

Education Law & Policy (K-12)

Tulane University Law School
3LAW-3480-01

Administrative Memo & Syllabus

[Last updated: 3/26/12]

Professor Francis X. Shen
Spring 2012

Location: Room 304

Wednesday, 10:00 am – 12:00 pm

The Supreme Court has famously said that “education is perhaps the most important function of state and local governments,”¹ and Americans consistently rank K-12 education as the one of the most important issues they want policymakers to address. Yet K-12 education is also one of the nation’s most contentious policy arenas. Education law stands at the center of these policy debates, and in this seminar students will be exposed to the many ways in which K-12 education is shaped by law. Topics to be covered include: the structure of education law and governance; the distinctions between public, private, and home schooling; the interplay of federal, state, and local laws; religion and public schooling; charter schools and school choice vouchers; school boards; segregation; students’ rights; and teachers’ rights and teacher unions. In addition to case law, students will consider policy perspectives on school reform. Special emphasis will be placed on K-12 reforms within the greater New Orleans area, several guest speakers are planned, and students will be encouraged to link law and real-world education policy. Students will be required to complete a paper (minimum 25 pages), as well as be active participants in seminar discussions.

- Instructor: Dr. Francis X. Shen
Email: fshen@tulane.edu | Phone: 504-865-5956
- Office: Weinmann Hall, 206C
Office Hours: Wednesday, 1:00-3:00 pm + By Appointment
- Required Text: MICHAEL J. KAUFMAN & SHERELYN R. KAUFMAN, EDUCATION LAW, POLICY AND PRACTICE (2009, Aspen Publishers)
ISBN: 978-07355-7807-4
- Recommended: EUGENE VOLOKH, ACADEMIC LEGAL WRITING (2010) (On Reserve at Tulane Law School Library)
- Grading: See Section V below. No pass/fail. Final paper of 25-30 pages. Attendance and completion of all seminar tasks is required.

¹ *Brown v. Board of Education*, 347 U.S. 483, 493 (1954).

I. Seminar Aims and Objectives:

Aims. This seminar has three interrelated aims: (1) to introduce you to many of the most important topics in K-12 education law and public policy; (2) to help you develop skills and experience that will aid you in practicing in this area of law; and (3) to challenge you to think about what role the law has in improving America's schools.

Specific Learning Objectives. By the end of this seminar, you will:

- ✦ Gain exposure to the many ways in which K-12 education in the United States is regulated by law.
- ✦ Think critically about the effects (both positive and negative) of particular education law, as well as the likely effects of alternative legal regimes.
- ✦ Become familiar with the historical roots of American public education, and how that history continues to affect law and policy today.
- ✦ Develop a better understanding of what lawyers can do in the education arena to innovate and improve educational outcomes.
- ✦ Learn about local efforts in New Orleans to improve public schooling.
- ✦ Develop a deep, substantive understanding of a selected part of the education law landscape through the development of a paper, roughly 25-30 pages in length.

II. Format, Procedures, & Seminar Philosophy

This is a seminar that allows for both breadth (in coverage of many important education law topics) and depth (through your selection of particular paper topic). The centerpiece of our weekly two-hour meetings will be discussion of the week's reading material, but I will also use some of class time to provide contextualizing background on the policies being discussed. Although no particular background is required, you may find this course particularly rewarding if you have at least some familiarity with education policy at the K-12 level. Throughout the semester we will be examining local efforts at school reform here in New Orleans.

We will also place an emphasis on asking not only "Is this policy or practice constitutional?" but also: *Is this policy or practice actually effective?* This is not a class in public policy analysis, but you will be exposed to the tools that schools, districts, states, and researchers use to explore questions of efficacy. You will also see how – in many modern statutory contexts – performance data is being explicitly included in education governance.

III. Seminar Requirements

1. *Class attendance and participation policy:* Class attendance and active participation both in class and through e-communication, is required. You are expected to attend seminar, complete all of the assignments noted below, and actively engage with your classmates during our discussions.

2. *Seminar readings:* The majority of the seminar readings will be derived from the casebook: MICHAEL J. KAUFMAN & SHERELYN R. KAUFMAN, EDUCATION LAW, POLICY AND PRACTICE (2009, Aspen Publishers) ISBN: 978-07355-7807-4. In addition, I will provide supplementary readings and online resources. Supplementary readings will be made available for pickup from Ms. Jane Johnston, in Suite 255.

3. *Assignments.* Each of the following assignments must be completed in order to pass the seminar:

- Submission, before the first week, of the first (biographical background) assignment.
- Submission, starting in week two, of a short (one paragraph to one page) reaction to the week's materials. Reactions must be submitted no later than 8:00 pm on the Tuesday before class.
- Submission of your preliminary research proposal and outline (minimum 3 pages) by Friday, February 24, 2012.
- Submission of your completed seminar paper (minimum 25 pages) by Monday, April 30, 2012 at 11:59 pm central time (the day before the first day of the Spring exam period).

