

# LEGAL RESEARCH IN THE CONTEXT OF EDUCATIONAL LEADERSHIP AND POLICY STUDIES\*

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## Abstract

Legal research methodology is not included in the cluster of research and design courses offered to undergraduate and graduate students in education by traditional departments of research and foundations, so it becomes the responsibility of education law faculty to instruct students in legal methodology. This narrow corridor of opportunity for learning how to conduct legal research is sometimes and unnecessarily disconcerting to students because they fear this line of inquiry is too obscure. Our purpose here is three-fold: (a) to assert the critical role legal research plays in education policy and practice and (b) to explain the general principles and applications of traditional legal research to practitioners, graduate students, and education researchers who are unfamiliar with it, and (c) to describe some examples that illustrate the usefulness of legal research to practitioners and graduate students in educational leadership.

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Legal research is an enigma to most education researchers, whether they are students or professors. Legal research methodology is not included in the cluster of research and design courses offered to graduate students in education by traditional departments of research and foundations, so it becomes the responsibility of education faculty whose course load includes public school, higher education, pupil personnel services, and/or special education law to instruct students in legal methodology. Another hindrance to understanding or conducting legal research is the fact that not all doctoral programs in educational leadership require an education law course; sometimes it is just one among many possible electives or cognates. Interestingly, professors of education law usually acquire the knowledge and skills of legal research from their former school law professors or they pursue a J.D. in addition to their Ed.D. or Ph.D. degree, during which time they learned how to conduct traditional legal research.

The narrow corridor of opportunity for learning how to understand or conduct legal research is sometimes and unnecessarily disconcerting to graduate students and practitioners because they fear this line of inquiry is too obscure. This is unfortunate because legal research, albeit a specialized approach to investigation, plays an important role in (a) explaining government authority and responsibility for education; (b) exposing potential legal vulnerabilities that result from misguided or outdated educational policies and practices; (c) critically analyzing the unintended consequences of education law and policy that may deny educational equity to students or that may infringe on the civil rights of teachers or of students and their families; (d) providing political and/or historical context to the law affecting education; and (e) informing policy-makers and practitioners of the trends in judicial reasoning and in applied legal principles that determine the legality and reasonableness of law, policy, and practice. More succinctly put, "legal research in education covers those formal acts of government that shape public education, legal cases that involve educational agencies, and the development of legal precedents" (Lee & Adler, 2006, p. 31).

Our purpose here is three-fold: (a) to assert the critical role legal research plays in education policy and practice and (b) to explain the general principles and applications of legal research to practitioners, graduate students, and education researchers who are unfamiliar with it, and (c) to describe some examples that illustrate the usefulness of legal research to practitioners and graduate students in educational leadership.

In particular, we will summarize the sources of law and will examine the unique role of case law in producing legal precedents that inform policy and practice. We will then describe the basics of traditional legal research, and will provide a variety of examples of how legal research combines richly with other methodologies to produce studies that elucidates how government and its agents compel school districts to function, even in light of outcomes that reveal educational inequities and funding disparities.

## 1 Sources of Law

Depending on the subject matter, a legal study may be broadly or narrowly structured to meet the researcher's purpose. A narrowly tailored approach most likely would restrict the study to traditional legal research, while a more in-depth or comprehensive study may supplement traditional legal research with historical, quantitative, and/or qualitative methodologies. Regardless of the formulation of methodologies, the investigation originates with the law, of which there are several sources.

There are predominately four sources of law within each of the two jurisdictions (federal and state): (a) constitutions, (b) statutes, (c) administrative rules and regulations, and (d) case law. Most people in education are well aware that both federal and state constitutions and statutes govern society and its institutions, and that federal, state, and local government agencies promulgate rules and regulations that provide guidance on implementing statutory law. They are perhaps less familiar with the fact that both court systems (federal and state) produce case law, which affects how the other sources of law are interpreted and applied.

For each source of law described below, several citations are provided to illustrate the breadth and depth of legal research in education or to provide examples of the particular kind of law discussed. Most

of the citations reference studies and articles written by law students, attorneys, professors, and others affiliated with institutes that monitor educational law and policy and that attempt to influence education law and policy through research and publications. While this level of legal research plays an important role is investigating the impact of law and policy on children and schooling, not all of these may be particularly useful to the practitioners or education leadership students who are interested in reading or applying legal research to their educational settings. A more pragmatic discussion and examples of legal research in educational leadership will follow in a later section.

## 1.1 Constitutions and Statutes

The first and foremost sources of law are the federal and 50 state constitutions. They are the fundamental laws of the land. They organize government and dictate the breadth of and the restrictions on authority granted to the three branches of government in each jurisdiction (federal and state). It is within this authority and limitations that Congress and state legislatures enact statutes that indirectly (federal government) or directly (state government) influence the structure and function of education. Similarly, federal and state agencies promulgate regulations and policies that are authorized by statute, and which must align with the intent of the legislation. Finally, if there are discrepancies between federal and state law, the Supremacy Clause (1787) in the federal Constitution places federal law over state law.

**Constitutional analysis.** Legal scholars often use their knowledge of federal and state constitutions and statutes to evaluate the impact of law on schooling within a state. For instance, every state constitution confers some degree of responsibility for a system of public education upon the legislature. Often this responsibility includes defining the characteristics of the public school system, as well as funding it equitably and adequately. Plaintiffs who challenge how a state funds education will often depend on legal and finance researchers to provide expert reports on the plain meaning of the terms of art that comprise the state constitution's education clause (Campaign for Fiscal Equity, 2000; *Rose v. Council for Better Education, Inc.*, 1989) or on the impact of disparate funding on the educational opportunities of the children in school districts that are adversely affected by the funding formula (Verstegen & Driscoll, 2008).

