A TEACHER'S GUIDE TO EDUCATION LAW

MICHAEL IMBER
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JONATHAN FELDMAN

FIFTH EDITION

ROUTLEDGE

A Teacher's Guide to Education Law

Adapted from its parent volume *Education Law, Fifth Edition*, this accessible text concisely introduces topics in law that are most relevant to teachers. Providing public school teachers with the legal knowledge necessary to do their jobs, *A Teacher's Guide to Education Law* covers issues of student rights, discipline, negligence, discrimination, special education, teacher rights, hiring and firing, contracts, unions, collective bargaining, and tenure.

Special Features:

- This revised edition includes new content on compulsory schooling, bullying, privacy, discrimination, school finance, and issues relating to the Internet and technology, as well as updated references and case law throughout.
- To aid comprehension, technical terms are carefully explained and summaries of key topics and principles are provided.
- Case law is presented within the context of real-world examples, making this text accessible to pre-service teachers who have little background in law.
- A companion website provides additional resources for students and instructors, such as links to full cases and a glossary of key concepts.

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Preface

Many aspects of the law of education have changed during the twenty years since the first edition of *A Teacher's Guide to Education Law* was published. This Fifth Edition has been extensively updated and revised to reflect the changes, but its goal remains the same: to provide public school teachers with the legal knowledge necessary to do their jobs.

The text is organized to reflect the variety of legal problems that elementary and secondary school teachers actually face. The focus is on the law relating to students, teachers, and school programs. The greater the likelihood of litigation, legal controversy, or error in a particular area of professional practice, the more extensive the discussion.

Topics that have been added or significantly expanded or revised since the book was first published include (among many others): the No Child Left Behind Act; student rights, especially in the areas of free speech and search and seizure; vouchers and government assistance to private and religious schools; employment discrimination; racial and sexual harassment of students and school employees; affirmative action and voluntary school integration; issues relating to the use of the Internet; and the law relating to special student populations. This Fifth Edition contains significant new material on bullying, social media, compulsory schooling, and school finance, topics that have become much more relevant to teachers in recent years.

Every effort has been made to make the book comprehensible to readers with little or no background in law. The text is written in a style that teachers should find familiar. When technical legal terms are used, their meaning is explained. Discussions of particularly complex topics begin with an overview, and subsequent sections provide additional detail. The last section of each chapter provides a summary of the most significant topics and principles discussed. The first chapter is devoted to providing a foundation for understanding the remainder of the book, including an explanation of the system of legal citations employed.

One of the difficulties of producing a comprehensive treatment of education law designed for teachers throughout the United States is that legal principles and interpretations can vary significantly from state to state. No attempt has been made to review the laws of each state exhaustively. Rather, the text focuses on generally applicable principles, noting areas where the specifics of state law vary. In these areas, readers may want to supplement the material presented with statutes and cases from their own state.

One final word of caution: anyone who expects unambiguous answers to all legal questions is in for disappointment. Some legal issues are well settled, and they are

presented as such. However, by its very nature, the law is often complex and uncertain. New issues and new perspectives on old issues arise continually; questions that once seemed settled are re-examined as notions about government and law evolve. Even experts often cannot agree on the application of a legal principle to a particular situation. Thus, in some instances, we can only pose issues and present a range of less-than-definitive answers for contemplation.

We hope you learn from and enjoy the book and that your study of the law of education is successful and rewarding.

The Authors

1 Understanding Education Law

Teachers perform their duties within a network of laws that prohibits them from doing some things while permitting, empowering, or requiring them to do others. Legislatures create local school districts and give school officials the authority to raise taxes and borrow money, to buy property, to construct buildings, to hire and fire teachers, to purchase supplies, to prescribe the curriculum, and to discipline pupils. At the same time, the law limits the exercise of all these powers. The federal Constitution protects the free speech rights of students and teachers; provides procedural protection when they are disciplined; and prohibits policies that wrongfully discriminate on the basis of race, national origin, gender, disability, or religion. The courts provide for the formal resolution of disputes and processes by which students, parents, teachers, and members of the wider community can seek redress for alleged infringements of their rights.

This chapter provides a general survey of education law, introducing the sources of law that affect the operation of schools and the work of educators, the structure of the federal and state court systems, and the role of the courts in making, interpreting, and applying education law. To help readers better understand the material in the chapters that follow, the chapter also explains the elements of a judicial decision and the use of legal citations.

1.1 Sources of Law

Education law includes federal and state constitutional provisions, federal and state statutes and regulations, countless local district and school policies, and an array of common law principles and doctrines. While these sources of law generally complement one another, they occasionally conflict. To further complicate matters, rules of law originate at the federal, state, and local levels. Thus, in a legal sense, public school educators serve many masters.

The Federal Constitution

The U.S. Constitution is the supreme law of the land. It establishes the union of the states; it separates the executive, legislative, and judicial branches of the federal government; it structures the relationship between the federal government and the states; it delegates responsibilities to the federal government while reserving others to the states; and it provides for the protection of individuals from rights violations by government.

The federal Constitution both legitimates and limits the actions of government, thereby protecting the liberties of individual citizens. Because public schools are

government agencies, the Constitution regulates the relationships between administrators, teachers, and students within public schools. The Constitution also regulates the relationships between government and private schools, but not the relationships between administrators, teachers, and students within private schools.

Although it mentions neither "education" nor "schools," the Constitution has been interpreted to empower Congress to use its taxing and spending authority for educational purposes and to adopt certain types of legislation affecting schools that receive federal funds. Apart from this, the federal role in governing schools is extremely limited, largely because the Tenth Amendment stipulates that "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." Because the power to create and operate schools has neither been delegated to Congress nor denied to the states, the United States does not have a centralized educational governance and policymaking structure. The resulting system of state and local control complicates the study of education law because the rules often vary widely from one state to the next.

The federal Constitution is nonetheless extremely relevant to education law because all state education laws, school district policies, and public school practices must be consistent with its provisions. Many important cases in education law involve statutes, policies, or practices alleged to violate First Amendment guarantees of freedom of speech and freedom of religion, Fourth Amendment protection against unreasonable search and seizure, and Fourteenth Amendment requirements of due process and equal protection.

State Constitutions

In keeping with the Tenth Amendment, the basic power to control education is reserved to the states. However, the federal Constitution does not require the states to exercise this power, and for several decades following the adoption of the federal Constitution, the states did not use their inherent authority. Over the course of the nineteenth century, the people of each state adopted constitutions requiring their legislatures to establish publicly funded school systems. State constitutions often contain vague language requiring legislatures to establish and maintain a system of common schools, describing in general terms the way schools shall be governed and funded, and outlining the purposes of common schooling. For example, Article VIII, Section 1 of the Indiana Constitution states:

> Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government; it shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement; and to provide by law, for a general and uniform system of Common School, wherein tuition shall be without charge, and equally open to all.

Many state constitutions also create state boards of education, and some grant these agencies independent authority. Most contain provisions mirroring the federal Constitution, prohibiting the establishment of religion and guaranteeing the equal protection of the laws. Indeed, some state constitutions offer greater protection for individual rights than the federal Constitution. While state constitutions and laws

may provide more protection than the federal Constitution requires, they may not provide less. Under Article VI, Clause 2 of the U.S. Constitution, known as the **Supremacy Clause**, state constitutions and state and local laws and policies must not contradict the federal Constitution. Under the Supremacy Clause, any state law that curtails rights established under any federal law is invalid.

Federal and State Statutes

The U.S. Congress and state legislatures execute their powers and duties through the enactment of statutes. Federal statutes must be consistent with the U.S. Constitution, while state statutes must be consistent with both the federal Constitution and the applicable state constitution. To the extent that any state law conflicts with federal law, it is unenforceable or "without effect."[1]

Most statutes controlling the operation of public schools are enacted by state legislatures. In every state, the laws governing education are organized by topic and published either as an education code or as a section of the general laws of the state. Although the specifics vary greatly, most state legislatures have enacted statutes that:

- dictate who may and who must be enrolled in schools;
- create and regulate local school districts and local school boards;
- set the qualifications for public school teachers and administrators;
- prescribe curricular content and learning aims for public schools;
- establish minimum requirements for high school graduation;
- create and maintain school funding systems;
- establish guidelines for student discipline and employee discipline;
- fix the selection process, duties, powers, and limitations of local boards of education;
- regulate certain aspects of the program of private schools; and
- delegate educational authority to state agencies and officers.

Federal statutes are particularly influential because, unlike state laws, they apply throughout the United States. The Tenth Amendment prevents Congress from controlling education. Nonetheless, Congress exercises considerable influence by virtue of its power to regulate interstate commerce and its ability to impose conditions on the receipt of federal funds by schools and school districts. In recent decades, Congress has enacted laws of general applicability that prohibit schools and other employers from engaging in certain forms of discrimination and providing specific protection for persons with disabilities. The two most significant federal statutes in terms of their effects on the programs of local public schools are the Individuals with Disabilities Education Act (IDEA) (see Section 7.3) and the No Child Left Behind Act (NCLB) (see Section 3.6).

Federal and State Regulations

Regulations differ from both constitutions and statutes. Most regulations are created by public departments, agencies, or bureaus that in turn are created by statute. Regulations are designed to implement the goals and fill in the details of legislation. If a

statute applies to schools, regulations associated with it will apply as well. A regulation is legally binding if it meets three requirements: (1) It must have been adopted in accordance with procedures prescribed in the governing statute; (2) its substance must be consistent with the aims and purposes of the governing statute; and (3) the governing statute itself must be constitutional.

Many of the specifics of education law are found in regulations issued by state departments of education, the U.S. Department of Education, and other federal and state agencies. For example, most of the rules governing the treatment of students with disabilities under the IDEA are contained in regulations created by the Department of Education. States also have extensive sets of regulations that provide further details concerning the treatment of pupils with disabilities.

The Common Law

Constitutions are adopted by the people, statutes are enacted by legislatures, regulations are implemented by government agencies, and the common law is created by courts. In common law cases, courts apply rules created by other courts in previous similar cases. By contrast, in constitutional and statutory cases, courts interpret and apply laws created by other authorities. Each state has its own common law, with minor variations from state to state.

Received from England during the colonial period, U.S. common law originally had both civil and criminal branches. Virtually all common law crimes have since been replaced by statute. For educators, the civil branch of the common law remains extremely important. This branch is divided into **contracts** and **torts**. Contract law establishes the conditions under which an exchange of promises creates enforceable obligations (see Section 11.5). Tort law deals with a variety of matters including negligent or intentional behavior causing harm, defamation, and injuries resulting from defects in buildings or land (see Chapter 12).

