use Doctrine and Teacher Exception	120
	▪ Guidelines for Classroom Copying	120
	▪ Fair Use and Teaching in a Wired World	121
46	Discrimination	122
	▪ Constitutional Standards for Reviewing School Policies or Decisions.....	122
	○ The Rational Basis Test.....	122
	○ Strict Scrutiny.....	123
	○ Intermediate Test.....	123
	▪ Title VII of the Civil Rights Act of 1964	123
	○ Bona Fide Occupational Qualification.....	124
	○ Disparate Treatment and Disparate Impact.....	124
	○ Affirmative Action.....	125
	○ Gender and Discrimination	126
	▪ Pregnancy Discrimination Act.....	127
	▪ Sex Harassment.....	127
	▪ Age Discrimination.....	128
	▪ Discrimination on the Basis of Disability	129
	○ ADA Compliant Employment Steps	130
	○ Relationship Between Reasonable Accommodations and Essential Functions.....	131
47	Constitutional Issues.....	132
	▪ Expressive Rights.....	132
	▪ Association Rights	134
	▪ Search and Seizure	134
	▪ Personal Behaviors	135
	▪ Personal Appearance	136
48	Public Forum Doctrine	137
	▪ Public Forum	137
	▪ Non-Public Forum.....	137
	▪ Limited Public Forum.....	138

STUDENT ISSUES

49	Conduct Regulations	140
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▪ Alabama Statutes	140
○ Duty to Adopt Conduct Codes	140
○ Duty to Disseminate.....	141
○ Duty to Report.....	141
○ Duty to Get Parents Involved	141
○ Duty to Separate Wrongdoers from School.....	142
○ Duty to Address Hazing	142
50 Suspensions and Expulsions	143
▪ Definitions.....	143
▪ Due Process Requirements.....	143
▪ Alabama Statutory Provisions	143
51 Disciplinary Transfers	146
▪ Statutory Provisions.....	146
▪ Reauthorization of IDEA	146
▪ Section 504 and A.D.A.	148
▪ Interaction with Existing Desegregation Orders.....	148
52 Corporal Punishment.....	149
▪ Definition of Corporal Punishment.....	149
▪ Constitutional Rights.....	149
▪ States Where Prohibited	150
▪ Legislative Immunity	150
▪ Parental Objections	151
53 Search and Seizure	153
▪ Constitutional Provisions	153
▪ Implications of Improper Searches	153
▪ <u>New Jersey v. T.L.O.</u>	154
▪ Reasonable At Inception	154
○ Exceptions to Individualized Suspicion	154
▪ Reasonable In Scope	155
54 Academic Sanctions	157
55 School Safety and Health	159
▪ Student Violence and School Safety	159
▪ Harassment and Hazing	160
▪ Protection from Sexual Predators.....	160
▪ Emergencies and School Safety Plans	161
▪ Safe Space Requirement	161
▪ Alcohol, Drugs, and Tobacco Use	162
▪ Asthma Self-Medication	162
▪ School Health Services	162

▪ Contagious Diseases.....	163
▪ Medically Fragile Children	164
▪ Service Animals.....	164
56 Attendance and Instructional Issues	165
▪ Compulsory Attendance	165
○ Attendance Requirements	165
○ Exemptions	165
▪ Residency.....	167
▪ Fees	167
▪ Curriculum	167
▪ School Calendar	169
▪ Instructional Supply Money	169
▪ High School Diplomas for Veterans.....	170
57 Classification Practices	171
▪ Constitutional Standards for Reviewing School Policies or Decisions.....	171
○ The Rational Basis Test.....	171
○ Strict Scrutiny.....	172
○ Intermediate Test.....	172
▪ Race, Color, Alienage, and National Origin-Based Classifications.....	173
▪ Gender-Based Classifications	173
▪ Language-Based Classifications	174
▪ Ability Grouping	175
▪ Age Classifications	175
58 Students With Disabilities	177
▪ Duties	178
▪ Eligibility Requirements	178
▪ Differences Between IDEA and Section 504 in Evaluations.....	179
▪ Zero Reject.....	179
▪ Free Appropriate Public Education.....	180
▪ Individualized Educational Program	180
▪ Least Restrictive Environment.....	181
▪ Parental Involvement.....	182
▪ Non-Discriminatory Testing	182
▪ Due Process.....	182
▪ Discipline	183
59 Constitutional Rights.....	186
▪ Due Process.....	186
○ Substantive Due Process	187
○ Procedural Due Process.....	188
▪ Free Speech Rights.....	189
○ <u>Tinker</u> “Material and Substantial Disruption” Standards	190

- The Bethel Standard..... 191
 - The Hazelwood Standard 191
 - Morse v. Frederick 192
 - T-Shirt Speech..... 193
- Free Exercise Rights 194
- Personal Appearance 195
- Privacy Rights..... 196
- Association Rights 197
- Search and Seizure 197
- Public Forum Doctrine 198
 - Public Forum..... 198
 - Nonpublic Forum 199
 - Limited Public Forum 199
 - Application of Public Forum Doctrine as Applied to Students..... 200
- Equal Access Act..... 200

32. ORGANIZATIONAL ISSUES: FEDERAL GOVERNMENT

Provisions of the Federal Constitution Impacting Schools

The federal government is a government of limited powers. Its powers are limited to specific references within the U.S. Constitution. Because there is no reference to education in the U.S. Constitution, there is no federal right to an education within the United States. The right to an education arises from state constitution, not federal constitution. However, once a state has provided through the state constitution for public education within the state, the right to an education under state constitution becomes a property right under federal constitution, and the federal constitution can be used to defend that property right. The following provisions under the U.S. Constitution are most likely to become involved in various school governance issues.

Tenth Amendment

Education is generally considered an “other power” under the Tenth Amendment. The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." (U.S. CONST. amend. X.) The fifty states of the United States each are invested with police power. Police power refers to the right of the state, as a sovereign entity, to make rules for itself regarding its peoples' health, safety, welfare, and morals. As a government of limited powers, the U.S. government lacks police powers. As stated, the federal government may exercise power only where explicitly granted to it by the U.S. Constitution.

Supremacy Clause

The Supremacy Clause of the U.S. Constitution makes it clear that on overlapping issues or topics, federal law is supreme over state law. The Supremacy Clause provides:

"This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the Supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding. U.S. CONST. art. VI., cl. 2.

Although public education is a state function, the exercise of that function by the various states must be consistent with the principles of the federal constitution. An application of the Supremacy Clause might be where a state law asserts authority to a

local school board to expel students in certain circumstances, for example, Section § 16-1-24.3 Code of Alabama (1975) requires all city and county boards of education in Alabama to develop and implement policies that require the expulsion of students for a period of one year, for possessing a firearm in a school building. Under federal law for special education students and regulations implementing that law, prior to the reauthorization of IDEA in 2004, special education students who brought a firearm to school could be moved unilaterally to an alternative school setting for up to 45 days by school officials. (I.D.E.A., 20 U.S.C. § 1415(e)(3)(2003).) That was actually the extent to which the student could be removed by school officials from his or her current placement. After passage of the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA), (2004 H.R. 1350), school officials apparently may not unilaterally move a special education student to an interim alternative educational setting, even when the behavior violating the conduct code is not a manifestation of the disability. The language in the reauthorization indicates that even this decision belongs to the IEP Committee, not just the school official administering the school conduct code. (See, IDEIA, 20 U.S.C. §1415(k)(2).)

The student must be provided a free, appropriate public education, and the committee charged with developing the student's individualized educational program (IEP) controls where that IEP must be delivered. This decision is in the hands of the IEP committee, not an administrator or the school board, even when either party wants to expel the student. Because of the direct wording of state law under Section § 16-1-24.3, the school district may go through the motions of expelling a special education student who brings a firearm to school, and the disciplinary consequence could appear on the student's permanent record. However, in the final analysis, the school district may not actually expel the child (where the operational definition of "expulsion" is to completely cease services). Due to the federal mandate under federal special education law to serve students covered by the Individuals with Disabilities Education Improvement Act of 2004 (20 U.S.C. 1412(a)(1), and the application of the Supremacy Clause, the state law on expulsion for possessing a firearm in school is inoperative as to special education students.

It should be noted that application of the Supremacy Clause extends to all three branches of state government, including the judicial branch. In Howlett and Howlett v. Rose, 496 U.S. 356 (1990), the U.S. Supreme Court held that the Florida courts could not use state sovereign immunity for school districts as an excuse for denying a federal claim under 42 U.S.C. § 1983, when that claim would be available in a federal court, because of the federal constitution's Supremacy Clause.

General Welfare Clause

The General Welfare clause has been used by Congress to tax and spend public funds for a wide array of purposes. The General Welfare Clause reads:

“The congress shall have power to lay and collect taxes, duties, imposts and excise, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;” U.S. CONST. art. I, sec. 8, cl. 1.

This clause has arguably provided congressional authority to legislate programs related to education, as well as legislate statutes impacting schools nationally. A partial listing of some of those acts is provided below, in the section “Legislative Branch and Statutory Law.”

Commerce Clause

Historically, the commerce clause has been interpreted broadly by the Supreme court, to provide the Congress with broad authority, especially in the areas of transportation, labor relations, occupational safety, health, and environmental control. The Commerce Clause provides Congress with authority:

“To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;” U.S. CONST. art. I, sec. 8 cl. 3.

An important application of the Commerce Clause was articulated in *U.S. v. Lopez*, 115 S.Ct. 1624 (1995). In that case, the Gun-Free Schools Act of 1994, Pub.L. 103-227 § 1031-1032, 108 Stat. 270 (1994), was found to violate the Commerce Clause. The Gun-Free Schools Act required every state to adopt legislation mandating at least a one-year suspension from school for students who brought firearms to school. Failure to adopt such state-level legislation would have jeopardized funding under the Elementary and Secondary Education Act. The Supreme Court found the Gun-Free Schools Act of 1994 outside Congress’ Commerce Clause authority, because the legislation failed to show how gun control legislation was an activity that substantially impacted interstate commerce.

Obligation of Contract Clause

Although it is not a topic often discussed in education law courses, contracting is an important function of school boards and a source of much litigation involving them. Section § 16-8-40(b), Code of Alabama (1975) gives county boards of education in Alabama the right to sue and contract, particularly with regarding property. A similar provision exists for city boards of education at Section § 16-11-12, Code of Alabama (1975). School boards also enter into contracts with employees. (See, for county boards, Section § 16-8-23, Code of Alabama (1975). Note that for city boards, there

may not be a comparable provision, but Section § 16-11-17, Code of Alabama (1975), which provides authority to fix salaries, may imply equal authority to contract.) The Obligation of Contract Clause is buried within the following prohibitive language:

“No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.” U.S. CONST. art. 1, sec. 10, cl. 1.

The Obligation of Contract Clause makes it inappropriate for a governmental entity like a school board to pass a policy or rule which has the effect of abandoning a contractual obligation. Perhaps one of the most famous Contract Clause cases was Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819), in which the Supreme Court ruled that Dartmouth College’s corporate charter, originating by grant from the British Crown, was a contract, and that the state legislature could not pass legislation placing controls on the college without impairing the contract.

First Amendment

The U.S. Constitution and its appended Bill of Rights are aimed at constraining the federal Congress. The well-known First Amendment provides:

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.” U.S.CONST. amend. I.

The First Amendment has become applicable to state governments through the process of selective incorporation. Through selective incorporation, each clause of the First Amendment has become, over time, applicable to the states, by being “incorporated” into the Due Process Clause of the Fourteenth Amendment. The Free Speech Clause did not become applicable to the states until 1925 in Gitlow v. New York, 268 U.S. 652 (1925). The Free Exercise Clause of the First Amendment did not become applicable to the states until 1940, in Cantwell v. Connecticut, 310 U.S. 296 (1940). And, the Establishment Clause did not become applicable to the states until 1947 in Everson v. Board of Education, 330 U.S. 1 (1947). Much of the litigation involving schools and the First Amendment involve these three clauses, although the right to association (vested in the “peaceably to assemble” clause) has become increasingly used to challenge regulations targeting such student groups as youth gangs.

Fourth Amendment

The Fourth Amendment declares:

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S.CONST. amend. IV.

The application of the Fourth Amendment in public school settings generally involves the propriety of searches of students or seizures of student property. A full discussion of this application can be found in Module 53, Student Issues: Search and Seizure.

Fifth Amendment

The Fifth Amendment stipulates that:

“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” U.S.CONST. amend. V.

The Fifth Amendment has many provisions familiar to the general populace. “Taking the Fifth” is a general expression that has passed into all-purpose usage, meaning “refusing to answer.” In education law, four provisions of the Fifth Amendment have specific application. The prohibition against deprivation of life, liberty, or property, without due process of law, for example, can serve to restrain the federal government from withholding federal funds from local school districts without according minimal due process. The provision against “double jeopardy” has often been raised to question the ability of a school board to terminate a teacher’s employment after the teacher has been convicted of a crime. Because the school board’s decision is a civil matter, and the conviction is a criminal matter, double jeopardy does not apply. The provision against being compelled to witness against one’s self in a criminal case is implicated when a school employee is arrested. Finally, the “just compensation” provision becomes applicable in instances of eminent domain, where the school board must

compel a property owner to sell property that is needed by the school district for educational purposes.

Ninth Amendment

The Ninth Amendment provides:

“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” U.S. CONST. amend. IX.

The Ninth Amendment is often used by plaintiff parents and schoolchildren to challenge school regulations that are believed to interfere with basic unenumerated rights, such as privacy, or the right to direct the upbringing of one’s child. (See, Oldaker, Lawrence Lee, “Privacy Rights, School Choice, and the Ninth Amendment,” BYU Educ & Law J., Spring 1993, pp. 58-75.) Another common, but usually unsuccessful, Ninth Amendment claim arises when students challenge grooming and dress regulations.

Eleventh Amendment

The Eleventh Amendment is a jurisdictional amendment; it provides immunity for states in federal court. As such, it is an expression of state rights against the federal government. The Eleventh Amendment provides:

“The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.” U.S. CONST. amend. XI.

In the last decade the Eleventh Amendment has had an increasingly-important impact on education. Since Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) a revolution in sovereign immunity case law is changing the relationship between the federal government and the states. This is important in education, because school districts in a few states have been found to be instrumentalities of the state and are thus immune from suit in federal court. (See, Oldaker, L. and Dagley, D. "The Eleventh Amendment, Its History, and Current Application to Schools and Universities." West's Education Law Reporter. Vol. 72, No. 2 (April 9, 1992): 479-501.) There is a potential argument that the schools in many more states have Eleventh Amendment immunity. (See, Dagley, D and Oldaker, L. "Are School Districts State Actors (Alter Egos)?" West's Education Law Reporter. Vol. 79, No. 2 (February 25, 1993): 367-81.)

Fourteenth Amendment

Of all constitutional provisions, the Fourteenth Amendment has had the greatest impact on public education. This is because education is a state function and the

Fourteenth Amendment acts as a constraint on improper state action. The pertinent part of the Fourteenth Amendment reads:

“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. CONST. amend. XIV, sec. 1.”

Both the “Due Process Clause” and the “Equal Protection Clause” of the Fourteenth Amendment have been used to challenge governmental action. The Due Process Clause prohibits the deprivation of life, liberty, or property, without due process of law. Bodily integrity, which is often invoked in corporal punishment or sexual abuse situations, is a liberty interest. A lineage of cases, including the well-known case of Roe v. Wade, 410 U.S. 113 (1973), recognizes a liberty interest in privacy, connected to concepts such as “home, hearth, family, marriage, procreation, and contraception.” Teachers often have a liberty interest in their reputation, which may become at stake in adverse employment actions. Students have a property interest in attending schools, arising from the state’s passage of compulsory attendance laws. Teachers have a property interest in existing employment contracts. All of these rights are protected by the Due Process Clause. The Due Process Clause, through selective incorporation, also gives individuals protection from violations of much of the Bill of Rights by state actors, including school districts and personnel.

The Equal Protection Clause has been invoked in significant litigation concerning allegations of discrimination, particular discrimination based upon race, national origin, ethnicity, disabilities, or gender.

Legislative Branch and Statutory Law

Despite the fact that public education is considered a state function under the Tenth Amendment and not a federal function, the federal Congress has always actively promoted public education through legislation. The Ordinances of 1785 and 1787 granted the sixteenth (and thirty-second) sections of land in every township to the states, to promote the development of education. Vocational rehabilitation legislation originated shortly after World War I to address the needs of wounded veterans, and that legislation eventually developed into the Rehabilitation Act of 1973. By the middle of the Twentieth Century, many examples of federal legislation have impacted upon schools or provided for educational funding. Examples of such legislation include the National Defense Education Act of 1958, the Vocational Education Act of 1963, the Elementary and Secondary Education Act of 1965, the Bilingual Education Act of 1968,

Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, the Family Educational Rights and Privacy Act of 1974, the Education for all Handicapped Children Act of 1975 (later, the Individuals with Disabilities Education Act of 1990), and the Pregnancy Discrimination Act of 1978. Four years ago, Congress passed comprehensive legislation that is likely to have the greatest impact on public educational institutions, with the No Child Left Behind Act of 2001 (NCLB). The textual constitutional source of congressional power to pass NCLB is not exactly clear. To date, no state has brought an action questioning its constitutionality, although the Commonwealth of Pennsylvania has raised the issue of funding. (Title X of the NCLB stipulates that, if the act is not fully funded, then its provisions become moot.) Three low level courts have held that only state governments, as recipients of federal funds under NCLB, have standing to challenge NCLB.

Perhaps the greatest potential impact, on public educators (as opposed to public educational institutions) arises from the Civil Rights Act of 1871. This act, designed to enforce the Thirteenth, Fourteenth, and Fifteenth Amendments, is codified at 42 U.S.C. Section § 1983. This provision, usually just called “Section 1983,” holds state actors (including school professionals) accountable when they violate the clearly established constitutional or civil rights of others. Section 1983 liability is an important deterrent to such illegal activity, inasmuch as it implicates the personal assets of school officials.

Executive Branch and Regulatory Law

The Executive Branch of the federal government is created in Article II of the U. S. Constitution. This branch of government is charged with executing the law (“he shall take Care that the Laws be faithfully executed,” U.S.CONST. art. II, sec. 3 (1787).) By this power, the Executive Branch is charged with creating regulatory law to fulfill and give meaning to statutory law.

The primary federal actor within the Executive Branch is the U. S. Department of Education. The federal department did not achieve cabinet status until 1980, although an Office of Education was originally created in 1867 and became part of the Department of Health, Education, and Welfare in 1953. Much of the activity of the federal department is involved with funding for educational activities, coordination of educational functions, provision of technical assistance, and regulatory oversight. Dominant other federal regulatory agencies include the Office for Civil Rights and the Equal Employment Opportunity Commission.

Federal Courts and Common Law

The Federal Court System is established within Article III of the U. S. Constitution, which creates the Supreme Court and authorizes Congress to create other federal courts as required. (U.S. CONST., art. III, sec. 1 (1787).)

The trial courts in the Federal Court System are the federal district courts. One or more federal district courts exist in each state, the number of which is distributed, like seats in the House of Representatives, based upon state population. Decisions of the federal district courts are reported in the Federal Supplement (F.Supp.).

The appellate courts in the Federal Court System are arranged by geography into twelve circuit courts of appeal and a federal circuit court, which hears claims such as copyright, patents, trademarks, customs, and international trade. The appellate courts have jurisdiction over both civil and criminal claims. The decisions of the appellate courts have precedential value within their own circuit only, but may have influence over a sister court in another jurisdiction. The decisions of the appellate courts are reported in the Federal Reporter, now in its third series of 999 volumes (F.3d). The geographical jurisdiction of the circuit courts of appeal are as follows:

- 1st Circuit: ME, MA, NH, RI, PR
- 2nd Circuit: CT, NY, VT
- 3rd Circuit: DE, NJ, PA, VI
- 4th Circuit: MD, NC, SC, VA, WV
- 5th Circuit: LA, MS, TX, Canal Zone
- 6th Circuit: KY, MI, OH, TN
- 7th Circuit: IL, IN, WI
- 8th Circuit: AR, IA, MN, MO, NE, ND, SD
- 9th Circuit: AK, AZ, CA, ID, HA, MT, NV, OR, WA, Guam
- 10th Circuit: CO, KS, NM, OK, UT, WY
- 11th Circuit: AL, FL, GA
- D.C. Circuit: Washington, D.C.
- Fed. Circuit: Special federal claims

The U. S. Supreme Court is the nation's highest court, and its decisions are precedent for the same issue in all jurisdictions. Its decisions are reported in three different reporters, the Supreme Court Reporter (S.Ct.), the Lawyer's Edition, in its second series (L.Ed.2d), and the United States reports (U.S.). Although it is common for an aggrieved parent to promise to "sue school officials all the way to the Supreme Court," there is no right to appeal to the Supreme Court. Instead, application is made to the court to be heard, by way of a writ of certiorari. If four of the nine justices of the Supreme Court agree to hear a case (called "the rule of four"), then certiorari is granted, and the case will be heard.

33. ORGANIZATIONAL ISSUES: STATE GOVERNMENT

Because the U. S. Constitution is silent concerning its provision, education is considered an “other power” under the federal constitution’s Tenth Amendment. Thus, education in Alabama is a creature of the state constitution, a state function that operates pursuant to state law, and exists as one of many exercises of police power by state government. “Police power” refers to the comprehensive power of the state, as a sovereign, to make laws concerning the health, safety, welfare, and morals of persons in Alabama.

Module 2, Legal Foundations of Public Education, *supra*, provides information about the background and history of public education in Alabama. The following section provides additional detail about the constitutional status of public schooling in Alabama.

State Constitution and Public Schools

As a condition of statehood, the Northwest Ordinance of 1787 required each territory to specify within its proposed state constitution how it would provide for public education within the new state. In exchange for specifying how it would provide for public education, the federal government ceded the sixteenth section of each township within the territory to the new state government, to provide beginning resources for the support of public education.

Alabama’s original constitution provided that “Schools, and the means of education, shall forever be encouraged in this state.” (ALA. CONST. art. VI. (1819).) Article VI of the 1861 constitution repeated this provision, and the 1865 Constitution expressly directed the legislature to enact laws for the encouragement of education and the promotion of schools. Alabama’s legislature had already created a public school system in 1854, by act declaring its intent “to extend, upon equal terms, to all the children of our State, the inestimable blessings of liberal instruction. (1853-54 Acts 6 at 8.) The 1875 constitution spoke for the first time of a “system” of education: “The General Assembly shall establish, organize, and maintain a system of public schools throughout the State, for the equal benefit of the children thereof between the ages of seven and twenty-one years. . .” ALA. CONST. art. XIII, s. 1 (1875). The “equal benefit” referred therein was realized by adoption of a separate but equal system of segregated schools. (See, Plessy v. Ferguson, 163 U.S. 537 (1896).)

The 1901 constitution solidified the legislature’s duty to provide for a liberal system of schooling, although separated by race:

The legislature shall establish, organize, and maintain a liberal system of public schools throughout the state for the benefit of children thereof between the ages of seven and twenty-one years. The public school fund shall be apportioned to the several counties in proportion to the number of school children of school age

therein, and shall be so apportioned to the schools in the districts or townships of the counties as to provide, as nearly as practicable, school terms of equal duration in such school districts or townships. Separate schools shall be provided for white and colored children, and no child of either race shall be permitted to attend a school of the other race. ALA. CONST. art. XIV, s. 256 (1901).

In 1956, the Alabama Legislature proposed a constitutional amendment to the state's education clause. Replacing the requirement of a liberal system of education, the amendment, as adopted, stated:

It is the policy of the state of Alabama to foster and promote the education of its citizens in a manner and extent consistent with its available resources, and the willingness and ability of the individual student, but nothing in this Constitution shall be construed as creating or recognizing any right to education or training at public expense, nor as limiting the authority and duty of the legislature, in furthering or providing for education, to require or impose conditions or procedures deemed necessary to the preservation of peace and order.

The legislature may by law provide for or authorize the establishment and operation of schools by such persons, agencies or municipalities, at such place, and upon such conditions as it may prescribe, and for the grant or loan of public funds and the lease, sale or donation of real or personal property to or for the benefit of citizens of the state for educational purposes under such circumstances and upon such conditions as it shall prescribe. Real property owned by the state or any municipality shall not be donated for educational purposes except to nonprofit charitable or eleemosynary corporations or associations organized under the laws of the state. ALA. CONST. art. XIV, s. 256, amend. 111 (1901).

Upon passage of this amendment, the state constitutional education clause made it permissive, rather than mandatory, for the legislative branch to provide for public education. Based upon the documents transmitted with the text of the proposed amendment, the committee made clear that the intent of the constitutional amendment was entirely to thwart required desegregation (Report of Alabama Interim Legislative Committee on Segregation in the Public Schools, Legislative Document No. 1, Senate, (October 18, 1954) Hereafter, Report of Committee.) Indeed, the senate resolution creating the committee to study the problem observed:

This Resolution found that the pending group of cases before the U.S. Supreme Court would impose expense upon the State in the continuation of the school system beyond any present provision or capacity to meet and compel serious consideration of the abandonment of the function of public education. (Acts of Alabama 1953, S.J.R. 49, Act No. 894 (September 21, 1953).)

In the opening pages of its report to the Legislature, the committee observed: “The overwhelming majority of white citizens of Alabama are unalterably opposed to the idea of permitting the use of the public school system to coerce racial integration. (Report of Committee at 4.) Despite Brown v. Board of Education (347 U.S. 483 (1954) (Brown I); 349 U.S. 294 (1955) (Brown II)) the committee believed that the amendment would permit the state to discontinue public education in locations where public disorder was likely and would permit the use of public funds to aid private (white) schools. In this way, public school segregation could be preserved:

The main objective of the proposals is to give the authority to the legislature to assure the recognition by our school authorities of the right of white people, as well as negro people, to elect to attend schools of their own race and to make possible the application of tests and standards which must be met before mixed schools can be operated at all for those willing to attend them. (Report of Committee at 9.)

The legislature soon passed statutes implementing Amendment 111, which included provisions for private tuition payments and school closings, but these provisions were stricken by the federal court in Lee v. Macon County Board of Education. (232 F.Supp. 743 (1967).) Amendment 111 was later found unconstitutional by the grant of a summary judgment to the plaintiffs in A.C.E v. Hunt. (624 So. 2d 107, 111.) The Alabama Supreme Court later upheld the circuit court’s findings with regard to the original 1901 education clause, thereby implying agreement with the unconstitutionality of the 1956 amendment. (Opinion of the Justices. No. 338., Appendix (Alabama Coalition for Equity v. Hunt, Civ. A. Nos. CV-90-883-R,, CV-91-0117), 624 So.2d 107, 108 (Ala. 1993).) However, the Alabama Supreme Court settled all question of the impact of the School Equity Funding Case in 2002, when it dismissed the case. Ex parte James, 836 So.2d 813, 815 (Ala. 2002). The Court recognized the command of the state constitution, that the Supreme Court “shall never exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws and not of men.” ALA. CONST. 1901 §43. The Court further recognized the impact of Amendment 582 to the Alabama Constitution of 1901, which nullifies any “order of a state court, which requires disbursement of state funds, . . .until the order has been approved by a simple majority of both houses of the Legislature.” By this decision, Amendment 111 of Section 256 of the Alabama Constitution, which declares that school children in Alabama have no right to a public education, was reinstated.

State Legislature and Statutory Law

State legislatures throughout the United States, year in and year out, propose and address approximately 20,000 pieces of new legislation related to education annually. Of these, nearly 2,000 new bills are passed into law nationwide. (See, e.g., Dagley, “State and Federal Legislation,” The Yearbook of School Law 2004, Education

Law Association, Dayton, OH (2004). One way to view this abundance of legislation is to recognize it as fifty different educational laboratories, each attempting to experiment over time with new and different approaches to delivering education.

When looking at structures providing for education among the states, there is variety in the approaches taken, but at the same time, there are striking similarities. Hawaii alone has a statewide school system; all forty-nine other states operate with three state-level entities: a state-level board; an executive officer; an office, with assistants, for the executive officer. Most states have legislation giving these state-level actors “general control and supervision” over the public schools of the state. Consequently, these state-level actors tend to pursue roles that are somewhat removed from the day-to-day governance of public schools. The day-to-day operation of public schools is generally given to local school boards.

Pursuant to ALA. CONST. art. XIV, s. 256 (1901), the Alabama legislature has constructed a state-level system with three state actors, all creatures of the legislature: the State Board of Education; the State Superintendent of Education; and the State Department of Education. Their powers and duties are assigned by statute and discussed below. State legislation also details the powers and duties of local boards of education, which are discussed in Module 34.

State Court System

The court system in the State of Alabama is provided for by state constitution, and the legislature has codified provisions relating to the state court system in Title 12, Code of Alabama (1975).

The trial courts of the state are the district courts and circuit courts, although provision is also made for municipal, juvenile, and other types of courts. State district courts are created by legislation in Title 12, Chapter 12 Code of Alabama (1975). District courts have general jurisdiction, concurrent with the circuit courts, over civil matters in which the matter in controversy does not exceed \$10,000. (Section § 12-12-30, Code of Alabama (1975).) Section § 12-11-2, Code of Alabama (1975) specifies the location of 41 separate circuit courts, serving the various counties of the state. Circuit courts have concurrent jurisdiction with district courts over matters involving controversies not exceeding \$10,000 in value, but exclusive jurisdiction on matters of greater value. Circuit courts also have original jurisdiction on criminal matters. (Section § 12-11-30, Code of Alabama (1975).)

Alabama has separate appellate-level state courts. Criminal matters are appealed to the Court of Criminal Appeals, and civil matters are appealed to the Court of Civil Appeals (see, Title 12, Chapter 3, Code of Alabama (1975)).

The highest court in the state is the Supreme Court, which is created by the legislature and codified in Title 12, Chapter 2 of the Code of Alabama (1975). The State Supreme Court is composed of a Chief Justice and eight Associate Justices. (Title 12-2-1, Code of Alabama (1975).)

What is important to recognize about the state court system in Alabama is that, because our court system is a common law system, a primary function of the state court system is to interpret state law. Consequently, it is also important to recognize that interpretation of law also creates law.

Attorney General

Title 36, Chapter 15 of the Code of Alabama (1975) specifies the role and duties of the Attorney General. Among his or her duties is a specific provision related to the issuing of opinions for local school boards, when requested to do so in writing:

The Attorney General shall give his or her opinion, in writing or otherwise, as to any question of law connected with the duties of the following county or city officer when requested so to do in writing: judge of probate, clerk of the circuit court, sheriff, *city and county boards of education* (emphasis added), county commission, register of the circuit court, tax collector, tax assessor, mayor or chief executive officer of any incorporated municipality, city council or like governing body of any incorporated municipality, or any other officer required to collect, disburse, handle, or account for public funds. Section § 36-15-1.1(1)(b) Code of Alabama (1975).

Section § 36-15-1.1(3) Code of Alabama (1975) requires the Attorney General to publish quarterly in pamphlet form copies of written official opinions which have rendered in the prior three months. These opinions have the force of law until overturned by a court of competent jurisdiction. The value of an attorney general opinion to the local school board is the protection from liability provided by following the opinion:

The written opinion of the attorney general, heretofore or hereafter secured by any officer, board, local governing body or agency legally entitled to secure such opinion, shall protect such officer and the members of such board, local governing body or agency to whom it is directed or for whom the same is secured from liability to either the state, county or other municipal subdivisions of the state because of any official act or acts heretofore or hereafter performed as directed or advised in such opinion. Section § 36-15-9, Code of Alabama (1975).

State Board of Education

Title 16, Chapter 3 of the Code of Alabama (1975) details the organization, powers, and duties of the State Board of Education. Because it is called a “board,” the tendency for educators is to view the role and functioning of the State Board of Education by analogy to the role and functioning of local boards of education. This includes calling the rules passed by the State Board of Education as “policy.” Although there are operational parallels, the State Board of Education and other state-level actors are executive branch entities within state government. As such, they are subject to Alabama’s Administrative Procedures Act, Section § 41-22-1, *et. seq.*, Code of Alabama (1975), in rule-making function. Therefore, the rules passed by the State Board of Education are “regulations” or “regulatory law,” just as rules passed by any other executive branch entity (e.g., state parks; transportation; emergency management; etc.) are also “regulations” or “regulatory law.”

Note that in its general powers statement, the powers of the State Board of Education include “general control and supervision”:

The State Board of Education shall exercise, through the State Superintendent of Education and his professional assistants, general control and supervision over the public schools of the state, except institutions of higher learning which by law are under the general supervision and control of a board of trustees, and shall consult with and advise through its executive officer and his professional assistants, county boards of education, city and town boards of education, superintendents of schools, school trustees, attendance officers, principals, teachers, supervisors and interested citizens, and shall seek in every way to direct and develop public sentiment in support of public education. (Section § 16-3-11 Code of Alabama (1975).)

Notwithstanding the general powers statement, above, other provisions in state law give the State Board of Education more specific and immediate control over local education functions. Paramount among these is the authority to take over local schools or school districts under the Education Accountability Plan (Acts 1995, No. 95-313, p. 620, § 1), which is codified in Title 16, Chapter 6B in the Code of Alabama (1975). Intervention by the State Board of Education can occur for academic reasons (Section § 16-6B-2 Code of Alabama (1975)), for financial reasons (Section § 16-6B-4 Code of Alabama (1975)), or for school safety and disciplinary reasons (Section § 16-6B-5 Code of Alabama (1975)). Additionally, state law gives the State Board of Education the power and authority to make rules and regulations to govern the manner in which the State Superintendent of Education may review the actions and orders of county and city boards of education, as well as the actions of county and city superintendents, in “matters relating to finance and other matters seriously affecting educational interest.” (Section § 16-3-27 Code of Alabama (1975).)

Other specified powers of the Board are listed as follows, although the following is not a complete listing:

The Board must adopt “rules and regulations for the proper construction of school buildings, for the sanitation of schools, for the physical examination of school children, and, in conjunction with other state authorities, shall see to it that the rules relating to school health, compulsory education, and child conservation are enforced.” (Section § 16-3-12 Code of Alabama (1975).)

The Board must prescribe rules and regulations concerning the grading and standardizing of public schools. (Section § 16-3-14 Code of Alabama (1975).)

The Board may permit, but may not require, nonpublic high school students in the state to take a high school graduation examination. The Board may charge a fee for the examination. (Section § 16-3-40 Code of Alabama (1975).)

The Board has primary authority over the training and certification of teachers (Section § 16-3-16 Code of Alabama (1975)), and is required to assess teachers through a nationally-normed test. (Section § 16-3-16.1 Code of Alabama (1975).)

State Superintendent of Education

Title 16, Chapter 4 of the Code of Alabama (1975) details the powers and duties of the State Superintendent. The State Superintendent is appointed by the State Board of Education and serves at the pleasure of that body ((Section § 16-4-1 Code of Alabama (1975).). Section § 16-4-4 Code of Alabama (1975) details the State Superintendent’s general duties:

“The State Superintendent of Education shall explain the true intent and meaning of the school laws and of the rules and regulations of the State Board of Education. He shall decide, without expense to the parties concerned, all controversies and disputes involving the proper administration of the public school system. The State Superintendent of Education shall enforce all the provisions of this title and the rules and regulations of the State Board of Education. He shall file charges with the State Board of Education or other controlling authority and shall recommend for removal or institute proceedings for the removal of any person appointed under the provisions of this title for immorality, misconduct in office, insubordination, incompetency or willful neglect of duty.” Section § 16-4-4 Code of Alabama (1975).

On a continuum, the statutory duties listed above place the Alabama State Superintendent of Education in a strong position of authority over the activities in the city and county school districts in the state, compared to the authority enjoyed by State Superintendents or Commissioners in other states. Section § 16-4-4 Code of Alabama (1975) provides for four unique functions for the State Superintendent: interpreter;

decision-maker; enforcer; and terminator. Taken together, they indicate a strong statewide leadership role, with the capacity to intercede in local affairs.

An Alabama Supreme Court case clarifies the State Superintendent's intercessory role. In Jones v. Richardson, CV No. 2001-792, Circuit Court of Jefferson County (May 2, 2002), the Bessemer City School District and Jess Lanier High School were in state intervention through the Education Accountability Plan under Title 16, Chapter 6B, Code of Alabama (1975). The interim local superintendent would not make a recommendation regarding transfer of tenured teachers and the non-renewal of non-tenured teachers. The State Superintendent asked the district's chief financial officer, an employee of the State Department of Education, to make the personnel recommendations. The trial court granted summary judgment to the teachers, finding that the State Superintendent did not have the power, under either his general oversight powers or under the Education Accountability Plan, to make personnel recommendations required by Title 16, Chapter 24 (the tenure and transfer statutes) to be given by the local superintendent. On appeal to the Supreme Court, the high court affirmed the summary judgment on the issue of the transfer of tenured teachers. (Richardson v. Terry, Supreme Court of Alabama 1011702 (3/19/04) (<http://www.wallacejordan.com/decisions/Opinions2004/1011702.htm>, last viewed 1/2/05).) Because Section §16-24-5 specifies that the local superintendent must recommend the transfer of tenured teachers, the state superintendent may not direct the chief financial officer to make the recommendation while in state take-over. However, the court reversed the summary judgment on the issue of non-renewals for non-tenured teachers, because Section §16-24-12, the statute governing such actions, does not require the local superintendent to recommend such non-renewals. This decision seems to support the notion that the State Superintendent's power to intercede in local affairs exists more as the power to review after-the-fact, rather than the power to direct at the outset of particular local issues, except where specifically articulated in the take-over provisions of Title 16, Chapter 6B, Code of Alabama (1975).

The review power of the State Superintendent is strengthened by language found in Section § 16-4-8 Code of Alabama (1975):

The State Superintendent of Education, under rules and regulations promulgated by the State Board of Education, shall have the authority to review actions and orders of county and city boards of education and of county superintendents of education and city superintendents of schools in matters relating to finance and other matters seriously affecting the educational interest. Upon such review the State Superintendent of Education shall have the power to determine from the facts the just and proper disposition of the matter. The order of the state superintendent shall be binding. Section § 16-4-8 Code of Alabama (1975).

Other powers delegated to the State Superintendent include: to execute the educational policy of the State Board (Section § 16-4-6 Code of Alabama (1975)); to administer the State Department of Education (Section § 16-4-11 Code of Alabama

(1975)); to conduct a school census (Section § 16-4-15 Code of Alabama (1975)); to guide the creation of regulations regarding the grading and standardizing of all public schools in the state (Section § 16-4-14 Code of Alabama (1975)); to prepare forms and blanks for local reports (Section § 16-4-16 Code of Alabama (1975)); to prepare an annual report of the State Board of Education (Section § 16-4-18 Code of Alabama (1975)); to prepare the budget (Section § 16-4-19 Code of Alabama (1975)); and, to prepare and submit for approval and adoption legislative measures needed for the further development and improvement of the state's public schools (Section § 16-4-20 Code of Alabama (1975)).

State Department of Education

The Alabama State Department of Education is created by Section § 16-2-1(a) Code of Alabama (1975). The State Department operates under the direction of the State Superintendent of Education, with the advice and counsel of the State Board of Education. Assistant state superintendents are permitted to perform the duties of the State Superintendent when directed by the State Superintendent. The duties of the Department of Education are to assist in executing the policies and procedures authorized by law and by regulations of the State Board of Education. Section § 16-2-2 Code of Alabama (1975). The organizational structure of the department must be approved by the State Board of Education, upon recommendation of the State Superintendent. Section § 16-2-3 Code of Alabama (1975).

The State Department of Education exercises its influence as the office of the executive officer for the State Board of Education, who is the State Superintendent of Education. The State Department is directed by legislation to exert its influence also through publications of the department. Section § 16-2-4 Code of Alabama (1975).

State Tenure Commission

Title 16, Chapter 24, art. 2, Code of Alabama (1975), *now repealed*, outlined the duties and role of the State Tenure Commission. The State Tenure Commission was a creature of the Legislature, and it had seven members. Section 16-24-30 Code of Alabama (1975). The State Tenure Commission was given by Section § 16-24-36 the duty to hear and determine in appealed cases whether an adverse employment action against a teacher was in compliance with the tenure law and whether such action was arbitrarily unjust. (See, Section § 16-24-10 Code of Alabama (1975).) The statute creating the State Tenure Commission was repealed by Act 2004-566, §3, effective July 1, 2004. Thus, after that date, the commission ceased to exist with respect to new adverse employment actions occurring after July 1st. The commission continued to exist and operate until reviews originating before July 1, 2004, are worked through the system.

State Ethics Commission

The State Ethics Commission is created by the Legislature in Section § 36-25-3 Code of Alabama (1975). It has five members and is charged with the following duties:

- (a) The commission shall do all of the following:
 - (1) Prescribe forms for statements required to be filed by this chapter and make the forms available to persons required to file such statements.
 - (2) Prepare guidelines setting forth recommended uniform methods of reporting for use by persons required to file statements required by this chapter.
 - (3) Accept and file any written information voluntarily supplied that exceeds the requirements of this chapter.
 - (4) Develop, where practicable, a filing, coding, and cross-indexing system consistent with the purposes of this chapter.
 - (5) Make reports and statements filed with the commission available during regular business hours to public inquiry subject to such regulations as the commission may prescribe.
 - (6) Preserve reports and statements for a period consistent with the statute of limitations as contained in this chapter. The reports and statements, when no longer required to be retained, shall be disposed of by shredding the reports and statements and disposing of or recycling them, or otherwise disposing of the reports and statements in any other manner prescribed by law. Nothing in this section shall in any manner limit the Department of Archives and History from receiving and retaining any documents pursuant to existing law.
 - (7) Make investigations with respect to statements filed pursuant to this chapter, and with respect to alleged failures to file, or omissions contained therein, any statement required pursuant to this chapter and, upon complaint by any individual, with respect to alleged violation of any part of this chapter to the extent authorized by law when in its opinion a thorough audit of any person or any business should be made in order to determine whether this chapter has been violated, the commission shall direct the Examiner of Public Accounts to have an audit made and a report thereof filed with the commission. The Examiner of Public Accounts shall, upon receipt of the directive, comply therewith.
 - (8) Report suspected violations of law to the appropriate law-enforcement authorities.

(9) Issue and publish advisory opinions on the requirements of this chapter, based on a real or hypothetical set of circumstances. Such advisory opinions shall be adopted by a majority vote of the members of the commission present and shall be effective and deemed valid until expressly overruled or altered by the commission or a court of competent jurisdiction. The written advisory opinions of the commission shall protect the person at whose request the opinion was issued and any other person reasonably relying, in good faith, on the advisory opinion in a materially like circumstance from liability to the state, a county, or a municipal subdivision of the state because of any action performed or action refrained from in reliance of the advisory opinion. Nothing in this section shall be deemed to protect any person relying on the advisory opinion if the reliance is not in good faith, is not reasonable, is not in a materially like circumstance. The commission may impose reasonable charges for publication of the advisory opinions and monies shall be collected, deposited, dispensed, or retained as provided herein. On October 1, 1995, all prior advisory opinions of the commission in conflict with this chapter, shall be ineffective and thereby deemed invalid and otherwise overruled unless there has been any action performed or action refrained from in reliance of a prior advisory opinion.

(10) Initiate and continue, where practicable, programs for the purpose of educating candidates, officials, employees, and citizens of Alabama on matters of ethics in government service.

(11) In accordance with Sections 41-22-1 to 41-22-27, inclusive, the Alabama Administrative Procedure Act, prescribe, publish, and enforce rules and regulations to carry out this chapter. Section §36-25-4 Code of Alabama (1975).

An important feature of the state ethics law is the requirement that certain school officials must file an annual statement of economic interest. Section §36-25-14 Code of Alabama (1975). The following educational personnel must file such a statement:

- (1) City and county superintendents and school board members (whether appointed or elected).
- (2) City and county school principals or administrators.
- (3) Members of the State Board of Education.
- (4) College administrators, including chancellors, presidents, vice-presidents, deans, and department chairs.
- (5) Persons who oversee governmental funds.
- (6) Purchasing or procurement agents having the authority to make any purchase.
- (7) Teachers who earn more than \$75,000 annually. (Ala. Act 2012-509)
- (8) Educators or their spouses who have engaged in business with an educational entity.
- (9) Education lobbyists.
- (10) The chair of the Alabama Commission on Higher Education.

In 2011, the Legislature required public officials, candidates for public office, and their spouses to publicly disclose whether they are employed by or have a contract with the state. (Alabama Act 2011-674, H.B. 58.) The Legislature again increased the threshold requirement for filing an economic interest statement to \$75,000 in 2012, and added a requirement that every full-time public employee serving in a supervisory capacity must also file an economic interest statement. (Alabama Act 2012-509, H.B. 136.)

The State Ethics Commission must interpret statutory prohibitions against:

- 1) a conflict of interest (Section §36-25-1(8) Code of Alabama (1975));
- 2) use of official position or office for personal gain; and,
- 3) what is a thing of value (Section §16-25-1(33) Code of Alabama (1975)).

In 2011, the Legislature amended the state ethics law to prohibit the offering or receipt of any gift or receipt of anything for the purpose of influencing official action. The ambiguities implicit in this language led to concerns that teachers could not receive gifts of any type from students, especially at Christmas time. (Alabama Act 2011-632, S.B. 222.) The following year, the Legislature returned with another bill to define the word “de minimis” as a value of \$25 or less per occasion and an aggregate of \$50 or less in a calendar year from any single provider, which serves as a guide for what is permissible in gifts for teachers from their pupils. The Ethics Commission may alter the value for what is “de minimis” by using their rulemaking authority or by following changes in the Consumer Price Index. (Alabama Act 2012-433, H.B. 466.)

What has the Ethics Commission found to be prohibited by state ethics law?

Serving on a school board and being an employee of that same board.

A school member voting on the employment of a family member in the school system.

A school board member voting on a pay raise that would affect a family member differently from others in the same class of persons in the school system.

A school board member voting to contract with a business with which the board member is associated, or the superintendent to recommend a contract with a business with which the superintendent is associated.

A school superintendent formally recommending a family member for employment within the school system.

Teachers/sponsors soliciting students to participate in a school trip abroad, where the contracting tour company pays the sponsors' expenses.

Educators selling goods or services to the school population as part of their own private business, for example, assistant principals selling Tupperware products to persons in their schools.

.Educators advertising for sale of goods or services to the school population as part of their own private business, on school time and on school property.

Educators tutoring students for a fee on school property.

Family members of educators advertising or soliciting on school property tutoring services on behalf of educators.

Coaches receiving donations or payment directly from booster clubs.

Educators selling instructional materials that were developed as part of their employment responsibilities, using school facilities and school time.

College administrators, faculty members, P-12 school administrators, or teachers using their position or the name of their employing college or school to advertise a product.

Educators receiving a substantial gift from a fund-raising contractor, as an award for a fund-raising project.

Principals who are also representatives of long distance phone carriers, switching their school to that long distance carrier.

Principals who serve on a bank's board of directors, transferring the school's accounts to that bank.

Assistant principals who are also exterminators, exterminating in their own schools.

Accepting prizes or awards in connection with fund raising activity.

Accepting a new car, rather than use of a new car.

Accepting donated land for a school building, in exchange for awarding an architectural contract to the donor's architectural firm.

Accepting an expense paid trip to look at computer software for prospective purchase.

The State Superintendent and State Board members accepting an expense paid trip to Japan, to discuss the establishment of a 2-year school in Alabama.