Independent of court cases that may require expert testimony, legal researchers may analyze constitutional language to establish the authority for legislative action to govern education and to ensure that constitutional guarantees of individual rights are secure. For instance, some seek to glean the meaning of language in state constitutional education clauses through an exploration of legislative documents and court cases for the purpose of determining the state's obligation to public education (Hodges, 2008; Hogan, Peters, & Mackin, 2010; Mills & McLendon, 2000; Noonan, 2007). Others are focused on the distinct roles the three branches of federal or state government play in directing or influencing education policy and practice (DuRante, 2008; Ryan, 2004; Simon-Kerr & Sturm, 2010), or they may choose to investigate the politics behind federal or state education legislation (Binggeli, 2001; Vinik, 1996). Still others explore the limitations placed on federal constitutional rights of students and teachers, examples being free speech (Miller, 2002; Raskin, 2009; Rosborough, 2009), religious expression (Mawdsley, 2004; Strasser, 2009), and protections against unreasonable searches (Cooley, Fleming, & McFadden-Wade, 2011; Kurcharson, 2004).

Equal protection clauses in federal and state constitutions are employed in arguments by legal researchers who are interested in protecting the educational opportunities of children of color, of children who have impairments, or of other children who are marginalized by education law and policy (Black, 2010; Brittenham, 2004). Specifically, there has been a surge of legal research looking at the debate surrounding segregation, desegregation, and resegregation in the wake of the 50th anniversary of the *Brown v. Board of Education, Topeka, KS*, (1954) decision (Brown, 2006; Chemerinsky, 2003; Nicols, 2005) and since the U.S. Supreme Court struck down local school district efforts in *Parents Involved in Community Schools v. Seattle School District No. 1* and *Meredith v. Jefferson County School Board of Education* (2007) to diversify student populations in schools by using race as a factor in determining school assignments (Daniel, 2010; Gullen, 2012; Holly-Walker, 2012; Turner, 2008).

**Statutory analysis.** Analyses of federal and state education statutes and their implications for children and schooling are very much in evidence in the literature that comprises legal research. A plethora of legal

analyses has been conducted on the provisions of the Individuals with Disabilities Education Act (IDEA) (2004) (Boland, 2009; Zykorie, 2003) and of the No Child Left Behind Act (NLCB) (2002) (Oluwole & Green, 2007; Pinder, 2008), and on the intersection of these two complex federal education acts (Bucaria, 2007; Burgreen, 2009). Likewise, there is a great deal of legal research that focus on state issues, such as zero-tolerance statutes (Sughrue, 2003), accountability and high stakes testing (DeMitchell & DeMitchell, 2003; Moran, 2000), and charter schools (Brunet, 2011; Mead, 2003.)

Constitutions and statutes can be the beginning and end of some legal research, but they are also critical starting points for establishing a research trail to other sources of law and to what transpires in schools. What follows is a brief description of the nature of administrative rules and regulations, the intermediate step between statutory law and its implementation in schools.

## 1.2 Administrative Rules and Regulations

It is the role of government agencies, such as the federal department of education, to issue mandates in the form of rules and regulations to those who are responsible for implementing and abiding by statutory law. This is typically the result of a process in which proposed rules and regulations are distributed and then public hearings are scheduled so that interested parties can provide input. This usually transpires during a period of implementation in order to see what problems arise and what further clarification might be needed.

Federal rules and regulations are published in the Federal Register. For instance, the final rules and regulations for NCBL were published in the Federal Register in 2008 "after six years of implementation of the reforms introduced into the [Elementary and Secondary Education Act] by NCLB" (Title I – Improving the Academic Achievement of the Disadvantaged, 2008, p. 64436).

Likewise, state boards of education are compelled to propose rules and regulations in response to federal and state education legislation. These rules and regulations may cover educational matters such as licensure of school personnel, accreditation standards, graduation requirements, standardized testing requirements, and special education programs, among others. Drafts are circulated and public hearings are held to garner input. State registers or an "administrative weekly" publish notices of proposed, expedited, and permanently adopted rules and regulations.

It is not uncommon for state departments of education to publish "guidance documents," as well. For instance, the Virginia Department of Education provides a number of such documents, all available online (Virginia Board of Education (VABOE), 2011). Examples include "Guidelines for Local Textbook Adoption" (BOE, 2011), "Guidelines Concerning Student Drug Testing in Virginia Public Schools" (VABOE, 2004), and "Virginia Board of Education Guidelines – An Incentive Program to Encourage and Recognize School Accountability Performance and Competence to Excellence (8VAC 20-131-325)" (VABOE, 2007).

Administrative rules, regulations, and guidance documents are essential sources of data for those legal researchers interested in tracking the transformation of education law into policy and practice. These provide the nuts and bolts of implementation, the "how to" of following the law. Yet, there is another source of law that may have a bearing on how statutes and administrative rules and regulations are interpreted and applied, and that is case law.