School Board Policies

Subject to the scope of authority delegated to them by the state legislature, school boards may issue their own rules and regulations. School board policies must be consistent with federal and state constitutional provisions, federal and state statutes, regulations associated with federal and state statutes, and the common law. For example, school boards must comply with the **open meeting laws** adopted by most states following enactment of the federal Government in the Sunshine Act of 1976.[2] Open meeting laws require that the meetings of all government agencies be open to the public, with limited exceptions. Most require advance notice of the time, place, and purpose of all government agency meetings to ensure transparency and accountability in government decision-making. When a school board issues policies in accordance with federal and state requirements, it is bound by those policies.

1.2 The Courts and Education Law

Courts perform three overlapping functions of relevance to educators, whether or not they are involved in litigation. First, courts resolve conflicts by applying constitutional

provisions, legislation, and regulations to specific situations. Second, courts rule on the constitutional validity of statutes, policies, and actions. Third, courts provide an official interpretation of the federal and state constitutions, statutes, regulations, and common law principles.

In performing these functions, courts must frequently deal with broad, ambiguous, and sometimes vaguely worded laws. It is one thing to know, for example, that the Fourteenth Amendment to the U.S. Constitution requires "equal protection of the laws" for all persons and quite another to determine whether an affirmative action program that gives preference to members of a particular class of persons is consistent with this requirement.

Interpreting rules of law raises difficult and unsettled issues. "**Originalists**" argue that constitutional interpretation should be based solely on the intent of the Constitution's framers, while others believe that constitutional interpretation should reflect contemporary conditions and problems. Similarly contentious issues arise concerning the interpretation of statutes and common law precedents.

Regardless of the theory of interpretation employed, the decisions rendered by courts are known as **case law**. Some case law is constitutional, some is statutory, and some is common law. The study of education law—or any other area of law—is primarily a study of case law because judicial opinions provide an authoritative interpretation of constitutional provisions, statutes, and common law principles. We study case law to find out who prevailed in a particular legal dispute and why. By studying the rulings of courts in particular cases, we hope to learn to conduct ourselves in accordance with the law in similar situations.

Decisions in prior cases factually similar to pending cases are referred to as **precedents**. Precedents are extremely important, reflecting a fundamental principle of justice: The law should be consistent. Otherwise, even the most well intentioned people will not know how to conduct themselves in a lawful manner.

On questions involving state law, decisions made by the highest court in each state generate **mandatory precedents** that are binding on the lower courts of that state. However such decisions are merely **persuasive authority** for courts in other states. While a mandatory precedent from a higher court must be followed, individual courts may decline to follow their own previous rulings. Until they do so, however, they must follow their prior decisions. On questions involving federal law, only decisions by the United States Supreme Court generate mandatory precedents that bind all courts (both federal and state).

Even when a mandatory precedent exists, it may not be determinative in a particular dispute. Because no two cases have identical facts, a precedent may only provide partial guidance. A critical difference in the facts may make a precedent **distinguishable** from a pending case. Whether an otherwise binding precedent can be distinguished is frequently a matter of dispute.

Federal and State Judicial Systems

There are both federal and state court systems. Both systems are organized into three levels: **trial courts**, intermediate **courts of appeal**, and a highest or **supreme court**. Federal and state courts vary in the kinds of cases they may decide but, in both systems, courts at all levels are limited to dealing with cases that are brought before them. A

court cannot declare that a newly enacted statute is unconstitutional unless someone challenges its constitutionality. In most instances, constitutional challenges can only be initiated by persons whose interests have been directly affected by the statute. Such persons are said to have **standing** to raise claims before the courts.[3]

Federal Courts

The federal court system deals almost exclusively with cases involving the U.S. Constitution, federal statutes, or federal regulations. Only in certain limited and exceptional circumstances will the federal courts deal with conflicts regarding the interpretation of state constitutions, state statutes, or the common law. Nonetheless, the decisions of federal courts have had a tremendous impact on local schools.

There are ninety-five federal trial courts called **U.S. District Courts**. Each state has at least one, and more populated states may have several, each with jurisdiction over a different geographic area. These courts hear evidence in order to build the factual record of cases brought before them. Their primary function, once the facts are determined, is to apply the law as found in the Constitution, federal statutes, and relevant higher court precedents.

The intermediate appellate courts in the federal system are the **U.S. Courts of Appeals** or **Circuit Courts**. Table 1.1 indicates the jurisdiction of each of the thirteen Circuit Courts, including eleven with jurisdiction over a group of states, one for the District of Columbia, and one consisting of three specialized federal courts.

The function and procedures of both the intermediate and highest appellate courts differ greatly from trial courts. These multi-member courts conduct no trials and hear no new evidence. Their sole function is to review the records of lower courts to determine if **errors of law** have been committed. Errors of law come in many forms, including incorrect instructions to juries, wrongful applications of rules of evidence, procedural mistakes, and misinterpretations of the Constitution, relevant statutes, or other rules of law.

After considering both written and oral arguments from both sides of the case, the

Table 1.1 Jurisdiction of Federal Circuit Courts of Appeals

Circuit	*Jurisdiction*
1st	Maine, Massachusetts, New Hampshire, Puerto Rico, Rhode Island
2nd	Connecticut, New York, Vermont
3rd	Delaware, New Jersey, Pennsylvania, Virgin Islands
4th	Maryland, North Carolina, South Carolina, Virginia, West Virginia
5th	Louisiana, Mississippi, Texas
6th	Kentucky, Ohio, Michigan, Tennessee
7th	Illinois, Indiana, Wisconsin
8th	Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, South Dakota
9th	Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Northern Mariana Islands, Oregon, Washington
10th	Colorado, Kansas, New Mexico, Oklahoma, Utah, Wyoming
11th	Alabama, Florida, Georgia
D.C.	Washington, D.C.
Federal	Washington, D.C. (specialized courts)

judges vote, reach a decision, and begin the process of opinion writing. This may entail some bargaining among the judges regarding the rationale for the decision and the legal rules and principles to be announced. If an appellate court decides that an error of law has been made, it has two basic options: It can **overrule** the trial court or it can **remand** the case for retrial by the lower court in accordance with its new ruling.

Decisions by a U.S. Court of Appeal create binding precedents for all U.S. district courts within its jurisdiction. For example, a ruling by the 11th Circuit would be binding on federal district courts in Alabama, Florida, and Georgia. In other circuits, the ruling would merely be persuasive.

As the only court whose rulings are binding throughout the country, the **Supreme Court** serves as the highest authority on the meaning of federal statutes and the U.S. Constitution. As such, the Supreme Court tends to hear appeals in cases that raise especially important or novel points of law and in cases that have potentially widespread consequences. When there are inconsistencies in rulings issued by the U.S. Courts of Appeal on a particular legal question, the Supreme Court is more likely to grant certiorari—to agree to hear an appeal—in a case involving that question. Although the Supreme Court receives more than 7000 requests each year, it generally agrees to hear 100–150 appeals.

Because the Supreme Court has nine members, it takes the agreement of five to form a **majority opinion**. Precedent is created only if at least five justices agree on the outcome of a case and the rationale for the decision. Justices who disagree with the decision may issue **dissenting opinions** but only majority opinions have the force of law. Similarly, justices agreeing with the outcome but disagreeing with the rationale may issue separate, non-binding, **concurring opinions**.

Even when there is no majority agreement on the rationale for a decision, the outcome of the case is still decided by majority vote. There may be a **plurality opinion** supported by a majority of the justices on the winning side and one or more concurring and dissenting opinions. If the Court is badly split, there may not even be a plurality opinion. Instead, the Court will issue a brief, unsigned, per curiam decision stating the outcome of the case and the concurring and dissenting opinions. If there is no majority opinion, no precedent is created. When the Court is deadlocked on the outcome of a case, with one judge not participating, the lower court is affirmed and no precedent is created.

State Courts

State courts hear cases involving state constitutional law, state statutes, state regulations, and the common law. Many education cases are decided in state courts because they raise no federal legal questions. For example, cases of alleged negligence by teachers are usually heard in state courts. Cases raising both state and federal questions may also be heard in state courts.

The structure of state judiciaries mirrors the federal system: trial courts, intermediate appellate courts, and, in most states, a single highest court. Although state courts at all levels are known by a variety of names, in the majority of states the highest court is called the Supreme Court. State trial courts usually cover a relatively small geographical area, whereas intermediate courts hear appeals from more than one trial court jurisdiction.

As in the federal system, the opinions of intermediate courts are binding only on other courts within their jurisdiction, so it is possible for different intermediate courts within the same state to reach conflicting legal conclusions. One of the roles of a state's highest court is to reconcile any such discrepancies. Its rulings are binding on all other courts within the state court system, but not on federal courts or the courts of other states.

1.3 Elements of a Judicial Opinion

Trial courts sometimes, intermediate courts often, and highest courts almost always conclude their proceedings with a written opinion. **Judicial opinions** are comprised of a set of components or elements that provide the information necessary to understand who won the case and why. A standard opinion contains the following elements: the case name, a review of the facts, a restatement of the claims and arguments of both sides, a review of the procedural history of the case, a statement of the issue(s), a ruling on the issue(s), a justification for each ruling, and a disposition.

Case Name

Almost all cases are named for the adversaries or **parties** to the case. The natural or legal entity that brings a suit to trial is called the **plaintiff** or **complainant**, and the natural or legal entity against whom the suit is brought is the **defendant** or **respondent**. In trial court opinions, the name of the case is in the form *Plaintiff v. Defendant*. If the case is appealed, the initiator of the appeal (the loser of the previous round) is called the **appellant** or **petitioner** and the other party, the **appellee** or **respondent**. In the federal system, and most other courts, the case name lists the appellant first and the appellee second.

Facts

Judicial opinions generally begin by recounting who did what to whom, when, where, how, and why. The court describes the conflict between the parties as determined from the evidence presented at trial.

Claims

The court may then summarize the claims of the two parties and the arguments offered in support of these claims. For example, if the parties disagree about the correct interpretation of a statute, the opinion will present the statute and the contentions of the parties.

Procedural History

Judicial opinions usually include a review of earlier decisions in the case by lower courts. For example, a decision of a highest court may indicate that the trial court ruled for the plaintiff and that the intermediate appellate court reversed the decision.

Issues

In every case, the parties disagree about the facts, the proper application of the law to the facts, or both. The resulting questions of fact and law are at issue in the case. For example, a case alleging negligence on the part of a teacher in the injury of a student may turn on the following two questions: whether the teacher was present in the room when the student was hurt (a **question of fact**), and the duty of care required of teachers (a **question of law**).

