

# Practical Leadership

*Improving the Schools of Today  
Inventing the Schools of Tomorrow*

## RESEARCH INTO PRACTICE

### Major Legal Issues Faced by Principals

#### In A Nutshell

Every day principals make decisions that require an understanding of the law and current legal guidance. The law is fluid rather than fixed. The legal framework in which schools operate is shaped by laws passed by both state and federal legislatures, by policy interpretations made both in Washington, DC and their state capital, by the decisions of both state and federal courts, and by local district policy. Staying current is a challenge.

This brief will discuss six of the most frequent legal issues faced by school principals. It certainly is not inclusive of every issue that shapes school policy and practice. A brief discussion of each issue will be followed by a set of online resources that principals may use to both understand the issue more fully and to stay current. Finally, a set of additional resources on legal issues will be provided at the end of the brief.

Federal law and federal court decisions almost always take precedent over decisions by state or local courts. But frequently, in the absence of federal jurisdiction, state law prevails. The law and interpretations of the law vary significantly from state to state and principals must stay current on changes in law and policy in their state, as well as decisions made at the federal level.

#### Major Legal Issues Faced by Principals

While there is always a “hot” legal issue, principals face a remarkably similar set of legal issues most years. Among them are issues dealing with the First Amendment (speech, dress, grooming), religious objections to school policy and practices, issues related to use of technology (cyber bullying, sexting), conducting student searches, sexual harassment, and services for students with disabilities.

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#### Issue 1: Student Expression

The 1<sup>st</sup> Amendment of the US Constitution restricts undue governmental interference with free speech. The landmark US Supreme Court decision, *Tinker v. Des Moines Independent School District* (1969) established students’ rights to speak out on controversial issues. The Tinker case and others have established that a person’s expression may be restricted if it is likely to disrupt the educational setting or intrude on the rights of others. But school leaders must be careful not to restrict speech merely because they don’t like what is being said. Leaders must be able to demonstrate the potential for disruption.

The federal courts have identified some forms of student expression that are not protected. They include expression that is defamatory, obscene, lewd or inflammatory (*Bethel v. Fraser*, 1986) or expression that promotes unlawful activity (*Morse v. Frederick*, 2007). Schools may also regulate student expression in student publications that represent the school, as long as the reasons are clearly based on sound pedagogical reasons (*Hazelwood v. Kuhlmeier*, 1988).

# RESEARCH INTO PRACTICE

The preceding standards are long established. More recently challenges have arisen to school policies prohibiting expression that constitutes verbal or physical harassment based on race, religion, color, national origin, gender, sexual orientation, disability or other personal characteristic. The challenges often deal with the tension between religious freedom and free speech. For example, some federal courts allowed principals to ban T-shirts degrading homosexuality because they could promote disruption (*Harper v. Poway*, 2007). Another federal court found a T-shirt that read, "Be Happy, Not Gay" as permissive (*Nuxoll v. Indian Prairie School District*, 2008). You need to be clear about decisions that apply to your state.

## Resources on Student Expression:

First Amendment Center - <http://www.firstamendmentcenter.org/category/speech>

American Civil Liberties Union – Student Expression - [www.aclu.org/free-speech/student-speech](http://www.aclu.org/free-speech/student-speech)

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## Issue 2: Religious Objections to School Policy and Practice

The 1<sup>st</sup> Amendment of the US Constitution also protects an individual's right to practice their religion. There continues to be significant disagreement about how those protections apply in schools. There are three key ideas about religion in schools. First, schools or school employees cannot engage in religious expression that appears to endorse a particular religious point-of-view (The Establishment Clause). Second, individual students may be allowed to engage in religious expression (Free Exercise Clause). Finally, a federal law, The Equal Access Act, shapes the response when students or others want to use school facilities for a student club or other activity.

These issues are complicated and frequently contentious. But generally schools and school personnel must remain neutral on the issue of religion. Your school's programs, policies and practices should not favor or disfavor any religious group. Additionally, when parents raise objections to school practices, including curriculum, and you provide accommodations, you must respond similarly to other individuals or groups seeking similar accommodations.

In general, students have greater freedom to express their religious beliefs than employees. Since employees are agents of the school their advocacy for a particular faith would be seen as violating the Establishment Clause of the Constitution. There are limits, however, on the religious expression of both groups. For example, if student expression disrupts the school environment it might be restricted (see Issue 1: Student Expression).