## 1.3 Case Law

Case law is generated by the federal and state court systems; they are the decisions published by court justices. Broadly speaking, the federal courts produce case law on federal constitutional and statutory issues and state courts adjudicate state constitutional and statutory issues. To the average person, perhaps this distinction hardly seems notable; however, states are semi-autonomous governments, so federal courts do not have authority to adjudicate state matters unless there is a conflict between federal and state law or there is a controversy between states (Alexander & Alexander, 2012). State courts may adjudicate federal legal issues that accompany questions of state law in some instances, but they are bound by federal court precedent, a concept to be described later.

Interestingly, federal courts may revoke sovereign immunity from state government entities that are faced with litigation in federal court. For instance, the Supreme Court abrogated sovereign immunity from Ohio

public schools because it ruled that public schools were more like municipal corporations than "arms of the state," that is, entities tightly bound to the state through statute, funding, and governance (*Mt. Healthy City School District Board of Education v. Doyle*, 1977). In other instances, state governments sometimes waive their immunity in federal court as a condition of participating in federal programs, such as IDEA (2001), through which federal funds are distributed.

In both systems, higher courts often adjudicate points of law that have generated varied opinions in subordinate courts. They choose specific cases on appeal to articulate legal principles (precedent) that will provide guidance to lower courts and that will diminish divergent rulings in the same jurisdiction. What follows is a brief overview of how the two court systems are organized in order to understand to which court cases practitioners and graduate students should pay most attention.

**Federal court system.** The federal court system is basically organized on three levels: (a) courts of original jurisdiction (trial court), which are the federal district courts; (b) intermediate courts, which are the circuit courts of appeal; and (c) the court of last resort, the U.S. Supreme Court (Alexander & Alexander, 2012). There are 89 federal districts across the 50 states, in each of which there is at least one federal district court (U.S. Courts, n.d.). Including those in the District of Columbia and U.S. protectorates, there are a total of 95 district courts. There are 11 numbered circuit courts of appeal, as well as one circuit for Washington, D.C and one federal circuit court, for a total of 13 (Number and composition of circuits, 2012). Other federal appellate courts exist that have limited jurisdictions, but they usually are not relevant to education case law.

Each of the 13 circuits has a defined geographical region over which it has jurisdiction (Alexander & Alexander, 2012). For instance, Virginia, West Virginia, South Carolina, North Carolina, and Maryland are under the jurisdiction of the 4th Circuit Court of Appeals. This signifies that an educator leading a school in North Carolina should follow federal court action in the 4th Circuit, as opposed to other circuits. This is important to legal research and to educators because federal issues that have not yet been adjudicated in the Supreme Court are decided in circuit courts, each ruling independently of the others.

The U.S. Supreme Court decision on a particular point of law is final, unless the Court itself overturns it in a future case. The standards or legal principles it posits in the ruling are binding on all other courts, including state courts if they are adjudicating cases that implicate federal law.

**State court systems.** State court systems are generally organized in the same way, with courts of original jurisdiction, intermediate courts, and a court of last resort. As with the federal system, trial courts are bound by the legal principles set forth by the appellate courts and the appellate courts and trial courts are bound by the principles set forth by the court of last resort. Importantly, when two states pass similar legislation and the laws are challenged, the courts in the two states may arrive at different conclusions, depending on the states' constitutions and judicial precedent in each. Therefore, educational leadership students and school leaders cannot extrapolate from what happens in other state courts to what might happen in their state's court regarding a particular educational issue.

The primary functions of the courts are to (a) interpret statutes, (b) determine the constitutionality of statutes, and, in doing so, (c) apply principles of law to the set of facts before them (Alexander & Alexander, 2012). Necessarily, the constitutions themselves are interpreted as justices attempt to understand the meaning of the words and phrases contained within the constitutions that describe the authority, responsibility, and limitations they bestow on the three branches of government and the protections constitutions provide citizens. These determinations, as explained previously, create case law, which provide guidance to those who enact or execute statutory law. Case law, in turn, produces precedents, which provide guidance to lower courts on how to reach a reasoned conclusion on a point of law. What follows is an explanation of the nature and function of precedent and its importance to legal research.

## 1.4 Precedent

The most common form of litigation involving education is civil law (Alexander & Alexander, 2012), and usually requires the courts to interpret statutes, which is exemplified by the ample body of case law concerning IDEA. The federal courts were encumbered with the responsibility of deciphering Congress' intent when it

employed phraseology such as *free appropriate public education* (FAPE) and *least restrictive environment* (LRE). The courts had to respond to questions, such as what is the nature of a free appropriate public education (*Board of Education of Hendrick Hudson Central School District v. Rowley*, 1982)? How does one determine if a child with disabilities has been placed in the least restrictive environment when the placement is contested (*Daniel R. R. v. State Board of Education*, 1989; *Oberti ex rel. Oberti v. Board of Education of Clementon School District*, 1983; *Roncker v. Walter*, 1983; *Sacramento City School District v. Rachel H.*, 1994)? These are only two examples of hundreds of questions that have been brought before the courts on a single piece of legislation.

The accumulation of case law establishes precedents. Precedents serve the purpose of unifying reasoning so that future litigation that addresses similar points of law will be evaluated using prescribed judicial standards, tests, or principles. In other words, precedents explicate the analyses that should be applied methodically and logically to a set of facts that situate particular points of law.

