

Thinking Like a Lawyer

Thinking Like a Lawyer

An Educator's Guide to Legal Analysis and Research

Second Edition

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CAROLINA ACADEMIC PRESS

Durham, North Carolina

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Redfield, Sarah E.

Thinking like a lawyer : an educator's guide to legal analysis and research / Sarah E. Redfield. -- 2nd ed.

p. cm.

Includes index.

ISBN 978-1-59460-977-0 (alk. paper)

1. Legal research--United States. 2. Educational law and legislation--United States--Legal research. 3. Educators--United States--Handbooks, manuals, etc. I. Title.

KF240.R43 2011

340.072'073--dc22

2011002686

Carolina Academic Press
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
www.cap-press.com

Printed in the United States of America

Dedication

This book is dedicated to my family, Stewart Smith and Alexander and Althea Rose Redfield and, of course, to my students who have taught me so much.

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Preface to the Second Edition

Some things have changed since the first edition and some have not. Franklin Pierce Law Center affiliated with the University of New Hampshire, becoming the University of New Hampshire School of Law. This affiliation expanded and strengthened my relationships with colleagues in the Department of Education at the University, confirming once again for me the importance of educators and lawyers finding common ground.

Since the first edition, more laws have certainly been written and implemented. The Supreme Court of the United States has considered more education and special education cases as have lower federal and state courts around the country. The world of speech and communication has become instantaneous with ever-expanding use of cell phones and new media and concomitant new legal ground for schools and courts to consider. This edition reflects some of this change with new caselaw and examples. But, it is also no doubt true that by the time this book is in press more changes will be enacted and decided. What has not changed, however, is the basic method for thinking like a lawyer, which allows law students and educators to understand the law as it may apply to their particular situation or question and to predict what the law may require of them.

I continue to be grateful to all of my students who continue to inspire this work and look forward to hearing from many of you as you use the new edition.

Sarah E. Redfield
Concord, NH
April 2011

* The author acknowledges with gratitude the continuing support of the University of New Hampshire School of Law.

Preface to the First Edition

The origins of this book are at Franklin Pierce Law Center* and its Education Law Institute. The Institute's education law programs include an annual conference, courses, and two degree programs. The Institute has offered educators the opportunity to acquire the legal knowledge they need to function appropriately in today's schools and has also provided the opportunity for educators and lawyers to come together to learn. While law may well be too much with us in schools, it *is* in schools and it serves us all best if we can understand its origins and power.

As this book approached its final draft, I invited several of my students who were using the text to review and comment on the work. One of them, Dr. Ellenmorris Tiegerman, the founder of The School for Language and Communication Development in New York, wrote me a long letter describing what she saw as the conceptual basis for the book:

Your textbook should *not* be represented as a discussion of just legal basics or mechanics. You have created a rather unique program model... The program provides in the field of education at-large an opportunity for professionals to expand their knowledge base into the area of legal inquiry. In essence, you are proposing that the interface of education and law creates a nexus, which is both conceptual and pragmatic in nature. You are creating a new professional area that arises out of the plethora of cases in the field of education. The "legal educator" can provide a holistic view of the complex issues, which have historically been handled either by educators *or* lawyers....

It has been my experience that lawyers and educators are trained theoretically to function in different service contexts and, as a result, their viewpoints are limited by their separate training. Although they both contribute to part of the process, the translation of information often results in misunderstanding, miscommunication and limited thinking. The problem that presently exists is that educators and lawyers need to train in each other's field, to establish a common lexicon, theoretical framework and operational system to respond to issues that arise in schools.

The specialists your book attempts to reach will, I believe, fill a void that presently exists. The legal educator will be able to advise and counsel in order to cross the divide in thinking. The legal educator will be unique given the *nature* of problems occurring within the schools. Do not underestimate or understate the significance of the program or of the new professional. This is what your introduction needs to say. This is what will set your pro-

* The author acknowledges with gratitude the summer grant from the Franklin Pierce Law Center, which provided support toward writing this book.

gram apart from all of the rest, and this should be the lynchpin of your introduction.

As usual, I learned much from my students. I agree with Dr. Tiegerman that this exchange of knowledge between disciplines will serve both the education and legal communities well. This book offers a first step.

Introduction

For better or worse, the role of law in education is increasing. One need think only of special education to understand the enormity of the role of law in determining educational policy and practice. In 1970, the Congress enacted the Education of the Handicapped Act, followed in 1975 by the Education of All Handicapped Children Act, later amended as the Individuals with Disabilities Education Act (IDEA);¹ and the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA). The IDEA and its statutorily created concepts of free appropriate public education (FAPE),² individualized education program (IEP),³ and least restrictive environment (LRE)⁴ are today an integral, if not omnipresent, part of schools. Of course, IDEA is but one of the many legislative initiatives shaping education. These initiatives range from providing financial assistance to low income students under Title I of the Elementary and Secondary Education Act of 1965,⁵ to prohibiting discrimination on the basis of sex in education programs receiving federal financial assistance under Title IX of the Education Amendments of 1972,⁶ to the massive and controversial No Child Left Behind initiative.⁷ And these are only illustrative of many federal laws governing or affecting education and educational institutions. Each state will also have its own legislative agenda.