What has the Ethics Commission found to not violate state ethics law?

A school board hiring a family member of a superintendent, where there is a hiring process demonstrably out of the control of the superintendent and the superintendent is merely forwarding that recommendation.

Contracting with private businesses owned by school personnel, when competitive bid laws or observed.

Educators requiring students to purchase educational materials used in instruction, that the educator has developed on his or her own time or under a release time arrangement, and not using school facilities in their creation.

Educators copyrighting workbooks or other instructional materials, when their production is accomplished separately from the school and its facilities.

Teachers/sponsors soliciting students to participate in a school trip abroad, when the sponsors' expenses are paid by the school system or by the sponsors themselves.

Educators receiving trophies or plaques for recognition for outstanding service.

The Teacher of the Year accepting the use of a car for a year for that recognition.

Assistant principals who are also exterminators, exterminating in schools other than their own schools.

College faculty requiring students to purchase workbooks they created for a course of study.

College faculty receiving compensation for endorsement of products or services.

University faculty receiving income from the sale of books, inventions, or compositions, as provided by university policy.

Teachers who are professional photographers receiving compensation for taking pictures at school dances, when they do not use their public position to obtain the work.
State officials accepting a meal from the Alabama Education Association.
PTA members inviting legislators to an advocacy meeting and purchasing their lunch.

(Rogers, Paulette, *The Alabama Code of Ethics: Application and Issues in Education*. Ph.D. dissertation. University of Alabama/University of Alabama at Birmingham, 2002.)

Alabama Educator Code of Ethics

The Alabama State Board of Education adopted a resolution on July 12, 2005, regarding an Alabama Educator Code of Ethics, according to the wording of the resolution, as the “official guide to ethical conduct for public school administrators in Alabama.” The Alabama Educator Code of Ethics addresses and provides examples for nine standards of behaviors, including as follows:

1. Professional Conduct;
2. Trustworthiness;
3. Unlawful Acts;
4. Teacher/Student Relationship;
5. Alcohol, Drug, and Tobacco Use or Possession;
6. Public Funds and Property
7. Remunerative Conduct;
8. Maintenance of Confidentiality; and,
9. Abandonment of Contract

Section § 16-23-5 Code of Alabama (1975) gives the State Superintendent of Education the authority to revoke any certificate in circumstances where the person holding the certificate has been guilty of "immoral conduct or unbecoming or indecent behavior." Regulatory language indicates that this authority to revoke is extended to immoral conduct or unbecoming or indecent behavior in Alabama or any other state or nation. Ala. Admin. Code Section 290-030-020-.05(1). A reasonable interpretation is that the Alabama Educator Code of Ethics is a disclosure about what the State Superintendent views as being actionable behaviors for the revocation of an educator's certificate. However, the Legislature subsequently repudiated the Alabama Educator Code of Ethics, which had been eventually adopted as a revised rule of the State Board of Education, for the purpose of determining situations in which a certificate could be revoked. (Alabama Act 2010-33, No. 1.)

34. ORGANIZATIONAL ISSUES: COUNTY AND CITY BOARDS OF EDUCATION

Overview

Among the fifty states, local school districts exist under a variety of names: independent school districts, elementary school districts, secondary school districts, community unit districts, township districts, county school districts, city school districts, area administrative units, regional districts, borough school districts, and many others. To account for this variety in nomenclature, the federal government, in its regulations related to education, calls local school districts “local education agencies” (LEAs). The structure, function, and title of local school districts derive from each state’s statutory law. In Alabama, two types of school districts exist at the local level: the county school district and the local school district.

Organizational Matters

County Boards of Education

County Boards of Education are created by the Legislature in Title 16, Chapter 8 of the Code of Alabama (1975). County boards of education are statutorily required to have five members, who may be elected to represent a district within the county. Besides being a qualified elector of the county, school board members must meet the following characteristics:

They shall be persons of good moral character, with at least a fair elementary education, of good standing in their respective communities and known for their honesty, business ability, public spirit and interest in the good of public education. No member of the county board of education shall be an employee of said board; provided, that in counties having populations of not less than 96,000 nor more than 106,000 according to the most recent federal decennial census, not more than one classroom teacher employed by the board may serve as a board member and also as a teacher. Members shall not be required to hold teachers' certificates. Section § 16-8-1 Code of Alabama (1975).

County school board members are elected at the general election of state and county officers and serve six year terms, and they must take an oath of office prior to serving. Section § 16-8-2 Code of Alabama (1975). County boards of education must hold an annual organizational meeting each year in November, to elect a president and vice-president. They must hold at least five additional meetings each school year, and public notice must be given of all meetings. County boards of education must follow deliberative rules similar to Roberts Rules of Order in their actions, and an action

requires a majority of the whole board, not just a majority of those attending a meeting, to be adopted. Section § 16-8-4 Code of Alabama (1975). At least once each year, county boards of education must hold a meeting to allow the public an opportunity to present its views. Section § 16-8-3 Code of Alabama (1975).

Vacancies on county boards of education are filled by action of the remaining members of the board, except if they are unable to select someone to fill the unexpired term within thirty days, the State Superintendent of Education is empowered to step in and appoint a member. Section § 16-8-6 Code of Alabama (1975).

City Boards of Education

City Boards of Education are created by the Legislature in Title 16, Chapter 11 of the Code of Alabama (1975). Section § 16-11-1 Code of Alabama (1975) defines a "city" for the purposes of the creation of a city board of education, to include all incorporated municipalities of 5,000 or more inhabitants, according to the last or any succeeding federal census, or according to the last or any succeeding census taken under the provisions of Sections § 11-47-90 through § 11-47-95. City school districts that were created and had twenty years or more of existence before August 15, 1951, may continue to exist regardless of the census population. Section 16-11-2(e) Code of Alabama (1975).

Amendment 659 of the Alabama Constitution of 1901 provides for the creation of city boards of education through acts of the Legislature. Section § 16-11-2 Code of Alabama (1975). City boards of education generally are composed of five members, except in Class 4 municipalities with a mayor-city council form of government, which boards of education may have seven board members. Section § 16-11-2(b) Code of Alabama (1975). City board members are usually appointed by the city council, although there are provisions to create elected city boards of education (see, Section §16-11-3.2, relating to Class 4 municipalities). City board members are to be chosen because of their character and fitness and may not be employees of the same board, unless they are in Attalla or in another city with a population of 50,000 to 60,000. Section § 16-11-2(c) Code of Alabama (1975). In State of Alabama, ex rel. James T. Jeffers v. Martin, 735 So.2d 1156 (Ala. 1999), the Alabama Supreme Court considered a challenge to a situation where an employee of the Tallassee City Board of Education also held office on that Board of Education. The court held that the provision allowing employees to serve on the board in selected cities to be unconstitutional, and therefore conversely held that an employee of a school board cannot be on the same school board.

City board members serve without compensation, unless the city population is 300,000 or more, whereupon the board members may receive \$50 for each meeting of the board that is attended.

City school board members are appointed by the city council or commission in April and take their seats on the board the next June, and their terms of office are five years. Section § 16-11-3 Code of Alabama (1975). City boards are required to hold an annual meeting each year in May, to elect a president and vice-president. City boards of education must follow deliberative rules similar to Roberts Rules of Order in their actions, and an action requires a majority of the whole board, not just a majority of those attending a meeting, to be adopted. Section § 16-11-5 Code of Alabama (1975). City boards have other meetings annually, according to their own policies.

Practices concerned with an individual school district's annual organization meeting and other matters of organization may vary within certain school districts from the timeframes and means articulated above. This usually can be traced back to an individual act of the Legislature, impacting a particular school district, or it can be traced back to an agreement forged by the parties in a desegregation suit, under the jurisdiction of a federal court. (See, e.g., Alabama Act 2012-324 and Alabama Act 2012-216, which are "local bills" impacting only Marshall County.)

Powers and Duties

Section § 16-11-2 Code of Alabama (1975) vests with city boards of education the general administration and supervision of the public schools of the school district. Wider and more specific powers are delegated in Section § 16-11-9 Code of Alabama (1975), which states:

The city board of education is hereby vested with all the powers necessary or proper for the administration and management of the free public schools within such city and adjacent territory to the city which has been annexed as a part of the school district which includes a city having a city board of education.

The same general grant of authority is given to county boards of education (general administration and supervision of the public schools within the county) by Section § 16-8-8 Code of Alabama (1975). A subsequent provision grants "control and supervision" of the county public schools. An important feature of this latter grant of power is the provision that the power must be exercised through the county superintendent of education and his professional assistants:

The county board of education shall exercise through its executive officer, the county superintendent of education and his professional assistants control and supervision of the public school system of the county. The board shall consult and advise through its executive officer and his professional assistants with school trustees, principals, teachers and interested citizens and shall seek in

every way to promote the interest of the schools under its jurisdiction. Section § 16-8-9 Code of Alabama (1975).

There does not appear to be a similar statement for city boards of education, requiring that executive action occur through an executive officer, other than a statement in Section § 16-12-3(1) Code of Alabama (1975) that the city superintendent of schools shall be the executive officer of the city board of education.

Among the most important powers of city and county boards of education is policy-making. Section 16-1-30 § Code of Alabama (1975) provides several procedural steps in policy-making. Among those steps are: written recommendation from the superintendent; consultation with employees' professional organization; and availability within 20 days of passage. The full text of the requirement regarding policy-making is provided below:

The local board of education shall, upon the written recommendation of the chief executive officer, determine and establish a written educational policy for the board of education and its employees and shall prescribe rules and regulations for the conduct and management of the schools. Before adopting the written policies, the board shall, directly or indirectly through the chief executive officer, consult with the applicable local employees' professional organization. Input by the applicable professional organization shall be made in writing to the chief executive officer. Representatives of the professional organization shall be made known to the chief executive officer in writing by the professional organization's duly elected officers or their representative. The chief executive officer of the board may also consult with professional assistants, principals, employees, and other interested citizens. The written policies, rules, and regulations, so established, adopted, or promulgated shall be made available to all persons affected and employed by the board. Any amendments to the policies, rules, and regulations shall be developed in the same manner and furnished to the affected persons employed by the board within 20 days after adoption. Section 16-1-30(b) § Code of Alabama (1975).

Relationship with Superintendent and Chief Financial Officer

Section § 16-8-7 Code of Alabama (1975) requires the county superintendent of education to serve as both executive officer and secretary to the county board of education. In her/his secretarial role, the superintendent must conduct all correspondence of the board, keep and preserve all its records, receive reports required by the board, and see that such reports are in proper form, complete, and accurate. The county superintendent of education is also required to advise on any question under consideration by the board, thus indicating a right to make a recommendation on each motion before the board. However, the county superintendent may not vote on matters before the board. In the absence of the

superintendent, the county board may designate one of its members to serve as secretary.

Section § 16-12-1 Code of Alabama (1975) requires city boards of education to appoint a city superintendent of schools. Section § 16-12-3(e) Code of Alabama (1975) makes the city superintendent of schools executive officer of the board, and makes it permissive for the superintendent to also be the secretary of the board of education.

According to Section § 16-8-33 Code of Alabama (1975), the position of “custodian of school funds” for county boards of education was appointed directly by the county board of education. This provision was apparently not specifically repealed, but it was supplanted by the School Fiscal Accountability Act, passed in 2006. (Ala. Acts 2006-196, Section §16-13A-1 et seq. Code of Alabama (1975)). The new provision indicates that the superintendent still does not make a recommendation to hire a chief school financial officer:

“In consultation with the local superintendent of education, the local board of education shall appoint a chief school financial officer who shall be an employee of the board.” Section §16-13A-4 Code of Alabama (1975).

Likewise, under prior statutes apparently not repealed, the city treasurer is statutorily designated the custodian of funds for city boards of education, however, the city board of education may name another person to serve as its treasurer. Section § 16-11-6 Code of Alabama (1975).

For city boards of education, according to section § 16-11-7 Code of Alabama (1975), both the city treasurer and the city superintendent must be bonded. Section § 16-8-33 requires the custodian of school funds for county school boards to be bonded, and Section § 16-9-3 requires the county superintendent of schools to be bonded.

School Board Member Training and Principles of Governance

In 2009, the Legislature added a requirement that each local public board of education must adopt a policy for the orientation and ongoing training of members of its local board of education. Section §16-1-41 Code of Alabama (1975). In 2012, the Legislature added the School Board Governance Improvement Act. Alabama Act 2012-221, H.B. 0431. This act required all prospective school board members to publicly affirm prescribed principles of educational governance, and specified the responsibilities of local school board members. A feature of the act was the implementation of further training and continuing education in “boardsmanship” for all local school board members.

Location of Central Office

Section § 16-11-4 Code of Alabama (1975) requires that the office of the city board of education be located in the principal school building of the respective city, unless otherwise adequately provided for. The city board of education is also required

to provide the city superintendent of schools, his professional and clerical assistants with ample, convenient and comfortable office quarters and with adequate clerical supplies and equipment. A similar provision applies to county boards of education in Section § 16-9-24 Code of Alabama (1975).

Consolidation and Annexation

The closing of community schools can be among the most painful and politically costly decisions facing school superintendents and school boards. However, the Legislature seems to favor consolidation of schools, particularly within county school districts, as evidenced by the following language:

The county board of education shall consolidate schools wherever in its judgment it is practicable and arrange, if necessary, for the transportation of pupils to and from such consolidated schools, subject to the provisions of this title. Section § 16-8-13 Code of Alabama (1975).

The Legislature has also clearly given county school districts the authority to form a consolidated school out of two schools in close proximity to each other, but separated by county lines. Section § 16-8-14 Code of Alabama (1975). Such consolidation across county lines would require a resolution entered into the minutes for both county boards of education. Control over the school created by consolidation across two or more adjoining county lines would be vested in the county board of education where the school building is located, unless the county boards involved execute an agreement that vests control of the school building based upon another factor besides building location. Section § 16-8-15 Code of Alabama (1975). In such situations, funds for the consolidated school is required to be apportioned in the same way that funds are apportioned to other schools wholly within a county. Section § 16-8-16 Code of Alabama (1975).

State law also provides for situations where a county board of education and a city board of education decides to consolidate the administration of their respective systems into the county board of education, thus making the city board of education disappear. Section § 16-8-17 Code of Alabama (1975). In recent years the tendency has been for city school systems to be carved out of existing county school systems, and the Legislature seems to have anticipated that consolidation of city and county systems might be politically unpopular. Consequently, the statute provides for the question to be submitted to a referendum of the voters, to decide whether such consolidation should occur. Upon adoption of resolutions for consolidation by the respective school boards, opponents of such a measure would have 30 days to submit a protest in writing, signed by at least 25 percent of the qualified electors of the county, to cause the referendum mechanism to go into effect. Apparently, if a protest fails to achieve signatures of 25 percent of the electors, then the protest would fail and the

resolution to consolidate would go into effect without the need for a public referendum on the question.

Most cities in Alabama have enjoyed a healthy rate of growth during the last decade. An outcome of this growth may be the annexation into the city of county territory. This becomes complicated when the city has its own city board of education and the territory within the county was served by a county board of education. Section § 16-8-20 Code of Alabama (1975) addresses this problem, by requiring that the county board of education retain control of schools in the annexed territory until an agreement is accomplished between the parties to settle existing indebtedness and to assure the provision of same or equivalent school facilities.

Sections §§ 16-8-21 and 16-8-22 Code of Alabama (1975) provide for arbitration of an annexation agreement, if the city board of education and county board of education are unable to come to an agreement over the annexed territory. The Board of Arbitration is composed of three members chosen by the parties, and the Board's decision will be binding on the parties. If the parties cannot agree on the identity of the third member of the Board of Arbitration, the State Superintendent is empowered to appoint the third member.

In situations where the control and administration of a city board of education becomes transferred to a county board of education, Section § 16-11-8 Code of Alabama (1975) requires that pre-existing indebtedness continue through the transfer and that others will have the right to collect the debts.

Ownership and Control of Property

Section § 16-8-12 Code of Alabama (1975) indicates that all the property, estate, effects, money, funds, claims, and donations are vested in the county boards of education, and that all real and personal estate granted conveyed, devised, or bequeathed to a county board of education is to be held in trust for the benefit of the county school district. Section § 16-8-40 provides the right for county boards of education to acquire property, directly or through condemnation proceedings.

Similar control over property for city boards of education is provided by Section § 16-11-11 Code of Alabama (1975), which states:

All property real, personal and mixed now held or hereafter acquired for school purposes shall be held in trust by the city board of education for the use of the public schools of the city.

Authority to acquire and maintain property for the benefit of public schools is provided in Section § 16-11-12 Code of Alabama (1975). City boards of education are granted authority to initiate eminent domain condemnation proceedings by Section § 16-11-13 Code of Alabama (1975).

Sections §§ 16-8-18 and 16-8-19 Code of Alabama (1975) create provisions for the joint maintenance of schools for attendance zones straddling county lines or the state line.

Section § 16-11-19 Code of Alabama (1975) permits city boards of education to petition the city council or commission to call an election for the issuance of bonds for school grounds, buildings, and equipment.

Section § 16-8-42 Code of Alabama (1975) requires county boards of education to insure their school buildings. Section § 16-11-27 Code of Alabama (1975) permits city boards of education to insure their buildings and other property through the State Insurance Fund.

Section § 16-8-43 Code of Alabama (1975) includes a requirement that county boards of education must provide sanitary, hygienic, suitable and convenient rest rooms for the children of the public schools under its jurisdiction, not less than two for each school or building when both sexes are in attendance, with separate means of access to each. The provision also requires that county boards to make provisions for keeping rest rooms in a clean, comfortable, sanitary and hygienic condition.

City boards of education are authorized to purchase or lease school buses by Section § 16-11-14 Code of Alabama (1975). Section § 16-11-15 Code of Alabama (1975) authorizes the expenditure of funds for personnel, operations, and maintenance of school buses, and specifies that individual school board members are not to be held personally liable for injuries arising from the operation of school buses.

In recent years, the Legislature has acted to improve financial management within school districts in the state on several fronts. In 2006, an act required school boards to adopt policies related to regular reconciliation of bank statements, maintenance of fixed assets inventory, deposit of incoming funds, and review of monthly revenues and expenditures. Alabama Act 2006-196, Section §16-13A-1 et seq. Code of Alabama (1975). The same act created the office of Chief Education Financial Officer in the State Department of Education (Section §16-13A-2 Code of Alabama (1975)), created the position of Chief Financial Officer in each school district (Section §16-13A-4 Code of Alabama (1975)), and required specialized financial training for school superintendents (Section §16-13A-3 Code of Alabama (1975)).

In 2009, the Legislature added a chapter regarding competitive bidding for certain contracts for county and city boards of education. Alabama Act 2009-760, Section §16-13B-1 et seq. Code of Alabama (1975). Section §16-13B-1 Code of Alabama (1975) requires that the lease or purchase of materials, equipment, supplies, or other personal property in the amount of \$15,000 or more to be accomplished through free and open competitive bidding, on sealed bids, to the lowest responsible bidder. (Alabama Act 2008-379 had raised the threshold amount from \$7,500 to \$15,000 just a year before.) Section §16-13B-1 Code of Alabama (1975) permits the recognition of a preference for local vendors, and allowed local school boards to join

together by agreement into a joint purchase agreement. (Previously, such joint agreements could only be accomplished by contracting through respective municipal or county governments.) Section §16-13B-2 Code of Alabama (1975) provides a detailed list of purchases that do not need to be submitted to the bidding process. Section §16-13B-3 Code of Alabama (1975) permits school boards to act without bids in emergency situations, and Section §16-13B-4 Code of Alabama (1975) details the procedures for the bidding process.

Agreements

A common feature in many states is the existence of entities created by agreement between and among individual school districts. Such entities may be for the provision of special education services or vocational education services over a regional area to use staff more efficiently. Another purpose of such entities may be for purchasing and warehousing agreements, to take advantage of the economic savings brought about by economy of scale. Section 16-8-12.1 Code of Alabama (1975) grants authority to county boards of education to enter into cooperative agreements, projects, and programs with the county commission. Section 16-11-9.1 Code of Alabama (1975) grants similar authority to city boards of education, with respect to cooperative activity with the city council or commission. Neither provision specifically grants authority for inter-school district cooperative agreements.

Section § 16-8-42.1 Code of Alabama (1975) provides specific authority for both city and county boards of education to enter into a risk management cooperative. A risk management cooperative is an entity, formed by local boards of education in any combination of 25 or more school districts, formed for the purpose of creating a self-insurance pool. The risk management cooperative is designed to protect from risks other than those protected by the Public Education Employees' Plan or Health Insurance under the State Insurance Fund.

Specific authority to combine into a cooperative venture was also authorized in 2009, at the same time that the Legislature increased to \$15,000 the threshold amount for requiring bids for materials, equipments, and supplies. The 2009 legislation allows school districts to combine, by joint agreement, for the purchase of labor, services, or work, or for the purchase or lease of materials, equipment, supplies, or other personal property for use by their respective agencies. The agreement must be entered into by official actions of the respective governing boards. Ala. Act 2009-760, Section 16-13B-1(c) Code of Alabama (1975).

Instructional Matters

Attendance Zones

Section 16-8-3 Code of Alabama (1975) requires county boards of education to divide the county into compulsory school attendance zones. More discussion about attendance is included in Module 56, Attendance and Instructional Issues.

Grading and Standardization

Section § 16-11-20 Code of Alabama (1975) requires city boards of education, and Section § 16-8-29 Code of Alabama (1975) requires county boards of education, to grade and standardize the schools under their jurisdiction. Section § 16-8-36 Code of Alabama (1975) stipulates that elementary schools shall include grades one to six, junior high schools shall include grades seven and eight, and that high schools shall include grades ten to twelve, unless otherwise authorized by the State Board of Education.

Section § 16-8-11 Code of Alabama (1975) requires that county boards of education maintain a uniform and effective system of public schools throughout their respective counties. County boards of education are also required to establish a uniform opening date for schools in the county, by Section § 16-8-30 Code of Alabama (1975).

Sections §§ 16-8-41 and 16-11-16 Code of Alabama (1975) contain legislative authorization for the establishment of kindergartens. Both provisions permit students to attend kindergarten who are ages five through eight.

Courses of Study

Section § 16-8-28 Code of Alabama (1975) requires county boards of education to prescribe, on the written recommendation of the county superintendent of education, courses of study for the schools under its jurisdiction, and to supply a printed copy of these courses of study to every teacher and to every interested citizen of the county. Similar provisions exist at Section § 16-11-20 Code of Alabama (1975), which requires city boards of education to adopt a course of study and provide printed copies of the course of study to teachers and interested citizens.

City boards of education are given authority by Section § 16-11-23 Code of Alabama (1975) to establish public libraries and special schools:

The city board of education shall have the right to establish and maintain, or aid in establishing and maintaining, public libraries, either separately or in connection with the public schools, and also special schools for backward,

defective, truant or incorrigible children, day or night schools for adult illiterates and for the Americanization of foreigners and part-time continuation classes.

Promotion

Section § 16-8-35 Code of Alabama (1975) charges county boards of education with prescribing the conditions for promotion from elementary school to junior high school, and from junior high school to high school.

Employment Matters

Appointment

Legislative authority for county boards of education to appoint teachers arises from Section § 16-8-23 Code of Alabama (1975). This provision requires the county board of education to appoint, upon the written recommendation of the county superintendent, all principals, teachers, clerical and professional assistants authorized by the board.

Similarly, Section § 16-12-19 Code of Alabama (1975) authorizes city boards of education to employ professional, clerical, accounting, and statistical assistants, upon the recommendation of the city superintendent of schools. Note that this section does not stipulate that the superintendent's recommendation must be in writing. The duty of the city superintendent to nominate employees in writing is carried in Section § 16-12-16 Code of Alabama (1975). City boards are authorized, by Section § 16-11-17 Code of Alabama (1975) to fix the salaries of all employees.

County boards are authorized by Section § 16-8-24 Code of Alabama (1975) to offer teaching and other employee contracts for a period of time longer than the regular school year.

Causes of Dismissal

The authority to suspend or dismiss employees was given to county boards of education by Section §16-8-23. The same authority was given to city boards of education by Section §16-11-17. What is interesting about these two provisions is that they list different causes of dismissal. The provision for county boards of education states:

The county board may suspend or dismiss for immorality, misconduct in office, insubordination, incompetency or willful neglect of duty, or whenever, in the opinion of the board, the best interests of the school require it, superintendents, principals, teachers or any other employees or appointees of the board, subject

to the provisions of Chapter 24 of this title. Section § 16-8-23 Code of Alabama (1975).

The provision for city boards of education states:

(The city board) may suspend or dismiss any principal or teacher or supervisor or attendance officer or other regular employee so appointed on the written recommendation of the city superintendent of schools for immorality, misconduct in office, incompetency, willful neglect of duty or when, in the opinion of the board, the best interests of the schools may require, subject to the provisions of Chapter 24 of this title. Section § 6-11-17 Code of Alabama (1975).

Although the cause of “insubordination” is not listed as a cause of dismissal for employees of city boards of education, one should not conclude that employees of city boards of education could not be insubordinate. Both provisions in Chapter 11 point to the statutory causes of dismissal in Section § 16-24-8 Code of Alabama (1975), which include incompetency, *insubordination* (emphasis added), neglect of duty, immorality, failure to perform duties in a satisfactory manner, justifiable decrease in the number of teaching positions, or other good and just causes.

The provisions of Section §16-24-8 were then supplanted by the Students First Act in 2009. The statutory causes for termination under the Students First Act now read as follows:

Tenured teachers and nonprobationary classified employees may be terminated at any time because of a justifiable decrease in the number of positions or for incompetency, insubordination, neglect of duty, immorality, failure to perform duties in a satisfactory manner, or other good and just cause, subject to the rights and procedures hereinafter provided. However, a vote or decision to approve a recommended termination on the part of a president of a two-year educational institution operated under the authority and control of the Department of Postsecondary Education or the governing board shall not be made for political or personal reasons. Section § 16-24C-6(a) Code of Alabama (1975)

Vacations and Leaves

Section § 16-8-25 Code of Alabama (1975) gives county boards of education the authority to provide for leaves of absence and for vacations. Employees may carry over unutilized sick leave days to the next consecutive year or years of employment for the same school system, or for any other school system in which the educator may be employed. County boards are also authorized by Section § 16-8-26 Code of Alabama (1975) to provide up to five personal days per year, with discretion concerning whether they are paid or unpaid, except that portions reimbursed through the foundation

program must be paid. Personal leave that is not used may be reimbursed to the teacher at the end of the school year, at a daily rate equal to that paid substitute teachers. Unused personal leave days may be converted to sick leave days at the end of the year, and unused sick leave days may be carried forward to the next school year. No teacher or support employee may be required to divulge his or her reasons for requesting personal leave, as a condition of receiving personal leave.

Quadrennial Census

Both county boards of education and city boards of education are required to participate in a census of school age children under their jurisdiction, ages 6 to 19. City superintendents of schools file the quadrennial report with the county superintendent of schools by August 15th of the quadrennial year. (See, Sections §§ 16-8-31 and 16-11-1 Code of Alabama (1975)).

Reporting Requirements

Sections §§ 16-8-38 and 16-11-21 Code of Alabama (1975) require county and city boards of education to prescribe, based upon the superintendent's recommendation, forms and blanks on which school trustees and school employees shall make reports to the local boards.

Sections §§ 16-8-39 and 16-11-22 Code of Alabama (1975) place a duty on county and city boards of education to make reports that are required to the State Board of Education. Section § 16-11-22 Code of Alabama (1975) also provides a duty on city boards of education to conduct a fiscal audit as soon as possible after July first of each year, and to publish that audit. Additional auditing and reporting requirements are invested in the School Fiscal Accountability Act, passed in 2006. Section §16-13A-1 et seq. Code of Alabama (1975).

Sections §§ 16-8-37 and 16-11-24 Code of Alabama (1975) are identical sections requiring county and city boards to publish an annual report during the month of October in a local newspaper, a full and complete statement of receipts and disbursements for the prior fiscal year. This report must also be forwarded to the State Superintendent of Education. Both types of boards are also required to publish a statement of indebtedness as of September 30th, with a schedule for retiring the debt. Finally, the annual reporting requirement includes a report concerning the condition, current accomplishments, and needs for the improvement of schools.

Alabama Administrative Code ch. 290-010-040-.01 requires local boards of education to submit a comprehensive education plan to the State Superintendent pursuant to federal and state law and regulations. The plan must include provisions for capital improvements, transportation, professional development, use of technology,

special education, at-risk students, career and technical education, and federal education programs.

The Alabama Open Meetings Act

In 2005, the Legislature replaced an older version of a “sunshine” meetings law with the Alabama Open Meetings Act. Ala. Act. 2005-40, Section §36-25A-1 et seq. Code of Alabama (1975). The new Alabama Open Meetings Act is a broader piece of legislation, detailing requirements for providing notice for meetings as well as detailing the purposes for which public boards may go into executive sessions.

The old law had been part of the criminal code and had prohibited city and county boards of education, as well as most other governmental entities, from holding secret or executive sessions unless the “character or good name” of an individual would be discussed. Section § 13A-14-2 Code of Alabama (1975). The operative words of “character or good name” did not appear in the new Open Meetings Act. This point should be stressed. Because “character or good name” is no longer a legitimate reason to go into an executive session, school board members should be dissuaded, encouraged, and coached, if necessary, to avoid using those words and entering them into the board minutes when going into executive session.

In its first section, the Alabama Open Meetings Act sets out the broad purposes of the act: that the deliberative process of governmental bodies shall be open to the public during meetings; that notice must be provided before a public meeting; that executive sessions are restricted in their use and purpose; and that electronic communications may not be deployed to circumvent the act. Section §36-25A-1 Code of Alabama (1975).

What is a Meeting Under the Alabama Open Meetings Act?

For school boards, under the Alabama Open Meetings Act, “meetings” include:

1. Prearranged gatherings of a quorum of the board, which occur at a time and place which is set by law or operation of law;
2. Prearranged gatherings of a quorum of the board to exercise the powers it possesses or approve the expenditure of public funds;
3. Prearranged gatherings of the board to deliberate specific matters that, at the time of the exchange, the participating members expect to come before the board at a later date.

For school boards, under the Alabama Open Meetings Act, “meetings” do not include:

1. Social gatherings;
2. Conventions, conferences, or training programs;
3. Press conferences or media events;
4. Occasions when a quorum of the school board gathers with state or federal officials to report, obtain information, or seek support for issues of importance to the body;
5. Any other gathering in which the board discusses specific matters that the board does not expect to come before the body at a later date. Section §36-25A-2 Code of Alabama (1975).

Notice Requirements

The notice for school board meetings must be posted on a bulletin board convenient for public viewing in the central administrative office of the school board. The timeline for posting notices conforms to three categories: 7-day notice requirement; 1-day notice requirement; and 1-hour notice requirement. The three categories are described as follows:

7-day notice is required for all pre-arranged meetings required by law to be held at a certain time or place.

1-day notice is required for pre-arranged meetings to exercise the school board's powers to possess or approve the expenditure of public funds, and for all meetings, regardless of whether the meeting is pre-arranged, to deliberate matters the board members expect to come before the school board at a later date or time.

1-hour notice is required for meetings in emergency circumstances, described in the Open Meetings Act as requiring immediate action to avoid physical injury to persons or damage to property, and for meetings held solely to accept the resignation of a public official or employee.

The notice must contain the time, date and place of the meeting. If a preliminary agenda has been created, it must be posted with the notice. If no preliminary agenda has been created, the posted notice must contain a general description of the nature and purpose of the meeting. Section §36-25A-3 Code of Alabama (1975).

Requirements During a Meeting

Meetings must be conducted pursuant to the school board's adopted rules of parliamentary procedure. Section §36-25A-5 Code of Alabama (1975). (Note that separate statutes require school boards to follow deliberative rules "similar to Roberts Rules of Order". Sections §16-8-4 and Section §16-11-5 Code of Alabama (1975).) All

votes on matters before the school board must be made during the open or public portion of a meeting. The Open Meetings Act specifies that the following examples of votes must be given openly: appropriations; authorizing of the board's designated employee; spending of public funds; levying taxes or fees; forgiving debts; and, granting tax abatements. Votes cannot be done by secret ballot, and no votes may occur during executive sessions. There is no requirement that the board record any portion of an open meeting with audio or video equipment, but the Act does allow members of the public to openly record the meeting in several fashions. The Open Meetings Act requires that a record be made of the date, time and place of the meeting; the members present and the members absent; and the actions taken by the board during the meeting. Section §36-25A-6 Code of Alabama (1975). The Act requires that these records be made available to the public, as soon as practicable after approval, and these records must be maintained for a time not specified by the Act. Other legal requirements, such as regulations promulgated by the state archivist, would guide the manner and time for which records must be maintained.

Executive Sessions

The Alabama Open Meetings Act specifies nine exclusive reasons for which a school board may go into executive session. Section §36-25A-7 Code of Alabama (1975). The Act details within each reason the extent to which the items in the list can be protected by executive session or must remain in open session. One should not presume that any item is automatically protected just because it is on the list. For example, in the first reason, "job performance" is listed, but language in the Act indicates exceptions where the job performance of a person must be discussed in open session and situations where the job performance of a person may be discussed in an executive session. The nine reasons for which public boards may go into executive session are as follows:

1. Job performance, general reputation and character, physical condition, professional competence, and mental health.
2. Formal complaints or charges against an individual or legal entity.
3. Discussions with the government body's attorney.
4. Security plans and measures.
5. Criminal investigation and the identity of an undercover agent or informer.
6. Negotiations to buy/sell/lease real property.
7. Preliminary negotiations in trade competition.
8. Negotiations between the body and a group of public employees.

9. Discuss and vote upon a public or contested case.

How to Call an Executive Session

There is a requisite procedure which must be followed to go into an executive session. It is recommended that superintendents and/or board attorneys provide a script for the board president to follow, which actions should then be reflected in the board minutes. The steps for calling an executive session are detailed as follows:

1. The school board must be convened in an open meeting, for which notice has been provided.
2. There must be a motion to go into executive session, citing one of the nine exclusive reasons listed above, for which the school board may go into executive session. Because it has been habitual over the years to cite the old sunshine law and say the reason for the executive session is to discuss “the character and good name” of a person, school board members should be dissuaded from using those words. They are not one of the nine reasons listed in the act.
3. Four of the nine reasons for which the board may go into executive session require that a designated person “certify” that an executive session is warranted, in line with the identified reason for going into executive session. Those four reasons are:

Discussion with the school board’s attorney. (Reason #3) The Act does not specify that the certification must be oral or in writing. Presumably, the school board attorney could make a statement certifying the purpose of the executive session, and that written statement would be entered into the meeting minutes.

Discussions that would disclose the identity of an undercover officer or informer. (Reason #5)

Discussions concerning matters of trade or commerce in which the board is competing against private entities. (Reason #7)

Discussions about negotiations between the board and a group of public employees. (Reason #8)

4. During the open meeting, a majority of the school board members must vote on the motion to go into executive session. The vote must be public, and each individual member’s vote must be recorded in the minutes.
5. Finally, before going into executive session, the school board president must state during the open meeting, whether the school board will reconvene after the

executive session, and the expected time the school board will reconvene in an open meeting.

An excellent resource for a more complete discussion of the application of the Alabama Open Meetings Act can be found in a manual produced jointly by the Office of the Alabama Attorney General and the Alabama Press Association. The manual is entitled The Alabama Open Meetings Act: A Manual for Alabama Public Officials, and a copy of it can be found in a link on the website of the University of Alabama Superintendents Academy.

35. ORGANIZATIONAL ISSUES: SUPERINTENDENTS

County superintendents of education are creatures of the Legislature, provided for by Title 16, Chapter 9 Code of Alabama (1975). City superintendents of education are also creatures of the Legislature. Title 16, Chapter 12 Code of Alabama (1975) creates and describes the duties and responsibilities of city superintendents. This module discusses Alabama statutory references in those chapters related to both county and city superintendents of education.

Relationship with School Board

Section § 16-9-1 Code of Alabama (1975) identifies the county superintendent of education as both chief executive officer and secretary of the county board of education. This statutory section requires that the county board of education appoint a superintendent of schools for a term of from two to four years from the first day of July next succeeding his appointment. Where the county superintendent is elected by the voters, this appointment appears to be a formality indicating the county superintendent's dual role as executive officer and secretary.

Section § 16-12-1 Code of Alabama (1975) requires city boards of education to appoint a city superintendent of schools. The same section indicates that the city superintendent serves at the pleasure of the board and receives compensation as directed by the board. City superintendents may be removed by the city board of education for incompetency, immorality, misconduct in office, willful neglect of duty or when, in the opinion of the board, the best interests of the schools require it.

Qualifications and Certification

Sections §§ 16-9-2 through 16-9-10 Code of Alabama (1975), outlines the general qualifications for serving as a county superintendent as well as the electoral process for selecting the county superintendent. Section § 16-12-2 Code of Alabama (1975) describes the following qualifications for the superintendent of city schools. According to this section, the city superintendent shall be chosen for his general fitness and character. He must offer proof to the board that he holds a degree from a recognized four-year college or university and is knowledgeable in school administration. Such person need not be a resident or qualified elector of the city or county in which he offers to serve.

Section § 16-9-2 Code of Alabama (1975) describes the statutory qualifications for the county superintendent. County superintendents must:

- (1) Hold an Alabama certificate in administration and supervision based upon requirements established by the State Board of Education for such certificate;
 - (2) Have had not less than five years of experience in public school work at the time he assumes office;
 - (3) Submit proof to the State Superintendent of Education of three years of successful educational experience as a teacher, principal, supervisor, superintendent, educational administrator or instructor in school administration during the five years next preceding his appointment or election;
 - (4) Submit proof to the county board of education that he holds a degree from a recognized four-year college or university; and
 - (5) If such person is to be appointed by the county board of education, submit proof to the county board that he is knowledgeable in school administration.
- (b) A county superintendent of education, whether elected or appointed, need not be a resident or qualified elector of the county in which he is to serve. In every county where the county superintendent of education is elected by popular vote, he shall be nominated and elected in the same manner as other county officers are nominated and elected under the state election laws.

It is a misdemeanor for someone to print his name or another person's name on a ballot for county superintendent, if the person has not first filed with the probate judge, a certificate from the State Superintendent of Education indicating that the person holds a certificate of administration and supervision. Section § 16-9-4 Code of Alabama (1975). There is a mechanism by which a political party may give to the county board of education the authority to appoint a county superintendent, by entering on the ballot the choice for voters to empower the county board to select the superintendent. Section § 16-9-5 Code of Alabama (1975). When this mechanism is employed, the county board of education may not appoint the superintendent for a longer period of time than an elected superintendent would serve. Section § 16-9-9 Code of Alabama (1975).

In counties in which the county superintendent of education is elected by popular vote, the successful candidate will take office on January 1st after the election. Section § 16-9-8 Code of Alabama (1975). This section also makes provision for another election if the candidate for county superintendent dies before taking office.

If the state superintendent balks at providing certification for a candidate for county superintendent, and that a person hold credentials for administration or supervision, the state superintendent can be compelled to provide that certification. Section § 16-9-10 Code of Alabama (1975).

If a vacancy occurs in the office of county superintendent of schools, the county board of education is charged with filling the unexpired term within 180 days. Section § 16-9-11 Code of Alabama (1975). If the county board of education is unable to fill the vacancy, the state superintendent must step in to fill the vacancy. Alabama Act 2011-573, H.B. 455, amended this provision to make it applicable to both county and city superintendents, and authorized the designation of an interim superintendent.

In 2010, Alabama required a posting of notices of vacancies for the offices of state superintendent, appointed county superintendent, appointed city superintendent, chancellor of postsecondary education, chief executive officer of any two year school or college, the institute for deaf and blind, the school for fine arts, the department of youth services school district, and the executive director of the high school of mathematics and science. 2010 Ala. Act 10-210, No. 2, H.B. 79.

Powers and Duties

The powers and duties statements for the county and city superintendents are provided at Sections §§ 16-9-13 and 16-12-3 Code of Alabama (1975). Section § 16-9-13 states:

The county superintendent of education, as the executive officer of the county board of education, shall see that the laws relating to the schools, the rules and regulations of the state and county boards of education are carried into effect. The county superintendent of education shall have authority to administer oaths and to examine witnesses, under oath, in any part of the county on any matter pertaining to the public schools of the county, and to cause the examination to be reduced to writing.

The duties of the city superintendent are:

- (a) The city superintendent of schools shall be the chief executive officer of the city board of education and shall see that the laws relating to the schools and the rules and regulations of the city board of education are carried into effect.
- (b) The city superintendent of schools shall explain the true intent and meaning of the school laws, and of the rules and regulations of the city board of education and of the State Board of Education, subject to the provisions of this title.
- (c) The superintendent shall decide, without expense to the parties concerned, all controversies and disputes involving the rules and regulations of the city board of education and the proper administration of the public schools.

(d) The superintendent shall have authority to administer oaths and to examine under oath witnesses in any matter pertaining to the public schools of the city and to cause the examinations to be reduced to writing.

(e) The city board of education shall appoint as its executive officer a superintendent of schools, who may also be secretary of the board of education.

(f) The superintendent of schools shall conduct all correspondence of the board, keep and preserve all of its records, receive all reports required by the board and see that such reports are in proper form, complete and accurate. He shall attend all meetings of the board and of its committee and shall have the right to advise on any motion under consideration, but shall have no vote. In case the secretary is absent, the board shall appoint some member of the board or a teacher in the schools under the jurisdiction of said board to act for the time being. Section § 16-12-3 Code of Alabama (1975).

Two additional statutory provisions specify duties and powers of the city superintendent of schools. Section § 16-12-15 Code of Alabama (1975) requires the city superintendent of schools, acting under the rules and regulations of the city board of education, to be responsible for the administration of the office of superintendent of schools, and to see that all regular appointees of the city board of education devote their entire time to their duties. Section § 16-12-5 Code of Alabama (1975) requires the city superintendent of schools to recommend for approval and adoption by the city board policies adapted to promote the educational interests of the city, and rules and regulations for the conduct of the schools.

By statute, county superintendents of education may not hold other jobs. Section § 16-9-12 Code of Alabama (1975) requires the county superintendent of education to devote his entire time to public school business.

Building Programs and Consolidations

A paramount duty of both county and city superintendents of education is the building programs within their respective districts. Section § 16-9-14 Code of Alabama (1975) requires county superintendents to recommend for approval and adoption by the county board of education the kind, grade and location of schools to be established and maintained and the compulsory school attendance districts to be established. Section § 16-9-20 Code of Alabama (1975) underscores the duty of the county superintendent of education to work out plans for the consolidation of schools, as well as plans for the grounds, buildings and equipment of consolidated schools. Section § 16-9-18 Code of Alabama (1975) requires county superintendents to recommend plans for condemnation of unsanitary or unfit school buildings, and recommend in writing all repairs and construction projects for approval by the county board. Section § 16-9-17 Code of Alabama (1975) also requires county superintendents to recommend a district-

wide building program laying out local attendance districts. Likewise, sections §§ 16-12-4 and 16-12-6 Code of Alabama (1975) place a duty on city superintendents of schools to recommend for approval and adoption by the city board of education, a plan showing the kind, grade, and location of schools to be established and maintained. Section § 16-12-7 Code of Alabama (1975) requires city superintendents to recommend to the city board school buildings which are unsanitary, unfit for use, and targeted for condemnation. The city superintendent must also recommend an architect for the city board, and provide recommendations for building construction and repair. The city superintendent is also charged with approving in writing all contracts of whatever kind entered into by the city board of education.

Attendance and Instructional Matters

Both county and city superintendents of education have primary duty for enforcement of compulsory attendance laws. (See, sections §§ 16-9-30 and 16-12-18 Code of Alabama (1975)). County superintendents retain residual responsibility to prepare and submit for approval by the county board, rules and regulations for admitting students into the junior and senior high schools of the county. Section § 16-9-19 Code of Alabama (1975).

Both County and city superintendents are charged with responsibility for preparing rules and regulations for the grading and standardizing of the schools within their respective school districts. Sections § 16-9-22 and 16-12-8 Code of Alabama (1975).

Sections §§ 16-9-21 and 16-12-9 Code of Alabama (1975) require county and city superintendents, respectively, to prescribe courses of study for the schools in their districts and submit them for approval and adoption by the board of education. Printed copies of these courses of study must be supplied to every teacher and interested citizen of the county or city.

Sections §§ 16-9-23 and 16-12-16 Code of Alabama (1975) articulate the responsibility of superintendents to nominate in writing all principals, teachers, and other employees for employment. Additionally, both county and city superintendents have authority to assign, transfer, and suspend employees, and recommend the dismissal of employees, all subject to Title 16, Chapter 24 of the Code of Alabama (1975). To these provisions is added authority for county and city boards to hire supervisors and professional and clerical assistants (sections §§ 16-9-24 and 16-12-19 Code of Alabama (1975)) and the authority to prepare payrolls (sections 16-12-17 and 16-9-32 Code of Alabama (1975)).

Both county and city superintendents of education are required to visit schools in their jurisdiction, observe the management and instruction, and give suggestions for

improvement. Sections §§ 16-9-26 and 16-12-11 Code of Alabama (1975). Both sections direct the respective superintendents to work with and through principals and teachers for the improvement of the schools.

Conferences and Institutes

Among other duties, county and city superintendents have primary responsibility for organizing and attending institutes and conferences. Section § 16-9-25 Code of Alabama (1975) requires county superintendents to organize and attend county and local institutes for teachers and citizens, to advise teachers as to their further study in professional reading, and to assist parents and citizens in acquiring knowledge of the aims and work of the school. A parallel provision for city superintendents can be found at Section § 16-12-10 Code of Alabama (1975).

Section § 16-9-16 Code of Alabama (1975) requires the county superintendent of education to call and conduct conferences with principals, teachers, attendance officers, school trustees and other interested citizens, as one of many ways of fostering in teachers professional insight and efficiency and of developing public interest in education.

Section § 16-23-11 Code of Alabama (1975) prohibits both county and city superintendents of schools from paying any person who does not attend county institutes without permission to be absent. Section § 16-23-9 Code of Alabama (1975) empowers superintendents to provide excuses from attendance, so that those with excused absences may be paid.

In 2009, the Legislature established a training and professional development program for school superintendents. Alabama Act 2009-344, S.B. 262 The program must provide support for the responsibilities of the position and the requirements for recertification, and must include a mentoring program for new superintendents. Section § 16-1-38.1 Code of Alabama (1975).

Quadrennial Census

Both county and city superintendents are required to cause a census of school age children (ages 6-19) to be conducted every four years. Section § 16-12-13 Code of Alabama (1975) requires the city superintendent to submit the census data to the county superintendent by August 15th after the quadrennial census. The county superintendent is required to consolidate reports and submit them to the state superintendent by September 1st. Section § 16-9-29 Code of Alabama (1975).

Reporting Requirements

Sections §§ 16-9-27 and 16-12-12 Code of Alabama (1975) require county and city superintendents to prepare blanks and forms upon which employees are to make

reports. These reports are then required to be submitted for approval and adoption by the respective boards of education.

Sections §§ 16-9-30, 16-9-31, and 16-12-14 Code of Alabama (1975) require county and city superintendents to prepare and submit through their respective boards of education all reports required by the State Superintendent of Education and State Board of Education. Section § 16-9-28 Code of Alabama (1975) places a duty on the county superintendent of education to prepare an annual statement of receipts and disbursements and publish it in a local newspaper. Failure to comply with this provision is a misdemeanor. Section § 16-9-31 Code of Alabama (1975) makes failure to file the annual report by November 1st an impeachable offense for county superintendents.