**Examples.** Laws and policies that govern the role of religion in public schools may be adjudicated using the *Lemon* test (*Lemon v. Kurtzman*, 1971). The *Lemon* test is a tripartite standard that asks three questions, the answers to which help judges determine if an educational law or policy is constitutional under one or both of the religious clauses in the First Amendment of the U.S. Constitution (1791). The three questions are: (1) Does the law have a secular purpose? (2) Does the law have the primary purpose of promoting or inhibiting religion? (3) Does the law result in excessive government entanglement with religion? If the set of facts before the court indicates the law does not have a secular purpose, then the law is constitutionally invalid and the court need not proceed further with the other two questions. In the event that the answer to the first question is yes, then the court continues to the second question. If the facts reveal that the law or policy prohibits or promotes religion, then the law will be struck down. If not, then the third question is addressed. When a convincing argument is made that the law will require too much government intrusion into the business of the religious organization, then the law will be declared unconstitutional. If there is no conflict with the *Lemon* test, then the legislation or policy will pass constitutional muster. This sequential application of the tripartite standard is the line of reasoning that any court would follow if the point of law under scrutiny were similar.

This begs the question, why is it important for law and policy makers, legal researchers, and practitioners to follow case law and be aware of precedents. First, precedents provide the reasoning with which they may analyze new or existing laws, policies, and practices, after which they may forecast the potential for legal challenges and their outcomes. As an example, it is not uncommon for a state legislature to revise a piece of legislation by understanding how the court evaluated the original statute, i.e., applied precedent, when it was challenged. In 2000, the Virginia legislature amended an existing statute that *authorized* school districts to one that *required* them to set aside a minute at the beginning of the school day and in every classroom for the purpose of "allowing students to meditate, pray, or engage in any other silent activity" (Daily observance of one minute of silence, 2000). Aware of the U.S. Supreme Court's decision in *Wallace v. Jaffree* (1985), a case involving Alabama statutes that, in one way or another, encouraged school sponsored prayer, the Virginia legislature was intent on not requiring students to pray, only allowing them the opportunity. When the revised statute was challenged in court, the Fourth Circuit noted the legislature's efforts to abide by precedent.

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There is no evidence that the Commonwealth of Virginia acted in open defiance of federal constitutional law. To the contrary, its debates reflected serious consideration of relevant Supreme Court precedents and concern that it act constitutionally in enacting its proposed statute. (*Brown v. Gilmore*, 2001, p. 280).

As a result, the revised law survived the legal challenge because the court noted that "even though religion is . . . the object of one of the statute's purposes, the *accommodation* of religion is itself a secular purpose in that it fosters the liberties secured by the Constitution" (*Brown*, p. 276).

**The role of precedent in legal research.** There are multiple purposes for a systematic analysis of case law and precedents, such as trying to advise Congress or state legislatures on weaknesses or conflicts

within specific laws or policies that surface when litigated. For example, a legal analysis of the administrative exhaustion requirements for special education law could advance some proposals for Congressional consideration during the reauthorization of IDEA (Wasserman, 2009). Furthermore, as new laws are passed or new circumstances (sets of facts) arise or the composition of the court membership changes, precedents may be modified or replaced by new standards (*Agostini v. Feldman*, 1997; *Lee v. Weisman*, 1992, *Mitchell v. Helms*, 2000). This provides the researchers and practitioners with the analytical tools with which to anticipate the implications to existing policies and practices.

For instance, the Florida code authorizes school districts to require all students to stand and recite the pledge of allegiance at the start of each school day (Patriotic program; rules, 2012). To be excused from this exercise, a student has to obtain written permission from her/his parent. An eleventh grade student, through his mother, challenged the constitutionality of this provision, as well as another that required all students to stand as a sign of respect even if exempted from saying the pledge (*Frazier v. Winn*, 2008). The federal district court agreed with the plaintiff, declaring that to require a student to get parental permission to be excused from saying the pledge "robs the student of the right to make an independent decision whether to say the pledge" (*Frazier*, p. 1282).

The school district appealed the decision to the Eleventh Circuit Court of Appeals. While concurring with the lower court that the provision obligating exempted students to stand during the pledge was unconstitutional, it viewed the requirement that students get permission from their parents to be excused as "largely a parental rights" issue and observed that the State "in restricting the student's freedom of speech, advances the protection of the constitutional rights of parents: an interest which the State may lawfully protect" (p. 1284).

This provision distinguished the statute and the case from *West Virginia State Board of Education v. Barnette* (1943), in which a West Virginia statute requiring all students to recite the pledge of allegiance was adjudicated as a violation of religious freedom. Jehovah's Witness families initiated the suit because their religious doctrine interpreted the flag salute as an act of worship to an image, which was strictly forbidden. *Barnette* was the landmark case whose precedent had been the benchmark by which other flag salute cases were evaluated. However, juxtaposing parental rights with those of students created a new set of circumstances that required some refinement in the standard by which to evaluate similar cases.

Lastly, judicial decisions reveal the ideological and theoretical perspectives of the justices who hear these cases, which is particularly relevant in the courts of last resort. Legal scholars and policymakers may compare and contrast these perspectives as they try to understand the tension that arises from the differences and the impact that tension has on the interpretation of a constitutional provision or statute (Noonan, 2007). Likewise, this line of research provides litigators and lawmakers an understanding of the influences that affect the justices' reasoning and opinions. This helps them construct arguments if they are going to court or if they are crafting the rationale for new legislation that might be challenged.

## 1.5 Summary

There is a hierarchy to constitutional and statutory law, between federal and state law, among the three levels of courts in the federal and state judiciary, and between the federal and state courts. Rules and regulations are the "how to" of statutory law and statutory law is an expression of legislative will that is authorized by the constitution. The judiciary acts independently to interpret Congressional and state statutes with regard to their intent and to determine constitutionality. However, it is restricted to adjudicating true controversies (not hypothetical questions of law, with some exceptions at the state level) and to assume that the legislature acted in good faith and that the statute in question is constitutional; it is the burden of the plaintiff to prove otherwise (Alexander & Alexander, 2012). What is important is that this check and balance works on behalf of citizens to protect them from unwarranted government intrusion.