Often, courts structure their analyses by dividing complex issues into a series of smaller ones. These may be organized in a logical sequence analogous to a flow chart. For example, a court may first decide whether expressive conduct regulated under a school policy falls into a category of speech protected by the First Amendment. If the answer is yes, then it must next determine whether the school met the appropriate standard for controlling protected speech.

Ruling and Justification

The main body of a judicial opinion includes a **ruling** on questions of fact and questions of law, along with the rationale for each. There is not always a clear distinction between rulings and justifications. Rulings are also referred to as **holdings**, **findings**, or **conclusions of law**. A brief statement encapsulating the material facts and major conclusions of law may also be referred to as the holding of the case. Rulings interpreting a constitutional provision or statutory provision may allude to **principles**, **rules**, **standards**, or **doctrines** to guide the application of the law in related situations.

Courts arrive at their rulings through **deductive reasoning** with the relevant facts and rules of law as premises. The deductive argument also provides the justification for the decision. Here is a simple example:

> **Premise 1**: Max was driving at 40 mph on Main Street.
> (This is a matter of fact.)
>
> **Premise 2**: The speed limit on Main Street is 30 mph, and exceeding this limit is the legal wrong of speeding.
> (This is a matter of law.)
>
> **Conclusion**: Max has committed the legal wrong of speeding.
> (This is the ruling.)

The cases discussed in this book are not ususually so simple. While the facts may be straightforward, the application of the relevant legal rules, principles, or tests may not be. For example, if the law required that drivers maintain a reasonable speed (rather than specifying a precise speed limit), it would be much more difficult to decide whether Max had committed the legal wrong of speeding.

Disposition

Having resolved the legal issues and having explained its reasoning, the court concludes with an order indicating what must be done by the parties. If the defendant wins

a trial, the trial court will simply dismiss the case and perhaps order the plaintiff to pay court and legal fees. If the plaintiff wins, the trial court will fashion a remedy for the injustice the plaintiff has suffered.

Depending on the type of case, the law may permit various forms of remedy including payment of money **damages**, issuance of an **injunction** or order requiring public officials to cease prohibited practices or perform mandated duties, or other relief. In some cases, the court may order further proceedings to decide on an appropriate remedy. An appellate court can conclude a case by affirming or upholding the trial court decision, modifying it in some respect, or reversing it. In the latter case, the court may either issue an order of its own or remand the case back to the trial court for additional proceedings consistent with its ruling. Many cases are remanded for procedural reasons with the outcome no longer in doubt.

Interpreting judicial opinions is a subtle and imprecise act. Lawyers and judges in later cases argue over the meaning of precedents just as they argue over the meaning of statutes and constitutional provisions. For example, a court may have ruled against starting the school day with an organized prayer, but does this ruling preclude a moment of silence?

One common pitfall is to confuse the holding of a court with **dicta**, or judicial side comments. Often these are speculative remarks about issues related, but not directly relevant, to the case under consideration. For example, if the judge in the speeding case above had written, "Although a life-threatening emergency might justify exceeding the speed limit, there was no such emergency here," this would be dicta. It would be wrong to conclude that the court had ruled that drivers are authorized to exceed the speed limit in life-threatening emergencies.

1.4 Legal Citations

Citations to judicial opinions contain a series of numbers and abbreviations following the case name, indicating where the full text of the opinion has been published. Volumes of published opinions, known as **case reporters**, are generally found only in law school and court libraries.

The full text of published federal and state court decisions as well as federal and state statutes and regulations of government agencies can also be found using subscription database services such as LexisNexis. Supreme Court cases may be found at www.supremecourtus.gov, while other significant judicial opinions can be accessed using websites maintained by universities (such as www.law.cornell.edu) and non-profit organizations (such as www.aclu.org).

Case citations all follow the same basic format. A case citation for a U.S. Supreme Court decision with each of its elements identified appears below:

Brown v. Board of Education,	**347**	**U.S.**	**483**	**(1954)**
Case Name	Volume	Reporter	Page	Year

This case is found on page 483 of volume 347 in the case reporter known as *United States Reports*, abbreviated as "U.S." in case citations (see Table 1.2). *United States Reports* is the official government publication for Supreme Court opinions. Several

Table 1.2 Reporters for Federal Court Decisions

Abbreviation	*Full Title*	*Courts Reported*	*Publisher*
U.S.	United States Reports	Supreme Court	U.S. government
S. Ct.	Supreme Court Reporter	Supreme Court	Thomson Reuters
F.3d	Federal Reporter, 3rd series	Circuit Courts	Thomson Reuters
F. Supp. 2d	Federal Supplement, 2nd series	District Courts	Thomson Reuters

private case reporters also publish Supreme Court opinions. The most commonly cited of these is the *Supreme Court Reporter* (S. Ct.). For example, the *Brown* case may also be cited as 74 S. Ct. 686, indicating that the opinion may be found on page 686 of volume 74. The *United States Reports* citation should be used unless it is not yet available.

Citations to lower federal courts give the same information as Supreme Court citations and give the abbreviated name of the specific circuit or district court in parentheses before the date, although this information is not necessary to find the case. A case citation for a federal circuit court of appeals decision from the Fifth Circuit with each of its elements identified appears below:

Tomkins v. Vickers,	**26**	**F.3d**	**603**	**(5th Cir. 1994)**
Case Name	Volume	Reporter	Page	Circuit Year

A case citation for a district court decision from the Northern District of Illinois with each of its elements identified appears below:

Olesen v. Board of Education,	**676**	**F. Supp.**	**820**	**(N.D.**	**Ill.**	**1987)**
Case Name	Volume	Reporter	Page	District	State	Year

Citations to lower federal court decisions may include additional information about the subsequent actions of higher courts. For example, in *Uzzell v. Friday*, 547 F.2d 801 (4th Cir. 1977), *cert. denied*, 446 U.S. 951 (1980), the last part of the citation indicates that the Supreme Court declined to review the case. This denial of *certiorari* is reported in *United States Reports* as cited. Other subsequent citations indicate that a decision was subsequently affirmed (*aff'd*) or reversed (*rev'd*) on appeal.

State case citations follow the same format, but they have their own case reporters. Some states publish their own case reporters, while Thomson Reuters publishes state appellate court decisions in its regional reporters. Seven regional reporters cover groups of states. The information in parentheses indicates the state and year for cases heard in the highest courts or a more complete name for lower state courts.

Statutory citations are similar to case citations, but a section (§) number is given instead of a page number. The preferred sources for federal statutes are the *United States Code* (U.S.C.), *Statutes at Large* (Stat.), and the *United States Code Annotated* (U.S.C.A.). A statutory citation for a piece of federal legislation with each of its elements identified appears below:

42	**U.S.C.**	**§ 2000d**	**(1981)**
Volume	Abbreviation	Section	Year

This citation refers to section 2000d in volume 42 of the *United States Code*, published in 1981. It is not necessary to include the year in statutory citations because the volume and section numbers remain constant. A federal statute might also be referred to by its popular name. For example, the *No Child Left Behind Act of 2001*, 20 U.S.C. § 6319 (2008) is often referred to as No Child Left Behind or NCLB. Each state has its own specialized notation format for citations to its statutes, but most follow a format similar to federal citations. In some states there is more than one possible source and citation for the same statute.

Federal regulations are published in the *Code of Federal Regulations* (C.F.R.) and in the *Federal Register* (Fed. Reg.). Citations give the volume, abbreviation, section or page, and (sometimes) the year of publication. A citation for a federal regulation with its elements identified appears below:

34	**C.F.R.**	**106.12**	**(1996)**
Volume	Abbreviation	Section	Year

Complete information concerning legal citations may be found in *The Bluebook: A Uniform System of Citation*, published by the Harvard Law Review Association every five years. Information on legal citations is also available online at http://www.law.cornell.edu/citation/.

1.5 Summary

The law plays a part in everything that educators do in the course of their duties. Some practices are required by law, some are prohibited, and the rest are permitted. The law of education comes in a variety of forms: constitutional provisions, statutes, regulations, the common law, and school board policies. Some of the law originates at the federal level and some at the state level. Some policies are formulated by local school boards under authority delegated by the state.

Regardless of the source of a given law, it falls to the courts to interpret it and apply it in resolving specific disputes. Courts also resolve inconsistencies between laws and rule on the validity of laws that might contradict a higher authority. Ultimately, case law provides an official interpretation of what the law requires, prohibits, and permits.

There is a federal judicial system, and each state has a judicial system of its own. At both levels, the system consists of trial courts, courts of appeal, and a highest court. In the federal system, these are known as U.S. District Courts, Circuit Courts of Appeal, and the Supreme Court. Trial courts hear evidence, determine facts, and apply the law, whereas appellate courts correct errors of law at lower levels. Appellate courts, especially the highest courts, focus on issues of broad significance. Their majority opinions establish binding precedents within their area of jurisdiction.

Most written court decisions contain certain common elements. The facts of the case are the events and actions that created the dispute; the issues are the disputed questions of law or fact. The holdings of a court explain and justify its decisions while establishing precedents for similar cases in the future. A uniform system of legal citation is employed to reference published court decisions, as well as federal and state statutes and regulations.

2 Compulsory Schooling

In every state, parents are required by law to enroll their children in a public school or a state-approved alternative. State legislation typically specifies the period of mandatory attendance, the age at which a child must be enrolled in school, the age at which a student may withdraw or be withdrawn from school, residency and other eligibility criteria for attendance in particular districts or schools, and the types of schools or programs that satisfy compulsory school attendance requirements. In most states, local school officials are charged with enforcing compulsory schooling laws. School officials may also be responsible for monitoring or evaluating local alternatives to public or private schools, including homeschooling, cyber-schooling, and other forms of home-based education. In a handful of states, school officials are currently required to verify the immigration status of students, though the constitutionality of such requirements has been challenged.

This chapter begins with an overview of compulsory schooling laws, including their history and rationale. Subsequent sections consider the circumstances in which individuals or groups have sought exemptions from compulsory schooling laws. Among the most legally troublesome aspects of compulsory schooling laws is the conflict between parental preferences and state interests in the education of children. Homeschooling, cyber-schooling, and other forms of home-based education have coincided with a decline in the rigor of compulsory schooling laws in many states. This chapter also examines state authority to regulate private schools and home-based education, along with state and federal constitutional constraints on vouchers and other forms of government assistance to private schools.