36. ORGANIZATIONAL ISSUES: ASSOCIATIONS

Discretionary and Ministerial Authority

Throughout the public school code, county and city boards of education in Alabama are granted both general and specific powers and functions. Courts nationally have addressed the type of authority given to a school district as being one of two types: discretionary or ministerial authority. Discretionary powers or functions are those which require the exercise of judgment. Ministerial powers or functions are those which school officials are required to perform, without the exercise of judgment. Examples of discretionary power include the decision to create another teaching position at a particular school, the decision to build a school, or the decision to adopt a teacher salary schedule that goes beyond the state minimum salary schedule. Examples of ministerial power include refusing to enroll a student without proper immunization, posting a position announcement for fourteen days prior to filling a teaching vacancy, or submitting a required report to the State Superintendent of Education.

Whether a power or function is discretionary or ministerial is important for at least three reasons. First, governmental agencies (e.g., school boards) and their officials are usually considered immune from tort claims arising from the exercise of discretionary functions. To preserve immunity, it is not necessary for a school board's decision to be the best decision, or even a wise decision. It only must not be arbitrary, capricious, malicious, or fraudulent. Second, discretionary authority cannot be delegated. It is an illegal delegation of discretionary authority for a school board to give decisions to others, when the decision was given by the legislature to the school board. Examples of illegal (*ultra vires*) delegations of authority might include a decision to give the teacher's association the final decision on how to disperse salary funds or a decision to give to a teacher committee the final decision on a particular course of study. Third, when a ministerial power or function is given to a governmental actor like a school board or school official, the board or official has no choice but to perform the function. Unlike a discretionary power or function, a ministerial power or function may be delegated to another. For example, principals may see to it that students are properly immunized, even though the school board is directed by the legislature to assure that students are immunized before enrollment. It is important to remember that a school official can be held personally liable (thus, lose his or her immunity) for the injury or personal loss of another resulting from the improper performance of a ministerial function, or the failure to perform that ministerial function.

As society and the provisions for education become more and more complicated over time, school boards will often enter into agreements with other entities or join associations to assist the school board in meeting its duties. The question of whether a power or function is discretionary or ministerial becomes critical in deciding issues of immunity, propriety, and legality of school board decisions. This module addresses the

various types of associations and cooperative agreements authorized by statute, and some potential problems of delegation of powers.

Alabama Association of School Boards

Section § 16-1-6 Code of Alabama (1975) authorizes county and city boards of education to affiliate with the Alabama Association of School Boards:

The Alabama Association of School Board Members is hereby recognized as the organization and representative agency of the members of the school boards of Alabama.

The State Superintendent of Education, the State Department of Education and the boards of education of the county and city systems are hereby empowered and authorized to cooperate with the Alabama Association of School Board Members in its in-service training program for school board members and in encouraging and fostering cooperation among the school boards affiliated with the Alabama Association of School Board Members.

Members of the state, county and city boards of education are authorized to pay dues to and also may incur reasonable traveling and subsistence expenses in attending meetings of the Alabama Association of School Board Members with which it is affiliated. Such dues and expenses may be paid as other expenses are paid by such boards of education.

This statutory provision does not change the powers and duties of individual school boards, but does serve to thwart taxpayer suits that might argue that dues and expenses related to affiliation are an improper expenditure.

Cooperative Agreements

Sections §§ 16-8-12.1 and 16-11-9.1 Code of Alabama (1975) are mostly identical provisions granting authority for county and city boards of education to enter into cooperative agreements. Both sections read as follows:

In addition to all authority previously granted by statute, county (city) boards of education may enter into cooperative agreements, projects and programs with the county (city council or) commission, and may take such other actions as they deem necessary and appropriate for the proper management of the public schools; provided, however, that such agreements, projects, and programs shall not be in conflict with nor inconsistent with any law or policy of the State Board of Education and shall not conflict with the purposes for which the school system is established. Provided, further, that such authority shall not be used to deny any employee any legal or constitutional rights to which he or she is entitled, nor shall

such authority be used in such a way that employees are denied any benefits established and required by law, nor shall such authority be construed as authorizing county (city) boards of education to levy any taxes not otherwise authorized by law. Sections §§ 16-8-12.1 and 16-11-9.1 Code of Alabama (1975).

Similar provisions exist in many states. However, provisions in other states usually have more general language, indicating a broader grant of authority to enter into cooperative agreements, especially inter-district agreements involving several school districts, spanning across a region of the state. One of the most common types of cooperative agreements is for the delivery of special education services across several, usually rural, school districts. Such agreements provide efficiency in service delivery, by sharing the costs of hiring school psychologists, social workers, school nurses, physical therapists, occupational therapists, speech therapists, and audiologists, and using these highly specialized professionals over a broader area. The first clause of the statutory grant in Alabama seems to limit the cooperative agreement to agreements through a city council or county commission. The second clause (“and may take such other actions as they deem necessary and appropriate for the proper management of the public schools”), however, suggests the potential for broader agreements similar to those in other states.

Risk Management Cooperative

Section 16-8-42.1 Code of Alabama (1975) provides specific authority for both city and county boards of education to enter into a risk management cooperative. A risk management cooperative is an entity, formed by local boards of education in any combination of 25 or more school districts, formed for the purpose of creating a self-insurance pool. The risk management cooperative is designed to protect from risks other than those protected by the Public Education Employees’ Plan or Health Insurance under the State Insurance Fund.

Alabama High School Athletic Association

Athletic or activity associations commonly make regulations regarding age, length of eligibility, residency, academic requirements, and health requirements for participation. School districts in Alabama affiliate with the Alabama High School Athletic Association, which body adopts statewide participation rules. Such rules are often challenged by student-athletes, on grounds that they violate the due process clause, that they violate federal disabilities laws, or that they are an illegal delegation of the discretionary power of local school boards. Such challenges generally are unsuccessful, except in the area of disabilities law. A key question in challenges based

on disability law is whether or not waiver of the challenged rule is a reasonable accommodation to the individual student-athlete's disability.

Information Technology Joint Purchase Agreements

In 2003, the Legislature passed legislation authorizing the creation of Information Technology Joint Purchase Agreements. (Alabama Act 2003-392, p. 1111, §§1-2.) The rationale for such agreements is that "information technology is an area of rapid change in which specialized knowledge and equipment are often essential," and that "substantial savings may be realized by aggregating the purchasing power of educational institutions." Section §16-61E-1 Code of Alabama (1975). City and county boards of education, as well as state junior colleges and trade schools, state colleges and universities, the Department of Youth Services, the Alabama Institute for Deaf and Blind, the Alabama School of Fine Arts, and the Alabama School of Math and Science, may all enter into joint agreements with other listed educational entities to jointly purchase information technology. Section §16-61E-2(a)(1). The legislation allows a single contract to be formed by any number or combinations of educational institutions. The contract must stipulate the categories of information technology to be purchased or leased, the manner of advertising for bids and awarding the contract, the method of payment by each participating educational institution, and other matters needed to fulfill the agreement. Section §16-61E-2(a)(3). The contract may designate a joint purchasing administrator to be responsible for issuing invitations to bid, evaluating the bids, and awarding the contract. Bidding requirements under Title 41, Chapter 16 and Title 39, Chapter 2 of the Code of Alabama (1975) must be followed. Section §16-61E-2(c).

Materials, Equipment, and Supplies Joint Purchasing Agreements

Specific authority to combine into a cooperative venture was also authorized in 2009, at the same time that the Legislature increased to \$15,000 the threshold amount for requiring bids for materials, equipments, and supplies. The 2009 legislation allows school districts to combine, by joint agreement, for the purchase of labor, services, or work, or for the purchase or lease of materials, equipment, supplies, or other personal property for use by their respective agencies. The agreement must be entered into by official actions of the respective governing boards. Ala. Act 2009-760, Section 16-13B-1(c) Code of Alabama (1975).

37. ORGANIZATIONAL ISSUES: LIABILITY AND IMMUNITY

To school officials, the concept of “liability” is generally identified with negligence. Negligence is within a category of law called “torts,” and as it will be seen, negligence is only one of many kinds of tort. The word “tort” is derived from the Latin word for “twisted.” A tort is a civil wrong, other than breach of contract, for which the court will provide a remedy in the form of an action for damages. Torts are divided into two categories: intentional torts and non-intentional torts. While assault and battery are examples of intentional torts, negligence is a non-intentional tort.

Torts arise from the common law, but over time legislatures will weigh in with legislation intending to modify common law applications. For example, in Illinois, state law requires that a teacher’s actions must be malicious before the teacher can be considered negligent. This statutory requirement makes it more difficult to prove negligence than it normally would at common law.

Intentional Torts

Assault

Assault is the placing of another in apprehension of bodily harm. It is not necessary for physical contact to actually take place, although one must need to be aware of the threat. Examples of assault might be to wave a knife or gun, or to make a threatening motion with one’s fist.

Battery

Battery is a harmful or offensive contact with a person, resulting from an act intended to cause the plaintiff or a third person to suffer such contact, or apprehension that such contact is imminent.

Many of the assault and battery cases in schools arise from the administration of corporal punishment. School officials are usually not guilty of assault or battery, if the administration of corporal punishment is reasonable. Two sections of Alabama law, taken together, indicate an intent of the legislature to provide immunity for school personnel who use corporal punishment according to local board policy.

A teacher or administrator who, in good faith, reports suspected drug abuse by a student to the appropriate authorities shall be immune from civil or criminal liability. Section § 16-28A-4 Code of Alabama (1975). It is the intent of the Legislature to include under the provisions of this chapter, principals, assistant principals and any other school personnel authorized to use corporal punishment under the policies and guidelines developed by the local board of education. Section § 16-28A-5 Code of Alabama (1975).

False Imprisonment

False imprisonment can occur when one is held in any enclosed space, such as a room or closet. False imprisonment, to be proven, does not require incarceration. Alabama law defines false imprisonment as:

False imprisonment consists in the unlawful detention of the person of another for any length of time whereby he is deprived of his personal liberty. 6-5-170 Code of Alabama (1975).

Claims against school personnel for false imprisonment for common disciplinary techniques such as requiring a student to stay after class or to report to a detention room are not usually considered false imprisonment. However, unusual or unreasonable actions, such as tying or taping a student to a chair, might be false imprisonment.

Defamation

Defamation is a communication that injures the good name or reputation of another person. Slander is spoken defamation; libel is written defamation. Slander includes four categories of wrong which do not require proof of damages. These include statements: imputing that another committed a crime; statements that another has a loathsome disease; statements which relate negatively to one's business, trade, profession, or office; and, statements imputing the unchastity of women. The last type of slander is reflected in Alabama law:

Any words written, spoken, or printed of any woman falsely imputing to her a want of chastity are actionable without proof of special damages. Section 6-5-181 Code of Alabama (1975).

Intentional Infliction of Emotional Distress

Intentional infliction of emotional distress is a relatively new tort, because it involves mental injury rather than physical injury. Mere words that are threatening, insulting, racist, or violent are not sufficient to prove this tort. Conduct, including speech, must be flagrant, extreme, outrageous and outside the bounds of human decency to be actionable as intentional infliction of emotional distress.

Privacy Claims

The notion of privacy in the school setting tends to be broad and undefined. Privacy can arise from the constitution, from statute, or from the common law. An example of constitutional privacy is touched upon when a school official conducts a

student search, which must follow the requirements of the Fourth Amendment. An example of statutory privacy is that which is vested in the treatment and handling of student records under the Family Educational Rights and Privacy Act (FERPA). In this module, “privacy” relates to common law privacy. Common law privacy comes from an individual sense that someone has violated a person's right to be left alone. Like negligence or defamation, common law privacy is a tort.

Much of the common law privacy case law developed from conflicts between citizens who felt that newspapers and other media had violated their privacy. A new feature in the common law is the use of common law privacy actions as a way of seeking damages against school employees. Such claims began about fifteen years ago, and appear to be accelerating. Thus, common law privacy is a newly-emerging issue in public schools. Fortunately, many of the claims against school personnel fail, when school personnel are acting in traditionally ways.. For example, in Wooten v. Pleasant Hope R-VI School Dist., 139 F.Supp.2d 835 (W.D.Mich. 2000), a student sued her coach for talking the situation over with teammates before deciding, then telling teammates that the student had been ejected from the softball team for missing a game to attend another school's homecoming. The court ruled that the other teammates had an interest in the issue and it wasn't just a private matter between the coach and the player. The courts in most states have identified four types of common law privacy. Each of the four types, with a few representative cases, is discussed below.

Intrusion on seclusion might occur, for example, when the school's yearbook photographer attempts to capture a surprisingly candid moment in the rest room or locker room. Because students have an expectation of privacy in certain areas like locker room changing areas, the photographs may represent an intrusion. In Jarrett v. Butts, 379 S.E.2d 583 (Ga.App. 1989), a teacher who took photographs for the yearbook was sued for taking pictures of a girl against her will, in a hallway and classroom. Because the photos were taken in a public space and did not reveal anything that was not readily visible in public, the teacher did not intrude on the girl's seclusion. Similarly, school officials did not intrude on a principal's seclusion by putting him under surveillance and following him home, to make certain that he was living in the school district, as required by policy. Munson v. Milwaukee Board of School Directors, 969 F.2d 266 (7th Cir. 1992). Nor was it an intrusion when a teacher looked into a student's permanent file to determine if the student had changed a grade. Young v. St. Landry Parish School Board, 673 So.2d 1272 (La.App. 1996). However, a school did intrude on a student's seclusion when it ordered an HIV test on a blood sample taken from the student, when permission had only been given to test the blood sample for measles. Doe v. High-Tech Institute, Inc., 972 P.2d 1060 (Colo.App. 1998). Intrusion also occurred in a university case where faculty members overheard two female students discussing the possibility that another male student had raped a female student. A million dollar judgment was upheld after the school's investigation expanded into a general discussion among faculty and staff about the male student's personal

relationships, habits, and anatomy. Doe v. Gonzaga University, 24 P.3d 390 (Wash. 2001).

Publicizing private facts, the second type of common law privacy claim, occurs when highly offensive private information about someone is publicized and is not of legitimate concern to the public. For example, in Ghassomians v. Ashland Independent School Dist., 55 F.Supp.2d 675 (E.D.Ky. 1998), a teacher sued a principal for reading and copying notes on a yellow pad, given to the principal by a student, then giving copies of the notes to a central office supervisor. The notes were the teacher's journal, detailing the teacher's thoughts about the principal and other staff. The court ruled that giving the copies to one other person was not "publicizing" the private information. Generally, the information must be shared with the general population to be actionable. Some cases arise from the principal simply attempting to investigate wrongdoing. For example, a private school principal in Ohio was sued for publicizing private facts, when she investigated allegations of sexual misconduct. Iwenofu v. St. Luke School, 724 N.E.2d 511 (Ohio App. 1999). Fortunately the court did not agree that questioning witnesses was publicizing private facts.

False light privacy claims, the third type of privacy, can occur when someone publicizes a highly offensive and false impression of another person. In a school that might have considered having a nepotism policy, a female teacher sued her sister (the principal) and her niece (the yearbook sponsor) for putting her in a false light. Salek v. Passaic Collegiate School, 605 A.2d 276 (N.J.Super. 1992). A photograph in the yearbook featured the female teacher facing a male teacher. The male teacher's hand was on his forehead. The caption read, "Not tonight, dear, I have a headache." The court ruled that in the context of the yearbook photographs on that page, it should have been clear to everyone that the portrayal was an attempt at humor and not a statement that the teachers were having an affair. Consequently, the teacher was not cast in a false light. Another false light privacy claim came from a teacher's attempt to stop a 12-year-old middle school student from using her nickname, "Boo." Phillips v. Lincoln County School Dist., 984 P.2d 947 (Or.App. 1999). The teacher explained that "boo" was a street name for marijuana. The court decided that the school district was not liable for false light privacy, explaining that the teacher did not say that "Boo" used "boo," the teacher only asked "Boo" to quit using the name "boo." A third example of false light privacy occurred in an Alabama case. In Godby v. Montgomery County Bd. of Educ., 996 F.Supp. 1390 (M.D.Ala. 1998), the court denied a false light privacy claim against school officials, when the school officials recounted an alternative version of events, after a homecoming queen candidate sued the district over the selection process and the story came to the public's attention through the candidate's actions.

Appropriation of name or image, the final type of common law privacy, may occur when someone uses another person's name or likeness for some advantage without consent. An example of appropriation might be the use of a celebrity's picture on a school web-site. The few education cases in this type involve university faculty,

although the situations could also arise in the K-12 setting. In Felsher v. University of Evansville, 727 N.E.2d 783 (Ind.App. 2000), the university was successful in getting an injunction against a former professor, who had created web-sites and email addresses that appeared to belong to university administrators and the university. On these web-sites, the former professor had posted articles he had written about alleged wrongdoing by university administrators. He also nominated the administrators for jobs at other universities, linking email addresses back to the web-sites. The university and officials were successful on appeal at maintaining a permanent injunction against the professor.

In summary, it appears that the number of common law privacy claims involving schools and school personnel has risen dramatically in the last fifteen years. What may be happening is that, as society becomes more technical, more complex, and more dense in population, people are more quickly sensing an invasion of their personal space. Upon visiting their attorney, the word “privacy” may come up, and a common law privacy claim becomes added to other, more evident claims. School administrators need to be aware of the four types of common law privacy claims, and add them to the ever-growing list of potential legal problems arising from the school setting. (Note: the foregoing discussion on common law privacy is adapted from an article published in CLAS Leadership News 2002 Legislation Issue.)

Non-Intentional Torts

Negligence

To prove a claim for negligence, a plaintiff must prove the existence of each of the following four elements:

- 1) Duty of care to another;
- 2) A breach of that duty;
- 3) Causation of the plaintiff’s injury; and,
- 4) Actual injury to the plaintiff.

Courts consistently rule that school personnel are not guarantors of the safety of their pupils. However, they do have a duty of exercising reasonable care. In some states this is expressed as “do what a reasonable person would do in the same situation.” In a few states a higher standard of care exists: “do what a reasonable teacher with the same certification and experience would do.”

The duties owed by school personnel to their pupils include:

- 1) Duty to provide instruction;
- 2) Duty to provide supervision
- 3) Duty to maintain equipment and premises in good repair.

The first duty, duty to provide instruction, was originally taken in the vocational education or physical education/coaching context. For example, one might consider instructing in the proper use of shop machinery, or instructing in the proper way to tackle an opponent in football. To this traditional meaning of “duty to provide instruction” is the duty to provide instruction according to a student’s IEP under the Individuals with Disabilities Education Act.

Constitutional Torts

Section 1983 (42 U.S.C. Section § 1983) is part of the Civil Rights Act of 1871. It was passed under the enforcement provisions of Section 5 of the Fourteenth Amendment, to enforce the anti-slave Thirteenth, Fourteenth, and Fifteenth Amendments. Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . subjects, or causes to be subjected any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. 42 U.S.C. Section § 1983 (1994).

What this language points to is that a state actor, such as a school person operating with a teaching or administrative certificate, can be held *personally* accountable for violating the clearly established civil or constitutional rights of others.

The first application of Section 1983 in the school setting was in Wood v. Strickland, 420 U.S. 308 (1975), in which school board members were held liable for not according due process to students prior to expelling them. Under Section 1983, individual school officials’ personal assets are at risk, not the school district’s assets or the assets of the insurance company protecting the school board.

Governmental Immunity

Governmental immunity is often used interchangeably with sovereign immunity and is a judicial doctrine that precludes bringing suit against a government without its consent. BLACK’S LAW DICTIONARY 1396 (6th ed. 1990). It derives from the notion in English common law that “the King can do no wrong.” Unless waived by statute, governmental agencies and their agents, officers, or employees are immune from suit under this principle.

Several exceptions to governmental immunity exist. The first, of course, is when the state legislature specifically waives its immunity. The second exception is where a

person's acts or omissions are outside their scope of employment. The third exception is where a person's acts or omissions are malicious, willful and wanton, reckless, or in bad faith. A fourth exception is for proprietary rather than governmental acts. Proprietary acts are generally functions that schools are not required to perform, that may be accomplished by private enterprise, or that is done for fundraising purposes.

Eleventh Amendment Immunity

The Eleventh Amendment is a jurisdictional amendment; it provides immunity for states in federal court. As such, it is an expression of state rights against the federal government. The Eleventh Amendment provides:

“The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.” U.S. CONST. amend. XI.

In the last decade the Eleventh Amendment has had an increasingly-important impact on education. Since Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) a revolution in sovereign immunity case law is changing the relationship between the federal government and the states. This is important in education, because school districts in a few states have been found to be instrumentalities of the state and are thus immune from suit in federal court. (See, Oldaker, L. and Dagley, D. "The Eleventh Amendment, Its History, and Current Application to Schools and Universities." West's Education Law Reporter. Vol. 72, No. 2 (April 9, 1992): 479-501.) There is a potential argument that the schools in many more states have Eleventh Amendment immunity. (See, Dagley, D and Oldaker, L. "Are School Districts State Actors (Alter Egos)?" West's Education Law Reporter. Vol. 79, No. 2 (February 25, 1993): 367-81.)

38. ORGANIZATIONAL ISSUES: CHURCH AND STATE RELATIONS

The relationship between religious institutions and the public schools, as well as the relationship between religious people and public schools, has been a source of continuing litigation for over fifty years. Such issues are constitutional in nature, either under the federal constitution or the state constitution.

Constitutional Provisions

Within the body of the U.S. Constitution, there is only one reference to religion. Article VI, Section 3, U.S.CONST (1787) requires:

The senators and representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this Constitution; but no religious tests shall ever be required as a qualification to any office or public trust under the United States. U.S.CONST. art. VI., sec. 3 (1787).

Much more recognized as a constitutional reference regarding religion, and the source of most church-state litigation, is the First Amendment, which reads:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances. U.S. CONST. amend. I (1787).

The first clause of the First Amendment is called the Establishment Clause. The second clause of the First Amendment is called the Free Exercise Clause. Note that the language of the First Amendment specifically addresses and constrains the federal government (Congress), and does not mention the states. The Free Exercise clause did not apply to the states until 1940, when it became recognized as one of the liberties protected by the Due Process Clause of the Fourteenth Amendment. (See, Cantwell v. Connecticut, 310 U.S. 296 (1940).) The Establishment Clause became applicable to the states in 1947, in Everson v. Board of Education, 330 U.S. 1 (1947).

The Alabama Constitution of 1901 has one provision related to religion:

(That the great, general, and essential principles of liberty and free government may be recognized and established, we declare) (t)hat no religion shall be established by law; that no preference shall be given any law to any religious sect, society, denomination, or mode of worship; that no one shall be compelled by law to attend any place of worship; nor to pay any tithes, taxes, or other rate for building or repairing any place of worship, or for maintaining any minister or

ministry; that no religious test shall be required as a qualification to any office or public trust under this state; and that the civil rights, privileges, and capacities of any citizen shall not be in any manner affected by his religious principles. ALA.CONST. art. 1, sec. 3.

Occasionally, a state-level constitution will read sufficiently different from the federal constitution to create different outcomes in litigation. For example, although the federal courts have interpreted the federal constitution to permit the busing of parochial school children with public school buses, the practice is not permitted in the states of Oklahoma, Washington, Missouri, and Alaska. (See, Gurney v. Ferguson, 122 P.2d 1002 (Okla. 1941); Visser v. Nooksack Valley School Dist., 207 P.2d 198 (Wash. 1949); McVey v. Hawkins, 258 S.W.2d 927 (Mo. 1953); Matthews v. Quinton, 362 P.2d 932 (Alaska 1961), cert. denied, 368 U.S. 519 (1962).) This is because the state constitutional language regarding religion in those states is more restrictive, and state courts there have decided that such busing practices are unconstitutional under state constitutions. Thus far, there apparently have been no cases in Alabama courts to interpret, on the basis of the state constitution, a church-state issue in the public schools differently than the interpretation of the federal constitution in federal courts.

The metaphor concerning a “wall of separation” between church and state is not found in either constitution. This metaphor was used in 1802 in a letter by Thomas Jefferson to a Baptist association that had requested a national day of thanksgiving. (See Robert Healey, Jefferson on Religion in Public Education (New Haven, CT: Yale University Press, 1962), pp. 128-140.)

Establishment Clause Legal Tests

The federal courts are obligated to address claimed Establishment Clause violations by three different legal tests: the Lemon test; the Endorsement test; and the Coercion test.

Lemon Test

The Lemon Test originates from Lemon v. Kurtzman, 403 U.S. 602 (1971), in which an attempt to subsidize salaries for parochial school teachers was successfully challenged. The Lemon test requires the court to address three questions, in determining if a challenged law or policy violates the Establishment Clause. Those questions are:

- 1) Does the challenged law or policy have a secular purpose?
- 2) Does the challenged law or policy have a primary effect that neither advances nor inhibits religion?

3) Does the challenged law or policy produce excessive entanglement between the government and a religious entity?

In a series of decisions in the 1980's, Justice O'Connor influenced a slim majority of the court to take a more restrictive view of the first prong of Lemon. Because school children were subjected to compulsory attendance laws and were thus a captive audience in schools, and because school children, especially in the lower grades, are impressionable youth, it became insufficient in the first prong of Lemon to merely observe that a challenged law or policy had a secular purpose. The inquiry needed to expand to determine if the governmental entity, in passing the challenged law or policy, had articulated any sectarian purpose for the law or policy. For example, Section 16-1-20.1, Code of Alabama (1975) was passed in 1981 and given a descriptive title of "Period of Silence for Meditation." The text of this provision says nothing about prayer:

At the commencement of the first class each day in all grades in all public schools, the teacher in charge of the room in which each such class is held shall announce that a period of silence, not to exceed one minute in duration, shall be observed for meditation, and during any such period silence shall be maintained and no activities engaged in. (Acts 1981, No. 81-357, p. 523.)

A ready rationale for a moment of silence at the beginning of the school day would be that the moment of silence indicates a break from the previous, unorganized activities and formalized the beginning of the school day. Thus, after a moment of silence, students would be ready to take on the business of schooling. This is a clearly articulated secular, non-sectarian purpose. However, a legislative sponsor indicated that the bill was passed to permit school prayer to return to the classroom (a sectarian purpose), so the Supreme Court ruled that the provision violated the First Amendment. Wallace v. Jaffree, 472 U.S. 38 (1985). This outcome demonstrates the application of the O'Connor modification to the Lemon test.

Endorsement Test

A second test for Establishment Clause analysis is the Endorsement Test. The Endorsement test asks, "Does governmental action have the effect of endorsing religion?" The Endorsement Test was first proposed in a concurring opinion by Justice O'Connor in Lynch v. Donnelly, 465 U.S. 668 (1984). Under the Endorsement Test, government may not send a message that religious beliefs are endorsed or disapproved by government.

Coercion Test

The Coercion Test was adopted by the U.S. Supreme Court in Lee v. Weisman, 505 U.S. 577 (1992). The Coercion Test asks: “does governmental action have the effect of coercing a particular religious belief or exercise?” In Weisman, the court reviewed a challenge to a practice in a Rhode Island school district that permitted principals to invite members of the clergy to provide invocations and benedictions at school graduation exercises. The court viewed the practice coercive, in the sense that students felt peer pressure to participate in the devotionals that were conducted at the school-sponsored graduation ceremony. The majority of the court was not impressed with the argument that attendance was voluntary, observing instead that students should not have to choose between attending a milestone activity like their graduation ceremony and respecting their religious convictions.

Which Test?

Establishment Clause jurisprudence seems almost incoherent, when attempting to decide which test for analysis applies in which situation. The Lemon, Endorsement, and Coercion tests have been used variously by the Supreme Court during the last fifteen years, without discarding any one of the three tests. Consequently, the lower courts usually obligate themselves to analyze a particular situation in light of all three tests.

A recent Alabama case implicated the Establishment Clause. In Holloman ex rel. Holloman v. Harland, 370 F.3d 1252 (11th Cir. 2004), the challenge arose from the practice of a high school home economics and government teacher to solicit prayer requests from her students, which were then addressed through silent prayer during the statutorily-required moment of silence. It was argued that the prayer requests fulfilled the board-sanctioned curriculum regarding “compassion” in the Character Education Plan. The court ruled that the practice violated the Establishment Clause.

Exception(s) to Establishment Violations

The prohibition against government providing benefit to religion is not absolute. In 1947, the Supreme Court held in Everson v. Board of Education, 330 U.S. 1 (1947), that it was permissible, under the federal constitution, for states to transport parochial school students on public school buses. The rationale for this decision was that the child benefited from the practice, rather than the religious institution. The “Child Benefit Doctrine,” therefore, is an exception to general prohibitions against public monies going to support religious institutions or religious activities. The Child Benefit Doctrine has expanded, through a series of Supreme Court decisions, to permit the giving of governmental aid through the personal choice of individuals. This is discussed in more detail, below, in the section “Governmental Aid to Private Schools.”

Another means of avoiding Establishment clause violations is when the government entity is successful in separating itself from religious exercise by application of the public forum doctrine. As discussed at length in Module 48 – Public Forum Doctrine, in the school setting, public forum doctrine is used by the courts as a mechanism for analyzing situations where the right of government to control a governmental facility is pitted against the right of an individual to engage in expressive activity (religious or speech) in that facility. For example, does an individual unconnected to a school (other than being a citizen in the community), have a right to come uninvited into a classroom and give a speech or pass out leaflets or condoms? Or, if the president of the senior class traditionally gives a speech at graduation, and the speech is entirely of his or her choosing, does the speaker have the right to give religious testimony in the speech or finish the speech with a prayer? In the first situation, the school classroom is not a public forum (a nonpublic forum), so the uninvited visitor has no right to use the classroom for his or her expressive activities. In the second situation, an argument exists that the school has changed at least a few minutes of the graduation exercise from a nonpublic forum, to something more like a public forum, by inviting the speaker to speak his or her mind during those few minutes. Then, the speech is the speaker's speech and not the school's speech, so that the school has not violated the Establishment Clause.

Free Exercise Clause Legal Tests

Pendulum Swings

During our nation's history, the U.S. Supreme Court has struggled with the proper way of interpreting the Free Exercise Clause of the First Amendment. To a certain extent, analysis of the Free Exercise clause has swung on a pendulum between two extreme views of the proper relationship between religious expression and governmental regulation. The two extremes of the pendulum are exemplified by two Supreme Court cases: Reynolds v. U.S., 98 U.S. 145 (1878) and Sherbert v. Verner, 374 U.S. 398 (1963).

In Reynolds v. U.S., 98 U.S. 145 (1878), a polygamist from Utah was prosecuted under federal law for polygamy. The Supreme Court held that proscriptions against polygamy do not violate the Constitution. At this extreme of the pendulum, when religious expression comes into conflict with the law, the answer is very easy: "the law is the law," and the individual's religious rights must succumb to the law.

Sherbert v. Verner, 374 U.S. 398 (1963) involved a situation where a member of the Seventh Day Adventist church lost her job for refusing to work on Saturday, which was of course her Sabbath. The state unemployment office denied her claim for unemployment compensation, because she had been terminated from her job for cause. The Supreme Court held that when a job is lost due to a requirement to work on Saturday, then the state, if it cannot show a compelling governmental interest, is required to seek compromise with Seventh Day Adventist. At this extreme of the pendulum, there is no presumption favoring the government's position that the law is the law, and the individual's religious rights need not be examined. Instead, the burden switches to the government to show that the regulation conflicting with religious liberty meets a compelling interest of the government. At this end of the pendulum, government is usually forced to seek a compromise with the individual.

The Yoder Test

For many years the leading case involving Free Exercise in the school setting was Wisconsin v. Yoder, 406 U.S. 205 (1972). Wisconsin v. Yoder involved a situation where people of the Amish faith sued the state of Wisconsin, over the state's compulsory attendance law. The Amish people argued that the requirement of school attendance until age 16 would require their children to remain in a modern high school setting to an age where they might question their faith, and make it difficult for the Amish way of life to continue to succeeding generations. Wisconsin argued that the government had an interest in assuring that the next generation is sufficiently educated. To address these arguments, the Supreme Court adopted the Yoder test:

- 1) Is the individual's activity an expression of religion or a religious exercise?;
- 2) Does the governmental regulation impair or conflict with the religious exercise?
- 3) Does the government have a compelling governmental interest?

After examining the situation in light of these three questions, if the government cannot show a compelling governmental interest in its regulation conflicting with religion, then government will have to compromise with the individual whose religious liberty is being impaired. Clearly, the Yoder test is on the Sherbert v. Verner end of the pendulum swing described above.

The Smith Test

The application of the Yoder test for free exercise situations in the school setting became suspect when the Supreme Court decided Employment Division, Oregon Dept. of Human Resources v. Smith, 494 U.S. 872 (1990). Smith arose when two Native Americans lost their state jobs as drug counselors, after supervisors learned that they ingested peyote for sacramental purposes as members of the Native American church. The Supreme Court introduced a return to the Reynolds v. U.S. view of the relationship between religious liberty and law. In other words, "the law is the law," and there is no

need to inquire into the validity of an individual's religious belief, nor does government have to prove its compelling governmental interest in passing the law. However, the Smith court did identify two exceptions, in which the Yoder test still applies:

- 1) Yoder applies if the law targets a particular religion.
- 2) Yoder applies if the religious exercise can be linked with another constitutional right, such as speech or association.

RFRA

In response to the Smith case, the federal congress passed the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb (Supp. I 1995). The intention in passing RFRA was to impose a return to the compelling governmental interest (Yoder) test in situations where individual religious expression was in conflict with law. However, in City of Boerne v. Flores, 117 S.Ct. 2157 (1997), the U.S. Supreme Court reinforced its role as interpreter of the Constitution and declared RFRA unconstitutional.

Applications

The status of church-state law involving education continues to change, although a body of "rules" seems to be developing. States continue to pass new statutes to attempt to define the proper relationship between schools and religious institutions and between schools and religious people. A summary of church-state related Alabama statutes follow these pages. Then, a listing of "situations" for discussion and the construction of rules about church-state relations in the schools completes this module.

Alabama Statutes Related to School Prayer

Section 16-1-20

Period of silence for meditation at beginning of first class in public schools.

At the commencement of the first class each day in the first through the sixth grades in all public schools, the teacher in charge of the room in which each such class is held shall announce that a period of silence, not to exceed one minute in duration, shall be observed for meditation, and during any such period silence shall be maintained and no activities engaged in.

(Acts 1978, No. 662, p. 955.)

Section 16-1-20.1

Period of silence for meditation.

At the commencement of the first class each day in all grades in all public schools, the teacher in charge of the room in which each such class is held shall announce that a period of silence, not to exceed one minute in duration, shall be observed for

meditation, and during any such period silence shall be maintained and no activities engaged in.

(Acts 1981, No. 81-357, p. 523. Found to violate First Amendment in Wallace v. Jaffree, 472 U.S. 38 (1985). Repealed by Act 98-381, p. 715, § 2, effective April 27, 1998.)

Section 16-1-20.2

School prayer.

From henceforth, any teacher or professor in any public educational institution within the State of Alabama, recognizing that the Lord God is one, at the beginning of any homeroom or any class, may pray, may lead willing students in prayer, or may lead the willing students in the following prayer to God:

Almighty God, You alone are our God. We acknowledge You as the Creator and Supreme Judge of the world. May Your justice, Your truth, and Your peace abound this day in the hearts of our countrymen, in the counsels of our government, in the sanctity of our homes and in the classrooms of our schools in the name of our Lord. Amen.

(Acts 1982, 2nd Ex. Sess., No. 82-735, p. 190. Found to violate First Amendment in Wallace v. Jaffree, 472 U.S. 38 (1985).)

Section 16-1-20.3

Student-initiated voluntary prayer.

(a) The legislative intent and purpose for this section is to protect the freedom of speech guaranteed by the First Amendment to the United States Constitution and Article 1, Section 4 of the Constitution of Alabama of 1901, to define for the citizens of Alabama the rights and privileges that are accorded them on public school and other public property and at school-related events, and to provide guidance to public school officials on the rights and requirements of law they must apply. Further, the intent and purpose of the Legislature is to properly accommodate the free exercise of religious rights of its student citizens in the public schools and at public school events as mandated by the First Amendment to the United States Constitution and the judicial interpretations thereof as given by the United States Supreme Court.

(b) On public school, other public, or other property, non-sectarian, non-proselytizing student-initiated voluntary prayer, invocations and/or benedictions, shall be permitted during compulsory or non-compulsory school-related student assemblies, school-related student sporting events, school-related graduation or commencement ceremonies, and other school-related student events.

(c) Nothing in this section shall otherwise diminish the right of any student or person to exercise his or her rights of free speech and religion, including prayer, as permitted by the United States Constitution and the Alabama Constitution on public school or other public property, or other property, at times or events other than those stated in subsection (b).

(d) The exercise of these rights on public school or other public property, or on other property for school-related activities, by students or others, shall not be construed to indicate any support, approval, or sanction by the State of Alabama, any political subdivision thereof, municipal corporation, governmental entity of any description, or any agent or employee of any governmental entity of the contents of any such prayer, invocation, benediction, or other activity, or be an unconstitutional use of any public school property or other public property, or be the promotion or establishment of any religion or religious belief.

(Acts 1993, 1st Ex. Sess., No. 93-850, p. 77, §§1-4.)

Section 16-1-20.4

Period of quiet reflection.

(a) The Legislature of Alabama finds that in the hectic society of today all too few citizens are able to experience even a moment of quiet reflection before plunging headlong into the activities of daily life. Young citizens are particularly affected by the absence of an opportunity for a moment of quiet reflection. The Legislature finds that our young, and society as a whole, would be well served if students in the public schools were afforded a moment of quiet reflection at the beginning of each school day and at the opening of school athletic events and graduation ceremonies.

(b) At the opening of school every day in each public school classroom, the teacher in charge shall conduct a brief period of quiet reflection for 60 seconds with the participation of every pupil in the classroom.

(c) At the beginning of every school athletic event and graduation ceremony, the principal of the school, or his or her designee, shall conduct a brief period of quiet reflection for 60 seconds.

(d) The moment of quiet reflection authorized by subsection (b) and subsection (c) is not intended to be and shall not be conducted as a religious service or exercise, but shall be considered an opportunity for a moment of silent reflection on the anticipated activities of the day or event.

(Act 98-381, p. 715, &&§1; Act 2001-428, p. 556, § 1.)

Church-State Situations Involving Schools: Permissible or Impermissible?

1. For a school principal to permit a teacher to hold a Bible study group with only other staff members to voluntarily participate before the school day commences.
2. For a school principal to deny a teacher permission to hold a Bible study group with only other staff members to voluntarily participate before the school day commences.
3. For a teacher to voluntarily hold a Bible study or prayer group before school with students who wish to attend, prior to the beginning of the school day.

4. For a coach to lead a team in prayer before the beginning of each practice session, asking for safety for the team members.
5. For a coach to lead a team in prayer before an interscholastic game, asking for safety for team members and a win.
6. For a coach to lead a Bible study group at a motel where the team is staying for a regional tournament.
7. For a teacher to wear articles of clothing which identifies with a particular religious sect.
8. For a teacher to wear jewelry which identifies the wearer with a particular religious sect.
9. For a principal to tell a teacher he cannot wear articles of clothing or jewelry identifying the wearer with a particular religious sect.
10. For a student to bow her head and pray before taking a test in a science class.
11. For a student to bow her head and pray before consuming a meal in the cafeteria.
12. For a teacher to stop a student from bowing her head and praying before taking a test.
13. For a teacher to stop a student from leading a class in prayer in the middle of social studies class.
14. For a teacher to encourage a student to lead the class in prayer in the middle of social studies class.
15. For a teacher to encourage a student to lead the class in prayer prior to taking a science exam.
16. For a state to require all teachers to lead their classes in prayer to formalize the beginning of the school day.
17. For a state to require all teachers to have their classes begin with a moment of silence or school prayer.
18. For a state to require all teachers to have their classes begin with a moment of silence.
19. For a state to require science teachers to teach creationism instead of evolution.

20. For a state to prohibit the teaching of evolution.
21. For a state to require equal time for the teaching of evolution and creationism.
22. For a principal to deny students in her own high school from meeting for Bible study, when students are meeting in noncurriculum-related groups during the school day.
23. For a principal to deny students in her own high school from meeting for Bible study, when no noncurriculum-related groups are meeting during the school day.
24. For a principal to permit students in her own high school from meeting for a prayer group, before or after school.
25. For a principal to deny students from another high school from meeting for a pro-choice rally, when students from her high school meet after school for prayer groups.
26. For a principal to deny students from another high school from meeting for a pro-choice rally, when the Junior League often uses the auditorium for weekend meetings.
27. For a principal to permit the distribution of Bibles to fifth-grade students by members of the Gideons, while the students are at their desks.
28. For a principal to permit the distribution of the religious newspaper *Issues and Answers* by teachers during first-period announcements.
29. For a principal to permit the distribution of the religious newspaper *Issues and Answers* by students at a table in the cafeteria during the lunch period.
30. For a principal to prohibit the distribution of the religious newspaper *Issues and Answers* by students except at a designated place and time.
31. For a principal to prohibit the distribution of any religious-oriented materials, including newspapers, pamphlets, magazines, and tracts, at school during the school day.
32. For a public school teaching staff to hang a portrait of Jesus Christ in the school entryway.
33. For a public school teaching staff to hang a plaque of the Ten Commandments in a school hallway.

34. For a public school teaching staff to hang a plaque of the Ten Commandments, together with the excerpts from the Codes of Hammurabi, Justinian, Napoleon, Alabama, and the United States.
35. For a chorale music instructor to include religious-oriented music in the chorus' practices.
36. For a chorale music instructor to include religious-oriented music in the chorus' public performances.
37. For a principal to prohibit a chorale music instructor from including certain religious-oriented music in the group's repertoire.
38. For a public school teaching staff to create a bulletin board display which periodically changes subject matter to teach about different religions and their role in civilization.
39. For a teacher to read quietly from the Bible, during non-instructional time.
40. For a principal to prohibit a teacher from reading quietly from the Bible during school-wide reading time.
41. For a teacher to teach about religious influences in the development of Western civilization during the Middle Ages.
42. For a school to accept volunteer instruction by members of the local ministerial alliance in a for-credit class called "The Bible as Literature."
43. For a public school to permit students to leave school grounds during the school day, to attend religious training at local churches.
44. For a public school to grant course credit for religion classes taught at nearby church seminaries.
45. For a parent to require a school to change its curriculum for all its students, to comply with the parent's religious beliefs.
46. For a school to excuse students from participating in learning activities which are viewed as sinful by the child's religion.
47. For a school to require students to participate in learning activities, even when they are viewed as sinful by the child's religion.

48. For a principal to arrange for a local minister to provide the invocation and benediction at graduation exercise.
49. For a principal to give the senior class time during the agenda of the graduation exercise to express itself.
50. For a state to prohibit students from attending anything other than a public school.
51. For a state to place restrictions aimed at quality control (teacher certification, length of school day, nature of curriculum) upon private parochial schools.
52. For a state to pay for transportation of private and parochial school students to and from school.
53. For a state to provide textbooks to private schoolchildren.
54. For a state to provide instructional materials to private schoolchildren.
55. For a state to provide public school instructional services such as Chapter I on private school campuses.
56. For a state to provide diagnostic services for speech therapy, audiology, or psychology on private school campuses.
57. For a state to provide therapeutic services on private school campuses.
58. For a state to provide sign language interpreters for hearing-impaired students in parochial schools.
59. For a state to provide income tax deductions for private school tuition.
60. For a state to provide vouchers for attendance at either public, private secular, or private sectarian schools.

39. EMPLOYMENT ISSUES: CERTIFICATION

Certification as Showing of Legal Competency to Contract

To enter into an employment contract under common law, school personnel must first be legally competent to enter into the contract. Legal competence to enter into contracts in general, such as a contract to buy an automobile, only requires that the person be of majority age and mentally competent. According to Section § 26-1-1 Code of Alabama (1975), the majority age for contracting in Alabama is age 19. An exception to this rule is Section § 26-1-7 Code of Alabama (1975), which declares 17 year olds to be of majority age for the purpose of contracting for college education. Section § 8-1-170, Code of Alabama (1975) declares insane persons to be legally incompetent to enter into contracts. In the context of teacher contracts, it is essential for school employees to be certified for the position they seek. A teaching certificate may or may not be evidence of *professional* competence; however, it is *always* evidence, at common law, of *legal* competence to enter into a contract. The introduction of the concept of “highly qualified” teachers in the No Child Left Behind Act of 2001 may add weight to the notion that teaching certificates speak to professional competence, and not just legal competence to contract.

Statutory law also requires certification as a showing of legal competence to enter into employment contracts. Section § 16-23-1 Code of Alabama (1975) provides that “(N)o person shall be employed in the public schools of the state as county superintendent of education, city superintendent of schools, assistant superintendent, supervisor, principal, teacher or attendance officer unless such person shall hold a certificate issued by the State Superintendent of Education.” Therefore, by statute, professional school personnel must be certified to be employed in the schools.

Criminal Background Checks

One statutory condition for receipt of a certificate is the requirement of successfully passing a criminal background check. The Alabama Child Protection Act of 1999 (Act 99-361, p. 566, sec. 1) was amended in 2002 (Act 2002-457) to require criminal background checks for those educational personnel (including all current employees as well as all applicants for employment) who have unsupervised access to and provide, education, training, instruction, or supervision of children in an educational setting. Section § 16-22A-5 Code of Alabama (1975). The requirement that all current employees and applicants must undergo criminal background checks, rather than applicants and employees who arise suspicion, is the major change in the Child Protection Act. The second major change in the new version of the Act is that the State Superintendent now has the duty of making suitability determinations for individuals who have adverse information arise on their criminal background checks. The previous version of the Child Protection Act required that local superintendents make suitability

determinations for persons whose criminal background checks came back with negative information on them.

Teacher Testing

An additional statutory condition for receipt of a certificate is the requirement of successfully passing a pre-certification examination such as the National Teacher Examination (NTE) or some similar proficiency examination. Section § 16-23-16.1 Code of Alabama (1975).

Interstate Agreements

The legislature has also enacted the Interstate Agreement on Qualifications of Educational Personnel, in Title 16, Chapter 23A Code of Alabama (1975). Under this agreement, the State Superintendent of Education is authorized to enter into contracts to allow educational personnel to move more freely across state lines and maintain certification, by reciprocity between states signing the agreement.

Authority over Certification

Section § 16-23-2 Code of Alabama (1975) places control over all matters related to the issuance, extension and renewal of certificates with the State Board of Education. This provision places rule-making authority over certification issues with the State Board of Education. Section § 16-23-15 Code of Alabama (1975) grants to the State Board of Education general supervision over teacher-training institutions, which extends rule-making authority by the State Board of Education to include also the processes in training and developing teachers for placement in the schools. Additionally, the legislature has granted rule-making authority to the State Board, with regard to preliminary certificates for principals or educational administrators in Section § 16-24B-6 Code of Alabama (1975).

Approaches to Certification

Under the rule-making authority of the State Board of Education, regulations concerning certification is recorded in Alabama Administrative Code ch. 290-3-2-.01, *et seq.* The State Board of Education has taken several approaches to providing certification. Among those approaches are certification achieved by successfully completing an Alabama state-approved program (Ala. Admin. Code ch. 290-030-020-.02(1)); certification by way of another approved program recognition (Ala. Admin Code ch. 290-030-020-.02(2)); certification by recognition of a foreign credential (Ala. Admin.