Precedent is an essential component of the rule of law. It provides jurisdictional consistency in evaluating claims that come before the law and provides guidance to law and policy makers regarding the potential legality of their legislative and governance efforts. It is the underpinning of jurisprudence, the principles by which jurists contextualize a point of law within a set of facts.

These sources of law provide multiple opportunities for legal research and for guiding practitioners and educational leadership students in the proper implementation of law and policy and in asking and answering questions about the unintended consequences on children and schools. What follows is a more in-depth discussion about traditional legal research and its value to educators.

## 2 Traditional Legal Research

Traditional legal research is not easily characterized; it is neither qualitative nor quantitative. It is perhaps best described "as a form of historical-legal research . . . [that involves] the interpretation and explanation of the law" (Russo, 2006, p. 6). It is a systematic investigation into a question of law that requires the researcher to trace the legal issue from its origin to its current status and application.

In its simplest form, traditional legal research entails identifying a legal concern (perhaps a policy or practice in a school or district) and then determining the legal authority from statutes, regulations, and policies that govern the legal question under scrutiny. First, the researcher must consider all the sources of law that are associated with the issue, given the context in which the issue arose. If the question is associated with something that happened in a school, then the researcher would determine what of constitutional, statutory, regulatory, and/or case law applied in order to anticipate the possible repercussions from the incident or practice. If the question is related to developing and implementing a school board policy on an emerging issue, then the governing body needs first to determine whether it has the authority to address the issue through policy.

Researching law and policy entails accessing electronic databases or web sites that catalogue the breadth of legal materials (constitutions, statutes, administrative codes, case law, briefs, law reviews, and more) available to legal scholars and practitioners, or visiting a law or university library that houses hard copies of these documents. The researcher or practitioner can apply the acquired knowledge garnered from those sources to the set of facts that situate the issue and then s/he can arrive at a reasoned notion as to the legality or illegality of the policy or practice and to the consequences of crafting the policy or of continuing the practice.

What follows are two scenarios in which traditional legal research is employed. One exemplifies how school officials might approach crafting and implementing policies and practices that would withstand court scrutiny in the event they were challenged, or at least provide immunity from liability if the law from which they were drawn were declared invalid. The second scenario illustrates how educational leadership students can pair legal research with other methodologies to investigate whether there are inequities or injustices created by law, policy, or practice.

### 2.1 School Board Policy

Suppose a local school board in an unidentified state is considering implementing random drug testing of *all* students in its middle and high schools. The first concern is to determine if the school board has such authority. Consulting the state's education code, either by accessing the state Department of Education web site, the state's legislature's web site, or one of the electronic databases that provides access to state statutes and other legal documents, reveals that the state Board of Education was tasked with developing guidelines that govern how student searches should be conducted and that are consistent with state and federal laws and constitutional protections. A thorough reading of the pertinent statutes and the notes contained therein discloses that the Board of Education guidelines are available only in electronic format.

Upon downloading and reading the guidelines, the local school board is provided a thorough analysis of the U.S. Supreme Court decisions that govern the random drug testing of students and that explain the constitutional protection students can expect against unreasonable searches (*Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, 2002; U.S. Const. amend. IV, 1791; *Vernonia School District 47J v. Acton*, 1995). As a result of the analysis of case law, the Board of Education concludes there is no explicit endorsement of drug testing for all students and, therefore, it is not permitted in this state's schools.



As a result of its investigation of state statutes and agency rules and regulations, the local school board learns it can only require students who participate in extracurricular activities, particularly competitive activities such as athletics, band, chess club, and Future Farmers of America, to submit to a random drug testing regime. The school board decides it wants to proceed but to stay within the law. The second concern then becomes what the policy should say.

The guidelines provide additional and valuable information about policy development, including provisions that cover consent, student selection criteria, confidentiality, collection procedures, and consequences. For instance, the local school board discovers that students who have a positive test may be suspended from participation in extracurricular activities but may not suffer any adverse academic consequences based on a positive test alone. It also learns that positive results may not be reported to law enforcement. By adhering to the guidelines as it crafts the policy, the local school board is now confident that it, and the school personnel who implement the testing program, should be protected from challenges that allege the district is conducting illegal random drug tests.

In this particular scenario the Board of Education guidelines save the school board from having to conduct a search of relevant case law and to parse the judicial opinions for the precedent that governs random drug testing of students. In other instances, when guidance documents are not available on a particular policy or topic or when a graduate student is conducting research on a legal topic, that step will have to be taken, as exemplified in the next scenario.

## 2.2 Precedent Underpinning Policy

After reading about a controversy in which a student was strip searched in a local high school, a graduate student in educational leadership is interested in what constitutes a reasonable search of a pupil in a public school. Specifically, she wants to learn under what circumstances, if any, it might be reasonable to conduct a strip search. Having taken a school law course, she realizes she will have to inquire into all four sources of law: federal and state constitutional law, state statutes, administrative rules and regulations, and federal and state case law to find her answer.