Some common issues related to religion and schools:

- Students may be released from school for religious instruction that occurs off campus and is not provided by a teacher associated with the school.
- School sponsored prayers or invocations at graduation, sporting events or other school-sponsored events are unconstitutional.
- School sponsored moments of silence may be permissible as long as it is not designated solely for prayer.
- Teachers may restrict the religious content of student assignments if the assignment and the scoring criteria are unambiguous about not containing religious content.

# RESEARCH INTO PRACTICE

## Resources on Religious Objections:

First Amendment Center –  
<http://www.firstamendmentcenter.org/category/religion>

A Parent's Guide to Religion in Schools -  
[www.freedomforum.org/publications/first/findingcommonground/B12.ParentsGuide.pdf](http://www.freedomforum.org/publications/first/findingcommonground/B12.ParentsGuide.pdf)  
Developed by the National PTA and the Freedom Forum

US Department of Education Guidelines on Religion and Schools  
[www.ed.gov/policy/gen/guid/religionandschools/index.html](http://www.ed.gov/policy/gen/guid/religionandschools/index.html)

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### Issue 3: Cyber Issues

One of the fastest growing legal issues deals with the use of technology including more traditional uses (e-mail, Internet) and social networking sites and smart phones. When student expression occurs off campus, it may or may not be regulated by the school. The school may not regulate the vast majority of off-campus expression by students.

Technology has made the issue less clear. When the off-campus expression impacts the operation of the school it may be regulated. Depending on your state's law you may be able to ban the use of cell phones at school. The use of cell phones, smart phones and other social networking technology has complicated the issue. For example, students may write about teachers or their school on their blog or personal website. They may exchange pictures of themselves or other students via cell phones. They may use their smart phone to access information during the school day. For principals it is important to be able to demonstrate that the cyber activity is disruptive to school operations in order to regulate it.

**Cyber bullying** - Bullying behavior that uses cyber technology is called cyber bullying. The National Crime Prevention Council's definition of cyber-bullying is "when the Internet, cell phones or other devices are used to send or post text or images intended to hurt or embarrass another person." StopCyberbullying.org, an expert organization dedicated to internet safety, defines cyber bullying as: "a situation when a child, tween or teen is repeatedly 'tormented, threatened, harassed, humiliated, embarrassed or otherwise targeted' by another child, tween or teen using text messaging, email, instant messaging or any other type of digital technology."

Cyber bullying often blurs the lines between on-campus and off-campus activity. Cyber bullying is not protected speech but in order to regulate it principals must be able to demonstrate that it disrupts school operations. Failure to address cyber bullying may open school personnel to lawsuits under Title IX or state law. It is a form of harassment.

**Sexting** – Sending pictures of a sexual nature using cell phones or other digital media is sexting. A recent study found that almost 20% of teens admit to participating in sexting. Almost all legal guidance around sexting is at the state level. You should talk with your state principal's organization about legal guidance. Schools have been sued for not protecting students from sexting and other cyber activity. They have also been sued because they intervened when nude or semi-nude pictures were found on cell phones. Most communities recognize the need to be more diligent about educating students about the appropriate use of technology. For example, many students don't recognize that a message or picture they send to someone can be forwarded to many other people. The American Association of School Administrators suggests that education about sexting must be aimed at the entire community---students, parents, staff, and community members.

# RESEARCH INTO PRACTICE

**Use of Internet and E-Mail** – It is very clear that schools may regulate student use of the Internet and e-mail if it involves the use of school computers, facilities or servers. Messages sent from a school computer even if using an external e-mail provider (Google, AOL) may still be regulated.