Code ch. 290-030-020-.02(3)); and certification by an alternative approach (Ala. Admin. Code ch. 290-030-020-.02(4)). Of particular interest is the ability of individuals with a bachelor's degree, who meet other experience or coursework requirements to be issued an Alternative Baccalaureate-Level Certificate. (Ala. Admin. Code ch. 290-030-020-.03(1)(b)). In this alternative, application materials submitted by October 1st will permit the individual to be certified by alternative certificate for one year, and such certificate is renewable for a total of two additional years.

Section § 16-23-3(a), Code of Alabama (1975) requires the State Board of Education to modify its policies to provide an expanded alternative certification program for teachers in grades nine through twelve, and such rules are provided at Ala. Admin. Code ch. 290-030-020-.07(2). In 2008, the Legislature adopted an additional alternative certification path for professionals with baccalaureate degrees in fields other than education, in grades 6-12. Alabama Act 2008-281, Section § 16-23-3(5)-(7) Code of Alabama (1975). Section § 16-23-3(e), Code of Alabama (1975) authorizes the State Superintendent to grant emergency one-year, non-renewable certificates to persons who are filling a teaching position, where certified teachers are not available, and such rules are recorded at Ala. Admin. Code ch. 290-030-020-.09. Emergency certificates require a written request by a local superintendent to the State Superintendent, and time served as a teacher with an emergency certificate cannot be used for determining continuing service status under state teacher tenure law.

Revocation and Suspension Of Certificates

Section § 16-23-5 Code of Alabama (1975) gives the State Superintendent of Education the authority to revoke any certificate in circumstances where the person holding the certificate has been guilty of "immoral conduct or unbecoming or indecent behavior." Regulatory language indicates that this authority to revoke is extended to immoral conduct or unbecoming or indecent behavior in Alabama or any other state or nation. Ala. Admin. Code Section 290-030-020-.05(1).

The Alabama State Board of Education adopted a resolution on July 12, 2005, regarding an Alabama Educator Code of Ethics, according to the wording of the resolution, as the "official guide to ethical conduct for public school administrators in Alabama." The Alabama Educator Code of Ethics addresses and provides examples for nine standards of behaviors. A reasonable interpretation is that the Alabama Educator Code of Ethics is a disclosure about what the State Superintendent views as being actionable behaviors for the revocation of an educator's certificate. However, the Legislature subsequently repudiated the Alabama Educator Code of Ethics, which had been eventually adopted as a revised rule of the State Board of Education, for the purpose of determining situations in which a certificate could be revoked. (Alabama Act 2010-33, No. 1.) Another reasonable interpretation would be that only those violations

of the Alabama Educator Code of Ethics which are also “immoral conduct or unbecoming or indecent behavior” would warrant certification revocation.

In 2010, the Legislature made it a crime for a school employee to engage in a sex act or have sexual contact with a student, male or female, regardless of the age of the student. Alabama Act 2010-497, No. 2, H.B. 38. Companion legislation to this last provision required the state superintendent to revoke the teacher certificate for a teacher who is convicted of a felony or sex offense involving a child. Alabama Act 2010-264, No. 2, HB 37.

Duty to Report Adverse Employment Actions

Ala. Admin. Code ch. 290-3-2-.34(2) requires each county or city school superintendent to submit to the State Superintendent of Education, within ten calendar days of the decision, the name and social security number of each employee holding an Alabama certificate or license who is terminated, or non-renewed, who resigns, or who is placed on administrative leave for cause. The submission shall also indicate the reason for such adverse employment action. By regulation, local superintendents must also provide personnel records and all investigative information immediately upon request by the State Superintendent of Education. Failure of the local superintendent to comply with these regulatory requirements may result in disciplinary action against the local superintendent. The regulations do not indicate what the nature of the disciplinary action might permissibly be.

Superintendents are not required to report teachers who are non-renewed without cause.

When notification is received in the office of the State Superintendent concerning an individual who has been convicted of (or entered a plea of no contest to) a felony or misdemeanor (other than a minor traffic violation), regulations require a Certification Review Process. In this hearing process, a determination is made as to whether the State Superintendent is required to exercise his or her power to revoke the individual's teaching certificate. Regulations outline the procedures for the review process and prescribe the process in Ala. Admin. Code ch. 290-030-020-.05(2) through (6).

40. EMPLOYMENT ISSUES: RECRUITMENT

Authority to Employ

Section § 16-8-23, Code of Alabama (1975) authorizes county school boards to hire personnel, including principals, teachers, and clerical and professional assistants. No parallel provision seems to exist for city school boards, though Section § 16-11-17 authorizes city boards to fix the salaries of all employees, which would seemingly imply authority to hire personnel. Further, Section § 16-11-9 vests city boards of education with all the powers necessary or proper for the administration and management of the free public schools within school district. There is apparently no statutory requirement to hire the best person for any particular position, although such a requirement would generally provide important evidence in defending a hiring decision that is challenged on the basis of discrimination under Title VII.

Placement System

Posting an open position widely would seemingly increase the opportunity to hire better employees, and the use of a statewide placement system should assist in this effort. Statutory law supports the creation of a statewide teacher placement system. Section § 16-23-6, Code of Alabama (1975) requires the State Superintendent of Education to provide county and city school superintendents or other interested parties with the names of teachers who are unemployed and who are seeking positions. To make certain that this service is operational and effective, a placement bureau is required to be organized within the State Department of Education.

Posting Requirements for School Employees in General

In 1998, the Alabama Legislature amended the School Code to place a duty on boards of education to post a notice for each vacant personnel position. (Act 98-147, p. 248, sec 1.) The statute specifies a posting time of 14 days, except in certain emergency situations. The pertinent language from the statute includes the following directives:

(b) Each board of education, through its executive officer, shall post a notice of vacancy for each vacant personnel position. The notice shall be posted in a conspicuous place at each school campus and worksite at least 14 calendar days before the position is to be filled. The notice shall include, but not necessarily be limited to, all of the following:

- 1) Job description and title.
- (2) Required qualifications.
- (3) Salary schedule and amount.

- (4) Information on where to submit an application.
- (5) Information on any deadlines for applying.
- (6) Any other relevant information.

(c) If a personnel vacancy occurs during the time when the schools are in session, the vacancy notice shall be posted not less than seven calendar days before the position is to be filled. All vacancies involving jobs which are supervisory, managerial, or otherwise newly created positions shall nevertheless require posting notices of at least 14 calendar days.

(d) The board may adopt or continue policies which are not inconsistent with this section. The board may adopt policies to ensure the safety and welfare of its students during dire emergency situations, but the posting of a vacancy notice as required in this section shall not be abridged or delayed except in dire emergency circumstances and then delayed only temporarily in order to reasonably meet the conditions of the emergency. The adoption of additional policies shall comply with the requirements and procedures of Section 16-1-30 by all boards defined in this section. Section §16-22-15 Code of Alabama (1975).

The statute does not define “vacancy,” and many questions arise about the various types of situations that can arise. Two attorney general opinions have been issued to address these types of issues. Op. Ala. Att’y Gen. 2001-164. Op. Ala. Att’y Gen. 2002-069. The more comprehensive of the two opinions, Op. Ala. Att’y Gen. 2002-069 discusses the following types of scenarios:

Principal A is middle school principal and Principal B is high school principal. The high school principal position pays more. Both voluntarily wish to switch positions. Because neither principal is leaving the system, there is no vacancy; thus, neither position must be posted.

Teacher A retires or resigns. Teacher B at the same school wishes to be transferred to the position that is available because Teacher A has retired or resigned. Because Teacher A has vacated that position, it must be posted. Then, when Teacher B is transferred to Teacher A’s position, Teacher B’s former position is vacant, and it must be posted.

Librarian L at a high school retires. Teacher A in the same high school wishes to be transferred to the position formerly held by Librarian L. Both positions must be posted. When Librarian L retires, the position is vacant, so it must be posted. Then, when Teacher A is transferred to the position formerly held by Librarian L, then Teacher A’s former teaching position is now vacant. Then, it must be posted, too.

Teacher A at School A retires or resigns. Teacher B at School B wishes to transfer into the position held by Teacher A at School A. Both positions must be posted. When Teacher A retires or resigns, that position is vacant, and it must then be posted. When Teacher B is transferred from School B to Teacher A's position at School A, Teacher B's former position at School B is then vacant, and it must be posted.

Administrator A is given more duties with a new title and a small raise. This creates a new position, which was temporarily vacant at its creation. It must be posted.

The vocational teaching position held by Vocational Teacher V is increased from a nine-month contract to a ten-month contract. This is a new position or vacancy. It must be posted.

Due to proration, the school system must reduce force. Teacher A retires or resigns or is non-renewed. Teacher A's position is eliminated. Because the position no longer exists, it is not vacant, thus it need not be posted.

Due to proration, the school system must reduce force. Teacher A's position and Teacher B's position are merged into one position. Arguably, when the two positions are merged, there is no vacant position, and the resultant position need not be posted. However, on the other side of the argument, when the two positions are merged, a new position has been created to which either Teacher A or Teacher B is likely to be assigned. But, by creating a new position, such new position would be temporarily vacant, and it must then be posted. Because the AG opinion does not specifically address this situation, it would be circumspect to post the position anyway.

Posting Requirements for Certain Administrators

In 2010, Alabama required a posting of notices of vacancies for the offices of state superintendent, appointed county superintendent, appointed city superintendent, chancellor of postsecondary education, chief executive officer of any two year school or college, the institute for deaf and blind, the school for fine arts, the department of youth services school district, and the executive director of the high school of mathematics and science. 2010 Ala. Act 10-210, No. 2, H.B. 79.

Appointment

Appointment of personnel requires first a written recommendation of the superintendent before formal action by the board. The two-step process of written

recommendation by the superintendent, followed by formal action by the board, is described in state law regarding personnel actions. Section § 16-9-23 Code of Alabama (1975) speaks to the duty of the county superintendent:

The county superintendent of education shall nominate in writing for appointment by the county board of education all principals, teachers and all other regular employees of the board. He shall assign them to their positions, transfer them as the needs of the schools require, recommend them for promotion, suspend them for cause and recommend them for dismissal, subject to the provisions of Chapter 24 of this title.(School Code 1927, §161; Code 1940, T. 52, §123.)

Section § 16-12-16 Code of Alabama (1975) describes the same process in city school districts:

The city superintendent of schools shall nominate in writing for appointment by the city board of education all principals, teachers, supervisors, attendance officers, janitors and all other employees of the board and shall assign to them their positions, transfer them as the needs of the schools require, recommend them for promotion, suspend them for cause and recommend them for dismissal, subject to the provisions of Chapter 24 of this title. All persons so nominated for teaching or supervising positions shall hold certificates issued by the State Board of Education. (School Code 1927, §§224, 229; Code 1940, T. 52, §§182, 187.)

Note that both provisions were made subject to the tenure and transfer laws described in Title 16, Chapter 24 of the school code. These provisions have now been supplanted by the Students First Act, Section § 16-24C-1 et seq. Code of Alabama (1975).

41. EMPLOYMENT ISSUES: CONTRACT RIGHTS

Common Law Requirements

At common law, the basic elements of a contract are (1) offer; (2) acceptance; (3) competent parties; (4) consideration; (5) legal subject matter; and (6) proper form.

An offer of an employment contract for teachers generally requires such information as: (1) duties and responsibilities; (2) designated salary; and (3) period of time. An offer must come from the school board, and not from the superintendent, principal, or other school administrator. In areas of the country where teacher shortages are critically severe, school administrators may attempt to bind a prospective teacher with an offer from the administrator, and ask the teacher to respond by signing an “intent to contract” form. This arrangement is very suspect, raising the question of when a contract might be formed. Is it formed by signing the letter of intent, or is it formed upon subsequent action of the board to appoint the teacher? In this situation, the teacher’s letter of intent might be considered an offer from the teacher, and a motion by the board to appoint the teacher might subsequently signal an acceptance of the teacher’s offer, thus creating a contract under common law. Under common law rules, a contract might be created by 1) either party making the offer and 2) the other party accepting the offer. However, Alabama statutory law is supplemental to common law rules, and Alabama law prescribes a different means of forming a contract. The appointment process, as the first step in the contracting process, requires first an offer from the employing board, and not an offer from the prospective employee. Sections §§ 16-8-23 and 16-12-16 Code of Alabama (1975) speak to the process of appointing a teacher. Both sections require that the proper sequence of events is for the superintendent to make a written recommendation to the school board, followed by an action by the board (in a meeting that conforms with the Open Meeting Act). This alone does not form a contract. At this stage of events, there is only an offer from the board.

The employment applicant who receives an offer from the board can signal acceptance of the contract in three ways: (1) signing a contract; (2) verbally accepting the contract; or (3) showing up when the contract is supposed to begin. School administrators who wish to avoid the stress of knowing whether a classroom full of students is going to have a teacher meeting with them on the first day of school may decide to employ either of the first two options and forego the third option.

Although the previous paragraphs wrestle with the question of what is an offer and what is an acceptance of that offer, another, more critical question is “who is a competent party to enter into the contract?” A school superintendent’s promise of a contract made without concurrence of the school board, in a meeting of the board, does not create a contract. For the employer side of a teaching contract, only the board of education is a legally competent party to enter into the contract. Branch v. Greene County Board of Education, 533 So.2d 248 (Ala.Civ.App. 1988). Clearly, the teacher who accepts the contract must also be legally competent to enter into the contract,

demonstrated by holding a valid teaching certificate, identified now in the Students First Act of 2011 as a “Professional Educator’s Certificate.” (Section § 16-24C-3(6) Code of Alabama (1975).) See Module 39 for a more complete discussion of certification as a showing of legal competency to contract, and recognize that: (1) state law reinforces the legal competency rule by requiring in Section § 16-23-1 Code of Alabama (1975) that certain public school employees must hold certificates to be employed; and (2) the regulations discussed in Module 39 provide options for superintendents who wish to assist a desirable candidate to become certified.

Consideration is something of value that is offered by one party and provided in exchange for the other party’s performance. For the school board, the something of value is salary; for the teacher, the something of value is the teacher’s labor.

The contract must pertain to a legal subject matter. Obviously, a teaching contract with the unlikely requirement that a teacher provide alcohol to schoolchildren (an occurrence made a felony punishable with incarceration for one to three years by Section § 16-1-10 Code of Alabama (1975)) would be unenforceable because it lacks a legal subject matter. What may not be so obvious is that a teaching contract that places an unconstitutional duty on the teacher, for example, a requirement that a teacher refrain from marrying while employed by the school board, would likewise be unenforceable.

Finally, the contract must be in a legal form. Many states require that teaching contracts be in writing. Alabama apparently does not have such a statutory requirement. A situation where this issue would be critical would be the following scenario:

The board has acted to appoint the teacher, and the teacher has already begun performing the contract. However, for whatever reason, the administration has delayed producing a written contract. Before a contract is printed and signed, either the board or the new teacher want out of the contract.

Would the contract be enforceable? At common law, the contract would probably be enforceable. The board has offered; the teacher has signaled acceptance by beginning to perform. To break the contract, the board would have to follow the procedures specified under the thirty-day rule described in Section § 16-24C-5(c) Code of Alabama (1975). To break the contract, the teacher would have to provide notice in conformity with Section § 16-24C-11 Code of Alabama (1975).

Statutory Requirements

Statutory provisions related to employment contracts become added to common law provisions. That is, statutory provisions like the teacher tenure law in the Students First Act become “read into” all contracts entered into by school boards and teachers. See, Owen v. Rutledge, 475 So.2d 826 (Ala. 1985) and Haas v. Madison County Board

of Education, 380 So.2d 873 (Ala.Civ.App. 1980), *cert. denied*, 380 So.2d 877. The “law of contracts” for Alabama indicates a close relationship between common law and statutory law, so that common law provisions actually supplement statutory provisions, rather than the other way around:

Unless displaced by the particular provisions of this title, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions. Section § 7-1-103 Code of Alabama (1975).

When statutes concerning employment contracts conflict with ordinary common law principles, the statutory provisions control. (See, Ex parte Wright, 443 So.2d 40 (Ala. 1983), on remand 443 So.2d 43. Due to the extraordinary interaction of state law with common law, the general topic area of teacher employment contracts is especially state-specific. While the same general rules can be applied across jurisdictions in many topic areas (e.g., a teacher’s right to marry or a school board’s right to control a teacher’s classroom speech), contract law for teachers and other school employees depends primarily upon state law. The remainder of this module and the following module discuss contract rights specific to Alabama school employees.

Appointment

Legislative authority for county boards of education to appoint teachers arises from Section § 16-8-23 Code of Alabama (1975). This provision requires the county board of education to appoint, upon the written recommendation of the county superintendent, all principals, teachers, clerical and professional assistants authorized by the board.

Similarly, Section § 16-12-19 Code of Alabama (1975) authorizes city boards of education to employ professional, clerical, accounting, and statistical assistants, upon the recommendation of the city superintendent of schools. Note that this section does not stipulate that the superintendent’s recommendation must be in writing. The duty of the city superintendent to nominate employees in writing is carried in Section § 16-12-16 Code of Alabama (1975). City boards are authorized, by Section § 16-11-17 Code of Alabama (1975) to fix the salaries of all employees.

Extended Contracts

County boards are authorized by Section § 16-8-24 Code of Alabama (1975) to offer teaching and other employee contracts for a period of time longer than the regular school year.

Part-Time Contracts

In the 2004 legislative session, the Legislature expressly authorized part-time contracts for teachers. (Alabama Act 2004-300, p. 425.) The stated goal for such contracts was to better address the needs and goals of students, and to provide a more diverse teaching force. Section §16-24-60 Code of Alabama (1975). The provision applies to both tenured and non-tenured teachers, and the salary rate must be commensurate with the salary schedule hourly rate of pay adopted by the Legislature, based upon the teacher's educational attainment and years of experience. Part-time teachers are subject to certification requirements and criminal background checks. Section §16-24-61 Code of Alabama (1975). The use of part-time contracts it not intended to supplant or replace full-time teaching positions, and at any time that the class hours of the part-time teacher equals or exceeds 20 hours per week, the school system is statutorily required to hire a full-time teacher. Section §16-24-64 Code of Alabama (1975).

Regarding continuing service status for part-time teachers, Section §16-24-66 Code of Alabama (1975) provides:

Any teacher employed in the public schools under this article shall meet the same requirements for attaining continuing service status as defined in Section 16-24-2.

Because the Students First Act of 2011 apparently repealed the Teacher Tenure Act, including Section 16-24-2, referenced above, it becomes unclear exactly how a part-time teacher obtains continuing service status (now tenure under the Students First Act). What is also not clear is the question of whether the part-time teacher achieves continuing service status (tenure) as a part-time teacher, or has the same privileges as a full-time teacher with continuing service status (tenure).

Extra Duty Contracts

Extra duty contracts are supplemental contracts added to the teacher's regular contract. In most states, extra duty contracts are usually considered outside the scope of the tenure statute. In the absence of a specific statute stating otherwise, the general rule is that the extra duty contract is considered a separate contract from the teaching contract (for tenure purposes) unless the two contracts are linked by certification. In Alabama, "teacher" was defined in the Teacher Tenure Act at Section § 16-24-1 Code of Alabama (1975) to include "persons regularly certified." Because coaches were not regularly certified as coaches, extra duty contracts in Alabama were not subject to protection of the Teacher Tenure Act and were thus separate from the regular teaching contract. Bryan v. Alabama State Tenure Commission, 472 So.2d 1052 (Ala.Civ.App. 1985). With passage of the Students First Act and concomitant repeal of corresponding portions of the Teacher Tenure Act, the same reasoning can extend with the changing tenure law. The Students First Act defines "teacher" as "all employees of entities that are covered by this chapter who are required by law, regulation, or

employer policy to maintain a professional educator's certificate issued by the State Department of Education and who are employed by a city or county board of education. . ." Section § 16-24C-3(8) Code of Alabama (1975). The Students First Act defines a "professional educator's certificate" as "a certificate or license, by whatever name, designation, or subclassification known or identified, issued by the State Department of Education, or recognized under an approved interstate reciprocity program, and that must be maintained by the employee in order to be employed as a teacher in the county and city schools of this state." Section § 16-24C-3(6) Code of Alabama (1975). Because coaches do not hold a professional educator's certificate as a condition of employment as a teacher in the county and city schools of the state, extra duty contracts are not subject to protection under the Students First Act and such contracts remain separate from the regular teaching contract.

Sick Leave

Section § 16-1-18.1 Code of Alabama (1975) requires county and city boards of education to provide sick leave benefits to employees, defined in the statute as any full-time employee and adult bus drivers.

Sick leave is defined in the statute as (t)he absence from duty by an employee as a result of any of the following:

- a. Personal illness or doctor's quarantine.
- b. Incapacitating personal injury.
- c. Attendance upon an ill member of the employee's immediate family (parent, spouse, child, sibling); or an individual with a close personal tie.
- d. Death in the family of the employee (parent, spouse, child, sibling, parent-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, nephew, niece, grandchild, grandparent, uncle, or aunt).
- e. Death, injury, or sickness of another person who has unusually strong personal ties to the employee, such as a person who stood in loco parentis.

Section § 16-1-18.1(a)(4) Code of Alabama (1975).

Section § 16-1-18.1(b)(2) Code of Alabama (1975) requires school boards to use the list, above, as a reference for permissible reasons to take sick leave. Subsection (c) permits employees to accumulate an unlimited number of sick leave days, earned at one day per month, and to transfer unused sick leave days to a new employer. The subsection also requires superintendents to certify a departing employee's number of unused sick days to the employee's new employer. ("Employer" is defined by statute to include a broad array of educational and governmental entities, as well as all organizations that participate in the Teachers' Retirement System.)

Section § 16-1-18.1(d) Code of Alabama (1975) provides for sick leave arising from on-the-job injury. That section requires employees to report such an injury within 24 hours after occurrence.

Section § 16-1-18.1(e) Code of Alabama (1975) gives county and city boards of education the authority to provide for vacations and leaves of absences. The full text of that provision is provided to accommodate further discussion.

The employer shall have the authority, under the rules and regulations promulgated from time to time by the State Board of Education, to provide for paid leaves of absences and vacations for its employees. Payment may be from public funds. The employer may provide for leaves of absence during the times the schools are, or are not, in session when the teacher or employee devotes the leave to instructing in or attending schools for appropriate training, or when approved by the State Board of Education as beneficial to the state's educational objectives. The employer may also provide for the payment of any full-time teachers or employees for absences during the time schools are in session when the absence results from an unavoidable cause which prevents the teacher or employee from discharging his or her duties. Pay for the absences resulting from unavoidable causes other than sickness shall not be allowed for a longer time than one week during any one scholastic year. Section § 16-1-18.1(e) Code of Alabama (1975).

This provision for vacations and leaves of absences implies oversight control by the State Board in how a county or city board of education implements a vacation or leave of absence policy. (This is redundant, of course, with the oversight control given to the State Board and Superintendent by Section § 16-3-27 Code of Alabama (1975).) The provision above also seems to imply that the ability of school employees on twelve month contracts to take vacations at any time during the year is limited.

Section § 16-1-18.2 Code of Alabama (1975) provides an additional benefit to employees, or at least to their estate or beneficiaries. When an active and contributing member of the Teachers' Retirement System dies, his or her beneficiary or estate is to receive a monetary payment equal to the monetary value of accrued sick leave.

Leave of Absence

The Students First Act authorizes a leave of absence for a period of one year for good cause, to be granted to an employee by an employer without impairing the tenured or nonprobationary status of an employee. For valid reason, the employer may extend the leave of absence for one additional year. The Students First Act acknowledges that a leave of absence is also provided for military service in Section § 31-2-13 Code of Alabama (1975). Readers are reminded that provision is also made for military leave for school employees by federal law, the Uniformed Services Employment and Reemployment Rights Act, Pub. L. 103-353, 38 U.S.C. §§ 4301-4335.

Transportation

A permissive benefit for employees of county boards of education is found in Section § 16-8-27 Code of Alabama (1975). In that section, county boards of education may, at their discretion, transport their employees on school buses via regular bus routes, if it can be provided without creating extra mileage or overcrowding on the bus. Although county board employees do not have a contractual right to transportation on school buses, they do have the right to ask the county board of education to exercise its discretion to transport employees.

Students First Act of 2011

Repeal of Teacher Tenure Act and Fair Dismissal Act

The Legislature passed the Students First Act (Ala. Act No. 2011-270) in its 2011 Session, to change tenure law for school employees. The language regarding the repeal of pre-existing law is slightly unusual:

All laws or parts of laws which conflict with this act are repealed. Specifically, portions of the Teacher Tenure Law, consisting with Article 1, commencing with Section 16-24-1, Chapter 24, Title 16; the Fair Dismissal Act, Article 4, commencing with Section 36-26-100, Chapter 26, Title 36; and Section 16-24B-7, Code of Alabama 1975, relating to teacher transfers, are repealed. (Ala. Act No. 2011-270, § 14.)

Note that the language above did not specify which sections of the Teacher Tenure Act and the Fair Dismissal Act were to be repealed. It says that “parts of laws which conflict with” the Students First Act are repealed. Reaching then for greater specificity, it then says that “portions” of both acts are repealed. This language may leave open for interpretation whether any parts of the old law still survive the adoption of the Students First Act.

Employees

The Students First Act defines an employee as “unless otherwise specified, and as appropriate to the context, the term includes either a teacher or a classified employee, or both, whose employment is subject to this act.” Section § 16-24C-3(3) Code of Alabama (1975). Thus, an employee covered under the Students First Act is either a teacher or a classified employee. This represents a subtle change in definitions and, therefore, a subtle change in contract rights for many people who work for city and county school boards in the state. Other employees referred to within the Students First Act, but not covered by it, include the chief executive officer (superintendent), the chief school financial officer, and any principal who is covered by the Teacher Accountability Act.

Teachers

The former Teacher Tenure Act defined “teachers” as regularly certified instructors, principals, or supervisors in the public elementary and high schools of the state. Section § 16-24-1 Code of Alabama (1975). Principals were identified under the old act as the chief executive officer and head of the teaching faculty of a particular school. White v. State, 160 So.2d 496 (Ala.App. 1964). Principals hired before July 1, 2000, were covered by the Teacher Tenure Act. Principals hired after July 1, 2000, became covered by the Teacher Accountability Act. (Act 2000-733, p. 1588, § 1. Section § 16-24B-1 Code of Alabama (1975).) Principals who were covered by the Teacher Tenure Act were able to obtain tenure, or continuing service status. Principals who are now covered by the Teacher Accountability Act may not obtain tenure. Principals may elect to leave tenure and become contract principals under Section § 16-24B-3 Code of Alabama (1975).

“Supervisors” was not defined by the Teacher Tenure Act, but the separate identification of them in the old act, along with slightly different language in how they received continuing contract status, accorded them tenure that was separate from their tenure as a teacher. The Alabama Supreme Court adopted a loose and undefined use of the term, generally including any regularly certified person in a public school program who worked in a supervisory or advisory position. It was not necessary for the supervisor to be actively involved with both students and teachers in a school setting. For example, a transportation supervisor could receive continuing contract status as a supervisor. Ex parte Oden, 495 So.2d 664 (Ala. 1986), *on remand* 495 So.2d 669. Assistant principals were not considered principals, although they could be supervisors, depending upon the nature of their duties. Barnes v. Walker County Bd. of Educ., 661 So.2d 239 (Ala.Civ.App. 1994), *rehearing denied, certiorari denied, certiorari quashed*. Whether or not an assistant principal was a supervisor depended entirely, on a case-by-case basis, upon the role fulfilled by the assistant principal and whether that role had a supervisory aspect.

In contrast to the provisions detailed in the old tenure law, above, the Students First Act defines a “teacher” in this fashion:

All employees of entities that are covered by this chapter who are required by law, regulation, or employer policy to maintain a professional educator's certificate issued by the State Department of Education and who are employed by a city or county board of education, the Alabama Institute for Deaf and Blind, or educational and correctional institutions under the control of the Department of Youth Services. The term also includes instructors employed by two-year educational institutions operated under the authority and control of the Department of Postsecondary Education and principals who had attained tenure under prior law, but who have not elected to become contract principals under subsection (h) of Section 16-24B-3. The term does not include an employer's chief executive officer, chief school financial officer, or a principal who is employed as or who has elected to become a contract

principal under subsection (h) of Section 16-24B-3, whether or not certification is required for those positions by law or policy, and does not include the president or vice president of a two-year educational institution operated under the authority and control of the Department of Postsecondary Education. A probationary teacher is a teacher who has not attained tenure. Section § 16-24C-3(3) Code of Alabama (1975).

A teacher under the Students First Act is a school employee who must have a professional educator's certificate or a principal who achieved and retained tenure under the old Teacher Tenure Act. A teacher cannot include the employee who is the chief executive officer, the chief school financial officer, or a principal who is covered under the Teacher Accountability Act. Consequently, upon passage of the Students First Act, an employee can no longer attain tenure as a supervisor. The only subcategories for a teacher under the Students First Act are a probationary teacher and a tenured teacher.

Classified Employees

The Fair Dismissal Act applied to many school employees who were not covered by the Teacher Tenure Act. "Employees" under the Fair Dismissal Act included persons who were employed 20 or more hours per week, who were not otherwise certified by the State Board of Education, and who were not covered by the state merit system or the teacher tenure law. Adult bus drivers were covered by the Fair Dismissal Act regardless of the number of hours worked each week.

The Students First Act defines "classified employees" as:

All adult bus drivers, all full-time lunchroom or cafeteria workers, janitors, custodians, maintenance personnel, secretaries and clerical assistants, instructional aides or assistants, whether or not certificated, non-certificated supervisors, and, except as hereinafter provided, all other persons who are not teachers as defined herein who are full-time employees of a city or county board of education, two-year educational institutions operated under the authority and control of the Department of Postsecondary Education, the Alabama Institute for Deaf and Blind, including production workers at the Alabama Industries for the Blind, and educational and correctional institutions under the control of the Department of Youth Services. The term does not include the employer's chief executive officer, vice president, or chief school financial officer. Full-time employees include adult bus drivers and other employees whose duties require 20 or more hours in each normal working week of the school term, excluding holidays that are recognized by the employer. Employees who are eligible for coverage under the state Merit System are not covered by this chapter. A probationary classified employee is a classified employee who has not attained nonprobationary status. Section § 16-24C-3(2) Code of Alabama (1975).

“Classified employees” under the Students First Act are apparently the same grouping of employees who were covered under the prior Fair Dismissal Act. The only subcategories for classified employees under the Students First Act are those who are probationary and those who are nonprobationary.

Evaluation of Classified Employees

Section §36-26-101 Code of Alabama (1975) gave employees under the Fair Dismissal Act the right to be evaluated. The Alabama Court of Civil Appeals interpreted this requirement to mean that a probationary school employee was not entitled to more than one evaluation during the probationary period. Davis v. J.F. Drake State Technical College, 2002 WL 31528754 (Ala.Civ.App. 2002). The Students First Act does not mention evaluation of any employee, either teachers or classified employees. This would be a specific example of a contract provision accorded an employee in the Fair Dismissal Act, which does not conflict with any provision of the Students First Act, and is therefore arguably not repealed by the Students First Act at Ala. Act No. 2011-270, § 14.

Obtaining Tenure or Nonprobationary Status

Tenure for Teachers

The Students First Act indicates that, except as otherwise provided by Section 16-23-3, a teacher . . . shall attain tenure upon the completion of three complete, consecutive school years of full-time employment as a teacher with the same employer unless the governing board approves and issues written notice of termination to the teacher on or before the last day of the teacher’s third consecutive, complete school year of employment. Section § 16-24C-4(1) Code of Alabama (1975).

A probationary teacher whose employment or reemployment is effective prior to October 1 of the school year and who completes the school year shall be deemed to have served a complete school year. Section § 16-24C-4(1) Code of Alabama (1975).

The Students First Act specifies that, for teachers who are required to hold a professional educator's certificate, time in service without such a certificate shall not be credited toward the attainment of tenure. Section § 16-24C-4(1) Code of Alabama (1975). However, the subsection begins with the language “except as otherwise provided by Section 16-23-3.” Section § 12-23-3 Code of Alabama (1975) permits teachers to obtain tenure under the prior Teacher Tenure Act, while having only an alternative certificate:

Any person granted a teaching certificate issued by the State Superintendent of Education pursuant to Section 16-23-1, following the receipt of an alternative certificate, as herein provided, may be eligible to attain continuing

service status pursuant to Chapter 24, of this title. Time served as a teacher pursuant to an alternative certificate shall be counted in determining continuing service status pursuant to Section 16-24-2. Section § 16-23-3(d) Code of Alabama (1975).

A professional educator's certificate is defined in the Students First Act as:

A certificate or license, by whatever name, designation, or subclassification known or identified, issued by the State Department of Education, or recognized under an approved interstate reciprocity program, and that must be maintained by the employee in order to be employed as a teacher in the county and city schools of this state. *A professional educator's certificate does not include provisional, alternative, or emergency certificates,* (emphasis added) or certificates or licenses that are issued to instructional aides or assistants, to substitute teachers, or to business, technical, operational, or other employees whose job duties do not require or entail the instruction of students or the regular supervision of or interaction with employees with such job duties. Section § 16-24C-3(6) Code of Alabama (1975).

The stipulation that a professional educator's certificate does not include an alternative certificate and the requirement of working under a professional educator's certificate to achieve tenure (except when working under an alternative certificate) seems to create an internally inconsistent requirement for achieving tenure.

Nonprobationary Status for Classified Employees

The Students First Act provides that a probationary classified employee . . . attains nonprobationary status upon the completion of three complete, consecutive school years of full-time employment with the same employer unless the governing body of the employer approves and issues written notice of termination to the employee on or before the fifteenth day of June immediately following the employee's third consecutive complete school year of employment. An exception is made to this timeline, so that in the first year of each legislative quadrennium, the written notice shall be provided on or before June 30. Section § 16-24C-4(2) Code of Alabama (1975).

A probationary classified employee whose employment or reemployment is effective prior to October 1 of the school year and who completes the school year shall be deemed to have served a complete school year. Section § 16-24C-4(2) Code of Alabama (1975).

Other Provisions Regarding Receiving Tenure or Nonprobationary Status

The Students First act addresses five additional provisions about the means of attaining tenure as a teacher or nonprobationary status as a classified employee. Those provisions are briefly described below.

Only complete school years of service as defined in this chapter, including any leave that is credited to the employee for such purposes under board policy or applicable law, can be used for attaining tenure. Section § 16-24C-4(3)(a) Code of Alabama (1975).

Tenure or nonprobationary status cannot be attained as a chief executive officer, a chief school financial officer, as a president or vice president of a two-year educational institution. . . , or in or by virtue of employment in temporary, part-time, substitute, summer school, occasional, seasonal, supplemental, irregular, or like forms of employment, or in positions that are created to serve experimental, pilot, temporary, or like special programs, projects, or purposes, the funding and duration of which are finite. Section § 16-24C-4(3)(b) Code of Alabama (1975). This provision suggests that tenure or nonprobationary status cannot be attained for employees hired on what is commonly called “soft money.”

Except as expressly provided to the contrary elsewhere in the Students First Act, neither tenure nor nonprobationary status creates or confers any enforceable right or protected interest in or to a specific position, rank, work site or location, assignment, title, or rate of compensation within those categories of employment. Section § 16-24C-4(3)(c) Code of Alabama (1975). This provision indicates that an employee’s employment status can be altered through transfer, reduction in pay, shortening of work hours, as long as requisite procedures are implemented.

Service performed as a teacher cannot be used to attain probationary status as a classified employee, and service performed as a classified employee cannot be used to attain tenure as a teacher, even if the classified employee holds a teaching certificate. Section § 16-24C-4(3)(d) Code of Alabama (1975).

Tenure status and nonprobationary status cannot be transferred from one employer to another employer, unless the organizational structure of the employer changes through annexation, school district formation, consolidation, or a similar reorganization over which the employee has no control. Section § 16-24C-4(3)(e) Code of Alabama (1975).

Termination of Contract by Teacher

The Students First Act provides a measure to encourage teachers to perform their contracts and to not break them precipitously:

No tenured teacher within the contemplation of subdivision (1) of Section 16-24C-4 shall be permitted to terminate his or her employment within 30 calendar days before the first day of the next school term for students, or, for employees of two-year institutions operated under the authority and control of the Department of Postsecondary Education, within 30 calendar days before the commencement of the fall academic semester, unless such termination is mutually agreed upon. Any such employee may terminate his or her employment at any other time by giving five days' written notice to the president of a two-year educational institution or to the employing board of education. Any teacher terminating his or her employment in violation of this section is guilty of unprofessional conduct, and the State Superintendent of Education may revoke or suspend the certificate of such teacher. Section § 16-24C-11 Code of Alabama (1975).

The wording of the section above raises the question of whether the thirty-day rule applies to only tenured teachers or to all teachers. The first sentence indicates that it applies only to tenured teachers (“No tenured teacher. . . shall be permitted”). The last sentence refers to “any teacher.”

A second question regards the five days' written notice provision. May a tenured teacher, for example, arrive on the first day of school and provide five days' notice at that time?

Transfer of Teachers and Classified Employees

The Students First Act provides procedures for transferring employees (teachers and classified employees). The Emergency 15-Day Transfer Rule provided in the Teacher Accountability Act (Section § 16-24B-7 Code of Alabama (1975)) was specifically repealed by the Students First Act. (Ala. Act No. 2011-270, § 14.) Also, because the Students First Act also details procedures for transfer of employees that conflict with transfer procedures for employees in the Teacher Tenure Act and the Fair Dismissal Act, transfer procedures from those two older acts were also repealed.

Transfer of Probationary Teachers and Probationary Classified Employees

The section of the Students First Act that addresses transfers and reassignments begins with the following statement:

Except as otherwise specified, employees may be transferred or reassigned at any time as the needs of the employer require to any position for which they are qualified by skill, training, or experience by the president of a two-year educational institution alone or upon the recommendation of the chief executive officer and the approval of the governing board. Section § 16-24C-7(a) Code of Alabama (1975).

Because the remaining portions of the transfer provisions in the Students First Act relate to either tenured teachers or nonprobationary employees, or relate to a partial reduction in contract, the statement above would indicate that probationary teachers and probationary classified employees may be transferred at any time with only two restrictions: (1) the employee must hold appropriate certification or qualifications for the new position, and (2) the transfer does not include a lower rate of pay or a shorter employment term. Section § 16-24C-7(e) Code of Alabama (1975).

If the transfer of a probationary teacher or probationary classified employee includes a reduction in compensation or a shorter term of employment, the notice of proposed transfer must contain a written explanation of the effect of the transfer on the compensation of the employee and must also inform the employee that he or she may object in writing to the proposed transfer before a vote is taken on the transfer by the governing board. If approved, the proposed transfer shall be effective not less than 15 calendar days after the date of the board's final decision, and such transfers are not subject to challenge or review under the Students First Act. Section § 16-24C-7(e) Code of Alabama (1975).

Transfer of Tenured Teachers

The Students First Act permits a chief executive officer to reassign a teacher to any grade, position, or work location within the same school, campus, or instructional facility, as the needs of the employer require. However, if the teacher is tenured, the tenured teacher must be issued written notice of the reassignment no later than the twentieth calendar day after the first day of classes for students. A teacher may not be involuntarily reassigned under this provision more than one time in a school year, excluding summer term. The reassignment may only be to another position for which the teacher holds appropriate certification, and the reassignment may not entail a loss of or reduction in compensation. Such reassignments are not subject to challenge or review under the Students First Act. Section § 16-24C-7(b) Code of Alabama (1975).

If a situation necessitates a reassignment due to acts of God or disasters later than the 20th calendar day after the first day of class for students, a tenured teacher may request a hearing before the board prior to a vote of the board on the proposed transfer. Section § 16-24C-7(b) Code of Alabama (1975).

According to the Students First Act, tenured teachers may be transferred within an agency or system to any grade or position outside of the school, campus, or instructional facility to which the teacher is assigned, subject to the following terms and conditions: (1) The transfer must be to another position for which the employee holds appropriate certification; (2) the transfer must be without loss of or reduction in compensation; (3) written notice of the proposed transfer must be issued to the teacher by the chief executive officer no later than the twentieth calendar day after the first day of classes for students; (4) the teacher may not be involuntarily transferred under this subsection more than one time in a school year, excluding summer term; and, (5) in the notice of proposed transfer, and prior to a final decision of the governing board, the

teacher must be afforded an opportunity to meet with the governing board to demonstrate why the proposed transfer should not be approved. Such transfers are not subject to challenge or review under this chapter. Section § 16-24C-7(c) Code of Alabama (1975).

If the proposed transfer is to a work site outside of the high school feeder pattern in which the teacher is currently working, then the teacher may request a hearing before the board prior to a vote of the board on the proposed transfer. Section § 16-24C-7(c) Code of Alabama (1975).

For transfers due to acts of God or disasters that occur later than the 20th calendar day after the first day of class for students, a tenured teacher may request a hearing before the board prior to a vote of the board on the proposed transfer. Section § 16-24C-7(c) Code of Alabama (1975).

A tenured teacher may be involuntarily transferred to another position that provides a lower pay rate or shorter employment term, subject to the following terms and conditions: (1) The notice of proposed transfer and subsequent proceedings follow the same procedures that apply to termination of nonprobationary employees under Section 16-24C-6, including appeals; and (2) no vote or decision on such transfers shall be made for political or personal reasons. Section § 16-24C-7(f) Code of Alabama (1975).

Transfers of tenured teachers that occur in a reduction-in-force climate, or in order to comply with state or federal law, are provided great latitude by the Students First Act, even if the transfer results in a partial reduction in contract, by reducing the rate of pay or decreasing the term of employment:

Notwithstanding the foregoing, transfers or reassignments that are made as a part of, as a consequence of, or in conjunction with reductions-in-force authorized under Section 16-1-33, or in order to comply with state or federal law are not subject to challenge or review under this chapter, whether or not such transfers or reassignments are to positions that provide for a lower rate or amount of pay or a shorter term of employment. Section § 16-24C-7(f) Code of Alabama (1975).

Transfer of Nonprobationary Classified Employees

The Students First Act allows nonprobationary classified employees to be transferred to any position for which they are qualified within the school system, under the following conditions: (1) if the transfer is without loss of or reduction in compensation; (2) if written notice of the proposed transfer is issued to the employee by the chief executive officer not less than 15 calendar days before a vote on the proposed transfer is taken by the governing board; and (3) if the transfer is effective not less than 15 calendar days after the date of the final decision. Section § 16-24C-7(d) Code of Alabama (1975).

A nonprobationary classified employee who is proposed to be transferred to a principal work site that is outside of the high school feeder pattern in which the current work site of the employee is located, shall be afforded an opportunity to appeal in the same manner as a termination. This provision does not apply to employees whose daily work assignments and duties require regular or periodic travel throughout the school system or between work sites operated by or under the control of the employer. Section § 16-24C-7(d) Code of Alabama (1975).

A nonprobationary classified employee may not be involuntarily transferred more than one time in a school year, excluding summer term. The Students First Act grants an exception to this rule, in situations involving acts of God or disasters that are beyond the reasonable control of the employer. Such transfers are not subject to challenge or review. Section § 16-24C-7(d) Code of Alabama (1975).

A nonprobationary classified employee may be involuntarily transferred to another position that provides a lower pay rate or shorter employment term, subject to the following terms and conditions: (1) The notice of proposed transfer and subsequent proceedings follow the same procedures that apply to termination of nonprobationary employees under Section 16-24C-6, including appeals; and (2) no vote or decision on such transfers shall be made for political or personal reasons. Section § 16-24C-7(f) Code of Alabama (1975).

Transfers of nonprobationary classified employees that occur in a reduction-in-force climate, or in order to comply with state or federal law, are provided great latitude by the Students First Act, even if the transfer results in a partial reduction in contract, by reducing the rate of pay or decreasing the term of employment:

Notwithstanding the foregoing, transfers or reassignments that are made as a part of, as a consequence of, or in conjunction with reductions-in-force authorized under Section 16-1-33, or in order to comply with state or federal law are not subject to challenge or review under this chapter, whether or not such transfers or reassignments are to positions that provide for a lower rate or amount of pay or a shorter term of employment. Section § 16-24C-7(f) Code of Alabama (1975).

Contract and Probationary Principals

The Teacher Accountability Act created two new categories of school administrator, a “contract principal” and a “probationary principal.” A “contract principal” is created by Section § 16-24B-2(2) Code of Alabama (1975). A contract principal is a person certified as a principal who is hired after July 1, 2000, to serve as the chief administrator of a school, including a vocational center. Subsection § 16-24B-2(8) creates another category of administrator, a “probationary principal.” A probationary principal is a principal hired for the first time in any local school system as a principal on or after July 1, 2000. Probationary principals may be hired for *up to one* or *up to two*

probationary contract years, at the discretion of the board of education (emphasis added). After completion of the probationary period, the probationary principal may either be offered a contract of *not less than* three years or the board may terminate the probationary principal's contract for any reason or without a stated reason. Contract principals may be hired under an initial contract for *not less than* three years (emphasis added). At the end of a contract for a contract principals, the board of education may non-renew the contract by giving notice 90 days before the end of the contract, as well as the reasons for the non-renewal. The reasons for non-renewal may be for any reason except for personal or political reasons. During the contract period for a probationary principal or for a contract principal, the contract can only be terminated for cause.

A contract principal has the right to be evaluated at least annually by the superintendent or the superintendent's designee. If the evaluation describes an unsatisfactory but remediable performance on the evaluation, the principal must receive a conference and a professional development plan specifying the area(s) of unsatisfactory performance and recommending a plan for improvement. The principal must complete the plan before the next evaluation. If the evaluation leads to a recommendation to cancel the contract for cause, the principal has the right to ask, within 15 days of the evaluation, for a review of the evaluation by an independent, third party evaluator. This independent evaluator is selected through a process where five names are provided by the State Department of Education. From those five names, the parties each strike two names, and the remaining name is designated the review evaluator by the State Superintendent. The review evaluation must be conducted within thirty days after the local superintendent receives the original request for a review by the contract principal. Section § 16-24B-3(j) Code of Alabama (1975). Failure to conduct an evaluation in a contract year requires that the contract be extended one year for every year not evaluated. Section § 16-24B-3(j) Code of Alabama (1975).

A contract principal may reclaim a continuing service status (such as a teacher or supervisor) if one was earned in the same school district prior to becoming a contract principal, and if the cause of dismissal was not for conviction of a felony or a crime involving moral turpitude. Section § 16-24B-3(m) Code of Alabama (1975).

42. EMPLOYMENT ISSUES: ADVERSE EMPLOYMENT ACTIONS

Module 41 detailed the contract rights of employees of county and city boards of education in Alabama. Module 42 discusses the procedural aspects of ending the employment of school employees, as well as the procedural aspects of other adverse employment actions that may be administered.

Students First Act of 2011

The Students First Act repealed certain provisions of the Teacher Tenure Act and the Fair Dismissal Act and consolidated the procedures for adverse employment actions against most school employees under the solitary act. This section of Module 42 discusses procedures for terminating the employment of tenured teachers, nonprobationary classified employees, probationary teachers, and probationary classified employees.