2.1 Compulsory Schooling Laws: An Overview

The "Old Deluder Satan" Act of 1647, one of the first compulsory schooling laws, required every township of at least fifty households in the Massachusetts Bay Colony to hire a schoolmaster at public expense to teach all local children to read and write. The Puritans believed that people unable to read the Bible for themselves were vulnerable to the influence of priests, whom they regarded as agents of the devil. Moreover, every township with one hundred households was required to establish a grammar school to prepare young men for divinity studies at Harvard College, founded in 1636.

During the early days of the Republic, proponents of compulsory schooling argued that democratic institutions could not survive without a well-educated citizenry. Although Thomas Jefferson drafted his Bill for the More General Diffusion of Knowledge in 1779, universal public school systems did not become a reality until the late nineteenth century. At that time, an expansive conception of the *parens patriae*

doctrine ("the state as parent") provided a primary legal basis for the enactment of compulsory schooling laws. These were designed to serve the interests of children as future citizens and the public interest in maintaining democratic institutions. Then, as now, compulsory schooling laws required all persons having care and control of a child to share their custodial authority with state-approved teachers for limited periods of time. By compelling all parents to send their children to school, each state ensured, at least in theory, that all children would have access to public knowledge and opportunities for social, economic, and civic participation beyond what their parents alone could provide.

Although compulsory schooling laws vary from state to state, most have retained certain features in common, including the following:

Age Requirements

Most compulsory schooling laws stipulate the ages at which children are required to be enrolled in schools, as well as the ages at which children are eligible to attend school. In New York, for example, children who turn six on or before December 1 must attend from the start of classes in September of that school year and (with some exceptions) must remain in school until the end of the school year in which they turn seventeen.[1] Other states require attendance until age sixteen, seventeen, or eighteen, unless the student has parental consent to drop out, obtains full-time employment, or has already graduated from high school.

In most states, legislation compels schools to enroll students who are older or younger than those required to attend. For example, in New York, schools in some districts must enroll students at age five upon parental request, and students who have not received a high school diploma are entitled to attend a public school within the district in which they reside until age twenty-one.[2]

Duration of the School Year and School Day

Compulsory schooling laws typically stipulate the minimum length of the school day and the minimum length of the school year. These requirements may vary for public, private, and charter (see Section 3.1) schools. They may also vary for cyber-schooling, homeschooling, and other home-based education programs.

Acceptable Institutions and Programs

Compulsory schooling laws typically describe the kinds of programs that will satisfy compulsory schooling requirements. In all states, public and approved private schools are permissible choices. In most states, private tutoring and other forms of home-based instruction are also permissible.

Exemptions

Compulsory schooling laws typically outline acceptable grounds for claiming an exemption. In some states, these grounds may include living in a remote area, such that regular attendance at any school would be impossible or impractical.

Enforcement

Compulsory schooling laws typically provide for the appointment of an attendance officer with authority to initiate criminal and civil proceedings against truants and their parents. While compulsory schooling laws require that children be enrolled in schools for specific periods of time, they also restrict the ability of schools to de-register truant students. In New York, for example, a student must have been absent at least twenty consecutive days before a public school may de-register the student, provided there has been no response from the student or the parent(s) to statutory notices from the school. Such students have a right to re-enroll at any time.[3]

Claims by parents that compulsory attendance laws violate their own due process, equal protection, freedom of speech, freedom of assembly, or privacy rights have generally been dismissed by the courts.[4] A claim that a state compulsory education law requiring persons having control of a child to "cause the child to attend school regularly" was unconstitutionally vague has also been rejected.[5] Parents who fail to make an effort to send their children to school or to enroll them in an acceptable private school or home-based education program may face fines for statutory offenses or the loss of custody for neglect. Children who refuse to attend may be found delinquent or declared persons in need of supervision. They may be put on probation, placed in a foster home, incarcerated in a special juvenile facility, or otherwise placed under the care and control of the state.[6]

A number of states have adopted statutes designed to discourage students from dropping out of high school. In Georgia, an unemancipated minor who has not completed the requirements for a diploma must have written parental permission to drop out of school.[7] In Kentucky, an unmarried student aged 16–17 who wishes to drop out must attend a parent-principal conference, obtain a parental letter of withdrawal, and take part in a one-hour counseling program.[8]

A majority of states have implemented legislation denying driver's licenses to high school dropouts less than eighteen years of age and suspending or revoking the driver's licenses of habitual truants. Some of these laws provide certain exceptions such as if revocation of a student's license would create an economic hardship for the family. Depending on how they are worded and applied, statutes that require schools to report student academic information to other state agencies may raise equal protection, due process, or privacy issues.[9]

The state's broad power to require school attendance notwithstanding, the Constitution still places significant limitations on state compulsory schooling laws. The most important of these limitations is that states may not unduly restrict parental choice by requiring that children attend *public* schools. On the contrary, parents must be permitted to satisfy their educational duties by enrolling their children in private schools. The case that established this principle is *Pierce v. Society of Sisters*,[10] one of the earliest and most significant Supreme Court decisions concerning education. In *Pierce*, two private schools, one of which was also an orphanage, successfully challenged an Oregon law that would have compelled, under threat of criminal prosecution, "every parent, guardian, or other person having control or charge or custody of a child between eight and sixteen years to send him 'to a public school for the period of time a public school shall be held during the current year' in the district where the child resides . . ."

The *Pierce* decision was based on the **Due Process Clause** of the Fourteenth Amendment, which prohibits state actions that "deprive any person of life, liberty, or property without due process of law." Due process is a very elastic and abstract concept used by courts during the early part of the twentieth century to protect a variety of individual interests against improper or unjustified government intrusion. In *Pierce*, the Court recognized the duty of states to ensure all children receive an education, but it also recognized the property interests of private school operators and the liberty interests of parents "to direct the upbringing and education of children under their control."

Although the Due Process Clause is no longer used to limit government regulation of business, the right of private schools to exist and the general right of parents to choose private schooling for their children is not likely to be challenged in the foreseeable future. In 2000, in his concurring opinion in *Troxel v. Granville*,[11] Justice Souter noted that, "Even a State's considered judgment about the preferable political and religious character of schoolteachers is not entitled to prevail over a parent's choice of private school."

This does not mean, however, that parents may satisfy their obligation to have their children educated by enrolling them in any educational program or school they wish. On the contrary, the *Pierce* Court recognized that the need for an educated citizenry justifies state regulation of private schools:

> No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise, and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.

The nature and scope of the regulations that states may constitutionally impose on private schools and home-based education programs is an area of ongoing controversy (see Section 2.4).

2.2 Exemptions from Compulsory Schooling

Three general categories of exceptions to the requirements of compulsory schooling laws have been recognized. First, some parents and children must be excused from some of the requirements of compulsory schooling laws for constitutional reasons. Second, some states exempt certain categories of children. Third, state courts have sometimes accepted idiosyncratic reasons for failing to comply with compulsory education laws. Each of these categories is very limited in scope.

Constitutionally Required Exemptions

Among the most legally troublesome aspects of compulsory schooling laws is the conflict between parental preferences and state interests in the education of children. A large number of cases have asked the courts to deal with conflicts between state laws and school programs designed to expose all children to broad-based knowledge and diverse beliefs and the desire of religious parents to shield their children from such exposure. Parents who initiate these cases generally accept the notion that their

children should learn to read and write, but they claim that certain aspects of the public school curriculum violate their own right to free exercise of religion under the First Amendment. The best-known case of this type is *Wisconsin v. Yoder*,[12] in which the Supreme Court granted a limited exemption from compulsory schooling laws to a group of Old Order Amish parents on religious grounds.

The First Amendment states that government "shall make no law . . . prohibiting the free exercise" of religion. *Yoder* is typical of cases involving allegations that a government regulation violates this guarantee. The Amish plaintiffs sought an exemption from a generally applicable law on the ground that compliance would violate their free exercise rights. As in other free exercise cases, the Court's approach involved balancing the religious interests of the plaintiffs against the state's interest in enforcing the law. First, the Court imposed on the plaintiffs the burden of proving that their claim was **religious**, not merely philosophical or moral; that their belief was **sincere**, not a ruse to avoid an onerous law; and that the law had a **severe impact** on the exercise of their religion. Only after the Amish had met their burden of proof did the Court examine the state's asserted interests to determine if those interests were strong enough to justify an infringement of their free exercise rights. The state would have prevailed if it had been able to convince the Court that enforcement of the law was necessary to the achievement of a compelling state interest. In *Yoder*, however, Wisconsin was unable to do so.

Despite its outcome, *Yoder* constitutes a strong affirmation of the basic principle of compulsory schooling. The Court did not allow the Amish to avoid *all* schooling, only the last two years, and it based its decision in part on the fact that the children in that case were participating in a home-based educational program after the eighth grade. The Court also signaled a strong presumption in favor of compulsory schooling by wording its opinion to make it inapplicable to virtually any group other than the Amish. Nevertheless, members of other religious groups have repeatedly cited the *Yoder* decision when seeking exemptions from compulsory schooling laws.

In *Church of God v. Amarillo Independent School District*,[13] a U.S. District Court considered whether a school is compelled by the Constitution to excuse the absences of students who miss school to fulfill religious obligations. The case was brought on behalf of twenty-four students who were members of the Worldwide Church of God. In order to fulfill the requirements of their religion, the students were obliged to be absent from school for ten to twelve days per year, including seven consecutive days to attend a religious convocation. The school district had recently adopted a policy that imposed serious academic penalties on any student who missed more than two days per year for religious reasons. The students argued that the new policy was an unconstitutional violation of their First Amendment right to free exercise of religion.

The court began its analysis by pointing out that a law or policy will not necessarily pass constitutional muster just because it is facially neutral in the sense that it applies to all religions equally. The Free Exercise Clause may be used to object to laws that are "fair in form, but discriminatory in operation." An otherwise valid law that burdens the requirements of a specific religion will be declared unconstitutional unless the state can demonstrate a compelling reason for its enforcement.

Next, employing the standard mode of free exercise analysis described previously, the court concluded that (a) the students' belief that they had to miss school for

religious observance was religious because it originated in the official doctrine of their church and its interpretation of the Bible, (b) the belief was sincere as indicated by the students' willingness to suffer significant academic penalties rather than violate their religious obligation, and (c) enforcement of the policy would have a severe impact on the students' exercise of their religion because they could not meet their religious obligations without significantly damaging their academic record.