## Resources on Cyber Issues:

Embrace Civility in the Digital Age - <http://www.embracecivility.org>

Cyber bullying – Article from American Association of School Administrators (AASA)-  
[www.education.com/reference/article/Ref\\_Cyberbullying\\_3/](http://www.education.com/reference/article/Ref_Cyberbullying_3/)

Sexting – from AASA - [www.aasa.org/content.aspx?id=3390](http://www.aasa.org/content.aspx?id=3390)

Official School Administrator Guide for MySpace -  
<http://creative.myspacecdn.com/SafetySite/documents/School.Guide.1008.Clean.pdf>

Resources to Prevent Cyber bullying - <http://www.cyberbully411.com/>

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## Issue 4: Search and Seizure

Students are protected by the 4<sup>th</sup> Amendment to the US Constitution from unreasonable searches. The US Supreme Court ruled in 1974 (*New Jersey v. T.L.O.*) that students may be searched under certain circumstances. School officials are able to search students and their belongings if they have “reasonable suspicion” and do not need to obtain a search warrant. Searching student lockers is permissible because the lockers belong to the school. Doing a strip search is far more intrusive and must be handled differently. When determining reasonableness you should balance the needs of the school with the individual student’s right to privacy.

### **Drug Searches**

Schools cannot randomly test all students for drugs but drug testing programs for students in athletics or other extracurricular activities are permitted as long as you conduct the test in a way that protects student privacy. It is also okay to test individual students if you have “reasonable suspicion” that the individual student is using drugs.

### **Property Searches**

The TLO case provided guidelines for conducting property searches. You must first have reasonable suspicion for conducting the search. Second, the type of search, and how it is conducted, must be reasonably related to the alleged infraction.

Courts have ruled that you may search school district property (lockers, desks, closets) and you may search student backpacks, jackets or pocketbooks if you have reasonable suspicion and the search is related to the circumstances. For example, if you were searching for a large item you would not be allowed to search small pockets or backpacks. The law is not clear about your ability to search digital equipment like cell phones, Smart phones or computers unless they are school property. Strip searches of students are generally not legal except under very limited circumstances (*Safford Unified School District v. Redding*, 2009). For example, if there was an imminent danger of an alleged weapon. Generally the use of metal detectors or a drug-sniffing dog is allowed for a generalized search. Such searches must be conducted in a uniform way and be part of an overall plan for student safety.

# RESEARCH INTO PRACTICE

The 4<sup>th</sup> Amendment also protects employees from unreasonable searches. But school property like a classroom, desk or closet may be searched at any time. Unless there is evidence of an imminent danger to the school you generally cannot search a teacher's personal property.

## Resources for Information on Search and Seizure:

The Right to Search Students - <http://www.ascd.org/publications/educational-leadership/dec01/vol59/num04/The-Right-to-Search-Students.aspx>

Safford Unified School District v. Redding (2009) - [www.law.cornell.edu/supct/html/08-479.ZX2.html](http://www.law.cornell.edu/supct/html/08-479.ZX2.html)  
(Recent US Supreme Court decision on searches)

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## Issue 5: Sexual Harassment

There are many forms of harassment but sexual harassment charges against school employees or students are among the most serious. There are two types of sexual harassment. The first is overt sexual harassment called *quid pro quo*.

The second is harassment that occurs because of an individual's or school/district's policies and practices or behavior (hostile environment).

### **Students**

In 1992 the US Supreme Court ruled that sexual harassment of students is a form of discrimination under Title IX (*Franklin v. Gwinnett County Public Schools*). School officials may be liable for damages if they know of such harassment and fail to intervene. For damages to be awarded you must have actual knowledge of the inappropriate behavior and fail to deal with the problem. School employees are expected to act when they know of employee to student sexual harassment as well as student-to-student harassment.

### **Employees**

Sexual harassment usually involves repeated and unwelcome sexual advances, suggestive comment or sexually demeaning gestures or acts. It is gender-neutral meaning that both men and women can sexually harass other men or women. The harasser may be a supervisor or a coworker, a student or even a parent or nonemployee. As with students you have a legal obligation to intervene to stop all forms of sexual harassment once you have knowledge that it has occurred.

### **Protection from Liability**

Under Title IX there are some legal obligations for school officials. You can do several things to guard against liability. Develop and disseminate a school or district sexual harassment policy. Provide training for staff and students so that they recognize sexual harassment. Be clear about procedures to be followed when a person learns of sexual harassment including where and to whom the harassment should be reported. Take every report seriously and investigate it promptly. Always take appropriate corrective action and maintain a record of every complaint and how it was resolved.