Statutory Causes for Termination

The authority to suspend or dismiss employees is given to county boards of education by Section § 16-8-23 Code of Alabama (1975). The same authority is given to city boards of education by Section § 16-11-17 Code of Alabama (1975). What is interesting about these two provisions is that they list different causes of dismissal. The provision for county boards of education states:

The county board may suspend or dismiss for immorality, misconduct in office, insubordination, incompetency or willful neglect of duty, or whenever, in the opinion of the board, the best interests of the school require it, superintendents, principals, teachers or any other employees or appointees of the board, subject to the provisions of Chapter 24 of this title. Section § 16-8-23 Code of Alabama (1975).

The provision for city boards of education states:

(The city board) may suspend or dismiss any principal or teacher or supervisor or attendance officer or other regular employee so appointed on the written recommendation of the city superintendent of schools for immorality, misconduct in office, incompetency, willful neglect of duty or when, in the opinion of the board, the best interests of the schools may require, subject to the provisions of Chapter 24 of this title. Section § 16-11-17 Code of Alabama (1975).

Although the cause of “insubordination” is not listed as a cause of dismissal for employees of city boards of education, one should not conclude that employees of city boards of education could not be insubordinate. The Students First Act augments the earlier statutory causes for termination and provides an updated listing in the act, which reads as follows:

Tenured teachers and nonprobationary classified employees may be terminated at any time because of a *justifiable decrease in the number of positions or for incompetency, insubordination, neglect of duty, immorality, failure to perform duties in a satisfactory manner, or other good and just cause* (emphasis added), subject to the rights and procedures hereinafter provided. However, a vote or decision to approve a recommended termination on the part of a president of a two-year educational institution operated under the authority and control of the Department of Postsecondary Education or the governing board shall not be made for political or personal reasons. Section § 16-24C-6(a) Code of Alabama (1975)

Contract Termination for Probationary Classified Employees

Under the Students First Act, probationary classified employees may be terminated at the discretion of the employer by following three steps: (1) written recommendation of the chief executive officer; (2) a majority vote of the governing board; and (3) issuance of written notice of termination to the employee. Section § 16-24C-5(a) Code of Alabama (1975).

The three-step process above may occur at any time on or before the fifteenth day of June immediately following the employee's third consecutive, complete school year of employment. In the first year of a legislative quadrennium, the written notice must be provided on or before June 30. Until those applicable dates, a probationary classified employee can be terminated at any time. Section § 16-24C-5(a) Code of Alabama (1975).

The compensation and benefits of a probationary classified employee cannot be terminated before the expiration of 15 calendar days from the date of notice of termination is issued to the employee. Section § 16-24C-5(b) Code of Alabama (1975).

Although there is no requirement to provide an explanation of the cause for termination of the contract for a probationary employee, school officials must be prepared to articulate a legitimate, non-discriminatory reason for the termination. It is common for an employee who has been terminated to file a complaint with the Equal Employment Opportunities Commission and later file suit against the board of education and school officials, claiming that the termination was done for a discriminatory or unconstitutional reason. At some point in the lawsuit, the superintendent and other school officials will have to be able to explain the legitimate, non-discriminatory reason for the termination.

Contract Termination for Probationary Teachers

The Students First Act permits probationary teachers to be terminated at the discretion of the employer by following three steps: (1) written recommendation of the chief executive officer; (2) a majority vote of the governing board; and (3) issuance of written notice of termination to the teacher on or before the fifteenth day of June. In the first year of each legislative quadrennium, the written notice must be provided on or before June 30. § 16-24C-5(b) Code of Alabama (1975).

The “roll-over” provision which existed under the old Teacher Tenure Act survives in the Students First Act, which specifies that a probationary teacher who has not been terminated on or before the dates specified above shall be deemed reemployed as a probationary teacher. This “roll-over” provision carries an exception: “except as provided in subdivision (1) of Section 16-24C-4.” § 16-24C-5(b) Code of Alabama (1975).

The “roll-over” provision, as it is written in the Students First Act, also closes a loop-hole identified in Richardson v. Terry, 893 So.2d 277 (Ala. 2004) under the prior Teacher Tenure Act. In that court case, the Alabama Supreme Court indicated that for probationary teacher contracts, school boards could act on non-renewal of those contracts without a written recommendation from the superintendent. Because § 16-24C-5(c) Code of Alabama (1975) specifically requires the superintendent’s written recommendation, this former exception to the general rule is now erased.

The Students First Act also addresses the procedure for terminating a probationary teacher’s contract *during* a school year. The act indicates that the employment of any probationary teacher may be terminated before the completion of the school year by providing at least 30 calendar days’ written notice of the date on which the governing board is scheduled to vote on the superintendent’s recommendation. Upon issuance of such notice, the teacher may submit a written statement to the chief executive officer and the governing board explaining why such action should not be taken. It is advised that the written notice letter also include an advisement to the teacher regarding this means of responding to the recommendation. Section § 16-24C-5(c) Code of Alabama (1975).

Regarding how long payroll continues for probationary teachers whose contracts have been terminated, the Students First Act provides the following direction:

The decision to terminate the employment of any probationary employee shall be final and no compensation shall thereafter be due to the employee, except as provided in subsection (b). Section § 16-24C-5(d) Code of Alabama (1975).

Subsection (b), referred to in the above code section, requires the continuation of compensation and benefits for 15 calendar days from the date that notice of

termination was issued to the employee. The employee group identified in that provision, requiring that payroll and benefits continue for 15 days, is probationary classified employees. Therefore, the employee group identified in Section § 16-24C-5(d) Code of Alabama (1975) must be probationary teachers, for whom no additional compensation can be provided upon the action by the school board to terminate the probationary teacher's contract.

As was pointed out for termination actions for probationary classified employees, at some point the superintendent and other school officials may have to be able to explain the legitimate, non-discriminatory reason for the termination of probationary teachers.

Contract Termination for Tenured Teachers and Nonprobationary Classified Employees

The Students First Act details (at Section § 16-24C-6(b) Code of Alabama (1975)) that the first step in the process of contract termination for a tenured teacher or nonprobationary classified employee is initiated by the recommendation of the chief executive officer in the form of a written notice of proposed termination to the employee. The notice must contain the following statements:

- (a) The notice must state the reasons for the proposed termination;
- (b) The notice must contain a short and plain statement of the facts showing that the termination is taken for one or more of the statutory causes of termination that are listed in Section § 16-24C-6(a) Code of Alabama (1975);
- (c) The notice must be given in conformity with subsection (k), which provides the following permissible means of affecting delivery (by United States mail, certified delivery, by private mail carrier for next business day delivery, or by physical delivery to the employee or the last known address of the employee);
- (d) The notice must inform the employee that, in order to request a hearing with the governing board, the employee must file a written request for such a hearing with the chief executive officer within 15 calendar days after issuance of the notice. Section § 16-24C-6(b) Code of Alabama (1975).

If the employee fails to file the request for hearing within the 15 calendar days after issuance of the notice, the governing board shall vote on the recommended termination. Section § 16-24C-6(b) Code of Alabama (1975).

If the employee requests a hearing within the 15 calendar days after issuance of the notice, the hearing must be scheduled by the employer not less than 30 and not more than 60 calendar days from the date written notice of the time, date, and place of

the hearing was issued to the employee. The hearing may be rescheduled by agreement or for good cause shown. Section § 16-24C-6(b) Code of Alabama (1975).

The Students First Act provides additional information about the notice described above. According to the act, notice by certified mail or private mail carrier shall be deemed received by the employee and complete for purposes of this chapter two business days after the notice is deposited for certified delivery in the United States mail or placed with a private mail carrier for next business day delivery. The employer has the burden of producing evidence that service was affected in the manner permitted by this chapter, but the employee has the burden of proving that such service was not properly made. Section § 16-24C-6(k) Code of Alabama (1975).

Hearings

At the hearing contemplated for the termination of a tenured teacher or nonprobationary classified employee, the chief executive officer bears the burden of proof with regard to disputed issues of material fact. The employee or his or her representative shall be afforded the opportunity to present testimony, other evidence, and argument on matters relevant to the proposed termination and to cross-examine witnesses whose testimony is proffered in support of the proposed termination. Section § 16-24C-6(c) Code of Alabama (1975).

The employee has, at the hearing, the right to counsel at his or her expense. A court reporter must record the proceedings at the expense of the State Department of Education. The hearing may be public or private at the election of the employee. The chief executive officer shall issue subpoenas compelling the appearance of witnesses on the employee's behalf, upon the employee's timely request for issuance of such subpoenas. The chief executive officer may also issue subpoenas to any witness who the chief executive officer believes may have knowledge or evidence bearing on the issues presented for determination. Section § 16-24C-6(c) Code of Alabama (1975).

The employer is responsible for arranging for a transcript and record of any of the proceedings occurring before the governing board and conducted under the Students First Act. The transcript and record must be made and maintained by a qualified court reporter for use in connection with such review. All fees and costs associated with making and transcribing the record must be paid or reimbursed by the State Department of Education, under rules established for such purpose by the department. Section § 16-24C-6(l) Code of Alabama (1975).

The Students First Act prohibits employees from delaying, deferring, or defeating the initiation or pursuit of a termination or other adverse employment action under the act, based upon the pendency or threatened initiation of criminal proceedings arising out of the facts, circumstances, or subject matter of the employment action. The appearance or testimony of an employee in a proceeding authorized under this chapter cannot cause the employee to waive, forfeit, or relinquish any right against self-

incrimination, and no such testimony can be admitted in any court of this state in a criminal proceeding in which the right applies, upon the timely objection of the employee. Section § 16-24C-6(j) Code of Alabama (1975).

Perhaps the most important due process right is the right to be heard by an unbiased decision-maker. Consequently, it is critically important that the governing board do nothing that can be entered into the record to show bias. The Students First Act reinforces this rule by providing that, whenever an employee has the right to be heard by the governing board before a decision on the recommendation of the chief executive officer, and such right to be heard is requested by the employee, the merits of the recommended employment action shall not be deliberated or determined by the governing board before the hearing, except as specifically allowed within the act. Section § 16-24C-8 Code of Alabama (1975).

Notice of Governing Board Action

The Students First Act indicates that, whether or not the employee requests a hearing before the governing board, the chief executive officer must give written notice to the employee of the decision regarding the proposed termination within 10 calendar days after the vote of the board. If the decision follows a hearing requested by the employee, this notice must also inform the employee of the right to contest the decision by filing an appeal as provided in the act. Section § 16-24C-6(d) Code of Alabama (1975).

When Pay and Benefits Are Stopped

Unless otherwise specified by the governing board, a decision to terminate the employee or suspend the employee without pay shall be effective immediately, except that a tenured teacher or a nonprobationary classified employee must continue to receive pay and benefits until a final ruling by the hearing officer or 75 calendar days, whichever occurs first from the date of the employer termination decision. However, the continuation of pay and benefits must be halted if the termination is based on an act of moral turpitude, immorality, abandonment of job, incarceration, or neglect of duty. If the decision of the governing board is set aside and the employee is reinstated, the employee shall receive back pay and other relief, in the same manner as it is calculated under Section § 16-24C-6(f).. Section § 16-24C-6(m) Code of Alabama (1975).

Appeals and Review

The Students First Act stipulates that an employee who is terminated after a hearing requested by the employee may obtain a review of the adverse decision by filing a written notice of appeal to the State Superintendent of Education within 15 days of receipt of the decision. The State Superintendent of Education must then refer the

appeal to the Executive Director of the Alabama State Bar Association, who will then obtain a panel of neutrals and administer the hearing officer selection process. Section § 16-24C-6(e) Code of Alabama (1975).

The notice of appeal must state the grounds upon which it is based. A copy of the notice must be simultaneously served by the employee on the chief executive officer of the employer. Upon receiving notice of the employee's appeal, the employer must compile and file the record of administrative proceedings, including any hearing transcript, with the hearing officer within 20 days after its receipt of the notice of appeal, unless the time is extended by the hearing officer for good cause shown. Except as provided in the act, the appeal shall be submitted to the hearing officer. The hearing officer shall hold a hearing. The Students First Act indicates that deference must be given to the decision of the employer. A final ruling, either affirming or reversing the decision of the employer, must be rendered within five days after the hearing. Section § 16-24C-6(e) Code of Alabama (1975).

If the decision of the governing board is set aside by the hearing officer, the employee must be reinstated and credited with any benefits due under applicable statutes, salary schedules, or compensation policies. Either party may appeal an adverse decision rendered by a hearing officer to the Alabama Court of Civil Appeals, by filing a notice of appeal to the court in accordance with the Alabama Rules of Appellate Procedure. Section § 16-24C-6(f) Code of Alabama (1975).

The hearing officer assigned to review appeals under the Students First Act must be selected from a panel of neutrals comprised of five retired Alabama judges. The Executive Director of the Alabama State Bar Association is charged with identifying members of the panel, on a random and rotating basis, and providing the list to the chief executive officer. Upon receiving the names of the panel members, the parties may select the hearing officer from among the names provided or from any other source by agreement. Failing such agreement, the parties must select the hearing officer by a process of alternating strikes, in which the employee shall be provided the first strike and the employer the last strike. The hearing officer selection process must be accomplished within 10 calendar days of receipt by the parties of the panel of potential hearing officers. Section § 16-24C-6(g) Code of Alabama (1975).

The hearing officer must be paid for services rendered from funds appropriated for such purposes by the Legislature. The hearing officer shall not have a personal or professional interest that would conflict with his or her ability to render an objective decision. All hearing officers must agree to abide by all timelines provided in the act. Section § 16-24C-6(g) Code of Alabama (1975).

Lesser Penalties

The Students First Act reminds governing boards that, in considering termination recommendations made by the chief executive officer, the governing board acts in an independent and quasi-judicial capacity. Consequently, nothing in the Students First Act can be construed to prevent the governing board from imposing a lesser sanction than that recommended by the chief executive officer or to preclude a negotiated resolution by the president or the governing board of matters, issues, and disputes arising under the act. Section § 16-24C-6(h)(1) Code of Alabama (1975).

The Students First Act also authorizes the lesser penalty of suspension. Under the act, an employee may be suspended for cause—with or without pay—on the written recommendation of the chief executive officer and the approval of the governing board. The suspension of a tenured teacher or a nonprobationary employee for no more than 20 work days without pay is not a termination of employment that is subject to review under the Students First Act. Section § 16-24C-6(i) Code of Alabama (1975).

Before the imposition of a suspension, the employee must be given adequate notice of the reason or reasons for the proposed suspension. The employee must also have an opportunity to present evidence and argument, either in person or in writing, to the governing board with respect to the proposed action. Section § 16-24C-6(i) Code of Alabama (1975).

Suspensions of tenured teachers or nonprobationary classified employees without pay for more than 20 work days are subject to the notice, hearing, and review requirements and procedures that apply to terminations of tenured teachers and nonprobationary classified employees under the act. Section § 16-24C-6(i) Code of Alabama (1975).

Administrative Leave

The Students First Act stipulates that nothing in the act restricts the authority of the chief executive officer to place an employee on paid administrative leave, or to make reasonable and customary employment decisions not expressly provided for in the act, pending the disposition of proceedings authorized by the act, or otherwise in the exercise of sound administrative discretion. Section § 16-24C-9 Code of Alabama (1975).

Denial of a Hearing

The Students First Act provides tenured or nonprobationary employees, who believe they have been denied a hearing before an employer under provisions of the act, to appeal for relief directly to the Chief Administrative Law Judge of the Office of

Administrative Hearings, Division of Administrative Law Judges, Office of the Attorney General. The chief administrative law judge will then appoint an administrative law judge to address the issues raised in the appeal. This provision in the Students First Act details the procedures that must be followed in making such an appeal. Section § 16-24C-12 Code of Alabama (1975).

Termination Upon Revocation of Teaching Certificate

In 2010, the Alabama Legislature amended Section § 16-23-5 Code of Alabama (1975), to specify that a teacher must have a certificate revoked, after conviction of one of many crimes involving children. (Ala. Act No. 2010-264, p. 482, § 1.) The Students First Act reflected this legislative intent, by specifying that the employment of a teacher whose certificate is revoked by the State Superintendent of Education pursuant to Section 16-23-5 shall thereby be summarily terminated. Section § 16-24C-10(a) Code of Alabama (1975).

If a conviction resulting in certificate revocation under Section 16-23-5 is overturned on appeal, the State Superintendent of Education must immediately reinstate the certificate upon receipt of notice of the reversal, and the employer must either place the employee in a position for which the employee holds appropriate certification or place the employee on paid administrative leave. The employee must also receive back pay and benefits from the date of termination to the date of reinstatement. Section § 16-24C-10(b) Code of Alabama (1975).

The Students First Act acknowledged that the State Superintendent of Education or the employer is not prevented from pursuing other legal action against the teacher based upon the circumstances underlying the conviction. Section § 16-24C-10(c) Code of Alabama (1975).

The Students First Act also offers the following language:

If an employee is required to attain or hold a certificate issued by the State Department of Education or other licensing authority as a condition to his or her lawful employment and such certificate or license has been revoked, denied, suspended, or forfeited, or the employee has been determined to be ineligible for such certificate or license by the licensing authority, the rights, remedies, and procedures provided by this chapter shall not apply or be available to such employees. However, nothing in this subsection shall be construed to deny such employees any right to contest, challenge, or obtain review of any certification decision on the part of the licensing authority that may be provided by separate statute or departmental regulation including, but not limited to, any recourse that is available under the Alabama Administrative Procedure Act. Section § 16-24C-10(d) Code of Alabama (1975).

By this language, the Students First Act denies the procedural protections of the act to persons whose certificate has been revoked, denied, suspended, or forfeited.

Reduction in Force

Many of the adverse employment actions for teachers and other school personnel in recent years in Alabama have come about due to proration and the commensurate necessity of reducing force. Section §16-1-33 Code of Alabama (1975) requires all public city and county boards of education, as well as numerous other educational entities, to adopt a written reduction-in-force policy. The policy must be adopted in a manner consistent with Section §16-1-30 Code of Alabama (1975), and must address at least the following aspects: layoffs, recalls, and notifications of layoffs and recalls. The statute requires that the adopted reduction in force policy be based upon objective criteria.

Passage of the Students First Act complements the requirement, above, of having a written reduction-in-force policy to provide specificity about the procedural requirements of a reduction in force. The Students First Act offers as follows:

Reductions in or modifications to employee compensation or benefits or of the length of the work or school year are not terminations or transfers for purposes of this chapter or otherwise subject to challenge or review under this chapter, provided that the action is all of the following: (a) prospective in effect; (b) based on the recommendation of . . . the chief executive officer and formal approval of the governing board; and (c) applied to similarly situated employees within the . . . system, or within designated operating divisions, departments, or employment classifications therein. Section § 16-24C-6(h)(2), Code of Alabama (1975).

The Students First Act also specifies that layoffs and reduction in force are not subject to challenge or review under the Students First Act:

Layoffs or other personnel actions that are unavoidable reductions in the workforce beyond normal attrition due to decreased student enrollment or shortage of revenues, as specified in Section § 16-1-33, Code of Alabama (1975), are not subject to challenge or review under the act. Section § 16-24C-6(h)(3), Code of Alabama (1975).

Transition Between Old Tenure Laws and the Students First Act

Upon passage of the Students First Act, employees who are defined as teachers under the Students First Act, who had achieved continuing service status under the Teacher Tenure Act, retain their tenure as teachers under the Students First Act.

Likewise, non-certified employees who had achieved tenure under the Fair Dismissal Act, retain their tenure as classified employees under the Students First Act. For probationary employees, time contributed in service by employees who had not attained tenure status under the Teacher Tenure Act or nonprobationary status under the Fair Dismissal Act, as of July 1, 2011, must be credited toward attainment of tenure or nonprobationary status under the Students First Act, under the same terms for achieving tenure or nonprobationary status as provided for in that act. Section § 16-24C-14(1) Code of Alabama (1975).

Adverse employment actions that were in process, having been initiated under the Teacher Tenure Act of the Fair Dismissal Act, and stood pending on July 1, 2011, must be completed under the statutory procedures that were in effect on the date the action or proceeding was commenced. Section § 16-24C-14(2) Code of Alabama (1975).

Probationary and Contract Principals

The Teacher Accountability Act created two new categories of school administrator, a “contract principal” and a “probationary principal.” A “contract principal” is created by Section § 16-24B-2(2) Code of Alabama (1975). A contract principal is a person certified as a principal who is hired after July 1, 2000, to serve as the chief administrator of a school, including a vocational center. Subsection § 16-24B-2(8) creates another category of administrator, a “probationary principal.” A probationary principal is a principal hired for the first time in any local school system as a principal on or after July 1, 2000.

Probationary Principals

Probationary principals may be hired for one or two probationary contract years, at the discretion of the board of education. After completion of the probationary period, the probationary principal may either be offered a three-year contract or the board may terminate the probationary principal’s contract for any reason or without a stated reason. To non-renew a probationary principal, the superintendent must recommend and the board of education must approve a vote to non-renew the probationary principal’s contract. (Note: Alabama Act 2007-467 specified that a school board may not vote on the contract status of a probationary or contract principal, without a recommendation from the chief executive officer.) As stated, it is not necessary to give a reason for the non-renewal, however the non-renewal may not be for personal or political reasons, nor can the reason be because of a legally inappropriate reason, such as discrimination or retaliation because the principal exercised a constitutional right. It does not appear that the board of education must hold a hearing prior to voting to non-renew the probationary principal. After the vote to non-renew, the probationary principal should receive notice of the non-renewal by certified or registered mail and

personal service, but no hearing is required concerning the non-renewal. The notice to non-renew should be received sometime before the end of the probationary contract.

During the contract period for a probationary principal, the contract can only be terminated for cause. The permissible causes for contract termination, as well as the procedural rights due the probationary principal in this situation, are discussed below in the context of terminating an existing contract for a contract principal. The procedural rights for probationary principals and contract principals are the same, when an employment contract is terminated during the existence of the contract and not non-renewed at the end.

Contract Principals

Contract principals may be hired under an initial contract for up to three years. Subsequent contracts for contract principals, after the initial contract, must be at least three years in duration. Section § 16-24B-3(a) Code of Alabama (1975). After completion of the contract, the contract principal may either be offered a three-year contract or the board may terminate the contract principal's contract for any reason, except prohibited reasons. If the board of education chooses to non-renew the contract principal, the statute imposes a timeline on the decision. To non-renew a contract principal, the superintendent must recommend in writing and the board of education must approve a vote to non-renew the contract principal's contract ninety (90) days before the end of the contract. The recommendation must set forth the reasons for the non-renewal. Section § 16-24B-3(c) Code of Alabama (1975). There is no requirement to hold a hearing before the board before voting on the contract non-renewal. After the vote to non-renew, the contract principal must receive notice of the non-renewal by certified mail or personal service within five days of the board's action. The notice must set forth a reason for the non-renewal. The reason can be for any reason, except the non-renewal may not be for personal or political reasons, nor can the reason be for a legally inappropriate reason, such as discrimination or retaliation because the principal exercised a constitutional right. Again, the notice to non-renew must be received ninety days before the end of the contract.

Within ten days of receipt of the notice to non-renew, the contract principal may file written notice with the superintendent, requesting a non-jury, expedited evidentiary hearing before the local circuit court judge. At the same time, the principal must file a request for an expedited hearing with the circuit court and provide a copy of the request to the superintendent. At the non-jury, expedited evidentiary hearing before the circuit court judge, the sole issue must be whether or not the contract non-renewal of the contract principal was for personal or political reasons. The judge's decision is binding on all parties. Section § 16-24B-3(e)(2)(a) Code of Alabama (1975).

During the contract period for a contract principal (and a probationary principal), the permissible causes of contract termination are:

- Immorality;
- Insubordination;
- Neglect of duty;
- Conviction of a felony or crime;
- Failure to fulfill the duties and responsibilities imposed upon principals by state law;
- Willful failure to comply with board policy;
- A justifiable decrease in the number of positions due to decreased enrollment or decreased funding;
- Failure to maintain her or his certificate in a current status;
- Other good and just cause;
- Incompetency; and
- Failure to perform duties in a satisfactory manner.

Section § 16-24B-3(e)(1) Code of Alabama (1975).

A contract principal has the right to be evaluated at least annually by the superintendent or the superintendent's designee. If the evaluation describes an unsatisfactory but remediable performance on the evaluation, the principal must receive a conference and a professional development plan specifying the area(s) of unsatisfactory performance and recommending a plan for improvement. The principal must complete the plan before the next evaluation. If the evaluation leads to a recommendation to cancel the contract for cause, the principal has the right to ask, within 15 days of the evaluation, for a review of the evaluation by an independent, third party evaluator. This independent evaluator is selected through a process where five names are provided by the State Department of Education. From those five names, the parties each strike two names, and the remaining name is designated the review evaluator by the State Superintendent. The review evaluation must be conducted within thirty days after the local superintendent receives the original request for a review by the contract principal. Section § 16-24B-3(j) Code of Alabama (1975). Failure to conduct an evaluation in a contract year requires that the contract be extended one year for every year not evaluated. Section § 16-24B-3(j) Code of Alabama (1975).

A contract principal may reclaim a continuing service status (such as a teacher or supervisor) if one was earned in the same school district prior to becoming a contract principal, and if the cause of dismissal was not for conviction of a felony or a crime involving moral turpitude. Section § 16-24B-3(m) Code of Alabama (1975t).

43. EMPLOYMENT ISSUES: TEACHER ACCOUNTABILITY

As has been demonstrated in the two previous modules, teacher accountability is not addressed in the Teacher Accountability Act (Act 2000-733, p. 1588, § 1., Section § 16-24B-1, *et. seq.* Code of Alabama (1975).) And, as strange as it may seem, the existence of a teaching certificate demonstrates legal competence, but usually does not specifically address professional competence. Legal competence and professional competence become connected in those situations where universities are required to guarantee the professional competence of their graduates, after they have recommended their graduates for receipt of a teaching certificate. This is one of many policy methods of attempting to assure teacher accountability. This module addresses methods of teacher accountability that apply in Alabama.

Teacher Testing

Alabama statutory law has addressed teacher testing as a means of providing for accountability for the teaching profession. Section § 16-23-16.1 Code of Alabama (1975) requires that teachers successfully pass a pre-certification examination such as the National Teacher Examination (NTE) or some similar proficiency examination as a precondition for receipt of a teaching certificate.

Teacher Evaluation

Although Alabama statutory law has yet to address the use of teacher evaluation as a means of providing for accountability for the teaching profession, regulations promulgated by the State Board of Education have done so.

Graduation Examinations

As a condition of receiving a diploma from an Alabama high school, Alabama Administrative Code Rule No. 290-4-2-.02 requires successful passage of the Alabama High School Graduation Examination. To a certain extent, this regulatory requirement serves as a means of making teachers accountable to the public for their performance.

School Grading System

In 2012, the Legislature directed the State Superintendent of Education to develop a school grading system that reflects the performance of schools and school districts, thereby producing a measure of accountability for teachers. Alabama Act

2012-402, H.B. 588. The legislation also requires the development of a Legislative School Performance Recognition Program.

State Takeover for Academic Reasons

Section § 16-6B-2(b and c) Code of Alabama (1975) permits intervention by the State Superintendent of Education at the school and school system levels, when a school or system fails to show adequate improvement over a three-year time period.

Educational Malpractice

Another potential method of accountability for teachers is the threat of a malpractice claim. Malpractice is defined as the failure to exercise that degree of skill and learning commonly applied under all the circumstances in the community by the average prudent reputable member of a profession with the result of injury, loss or damage to the recipient of the professional's services or to those entitled to rely upon them. (See, BLACK'S LAW DICTIONARY 959 (6th ed. 1990).) Although this definition of malpractice applies to the legal profession, it can be extended to other professions, including education. Educational malpractice, if it exists, would be classified under a negligent tort, as discussed in Module 37. A claim for educational malpractice would be based on a breach of duty to educate a student at an acceptable standard, according to the profession, and, because of that breach, the student suffered the injury of impairment of educational development. Because it is difficult to show that a student's lack of educational development is based solely on a teacher's failure, and not lack of effort of the student or lack of parental control, courts are extremely reluctant to recognize a tort of educational malpractice in general education situations.

Where the greater opportunity for the development of an educational malpractice claim exists is in the area of special education. An educational malpractice type of claim can originate in special education in one of the following situations:

- (1) Where the student is not delivered the education written into the student's IEP.
- (2) Where the student is erroneously diagnosed to have a disability and placed in a program that is not proper for the student.
- (3) Where the student's disability is misdiagnosed and the student is put in the wrong type of program.
- (4) Where the student should have been diagnosed as having a disability, but never was.

44. EMPLOYMENT ISSUES: EMPLOYMENT RECORDS

Relationship Between Employment Records and Freedom of Information Acts

The federal congress passed the Freedom of Information Act, 5 U.S.C. § 552A, in 1974, to initiate the policy perspective that the public should be able to know what is happening in the inner workings of its government. The federal Freedom of Information Act applies only to the federal government. Subsequent to its passage, every state has adopted a freedom of information act to apply to individual state governments. (See, Dagley, Privacy Interests of School Personnel in District Personnel Files, Illinois School Law Quarterly, Vol. 14, No. 3, (April 1994), pp. 88-105.) Many states have followed the federal freedom of information act and provided a specific exemption for personnel files, to make it not required for school personnel to disclose personnel files or make them available to the public. Alabama is not one of those states.

Alabama's Open Records Act

Alabama's Open Records Act places a presumption in favor of disclosure of all public writings: "Every citizen has a right to inspect and take a copy of any public writing of this state. . ." Section § 36-12-40 Code of Alabama (1975). "Public records" is defined elsewhere as:

All written, typed or printed books, papers, letters, documents and maps made or received in pursuance of law by public officers of the state, counties, municipalities and other subdivisions of government in the transactions of public business. Section § 41-13-1 Code of Alabama (1975).

The lead case interpreting the Open Records Act has been Stone v. Consolidated Publishing Co., 404 So.2d 678 (Ala. 1981). In that case, the court described writings under the Open Records Act to include any public writing that is reasonably necessary to record the business of a public office, so that the public may know the status and condition of the business and activities of the office. Stone identified four exceptions to the Open Records Act, in which the following types of public writings do not have to be disclosed:

- (1) Recorded information received by a public officer in confidence;
- (2) Sensitive personnel records;
- (3) Pending criminal investigations; and
- (4) Records the disclosure of which would be detrimental to the public's best interest.

In Chambers v. The Birmingham News, 552 So.2d 854 (Ala. 1989), the Alabama Supreme Court decided that resumes and job applications, items commonly held in a

personnel file, and submitted for a county position in that case, had to be disclosed. The Chambers case discussed the exceptions listed in Stone, and provided some direction about whether information in personnel files must be disclosed to the general public, in the following paragraph:

The exceptions set forth in Stone must be strictly construed and must be applied only in those cases where it is readily apparent the disclosure will result in undue harm or embarrassment to an individual, or where the public interest will clearly be adversely affected, when weighed against the public policy considerations suggesting disclosure.

Consequently, it appears that writings inserted into a personnel file must be disclosed, unless they include information that will result in undue personal harm or embarrassment if disclosed and the public interest doesn't outweigh the personal harm or embarrassment. In Blankenship v. City of Hoover, 590 So.2d 245 (Ala. 1991) the Alabama Supreme Court held that federal W-2 income tax forms (which include sensitive personal information) are protected under the Open Records Act, but the rate of pay of the employee must be disclosed. This court case suggests that the court will pick and choose writings out of the personnel file for disclosure, based upon a balance between the individual harm compared against the public good.

The Alabama Legislature has added additional requirements concerning personnel files. While the discussion above regards disclosure of information in personnel files to the general public, the statutory provisions printed below apply primarily to management of personnel files and access to the files by the employee himself or herself.

The full text of Section § 16-22-14 Code of Alabama (1975) is provided below:

Personnel Records of Education Employees.

(a) Definitions. When used in this section, the following words shall have the following meanings:

- (1) EMPLOYEE. Any person employed by a school board.
- (2) EXECUTIVE OFFICER. The superintendent of any public county or city school system; the President of the Alabama Institute for Deaf and Blind; the president of any two-year school or college under the auspices of the State Board of Education; the Superintendent of the Department of Youth Services School District; the Executive Director of the Alabama School of Fine Arts; and the Executive Director of the Alabama High School of Mathematics and Science.

(3) LOCAL EDUCATION AGENCY PERSONNEL SYSTEM (LEAPS). The data base established and maintained by the Alabama Department of Education for record keeping of all data related to certificated and non-certificated personnel at each board of education.

(4) PERSONNEL AND ENROLLMENT REPORTING SYSTEM (PERS). The data base established and maintained by the Alabama Department of Postsecondary Education for record keeping of all data related to personnel and enrollment at postsecondary institutions.

(5) PERSONNEL RECORD. All records, information, data, or materials pertaining to an employee kept by the executive officer of the school board or other employees of the school board in any form or retrieval system whatsoever.

(6) SCHOOL BOARD or BOARD OF EDUCATION or BOARD. As applied to employees in the public schools, grade kindergarten through grade 12, any county or city board of education; the Board of Trustees of the Alabama Institute for Deaf and Blind; the Alabama Youth Services Board in its capacity as the Board of Education for the Youth Services School District; the Board of Directors of the Alabama School of Fine Arts; the Board of Directors of the Alabama High School of Mathematics and Science; and, as applied to two-year postsecondary education institutions only, the State Board of Education.

(b) Establishment and maintenance of records. Each board shall establish and maintain a personnel file on each employee. It shall be the responsibility of the executive officer of each school board to supervise the maintenance of personnel files and to maintain updated, complete, and accurate records.

(c) Employee access and response. The employee, or any person designated in writing by the employee, may, upon request, review all of the contents in his or her personnel file and receive copies of any documents contained in the file. No document shall be withheld from the employee or his or her representative. A representative of the employee may accompany him or her during the personnel file review. The employee may answer or object in writing to any material in his or her file and the answer or objection shall be attached to the appropriate material.

d) Public access. This section is supplemental to the statutes which apply to the public's access to government records. Public access to school personnel files is affirmed subject to the privacy rights rulings of the various federal and state courts.

(e) Work performance records. Any materials pertaining directly to work performance may be placed in the record of the employee and a copy of the materials shall be provided to the employee. Statements, reports, and comments relating to work performance, disciplinary action against the employee, suspension of the employee, or dismissal of the employee shall be reduced to writing and signed by a person reasonably competent to know the facts or make a judgment as to the accuracy of the

subject information. Additional information related to the written materials previously placed in the personnel file may be attached to the material to clarify or amplify them as needed. A copy of all materials to be placed in an employee's record which may tend to diminish the employee's professional or work status or reflect adversely on the employee's record of performance or character shall be provided to the employee.

(f) Anonymous materials. Any anonymous complaint or material received by a school official shall be immediately transmitted to the executive officer. If the material is deemed worthy of an investigation by the executive officer, it may be investigated. The results of the investigation shall be reduced to writing, signed by the executive officer, principal, or other designated official in charge of the complaint, dated, attached to the material in question, and placed in the personnel file of the employee. Any anonymous complaint which is not investigated within 30 calendar days of its receipt by the executive officer shall not be retained, but shall be destroyed.

(g) Transfer of information. Notwithstanding any other provision in this section to the contrary, the following provisions shall apply:

- (1) The transfer of the personnel file or any parts, summation, or copies of the personnel file of the employee shall be effectuated upon the written request of the employee.
- (2) The employer may transfer an employee's personnel file or copies or parts thereof to another employer or prospective employer.
- (3) The provisions contained in Section 16-22-6 shall remain in effect. Payroll deductions which the employee has authorized shall continue effective.
- (4) Any documents which may be lawfully contained in the personnel file of an employee shall be made available to a lawfully authorized hearing officer or panel conducting an investigation into the competency or performance of the employee, and to all appropriate law enforcement officials. Statistical information on employees and former employees may be transmitted to the Department of Archives and History and to the State Department of Education for historical research and information.

(h) Policies. Written policies established by a school board pertaining to personnel files which are not inconsistent with this section may remain in effect, consistent with Section 16-1-30.

(i) This section shall be implemented by each school board no later than September 1, 1998. (Act 98-374, p. 703, § 1, 3.)

In State Tenure Commission v. Jackson, 881 So.2 445 (Ala.Civ.App. 2003), the state appellate court held that records in a teacher's personnel file were admissible in a termination hearing before the school board.

45. EMPLOYMENT ISSUES: COPYRIGHT

Copyright law originates in Article I of the U. S. Constitution:

The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries. U.S. CONST. art. I, sec. 8(8).

Copyrights

With the constitutional authority reflected above, Congress has created copyright law in 17 U.S.C. § 101 *et seq.* (1996). Copyright is actually “copyrights,” because it represents a bundle of rights in the form of property granted by Congress to reward the person who creates or invents something new. The copyright owner has exclusive rights (copyrights) to do and to authorize any of the following:

- (a) To *reproduce* the copyrighted work in copies or phono records;
- (b) To *prepare* derivative works based upon the copyrighted work;
- (c) To *distribute* copies or phono records of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (d) In the case of literary, musical, dramatic, and choreographic works, pantomimes, motion pictures, and other audiovisual work, to *perform* the copyrighted work;
- (e) In the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to *display* the copyrighted work publicly; and
- (f) In the case of sound recordings, to *perform* the copyrighted work publicly by means of a digital audio transmission. 17 U.S.C. § 106 (1996).

The rights granted by copyright, therefore, include the right to reproduce, prepare, and distribute copies, to perform personally or by digital audio transmission, and to display works subject to copyright. Copyright vests a property right of economic value in the copyright’s owner.

Subject Matter of Copyright

The subject matter of copyright includes “original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a

machine or a devise.” 17 U.S.C. § 102(a) (1996). Works of authorship covered by copyright include:

- (a) Literary works;
- (b) Musical works, including any accompanying words;
- (c) Dramatic works, including any accompanying music;
- (d) Pantomimes and choreographic works;
- (e) Pictorial, graphic, and sculptural works;
- (f) Motion pictures and other audiovisual works;
- (g) Sound recordings; and
- (h) Architectural works. 17 U.S.C. § 102 (a) (1996).

Computer programs are considered to be “literary works.” Whelan Assoc. v. Jaslow Dental Lab, 797 F.2d 1222 (3rd Cir. 1986/1987). The statute defines “computer programs” as a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result. 17 U.S.C. § 101 (1996). In a school setting, the computer program that is used to carry instructional content delivered from the Internet is copyrighted, and the school must purchase the program and sufficient number of licenses for the subscribed usage, or face copyright infringement claims.

Public Interest in Copyright

Copyright is not just about creating a monopoly for authors, songwriters, choreographers, movie directors, computer programmers, and other creators. Copyright produces a property right in the material that is created, and the property right is exclusive to the owner for a set number of years. In time the owner’s economic interest in the material expires, and the public can then have free use of the material. But the public’s interest in the material develops much earlier than the expiration of the owner’s copyright. There is a public interest in promoting creation and invention, and protecting the owner’s economic interests for a time serves as an incentive to create and invent. Thus, copyright law represents a carefully crafted balance between the private property rights of the copyright owner and the public interest in invention and creativity.

Requirements for Copyright

Copyright does not protect an idea, it protects an expression of an idea. Baker v. Selden, 101 U.S. 99 (1879). Therefore, the person who says, “I thought of that first; they stole my idea” does not have a property right in the idea. To be protected by copyright, a work requires originality, creativity, and fixation. Originality requires that the work be the independent creation of someone, not copied from another. Whitol v. Wells, 231 F.2d 550 (7th Cir. 1956). Creativity is usually considered an element of proof of originality, and is required to exist at only a modest level. As the U. S. Supreme

Court observed in Feist Publications v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991): (t)he vast majority of works make the grade quite easily, as they possess some creative spark, 'no matter how crude, humble, or obvious' it might be." Fixation occurs when a work is "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." 17 U.S.C. § 101 (1996). The definition provided by statute adds that a work consisting of sounds, images, or both, and being transmitted becomes "fixed" if the fixation is being made simultaneously with the transmission. Therefore, a teacher's performance of a lecture does not become "fixed" until it is videotaped, although a written script for the lecture became "fixed" the moment it was printed or perhaps became digitally imbedded in the teacher's word processing program.

The "Work for Hire" Rule

Ownership of a copyright can be contested between the creator of the work and any potential employer of the creator of the work. Under the "work for hire" rule in copyright law, the owner of the copyright is the employer and not the employee, unless the parties contractually agree to another arrangement. Application of the work for hire rule has been an important issue in the university setting for many years, where production of copyrightable works is a condition of employment for most university professors. The work for hire rule may become increasingly important in the K-12 school setting, as classroom teachers create materials for use through Internet or web-based delivery. As a matter of policy, school superintendents and their boards will need to consider the proper balance between claiming ownership of materials produced by teachers versus the benefit to students of encouraging creativity by teachers. Creating an exception to the work for hire rule by policy or by individual contract with teachers would encourage better teaching with better materials and using newer technologies, to the benefit of students.

Actions for Infringement and Remedies

Winning a copyright infringement action requires that two elements be shown by the plaintiff: (a) ownership of the copyright; and (b) copying by the defendant of protected expression. A copyright registration creates a presumption of ownership that the other party must rebut to refute. Copying by the defendant can be shown by the plaintiff by demonstrating both access to the copied work and similarity to the copied work. Remedies for copyright infringement can include: (a) injunctive relief; (b) impounding and destruction; (c) actual damages and confiscation of profits; (d) statutory damages; and (e) court costs and attorneys' fees. 17 U.S.C. §§ 502-505. Software piracy can result in both civil suit and criminal fines of up to \$250,000 and jail terms of up to five years.

The Fair Use Doctrine and the Teacher Exception

The copyrights given to copyright owners (reproduction, preparation of derivative works, distribution, performance, and display rights), given in Section § 106 of the Act are subject to limitations listed in Sections §§ 107 through 119 of the Act. The fair use doctrine is an important limitation to the exclusive rights given to copyright owners.

The fair use doctrine is a privilege given to others (other than the owner of a copyright) to use the copyrighted material in a reasonable manner without the owner's consent, notwithstanding the monopoly granted to the owner. (See, BLACK'S LAW DICTIONARY, 6TH ed., 1990.) Section § 107 of the Act identifies fair use of a copyrighted work for purposes such as (a) criticism, (b) comment, (c) news reporting, (d) teaching (including multiple copies for classroom use), (e) scholarship, or (f) research as uses that are not an infringement of copyright.

Because teaching is listed as an exception to the copyright owner's exclusive rights, it permits a claim that a teacher is violating copyright to be subject to an analysis of whether the teacher's use was a "fair use." Fair use is examined, based upon a balancing process involving four factors identified by statute, to decide whether the teacher's interests outweigh the rights of the copyright owner. The factors that must be considered in the analysis are: (a) the purpose and character of the use, including whether such use is of a commercial nature or is for a nonprofit educational purpose; (b) the nature of the copyrighted work; (c) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (d) the effect of the use upon the potential market for or value of the copyrighted work. Because copyright is about economic rights, the last factor, the effect on market potential, always dominates the analysis.

Guidelines for Classroom Copying

An agreement was created in 1976 between various groups (author's guild, book publishers, etc.) to attempt to address the limits to which a teacher might go and still be under the fair use doctrine. The agreement is not a statute or a regulation, so it has no legal power other than the fact that it is an agreement that has been made between parties who are most likely to bring a copyright action against teachers. The agreement generally provides a safe harbor for classroom teachers on where fair use applies. One should be reminded that the agreement speaks to classroom uses in 1976, so that the application of instructional technology is not well-represented in the agreement. According to the agreement, teachers may make single copies for research purposes or for teaching or preparing to teach from any of the following resources: (a) a chapter from a book; (b) an article from a periodical or newspaper; (c) a short story; (d) short essay or poem, whether or not it is from a collective work; or, (e) a chart, graph, diagram, drawing, cartoon, or picture from a book, periodical, or newspaper. The

agreement also addresses making multiple copies for classroom distribution, by permitting one copy per pupil in a course, if the copying meets the tests for brevity, spontaneity, and cumulative effects provided in the agreement, and includes a notice of copyright on each copy. If a teacher copies a work under the circumstances outlined in the guidelines, then the teacher's use should be considered fair use within the fair use doctrine.

Fair Use and Teaching in a Wired World

Instruction in the new millennium, using modern computer programs, the Internet, and the World Wide Web, creates many opportunities for schoolteachers and their employers to be in violation of the copyright law. The ability of search engines to locate language and images placed on web-sites makes it easier to find copyright violations and copyright violators. Companies have found a market niche in helping large corporations learn about violations. For example, cartoon images are popular with teachers, as a way of creating interest in subject matter. If a teacher places an image of a cartoon character on instructional materials, then places the materials in a web page on the school's computer server, the large corporation who owns a propriety interest in the cartoon character's image will soon learn about the copyright infringement, from companies they have hired to find the infringements. Upon learning of the infringement, the corporation has an excellent copyright infringement claim against the schoolteacher and the schoolteacher's employers.

46. EMPLOYMENT ISSUES: DISCRIMINATION

Employment decisions, including hiring, firing, promoting, and assigning of benefits, may sometimes be based on reasons that seem inherently unfair. A disabled person is excluded from a position because of preconceived notions by the employer about what a person with a certain type of disability is able to do. A person is chosen for a principalship because of the person's experience as a coach, ignoring the fact that the ranks of experienced coaches are dominantly male. Another person is chosen to be a principal, because of the person's race and the desire to create balance in racial representation in the role. A young, new teacher is treated poorly by her principal, after she rebuffs his attempts to build a closer personal—rather than professional—relationship. A religious person shares his faith with a coworker, and their supervisor demands that the religious person keep his religious views to himself during working hours. All these employment situations may be marked by a feeling that something unfair has happened, and then precipitate into a claim of employment discrimination by the aggrieved job applicant or employee.

Constitutional Standards for Reviewing School Policies or Decisions

Employment discrimination claims involving schools and school people often implicate the Fourteenth Amendment Equal Protection Clause. Such claims raise a question concerning which constitutional standard is the appropriate standard for reviewing school policies or decisions. Three legal tests apply, based upon a potential characteristic (age, race, gender, etc.) that is used in making the decision. Those three tests are the Rational Basis Test, Strict Scrutiny, and the Intermediate Test. These three tests and their application to challenged employment decisions are discussed below.

The Rational Basis Test

Historically, school boards were presumed to make their decisions for permissible reasons. An aggrieved employee who did not like a decision by the board of education or its administration had the burden of overcoming this presumption of permissible decision-making. The employee would have to show that the school's decision was irrational. This is usually quite difficult to prove.

The Rational Basis Test applies when a school's policy or decision does not implicate a constitutional or civil right, or does not touch on a protected class. The Rational Basis Test asks if the classification is rationally related to a legitimate governmental purpose. Under this test, school personnel only have to state a reason for their decision. It doesn't have to be the best decision, or even a particularly wise

decision. It only has to be rationally related to a legitimate governmental purpose. The Rational Basis Test applies when the classification is unprotected for Fourteenth Amendment purposes (although they may be protected under federal or state law.) Examples of classifications that are not protected by the Fourteenth Amendment, and thus subject to the Rational Basis Test, include: age, sexual orientation, disability, ability, religion, and other ways of classifying people.