The graduate student is aware that search and seizure is related to the Fourth Amendment of the federal constitution and related jurisprudence. The Fourth Amendment asserts

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The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. (1791)

In simpler language, people are protected from searches of their bodies, their homes, and their things by government agents, i.e., law enforcement. Prior to conducting a search for evidence of a suspected crime, the government agent must have probable cause and must obtain a court-issued search warrant.

The graduate student is also aware that the U.S. Supreme Court has addressed student searches in Fourth Amendment jurisprudence. The first public school case to come before the U.S. Supreme Court that determined "the proper standard for assessing the legality of searches conducted by public school officials" was *New Jersey v. T.L.O.* (1985, p. 328). By rereading the case, she is reminded that the U.S. Supreme Court opined that school officials should not be constrained by probable cause and search warrants because "the school setting . . . requires some modification of the level of suspicion of illicit activity needed to justify a search" (p. 340) and "to obtain a warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools" (p. 340).

The Court observed that students have a lesser expectation of privacy in schools than citizens in society at large. It further opined that schools are unique because of the role of school officials to ensure the safety and wellbeing of students and staff. This is referred to as the *special needs* doctrine. However, the government's

interest in maintaining a safe and secure educational environment has to be balanced against the student's expectation of privacy, even though it is a diminished expectation in schools. What the Court stressed is reasonableness – reasonable suspicion as the justification for a search and reasonableness in the nature and scope of the search.

It is now the student's task to determine the precedent *T.L.O.* established in identifying the nature of a reasonable search by school officials. She accomplishes this by analyzing the case and outlining the Court's reasoning. She recalls that basically all judicial opinions are organized similarly, and that once she reads the facts of the case and any procedural discussion, she will arrive at the Court's response to each legal argument the plaintiff and defendant have made.

In its proceedings, the Court poses the question, "whether that [the Fourth] Amendment's prohibition on unreasonable searches and seizures applies to searches conducted by public school officials" (p. 333). In arriving at its conclusion, the Court relies on its previous decisions regarding unreasonable searches in other contexts (*Elkins v. United States*, 1960; *Mapp v. Ohio*, 1961; *Wolf v. Colorado*, 1949). The precedent set by these other cases posits that the Fourteenth Amendment (1868) provides protection against federal constitutional infringement by state government officials. In other words, the Fourteenth Amendment provides an avenue by which citizens can seek redress from state government officials who conduct unreasonable searches under the Fourth Amendment. The Court deduces that inasmuch as school officials are state government actors, then "the actions of public school officials are subject to the limits placed on state action by the Fourteenth Amendment" (p. 334).

The Court then deliberates how to reach a balance between students' "legitimate expectations of privacy and the school's equally legitimate need to maintain an environment in which learning can take place" (p. 340).

### 2.2.2

Determining the reasonableness of any search involves a twofold inquiry: first, one must consider "whether the . . . action was justified at its inception," *Terry v. Ohio*, 392 U.S., at 20; second, one must determine whether the search as actually conducted "was reasonably related in scope to the circumstances which justified the interference in the first place," *ibid.* Under ordinary circumstances, a search of a student by a teacher or other school official will be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction. (pp. 341-342)

As is the established practice in judicial opinions, the Court methodically justifies its conclusions with the previous case law in which the issue was first addressed. Quotations and citations are included in the decision so that legal researches and other courts can follow the reasoning back to its origins.

What the graduate student learns by parsing the *T.L.O.* decision is that the standards for a reasonable search already existed, but they had not been applied in a school context. The standards articulated in the *T.L.O.* case are now cited as precedent for determining the reasonableness of school-related searches.

It behooves the graduate student to conduct a further search for current case law on the matter of search and seizure. She is still seeking guidance on strip searches and may want to learn if the U.S. Supreme Court or lower federal courts have ruled on the topic. Using an electronic database or another venue that catalogues case law, she may employ search terms, such as "strip search" and "public schools," to locate judicial decisions that address strip searches in schools.

By following this research protocol, she would likely uncover the most current Supreme Court case regarding school related search and seizure, *Safford Unified School District v. Redding* (2009). Importantly, this case addresses strip searches. Until this case was adjudicated before the Supreme Court, federal appellate courts were issuing conflicting opinions on the subject, so there was no clear direction given to education policy makers and practitioners. For this reason, the U.S. Supreme agreed to hear this case.

In *Safford*, the Supreme Court ruled that the particular strip search under scrutiny was a violation of the

student's right to privacy under the Fourth Amendment. Relying on the precedent for reasonable searches set out in *T.L.O.*, the Court averred that the circumstances were not sufficiently compelling to justify such an intrusive search as a strip search.

In this instance, a young girl was strip searched in an effort to locate prescription strength ibuprofen. The assistant principal had received information that the plaintiff had pills and was distributing them to others. Recognizing that the assistant principal's actions were inspired by a desire to make sure drugs were not on school grounds, the Court nonetheless chastised him for being too aggressive in his pursuit. His search was based on information acquired days earlier and there were no reports of students becoming ill as a result of taking these pills.

### 2.2.3

Here the content of the suspicion failed to match the degree of intrusion. [The assistant principal] knew beforehand that the pills were prescription-strength ibuprofen and over-the-counter naproxen, common pain relievers equivalent to two Advil, or one Aleve. He must have been aware of the nature and limited threat of the specific drugs he was searching for, and while just about anything can be taken in quantities that will do real harm, [he] had no reason to suspect that large amounts of the drugs were being passed around, or that individual students were receiving great numbers of pills. (pp. 364-365)

The Court emphasized the invasiveness of the search and the assault on the student's dignity, which, when paired with the absence of "any indication of danger to the students from the power of the drugs or their quantity" were "deficiencies [that were] fatal to finding the search reasonable" (p. 365).