# RESEARCH INTO PRACTICE

## Resources for Information on Harassment:

US Department of Education Resources - [www.ed.gov/about/offices/list/ocr/sexharassresources.html](http://www.ed.gov/about/offices/list/ocr/sexharassresources.html)

ExpertLaw.com - [www.expertlaw.com/library/employment/sexual\\_harassment.html](http://www.expertlaw.com/library/employment/sexual_harassment.html)

Pamphlet – Sexual Harassment, It's Not Academic - [www.ed.gov/about/offices/list/ocr/docs/ocrshpam.html](http://www.ed.gov/about/offices/list/ocr/docs/ocrshpam.html)

Facts About Sexual Harassment – US Equal Employment Opportunity Commission  
[www.eeoc.gov/eeoc/publications/fs-sex.cfm](http://www.eeoc.gov/eeoc/publications/fs-sex.cfm)

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## Issue 6: Education of Students with Disabilities

Two federal laws protect students with disabilities. The first is the Individuals with Disabilities Educational Improvement Act (2004) and the second is Section 504 of the Rehabilitation Act of 1973. IDEA was written to protect students in the school environment while Section 504 has broader application including schools.

### **IDEIA**

IDEIA provides that all disabled students covered by the act will be provided a free, appropriate public education as defined by their Individualized Education Plan. The education will be in the least restrictive environment. While there is no obligation for inclusion there is a fundamental idea that handicapped students have a right to an appropriate, individually designed education in a regular education setting when possible.

For students to receive services they must qualify under one of the protected classes included in IDEIA. Districts are obligated to identify students eligible to receive special education services (Child Find) and this includes students in private schools, those who speak other languages and those who are homeless.

There is a legal requirement that a qualified student's parents be involved in planning an appropriate educational experience. Districts may be penalized for failing to provide these procedural requirements.

There is often disagreement between school personnel and parents about what constitutes an appropriate education. The US Supreme Court held that it does not mean the best or optimal education but does guarantee a program that provides educational benefit (*Bd. of Education v. Rowley*, 1982). The court later held that a student's program may not be changed without first following the procedural requirements of IDEA (*Honig v. Doe*, 1988).

Students protected by IDEA may be disciplined but there are procedural limitations that must be followed to assure that you follow the student's individualized education plan (IEP). *Honig v. Doe* (1988) determined that more than 10 days suspension was a change of placement requiring a review of the IEP. That means you can suspend students with disabilities for up to 10 days but the days are cumulative and once you exceed 10 days you must convene a meeting, called a manifestation determination meeting, to review the IEP. There are some options for interim placements if a student brings a weapon or drugs to school or seriously injures someone at school. Disabled students can only be expelled if the behavior is not a manifestation of their disability.

# RESEARCH INTO PRACTICE

## Section 504

Section 504 also prohibits discrimination based on disabilities. While there is overlap between Section 504 and IDEA some students may only qualify for protection under Section 504. To qualify under Section 504 a student must demonstrate a physical or mental impairment that “substantially limits a major life activity” either permanently or temporarily. Once a student is determined to qualify, the school is obligated to provide accommodations. Students do not qualify for Section 504 under specific categories and there is not the same obligation for developing an IEP.

## Resources for Information on Students with Disabilities

Wrightslaw – IDEA 2004 - <http://www.wrightslaw.com/idea/index.htm>

Department of Education, Office of Special Education and Rehabilitative Services - [www.ed.gov/about/offices/list/osers/osep/index.html](http://www.ed.gov/about/offices/list/osers/osep/index.html)

Jim Gerl’s Special Education Law Blog - <http://specialeducationlawblog.blogspot.com/>

## Other Online Resources for Principals

There are many tools that principals can use to stay current on legal issues. Several of the most noteworthy online sites for tools and other resources include the following:

*Education Week Legal Blog* ([http://blogs.edweek.org/edweek/school\\_law/](http://blogs.edweek.org/edweek/school_law/))

This blog is provided by *Education Week* and is the most current and up-to-date blog on contemporary legal issues. It summarizes recent court decisions and legislative changes and provides links to additional resources

*EdJurist Blog* ([www.edjurist.com](http://www.edjurist.com))

This blog by Justin Bathorn provides information for practicing administrators on current events concerning legal and policy matters in K-12 schools.

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This *Research into Practice* brief was prepared by Practical Leadership, LLC and authored by Ronald Williamson, Professor of Educational Leadership at Eastern Michigan University and Howard Johnston, Professor of Secondary Education at the University of South Florida.

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