

**INTRODUCTION TO
THE MISSISSIPPI LAW JOURNAL
SYMPOSIUM EDITION ON EDUCATION
LAW**

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The field of education law encompasses a diverse array of legal concerns, including K-12 and higher education issues that vary in scope from academic tenure to athletics, constitutional law to contracts, student discipline to procurement procedures, and far beyond. Fifty years ago, education law as we know it today did not exist as a field of study or professional pursuit. If a college, university, or K-12 institution employed an attorney, that person likely served on an ad hoc basis to converse infrequently with the President or Superintendent on business or student discipline issues.

With the explosion of the Civil Rights movement in the early 1960s, the Fifth Circuit's decision in *Dixon v. Alabama*,¹ passage of the Higher Education Act of 1965,² and the United States Supreme Court's decision in *Goss v. Lopez*,³ the scope of education

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¹ 294 F.2d 150 (5th Cir. 1961) (holding that public colleges and universities must provide due process protections when disciplining students, ushering the atrophy of the doctrine of *in loco parentis*, the theory that colleges and universities acted in the place of the parent with regard to student academic and social life).

² Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1269 (1965).

³ 419 U.S. 565 (1975) (holding that educational institutions must provide students a hearing prior to disciplinary action to satisfy due process).

law changed dramatically.⁴ Federal and state regulatory agencies assumed enormous rule-making and enforcement authority over both higher education and elementary-secondary institutions. Scholars in law and education began to publish books and articles focused on various education law subjects,⁵ and educational institutions employed full-time, in-house counsel as the volume of litigation against educational institutions intensified.⁶

Many legal issues are similar in both the higher education and elementary-secondary contexts. Others are dramatically different. As Stuart Biegel pointed out:

Unless a controversy is specifically covered by statute, the relevant legal principles are typically the same at both the K-12 and higher education levels. Yet these principles are often applied in very different ways depending on the setting and the age of the students. Often the question arises as to precedential value of a given case decision at a grade level other than one addressed. Sometimes, for example, the courts have recognized the applicability of major K-12 decisions to higher education disputes, and sometimes higher education cases have been deemed directly applicable at the K-12 level. Other times, however, the courts distinguish cases based on which grade level was initially addressed, on the grounds that the settings are very different. Patterns are often difficult to discern in this regard.⁷

This symposium edition of the *Mississippi Law Journal*, focused on education law, will address various areas of legal inquiry by identifying the underlying legal principles affecting

⁴ See AMY GAJDA, *THE TRIALS OF ACADEME: THE NEW ERA OF CAMPUS LITIGATION* (2009).

⁵ Arguably the first scholar of education law issues to a substantive extent was M.M. Chambers, whose early compositions of case summaries began in 1936 (initially joined by Edward C. Elliot). However, serious consideration of education law as a field of research and exploration, pioneered by Chambers, would require many more years. See EDWARD C. ELLIOT & M.M. CHAMBERS, *THE COLLEGES AND THE COURTS*, (1936).

⁶ See Perry A. Zirkel & Brent L. Johnson, *The "Explosion" in Education Litigation: An Updated Analysis*, 265 EDUC. L. REP. 1 (2011); Stacy Donoso & Perry A. Zirkel, *The Volume of Higher Education Litigation: An Updated Analysis*, 232 EDUC. L. REP. 549 (2008).

⁷ Stuart Biegel, *EDUCATION AND THE LAW*, 2 (2009).

education and the manner in which courts or legislatures have treated schools, colleges, and universities.

In this volume, Scott Bauries explores the contests surrounding academic freedom and how the concept relates to individual faculty concerns. He notes that the United States Supreme Court has not recognized a unique right to individual faculty academic freedom, and argues that to do so would frustrate the First Amendment. Also on the college campus, Robert O'Neil visits First Amendment jurisprudence across a range of issues through the lens of historical treatment, deftly surveying disputes involving hate speech, offensive utterings, and their judicial outcomes over time.

Laura Rothstein focuses on the foundations and current status of disability law as it relates to students across the educational spectrum, from K-12 through higher education. The article includes discussion of the impact of No Child Left Behind Act⁸ provisions as well as the 2008 amendments to the Americans with Disabilities Act,⁹ which significantly broadened the definition of a qualifying disability and have had a tremendous impact on postsecondary campuses.

Martha McCarthy directs her inquiry toward cyber-bullying and its impact on students in K-12 schools. Her article underscores that troublesome grey areas exist in the realm of student free expression rights, and that the ambiguity is further complicated by technology and the ease with which students can now bully and harass each other remotely—but still painfully. A key issue explored in this context is the role of speech made off campus via technology and how that informs new questions regarding student expression both on and off campus.

Barbara Lee turns her attention to student conflicts and discipline in the higher education setting, specifically addressing student-professor academic disputes on the college campus and the litigation that has recently resulted. She explores the fiduciary theory of the relationship between college and student, which requires a greater standard of conduct than that of good faith and fair dealing typically required in a contractual argument, and

⁸ No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1408 (2002).

⁹ ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

offers sound strategies to avoid litigation and insulate institutions of higher learning from liability.

Through empirical and legal analysis, Perry Zirkel's article examines student discipline on the private college campus, noting that students at private institutions are not veiled by constitutional protections, a stark distinction between such students and their counterparts at public institutions in the context of disciplinary decisions. He concludes that previous characterizations of private college student discipline merit reexamination.

University of Mississippi law student Casey McKay provides a note on *Fisher v. University of Texas*,¹⁰ the higher education affirmative action case rendered by the United States Supreme Court in June 2013. The discussion of *Fisher*, in which the Court returned the challenge to a Texas university's admission policy to the Fifth Circuit for reconsideration under the strict scrutiny standard, will help set the stage for the Court's upcoming decision in *Schuette v. Coalition to Defend Affirmative Action*.¹¹ In *Schuette*, argued in October 2013, affirmative action has once again been placed before the Supreme Court, this time questioning a referendum: can a state constitutional amendment banning affirmative action pass constitutional muster?

The symposium edition closes with a student comment by Claire Stamm, a University of Mississippi law student. The comment focuses on recent Mississippi K-12 legislation designed to end social promotion and provides nuanced analysis of critical issues relevant to education policy and practice in Mississippi.

This symposium edition of the *Mississippi Law Journal* has been designed to provide insightful analysis of compelling legal topics across the spectrum of education law. Although the scope of this edition precludes comprehensive coverage given the massive breadth of legal issues facing educational institutions, key dimensions of educational practice and the related legal issues have been explored by leading and emerging experts in the field, and the scholarship shared in this edition will provide valuable guidance to legal professionals, administrators, researchers, and

¹⁰ 133 S.Ct. 2411 (2013).

¹¹ 133 S.Ct. 1633 (2013).

students. Future symposia can build on this body of work to further inform the contemporary issues presented within and the many others that constitute the regularly shifting corpus of education law.