Strict Scrutiny (Compelling Governmental Interest)

Strict scrutiny is the appropriate legal test that is applied when the school board or official's decision touches on a suspect class or a fundamental interest. A "suspect class" is one having immutable characteristics, that has been stigmatized by government action, that has a history of being discriminated against, and that has historically been politically powerless as a class. A "fundamental interest" includes those freedoms listed in the Constitution and rights closely related to constitutional rights, such as the right to vote, to procreate, or to travel. Strict scrutiny requires the school to show a compelling governmental interest to justify its decision, with no less intrusive means of meeting the governmental objective. When strict scrutiny applies, as it does, for example, for making decisions about students based upon their race, the burden of proof switches from the employee to the board of education and school administration. The school officials must prove a compelling governmental interest in their decision.

Intermediate Test

There are two classifications—gender and illegal alien status—where the courts have been reluctant to apply either the rational basis test or strict scrutiny. The Intermediate Test requires that the classification affecting an individual interest must be substantially related to advance a significant governmental objective (i.e., necessary to achieve the goals), with no less restrictive means of achieving the goals. As with strict scrutiny, the Intermediate Test requires school officials to bear the burden of proof. On the surface the Intermediate Test seems to be the same as strict scrutiny, but note that a "compelling" governmental interest is a much higher standard than a "significant" governmental objective.

Title VII of the Civil Rights Act of 1964

Besides the Fourteenth Amendment, employment discrimination claims also implicate Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (1996). Title VII prohibits employers with fifteen or more employees from discriminating on the basis of race, color, religion, gender, or national origin with respect to hiring, promotion,

pay, benefits, and other terms and conditions of employment. Title VII also prohibits retaliation against employees because they exercise their rights under Title VII.

Title VII provides:

It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual, with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; and (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's race, color, religion, sex, or national origin. Title VII, Civil Rights Act of 1974, 42 U.S.C § 2000e-2 (1996).

It is also not unusual for a claim to arise for "constructive discharge." Although a person hasn't actually been discharged from a position, the employer may make the employee's work life so miserable that the employee chooses to resign. A constructive discharge claim can be shown under Title VII, if the employee can show that the working conditions created by the employer were so intolerable that a reasonable, similarly-situated person would have also resigned, and that the employer acted with the intent of forcing the employee to resign.

Bona Fide Occupational Qualification

A specific exemption is provided under Title VII for discriminating on the basis of gender, national origin, or religion (but not race or color), if the employer can show a Bona Fide Occupational Qualification (BFOQ) that is required for the normal operation of the business. In other words, a business necessity can sometimes be shown to make a rule or policy permissible, even if it results in discriminatory treatment. For example, airline companies, as a matter of company policy, put height and weight restrictions on the size of flight attendants. Such restrictions have the effect of impacting more negatively on males than females. Consequently, the height and weight restrictions might normally be discriminatory on the basis of gender. However, the airlines have a business necessity in putting height and weight restrictions on their flight attendants, connected to the safety role of flight attendants and the need for them to be able to move freely in confined spaces. Therefore, the height and weight restrictions put on flight attendants by airlines are a BFOQ.

Disparate Treatment and Disparate Impact

Two legal theories apply in Title VII claims: disparate treatment and disparate impact. Disparate treatment is used to analyze situations where a person says he or

she is being treated less favorably than others, based on being in a Title VII-protected class. With disparate impact, the person argues that the employer's policy is neutral on its face, but has a discriminatory impact on a Title VII-protected class.

Disparate treatment is often difficult to prove. The plaintiff will allege discrimination; the employer will deny it. Without direct evidence or a "smoking gun" such as a discriminatory policy or remark showing discrimination, the case will depend almost entirely on circumstantial evidence. In these types of situations, McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973), provides a method for the court to look at the evidence. First, the plaintiff must establish a prima facie case that, unless other evidence is brought forward, it appears that the employer has engaged in illegal discrimination. Once the plaintiff establishes a prima facie case, the burden then switches to the employer, to show a legitimate, nondiscriminatory reason for the employer's actions. If the employer can point to a legitimate, nondiscriminatory reason for his or her actions, then the burden switches back again to the employee. At this stage, the burden is on the employee to show that the employer's proffered reason is both false and pretext for a discriminatory reason. If the employee cannot show this, it is likely the employer will receive a summary judgment.

With disparate impact discrimination, it is not necessary to show intentional discrimination. Instead, the plaintiff must show that the employer's neutral practice has a disproportionately negative impact on a class protected by Title VII. Disparate impact discrimination cases are usually fought by statisticians as much as lawyers.

In today's environment of teacher accountability, a common application of disparate impact theory is the issue of whether tests like the National Teachers Examination (NTE) can be used to screen candidates for teacher certification. In U. S. v. South Carolina, 445 F.Supp. 1094 (D.S.C. 1977), *aff'd sub nom. National Educ. Ass'n v. South Carolina*, 4343 U.S. 1026 (1978), the U. S. Supreme Court affirmed, without a written opinion, a lower court's decision that the use of the NTE for teacher certification and salary purposes did not violate the Equal Protection Clause. To withstand scrutiny, such a test must represent a business necessity of the employer, and it must be reliable and valid, considering the training program that prepared the teacher and the actual skills the teacher will need to function effectively on the job.

Affirmative Action

Affirmative action is considered by many to be steps taken to remedy the grossly disparate staffing and recruitment patterns that are the present consequences of past discrimination and to prevent the occurrence of employment discrimination in the future. (See, U. S. Commission on Civil Rights, Statement of Affirmative Action for Equal Employment Opportunities (Washington, D.C.: U. S. Commission on Civil Rights, 1973).) The Fifth Circuit Court of Appeals described the need for affirmative action in the following manner: "It is by now well understood . . . that our society cannot be

completely colorblind in the short term if we are to have a colorblind society in the long term.” Associated Gen. Contractors of Mass. v. Altshuler, 490 F.2d 9, *cert. denied*, 416 U. S. 957 (1974). The Equal Employment Opportunity Commission (EEOC) supports the administrative adoption of affirmative action, including its adoption without admitting a violation of Title VII. 29 C.F.R. § 1608 *et seq.* (1996).

Affirmative action is considered by others to be a situation of “reverse discrimination.” Such is viewed where a preference is given to underrepresented minorities, without a finding in court of wrongdoing under Title VII. The first school-related case of reverse discrimination was Regents of the Univ. of California v. Bakke, 438 U.S. 265 (1978), in which the high court held that the use of racial quotas in university admissions decisions violated Title VII.

There is apparent conflict between the executive branch of government (represented by the EEOC) and the judicial branch of government, on the issue of affirmative action. The trend seems to be that courts will reserve to themselves the use of affirmative action as a means of rectifying past wrongs. It is inappropriate for the legislative or executive branches of government (and thus, school officials as representatives of the executive branch) to practice affirmative action. However, affirmative action is still a viable tool for a court to use to remedy past wrongs, after a finding of wrongdoing.

Gender and Discrimination

Title VII applies to discrimination based on gender (or religion), as well as to discrimination based on race, color, or national origin. As to gender, the principles discussed above apply similarly.

Gender-related BFOQs are valid exceptions to Title VII, although permissible examples of BFOQs are difficult to find in education. In Stone v. Belgrade Sch. Dist. No. 44, 703 P.2d 136 (Mont. 1985) the Montana Supreme Court approved the selective advertisement and hiring of a guidance counselor of a particular sex, to give students an opportunity to discuss intimate personal matters with a guidance counselor of either sex.

In the burden-switching process of McDonnell Douglas (where the plaintiff must show a *prima facie* case, then the employer must offer a legitimate and nondiscriminatory rationale for a decision, then the burden switches back to the plaintiff to show that the employer’s rationale is untruthful or pretext), it is not unusual for evidence to be brought to light of improper assumptions or biases. For example, a statement by a hiring committee that a female was passed over for a male, because the school needed someone with coaching experience who could handle the problems in the athletic department, would be evidence of discrimination on the basis of sex.

Pregnancy Discrimination Act

Title VII was amended in 1978 with the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (1996). The Pregnancy Discrimination Act (PDA) prohibits employers from discriminating based on pregnancy, childbirth, or related conditions. Under this act, it is prohibited to ask during employment interviews to ask the applicant about plans to marry or bear children, or to ask how one is going to care for children if hired. The PDA also prohibits discrimination in the provision of medical benefits related to pregnancy.

Sex Harassment

Discrimination on the basis of sex is prohibited by Title VII. Sex harassment claims can also be brought under Title IX, Section 1983 (on grounds of violation of a liberty interest in bodily integrity under the Fourteenth Amendment), and state claims for assault, battery, intentional infliction of emotional distress, or privacy violation by intrusion on seclusion.

Sex harassment has become a common discussion topic in the popular culture, and this has led to a misconception that sex harassment is always about sexuality. The rationale for sex harassment law is not to rid discussions of sexuality from the workplace, to create some sort of conduct code in the workplace, or to prevent highly personal relationships in the workplace. The purpose of sex harassment law is to assure that persons are not discriminated against because of their sex. Treating employees differently because of their sex (in the absence of a BFOQ) would be a violation of sex harassment law. Putting more rigid requirements on female employees compared to males, for achieving non-probationary status, would be an example of sex discrimination that may have nothing to do with sexuality.

Sex harassment law recognizes two classes of sex harassment claims: quid pro quo sex harassment and hostile work environment sex harassment. Quid pro quo (literally, “this for that”) sex harassment is shown by demonstrating that the employee was subjected to unwelcome sexual advances or requests for sexual favors, that the harassment was based on gender, and that submission to the unwelcome advances was an express or implied condition for receiving favorable treatment or for avoiding adverse treatment by the employer. Hostile work environment sex harassment differs from quid pro quo sex harassment in that it does not require conditioning of employment benefits. Hostile work environment sex harassment arises where unwelcome sexual conduct unreasonably interferes with an individual’s work performance or creates an intimidating, hostile, or offensive working environment. (See, Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).)

Many sexual harassment claims involve a fact pattern that includes a consensual sexual relationship between parties. A critical question in establishing a claim for sexual harassment is whether the conduct was “unwelcome.” The existence of consent at some point in time will be just one of many factors reviewed by the court in determining if the conduct was in the final analysis “unwelcome.”

To be actionable, hostile work environment sex harassment must be:

- (1) Severe;
- (2) Persistent;
- (3) Subjectively offensive to the victim; and
- (4) Objectively offensive.

Nearly all claims for hostile work environment sex harassment involve both physical actions as well as speech. Consequently, it is difficult to measure whether speech, which is usually protected by the First Amendment, can by itself produce an actionable sex harassment claim. Due to the requirement of persistence, it seems unlikely that any one word is severe enough to produce a claim. Likewise, the requirement of objective offense would seem to protect a speaker from a claim from a hypersensitive person, who is subjective offended by a statement that others would not usually find offensive. A complicating factor in this analysis is that, according to Connick v. Myers, 461 U.S. 138 (1983), speech in the workplace does not enjoy a great deal of protection from the First Amendment if it does not touch on an issue of public concern.

Age Discrimination

Age discrimination is not protected by Title VII. The Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 *et seq.* (1996), provides:

It shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age. 29 U.S.C. § 623(a)(1) (1996).

ADEA applies to employers with twenty or more employees who work for twenty or more weeks in a year. It protects workers age 40 and over. ADEA and Title VII are written similarly, have parallel language and provisions, and are treated by the courts similarly. Like gender, a BFOQ is available for age in employment situations, although it might prove difficult to find a position in the school setting where a business necessity could be shown for age discrimination. Perhaps a BFOQ can be shown for bus drivers.

ADEA prohibits discrimination in compensation and benefit packages for older employees. School districts commonly pay a standard amount for benefits for all employees. However, older workers may not obtain the same benefit based on the employer's expense. For example, \$100 per year for term life insurance would provide different benefits for different-aged employees, with older workers getting less benefit. Because employees receive the same support from the school district, the difference in term life insurance benefit received does not violate the ADEA. (See, Patterson v. Independent School Dist. No. 709, 742 F.2d 465 (8th Cir. 1984).

Mandatory retirement ages in education are now a thing of the past. Hopefully, constructive discharge actions against older employers are a thing of the past as well. Like Title VII, the ADEA also provides for constructive discharge against older workers.

As a final point regarding the ADEA, the ADEA is not applicable to state actors protected by the Eleventh Amendment. Currently, universities in Alabama cannot be sued in federal court under the ADEA, because of Eleventh Amendment immunity. However, under existing case law, school districts are not considered state actors under the Eleventh Amendment, so they may be sued in federal court under the ADEA. This suggests the need to reexamine the Eleventh Amendment immunity status of school districts in Alabama.

Discrimination on the Basis of Disability

The Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.* (1994) prohibits recipients of federal funds and most private businesses from discriminating against others, including employees, on the basis of a disability. ADA is patterned after Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a) (1994).

A person with a disability is defined as:

- One with a physical or mental impairment that substantially limits a major life activity;
- One with a record of such impairment; and
- One who is regarded as having such an impairment. 29 U.S.C. § 706(8)(B) (1994).

Congress specified that a person who is a current illegal drug user is not a person with a disability. 29 U.S.C. § 706(8)(C) (1994); 42 U.S.C. § 12210 (1994). "Major life activities" include functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 34 C.F.R. § 104.3(j)(2)(ii). Section 504 and ADA are enforced in educational institutions through the federal Department of Education's Office for Civil Rights.

The ADA is organized into five sections or “titles.” Title I of the ADA includes definitions and a prohibition statement that indicates prohibits discrimination against “qualified” individuals with disabilities. Critically important language indicating that a qualified individual is one who can perform “essential functions” of the job “with or without reasonable accommodations” is also included in this introductory title. Title II of the ADA expands the coverage of Section 504 to all public sector entities, whether or not they receive federal aid. An important provision in Title II is the requirement that governmental entities make “reasonable modifications” to policies and rules to allow otherwise eligible persons with disabilities to participate in governmental programs, services, or activities. Title III of the ADA provides for accessibility to public accommodations. Title IV of the ADA covers entities involved in communications industries and is responsible for requirements such as closed captioning and availability of telecommunications equipment for the deaf. Title V waives Eleventh Amendment immunity under the ADA, extends case law interpretations for Section 504 into the ADA, and specifies that a current illegal drug abuser is not covered by the ADA.

ADA-Compliant Employment Steps

To avoid claims of discrimination on the basis of disability in the employment context, school districts should take the following steps:

1. Identify the essential functions of a job. (This is required for all employees, not just those with disabilities.)
 - a. Consult with employees.
 - b. After considering employees’ ideas and observing the job, the employer should decide what the essential functions of the job are.
2. Create job descriptions. (These are required for all employees, not just those with disabilities.)
 - a. Use the essential functions to create the job description.
 - b. Discuss the job descriptions and essential functions with each employee.
 - c. Have the employee sign a form to indicate s/he understand the essential functions of the job and can do them, with or without reasonable accommodations.
3. Conduct job interviews. (These are required for all employees.)
 - a. Use the job description and essential functions to train supervisors who will interview job candidates on what questions are proper in a pre-offer interview and on what questions are proper in a post-offer interview.
 - b. Pre-offer interview questions cannot address disabilities or the essential functions.
 - c. Post-offer interview questions can address essential functions and the interviewer may discuss the disability, relevant to the essential-functions. Post-offer interview questions can also address medical examinations based on the essential functions.
 - d. Persons who conduct interviews should sign a form indicating understanding of the pre-interview and post-interview procedures.

- e. Share the essential functions of the job with the newly-hired employee.
- 4. Provide reasonable accommodations
 - a. Use steps 1, 2, and 3, above, to guide post-offer disability-related questions relevant to the essential functions. Discuss also the medical examination, based on the essential functions.
 - b. Determine if the new employee is disabled and if the disability is known. If so, the search for reasonable accommodations should continue.
 - c. Seek external and internal sources for addressing reasonable accommodations.
 - d. Ask ideas of the new employee about accommodations.
 - e. Document your decisions about requests for accommodations.
- 5. Evaluate employees
 - a. Evaluate all employees on the basis of steps 1, 2, and 3. Evaluate employees with disabilities on the basis of step 4 as well.
 - b. Take note of the purpose, method, criteria, timing, possible consequences, and the right to appeal the evaluation.
 - c. Take time to evaluate the process of steps 1 through 5.

(Source: Albert S. Miles, Ph.D., J.D., "The Americans with Disabilities Act (ADA) Employment Provisions for Educators: Update and Overview." Unpublished Manuscript, The University of Alabama (2002.))

Relationship Between Reasonable Accommodation and Essential Functions

A sequence of U.S. Supreme Court cases has linked the concept of reasonable accommodation and the concept of essential functions. Essential functions identify the dividing line between the employer's and employee's rights under ADA. A person with a known disability is qualified for a job if she or he can do the essential functions of the job, with or without reasonable accommodations.

47. EMPLOYMENT ISSUES: CONSTITUTIONAL RIGHTS

Expressive Rights

A series of United States Supreme Court cases has served to help public school employers to understand the expressive rights enjoyed by their employees. Most of these cases involved termination of public employees who got in trouble with their employers because of their speech or writings. The first major case in this area was Pickering v. Board of Education, 391 U.S. 563 (1968), in which a teacher was fired after writing a letter to the local newspaper, criticizing the school district's budgetary decisions. Applying a balance test, the Supreme Court weighed the teacher's interest in expressing his views on issues of public concern, with the school district's interest in providing educational services. If the school district could show evidence that the letter jeopardized the teacher's relationship with his immediate supervisor and fellow teachers or impaired classroom performance or school operations, then the school district's interest would outweigh the teacher's interest. Because such evidence balancing in favor of the school district was absent, the court held in favor of the teacher.

For at least a decade after the Pickering decision, the lower courts seemed to characteristically weigh the Pickering balance in favor of the teacher in all types of fact situations. In Mt. Healthy City School District v. Doyle, 429 U.S. 274 (1977) the Supreme Court established that a public school teacher could be fired, even if the teacher engaged in protected expression. Mt. Healthy represents a "mixed motive" type of case, where there is evidence that the teacher's contract was terminated for both protected and unprotected conduct. Under the Mt. Healthy test, the burden is first on the employee to show that the employee's speech or conduct was constitutionally protected and also a motivating factor in the adverse employment decision. Then, the burden switches to the school board, to show by a preponderance of the evidence that it would have made the same decision if the protected expression had never occurred.

Givhan v. Western Line Consolidated School Dist., 439 U.S. 410 (1979), originated in a situation where a teacher and a principal did not get along during desegregation of the school. Bessie Givhan was dismissed from her high school English teaching position after a series of discussions with her principal, described by her principal as "insulting," "hostile," "loud," and "arrogant" criticisms of the school. Givhan argued that her views were on issues of public concern. The school district argued that her views were expressed privately and were therefore not protected by the First Amendment. The Supreme Court held that a public employee does not forfeit her First Amendment protection against governmental abridgment of freedom of speech when she arranges to communicate privately with her employer rather than to express her views publicly.

In Connick v. Myers, 461 U.S. 138 (1983), an assistant district attorney in New Orleans lost her job after circulating a questionnaire to coworkers concerning office

moral and operations in the district attorney's office. The Supreme Court overturned the lower courts and denied the assistant district attorney her job, finding that her conduct involved issues of private concern and not issues of public concern. The court held that issues of public concern were protected speech, but issues of private concern were not. Whether or not speech is an issue of public concern depends upon the content of the speech, and both the context and form of the speech. In other words, the burden of the government employer in justifying the discharge runs on a sliding scale; the employer's burden of proof increases as the employee's speech more directly implicates public issues, and decreases as the speech can be shown to interfere with working relationships that are essential for fulfilling public responsibilities. Since Connick, if the question is a close call, the courts seem to characteristically find the contested expressions of teachers and other public employees to be issues of private, rather than public, concern. The examination of the context and form of the speech often brings in evidence of the impact of the speech on the public employer's business. An observance of a negative impact helps the argument that the speech is private and not public. However, if the issue is clearly one of public concern, it is protected, and then the inquiry requires that the school district's interest in efficient school operations must be balanced against the employee's right to speak on matters of public concern.

The most recent Supreme Court case involving employee speech rights has had the most profound effect on those rights. In Garcetti v. Ceballos, 126 S.Ct. 1951 (2006), the court considered a situation where the district attorney for Los Angeles asked one of his lieutenants to draft a report for him. The district attorney objected to information in the report and fired the senior attorney. Under the rule supplied by Connick v. Myers, Ceballos' speech was clearly on a matter of public concern. However, the Supreme Court adopted a new rule, that when an employee makes a statement pursuant to his official duties, the Constitution does not insulate his communications from employer discipline.

Perhaps the most noticeable outcome of the Garcetti case is its impact on reports by whistle-blowers within government, which no longer appear to be protected speech. For example, in Condiff v. Hart Co. Sch. Dist., 770 F.Supp.2d 876, 268 Educ. L. Rep. [797] (W.D.Ky. 2011), an elementary teacher informed her principal and superintendent by email of sexual harassment of her step-daughter by a high school teacher. The elementary teacher was soon non-renewed from her contract. The elementary teacher brought a Title IX retaliation and a speech retaliation claim. The federal district court granted summary judgment to the school district on the speech claim by applying Garcetti, and granted summary judgment on the Title IX claim, on grounds that the teacher could not prove pretext in her failure to be rehired.

Another consideration in analyzing the expressive rights of school personnel is the forum in which the speech occurs. Speech in a public forum or limited public forum, on an issue clearly of public concern, enjoys a great deal of protection. Speech in a nonpublic forum, especially within the school (which is a nonpublic forum), is protected

very little. Since Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988), it has become very clear that speech in the classroom is perceived as school-sponsored, and thus “curriculum,” which school officials have the right to curtail. (See, Module 59, p. 6, for a discussion of the Hazelwood standard.) Consequently, direction by a principal to teach using particular materials or methodologies (or direction by a principal to not teach using particular materials or by certain methodologies) is a directive that must be followed. (Dagley, “Trends in Judicial Analysis Since Hazelwood: Expressive Rights in the Public Schools,” West’s Education Law Reporter, Vol. 123, No. 1, (1998), pp. 1-36.)

Public schoolteachers enjoy little or no academic freedom, especially when higher authority has acted to redirect their teaching.

Association Rights

Most of the court cases involving the termination of teacher contracts for “immorality” in the 1950’s and 1960’s occurred because teachers were thought to be affiliated with the Communist Party. In Keyishian v. Board of Regents, 385 U.S. 589 (1967) the Supreme Court held that mere membership in an organization, without specific intent to further the unlawful aims of the organization, could not disqualify a person for public school employment. A First Amendment right to association is implicated in such situations.

Other legislation targeted membership in organizations like the NAACP. In Shelton v. Tucker, 364 U.S. 479 (1960), the Supreme Court struck down an Arkansas law that required all school teachers to submit annually a list of every organization they had joined or regularly supported during the prior five years.

Association rights are also implicated in situations where the school employee is politically active. Section § 16-3-3 Code of Alabama (1975) prohibits a person who is an employee of the (state) board or who is or has been engaged as a professional educator within five years prior to election to be eligible for membership on the board. A federal district court found this prohibition to be an unconstitutional provision in Gold et. al. v. Baggett et. al., Civil Action No. 76-120-N (M.D.Ala. 1976). The same conclusion was reached by a state court in Alabama State Ethics Com’n ex rel Charles Graddick v. Dr. Evelyn Pratt, Civil Action No. CV-83-175-G (Circuit Court, Alabama Fifteenth Judicial Circuit, 1983). However, state ethics commission rulings have made it clear that it is a conflict of interest for a school employee to be on the same governing board that employs him or her. (See, materials on Alabama State Ethics Commission, compiled by Dr. Paulette Rogers, and included in the materials following Module 33.)

Search and Seizure

In New Jersey v. T.L.O., 469 U.S. 325 (1985), the U. S. Supreme Court held that school authorities can conduct searches of students without a warrant, when the school

authorities have reasonable suspicion (and not probable cause) that the search will produce evidence of violation of school rules. What is generally not known is whether T.L.O. extends to include the search of school employees and their desks, filing cabinets, and personal effects. However, in a 1987 case involving a warrantless search of an employee physician's office by state hospital supervisors, the Supreme Court applied a reasonableness standard for work-related searches and concluded that a warrant was not necessary for work-related searches. O'Connor v. Ortega, 480 U.S. 709 (1987).

Another application of search and seizure law to the school setting is the use of drug testing for school employees, in the absence of individualized suspicion of the employee. The Supreme Court has upheld the use of suspicionless drug tests for employees in only two situations: railroad employees involved in accidents (Skinner v. Railway Executives' Ass'n, 489 U.S. 601 (1989)); and, customs employees who carry firearms and are involved in the interdiction of illicit drugs (National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989)). Courts have generally struck down random drug tests, in the absence of individualized suspicion, involving school personnel in general. (See, Patchogue-Medford Congress of Teachers v. Board of Education of Patchogue-Medford Union Free School District, 510 N.E.2d 325 (N.Y. 1987) and Georgia Ass'n of Educators v. Harris, 749 F.Supp. 1110 (N.D.Ga. 1990)). However, there are two cases indicating that suspicionless drug testing is permissible for those involved in the operation of motor vehicles and those involved in security or safety-sensitive roles. (See, e.g., American Fed'n of Gov't Employees, AFL-CIO v. Sanders, 926 F.2d 1215 (D.C.Cir. 1991) and National Treasury Employees Union v. Yeutter, 918 F.2d 968 (D.C.Cir. 1990)). In M.C.English v. Talladega County Bd. of Educ., 938 F.Supp. 775 (N.D.Ala. 1996), the court upheld random, suspicionless drug testing of school bus mechanics.

Personal Behaviors

In the 1930's and 1940's, it was common for local boards of education to terminate the employment of teachers who were found to be married, in violation of contracts and policies designed to reserve teaching positions for unmarried females. One might suppose that the employment future was equally short for a teacher found to be unwed and pregnant, or living with another without benefit of marriage, or suspected of being homosexual. Such issues implicate the privacy rights of public employees in personal behaviors.

A lineage of cases, including the abortion rights case of Roe v. Wade, 410 U.S. 113 (1973), has developed recognition for a right to privacy, in connection with the concepts of home, hearth, parents, marriage, family, contraception, and procreation. Consequently, personal behaviors which fit this lineage are constitutionally protected, and school boards may not pass policies interfering with teachers' rights in these areas. For example, the Fifth Circuit Court of Appeals struck down an Alabama school board

policy that prohibited the employment of unwed parents. Avery v. Homewood City Board of Education, 674 F.2d 337 (5th Cir. 1982), cert. denied, 461 U.S. 943 (1983).

When the Supreme Court first addressed criminal laws against homosexual activity, the court held that it was not protected under the lineage of privacy cases listed above. (Bowers v. Hardwick, 478 U.S. 186 (1986), rehearing denied 478 U.S. 1038 (1986).) The Supreme Court reversed its position in 2003, when it extended constitutional privacy to homosexual activity in Lawrence et al. v. Texas, 2003 U.S.L.W. 02-102 (June 26, 2003).

Canceling a teacher's contract for immorality will require the school board to demonstrate one of two legal tests. State courts have selected two alternative legal tests in deciding whether the cancellation is warranted. In one grouping of states, teachers are viewed as "moral exemplars" for the community. With the moral exemplar standard, the school board need only show that the activity engaged in is immoral and that is sufficient proof to sustain the termination of the teacher's contract. In a second and larger grouping of states, school boards must show a connection (nexus) between the proscribed conduct and a negative impact on the teacher's performance in the classroom. The nexus standard makes it more difficult to terminate teachers because of immorality.

Personal Appearance

A few courts in the late 1960's and early 1970's found the right to govern one's own appearance to be a fundamental constitutional right. However, since the 1970's there has been a tendency to support reasonable dress and grooming restrictions for teachers. The U. S. Supreme Court, in Kelly v. Johnson, 425 U.S. 238 (1976), acknowledged that personal appearance does implicate a constitutional right, but only enough to require the individual to show that the regulation is irrational, that there is a lack of a rational connection between the regulation and a legitimate public purpose.

School officials can impose personal appearance restrictions on school employees, as long as they can point to a legitimate reason for the regulation, and that there is a rational connection between the regulation and a legitimate public purpose.

48. EMPLOYMENT ISSUES: PUBLIC FORUM DOCTRINE

Over sixty years ago, the U.S. Supreme Court developed the Public Forum Doctrine as a means of addressing the extent to which government can control individual expression in places owned by the public in common. (See, Hague v. CIO, 307 U.S. 496 (1939).) The purpose of the public forum doctrine is an attempt to balance individual expressive rights with the right of the government to preserve a publicly-owned space for its intended governmental use and purpose. Public forum doctrine addresses questions such as whether a municipal airport authority can limit access to its terminals by members of groups like Hare Krishna, or whether a postmaster can deny a request from a girl scout troop to sell cookies in the post office lobby. In the school setting, public forum doctrine is used to analyze situations where groups want to use a part of a school building for a meeting, want to have announcements given on their behalf on a school's public address system, want to post items on school bulletin boards, or want to use the school system's distribution system to send announcements out to parents or other individuals in the community.

In Perry Education Association v. Perry Local Educators' Assn., 460 U.S. 37 (1983), perhaps the most important U.S. Supreme Court case explaining and using the public forum doctrine, two rival teacher unions fought over access to the school district's mail delivery system. The school district refused to allow one of the two unions (the one that was not the bargaining agent for the district) to use the delivery system. The collective bargaining agreement gave the bargaining agent exclusive access to the system. The union without representational status and access to the mail system alleged a violation of its speech rights in not having access to the mail system. The union with representational status won the case.

Public Forum

In Perry, the court identified three types of fora in the public forum doctrine: a public forum, a nonpublic forum, and a limited public forum. A *public forum* is a space which has "immemorially been held in trust for the use of the public and, time out of mind, ha(s) been used for purposes of assembly, communicating thoughts between citizens, and discussion of public questions." (460 U.S. at 45.) The quintessential public forum is the soapbox in the park (which no one has probably ever seen, unless one has visited Hyde Park in London). In a public forum, government has limited ability to control the expression.

Nonpublic Forum

A *nonpublic forum* is public property, which has a governmental function other than the open and unfettered exchange of ideas. In general, a public school building and all the classrooms within it are nonpublic fora. Even the bulletin board on the wall

and the school's public address system are nonpublic fora. Such spaces in a school were created for the purpose of delivering a curriculum, not particularly for independent free expression by disconnected members of the community.

Like private property owners, governmental agencies have power to preserve property under their control for the use to which they were lawfully dedicated. (Adderley v. Florida, 385 U.S. 39 (1966)). Although school buildings are publicly-owned buildings, they are not usually public fora. They are nonpublic fora, until the government agency decides to let it be used by members of the public for purposes other than its intended governmental purpose. In Perry, the court decided that the school's distribution system was a nonpublic forum, and it had not been opened up for use by outside groups. Therefore, the representational union had exclusive access to the system.

Limited Public Forum

A governmental agency may decide from time to time to permit members of the community to use a public facility under its control for the purpose of free expression of ideas. For example, a school may permit an auditorium to be used on a Saturday night by the League of Women Voters for a meeting to hear speeches from local political candidate, or a church group might rent a gymnasium for a worship service on Sunday mornings. In these situations, the governmental agency has converted its nonpublic forum into something like a public forum—a *limited public forum*. The government—or a school—usually cannot control the speech that occurs in a limited public forum, any more than it can control the speech in a traditional public forum. The government—or a school—can control the speech in a limited public forum only when it can show a compelling governmental interest in controlling the speech, and there is no less obtrusive means of meeting the governmental interest. In the auditorium being used by the League of Women Voters in the example above, school officials lose the ability to control the speech during the candidates forum, unless a compelling governmental interest can be shown for controlling the speech, and the means of controlling the speech is the least obtrusive of the possible ways of controlling the speech. A compelling governmental interest, sufficient to warrant controlling speech in the school setting, would be the need to protect from a "material and substantial" disruption. This is the standard supplied in Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).

By comparison, in the nonpublic forum, such as a classroom, government does not need to show a compelling governmental interest to control speech. It only needs to have a good reason, such as the need for a student to be quiet so the teacher may teach the class. Maintaining nonpublic forum status is a strategic benefit to the school district, because a plaintiff suing the school district would have the burden of proving that the school district's action in the nonpublic forum is irrational, which is usually very difficult to prove. If the forum is declared by the court to be a limited public forum, the burden switches to the school, and it must show a compelling governmental interest (a

material and substantial disruption) to be able to control speech in the forum, and this is exceedingly difficult to prove. The party without the burden of proof has the strategic advantage in lawsuits arising in these types of situations.

49. STUDENT ISSUES: CONDUCT REGULATIONS

Historically, even in the absence of statutory authority, school boards and school officials have always had the right to make reasonable rules concerning the proper conduct of pupils under their control. If the rule does not touch on a constitutional or civil right, nor implicates a protected class under civil rights law, then the burden of proof in a court challenge against the rule is on the plaintiff parent or child and not the school. The parent or child would have to show that the rule itself is irrational, and the school board would not have to show that the rule is rational or even a good rule. But if the rule touches on a constitutional or civil right, or implicates civil rights law, then the burden would switch to the school board to justify its rule. Generally, who carries the burden is often the losing party in such challenges to school rules.

Alabama Statutes

Several Alabama statutes relate to conduct regulations. Section § 16-6B-5 Code of Alabama (1975) imposes accountability requirements on school districts with regard to school safety and discipline. Failure of the local school district to comply with these requirements invites intervention by the State Superintendent, who may direct the day-to-day management of the district until compliance with school safety provisions is achieved. In the sections below, the various duties imposed on boards of education and school personnel by statute are listed and discussed briefly.

Duty to Adopt Conduct Codes

Four statutes place a duty on boards of education to adopt conduct codes. Section § 16-28-12(b) Code of Alabama (1975) requires local school boards to adopt conduct code policies, provide a copy of the conduct code to parents at the beginning of each school year (together with a copy of the statute), and obtain signatures from the student and their parents (or guardians) to document receipt of the policy. Section § 16-28A-3 Code of Alabama (1975) requires each local board of education to develop a written policy on student discipline and behavior and to broadly disseminate the policy upon adoption. Section § 16-1-14 Code of Alabama (1975) requires local school boards to prescribe rules and regulations relating to student conduct, and also indicates legislative permission to remove, isolate, or separate pupils who create discipline problems and whose presence may be detrimental to the best interest and welfare of other pupils. Section § 16-1-24.1(a) Code of Alabama (1975) requires school districts to adopt discipline plans setting forth policies, practices, and procedures dealing with students or other persons who bring illegal drugs, alcohol, or weapons on school campuses.

Duty to Disseminate

Two Alabama statutes place a duty on school officials to disseminate conduct code policies. Interestingly, both provisions require the gathering of documentation to demonstrate that parents have seen the conduct code. Section § 16-28-12(b) Code of Alabama (1975) requires local school boards to provide a copy of the conduct code to parents at the beginning of each school year (together with a copy of the statute), and obtain signatures from the student and their parents (or guardians) to document receipt of the policy. Section § 16-1-24.1(e)(1) Code of Alabama (1975) requires that discipline plans be distributed to students and parents, and that students and parents sign statements acknowledging they have received and read the plans. Section § 16-28A-3 Code of Alabama (1975)

Duty to Report

Two statutory provisions place a duty on school personnel to report wrongdoing. Section § 16-1-24 Code of Alabama (1975) requires school personnel to report violent disruptive incidents occurring on school property during school hours, or during school activities conducted on or off school property after school hours or at any other time when such incident can be reasonably related to schools or school functions. Under this statute, teachers must report violent incidents immediately to principals, principals must file written reports to the superintendent within 72 hours, and superintendents must furnish a copy of the report to the school board and the county sheriff (although the timeline for furnishing this report by the superintendent to the board and sheriff is not specified.) A school official failing to report violent incidents under this statute may be found guilty of a Class C misdemeanor. Section § 16-28-12(c) Code of Alabama (1975) requires school officials to report to the district attorney within 10 days the failure of parents to compel their children to conduct themselves in conformance with the conduct code policy, or the school officials face criminal penalties of their own.

Duty to Get Parents Involved

Two acts of the Alabama legislature place a duty on boards of education to do more to assure parental involvement in disciplinary problems with their children. Section § 16-28-2.2 Code of Alabama (1975) requires local boards of education to establish educational programs to inform parents of their education-related responsibilities regarding their children. Section § 16-28-12(a) Code of Alabama (1975) places criminal liability on parents who fail to compel their children to conduct themselves properly at school. Although this last provision places criminal liability on parents in certain circumstances, it also places a duty on school personnel to recognize its utility.

Duty to Separate Wrongdoers from School

Section § 16-1-24.1(c) Code of Alabama (1975) prohibits readmission of a student who has violated board policy concerning drugs, alcohol, weapons, physical harm to a person, or threatened physical harm to a person, until (1) criminal charges arising from the conduct have been disposed of and (2) the student has satisfied all additional requirements imposed by the local board of education as a condition for readmission. This statutory prohibition may inadvertently conflict with federal special education law, which imposes a duty to provide a free, appropriate education for all special education students, regardless of the circumstances.

Duty to Address Hazing

Section § 16-1-23 Code of Alabama (1975) prohibits hazing, makes it a Class C misdemeanor, and prohibits the expenditure of public funds, through grants, scholarships, or awards, for those who practice hazing.

50. STUDENT ISSUES: SUSPENSIONS AND EXPULSIONS

Section § 16-1-14, Code of Alabama (1975) requires local school boards to adopt disciplinary policies that permit school officials to remove, isolate, or separate pupils who create disciplinary problems in the classroom or other school activity and whose presence in the class may be detrimental to the best interest and welfare of the class as a whole. Such exclusions from the school setting come in two forms: suspensions and expulsions.

Definitions

In Goss v. Lopez, 419 U.S. 565 (1975), the U. S. Supreme Court addressed the distinction between suspensions and expulsions and drew a line between the two types of exclusion at ten days. Suspensions are removal from the school setting for ten days or less. Expulsions are removal from the school setting for a time period of more than ten school days. Suspensions require only minimal due process; expulsions require significantly more procedural steps to accomplish. School administrators have the power to suspend students; only the school board may expel. Many school districts have a school administrator who serves as a hearing officer for expulsions. School boards would do well to have the hearing officer's decision ratified by the board.

Due Process Requirements

The due process that is required to accomplish a suspension is quite simple: 1) the school administrator gives oral or written notice of the charges against the student; 2) the student has an opportunity to present his side of the story; and 3) the school administrator explains the evidence against the student. Expulsions require many more procedural steps, including, at least the following: 1) notice in writing of the intent to expel; 2) notice in writing of a hearing before the school board; 3) right to counsel; 4) impartiality on the part of the school board as a hearing body; 5) right to subpoena and call witnesses; 6) right to a record of the proceedings; 7) vote by the school board.

Alabama Statutory Provisions

Suspensions and expulsions should be specifically listed as potential consequences in the conduct codes developed under Sections §§ 16-1-14 and 16-1-24.1(a), Code of Alabama (1975). Section § 16-1-14 Code of Alabama (1975) provides:

Any city, county, or other local public school board shall, consistent with Section §16-28-12, prescribe rules and regulations with respect to behavior and discipline of pupils enrolled in the schools under its jurisdiction and, in order to enforce such rules and regulations, may remove, isolate, or separate pupils who create disciplinary problems in any classroom or other school activity and whose presence in the class may be detrimental to the best interest and welfare of the pupils of such class as a whole. Any rules and regulations adopted pursuant to this section shall be approved by the State Board of Education. Any such removal, isolation, or separation may not deprive such pupils of their full right to an equal and adequate education.

The existence of the standard "best interest and welfare of the pupils of such class as a whole" for deciding when to remove students who are disciplinary problems is in conflict with federal law regarding special education students. The Individuals with Disabilities Education Act, 20 U.S.C. § 1200 *et seq.* (1997) places a duty to serve disabled students, and specifically rejects a balance of interest test, such as the interest of the disabled student balanced against the interest of the other students. This duty continues in the reauthorization of IDEA, the Individuals with Disabilities Education Improvement Act, H.R. 1350, Sec. §612 (a)(1)(A) (November 2004). Consequently, federal law prevails, and the Alabama statute should be considered ineffective as to students receiving special education services as required by IDEA.

Section § 16-1-24.1(a) Code of Alabama (1975) also requires the creation of a conduct code, specifically focusing on producing a drug-free school environment:

The Legislature finds a compelling public interest in ensuring that schools are made safe and drug-free for all students and school employees. The Legislature finds the need for a comprehensive safe school and drug-free school policy to be adopted by the State Board of Education. This policy should establish minimum standards for classes of offenses and prescribe uniform minimum procedures and penalties for those who violate the policies. It is the intent of the Legislature that our schools remain safe and drug-free for all students and school employees. The State Board of Education shall adopt and all local boards of education shall uniformly enforce policies that protect all students and school employees. The State Board of Education shall require local school systems to modify their policies, practices or procedures so as to ensure a safe school environment free of illegal drugs, alcohol, or weapons. Any rules and regulations adopted by the State Board of Education pursuant to this section shall be exempt from Section 41-22-3(3). These modifications shall include the formulation of a discipline plan setting forth policies, practices, and procedures dealing with students or other persons who bring illegal drugs, alcohol, or

weapons on a school campus. The discipline plan shall also include uniform drug-free school policies with uniform penalties

A third statutory provision requires the adoption of conduct code policies and procedures, focusing on the problem of firearms. Section § 16-1-24.3 Code of Alabama (1975) requires all local school boards to develop and implement policies and procedures requiring the expulsion of students, for a period of one year, who possess a firearm in a school building, on school grounds, on school buses, or at other school-sponsored functions.

These last two statutory provisions, one dealing with drugs and the other with firearms, may lead school officials to falsely believe that it is proper to remove, isolate, or separate pupils who are in special education, the same as pupils who are not in special education. Readers are reminded that in certain applications, this section would violate federal special education law, because only the IEP team may determine placement for special education students. See Module 58, Students with Disabilities, for further information.

51. STUDENT ISSUES: DISCIPLINARY TRANSFERS

Statutory Provisions

Traditionally, school officials have enjoyed wide latitude in making decisions about where to place students, including the ability to transfer students for disciplinary purposes. This view is reinforced by Alabama law. Section § 16-1-14, Code of Alabama (1975) authorizes school officials to remove, isolate, or separate pupils who create disciplinary problems and whose presence may be detrimental to the best interest and welfare of other pupils. With the advent of special education law, through the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1200, *et. seq.* the authority of school officials to transfer special education students under state law is limited. This limitation continues with the reauthorization of IDEA. (Individuals with Disabilities Education Improvement Act of 2004, H.R. 1350 (November 2004).)

Reauthorization of IDEA

The statutory language in Section § 16-1-14 may mislead school officials into falsely believing that it is proper to transfer students who are in special education for disciplinary purposes. Prior to the recent reauthorization of IDEA, school officials could remove a special education student to an alternative setting, and then for only 45 days, and only when weapons or drugs are involved. If the student was a danger to others, school officials could not remove the child to an alternative setting for 45 days; the school official could only ask for a due process hearing and convince the hearing officer that removal was appropriate, sufficient to compel the hearing officer to order the student's placement in the alternative setting, and even then for only 45 days. The language after the reauthorization is less clear.

Section §615(k)(1)(A) of IDEIA requires a case-by-case determination of any unique circumstances to order a change of placement for a child with a disability who violates the student conduct code.

Section §615(k)(1)(B) of IDEIA gives school personnel authority to remove a child with a disability who violates the student conduct code from their current placement to an appropriate interim alternative setting, another setting, or suspension, for not more than 10 school days (to the extent such alternatives are applied to children without disabilities.)

Section §615(k)(1)(C) of IDEIA provides:

If school personnel seek to order a change in placement that would exceed 10 school days and the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability pursuant to subparagraph (E), the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner and for the same duration in which the procedures would be applied to children without disabilities, except as provided in section 612(a)(1) although it may be provided in an interim alternative educational setting.

Additionally, Section §615(k)(1)(G) provides:

School personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, in cases where a child--

- `(i) carries or possesses a weapon to or at school, on school premises, or to or at a school function under the jurisdiction of a State or local educational agency;
- `(ii) knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency; or
- `(iii) has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency.

On the surface, it would appear that the reauthorization of IDEA (IDEIA) gives school officials more latitude in using disciplinary transfers as a tool for special education students who violate the school's conduct code. There are two very important limitations, however:

1. Section §615 (k)(2) requires that the interim alternative educational setting in the two options above (subparagraphs (C) and (G)) must be determined by the IEP Team.
2. Section 615 §(k)(1)(D) requires that the child continue to receive educational services, as provided in section 612(a)(1), so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP; and receive, as appropriate, a functional behavioral assessment, behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur.

Previous to the reauthorization, a school official could unilaterally (without involvement of the IEP team) transfer students who violate firearm or drug aspects of the conduct code to an alternative setting for 45 days. While dangerousness supplies a third rationale for transferring to an alternative setting, the school official apparently must now go to the IEP team for concurrence in moving a student to the alternative setting for up to 45 days in all three situations.

A further caveat is provided by the second limitation listed above. It is difficult enough to provide a free, appropriate public education when there is a wide range of placement options available. It may not be possible to provide required services in a limited setting such as an interim alternative educational setting.

Section 504 and ADA

Disciplinary transfers may also create legal liability under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a) (1994), and the Americans with Disabilities Act, 42 U.S.C. § 12101 *et. seq.* (1994). Both federal statutes prohibit discrimination of students *because of their disability*. The reason why a manifestation determination is done prior to making decisions about excluding special education students, who are also protected by Section 504 and ADA, is to make certain that the student is not being punished *because of the disability*. If a student is protected by Section 504 or the ADA, but not receiving special education services under IDEA, school officials would do well to accomplish a relationship test or manifestation determination before transferring a student for disciplinary purposes, to make certain they are not punishing *because of the disability*.

Interaction with Existing Desegregation Orders

School officials are also advised to consider the application of disciplinary transfers to any existing court orders regarding school desegregation. Disciplinary transfers may have the unintended impact of altering demographic profiles based upon race, and consequently placing the school district in legal jeopardy. School officials should consult the school board attorney when disciplinary transfers may have the effect of changing demographic patterns in the school district.

52. STUDENT ISSUES: CORPORAL PUNISHMENT

Definition of Corporal Punishment

Corporal punishment is the use of physical punishment as a form of discipline for school children. Although the term is generally associated with spanking, paddling, or whipping, it can also refer to any physical act that causes discomfort to the student. For example, slapping, striking, grabbing, pulling to the ground or out of the classroom, or requiring the student to stay in a physically difficult posture, are all forms of corporal punishment. Corporal punishment may also include the continuance of strenuous physical activity, for example, running laps around a field. Some of the more interesting and creative forms of corporal punishment found in case law are where: one teacher held the child up in the air by the ankles, while the second teacher spanked the child with a split paddle (Garcia v. Miera, 817 F.2d 650 (10th Cir. 1987)); a teacher put a straight pin through the student's upper arm (Brooks v. School Board of Richmond, Va., 569 F.Supp. 1534 (E.D.Va. 1983)); and, a welding teacher on four occasions hit the testicles of students with tongs (Mott v. Endicott School District No. 308, 695 P.2d 1010 (Wash.Ct.App. 1985)).

Constitutional Rights

Case law involving corporal punishment has focused on two Amendments to the U. S. Constitution: the Eighth and Fourteenth Amendments. In Ingraham v. Wright, 430 U.S. 651 (1977), the U. S. Supreme Court rejected the argument that corporal punishment in the school setting violated the Eighth Amendment's prohibition against "cruel and unusual punishment." Interestingly, the court also rejected the notion that procedural due process, like that required by Goss v. Lopez in suspension situations, was required prior to delivering corporal punishment. The court pointed to the availability of state remedies, such as assault or battery claims, when corporal punishment was unreasonable or the force used was excessive.