Finally, the court turned to the question of whether the district's reasons for its attendance policy were sufficient to justify the burden that the policy placed on student members of the Church of God. The district offered two reasons for its policy: that "regular attendance in public school is necessary for a student's academic development" and "that accommodating the holy days of various and diverse religious groups would work an unreasonable burden on the teachers." To evaluate the first reason, the court looked to *Yoder*:

> The school district's interest in [the attendance policy] does not approach the magnitude of the state's interest in *Wisconsin v. Yoder*. Here we are not concerned with a religious sect that insists on keeping their children away from school. We are concerned only with the effect of a handful of absences on the Plaintiffs' academic development. This interest, standing alone, does not justify the burden placed on the free exercise of religion.

Regarding the second reason, the court noted that no teacher had ever complained about the work created by the prior more permissive attendance policy. Moreover, teachers had routinely provided and evaluated make-up work for students who missed class for sickness and sports. Thus, the court concluded that the district's attendance policy was an unconstitutional violation of the students' right to free exercise of religion.

Although the Court in *Church of God* rejected the district's contention that its attendance policy was necessary to the accomplishment of its educational goals, it strongly affirmed the importance of compulsory attendance laws: "The state's responsibility for the education of its citizens ranks at the apex of [its] functions . . ." Therefore, *Church of God* seems to imply that there is a limit on how much religiously motivated absence a school would have to tolerate, but it provides little guidance as to its extent. If church doctrine had required a month-long convocation or a weekly day off for religious observance, would the students have prevailed? What if teachers and administrators had complained strongly about the extra work required to accommodate the students' absences?

The unresolved issues in *Yoder* and *Church of God* have been further confounded by subsequent Supreme Court decisions. In *Employment Division, Department of Human Resources of Oregon v. Smith*,[14] the Court took a much stricter approach to free exercise claims than in *Church of God*. The *Smith* Court ruled that the Constitution is not violated by generally applicable laws that incidentally and unintentionally have an effect that burdens the free exercise of religion. This would seem to imply that school districts and states are now free to enforce the kind of policy struck down in *Church of God* or the compulsory attendance laws objected to in *Yoder*. However, the *Smith* opinion goes on to state that free exercise claims are to be given greater weight when they involve "not the Free Exercise Clause alone, but the Free Exercise Clause in

conjunction with other constitutional protections, such as . . . the right of parents, acknowledged in *Pierce v. Society of Sisters*, to direct the education of their children."

Statutory Exemptions

A state's compulsory schooling laws may exempt specified categories of children. Typically, the burden of proof is on the parents to show that an exemption applies. Conversely, the fact that a child fits into one of the exempted categories does not release the state or school district from the obligation to provide schooling if the parent chooses to enroll the child in public school. Some states exempt children living more than a specified distance from the nearest school, employed children of specified ages, minor parents lacking access to appropriate child care, and certain categories of children with disabilities.[15]

Some states specifically exempt Amish parents after their children have completed a certain grade or, more generally, parents who for bona fide religious reasons are opposed to school attendance.[16] In the case of children with disabilities, other federal and state statutes may require the state to provide educational services even if the parents choose not to send the child to school (see Section 7.3).

Judicial Exemptions

In the past, judicial exemptions were granted for married girls seeking to devote their time to homemaking, but such cases are of dubious relevance today.[17] In other cases, parents accused of violating compulsory schooling laws have attempted to defend themselves by objecting to conditions at local schools. However, a parent may not unilaterally withdraw a child from school to protest conditions at the school, nor may a parent remove a child from school to compel the school to change its educational program.[18] In *In re Baum*,[19] a seventh-grade student of Blackfoot heritage wrote a book report in which she criticized the historic treatment of Native Americans. In response, the teacher wrote, "I agree with your feelings of anger. However I have an uncle who is a Wampanoag Indian and his point of view is that the Indians got what they deserved." When the student asked for clarification, the teacher said, "Indians on reservations are lazy because they do not get off and get jobs." The teacher then allegedly spoke about "the high alcoholic rate of Indians," adding that many were "lazy." The entire exchange occurred in front of the class. The student's mother withdrew her from school and was ultimately found guilty of neglect for failing to make alternative arrangements that would satisfy compulsory schooling requirements.

Parents have occasionally prevailed, however, by establishing that conditions at school pose a significant health and safety risk to their children.[20] In *In re Ian D.*,[21] a boy testified that he was unable to attend school for more than 100 days because of constant abuse and ridicule from other students, despite his repeated pleas to school authorities for protection and assistance. Moved by this testimony, the court ruled in Ian's favor, citing the so-called "**choice of evils**" doctrine that permits violations of criminal statutes necessitated by exigent circumstances. The court also ordered the board of education to transfer Ian to another school where he could make a fresh start.

In addition to affirming an unusual exception to compulsory schooling, *In re Ian D.* raises the important issue of the extent to which a school has a legal obligation to protect students from **peer bullying** and **harassment**. An implicit premise of the opinion seems to be that the state had an obligation to provide Ian with a **safe school** (see Sections 6.9 and 12.4). In a more recent case, *S.C. v. Monroe Woodbury Central School District*,[22] a parent withdrew her son from public school after the school failed to protect him from repeated bullying. She then claimed the district had violated her son's Fourteenth Amendment rights by depriving him of his property interest in public education. The court indicated that it was sympathetic to the child's plight but denied the mother's claims, noting that the school's failure to protect her son from bullying was possibly negligent (see Section 12.4) but not a federal constitutional violation.

2.3 Admission Requirements

Until the 1970s, many states' laws exempted certain categories of children with disabilities from admission to public school. Courts generally upheld these laws on the dubious grounds that such children could not benefit from education or that their presence would be detrimental to the learning of others.[23] Today, excluding children with disabilities from school would violate federal and state constitutional guarantees of equal protection and a number of federal and state statutes (see Sections 7.1 to 7.3).

The once-common practice of excluding married students from school was found to exceed the district's authority in *Carrollton-Farmers Branch Independent School District v. Knight*.[24] However, several courts have allowed rules excluding married students from extracurricular activities.[25] Even if they are within the school's statutory authority, rules that discriminate against married students might violate their constitutional right of privacy.[26] State compulsory schooling laws have retained admission requirements for local public schools relating to age, health, and residency.

Age Requirements

State laws establish the minimum and maximum age of children eligible to receive an education in public schools. Typically, children must be five by a specified date in order to start kindergarten, six by a specified date in order to start first grade. Parents have challenged age requirements as a violation of state constitutional guarantees[27] and the Fourteenth Amendment's Equal Protection Clause without success.[28] A state court in Texas rejected a parental claim that a school was obliged to hold a hearing to determine their underage child's readiness for first grade before preventing the child from attending.[29]

Immunization Requirements

Most states require specified immunizations as a condition of admission to public school. Some parents have argued that mandatory immunization is a violation of their free exercise rights, but the Supreme Court in 1922 ruled that the public interest in preventing communicable diseases overrides such objections, and this precedent has been followed ever since.[30] Moreover, several courts have found religious exemptions from mandatory vaccination statutes to be unconstitutional.[31]

Residency Requirements

Parents sometimes wish to transfer their children out of their home district for educational, philosophical, social, or other reasons. Many states either prohibit school districts from admitting non-resident students or place significant limitations on inter-district transfers. In *Martinez v. Bynum*,[32] the Supreme Court held that residency requirements do not violate the constitutional right to interstate travel. In *Paynter v. State*,[33] New York's highest court upheld residency requirements against claims that they fostered *de facto* segregation (see Section 6.3).

When students are allowed to transfer, parents or, in some circumstances, the students' home district may be required to pay tuition. In some states, parents are not usually allowed to transfer their children without the approval of both the sending and receiving districts regardless of the basis of their objection to their home district's schools. Some states permit students to attend school in any district that declares itself open to students from outside its boundaries unless the racial balance in a district under a court desegregation order is adversely affected.[34] In districts not under a desegregation order, accepting or rejecting students for transfer on the basis of race (even if conducted with the aim of fostering racial integration) is probably unconstitutional.[35]

The issue of residency raises issues of financial responsibility, particularly for children placed in residential care facilities by the courts. Under these circumstances, most states hold the district where the child ordinarily resides financially responsible, but the criteria for determining residency vary somewhat from state to state. In most states, unless the minor is emancipated, the rebuttable presumption is that the residence of the minor is that of the parents. When parents are divorced, the presumption is that the residence of the child is that of the parent with legal custody.[36]

Under the laws of most states, a child can establish residency in a district other than the one in which the parents live even when living with someone who is not a legal guardian. One court ruled that a child who boarded in a district away from his custodial parent for health reasons satisfied school residency requirements.[37] However, schools are not usually required to admit children who reside in the district primarily for the purpose of attending school.[38]

State laws treat different classifications of institutionalized children differently and may distinguish between residency standards for admission purposes and for financial responsibility purposes.[39] Residency requirements pose a potential obstacle to the education of homeless children. The **McKinney-Vento Homeless Assistance Act** of 1988[40] requires states to ensure that the children of homeless parents and homeless youths have equal access to the same public education provided to other children. The Circuit Court of the District of Columbia has ruled that the McKinney Act permits homeless children to sue governmental officials to obtain the educational rights it guarantees.[41]

School Assignment

School boards are required to provide an education to children residing in the district or participating in a legally sanctioned transfer program. There is, however, no constitutional requirement that students be given a choice among a district's schools.[42] With few legal constraints, school boards may assign students to any school or program they choose. The most significant constraint is that pupils may not be assigned to schools

on the basis of race or other criteria in violation of the Equal Protection Clause of the Fourteenth Amendment or federal civil rights statutes. In *Parents Involved in Community Schools v. Seattle School District No. 1*,[43] the Supreme Court ruled in a plurality opinion that school districts may not use race as a criterion in assigning pupils to schools even if their goal is to promote "racial balance" (see Section 6.6).

School districts may not abuse their discretion in the assignment of pupils. Thus, in one case, a court prohibited the reassignment of pupils from a school close to their homes to a school more than forty miles away even though busing was provided.[44] In general, however, parents are not usually successful in getting the courts to require assignment to a particular school.[45] In recent years, a number of school boards have responded to calls for greater parental choice in education by voluntarily initiating plans that permit children to attend any school within the district, and a handful of states have adopted statutes requiring open enrollment within all districts.

As discussed in Section 3.6, the federal statute known as the **No Child Left Behind Act** (NCLB) imposes on states and school districts a complex set of requirements intended to ensure that all children achieve academic proficiency.[46] Students in schools that fail for two consecutive years to make "adequate yearly progress" must be given the option to transfer to another public school in the same school district, including a charter school, if permitted under state law, that has not been identified under NCLB as needing improvement. The school district must provide or pay for transportation for the student to attend the new school.[47] Note that the statute does not require that the student be allowed to choose any school in the district, only that an alternative placement be offered.