From this, the graduate student may deduce that a refinement has been added to the *T.L.O.* reasonableness standards. Before a school official can reasonably move from searching outer garments and backpacks to requiring a student to expose intimate parts, there must be a reasonable suspicion of imminent danger or of the likelihood that a student would hide evidence of wrongdoing in underwear. The probability of finding evidence of a serious breach of student conduct or criminal behavior and the humiliation and embarrassment a student may reasonably feel, place a search that intrusive in a category of its own and require a higher standard of suspicion. This becomes an enhancement to the *T.L.O.* precedent.

One more step is required in the graduate student's quest to uncover current case law related to strip searches before she moves to another source of law. She should "shepardize" the *Safford* decision. Shepard's® Citations Service is available on the LexisNexis legal database. It provides a method by which legal researchers can confirm that their legal citations are still good law and/or to find if the case at hand has been cited as an authority in subsequent case law. For example, after entering the *Safford* citation, i.e. 557 U.S. 364, into the Shepard's® Citation search box, a list comes up that provides a prior history (all court action directly related to the *Safford* case), a subsequent history (if there were subsequent hearings on the case, which in this instance, there were none), and citing references, which includes other court cases, law reviews, statutes, and other sources that have cited *Safford* for one reason or another. At the time this article was prepared, Shepard's® listed 158 citing decisions, 167 law reviews, four state statutes, 58 treatises, and another 72 miscellaneous citations that referenced the *Safford* decision.

A perusal of the citing decisions reveals that there are no other school-related cases that directly speak to strip searches. The *Safford* references under Shepard's® Citations Service related to aspects of the precedents cited in *Safford*, such as (a) students and their possessions are subject to searches by school officials when reasonable suspicion is established; (b) the easing of Fourth Amendment restrictions in the school setting; (c) qualified immunity (there was no clearly established federal law such that the defendants had fair warning that their conduct amounted to a constitutional violation); and (d) searches should be no more invasive than what is required to accomplish the school official's purpose.

The list of citing decisions include case law from both federal and state courts, which provides the graduate student with an efficient method to verify whether the federal and state jurisdiction in which she resides has generated any school strip search case law since the *Safford* decision. In this particular instance, there were none. If there had been state case law, the graduate student could have determined whether there were any meaningful differences, such as the impact of state statutes or local board policies, in the

case. The only federal cases in which constitutional violations involving strip searches transpired were prior to the *Safford* decision.

The graduate student also intends to learn if her state's constitution has provisions that protect its citizens from unlawful searches and seizures. In some instances, a state's constitution may guarantee more robust protections of civil liberties than the federal constitution. Such state constitutional provisions are said to have "independent vitality" (Alexander & Alexander, 2012, p. 484). For example, the Supreme Court of Washington concluded that random drug testing of student athletes was unconstitutional because school officials did not have the "authority of law" to conduct such searches (Invasion of private affairs or home prohibited, 2012). The court opined that school officials, like law enforcement, needed a warrant to conduct drug testing, and it refused to grant the school district a "special needs" exception. However, in relation to search and seizure generally, the graduate student found no evidence in state case law that her state's constitution provided any greater protection than the Fourth Amendment of the U.S. Constitution.

Next, the graduate student moves to state statutes and agency rules and regulations to see if they speak to search and seizure in schools and if they address strip searches, specifically. For her own edification, she expanded her search to all states. She learned from the *Safford* case that there were school districts that banned strip searches in schools. She wanted to ascertain whether there were statutory or state regulatory prohibitions against strip searches in schools in any state. What she discovered was that there were several states that outlawed strip searches, although some made exceptions for law enforcement officers or for school officials who had obtained a warrant. For instance, Florida's Office of Safe Schools (2001) included guidance on student searches within its "Emergency Planning Standards for Florida's Schools" publication. It specially states that "full or partial 'strip searches'" are prohibited (p. 11). As for the graduate student's state, the only statutory reference to search and seizure in schools was rather generic, but it did instruct the state Board of Education to develop guidelines related to all categories of searches in schools. This led her to the state Department of Education to search for rules and regulations governing strip searches.

As explained in the previous scenario, the state Board of Education or Department of Education are required to develop rules and regulations, which may also include model policies, to establish standards that operationalize state and federal education law. Upon reading the relevant rules and regulations promulgated by her state's Board of Education, she notes that the guidelines reference *T.L.O.* (1985) and *Safford* (2009), among others, and provide good summaries of the judicial standards. The guidelines go further and provide clear examples of situations in which strip searches may be appropriate and ones in which they may not be. The guidelines conclude by emphasizing that schools should refrain from conducting strip searches except in those instances where imminent danger is present.

The graduate student has now researched all the relevant sources of law and is satisfied that she has a working understanding of what constitutes a reasonable strip search. She is also confident that sufficient guidance has been provided to the school districts in her state. At this point, she can make a decision to develop an additional research question and advance her study to include an investigation of policy to practice. This could involve adding other methodologies that would facilitate collection of data from various sources and perhaps include statistical analyses.

She could extend her study by comparing and contrasting individual school district policies to determine if strip searches are discussed and to see if they conform to state statutes and rules and regulations. She could also petition for university and school district IRB approval to conduct interviews and review incident reports to ascertain how often and under what conditions strip searches have been employed. She may be able to determine if strip searches actually produced evidence of serious crime or of imminent danger. Her study could evolve into an evaluation of disciplinary procedures in a single school district, a region, or throughout the state.