Six of the federal courts of appeal have recognized that the Fourteenth Amendment includes among its protections a general interest in privacy, as well as liberty interest in bodily integrity. (See, Garcia v. Miera, 817 F.2d 650 (10th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988).) Consequently, the use of excessive force in corporal punishment situations could trigger a successful substantive due process claim. In Hall v. Tawney, 621 F.2d 607 (4th Cir. 1980), the Fourth Circuit Court of Appeals said that the standard for deciding if substantive due process is violated is "whether the force applied caused injury so severe, was so disproportionate to the need presented, and was so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience." (621 F.2d at 613.) The Fifth Circuit Court of

Appeals, on the other hand, has held that substantive due process rights are not implicated if unreasonable student discipline is proscribed by the state and if the state provides adequate post-punishment remedies for abuse. Fee v. Herndon, 900 F.2d 804 (5th Cir. 1990), *cert. denied*, 498 U.S. 908 (1990).

States Where Prohibited

Legislation or regulation has been adopted to prohibit corporal punishment in the following states: Alaska, California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, Oregon, Utah, Vermont, Virginia, Washington, and Wisconsin. (See, Dayton, "Corporal Punishment in the Public Schools: The Legal and Political Battle Continues," 89 West's Education Law Reporter 729 (1994). Also see, LaMorte, School Law: Cases and Concepts 7th ed..(Boston: Allyn & Bacon) 2002: p. 142.) In the absence of state legislation or regulation prohibiting corporal punishment, local boards of education are free to permit it, prohibit it, or give parents the right to prohibit it. Even though the Rhode Island legislative branch has not prohibited corporal punishment, every local school board in Rhode Island has chosen to prohibit it.

Legislative Immunity

Neither the Alabama Legislature nor the State Board of Education has prohibited corporal punishment, although a few school boards have done so by local policy. Legislation passed in 1995 (Acts 1995, No. 95-539, p. 1121, § 3) granted immunity to public school teachers when inflicting corporal punishment of students or when maintaining order and discipline in school settings, as long as such disciplinary actions are consistent with local school board policy. Section § 16-28A-2 Code of Alabama (1975). Immunity is also granted to principals, assistant principals, and other school personnel to use corporal punishment in accord with local school board policy. Section § 16-28A-5 Code of Alabama (1975).

Section § 16-28A-1 Code of Alabama (1975) provides:

It is the finding of the Alabama Legislature that the people of Alabama have two basic expectations of their public schools: (1) that students be allowed to learn in a safe classroom setting where order and discipline are maintained; and (2) that students learn at the level of their capabilities and achieve accordingly. The Legislature finds further that every child in Alabama is entitled to have access to a program of instruction which gives him or her the right to learn in a non-disruptive environment. No student has a right to be unruly in his or her classroom to the extent that such disruption denies fellow students of their right

to learn. The teacher in each classroom is expected to maintain order and discipline. Teachers are hereby given the authority and responsibility to use appropriate means of discipline up to and including corporal punishment as may be prescribed by the local board of education. So long as teachers follow approved policy in the exercise of their responsibility to maintain discipline in their classroom, such teacher shall be immune from civil or criminal liability. It shall be the responsibility of the local boards of education and the administrators employed by them to provide legal support to each teacher exercising his or her authority and responsibility to maintain order and discipline in his or her classroom as long as the teacher follows the local board of education's policy. Such support for the teacher shall include, but not be limited to, providing appropriate legal representation to defend the teacher against charges, filing of a written report pursuant to Section 16-1-24, seeking the issuance of a warrant or warrants for any person or persons threatening or assaulting a teacher, and the timely assistance and cooperation with the appropriate authorities in the prosecution of any person or persons threatening or assaulting a teacher. Local school board authorities and school administrators providing such support shall be absolutely immune from civil and criminal liability for actions authorized or required by this section.

Note that the section above grants immunity to teachers from civil or criminal liability "so long as (the) teacher(s) follow approved policy." It also grants absolute immunity for school administrators and school board authorities who provide support for teachers in defense of a claim "for actions authorized or required." Neither statement provides unlimited immunity. If discipline is provided in a manner that procedurally violates policy, it would not be immune. If discipline is provided in a manner that is so severe or excessive that it shocks the conscience, it would not be immune. Even if the corporal punishment meets board policy in all respects, the school employee who corporally punishes can still be reported to the Department of Human Resources, creating potential for personal and professional embarrassment.

Because the legislative immunity provided by the Alabama Legislature points to local board policy, the language of the local board policy can become a critical factor in situations involving alleged wrongdoing related to corporal punishment. Some school districts in Alabama have provided waiver rights to parents, permitting parents to decide that corporal punishment will not be used with their children. A teacher or administrator who spans a child over the parent's objection, where the local board has given the parent that right, would be outside board policy, and would thus lose immunity.

Parental Objections

In jurisdictions where both state law and board policy permit the administration of corporal punishment, parents may demand that corporal punishment not be used on

their child. In Baker v. Owen, 395 U.S. 294 (M.D.N.C. 1975) a three judge panel at the district court level heard the case, where a parent claimed that her right as a parent to control the upbringing of her child outweighed the right of the school to choose corporal punishment as a means of discipline. The court granted the school district summary judgment, and the U. S. Supreme Court affirmed without comment. 423 U.S. 907 (1975). Based on Baker v. Owen, it would seem that parents don't have the right to demand that corporal punishment not be used on their child, unless the legislature, state board of education, local school board, or administrator intervenes and gives parents that right.

53. STUDENT ISSUES: SEARCH AND SEIZURE

Constitutional Provisions

The Fourth Amendment to the U.S. Constitution provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. (U.S.CONST. amend. IV.)

Article I, Section 5 of the Alabama Constitution of 1901 supplies a similar protection:

"That the great, general, and essential principles of liberty and free government may be recognized and established, we declare (t)hat the people shall be secure in their persons, houses, papers, and possessions from unreasonable seizures or searches, and that no warrants shall issue to search any place or to seize any person or thing without probable cause, supported by oath or affirmation. (Article I, Section 5, ALA. CONST. of 1901.)

Implications of Improper Searches

When a school official decides, in the course of investigating possible wrongdoing by a student, to search the student, the student's property, or other property to which the student may have had access, one or both of these (state and federal) constitutional provisions are implicated. At least four repercussions arise from improper, unconstitutional searches. First, the evidence cannot be used in a legal proceeding against the student, and the student might be then absolved of responsibility, even though all other signs point to guilt. Second, the school official who conducts an improper, unconstitutional search might be found liable under 42 U.S. Code Section § 1983, federal civil rights law arising from the Civil Rights Act of 1871, for violating the student's constitutional rights, and thus would be required to pay damages or surrender personal assets to the searched student. Third, a particularly intrusive search may subject the school official to criminal charges or investigation by the Department of Human Resources, with presumptive placement of the school official's name on a list of potential child abusers. Fourth, a particularly intrusive search may also subject the school official to common law claims for assault, battery, or violation of the student's privacy interest against intrusion on seclusion.

New Jersey v. T.L.O.

The U.S. Supreme Court addressed search and seizure in public school settings in New Jersey v. T.L.O., 469 U.S. 325 (1985). In T.L.O., the court held that the Fourth Amendment applies to public school officials; however, school officials need only have reasonable suspicion to conduct a search or seizure, instead of the probable cause standard required for police officers. The reasonable suspicion standard has two steps in its analysis: 1) the search must be reasonable at its inception, and 2) the search must be reasonable in scope. School leaders need to have a clear understanding about what these steps mean, how to apply them, and when exceptions exist to help them exert authority over students. T.L.O., 469 U.S. 325, 341-342.

Reasonable At Inception

To be "reasonable at its inception" a school leader must be able to simply articulate a good reason why the search began where it did. For example, "I looked in the girl's purse first, because she had just told me that she didn't smoke, I could smell smoke coming from her person, and I thought if I looked in her purse, it would refute her statement that she didn't smoke." Or, "I looked in the boy's locker because another student gave me a tip that the stolen money was in the locker." A key element in having reasonable suspicion is individualized suspicion, the ability to identify *an individual* who is the target of the search. That is why "sweep" searches, searches that might involve everyone in a room, including those who could not have been the wrongdoers with those who might have been the wrongdoers, are problematic: there is no individualized suspicion. In other words, for a search to be reasonable at its inception (the first part of the T.L.O. standard), the school official must have individualized suspicion.

Exceptions to Individualized Suspicion

There are four exceptions to the requirement that you must have individualized suspicion for the search to be reasonable at its inception. The four exceptions to the rule that you have to have individualized suspicion are:

- 1) Where joint use doctrine applies;
- 2) Where plain view doctrine applies;
- 3) Drug tests for students in extra-curricular activities; and
- 4) Where the search is considered "reasonable" due to emergent circumstances.

If any one of these four exceptions exists, the school official does not need to have individualized suspicion for a school search to be reasonable at its inception.

"Joint use doctrine" applies when the school official needs to search lockers, desks, computers, and other school-owned equipment. Students should have a low expectation of privacy in school-owned equipment, because it is under joint control, i.e., it is used jointly by the student and the school. Some school district policies in Alabama give away control over such equipment, simply by stating that students have an expectation of privacy in lockers and desks. This is a mistake, because it denies school officials the right to initiate a search when they lack individualized suspicion and don't know who the particular culprit is. If local policy has not given students an expectation of privacy in school equipment under joint control, then the joint use doctrine should apply.

"Plain view doctrine" is the second exception to the rule that you must have individualized suspicion to initiate a search. If, for example, a school leader sees a marijuana cigarette, a revolver, or other contraband through the windows of a car parked in the school parking lot, individualized suspicion is not required to initiate and continue the search. The contraband was in plain view, and it is not necessary for the school official to know whose car it is or who the individual might be before beginning the search.

The third exception to the rule requiring individualized suspicion in school searches is in drug testing for students in extra-curricular activities. Board of Education Indep. School Dist. v. Earls, 122 S.Ct. 2559 (2002). Drug testing of students who do not participate in extra-curricular activities would be outside the decision of Earls, so that school districts who decide to do so are creating a new issue.

The fourth exception to the rule requiring individualized suspicion in school searches is where the court takes into account the emergency nature of the situation and, in light of the circumstances, declares that the search was "reasonable." (See, Nichols, Edwin C., Jr., "Search and Seizure in the Public Schools: Implications for Students and School Administrators," (Ed.D. dissertation) The University of Alabama, 2003.) In recent years, courts have begun to tip the balance between school safety and Fourth Amendment rights in favor of safety, particularly if a firearm is involved. For example, searching all the backpacks in a class without individualized suspicion has been held "reasonable" in emergent situations.

Reasonable In Scope

The second part of the T.L.O. test for reasonableness is that the search must be reasonable in scope. To be reasonable in scope, the school official must be able to explain in detail the logical connection between each step in a search. For example a principal giving testimony might say, "I was given a tip that Bobby had cigarettes in his

jacket pocket. I went to Bobby in his science class and asked him to join me in the hallway. I asked Bobby where his jacket was. Bobby said it was in his locker. We went and looked in his locker. I searched in his jacket pockets, but didn't find cigarettes in them. Then I saw a paper sack in the bottom of his locker. The cigarettes were in the paper sack." In this scenario, the school leader can explain a logical connection between each step of the search. If such a logical connection can be made for each step, the search will be considered reasonable in scope, and the requirements for T.L.O. will have been met.

One additional aspect of scope asks the question, how far may one go in scope for the search to still be reasonable? May you go so far as to strip search a student? The Seventh Circuit Court of Appeals observed in 1980: "It does not require a constitutional scholar to conclude that a nude search of a thirteen-year-old child is an invasion of constitutional rights of some magnitude. More than that: it is a violation of any known principle of human decency." Doe v. Renfrow, 631 F.2d 91, 92-93 (7th Cir. 1980), *cert. denied*, 451 U.S. 1022 (1981). This may not be the prevailing view today. Many appellate courts have upheld the reasonableness of strip searches, when looking for drugs. See, e.g., Williams v. Ellington, 936 F.2d 881 (6th Cir. 1991) and Cornfield v. Consolidated High School Dist. No. 230, 991 F.2d 1316 (7th Cir. 1993). In Jenkins v. Talladega City Bd. of Educ., en banc, 115 F.3d 821 (11th Cir. 1997), *cert. denied*, 522 U.S. 966 (1997), the Eleventh Circuit held that it was no longer "clearly established law" that it was impermissible for school official to strip search students. Despite this jurisdictional decision for Alabama (Alabama is in the Eleventh Circuit), school officials would be well advised to refrain from ever strip searching a student. If one is so sure that the logical next step is to strip search, then one might well ask if it is also the logical time to call the police and have them arrest the student. If insufficient evidence exists to call the police, then it isn't logical to strip search. If sufficient evidence exists to call the police, then the administrator should call the police and forego the urge to strip search. (For a study of the relationship between school personnel and police, see, Rivera, Grant Marshall, "Law Enforcement Officers in Public Schools: Standards for Searches, Seizures, and Interrogations," (Ph.D. dissertation) The University of Alabama, 2004.)

54. STUDENT ISSUES: ACADEMIC SANCTIONS

Academic sanctions are the use of academically-related punishments, such as demotion, loss of credit, or reduction or denial of a letter grade. As discussed in Module 49, Student Issues: Conduct Regulations, above, the courts usually adopt the academic abstention doctrine in disciplinary actions involving students. With academic sanctions, however, courts will look more carefully at the facts of the situation, because denial of credit or another form of academic sanction may also have the effect of impacting significant liberty or property interests. Academic sanctions may cause a student to be denied a scholarship that has already been earned, or they may cause the student to not get into a job-training program or a particular college. Thus, constitutional interests may be involved, and the court may not be able to academically abstain from hearing the case.

With academic sanctions, it becomes very important that the disciplinary consequences match the gravity and nature of the student's wrongdoing. When there is a wide discrepancy between the punished behavior and the extent of the punishment, a substantive due process violation may exist. A procedural due process violation is possible, when school officials fail to initiate and implement sufficient procedures to warn students that cannot know that their behavior will precipitate with academic sanctions. Minimally, students need to be provided sufficient warning about possible infractions. When an infraction occurs, students must be provided at least a hearing with a school administrator, notice about the nature of the charges and the evidence against the student, and an opportunity to tell his or her side of the story.

Constitutional challenges to academic sanctions perhaps turn out in favor of the student about as often as they turn out in favor of the school system. What seems to make the difference is the factual situation. If, to a reasonable person (e.g., a jury member), the consequences are overwhelmingly greater than the nature of the offense, the school system will lose. If the school system skimps on communicating to the student ahead of time the academic consequences of certain actions, or fails to provide sufficient procedures to give the student a fair hearing, the school system is likely to lose.

Perhaps the greatest potential for challenge for academic sanctions is when the sanction serves to misrepresent the student's overall academic record. For example, a senior in high school may have a record that includes an extremely high GPA, membership in the National Honor Society, the senior class presidency, and receipt of a significant scholarship. Suppose the senior gets involved in a senior prank the last week of his senior year. As a punishment for the prank, the senior is suspended and not permitted to take final examinations. The "zeroes" on the final examinations has the effect of lowering his GPA. His infraction causes him to lose his class presidency and NHS membership. The lower GPA and the loss of his offices have the effect then of causing the university to withdraw his scholarship offer. Because of one display of poor

judgment, the remainder of the student's life will be affected. More immediately, the student's transcripts may not represent accurately his overall academic record.

Alabama law identifies three types of fraud, including fraud, misrepresentation of a material fact, and suppression of a material fact. Although the first two types of fraud may be inapplicable to the scenario suggested above, the third type of fraud, suppression of a material fact, may create a cause of action against the school district and its officials. Section § 6-5-102, Code of Alabama (1975) states: "suppression of a material fact which the party is under obligation to communicate constitutes fraud. The obligation to communicate may arise from the confidential relations of the parties or from the particular circumstances of the case." In the scenario outlined above, it may not be too difficult for the student's attorney to show that the school officials involved has misrepresented the student's overall academic record. Consequently, a tort claim under state law could be added to a due process claim under federal constitutional law.

55. STUDENT ISSUES: SCHOOL SAFETY AND HEALTH

Student Violence and School Safety

Parents have an expectation that their children will be safe in school, but recent headlines involving school shootings and the level of violence in schools has created a climate of heightened concern and fear. Statistically, public schools are exceedingly safe places for schoolchildren, but statistics don't always shape public perceptions. As a result of these heightened concerns and fears, most state legislatures have responded with school safety legislation, placing duties on local boards of education to do more to address student violence and school safety concerns.

Module 49, Student Issues: Conduct Regulations describes how the Alabama Legislature has responded to student violence and school safety concerns. Four separate statutes place a duty on boards of education to formulate conduct code policies. (See Module 49 for citations.) Besides these four provisions requiring the adoption of conduct codes, two statutory provisions place additional requirements on state and local education entities. Section § 16-1-24.2 Code of Alabama (1975) requires the State Department of Education to develop a statewide violence prevention program. Section § 16-1-24.3 Code of Alabama (1975) requires local boards of education to implement policies requiring expulsion for students who possess firearms in school settings. School superintendents and local boards are given discretion to provide an alternative consequence as the situation requires on a case-by-case basis. The State Board of Education has also addressed safety concerns by adding regulatory language to the Public School Governance section of state-level regulations. Ala. Admin. Code ch. 290-3-1.

School safety legislation also includes legislative attempts to require a closer information flow between schools and the law enforcement community. Section § 16-1-24 Code of Alabama (1975) requires reporting violent incidents through the superintendent and board to the sheriff. Section § 16-28-12(c) Code of Alabama (1975) requires reporting to the district attorney, when parents do not cooperate in compelling their children to conform to attendance law and the conduct code.

Additional school safety provisions passed by the Alabama Legislature include a requirement for eye protective devices in certain laboratories and vocational education classrooms (Section § 16-1-7 Code of Alabama (1975)) and a requirement that automated external defibrillators must be placed in each public K-12 school, with at least one employee at each school designated to be trained in its use. Alabama Act 2009-754, S.B. 306. Section § 16-1-45 Code of Alabama (1975).

An earlier prohibition against electronic pagers and communication devices in schools (Section § 16-1-27 Code of Alabama (1975)) was amended in 2006, to instead

allow local school boards to make policy concerning the use of such devices, including cellular telephones. Ala. Acts 2006, No. 06-530. School leaders are advised that the way this resulting policy is written has immediate and direct impact upon how searches and seizures of cell phones may be accomplished.

In 2012, the Legislature approved a bill requiring that youth athletes who have been removed from a practice or game because of a concussion to be withheld from participation until the youth is evaluated by a physician and receives from the physician a written clearance to participate. Alabama Act 2012-312, H.B. 308.

Harassment and Hazing

The Alabama Legislature adopted the Student Harassment Prevention Act of 2009, which requires school boards to adopt policies to prevent harassment of students. The act requires schools to identify and protect members of groups who are targeted for harassment. Alabama Act 2009-571, No. 4, H.B. 216. Section § 16-28B-1 et seq. Code of Alabama (1975). An earlier provision prohibits hazing in schools. (Section § 16-1-23 Code of Alabama (1975)).

Protection from Sexual Predators

Since these materials were first prepared, the Alabama Legislature has added more and more policy tools to protect schoolchildren from sexual predators. The Child Protection Act of 1999 (Act 99-361, p. 566, sec. 1) was amended in the 2002 legislative session (Alabama Act 2002-457) to require criminal background checks for all employees who have unsupervised access to schoolchildren.

In 2010, the Legislature made it a crime for a school employee to engage in a sex act or have sexual contact with a student, male or female, regardless of the age of the student. Alabama Act 2010-497, No. 2, H.B. 38. Companion legislation to this last provision required the state superintendent to revoke the teacher certificate for a teacher who is convicted of a felony or sex offense involving a child. Alabama Act 2010-264, No. 2, HB 37.

In transportation-related legislation, the Legislature prohibited sex offenders from obtaining a commercial driver's license or operating a passenger vehicle or school bus. Alabama Act 2010-129, H.B. 144. A year earlier, the Legislature had added school bus stops to the list of restricted areas for a convicted sex offender, and clarified that the term "school" in the list of such restricted areas included elementary and secondary schools, as well as colleges and universities. Alabama Act 2009-558, No. 4, H.B. 1. Section § 15-20A-17 Code of Alabama (1975) Finally, legislation in 2010 allowed county commissions to establish a lower speed limit for school zones outside the corporate limits of a municipality. Alabama Act 2010-692, No. 4, H.B. 100.

Emergencies and School Safety Plans

An emergency is by definition an unplanned event. It does not follow, however, that school officials have no responsibility for planning for emergencies. The numerous statutory references related to conduct codes, school safety, and student violence demonstrate a heightened awareness of the need to plan for emergencies, so that school personnel can implement the plan immediately. Failure to do what reasonable persons would do creates the risk of negligence claims and resultant legal liability.

School officials have a duty to examine the potential risks and have plans in place to prepare for such situations as fires, earthquakes, tornadoes, snow and ice storms, weapons or drugs in schools, civil disruptions, criminal assaults and batteries, bomb threats, trespassers on campus, serious illnesses and injuries. Those plans should address, minimally: alarm systems; building evacuation or shelter plans; communications plans, both internal to the school system and external to police and fire departments, parents, and the community at large; and follow-up services such as student counseling.

After creation of a plan, the plan should be practiced so that each member of the school staff knows exactly what is to be done. If a real emergency occurs, the plan itself must be rigorously examined for effectiveness and changed to prepare for the next emergency.

In accordance with the principles reflected upon above, the Legislature required, by Alabama Act 2009-655, each local school board to adopt a comprehensive school safety plan for each school under the authority of the school board. The plan is to be constructed by examining local conditions and determining hazards to safety, and the plan is to be developed by involving community law enforcement, safety officials, and nonteaching employees assigned to the school. The bill details what must be in the plan, requires understanding about what notifications must be made, and articulates a close relationship between school authorities and law enforcement authorities. The principal is charged with instructing students in procedures for drills and evacuations, and a school safety drill must occur each school year. Section § 16-1-44 Code of Alabama (1975).

Safe Space Requirement

Beginning with legislation adopted in 2010, school districts in Alabama are required to build new school buildings to incorporate a safe space or hallway in new school construction, particularly to protect students from injury during tornadoes. Section § 16-1-2.1 Code of Alabama (1975).

Alcohol, Drugs, and Tobacco Use

The use of alcohol, drugs, and tobacco represent significant health risks to students, as well as disruption to the school's learning environment. Perhaps every school district in every state has prohibited the possession or use of alcohol or drugs in school settings; depending upon state law, most schools also prohibit the possession or use of tobacco. Nationally, the courts at both the state and federal level are very supportive of school officials who punish students under these policies. In jurisdictions where adults are permitted to have substances such as tobacco in the school setting, but students are prohibited from having tobacco in the school setting, the courts are unlikely to accept an Equal Protection argument, based on dissimilar treatment between adults and juveniles.

The Alabama school code has three sections addressing the responsibility of school officials related to the use by students of alcohol, drugs, and tobacco. Section § 16-1-10 Code of Alabama (1975) criminalizes the selling, giving, or dispensing alcoholic beverages to students under the age of 18, as well as keeping or having in possession alcoholic beverages in the school setting. The preceding actions constitute a felony, punishable by imprisonment in the state penitentiary for one to three years. Section § 16-1-24.1 Code of Alabama (1975) requires boards of education to pass a discipline plan that includes provisions for uniform drug-free school policies, with uniform penalties. Section § 16-28A-4 Code of Alabama (1975) provides immunity for school personnel who report suspected drug abuse.

Asthma Self-Medication

In the 2003 legislative session, the Legislature required each local board of education and the governing body of each nonpublic school to permit the self-administration of asthma medication for students. (Alabama Act 2003-271.) To be able to self-administer such medications at any time while on school property or while attending school-sponsored activities, the student's parent or guardian must provide:

1. A written and signed authorization to the chief executive officer of the school;
2. A written waiver of liability statement; and
3. A written medical authorization. Section §16-1-39 Code of Alabama (1975.)

Permission to self-administer asthma medications is effective for only one school year at a time. All statutory requirements must be followed again each subsequent year.

School Health Services

IDEA has provided an impetus for the provision of health services in schools nationally. Immunizations and vaccinations are general requirements for attendance in

many states. Students come to school with medical and health needs, some of which are simple and some are chronic. Zero tolerance policies on drugs conflict with the valid medical needs of students to take medication during the school days. All of these issues implicate the provision of school health services in the public schools.

When provision for school health services is challenged by taxpayers, courts generally approve of the creation of school health services as an expression of the powers and duties of local boards of education. Measures to control the access of children to prescription drugs brought to school by students are uniformly examined under the rational basis test. “Hot button” issues, such as condom distribution or access to birth control information, are generally political questions rather than legal issues in nature. A few courts have permitted curriculum control, represented by the Hazelwood case (see, Module 59, p. 6), to defeat challenges made by parents over the ability of their children to have access to birth control information, when the unusual situation arises that the school board adopts such a policy over objections in the community.

Contagious Diseases

In earlier years, schools were able to exercise much more discretion in excluding students due to contagious diseases. It was not uncommon to exclude students while they were contagious or even quarantine them at home with the assistance of public health authorities. It is less common for students to be excluded from school because of their health conditions. From less serious conditions like head lice and measles, to dangerous conditions like AIDS and Hepatitis B, school personnel are called upon to deal with all types of contagious diseases in the school setting.

Since the 1980's conditions like HIV, AIDS, and Hepatitis B have become increasingly common in the school setting. In many school districts, the response was to attempt to exclude students with these conditions. Uniformly, the courts have accepted the application of Section 504 to these situations and found exclusionary policies to be discriminatory. Rather, the school would do well to make an individualized determination about programming needs for students with such conditions and exclude only when the student's unique situation (e.g., propensity for behaviors that endanger others) requires more to be done to separate the student from others.

Another consideration related to contagious diseases is the issue of privacy. If information concerning the student's medical condition is introduced into the student's educational records, then the medical condition becomes protected by the Family Educational Rights and Privacy Act (FERPA).

Medically Fragile Children

Due to medical advances, children with life-threatening health care needs are making it to school when, in years past, they would not have survived long enough to make it to school. Students with a history of an accident, trauma, premature delivery, or profound disabilities make up the classification of medically fragile children. These students require much more medical support to keep them alive during the school day, they are much more dependent on technology, and they create special problems for school officials due to the life-threatening nature of their conditions.

One issue that surrounds medically fragile children is whether or not the medically-related services that they need are related services covered under IDEA or are instead medical services for which the school district is not financially responsible. In general, if the care is something for which a school nurse or a lay person can be trained to accomplish, the care is a related service under IDEA. If the care is something requiring a medical degree or advanced nursing training, it is a medical service outside the responsibility of the school district.

Another issue that surrounds medically fragile children is do not resuscitate (DNR) orders. Besides creating ethical problems for school personnel, DNR orders also implicate Section 504. The Office for Civil Rights has indicated the possibility of DNR orders being a form of discrimination based on disability. School officials are encouraged to confer with legal counsel in fashioning an appropriate policy related to DNR orders.

Service Animals

In 2011, the Legislature permitted every person with a disability to have the right to be accompanied by a service animal in any public or private school. Alabama Act 2011-578, H.B. 502.

56. STUDENT ISSUES: ATTENDANCE AND INSTRUCTIONAL ISSUES

Compulsory Attendance

Title 16, Chapter 28 of Code of Alabama (1975) addresses compulsory attendance law for Alabama school boards. This chapter is crafted to place a burden on parents to assure that their school age children are enrolled in a school, whether it is public, private or church school. Additional legislative responsibilities are placed on city and county boards of education and their superintendents. This section address legislative enactments related to school attendance.

Attendance Requirements

Section § 16-28-3 Code of Alabama (1975) requires every child between the ages of 6 and 17 to be in attendance at a public school, a private school, a church school, or be instructed by a competent private tutor. (Alabama Act 2009-564, S.B. 334, increased the range from 16 to 17 in 2009; Alabama Act 2012-295, S.B. 28, lowered the age from 7 to 6 in 2012.) Section § 16-28-2.1 Code of Alabama (1975) makes parents accountable for their child's attendance in one of the educational environments listed above, with enforcement duty lying with the local board of education and the juvenile court system. Section § 16-28-12 Code of Alabama (1975) places criminal liability on parents for failing to assure that their child is not in school. It is important to note that at every juncture, church schools are exempt from oversight by the state board of education or local boards of education. (See, e.g., Section § 16-28-3 Code of Alabama (1975).

Sections §§ 16-8-34 and 16-9-17(b) Code of Alabama (1975) require county superintendents and county boards of education to adopt a plan establishing attendance districts. Section § 16-9-30 Code of Alabama (1975) requires county superintendents to enforce compulsory attendance laws, and provide attendance reports as required by law. City superintendents are required to recommend the employment of attendance officers to implement compulsory attendance laws, by Section § 16-12-18 Code of Alabama (1975).

Exemptions to Compulsory Attendance

Section § 16-28-6(a) Code of Alabama (1975) lists exemptions from compulsory attendance requirements:

(1) Children whose physical or mental condition is such as to prevent or render inadvisable attendance at school or application to study. Before issuing such certificate of exemption, the superintendent shall require a certificate from the county health officer in counties which have a health unit, and from a regularly licensed, practicing physician in counties which do not have a health unit, that such a child is physically or mentally incapacitated for school work;

(2) Children 16 years of age and upward or children who have completed the course of study of the public schools of the state through high school as now constituted;

(3) Where because of the distance children reside from school and the lack of public transportation such children would be compelled to walk over two miles to attend a public school;

(4) Where the children are legally and regularly employed under the provisions of the law relating to child labor and hold permits to work granted under the terms of said child labor law.

(b) Nothing in this section shall be construed so as to deny any right to any child granted under the provisions of Sections 16-39-1 through 16-39-12

Subsection (a)(1) in years past was used to justify denying access to school for students with physical or mental disabilities. It should be stressed that subsection (a)(1) provides an exemption for parents from punishment when their students do not attend school, when an exemption certificate is provided by the local superintendent. The provision does not given an exemption for school personnel so that they do not have to serve disabled students. Subsection (b), in specifying the application of Title 16, Chapter 39 Code of Alabama (1975), makes it clear that students with disabilities are to be served.

A separate section in the compulsory attendance law provides permissive ages at which students may attend school. Section § 16-28-4 Code of Alabama (1975) requires students to reach age 6 by September 1st for admission to first grade and age 5 by September 1st for admission to kindergarten. An Attorney General Opinion supplements this provision, by ruling that, at common law, a student is eligible for admission if their birthday is September 2nd of the respective year. Report of Attorney General of Alabama, October-December 1963, Vol. 113. p. 20.

If a student is enrolled in school, the student is subject to compulsory attendance laws, even if the student is over age 17. Section §16-28-3.1 Code of Alabama (1975) requires a student who withdraws from school, even if the student is age 17, to obtain

written consent from parents and participate in an exit interview, where the student is to receive information on the detrimental impact arising from not finishing school. Further, principals are not required to investigate why a student has been a habitual truant before reporting to the truancy officer. See, S.H. v. State, 2003 WL 21488876 (Ala.Civ.App. 2003).

Residency

Residency is a condition precedent to being permitted to attend school within a certain school district or attendance zone of a school district. In general, residency is a function of state law and local board policy, in deciding which persons are legal residents of a particular jurisdiction. Residency cannot be conditioned on alien status. Aliens who are not residents of a school district can be excluded from school because of their lack of residency (and not because of their alien status). See Module 34 for discussions concerning the authority of county and city boards of education to provide for education for students who are across attendance boundaries.

Fees

Much of the litigation involving the assessment of fees nationally arises because of provisions in state constitutions requiring “free” schools. The argument follows that, where a state constitution requires free schooling, then fees cannot be assessed. The Alabama State Constitution does not have such language in its education clause (Section 256), nor amendments to it. The issue of fees in schools is controlled, therefore, entirely by state law, state-level regulations, and local policy.

Section § 16-11-26 Code of Alabama (1975) prohibits the collection of fees of any kind from children attending any of the first six grades of city schools during the school term. Section § 16-13-13 Code of Alabama (1975) prohibits the assessment of fees for courses required for graduation. In elective courses (not required for graduation) local school boards may set reasonable fees for courses requiring laboratory and shop materials and equipment, with a waiver provision for students who cannot afford the fee. Funds collected for such courses must be spent only for such courses. Section § 16-13-13 is not to be construed in a way that prohibits fundraising activities, however it does prohibit requiring students to participate in the fundraising.

Curriculum

As part of the state’s Education Accountability Plan, Section § 16-6B-2 Code of Alabama (1975) specifies a core curriculum for all students. Sections §§ 16-9-21 and

16-12-9 Code of Alabama (1975) requires city and county superintendents, respectively, to prescribe a written course of study and submit it for approval to their respective boards of education. Sections §§ 16-8-28 and 16-12-20 Code of Alabama (1975) require city and county boards of education to adopt a course of study and make copies of the course of study available to teachers and citizens. However, Section § 16-35-4 Code of Alabama (1975) requires the State Board of Education, based upon the recommendation of the State Superintendent, to prescribe the minimum contents of courses of study for all grade levels. The State Superintendent is advised on course of study contents by a Courses of Study Committee, which is created by Section § 16-35-1 Code of Alabama (1975).

Section § 16-36-61 Code of Alabama (1975) requires local boards of education to adopt textbooks that have been approved by the State Board of Education. Members of local boards who adopt textbooks rejected by the State Board are subject to a misdemeanor conviction, a \$500 fine, and imprisonment at hard labor for a term not exceeding six months. Section § 16-36-62 Code of Alabama (1975) requires local boards of education to appoint local textbook committees for the purpose of selecting textbooks from the State Board-approved list of textbooks. The Alabama Ahead Act (Alabama Act 2012-560, H.B. 165) would provide all public school students in grades 9-12 access to electronic textbooks and instructional materials, where they are available. The bill provides a framework for the issuance of bonds for the purchase of tablet computers for students, but additional legislation would be necessary to implement the plan.

The Alabama Legislature has also added specific provisions related to curriculum and instruction. Section § 16-1-36 Code of Alabama (1975) requires tutoring for students who score below average scores on the SAT. Section § 16-40-1 Code of Alabama (1975) requires instruction in physical education (except in church schools), Section § 16-40-1.1 Code of Alabama (1975) requires instruction in parenting skills and responsibility, and Section § 16-40-9 Code of Alabama (1975) requires instruction in cardiopulmonary resuscitation (CPR). Section § 16-40A-2 Code of Alabama (1975) describes minimum contents to be included in sex education curricula, and Section § 16-40A-3 Code of Alabama (1975) does the same for drug education curricula. Another provision in Chapter 40A prohibits teaching that encourages illegal conduct:

Conduct that is illegal under state or federal law, including but not limited to, illegal use or distribution of controlled substances, under-age alcohol use or distribution, sexual intercourse imposed by means of force, or sexual actions which are otherwise illegal, shall not be encouraged or proposed to public school children in such a manner as to indicate that they have a legitimate right to decide or choose illegal conduct. Section § 16-40A-4 Code of Alabama (1975).

Title 16, Chapter 41 of the Code of Alabama (1975) codifies the Drug Abuse Education Act of 1971, which requires that schools teach about the dangers of drugs. Section § 16-41-5 Code of Alabama (1975) prohibits the exclusion of nonpublic school teachers or administrators from participating in in-service teacher education institutes or curriculum development programs established by Chapter 24.

Section § 16-43-3 Code of Alabama (1975) requires all students to daily have the opportunity to voluntarily recite the pledge of allegiance to the United States flag.

In 2010, the Legislature directed the state board of education to incorporate money management in the curriculum for high school students. Alabama Act 2010-207. Five years earlier, the Legislature declared that American Sign Language is considered a foreign language for purposes of satisfying high school graduation requirements. Alabama Act 2005-312, S.B. 94.

School Calendar

In 2006, Alabama's Legislature increased the length of a school year from 175 days to 180 days. Alabama Act 2006-251. In 2011, the Legislature amended the 180-day school year requirement, to permit school districts to make up lost school days for inclement weather, by adjusting the hours of instruction. Alabama Act 2011-235, S.B. 271.

Undocumented Aliens

The Beason-Hammond Alabama Taxpayer and Citizen Protection Act, passed by the Legislature in 2011, placed criminal sanctions on undocumented aliens found in Alabama. Section 28 of the act requires public schools to ascertain the alien status of all students and their parents, and report that status to the state board of education. Alabama Act 2011-535, H.B. 56. The Legislature made revisions to this bill in 2012. Alabama Act 2012-491, H.B. 658. In the same timeframe, the U. S. Supreme Court ruled on a similar law passed in Arizona. Arizona v. U.S., 132 S.Ct. 2492 (2012). Based upon this decision, the Eleventh Circuit Court of Appeals enforced a preliminary injunction on the State of Alabama, directing school districts to refrain from reporting alien status under Section 28 of the Beason-Hammond Alabama Taxpayer and Citizen Protection Act. Hispanic Interest Coalition v. Governor of Alabama, D.C. Docket No. 5:11-cv-02484-SLB, No. 11-14535, No. 11-14675 (11th Cir. 2012).

Instructional Supply Money

An annual appropriation in the Education Trust Fund has provided monies to each public state earned classroom teacher in public school grades K-12 for the

purchase of instructional supplies. A provision was added by the Legislature in 2005, to allow teachers to pool their state-allotted monies for instructional materials, to make common purchases together. Alabama Act 2005-198, H.B. 258. The amount appropriated in 2012 was \$300 per each public state earned classroom teacher. Alabama Act 2012-414, S.B. 257.

High School Diplomas for Veterans

In 2001, the Legislature authorized the State Superintendent to award a standard high school diploma to any honorably discharged veteran whose high school career was interrupted by military service at particular times in the past. (Alabama Act 2001-345; codified at Section §16-1-37 Code of Alabama (1975). The statute was amended in 2004 to specify that the veteran had to have been a resident of Alabama prior to entry into the United States Armed Forces, and to specify dates of service to qualify for the diploma. (Alabama Act 2004-549.)

57. STUDENT ISSUES: CLASSIFICATION PRACTICES

Dividing students into different groups is a common educational practice employed by schools. Compulsory attendance laws have an effect of grouping students by age. Grouping students by age occurs naturally, when students come into the school system together at age five for kindergarten and age 6 for first grade. Students may be grouped within classes, based upon academic level or achievement. Students are identified by their disability and given a specialized program based upon their unique needs. Coaches choose students based on athletic ability and provide those students more playing time. Now, discussions are occurring around the country to group students on the basis of gender, to move away from coeducational programming in such subject areas as mathematics or science. Each of these classification practices potentially raises issues of constitutional significance.

Constitutional Standards for Reviewing School Policies or Decisions

Classification practices used by school people to group students into groups often implicate the Fourteenth Amendment Equal Protection Clause. Such claims raise a question concerning which constitutional standard is the appropriate standard for reviewing school policies or decisions.

The Rational Basis Test

Historically, school boards were presumed to make their decisions for permissible reasons. Parents or students who did not like a decision by the board of education or its personnel had the burden of overcoming this presumption of permissible decision-making. Aggrieved parents or students would have to show that the school's decision was irrational. This is usually quite difficult to prove.

The Rational Basis Test applies when a school's policy or decision does not implicate a constitutional or civil right, or does not touch on a protected class. The Rational Basis Test asks if the classification is rationally related to a legitimate governmental purpose. Under this test, school personnel only have to state a reason for their decision. It doesn't have to be the best decision, or even a particularly wise decision. It only has to be rationally related to a legitimate governmental purpose. When it comes to a decision about grouping practices involving schoolchildren, grouping on the basis of age, academic level, academic achievement, social maturity, athletic ability, and disability are all reviewed under the Rational Basis Test.

Strict Scrutiny (Compelling Governmental Interest)

Strict scrutiny is the appropriate legal test that is applied when the school's decision touches on a suspect class or a fundamental interest. A "suspect class" is one having immutable characteristics, that has been stigmatized by government action, that has a history of being discriminated against, and that has historically been politically powerless as a class. A "fundamental interest" includes those freedoms listed in the Constitution and rights closely related to constitutional rights, such as the right to vote, to procreate, or to travel. Strict scrutiny requires the school to show a compelling governmental interest to justify its decision, with no less intrusive means of meeting the governmental objective. When strict scrutiny applies, the burden of proof switches from the parents or student to the board of education and school personnel. The school must prove a compelling governmental interest in its decision. When it comes to grouping decisions and classification practices, strict scrutiny applies when school personnel want to group students on the basis of race, color, national origin, and legal alien status.

Intermediate Test

There are two classifications—gender and illegal alien status—where the courts have been reluctant to apply either the rational basis test or strict scrutiny. The Intermediate Test requires that the classification affecting an individual interest must be substantially related to advance a significant governmental objective (i.e., necessary to achieve the goals), with no less restrictive means of achieving the goals. As with strict scrutiny, the Intermediate Test requires school officials to bear the burden of proof. On the surface the Intermediate Test seems to be the same as strict scrutiny, but note that a "compelling" governmental interest is a much higher standard than a "significant" governmental objective.

Perhaps the most important application of the Intermediate Test was in Plyler v. Doe, 457 U.S. 202 (1982), in which the U.S. Supreme Court struck down Texas law prohibiting the delivery of educational services to students who were illegal aliens. There, the court denied the State of Texas' argument that educating illegal aliens drained state resources, and stopping the drain on resources was a significant governmental objective. Instead, the court recognized the likelihood that the illegal alien schoolchildren would probably remain in the state into adulthood, and accepted the plaintiff's argument that the state had a more significant interest in training the alien schoolchildren to become contributing members of U.S. society.

Because the Intermediate Test is a somewhat easier test for schools to prove than Strict Scrutiny, initiatives to provide single-sex classes would have a better chance of obtaining court approval, than initiatives to separate students on the basis of race or color.

Race, Color, Alienage, and National Origin-Based Classifications

As stated above, classification or grouping of students based upon the student's race, color, national origin, or legal alien status will be reviewed by the courts using the Strict Scrutiny Test. This test represents the highest standard of review and is generally insurmountable. One of the rare situations in which a school was able to show strict scrutiny in its decision to classify and group students based on race was with a laboratory school at the University of California, which grouped students on the basis of race to structure scientifically-designed educational research studies.

Gender-Based Classifications

Classifications based on gender raise statutory concerns, as well as constitutional concerns. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (1996) prohibits recipients of federal funds from discriminating, excluding, or denying benefits because of gender. Title IX will apply to private schools that receive federal funds, although the Fourteenth Amendment will not. Title IX has for many years been recognized for its impact on interscholastic sports. A regulation for Title IX addresses coeducational sports, by allowing recipients of federal funds to:

operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try out for the team offered unless the sport involved is a contact sport. 34 C.F.R. § 106.41(b) (1996).

Title IX is designed to provide equal opportunity to participation in sports, and not equal participation in sports. Title IX permits segregation based on gender, but it does not require it. Despite the regulatory language, above, prohibiting girls' participation in contact sports can result in an Equal Protection claim. It is difficult for a school to argue that safety concerns are an "important governmental objective," when a policy that categorically denies participation by girls fails to consider the size and strength of the female and the likelihood that all of the males are eligible despite their size or strength.

Situations often arise where a sport is offered to only one gender (e.g., football for boys; volleyball for girls) and a student wants to participate in the sport with students of the opposite gender. Because the purpose of Title IX is to provide equity in participation, boys wanting to play volleyball are not as likely to be successful as girls wanting to play football. This is because there are more spots on the football team than the volleyball team, because football has probably existed longer than volleyball

(showing historical exclusion of females), and because a boy playing volleyball will cause another girl from being allowed to participate.

An important application of Title IX has been its emerging use as a weapon to hold school districts accountable for instances of sexual abuse or sexual harassment perpetrated against students. In Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992) the U. S. Supreme Court ruled that Title IX permitted the assessment of damages against the school district itself when authorities knew or should have known about the harassment and failed to take prompt remedial action. Title IX case law has borrowed from Title VII sexual harassment standards, so that school districts are occasionally being held accountable for sex harassment that occurs between students.

An additional area related to gender-based classification practices is policies attempting to address student marriage and pregnancy. Such policies will be uniformly reviewed by strict scrutiny because marriage and pregnancy are liberties protected by the Fourteenth Amendment. Thus, such policies are unlikely to be permissible and may in fact create a successful Section 1983 suit against school officials, including individual board members.

Language-Based Classifications

The rights of students whose native language is other than English are protected by the Fourteenth Amendment, the Equal Educational Opportunities Act of 1974 (EEOA) (20 U.S.C. § 1701 *et seq.* (1996)), the Bilingual Education Act of 1974 (20 U.S.C. § 3281 *et seq.* (1996)), and Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d *et seq.* (1996)).

EEOA applies to public school systems and requires them to develop appropriate programs for limited English proficiency (LEP) students. Specifically, EEOA holds school districts accountable for failure to take appropriate action to overcome language barriers that impede equal participation of students in its instructional program. It should be noted that EEOA does not prescribe a particular type of bilingual program; it requires “appropriate action.” The Bilingual Education Act of 1974 supplies funds to states and schools, to support programs for transitional or developmental bilingual education and other language-related programs. Title VI prohibits discrimination on the basis of race, color, or national origin, in any program or activity receiving federal financial assistance.

The only U. S. Supreme Court case involving LEP students has been Lau v. Nichols, 414 U.S. 563 (1974). In Lau, students of Chinese descent sued the San Francisco public school system for failure to provide for the needs of LEP students. The court ruled that the failures of the system to address the needs of LEP students violated Title VI. Since Lau, claims on behalf of LEP students have continued. The lead case in the Fifth Circuit Court of Appeals, which had jurisdiction over Alabama at

that time, was Castaneda v. Pickard, 648 F.2d 989 (5th Cir. 1981). The court in Castaneda stressed the importance of giving school authorities substantial latitude in developing LEP programs. The Fifth Circuit Court of Appeals in Castaneda posed three questions to assess the appropriateness of a remedial LEP program:

Is the program based on recognized and sound educational theory or principles?
Is the program or practice designed to implement the adopted theory?
Has the program produced satisfactory results?

In comparing Lau with Castaneda, what appears to be critical is whether the school is attempting to address student LEP needs. However, attempting to address is insufficient, because the inquiry goes on to look at effectiveness. What can be seen here is a tension between the concepts of giving schools latitude and checking to see if the program produces results. Clearly, it is inappropriate to leave LEP student needs unaddressed; it is just as inappropriate to not attempt to deliver a program that is based on sound theory and calculated to produce results.

Ability Grouping

Grouping students based on their achievement or ability levels is not impermissible in itself. However, such grouping programs are open to challenge on the basis that they are culturally or racially biased. In Hobson v. Hanson, 269 F.Supp. 401 (D.D.C. 1967), *aff'd sub nom. Smuck v. Hobson*, 408 F.2d 175 (D.C.Cir. 1969), plaintiffs challenged the use of intelligence test scores as a means of placing students into ability groups or tracks. Although the court found the use of the IQ tests to be discriminatory, the court did not specifically find the tracking scheme unconstitutional. The court held that tracking schemes that are reasonably related to educational purposes are constitutionally permissible, unless they create discrimination against identifiable groups of children. Such reasoning was followed in Georgia, where the court supported ability grouping that allow more resources to be provided to low-achieving students. Georgia State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403 (11th Cir. 1985).