Immigration Status

In 1975, Texas enacted a law withholding funds from local school districts that enrolled the children of illegal aliens. At least one school district began charging tuition for such children in an attempt to recover lost revenue. In a 5–4 decision, the Supreme Court struck down the Texas law in *Plyler v. Doe*.[48] The Court found the policy imposed a discriminatory burden on children brought illegally into the country through no fault of their own. The Court also found that denying such children the benefits of public education furthered no substantial state interest, adding that it could lead to "the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime." In 2012, the Hispanic Interest Coalition of Alabama challenged the constitutionality of the **Beason-Hammon Alabama Taxpayer and Citizen Protection Act**.[49] Among other things, the legislation required local school officials to verify the immigration status of children and their parents as part of the enrollment process. Following *Plyler*, the Eleventh Circuit struck down these provisions, finding they presented "similar obstacles to the ability of an undocumented child to obtain an education."[50]

2.4 Government Regulation of Private Schools

It often falls to the courts to assess the constitutionality of state regulation of private alternatives to public schooling. To do so requires balancing the state's interests in

ensuring the education of all children against the right of parents to direct the upbringing of their children. As the *Pierce* Court recognized, if states could not regulate private schools, they would have no way of ensuring that the goals of compulsory schooling are met. Private school students might receive a program limited to one particular subject or skill or they might be taught nothing at all. However, if the state's power to regulate private schools was unlimited, the authority of parents to choose an alternative to public schooling for their children would be meaningless. States would be free to impose so many requirements and restrictions on private schools that they would become indistinguishable from public schools.

After World War I, a number of states passed laws designed to promote the goal of socializing or, as it was often called, "Americanizing," their diverse populations. Some of these laws sought to foster majoritarian American beliefs and values and the use of the English language by regulating the curricula of private schools. In 1923, two years before *Pierce*, the Supreme Court in *Meyer v. Nebraska*[51] struck down a Nebraska law requiring that all instruction in private schools be in English and barring the teaching of any modern foreign language until after the eighth grade.

The *Meyer* Court recognized the right of the state to impose curricular requirements on private schools designed to foster the physical, mental, moral, and civic development of their students. At the same time, it recognized the right of parents to have their children taught in accordance with the parents' desires and beliefs. In *Farrington v. Tokushige*, shortly after *Meyer*, the Supreme Court rejected a Hawaii law regulating private academies that children attended in addition to public school.[52] The law prohibited attendance at these schools until after the second grade, limited attendance to six hours a week, and thoroughly regulated their curriculum. Taken together, *Pierce*, *Meyer*, and *Tokushige* can be read as barring the states from prohibiting private school practices and curricula except, as the *Pierce* Court put it, those clearly "inimical to the public welfare." The power of the state to require private schools to teach certain subjects and even certain topics is generally accepted. However, states may not prohibit the inclusion of additional subjects even to ensure that more time will be available to devote to subjects legitimately required by the state.

Today, most states prescribe a core curriculum including "the three Rs" and other subjects such as U.S. history that private schools are required to provide. Some states go further by insisting that private schools teach "patriotism" or "good citizenship." At least one state, Michigan, requires private schools to use textbooks that recognize the achievements and accomplishments of various ethnic and racial groups, and other states impose their own specific mandates. At the other end of the spectrum, some states only impose requirements on private schools that wish to be accredited by the state.

No state currently prohibits private schools from teaching any particular subject or topic. What topics, if any, are sufficiently inimical to the public welfare to be prohibited by the state? Do private schools have a constitutional right to promote beliefs that government policy explicitly rejects? Do parents have a constitutional right to send their children to schools that advocate lawlessness? Given the great weight placed by modern courts on both parents' rights and freedom of speech, the answer to both these questions might well be that they do. Indeed, one Supreme Court opinion contains the dictum that "parents have a First Amendment right to send their children to

educational institutions that promote the belief that racial segregation is desirable, and . . . children have an equal right to attend such institutions."[53]

Challenges to state regulation of private schools have been based on the Constitution's protection of parental rights, free speech, and, most frequently, freedom of religion. In *Circle School v. Phillips*,[54] the court ruled that a state statute requiring private schools to "provide for the recitation of the Pledge of Allegiance or the national anthem at the beginning of each school day," and to notify parents of any student who declined to participate, violated the right of parents to direct the upbringing of their children and the free speech rights of students and private schools. Another court struck down a law that required private schools intending to adopt a new edition of a textbook for use during the following academic year to inform parents of the changes contained in the new edition and whether the changes were "significant," and, in cases where the changes were not considered significant, gave parents the option of having their children use the prior edition. The court concluded that the law violated the right of private schools to free speech and "academic freedom."[55]

In *State v. Whisner*,[56] a school affiliated with a fundamentalist Christian church objected to a set of regulations promulgated by the Ohio Board of Education imposing strict standards on almost every facet of private school operation, from the content of the curriculum to the layout of school buildings. Most onerous was the rule requiring that 80 percent of instructional time be spent on language arts, mathematics, social studies, health, and citizenship, with the remaining 20 percent of instructional time spent on physical education, music, and art. This effectively prohibited additional instruction in religion or other subjects not on the prescribed list. In its analysis, the court found the state could not demonstrate a compelling need for such regulations, and they were accordingly declared unconstitutional.

Whisner shows that the Constitution does place limits on the state's power to regulate the program of private religious schools. Regulations that are arbitrary or unnecessary to the achievement of the state's legitimate educational goals may not be enforced. However, the opinion should not be understood to prohibit all state regulations that a private school objects to on religious grounds. In fact, although the *Whisner* plaintiffs prevailed, most religion-based attacks on state regulation of private schools have been unsuccessful. In another Ohio case, the Sixth Circuit rejected a parental claim that the state's mandatory program of proficiency testing in reading, writing, mathematics, science, and citizenship impermissibly forced private schools to change their curricula and eradicated the distinction between public and private education.[57] Other courts have also upheld laws requiring standardized testing of private school students[58] as well as prior state review of private school programs,[59] local school board investigation of private schools,[60] and reporting of private school enrollment and attendance to the state.[61] If the "minimum standards" objected to in *Whisner* had merely required the teaching of specified subjects while permitting additional instruction in other subjects, they probably would have been sustained as well.

The *Pierce* opinion suggests that the state has the authority to insist that those who provide instruction in private schools be qualified teachers. Although most states place no specific requirements on private school teachers, or require only that they be "qualified" or hold a bachelor's degree, some states insist that private school teachers

hold certification. This requirement has proved controversial, especially in religious schools.[62] In *Sheridan Road Baptist Church v. Department of Education*,[63] a church school objected on free exercise grounds to Michigan's requirement of certification for its teachers. In order to obtain certification, prospective teachers had to obtain a bachelor's degree from an "approved" university including specified amounts of credits in education, liberal arts, and the subjects they wished to teach. Although it agreed with the school that the requirement could potentially place a burden on its exercise of religion by limiting the pool of acceptable applicants, the court found that the state had a strong justification for its rule: A high quality education requires well qualified teachers. Because the state's interest in assuring that all students be taught by qualified teachers outweighed the potential minor burden on the parents' religious freedom, the certification requirement was upheld.

Background Checks

To help protect children enrolled in private schools from harm at the hands of private school employees, many states require private schools to conduct criminal background checks and sex-offender-registry checks of all prospective employees in order to maintain their status as approved alternatives to public schools under their compulsory schooling laws. In Illinois, a non-public school will not receive "Non-Public School Recognition Status" unless it requires all applicants to authorize a fingerprint-based criminal background check prior to employment.[64] Maryland requires its Department of Education to revoke the approved status of any private school that knowingly employs a person convicted of child sexual abuse.[65] Louisiana prohibits public and private schools from employing any person in any capacity who has been convicted of a crime involving children or who has pleaded no contest when charged with such an offense.[66]

Federal Regulation of Private Schools

Because private schools are not government agencies, they are not generally bound by the limitations that the Constitution places on the government. Thus, for example, private schools are free to require their students to attend a particular church. Nevertheless, several federal statutes prohibit racial and other forms of discrimination in private school admissions and employment practices. A statute known as Section 1981 prohibits racial discrimination in the formation of contracts.[67] In *Runyon v. McCrary*,[68] the Supreme Court ruled that Section 1981 prohibits private schools from denying admission on the basis of race.[69] In 2006, the Ninth Circuit ruled that the longstanding practice of a private school in Hawaii of giving preference in admissions to students of Native Hawaiian ancestry did not violate Section 1981,[70] but a subsequent Supreme Court ruling suggests that the Ninth Circuit's interpretation of Section 1981 might not be correct.[71] Private schools that engage in racial discrimination in any of their policies or practices may lose their tax-exempt status even if the discrimination is based on religious belief.[72]

In addition, if a private school receives federal money, it is subject to Title VI of the **Civil Rights Act** of 1964 (see Section 6.8), which prohibits discrimination on the basis

of race by programs receiving federal financial assistance.[73] According to the broad definition of "program" adopted by Congress, a private school with a federally assisted lunch program would be required to comply with Title VI in all its endeavors, not just the lunch program.[74] Failure to do so could mean the loss of all federal funds. Similarly, private schools receiving federal money are prohibited from discriminating on the basis of gender by Title IX[75] (see Section 6.8), except that schools sponsored by religious organizations are exempt from Title IX (but not Title VI) to the extent that the law conflicts with the tenets of the religious organization.[76] Private schools that participate in the National School Lunch Program must comply with nondiscrimination requirements of the Department of Agriculture.[77] In some states, anti-discrimination statutes that apply to private schools may be more stringent than federal requirements.

Private schools receiving federal financial assistance are prohibited from discriminating against "otherwise qualified" pupils with disabilities by the Rehabilitation Act of 1973.[78] They "may not, on the basis of handicap, exclude a qualified handicapped person from the program if the person can, with minor adjustments, be provided an appropriate education"[79] (see Section 7.2). The "with minor adjustments" qualification means that, unlike public schools, private schools may sometimes refuse to serve pupils with disabilities, but only if they are ill-equipped to provide them with an appropriate education and subject to the requirements of the Americans with Disabilities Act (ADA), if applicable.