To form the body of education law, legislative enactments join with court opinions. There are historic, landmark constitutional decisions such as *Brown v. Board of Education of Topeka*,⁸ *Goss v. Lopez*,⁹ and more recent influential decisions like *Agostini v. Felton*,¹⁰ *Grutter v. Bollinger*.¹¹ There are also fundamental court opinions interpreting and applying education laws, like *Board of Education of the Hendrick Hudson Central School District v. Rowley*.¹² These well-known cases are just a few of the opinions of the Supreme Court,

1. See 20 U.S.C.A. § 1400 et seq.

2. Free appropriate public education is now defined at 20 U.S.C.A. § 1401(8); see also 20 U.S.C.A. § 1412(a)(1).

3. Individualized education program is defined at 20 U.S.C.A. § 1401(11).

4. See 20 U.S.C.A. § 1412(a)(5).

5. Title I in its current form can be found at 20 U.S.C.A. § 6301 et seq.

6. Title IX is codified at 20 U.S.C.A. § 1681.

7. See 20 U.S.C.A. § 6301 et seq.

8. 74 S.Ct. 686 (1954) (declaring racial segregation in public schools to be in violation of the Equal Protection Clause of Fourteenth Amendment, even if the facilities were “separate but equal”).

9. 95 S.Ct. 729 (1975) (applying constitutional due process principles to require that students subject to suspension be given notice of the charges and an opportunity to have their version of events heard).

10. 117 S.Ct. 1997 (1997) (overruling prior opinions and construing the First Amendment’s Establishment Clause so as not to continue to bar New York City’s sending public school teachers to parochial schools to provide Title I services).

11. 539 U.S. 306 (upholding University of Michigan’s admissions policy).

12. 102 S.Ct. 3034 (1982) (interpreting “free appropriate public education”).

which, while obviously the leading court, is itself only one of the federal courts pronouncing law in the education arena. In addition to the Supreme Court, education law also includes opinions of the federal trial and appellate courts and opinions of the state courts.¹³ Beyond statutes and judicial opinions, also part of education law are the decisions, orders, and policies of federal agencies such as the Department of Education¹⁴ and their state counterparts. It is not overstatement to say that the law is everywhere in schools. Even where the effort is to reform or move away from traditional public schools, it is through legislation, regulation, and judicial opinions that the movement will be defined.¹⁵

From any vantage point, it has become crucial for educators, community leaders, and advocates for children and schools to understand the basics of legal analysis. Understanding how to analyze legal issues will help educators recognize the difference between law and policy and know what role they as educators and community leaders may legitimately play in the shaping of both. Understanding the law will help educational leaders in discerning current responsibilities as well as in predicting future responsibilities and liabilities. Such understanding can help educators and advocates in determining what is and is not a legal issue, when to appropriately consult legal counsel, and how to minimize conflict.

This book aims to help educators achieve an understanding of how law is made, how to read the law analytically, and how to apply law to situations that arise in educational arenas. Chapter 1 deals with sources of law. Not surprisingly, not all sources of law are equal, and their relative weight is important in considering how existing law applies to new legal questions. While legislatures are generally free to enact, amend, or repeal legislation (subject to constitutional parameters), courts do not have the same powers when resolving a legal dispute. The court looks at only cases brought before it by disputing parties and has to look to all applicable existing sources of law to decide the case. In doing so, it has to consider how much value or authority each source has. Here the concepts of precedent, authority, and jurisdiction are relevant. These, too, are discussed in Chapter 1.

Chapter 2 introduces court opinions, or case law, one of the major sources of education law. Chapter 2 provides a method of case analysis, known in lawyer and law student language as “briefing a case.” The case law materials start with the example of *New Jersey v. T.L.O.*,¹⁶ a case in which the United States Supreme Court deals with the Fourth Amendment’s prohibition of unlawful search and seizure as applied to searching a 14-year-old freshman at Piscataway High School in Middlesex County, New Jersey. Other cases that build on *T.L.O.* follow to show the way the law builds on preceding cases (precedents) and analogizes them to new facts to make new law. The search and seizure line of cases represented by *T.L.O.* is just one line of cases that might have been used to illustrate how judicial opinions develop the law. The method will be the same for other subjects.

13. The significance of state constitutional law is particularly noticeable in the areas of adequacy of public education and equality of educational funding and opportunity. See, as only two of the many examples, *Brigham v. State*, 692 A.2d 384 (Vt. 1997) (finding the Vermont system of funding education unconstitutional under state constitutional analysis) or *Leandro v. State*, 488 S.E.2d 249 (N.C. 1997) (construing the North Carolina constitutional provision re: a free public education). Cf. *San Antonio Independent School Dist. v. Rodriguez*, 93 S.Ct. 1278 (1973) (finding that education is not a fundamental right under the federal constitution).

14. The Department is established under the provisions of Title 20 U.S.C.A. § 3411 et seq.

15. See, e.g., 20 U.S.C.A. § 8061 (regarding charter schools); Ariz. Rev. Stat. Ann. § 15-181 (Arizona’s charter school statute); or N.H. Rev. Stat. Ann., Ch. 193-A (New Hampshire’s home schooling statute).

16. *New Jersey v. T.L.O.*, 105 S.Ct. 733 (1985).

As even this introduction demonstrates, law has its own way of providing references to legal materials—citations. Citations tell lawyers where to find the relevant law and also how much weight the writer using them thinks the law has in regard to the point being made. Chapter 3 explains the somewhat esoteric system of legal citation and provides an overview of legal resources for research. Throughout, legal vocabulary is rampant. Chapter 4 presents a glossary of legal terms, offering examples drawn from materials addressing educational issues. Educators and community leaders will recognize the context of the words as a beginning point for understanding the legal definitions and implications. Finally, the Appendix offers a combination of additional materials and answers to some of the exercises used throughout the text.