A metaphor one might consider for ability grouping is the interstate highway system. Ability grouping is permissible where nondiscriminatory tests are used as a means of entering the highway, where there are ways of easily exiting the highway, and parallel highways exist and are available to students on a nondiscriminatory basis. This is especially true for short duration grouping, based on skills rather than ability.

Age Classifications

As stated, age classifications are subject to review using the Rational Basis Test. As long as the school applies age classifications consistently and without discriminating against students because of other characteristics, the use of age as a

way of dividing students is uniformly upheld by the courts. For example, parents will often challenge a school district's decision to delay entry of the parents' precocious pre-kindergartener until the child is of school attendance age. These challenges almost always fail.

Disability-Based Classifications

Disability-based classifications of students are discussed in Module 58.

58. STUDENT ISSUES: STUDENTS WITH DISABILITIES

Students with disabilities can be divided into two groups of students: those students served under the Individual with Disabilities Education Act (IDEA), 20 U.S.C. § 1401 et seq. (1996), and those students protected by Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794 (1996), and the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-12213 (1996). The ADA incorporates the terms and concepts of Section 504 for what constitutes discrimination, as interpreted by the courts, uses Title II and VII of the Civil Rights Act of 1964 for coverage and enforcement, and applies to private sector employers with 15 or more employees. For the purposes of this discussion, students served under IDEA will be called “IDEA students” and students receiving protection by Section 504 and ADA will be called “Section 504 students.”

IDEA originated as a funding statute, where Congress allocated seed money to encourage the development of programs for disabled students. Unfortunately, the funds allocated by Congress have never been more than a minority percentage of the funds spent each year to implement its requirements. Section 504 is a civil rights law, designed to protect disabled students from discrimination because of their disability. Consequently, Section 504 provides no funding for student programming. IDEA is administered by the Department of Education’s Office of Special Education and Related Services (OSERS). Section 504 is administered by the United States Office for Civil Rights (OCR).

IDEA was originally passed as the Education for All Handicapped Children Act in 1975, and has gone through numerous amendments and reauthorizations. It was revised again in November 2004 and styled the Individuals with Disabilities Education Improvement Act. For the sake of clarity, it will continue to be referred to as IDEA in these materials, although it might more correctly be identified as IDEIA at this time. With passage of the Handicapped Child Protection Act of 1986, Pub. L. 99-372, 100 Stat. 796 (1986), which authorized Section 1983 to be used for enforcement, IDEA became as much a civil rights statute as a funding statute. IDEA carries within it six guiding principles which will be discussed more fully in this module. Those six guiding principles are: zero reject; nondiscriminatory testing; parental involvement; free appropriate public education; least restrictive environment; and due process.

Section 504 was added to earlier existing versions of a Rehabilitation Act (going back to 1920) in 1973. Regulations for Section 504 were written after regulations were written for IDEA (or EAHCA, as it was called at that time), and the Section 504 regulations were modeled after the IDEA regulations. Consequently, many regulatory requirements for Section 504 look like the regulatory requirements for IDEA. Over the years, conflict has arisen in interpreting IDEA, between the executive and judicial branches of the federal government. OCR, as executive overseer of Section 504, has interpreted the duty of school districts with regard to Section 504 students to be similar

to their duties to IDEA students. The federal courts, however, have taken a more restrictive view of the duty of school districts with regard to Section 504 students. The court's interpretation has been to apply the concept of "reasonable accommodation," which originates in the employment section of Section 504 regulations, to the provision of services such as those provided by universities and school districts.

Duties

For IDEA, the duty of school districts (passed to them by the state) is to serve the student, aged 3 through 21, with a free, appropriate public education in each disabled student's least restrictive environment. For Section 504, the duty of school districts is to not discriminate because of the student's disability. One way of showing compliance under Section 504 is to operate under compliance with IDEA. As stated above, the executive and judicial branches of government do not entirely agree on what must be done to meet a duty under Section 504. For example, the position of OCR is that schools have the following duties: duty to identify and locate disabled students; duty to notify of their rights and the school district's duties; duty to evaluate prior to placement; duty to provide a free, appropriate public education, regardless of the severity of the disability; duty to create or modify a placement; duty to provide residential placement, if needed; and, duty to create procedural protections. The measure used by the federal courts in addressing the duty of school districts, is to require school districts to make "reasonable accommodations" to the student's disability.

Eligibility Requirements

To be eligible for services under IDEA, the regulations provide:

As used in this part, the term child with a disability means a child evaluated in accordance with 300.530-300.536 as having mental retardation, a hearing impairment including deafness, a speech or language impairment, a visual impairment including blindness, a serious emotional disturbance (hereafter referred to as emotional disturbance), an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities and who by reason thereof needs special education and related services. 34 C.F.R. § 300.7(a)(1).

To be eligible for protection under Section 504, the statute and the regulations define a Section 504-protected person as one who

Has a physical or mental impairment which substantially limits one or more major life activities;

Has a record of such an impairment; or
Is regarded as having such an impairment. 29 U.S.C. 706(8)(B) (1994); 34 C.F.R. 104.3(j)1) (1995).

Note that the definition of IDEA has two parts: eligibility under one of a dozen disability labels and the need for special education and related services. In comparison, eligibility for protection under Section 504 does not require a showing of a need for services. The student only needs to have, have a record of, or be regarded as having, a physical or mental impairment which substantially limits one or more major life activities. Major life activities includes functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 34 C.F.R. § 104.3(j)(2)(ii). IDEA students are usually all protected by Section 504; but, Section 504 students are not all eligible for IDEA services.

Differences Between IDEA and Section 504 in Evaluations

Besides the differences in eligibility requirements for IDEA and Section 504, other important distinctions must be underscored, especially in the area of evaluations. At initial evaluation, IDEA requires that parents provide "informed consent" for the evaluation, while Section 504 only requires that the parents be given notice of the evaluation. Parental consent is not required to conduct an evaluation under Section 504. IDEA requires a comprehensive evaluation, while Section 504 only requires that school officials address "areas of concern." IDEA requires written notice prior to changing placement; Section 504 only requires that notice of the program change, and parental consent is not required. The school district has to pay for independent evaluations; Section 504 only requires that school officials consider the information presented in all evaluations. To make a significant change in placement under IDEA, the student need not receive a comprehensive evaluation; however an evaluation that addresses "areas of concern" is required to change a placement for a Section 504 student.

Zero Reject

IDEA provides a duty to serve eligible disabled students, regardless of the severity of the disability, and regardless whether eligible disabled students have been suspended or expelled from school. (see Pub. L. 105-17, § 612 (a)(1)(A).) The affirmative duty to serve translates to "zero reject," that is, under no circumstances can the school argue that it does not have to serve an IDEA-eligible student. Regulatory language implementing Section 504 includes similar sweeping statements, but the statutory duty not to discriminate refers to an "otherwise qualified" disabled individual (29 U.S.C § 794 (a) (1996)). This signals that not all disabled students are protected by Section 504, only otherwise qualified ones. Case law interpreting Section 504 links the concepts of "otherwise qualified" and "reasonable accommodation," so that if the

accommodation is not reasonable, the disabled person is therefore not otherwise qualified. The duty to serve is not the same thing as the duty not to discriminate, and the school district's responsibilities under Section 504 are not as extensive as its responsibilities under IDEA.

Free Appropriate Public Education

States are required by IDEA to ensure that all children with disabilities are provided a free appropriate public education, which is designed to meet the unique needs of each child and includes special education and related services. 20 U.S.C. § 1401(a)(16-17) (1996). The leading case defining "appropriate education" under IDEA is Board of Education of Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982). In Rowley, the court held that an appropriate education is one that is reasonably calculated to confer educational benefit and grow the child educationally from year-to-year. It is not necessary that the school district maximize the opportunities or provide the very best education available. The school must only provide an education that confers educational benefit and grows the child from year-to-year. Since Rowley, the courts are obligated not to insert their own views into what is an appropriate education. Instead, the court must ask two questions. The first question is, did the school comply with the procedures under IDEA? The second question is, did the school develop an IEP through the procedures that is reasonably calculated to enable the child to receive educational benefit? Obviously, failure to follow procedures would make any program (no matter how good it is, how expensive it is, or how much benefit it can deliver) measured under this standard inappropriate at the outset.

Individualized Educational Program

The Individualized Educational Program (IEP) is constructed by a team that includes: a representative of the local educational agency; the student's special education teacher; the student's general education teacher; the student's parent or guardian; the student, when appropriate (required for constructing a transitional IEP); a person who can interpret instructional implications of the evaluation results; related services personnel; a representative of the agency providing transitional services, when constructing a transitional IEP; and, other persons at the discretion of the parent or the local education agency. 34 C.F.R. § 300.344 (1996).

The contents of an IEP must include: the present levels of the student's educational performance; measurable annual goals, including benchmarks for short-term instructional objectives; special education, related services, supplemental aids, and services to be provided; program modifications; extent to which the student will not participate with students without disabilities in general education; modifications in administration of state- or district-wide assessments; projected dates of initiation of services and anticipated duration of services; a statement of needed transition services

focusing on an appropriate course of study, if the student is age 14; a statement of needed transition services, if the student is age 16; and, a statement of how the student's progress will be measured and reported to the parents. 34 C.F.R. § 300.346 (1996).

The most important thing for superintendents to remember is that the IEP team has control of the IDEA student's program, not the superintendent or the board of education. The IEP team is granted authority directly by Congress to make decisions about the IDEA student's program, including placement and supplemental services.

Least Restrictive Environment

IDEA requires that a full complement of placement options be available for all IDEA students in every school district. Among those placement options, in order of least restrictive to most restrictive, are: regular classrooms, resource (part-time special education) classroom; self-contained special education classroom; day school; residential school; hospitalization; and homebound. Note that homebound is the most restrictive placement possible.

There is a bias in favor of serving students in the regular setting, as reflected in regulations:

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and that . . . (the) removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 C.F.R. § 300.550(b)(1) (1996).

Consequent to this bias favoring placement in a lesser restrictive environment, there is a requirement for school personnel to demonstrate, as part of the IEP process, that the student is unable to be educated in the regular educational environment even with the use of supplementary aids and services, prior to making a decision to place a student in a more restrictive placement. It is important to recognize that, wherever a student is now placed, there is a presumption in favor of that placement. Any decision to move the student to a more-restrictive or less-restrictive environment would require that the IEP team rebut the presumption favoring the current placement with data supporting the new placement.

It should be noted that it is not a requirement the student be served in *the* least restrictive environment; the student must be served in *the student's* least restrictive environment.

Parental Involvement

A central feature of IDEA is the requirement of parental involvement throughout the process. Written parental consent is required for evaluating a student suspected of requiring services under IDEA. Parents are required to be part of the IEP team. If the parents disagree with the other members of the IEP, either side may initiate due process procedures. While due process is being pursued, the student stays put in the student's then-current placement.

Non-Discriminatory Testing

Before a student can be placed in an IDEA program, a comprehensive, multi-factored evaluation must be performed by a multidisciplinary team. No criterion by itself can be used to determine an eligibility or placement decision. Testing must address all the areas of the student's suspected disability, using assessment methods that are valid and reliable for their intended purpose. The tests must not discriminate on the basis of race or culture, and must be administered in the student's native language. The student's program must be reviewed annually, and a full comprehensive assessment must be accomplished every three years.

Due Process

Due process in IDEA situations is generally viewed by school officials to apply to the adversarial hearing process that is required to resolve disputes between parents and the school, but due process goes much further. By statute, due process procedural safeguards include:

- (1) An opportunity for parents to examine their child's records;
- (2) Procedures to protect the rights of the child whenever the parents of the child are not known, the agency cannot, after reasonable efforts, locate the parents, or the child is a ward of the State, including the assignment of an individual to act as a surrogate for the parents;
- (3) Written, prior notice before an education agency proposes (or refuses) to initiate or change the child's identification, evaluation, educational placement, or provision of a free appropriate public education;
- (4) Procedures to assure that the notice in 3, above, is in the parent's native language;
- (5) An opportunity for mediation;
- (6) An opportunity for any party to present a complaint with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child;

- (7) Procedures that require either party, or the attorney representing a party, to provide confidential due process complaint notice;
 - (8) An opportunity for parents to obtain an independent educational evaluation of their child;
 - (9) An opportunity for parents to present complaints and to have an impartial due process hearing;
 - (10) A state review procedure (either one- or two-level) if the hearing is conducted by a local or intermediate level agency;
 - (11) A right to appeal the final administrative hearing decision in state or federal court; and
 - (12) A right to attorneys fees if the parent is the prevailing party.
- IDEIA Sec. 615, 20 U.S.C. § 1415 (2004).

Administrative procedures must be exhausted before either party can take the dispute to federal district court.

Discipline

Perhaps the most problematic area of concern in dealing with students with disabilities is in meting out discipline. It is clear that students with disabilities, both those protected by Section 504 and those served under IDEA, are not exempt from reasonable disciplinary rules and consequences. Court cases can be found to support the use of time out, detention, assignment to a screened area in the classroom, corporal punishment, and the withdrawal of privileges as means of punishment. The greatest area of concern is the use of transfer, suspension, or expulsion as a disciplinary technique, because all have the potential of interrupting the program of an IDEA student, in violation of the “zero reject” guarantee of IDEA.

It should be noted that virtually all of the early cases involving suspension and expulsion of IDEA students were brought under both Section 504 and IDEA, because students in those cases were both IDEA and Section 504 students. From those cases developed the requirement of conducting a “manifestation determination” or “relationship test,” which involves an inquiry into whether the behavior which may warrant suspension or expulsion under the school’s conduct code is related to (or is a manifestation of) the student’s disability. The “manifestation determination” or “relationship test” is actually a Section 504 concept, because it is designed to assure that the student is not being punished (and thus discriminated against) because of the student’s disability. The “manifestation determination” was written into the 1997 Amendments to IDEA and carried forward in its reauthorization as IDEIA 2004, and that is the most important reason that it must be done. By statute, the manifestation determination must be accomplished prior to punishing in a way that might interrupt the student’s educational program. If the student’s behavior is a manifestation of the student’s disability, then the student may not be expelled or removed for a long term. If the student’s behavior is not a manifestation of the student’s disability, then expulsion

processes may be begun, but it should be noted that regardless of the outcome of the “manifestation determination” the student still must be served according to the student’s IEP.

IDEA students may be suspended for no more than ten days. The best interpretation of the 10-day rule is that the school administration has only ten days per school year to use in meting out suspensions. (This interpretation results from an OCR policy letter, not a source from OSERS.) Consequently, school officials are advised to use suspensions judiciously.

At any time that behavior of the IDEA student becomes a problem, the IEP team should accomplish a functional behavior assessment (FBA) of the student, as well as a behavior intervention plan (BIP). These are required when it is found that the behavior was a manifestation of the disability. (Section §615(k)(1)(F)(i) of IDEIA.)

Press releases after reauthorization of IDEA in November 2004 promised that discipline of students receiving special education and related services would be easier. That may or not may be true. The following paragraphs describe changes in the law related to discipline.

Section §615(k)(1)(A) of IDEIA requires a case-by-case determination of any unique circumstances to order a change of placement for a child with a disability who violates the student conduct code.

Section §615(k)(1)(B) of IDEIA gives school personnel authority to remove a child with a disability who violates the student conduct code from their current placement to an appropriate interim alternative setting, another setting, or suspension, for not more than 10 school days (to the extent such alternatives are applied to children without disabilities.)

Section §615(k)(1)(C) of IDEIA provides:

If school personnel seek to order a change in placement that would exceed 10 school days and the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability pursuant to subparagraph (E), the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner and for the same duration in which the procedures would be applied to children without disabilities, except as provided in section 612(a)(1) although it may be provided in an interim alternative educational setting.

Additionally, Section §615(k)(1)(G) provides:

School personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior

is determined to be a manifestation of the child's disability, in cases where a child--

- `(i) carries or possesses a weapon to or at school, on school premises, or to or at a school function under the jurisdiction of a State or local educational agency;
- `(ii) knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency; or
- `(iii) has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency.

On the surface, it would appear that the reauthorization of IDEA (IDEIA) gives school officials more latitude in using disciplinary transfers as a tool for special education students who violate the school's conduct code. There are two very important limitations, however:

1. Section §615 (k)(2) requires that the interim alternative educational setting in the two options above (subparagraphs (C) and (G)) must be determined by the IEP Team.
2. Section 615 §(k)(1)(D) requires that the child continue to receive educational services, as provided in section 612(a)(1), so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP; and receive, as appropriate, a functional behavioral assessment, behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur.

Previous to the reauthorization, a school official could unilaterally (without involvement of the IEP team) transfer students who violate firearm or drug aspects of the conduct code to an alternative setting for 45 days. While dangerousness supplies a third rationale for transferring to an alternative setting, the school official apparently must now go to the IEP team for concurrence in moving a student to the alternative setting for up to 45 days in all three situations.

A further caveat is provided by the second limitation listed above. It is difficult enough to provide a free, appropriate public education when there is a wide range of placement options available. It may not be possible to provide required services in a limited setting such as an interim alternative educational setting, thus making it more difficult for the school to demonstrate that it is providing a free, appropriate public education.

59. STUDENT ISSUES: CONSTITUTIONAL RIGHTS

Due Process

The Fifth Amendment to the U. S. Constitution reads:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. U.S. CONST. amend. V.

The part of the Fifth Amendment relevant to this discussion is that part which declares that: “No person shall be . . . deprived of life, liberty, or property, without due process of law. . .” The Fifth Amendment applies to the federal Congress, and not to the states.

Section 1 of the Fourteenth Amendment reads:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. CONST. amend. XIV, sec. 1.

The part of the Fourteenth Amendment relevant to this discussion is the part that declares: “No State shall . . . deprive any person of life, liberty, or property, without due process of law.” The Fourteenth Amendment is applicable to the states and is thus more pertinent to activities in the public schools than is the Fifth Amendment.

Several points based upon a plain reading of both constitutional provisions regarding due process are evident. First, neither statement suggests that government may not take away a person’s life, a person’s liberty, or a person’s property. For example, many examples of government taking of life, liberty or property exist: the death penalty; jail terms; the taking of property by eminent domain. Second, both statements indicate that a person must receive due process as a central feature in the manner that government takes away a person’s life, liberty or property. That is, the very notion of due process implies a set of procedures that must be enacted to take away life, liberty, or property. Third, the greater the importance of the right, or the

greater the punishment impairs a right, the more process is due the individual. For example, a student facing expulsion for the rest of the school year must be given more due process than a student facing suspension of merely three school days. And finally, due process is not a requirement if the right has not attached to the person as a liberty right or a property right. For example, a student only has a property right in an education to the extent that the courts are able to identify such a property right in the Alabama Constitution.

Generally the courts have identified two types of due process: substantive due process and procedural due process. Both substantive due process and procedural due process have implications for the functioning of school administrators and school boards.

Substantive Due Process

Substantive due process has at least two aspects that have been supported by the courts. The first aspect is that it is a substantive due process violation if a government actor exceeds its authority and acts arbitrarily and capriciously. When a parent or student complains that a local school board has violated his or her substantive due process rights, the question to be asked is whether the exercise of authority “is a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual in his personal liberty (or property)?” School authorities may infringe upon a person’s liberty or property interests only if such actions have a valid relationship to the functioning of the school system and that the government’s interest outweighs the individual’s interest. Substantive due process is not designed as a mechanism to tie local school officials’ hands nor to decrease their inherent authority to function. It is designed to curb abuses of power, and to prevent school officials from acting arbitrarily or capriciously.

The second aspect of substantive due process, much more limited in its application and scope since 1937, is the view that substantive due process limits government from taking away basic freedoms protected by the U. S. Constitution, even if the basic freedom is explicitly stated in the Constitution. For example, the right of parents to direct the upbringing of their children is not specifically addressed in the Constitution, though generally recognized throughout society and in the courts. Two early U.S. Supreme Court cases recognized this parental right in the context of state laws attempting to control private schooling. In Meyers v. Nebraska, 262 U.S. 390 (1923), the court struck down a state law that criminalized the teaching of the German language in private schools. In Pierce v. Society of Sisters, 268 U.S. 510 (1925), the high court invalidated an Oregon law requiring all schoolchildren between the ages of eight and sixteen to attend only public schools. Both cases recognized parental rights in the upbringing of their children, and linked that right with the economic right of the private schools to function without undue governmental interference. Another example

of the application of substantive due process in protecting basic non-textual freedoms is the identification of the right to bodily integrity as a liberty right protected by the Fourteenth Amendment. In this application, school officials may be found to violate substantive due process when corporal punishment is severe enough to shock the conscience (see, Garcia v. Miera, 817 F.2d 650 (10th Cir. 1987), *cert. denied* 485 U.S. 959 (1988)) or severe enough to shock the conscience and be inspired by malice or sadism (see, Hall v. Tawney, 621 F.2d 607 (4th Cir. 1980)).

Procedural Due Process

The most important point to be made about Procedural Due Process is that procedural due process is based upon the need for school officials to act fairly. Procedural due process is required before taking away life, liberty, or property. This is an expression of balancing the rights of society and the community with the rights of the individual. There will be times when the balance favors society and the community over the individual; fairness in the balance comes out of the procedures used to address relevant rights.

The amount of process that is due operates on a sliding scale, depending upon the importance or extent of the right being impaired. When the property or liberty right is slight, the amount of due process that is required is also slight. When the property or liberty right is great, the amount of due process that is required increases proportionately. Clearly, for slight intrusions on rights, the process can be quite informal; for greater intrusions on rights, the process must be progressively more formal. Perhaps the minimum process that is due before impairment of a liberty or property right is notice from the government and a chance to respond. In Goss v. Lopez, 419 U.S. 565 (1975), the U. S. Supreme Court held that students had a property interest in completing their education and a liberty interest in their reputation. Both interests, then, are threatened when students are suspended from school for ten days or less. The Goss court held that in such suspension situations, students must receive the following due process: 1) notice verbally or in writing; 2) an opportunity to tell their side of the story; and 3) an explanation of the evidence against them.

For expulsions from school, which last more than ten days, many more procedures must be followed to accord due process. Often, statutory language will provide great detail about what procedures are required to expel a student. Usually, the expulsion hearings do not have to conform to the rules followed in a trial. McCarthy, Cambron-McCabe, and Thomas suggest the following minimum steps of due process for expulsions:

1. Written notice of the charges, the intention to expel, the place, time and circumstances of the hearing, with sufficient time for a defense to be prepared;
2. A full and fair hearing before an impartial adjudicator;
3. The right to legal counsel or some other adult representation;

4. The right to be fully apprised of the proof or evidence;
 5. The opportunity to cross-examine opposing witnesses; and
 6. Some type of written record demonstrating that the decision was based on the evidence presented at the hearing.
- (Thomas, Cambron-McCabe, and McCarthy, Public School Law, 4th edition, Pearson, Boston (2009), p. 230.)

Of current concern in Alabama is the use of competency tests and graduation examinations for students. Florida's minimum competency test was challenged in Debra P. v. Turlington, 644 F.2d 397 (5th Cir. 1981), on grounds that the test as administered violated procedural due process. Procedural questions are answered appropriately when a student is given notice of the required competencies, exposure to material to teach the competencies, and sufficient opportunity and time to prepare for the tests.

Procedural due process has also been a factor in student discipline, particularly in the use of corporal punishment. In Ingraham v. Wright, 430 U.S. 651 (1977), the U.S. Supreme Court held that corporal punishment does not violate the Eighth Amendment's prohibition against cruel and unusual punishment. Relevant to the question of procedural due process, the court held that a liberty right of bodily integrity does attach to students in corporal punishment situations, but that rigorous procedural safeguards like written notice and a hearing before the school board would be impractical and would intrude too much into the discretion of school administrators.

Many school districts in Alabama have adopted student discipline policies whereby an administrator hears the expulsion hearing and makes a recommendation to the board for action. As long as the student has an opportunity to appeal the hearing officer's decision to the school board and have a hearing before the school board, the use of a school administrator as a hearing officer does not violate procedural due process rights of the student.

Free Speech Rights

Traditionally, school officials have had the authority to exert control over all student behaviors, both spoken behaviors and action behaviors. Whether a student had violated a school rule or had engaged in improper conduct had traditionally been a question of fact and a court would not review a case unless it could be shown that the school board had acted arbitrarily, maliciously, unreasonably, or in bad faith. Thus, school boards enjoyed a presumption that what they were doing was reasonable, and the burden of proof was on upset parents or students to prove that the board rule was unreasonable. This presumption in favor of school boards changed dramatically in 1969, when speech student behaviors were separated from student action behaviors. While school authorities still retained their traditional control over their students' action behaviors after 1969, and the concomitant presumption by the courts that what they

were doing was reasonable, school authorities, for a time after 1969, lost the ability to control speech behaviors in the same way.

Tinker “Material and Substantial Disruption” Standard

In 1969, in Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969), the U. S. Supreme Court ruled that student speech was protected by the First Amendment to the U. S. Constitution. The First Amendment reads:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances. U.S.CONST. amend. I.

Obviously, the part of the First Amendment implicated in Tinker was the prohibition against “abridging the freedom of speech.” Tinker arose from a situation where Mary Beth Tinker and her older brother John wore black armbands to school, to protest the Viet Nam war. The two siblings and another youth were sent home until they agreed to remove the armbands. They refused and the landmark Tinker decision was the result. The court first observed that “it can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” (393 U.S. at 507.) The court held that a student may express his opinions, even on a controversial subject, if he does so “without materially and substantially interfering with the requirements of appropriate discipline in the operation of the school” but conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech. (393 U.S. at 514.) The Tinker standard, then, demands that, student speech must rise to a “material and substantial disruption” standard before school official may halt speech or punish the student for exercising his or her right to expression.

School officials should take care to note that the Tinker standard is not a simple “disruption” standard. When speech rights are implicated, a mere disruption or a fear of disruption is not an adequate rationale to stop the speech or punish a student who dares to make an unpopular or unwise statement. To be “material” (real) and “substantial” (sufficient to predict that schooling would be stopped, in a near riot condition) is an extreme situation and often difficult for school officials to prove.

The following two situations may illustrate the application of Tinker. Two different school districts attempted to stop students from wearing buttons which demonstrated racial pride and political positions related to race. One school district one their case; the other school district did not. The court upheld the school district’s policy where there was a racially-charged atmosphere, a history of violence arising from racial

issues, and a threat of disruption arising from wearing the buttons. (Blackwell v. Issaquena County Board of Education, 363 F.2d 749 (5th Cir. 1966.) The other school district was unable to bring evidence that was predictive of such a level of disruption. (Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966). Note that these two court cases occurred in 1966. The distinction between these two cases was specifically adopted by the Tinker court three years later.

The Bethel Standard

Tinker's extreme position of protecting student speech was modified in Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986). In Bethel, a student gave a nomination speech for a candidate for a student office that was filled with sexual innuendo. The high court did not require a showing of a "material and substantial disruption" in this case. Instead, the court held that the school district acted within its authority when it imposed sanctions on the student for his offensive, lewd, and indecent speech. Although the court had recognized in Tinker that students nor teachers lose their constitutional rights at the schoolhouse gate, the court had later observed in the leading school search and seizure case, New Jersey v. T.L.O., 469 U.S. 325 (1985), that constitutional rights of students in the school setting were not automatically coextensive with the rights of adults in other settings. Further, the court recognized the role of schools in transmitting the culture and preparing students to take their place in society. Consequently, the court added the Bethel standard as an exception to Tinker. School officials did not have to show a "material and substantial disruption" in all situations involving student speech. The Bethel standard permitted the control of student speech that was "lewd, indecent, or offensive." Therefore, traditional control is returned to school officials, when the student's speech is lewd, indecent, or offensive.

The Hazelwood Standard

The U.S. Supreme Court supplied another exception to the Tinker standard in Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988). In Hazelwood, a student editor sued the school principal and school district when the principal excised two articles of questionable propriety from the page proofs before sending them to the printer. The student editor alleged that the principal had violated her speech rights, by placing an unconstitutional prior restraint on student speech. After Tinker (and before Hazelwood), the school district characteristically lost the case in such situations, because they usually could not show a material and substantial disruption could be predicted from printing the student newspaper. In Hazelwood, the court held school officials do not violate First Amendment expressive rights by exercising editorial control over what is printed in school-sponsored publications, as long as their actions relate to a legitimate pedagogical purpose. (484 U.S. at 269.) Of particular interest in Hazelwood is the court's identification of school sponsorship with curriculum:

The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences. (484 U.S. at 269-270.)

Consequently, anything that may be reasonably perceived by the public as having the school's imprimatur (stamp of approval) or having school sponsorship, becomes curriculum, over which the school has complete control. The variety of court cases decided by the use of the Hazelwood standard indicates that, where the court identifies the speech as school sponsored, the student's First Amendment right immediately seems to disappear. (See, Dagley, Trends in Judicial Analysis Since Hazelwood: Expressive Rights in the Public Schools, 123 Ed.Law Rep. [1] (March 19, 1998).)

Morse v. Frederick

The U. S. Supreme Court did not return to issues of student speech for nearly two decades, when it heard a case originating from Juneau, Alaska, in 2007. The situation precipitating in Morse v. Frederick, 127 S.Ct. 2618 (2007), was the running of the Olympic Torch as it passed on a four-lane highway between a marina and Juneau-Douglas High School on its way to the Winter Olympics in Salt Lake City. Students were released from classes to observe the event, which became described by the court as a "school-sponsored event." Joseph Frederick and some of his friends used the occasion to unfurl a 14-foot banner bearing the phrase "BONG HiTS 4 JESUS" The principal, Deborah Morse, directed the students to take down the banner. Frederick refused to do so, and was suspended for his defiance.

Frederick sued Morse and the school district, arguing that his First Amendment speech rights had been violated. The federal district court granted summary judgment to Morse on grounds of immunity, but the Ninth Circuit Court of Appeals reversed, holding that the principal had failed to show that a material and substantial disruption (the Tinker standard) had occurred. On certiorari, the U. S. Supreme court applied the Bethel standard to hold in favor of Principal Morse. It was reasonable to perceive the message on the banner to support illicit drug use, and like sexually-related speech, the principal had the authority to punish for speech which she reasonable perceived as supporting illegal drug abuse.

T-Shirt Speech

One group of cases has uniquely emerged to illustrate the applications of Tinker, Bethel, Hazelwood, or Morse in the school setting. Those cases involve the punishment of students who refuse to discontinue wearing t-shirts with printing upon them, when the printing appears to violate the school's dress code. As it will be discussed, below, what one wears is generally not considered speech; however, what may be written or printed upon clothing is speech. Court cases about t-shirts with printing on them provide an excellent source for understanding in which situations Tinker, or Bethel, Hazelwood, or Morse applies in constraining expressive rights.

In Pyle by and through Pyle v. South Hadley School Committee, 861 F.Supp 157 (D.Mass. 1994), a young man was disciplined fifty-eight times in a school year for wearing t-shirts with numerous variations of the "Coed Naked" theme. Examples mentioned by the court included: Coed naked law Enforcement: Up Against the Wall and Spread 'Em;" Coed Naked Firefighters: Find 'Em Hot, Leave 'Em Wet;" and Coed Naked Lacrosse: Ruff and Tuff and in the Buff." The court discussed the three judicial approaches that might apply. If the speech on the t-shirt is vulgar, Bethel would apply. If the speech is school-sponsored, then Hazelwood would apply. If the speech is neither vulgar nor school-sponsored, then Tinker would apply. The court deferred to school authorities in banning t-shirts that were "obscene, profane, lewd, or vulgar."

In Broussard by Lord v. School Board of City of Norfolk, 801 F.Supp. 1526 (E.D.Va. 1992), a student challenged her one-day suspension for refusing to change out of her "Drugs Suck" t-shirt. While one etymologist might point out the word "suck" has a sexual connotation, another might argue that "suck" is a word that has passed from its original meaning to now connote being bad or disfavored. The court held that the existence of a sexual connotation brought the girl's t-shirt under the Bethel standard and ruled in favor of the school district.

Chandler v. McMinnville School District, 978 F.2d 5243 (9th Cir. 1992), involved a situation where students wore t-shirts with the word "SCAB" color-blocked on the front. The school district was in a contract with teachers, and many teachers were on strike. Students wore the "scab" t-shirts to indicate their solidarity with striking teachers and their disdain for the substitute teachers. The court observed that observed that "the standard for reviewing the suppression of vulgar, lewd, obscene or plainly offensive speech is governed by Bethel, school sponsored speech is governed by Hazelwood, and all other speech is governed by Tinker. Because the school could not show a material and substantial disruption in the student's expression, the court found their discipline a violation of their free speech rights.

Gano v. School District 411 of Twin Falls County, Idaho, 674 F.Supp. 796 (D.Idaho 1987), arose from a situation where students were disciplined for selling and wearing t-shirts that depicted by caricature the administrators in a drunken state. The court ruled that, under Bethel, the school district was justified in punishing the students,

because the caricatures were offensive to the administrators. More needs to be said about this. Apparently, the Bethel standard makes a distinction between what is subjectively offensive to an individual administrator and what might be objectively offensive to a group of individuals (such as a jury). In McIntire v. Bethel School, Independent School District No. 3, school officials were unsuccessful at banning t-shirts created for the annual prom which borrowed language from a liquor ad: “The best of the night’s adventures are reserved for people with nothing planned.” Testimony showed that most students, and most administrators for that matter, were unaware that the slogan had come from a whiskey ad. The court granted injunctive relief to the plaintiff student.

What might be observed is that Bethel applies to language or symbols that are objectively offensive. For example, the curriculum teaches against the use of liquor, cigarette, or drug use. Such teachings in the curriculum indicates objective offense in liquor, cigarettes, or drugs, and t-shirts (knowingly) advertising liquor, cigarettes, or drugs should come under the Bethel standard. The application of school disciplinary policies to symbols and words promoting drug use, per Morse, is merely an extension of the Bethel standard. Just because a slogan or symbol on a t-shirt is subjectively offensive to an administrator, such as in the McMinnville “scab” t-shirts, would not bring such speech under the Bethel standard. Subjectively offensive speech, like political speech, could only be prohibited upon a showing of the Tinker “material and substantial disruption” standard.

Free Exercise Rights

Free Exercise Rights are guaranteed by the First Amendment:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances. U.S.CONST. amend. I.

Module 38 discusses the legal tests for situations involving the Free Exercise Clause. Recall that the Free Exercise jurisprudence has swung back and forth between two extremes. At one extreme the rule is “the law is the law.” At the other extreme, the government must accommodate the religious exercise unless it can show a compelling governmental interest. These two legal principles are exemplified, respectively, by the “law is the law” Smith test from Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990) and the Yoder “compelling governmental interest” test from Wisconsin v. Yoder, 406 U.S. 205 (1972). Given the existence of these two tests, it’s difficult to know in any fact situation which test should apply (and from that application, decide which is the “safer” position to take as superintendent).

For example, suppose that a female student has been selected for the dance team. After selection, the student complains that the skimpy outfits worn by the dance team members violate her family's religious views. She wants to continue to participate with the dance team, but wants to participate in sweat clothes instead of the skimpy outfits. Obviously, the sponsor for the dance team is adamant that the outfit is necessary for participation. What would be the better decision?

Given the existence of the two Free Exercise tests, it is possible that the law is on both sides of this issue. In other words, the superintendent's chance of success later on in court may be as good either way. The Yoder test would tell the superintendent to find a compromise with the girl and her family. The Smith test would defend the superintendent's right to require the outfit, because the requirement wasn't a policy that was made to target a particular religion, nor does the girl's free exercise right seem to "blend" with another constitutional right like speech or assembly.

Another way to look at the two tests is to raise the question that Smith has replaced Yoder. The Yoder test was used in 1972 and the Smith test was used in 1990. The newer test may be the correct application, so that a decision to ignore the girl's religious objections may be better supported. However, it is the choice more likely to cause a lawsuit to occur.

Another example may be that a school board has a "zero tolerance" policy on weapons. Suppose that a student is a member of the Sikh sect. Upon reaching adult status, Sikh males are required to carry a ceremonial dagger as a condition of their faith. Should the school officials find a way to accommodate the student's religious expression, or should the school officials cling fast to their "zero tolerance" policy?

Personal Appearance

Conduct code policies frequently address issues of personal appearance, through dress codes, uniform policies, and the like. Generally, what one wears (and the way they wear it) is not "speech," as a ninth grade student discovered when he brought an unsuccessful Section 1983 action against school officials, arguing that a dress code provision prohibiting him from wearing sagging pants violated his expressive rights. Bivens v. Albuquerque Public Schools, 899 F.Supp. 556 (D.N.M. 1995). Although what one wears is generally not speech, what is printed on clothing usually is speech. This concept is fully explored, above, in the section discussing "T-Shirt Speech."

Another issue commonly related to personal appearance is the ability of school officials to have gender-specific dress code provisions, for example, a prohibition against boys wearing earrings. Characteristically, courts reject an equal protection type of argument in these situations, and permit schools to have different provisions for boys compared to girls.

Hair cut policies precipitated in an unusual number of court cases in the early 1970's. In general, whether hair cut policies could be enforced depended largely upon jurisdiction. Roughly half of the federal circuit courts of appeal believed that the way a schoolboy wore his hair was speech; the other half did not think so. Alabama is in a jurisdiction (the old Fifth Circuit Court of Appeals) in which the court did not believe that hairstyle was a form of personal expression. Consequently, hair cut policies are still enforceable in Alabama. Where the courts may depart from that view is where the hair style shows affiliation with a particular group (association right) or with a particular religious belief (free exercise right).

Privacy Rights

The concept of privacy rights for students is often vested in the notion of records privacy under the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g (1996), or the Hatch Amendment, 20 U.S.C. § 1232h (1996). FERPA restricts the disclosure of student educational records to outside parties, while assuring their availability to parents. The Hatch Amendment requires parental consent before conducting psychological testing or conducting a survey of private family matters. Both FERPA and the Hatch Amendment are examples of statute-based privacy rights for students. In the context of this module, privacy rights relate to constitutional privacy.

The right to privacy under the Constitution is generally considered an unenumerated right under the Ninth Amendment. The Ninth Amendment reads:

The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people. U.S.CONST. amend. IX.

In the early part of the twentieth century, the U.S. Supreme Court invalidated state laws in Oregon and Nebraska, on the grounds that both laws improperly interfered with liberty interests of parents in directing the upbringing of their children. In Pierce v. Society of Sisters, 268 U.S. 510 (1925), the court struck an Oregon statute prohibiting students to attend private schools. In Meyer v. Nebraska, 262 U.S. 390 (1923), the court overturned a private school teacher's conviction for teaching in German, which was criminalized by Nebraska law. Although both cases were brought as due process cases under the Fourteenth Amendment, both were predicated on the recognition of the right of parents to make private decisions regarding family matters as a central feature to liberty.

Since those early cases, a lineage of cases, including the well-known abortion rights case of Roe v. Wade, 410 U.S. 113 (1973), have developed recognizing a right to privacy, connected to the concepts of home, hearth, parents, marriage, family, contraception, and procreation. Out of these cases has grown the privacy right of students, for example, to marry or have children, without interference of school board policy.

Association Rights

Buried in the middle of the First Amendment is the right to associate with others, without governmental interference:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances. U.S.CONST. amend. I.

It has become common for school districts to adopt dress code provisions, with some sort of statement articulating that their purpose is to address the problem of youth gangs. This is a mistake. By stating a purpose that touches on a constitutional right (the right to associate with others), the burden switches to the school district to defend the policy, and the school district must show “strict scrutiny.” In other words, the burden is no longer the student’s burden, to show that the school policy is irrational. Rather, the burden becomes the school’s, and at a much higher standard. The school must show the Tinker standard, (that) a material and substantial disruption will occur if the regulation is not enforced. With youth gangs, it may be possible to show such a standard in some schools in a school district; it is unlikely that such a high standard can be shown in every school in the school district.

Another dress code provision commonly adopted is a prohibition against unusual hairstyles. In itself, such a provision is usually defensible. However, if the application of the policy, if not the direct language of the policy, expands to deny students the right to wear their hair in a way that shows cultural affiliation (e.g., Native Americans with long hair; or African Americans with braids), then, again, the school district would have to be able to show the Tinker standard to enforce such a provision.

Search and Seizure

Search and seizure issues in the schools implicate the Fourth Amendment:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S.CONST. amend. IV.

A full discussion of search and seizure is located in Module 53.

Public Forum Doctrine

A discussion of constitutional rights of students in the school setting is incomplete without a consideration of the place or location in which the students' rights exist. Consequently, the application of public forum doctrine to student rights warrants discussion.

Over sixty years ago, the U.S. Supreme Court developed the Public Forum Doctrine as a means of addressing the extent to which government can control individual expression in places owned by the public in common. (See, Hague v. CIO, 307 U.S. 496 (1939).) The purpose of the public forum doctrine is an attempt to balance individual expressive rights with the right of the government to preserve a publicly-owned space for its intended governmental use and purpose. Public forum doctrine addresses questions such as whether a municipal airport authority can limit access to its terminals by members of groups like Hare Krishna, or whether a postmaster can deny a request from a girl scout troop to sell cookies in the post office lobby. In the school setting, public forum doctrine is used to analyze situations where groups want to use a part of a school building for a meeting, want to have announcements given on their behalf on a school's public address system, want to post items on school bulletin boards, or want to use the school system's distribution system to send announcements out to parents or other individuals in the community.

In Perry Education Association v. Perry Local Educators' Assn., 460 U.S. 37 (1983), perhaps the most important U.S. Supreme Court case explaining and using the public forum doctrine, two rival teacher unions fought over access to the school district's mail delivery system. The school district refused to allow one of the two unions (the one that was not the bargaining agent for the district) to use the delivery system. The collective bargaining agreement gave the bargaining agent exclusive access to the system. The union without representational status and access to the mail system alleged a violation of its speech rights in not having access to the mail system. The union with representational status won the case.

Public Forum

In Perry, the court identified three types of fora in the public forum doctrine: a public forum, a nonpublic forum, and a limited public forum. A *public forum* is a space which has "immemorially been held in trust for the use of the public and, time out of mind, ha(s) been used for purposes of assembly, communicating thoughts between citizens, and discussion of public questions." (460 U.S. at 45.) The quintessential public forum is the soapbox in the park (which no one has probably ever seen, unless one has visited Hyde Park in London). In a public forum, government has limited ability to control the expression.

Nonpublic Forum

A *nonpublic forum* is public property, which has a governmental function other than the open and unfettered exchange of ideas. In general, a public school building and all the classrooms within it are nonpublic fora. Even the bulletin board on the wall and the school's public address system are nonpublic fora. Such spaces in a school were created for the purpose of delivering a curriculum, not particularly for independent free expression by disconnected members of the community.

Like private property owners, governmental agencies have power to preserve property under their control for the use to which they were lawfully dedicated. (Adderley v. Florida, 385 U.S. 39 (1966)). Although school buildings are publicly-owned buildings, they are not usually public fora. They are nonpublic fora, until the government agency decides to let it be used by members of the public for purposes other than its intended governmental purpose. In Perry, the court decided that the school's distribution system was a nonpublic forum, and it had not been opened up for use by outside groups. Therefore, the representational union had exclusive access to the system.

Limited Public Forum

A governmental agency may decide from time to time to permit members of the community to use a public facility under its control for the purpose of free expression of ideas. For example, a school may permit an auditorium to be used on a Saturday night by the League of Women Voters for a meeting to hear speeches from local political candidate, or a church group might rent a gymnasium for a worship service on Sunday mornings. In these situations, the governmental agency has converted its nonpublic forum into something like a public forum—a *limited public forum*. The government—or a school—usually cannot control the speech that occurs in a limited public forum, any more than it can control the speech in a traditional public forum. The government—or a school—can control the speech in a limited public forum only when it can show a compelling governmental interest in controlling the speech, and there is no less obtrusive means of meeting the governmental interest. In the auditorium being used by the League of Women Voters in the example above, school officials lose the ability to control the speech during the candidates forum, unless a compelling governmental interest can be shown for controlling the speech, and the means of controlling the speech is the least obtrusive of the possible ways of controlling the speech. A compelling governmental interest, sufficient to warrant controlling speech in the school setting, would be the need to protect from a "material and substantial" disruption. This is the standard supplied in Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).

By comparison, in the nonpublic forum, such as a classroom, government does not need to show a compelling governmental interest to control speech. It only needs

to have a good reason, such as the need for a student to be quiet so the teacher may teach the class. Maintaining nonpublic forum status is a strategic benefit to the school district, because a plaintiff suing the school district would have the burden of proving that the school district's action in the nonpublic forum is irrational, which is usually very difficult to prove. If the forum is declared by the court to be a limited public forum, the burden switches to the school, and it must show a compelling governmental interest (a material and substantial disruption) to be able to control speech in the forum, and this is exceedingly difficult to prove. The party without the burden of proof has the strategic advantage in lawsuits arising in these types of situations.

Application of Public Forum Doctrine as Applied to Students

In most situations, the school setting is a nonpublic forum, and this has been reinforced by the U. S. Supreme Court in the Hazelwood case, discussed above. However, school personnel may always change the nature of the forum by their own actions, within discretionary guidelines given by the board of education. For example, a principal may choose to allow students to distribute newsletters at a table in the corner of the cafeteria during lunch hours. That table, during that time, has been converted from a nonpublic forum to a limited public forum. If the newsletter is religious in nature, then a claim that the distribution of the newsletter is an unconstitutional violation of the Establishment Clause can be answered by the school's claim that the newsletter is the student's speech, and not the school's. This is because the existence of the limited public forum has created a barrier between the school and the students.

Equal Access Act

In 1984 Congress enacted the Equal Access Act, 20 U.S.C. § 4071 (1996). The Equal Access Act borrows conceptually from public forum doctrine to give certain rights to public secondary school students concerning meetings. The Equal Access Act does not speak to other applications of public forum doctrine, such as distribution of materials, access to the public address system, or the like. It only applies to student meetings.

The Equal Access Act (EAA) begins by setting out conditions which must exist for the EEA to apply. Those conditions are:

- (a) A public secondary school;
- (b) Must have a limited open forum, as defined by the Act, which means that
 - (i) A non-curriculum related group must meet;
 - (ii) During non-instructional hours.

If all the above conditions exist and a student in that public secondary school asks permission for another group of students to meet, then the principal must permit the group to meet.

Under the EAA, the courts have taken an extremely literal meaning of the word “curriculum” in determining what a non-curriculum related group might be. (See, Board of Education of Westside Community Schools v. Mergens, 496 U.S. 226 (1996).) To be a non-curriculum related group, the group in question must have no affiliation written into the school’s curriculum. For example, for a SCUBA diving club to be affiliated with the physical education curriculum, one would probably need to find the word “SCUBA” in the physical education curriculum guide or course of study. Thus, if every student group meeting in the school during the school day (as the school defines it) and during non-instructional hours is literally connected to the curriculum, then a limited open forum under the EAA has not been created, and school officials would have no duty under the EAA.

In the analysis concerning responsibilities under the EAA, certain fact patterns need to be examined more carefully. For example, if an adult representative for a religious organization (who is not a student at the school) is the person asking the principal for building access to the building under the EAA, then the principal has no responsibility to the person under the EAA. Because the person is not a student at the school, the EAA does not operate in this fact pattern.

For another example, if the only non-curriculum related groups that exist are those that are meeting after school or before school, then the EAA does not apply. The non-curriculum related groups are meeting before school or after school. These groups are meeting in a limited public forum under public forum doctrine, and the EAA does not operate in this fact pattern.