## 2.3 Summary

Traditional legal research is the pursuit for legal authority that governs questions of law. The investigation may require searching through some or all sources of law, as illustrated by the two scenarios. Case law provides the roadmap by which legal researcher may track precedent from the point of origin to its current form.

Precedent directs the researcher through the evolution of judicial principles that guide the determination of constitutionality, the interpretation of statutes, and the resolution of controversies. Other methodologies may complement legal research to provide data that empirically illustrate the impact of laws, policies, and practices on the educational enterprise, some examples of which follow.

### 3 Legal Research in Educational Leadership and Policy Studies

Doctoral students, through their dissertations, and professors of education leadership may seek to determine whether education policies, which are the progeny of statutory law, are legally sound and implemented with fidelity, and if there are unintended consequences from either that deny teachers, children, or families their rights or that create educational inequities or exclusionary practices. Current examples are policies and practices that pertain to zero tolerance (Sughrue, 2003), search and seizure (Cox, Sughrue, Cornelius, & Alexander, 2012), drug testing (Lineburg, 2005), school resource officers (Cox et al., 2012), migrant children (Murray, R., 2010), English language learners (Rodriguez, 2011), home schooling (Rowland, 2005), and graduation rates (Watson, 2009; Watson & Sughrue, in press), to name a few.

Many of the examples cited above, particularly the dissertations, supplemented traditional legal research with qualitative and/or quantitative methods to in order to determine if the law is being followed in its application. For instance, a doctoral student was curious to learn if school districts that serve migrant children in his state are using federal migrant education funds as they were intended under Part C of Title I of the Elementary and Secondary Education Act of 1965 (Education of Migratory Children, 2012). In other words, were the funds being used to meet the unique educational needs of migrant children (Murray, R., 2010)?

After researching the history of federal legislation focused on migrant children and their families, the doctoral student parsed the language of the federal statute to identify funding priorities. He then studied federal and state rules and regulations that specify how to identify student needs and how to apply for federal funds through a state application process.

The grant applications require line item budgets that have specific codes to identify proposed expenditures and narratives that detail the specific programs and services that will be offered in the schools. The state requires that school districts that apply for and receive migrant education funds periodically update the budgets they submit to reflect actual expenditures. Learning this, the doctoral student accessed all the grant applications for the past several years and deconstructed the narratives. Using document analysis methods, he then categorized and coded the pieces of narrative. This allowed him to determine the spectrum of programs and services and if they were designed specifically for migrant students. He also ran descriptive statistics to generate an expenditure profile over the period under investigation. The results of his investigation determined that the programs and services were not particularly unique or innovative, but rather followed examples of programs the state listed on the grant application. More importantly, his statistical analysis revealed that nearly 62% of migrant education funding was expended on non-academic costs, primarily on non-academic personnel.

Other legal studies may incorporate historical methods with traditional legal research. A researcher may be interested in understanding the historical context and process of desegregation in a school (Hedrick, 2002) or a district (Mickelson, 2003). Some doctoral students are interested in the politics of education law and policy and may choose to use a combination of historical, qualitative, and traditional legal research to trace the politics of passing a particular law (Bingeli, 2001) or to uncover the impact of a particular piece of legislation (Rowland, 2005; Wanza, 2009) on school districts and schools. Motivated by educational equity for all students, a doctoral student may choose to decipher a revised education clause in the state constitution in order to understand the legislature's intended meaning of the terms of art and how the modified wording in the new clause might change the nature of the responsibility the legislature has for providing for a high quality public education (Hodges, 2008). All these examples may involve document and content analysis, discourse analysis, and interviews.

Finally, a good use of legal research in combination with other methods is to demonstrate to law and policy makers and to the public the unintended consequences of legislation and/or policy on children and

schooling. It could be uncovering the disparate impact that state or district promotion and retention policies have on students of color (Murray, M., 2010) or the reckoning of the disproportionate identification of Black and males in special education (Allen, 2010). While these examples do not cover the full depth and breadth of what legal research can produce, they are representative of the substantial and critical contribution legal studies, including doctoral dissertations, can make to improving the conditions of education and to protecting the interests of society and the rights of school personnel and students.

## 4 Conclusion

The importance of legal analysis may not be readily evident to education researchers who do not engage in legal research or to practicing school administrators, but its contribution becomes evident when their research is cited in case law (*Bush v. Holmes*, 2006; *Zelman v. Simmons-Harris*, 2002) or in state rules and regulations (VBOE, 2004). Notably, professional conferences, such as those sponsored by the Education Law Association, National Council of Professors of Education Administration, National Education Finance Conference, and University Council of Educational Administration, provide venues for disseminating legal research that informs practitioners, graduate students, and professors of educational leadership on the impact laws and courts have on schools and schooling.

Legal research offers insights to practitioners and graduate students who are committed to improving educational opportunity for all children and to shining a bright light on laws and policies that exacerbate inequities and deny children a high quality education. Legal research can and should be an agent of accountability for those who regulate schooling but who remove themselves from its realities. Practitioners and graduate students in educational leadership can play a pivotal role by understanding or conducting legal research and by employing what they learn to inform their decision-making and to better the educational opportunities for all children. For all these reasons, it is imperative that education law courses and legal studies continued to be a part of graduate schools of education in order that transparency and democracy flourish in schools, in district and school board offices, and in legislative chambers.

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