The ADA[80] (see Sections 7.2 and 9.6) requires private schools, whether they receive federal assistance or not, to make "reasonable modifications" in their practices and policies, and to provide "auxiliary aids and services," in order to accommodate people with disabilities, unless such modifications would "fundamentally alter" the nature of the services offered or result in an "undue burden."[81] The law also requires schools to remove structural, architectural, and communication barriers in existing facilities and transportation barriers in existing vehicles if removal is "readily achievable." Religious schools under the control of religious organizations or entities are exempt from the provisions of ADA that deal with discrimination against students with disabilities,[82] but not from the provisions that deal with discrimination against employees with disabilities.[83] However, the Supreme Court has recently created a "ministerial exception" to ADA rules. In *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*,[84] the Court barred an ADA lawsuit against a parochial school by a disabled employee on the ground that she was not a teacher but a "commissioned minister." The Court found it would violate the First Amendment for federal law to foist an unwanted minister on any faith community.

Federal law, in some states supplemented by state statutes, also regulates the relationship between private schools and their employees. Title VII of the Civil Rights Act of 1964 forbids discrimination in private employment on the basis of gender, race, color, religion, or national origin[85] (see Section 9.4). Title VII's prohibition of discrimination based on religion does not, however, apply to religious schools. One section of the law specifically permits religious organizations, including religious schools, to employ only people of a particular religion.[86] A different section also permits hiring on the basis of religion by schools, colleges, and universities owned, supported, or controlled by a particular religion, or if the curriculum of the school is directed toward the "propagation" of a particular religion.[87] Based on these exceptions, one court

permitted a Catholic school to dismiss a non-Catholic, previously divorced, teacher because her marriage to a Catholic violated church doctrine.[88] However, Title VII's prohibitions of discrimination based on race, gender, and national origin do apply to religious schools[89] except to the hiring of ministers.[90] In addition to Title VII, private schools may be subject to certain state civil rights and labor laws.[91]

2.5 Government Regulation of Home-Based Education and Cyber Schools

Although many of the issues that arise regarding state regulation of home-based education parallel the private school issues discussed previously, some issues are unique to the regulation of homeschooling. Courts have generally rejected constitutional objections to states treating homeschooling operations differently from private schools.[92] In *Pierce*, the Supreme Court made it clear that states must allow parents to choose private schooling for their children, but the Court has not specifically addressed whether states may prohibit homeschooling

Until the 1990s, homeschooling remained illegal in many states, and homeschooling parents were routinely prosecuted. For example, in *State v. Edgington*,[93] a New Mexico court upheld a ban on homeschooling to promote the goal of ensuring that children were brought into contact with people in addition to their parents so that they might be exposed "to at least one [additional] set of attitudes, values, morals, lifestyles, and intellectual abilities." Other courts accepted the argument that the state may force parents to enroll their children in a school outside their home to foster the goal of socialization and the ability to relate to others.[94] Even parents claiming that their religious beliefs required teaching their children at home usually lost in court.[95] In a few cases, parents succeeded in convincing a court that, under certain circumstances, homeschooling was a constitutional right subject only to reasonable state regulation. In one such case, the court concluded that the Constitution prohibits state rejection of a homeschooling program for non-academic reasons.[96]

Today, most states explicitly permit home-based education. Even in states that do not explicitly permit home-based education, parents may continue to educate their children at home by classifying their home as a private school. There are four general categories of regulation that some states impose on home schools: (a) instructor qualification requirements, for example, that homeschooling parents be "qualified" or "competent" to teach; (b) assessment requirements, for example, that homeschooled children take a specified standardized test; (c) programmatic requirements, for example, that home schools provide instruction that is "equivalent" to that of public schools; and (d) graduation requirements, that homeschooled students complete a specified program of study in order to receive a diploma. Regulations like these have generally survived claims that they are unconstitutionally vague.[97]

In some states, including New York and Pennsylvania, public school administrators are charged with enforcing some or all of the statutory restrictions on home-based education programs.[98] The Pennsylvania Home Schooling Act requires district superintendents to ensure that homeschooled students receive an "appropriate education." The statute requires homeschooling parents to submit documentation to prove that their child is receiving instruction and making sustained progress in a specified set of

subjects. Unwillingness or inability to satisfy this requirement could result in losing the right to homeschool. A federal district court rejected a challenge to the law by homeschooling parents who claimed that it impermissibly impinged on their right of free exercise of religion. The court found that the requirement did not place a "substantial burden" on the parents' ability to educate their children as their religion required.[99] In some states, the burden of proof is on home instructors to show that they are meeting the requirements of state law, but in others the state bears the burden of showing that a home school is not adequate under the law.[100]

In any case, enforcement of homeschooling regulations is often quite lax, and prosecution of homeschooling parents for violating compulsory education laws has become quite rare. In many states, either by law or practice, any parent may homeschool and homeschools may offer whatever program the parent chooses. In places where homeschooling is completely unregulated, the state has no way of ensuring that the goals of compulsory schooling are being met.

Participation in Public School Programs

Parents of private and home-schooled pupils sometimes wish to have their children participate in some public school courses or extracurricular activities. Statutes in a small number of states such as Idaho permit non-public school students and homeschooled students to enroll in any public school course, participate in extracurricular activities, and use school facilities.[101] A Michigan law permits students who attend non-public schools, including homeschools, to enroll in non-core courses in public schools.[102]

In the absence of such a statute, parents have no legal right to insist that their children be allowed to participate in public school programs in which they are not enrolled. In a Maryland case, the court rejected a claim by the parents of a private school pupil that the constitutional guarantees of equal protection and religious freedom required the public school to allow their child to participate in extracurricular activities.[103] A West Virginia court found that a rule prohibiting homeschooled students from participating in interscholastic sports did not violate equal protection guarantees.[104] Some school boards may adopt a policy of allowing private or homeschooled students to enroll part-time for particular courses or activities, but the district will usually not receive state aid for such pupils. In New York, children receiving home-based instruction are not permitted to participate in interscholastic sports, intramural sports, school-sponsored club activities, or in any aspect of the instructional program of any school district.[105] In *Bradstreet v. Sobol*, the New York Court of Appeals ruled that a homeschooled student's right to equal protection under the Fourteenth Amendment was not violated when his school district denied him the opportunity to participate in the district's sports program.[106]

Private Virtual and Cyber Schools

As of 2011, approximately 200,000 children in thirty-three states were enrolled in publicly-funded online charter schools operated by private for-profit education management organizations. **Cyber schools** differ from other forms of home-based education

in that they typically rely on certified teachers working remotely with large numbers of students while parents provide ongoing tutorial support. Most are publicly-funded and, to some extent, publicly-regulated. Pennsylvania authorizes public funding of cyber schools provided they comply with the requirements of its Charter School Law.[107] (See Section 3.1)

2.6 Government Assistance to Private Schools

Despite the legal disputes examined in Section 2.4, states are not always hostile to private schools. In fact, many states wish to encourage private school attendance for political, philosophical, or educational reasons, or as a way to save money. However, aid to private schools is legally controversial because many private schools are associated with a church, teach religious doctrines, and encourage religious belief. The basic question examined in this section is whether various forms of state aid to private religious schools and their students violate the Establishment Clause of the First Amendment.

In the early days of the United States, government aid to private schools was quite common. State support of private religious schools was not seen as a violation of the First Amendment, which provides only that "Congress"—that is, the federal government—"shall make no law respecting an establishment of religion." Not until 1925 did the Supreme Court interpret the Fourteenth Amendment, adopted in 1868, as placing some of the same restrictions on state government action that the Bill of Rights imposes on Congress.[108] Not until 1940 was the Establishment Clause applied to the states.[109]

Nevertheless, by the late nineteenth century, state aid to religious schools had become controversial. Some states continued to assist private schools by offering free transportation or textbooks to their pupils, but others rejected these measures and even passed laws designed to discourage private school attendance. A proposed federal constitutional amendment prohibiting the use of any state tax money to aid parochial schools was considered in 1876, but ultimately failed.

In many states, the most valuable and politically and legally contentious form of state aid to parochial schools was the exemption of property used for religious or educational purposes from property tax. By 1918, fourteen state constitutions required the legislature to grant property tax exemptions and nineteen others authorized them. In many of the latter group of states, exemptions were repeatedly granted and rescinded. In 1970, the Supreme Court in *Walz v. Tax Commission*[110] upheld a New York law granting property tax exemptions to private religious, educational, and charitable institutions.

Beginning in 1947, the Supreme Court has considered a long series of Establishment Clause-based challenges to a variety of more direct forms of aid to parochial schools and their pupils. In *Everson v. Board of Education*,[111] the Court considered the constitutionality of a state plan providing free transportation to private school pupils. In deciding the case, the Court for the first time employed Thomas Jefferson's metaphor that the First Amendment erected "a wall of separation between church and state." This meant, according to the Court, that the government could not pass laws that aided one religion, aided all religions, or preferred one religion over another. In this case, however, the Court concluded that the program under attack did not in fact support private religious schools. The aid in question was but "a general program to help parents get their children, regardless of their religion, safely and expeditiously to and

from accredited schools." The Court did warn, however, that the program approached the "verge" of the state's power.

A year later in *McCollum v. Board of Education*,[112] the Court found unconstitutional a program that enabled the interfaith Champaign (Illinois) Council on Religious Education to offer classes in religious instruction to public school children on public school premises. The classes were taught by members of the clergy at no expense to the schools and were attended for thirty to forty-five minutes a week by pupils whose parents signed written authorizations. Students who did not attend were required to pursue their secular studies elsewhere in the building. Attendance at both the secular and religious classes was strictly enforced. Relying on the "no aid" principle of *Everson*, the Court found that this arrangement provided "sectarian groups an invaluable aid."

In the next major related case, *Zorach v. Clauson*,[113] the Court found no constitutional violation in a plan that allowed public school students with parental permission to leave the school during regular school hours to go to private religious centers where they were instructed in religion and where attendance was taken on behalf of the public school. To reach this conclusion, the Court abandoned the strict separation doctrine used in *Everson* and *McCollum*. The First Amendment, said the Court, did not require "that in every and all respects there shall be a separation of Church and State." What was prohibited was "concert, or union or dependency one on the other." The release time arrangement was merely the accommodation of the public school schedule to a program of outside religious instruction.

Then, in 1968, in *Board of Education v. Allen*,[114] the Court upheld a program of loaning secular textbooks to students attending private religious schools. In deciding this case, the Court invoked yet another standard for analyzing challenges to programs of state aid to parochial schools. Its conclusion was based on the finding that the program had neither the purpose nor the primary effect of aiding religion.

In 1971, in considering a program of state subsidies for parochial school teachers, the Court in *Lemon v. Kurtzman*[115] for the first time employed the framework for analyzing alleged violations of the Establishment Clause that has become the standard ever since. Combining elements of the doctrines used in *Zorach* and *Allen*, the three-part ***Lemon* test** holds that a government policy or practice violates the Establishment Clause if (a) its purpose is to endorse or disapprove of religion, (b) its primary effect is to aid or inhibit religion, or (c) it either creates excessive administrative entanglement between church and state or is conducive to religiously based political divisiveness. Chapter 3 further explains the use of the *Lemon* test as it applies to the programs and practices of public schools. The application of the *Lemon* test to programs of government aid to parochial schools has resulted in a patchwork of inconsistent decisions. The following forms of aid have been judged permissible:

- Supply of state-prepared standardized tests and scoring services.[116]
- Provision of speech, hearing, and psychological services whether offered at the parochial school or a neutral place.[117]
- Provision of diagnostic speech, hearing, and psychological services provided at the parochial school.[118]
- Cash reimbursement for costs associated with state-mandated testing and reporting requirements in connection with tests prepared by the state, but scored by parochial school personnel.[119]

- State income tax deductions, available to both public and private school parents for expenses incurred for tuition, textbooks, and transportation to school.[120]
- Federal grants for care and prevention services regarding teenage pregnancy provided by religious and nonreligious organizations.[121]

However, the Supreme Court has found the following parochial school assistance programs impermissible:

- Subsidizing teacher salaries.[122]
- Subsidizing secular courses.[123]
- Loan of maps and audiovisual equipment.[124]
- Subsidizing transportation for field trips.[125]
- Grants for maintenance of school facilities.[126]
- Per pupil allotment of funds to maintain enrollment records.[127]
- Provision of remedial and accelerated instructional services, guidance, counseling, testing, and speech and hearing services on the premises of a parochial school.[128]
- Provision of remedial and enrichment courses on parochial school grounds during the school day.[129]
- Provision of community education programs on parochial school grounds during non-school hours.[130]
- Tax deductions for tuition expenses available only to parents sending children to private schools.[131]

In *Aguilar v. Felton*,[132] the Supreme Court considered whether it was permissible under the Establishment Clause for a public school district to provide Title I services in parochial schools. The district used federal funds to send teachers to religious schools to provide federally mandated, supplementary remedial education to qualifying students. Steps were taken to ensure that the publicly paid teachers would not be involved in religious activities and that the classrooms in which they worked would be free of religious adornment. The Court, relying primarily on the entanglement prong of the Establishment Clause, found the program impermissible nonetheless.

Twelve years later, in the wake of a great deal of expenditure of public funds to transport parochial schools students off campus to receive Title I services and significant public and government sentiment against the *Aguilar* decision, the Supreme Court reconsidered the issue. This time, in *Agostini v. Felton*,[133] the Court came to the opposite conclusion. The program of providing Title I services to eligible students at the parochial schools that they attend, concluded the Court, did not constitute excessive entanglement between church and state. "We no longer presume," wrote the Court, "that public employees will inculcate religion simply because they happen to be in a sectarian environment."

Agostini is consistent with the Court's approach to most Establishment Clause cases since the 1980s. This approach, referred to as the "neutrality doctrine," has refined but not replaced the Court's use of the *Lemon* test. The neutrality doctrine holds that it is permissible for a church or other religious organization such as a parochial school to receive assistance from a government program as long as the program is religiously neutral. This means that beneficiaries of the program must not be defined according to

religion, but rather that the assistance must be available to all or on the basis of non-religious criteria. Most often, this requirement will be satisfied if individuals receive benefits that they may, at their discretion, transfer to either religious or secular organizations. Thus, during the past three decades, the Court has:

- Authorized payment of public funds to a visually impaired person for vocational services even when the recipient used the funds to pay his tuition at a Christian college to prepare himself for a career as a pastor, missionary, or youth director.[134]
- Upheld a system of federal grants for public and non-public organizations, including religious organizations, for counseling services and research concerning premarital adolescent sexual relations and pregnancy.[135]
- Held that, although a school district may limit the use of its property to school activities, once a district makes its facilities available for after-hours use for social, civic, and recreational purposes, it may not deny the use of those facilities to a religious group solely because of the religious message of the group.[136]
- Concluded that the provision of a publicly funded sign-language interpreter, pursuant to the Individual with Disabilities Education Act, to a deaf student attending a religious school did not violate the Establishment Clause.[137]
- Prohibited a state from redrawing school district boundaries in order to create a religiously homogeneous school district.[138]

The neutrality doctrine case with the most far-reaching implications for public funding of private schools and for educational policy generally was actually decided two years before *Aguilar*. In 1983, in *Mueller v. Allen*,[139] the Supreme Court upheld a Minnesota law that allowed taxpayers to deduct from their state income taxes certain expenses incurred in providing education for their children including tuition expenses at parochial schools. To decide the case, the Court applied the three prongs of the *Lemon* test: purpose, primary effect, and entanglement. On the issue of whether the law had a secular purpose, the Court wrote:

> A State's decision to defray the cost of educational expenses incurred by parents—regardless of the type of schools their children attend—evidences a purpose that is both secular and understandable. An educated populace is essential to the political and economic health of any community, and a State's effort to assist parents in meeting the rising cost of educational expenses plainly serves this secular purpose of ensuring that the State's citizenry is well educated. Similarly, Minnesota, like other States, could conclude that there is a strong public interest in assuring the continued financial health of private schools, both sectarian and nonsectarian.

In finding that Minnesota's educational tax credit law did not have the primary effect of advancing religion, the Court noted that the tax deductions were available to all parents including those whose children attended public schools and nonsectarian private schools. The Court did acknowledge that the financial aid provided to parents had an economic effect comparable to that of aid given directly to parochial schools. But Establishment Clause concerns were reduced because the aid was channeled through the parents, so there was no state imprimatur conferred on the religious schools. The

historic purposes of the Establishment Clause, said the Court, were to avoid significant religious or denominational control of our democratic processes and deep division along religious lines. "The historic purposes of the Clause simply do not encompass the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case."

As for the claim of the plaintiffs that the law had the primary effect of benefiting religion because ninety-six percent of the children attending private schools attended religious schools, the Court wrote, "We need not consider these contentions in detail. We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law."

Regarding the third prong of the *Lemon* test, the Court concluded that the tax-credit program did not foster excessive entanglement between church and state. That the state might have to disallow deductions for textbooks used in teaching religion was no more a problem than having to screen the books eligible for textbook loan programs. Finally, the Court suggested that religiously-based political divisiveness was only an issue when direct financial subsidies are paid to parochial schools but, again, not when they are channeled through individual citizens.

In 2000, the neutrality doctrine was accepted in a plurality opinion in *Mitchell v. Helms*.[140] The decision upheld a state aid program that purchased and then loaned computers, books, and other educational materials and teaching aids to public and private schools, including religious schools. The opinion is based on the premise that aid provided to a broad range of groups or persons without regard to their religion is permissible.

The No Child Left Behind Act (see Section 3.6) requires that public schools provide, on an equitable basis, certain benefits and services to "eligible" children enrolled in private schools. Benefits to be provided after consultation with the child's private school include Title I aid for low-income students, special educational services, and access to various forms of educational technology.[141] Eligible children are children identified by the school as failing or at high risk of failing to meet the state's academic proficiency standards.[142]

In *Zorach v. Clauson*, the Supreme Court declared that the Establishment Clause prohibited "concert, or union or dependency" of religious organizations and the state, but such partnerships have been commonplace since the establishment of the White House Office of Faith-Based and Neighborhood Partnerships in 2001. This executive office allows faith-based organizations to apply for federal funding for social services, including educational programs and services. In *Hein v. Freedom from Religion Foundation*,[143] the Supreme Court held that taxpayers do not have standing to challenge the constitutionality of funding decisions made by the executive branch of government.

2.7 Voucher Programs and the Establishment Clause

A much-discussed proposal for educational reform is to implement voucher plans that would allow parents to send their children to the public or private school of their choice at state expense. Does the Establishment Clause permit states to pay tuition at

religious schools in this way? In *Zelman v. Simmons-*Harris[144] the Supreme Court considered this question with regard to a voucher program established by the state of Ohio to provide educational choices to families in Cleveland. The Court had no difficulty in determining that the program had "the valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system." Thus, said the Court, the main issue was whether the program despite its secular purpose "has the forbidden 'effect' of advancing or inhibiting religion."

Relying on *Mueller* and a number of similar decisions, the Court ruled that it does not:

> . . . our decisions have drawn a consistent distinction between government programs that provide aid directly to religious schools and programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals.

It did not matter, said the Court, that 96% of the vouchers were used at religious schools as long as the program did not encourage parents to select religious schools.

Zelman indicates that voucher plans that meet the criteria of religious neutrality are permissible under the Establishment Clause. Several pre-*Zelman* state cases reached the same conclusion.[145] However, some state courts have ruled that their state constitutions prohibit state payment of tuition at religious schools.[146] The Florida Supreme Court ruled that a voucher program violated the requirements of the state constitution that education in the state be provided through a system of "public schools" and that the education provided by the state be "uniform."[147] The Arizona Supreme Court ruled that the state constitution prohibits the expenditure of public funds in private schools of any kind even if the public funds "passed through the hands" of parents in the form of a voucher.[148] Voucher plans that allow state payment of tuition at secular private schools but exclude participation of religious schools may be vulnerable to attack based on the Free Exercise Clause,[149] or the Establishment Clause. A program that excludes private schools based on state objections to the content of the curriculum would raise free speech issues.

In 2012, Louisiana enacted a voucher program providing state funds for students enrolling in charter schools, cyber-schools, and certain home-based education programs.[150] The constitutionality of the program was immediately challenged by the Louisiana Federation of Teachers. In a decision that will almost certainly be appealed, a state court subsequently found the program violated provisions within the Louisiana constitution disallowing the use of Minimum Foundation Program (MFP) funds—tax revenues earmarked for the support of public schools—for non-public educational institutions. "This Court is not suggesting that the State is prohibited from providing funding to nonpublic schools or nonpublic educational opportunities . . . rather, that MFP funding cannot be constitutionally spent on nonpublic education or distributed to non-public school systems." The court ruled that funding for non-public schools "must come from some other portion of the general budget."[151] Also in 2012, two school districts in Oklahoma sought a declaration that legislation authorizing a voucher program for students with disabilities in that state was likewise unconstitutional. In *Independent School District No. 5 v. Spry*,[152] the Supreme Court of Oklahoma