IV. Grading

Basis for Grades. Grading will be comprised of the following components:

- 20%: Class participation (including submission of weekly written reactions)
- 5%: Paper outline
- 75%: Final seminar paper

Class Participation (20%). This is a seminar in which active participation with classmates and meaningful engagement with seminar materials is expected. Class participation includes attendance, thorough preparation of reading and written assignments; scholarly and constructive critique of readings; adherence to the cell phone and laptop policies discussed below; and avoidance of unexcused absences.

Seminar Paper Outline (5%). By approximately midway through the semester (adjustable depending on individual circumstances) you will be required to submit to me a short outline for your seminar paper. I will review the outline, offering suggestions for how to further develop the paper. Note that the seminar paper must be primarily of an analytical rather than descriptive nature. I strongly recommend that no more than one-third of the paper be devoted to descriptive background.

In choosing your paper topic, I encourage you to speak with me outside of class. There are many interesting questions to ask in the field of education law, and many creative ways to answer those questions. Your paper and your education benefit most when you write on a topic that particularly interests you. Consequently, you should carefully develop your topic, so that it is something you will enjoy exploring. Experience suggests that a narrow topic explored in some depth makes for a better paper, and a more fulfilling experience, than a broad topic explored superficially.

Final seminar paper (75%). As is appropriate in a seminar, the bulk of your grade rests on the quality of your final seminar paper. Factors relevant to the grading of papers (in no particular order) are: Depth of Research; Organization and Clarity; Thoroughness; Originality; Accuracy and Professionalism; Compliance with Directions; and Strict Compliance with Honor Code (including proscriptions against plagiarism). Many more details about the final paper will be provided in seminar.

Cell Phones, Smart Phones, and Laptops

Our two hours together each week will be cell phone and smart phone free. When you walk into the room, you are expected to turn off your phones. Exceptions will be made only in exceptional circumstances (which you should discuss with me before class). Student laptops in the classroom are a conundrum to many professors, and professors at some schools have experimented with banning them from classrooms altogether. I believe in harnessing the power of the Internet, and we will draw on interactive tasks even within seminar. However, you are expected to refrain from any computer use that is not germane to the seminar.² Violation of the laptop use policy will result in a reduced class participation grade.

V. Academic Integrity

Each student in this seminar is expected to abide by the policies discussed in the Tulane University School of Law Code of Professionalism. In this seminar you are encouraged to study together and to discuss information and concepts covered in our weekly seminar discussions. With the exception of clearly noted collaborative tasks, this permissible cooperation should never involve a student submitting as her/his own work the work of another. If at any time you have questions about the right way to proceed, simply ask.

² For a good summary of the debate, and some “pro-laptop” data, see: Kristen E. Murray, *Let Them Use Laptops: Debunking the Assumptions Underlying the Debate Over Laptops in the Classroom*, 36 OKLA. CITY U. L. REV. 185 (Forthcoming, <http://ssrn.com/abstract=1761358>).

VI. Seminar Schedule [FINAL]

NOTE 1: Readings not in the casebook will be distributed via email and will be made available for pickup in hard copy.

NOTE 2: Further guidance on these readings will be provided in class.

Part One: Structural & Institutional Context

Week 1: Wednesday, January 18, 2012. Introduction: Education Law and Education Policy

Reading:

1. Excerpts from John Dewey, *Democracy and Education* (20 pages of quick reading in this large-print format)
2. James Traub, *What No School Can Do* (2000) (7 page New York Times Magazine article)
3. Pages 29-65 in the Casebook (emphasis on Pierce and especially Yoder)

Guide for Week 1 Reading:

Not only is the final product for this seminar different, but as a result so too should your approach to the weekly readings change. I will say much more about this during our first class, but for now let me simply offer some specific direction for the first week's readings,

In our first session, we will tackle some fundamental questions such as: What should be, and what are, the aims of education? How should competing aims be reconciled? What constitutes "education"? Why have a public education system at all? Why monitor private (or home school) education?

As we talk about these questions, we will derive different types of answers. Some answers will seem familiar to you from IL Constitutional Law, e.g. what has the Supreme Court held about compulsory education? For such a question, there will be a (fairly) clear answer, with factors to consider and the like. But we will go far beyond the holding of particular cases, as we debate and discuss the merits of the holdings, as well as what – given the legal landscape – states and localities should do.

Here is what I recommend you do with these readings:

First, read the Dewey piece quickly (you might even do a deep skim). As you read it, you should think to yourself: what do I believe are the aims of "education"? You should also be thinking about: how might the aims that I hold vary from those that others hold? How would I argue in favor of my aims versus others?

Second, read the Traub piece and ask yourself: given the aims that I (or others care about), what role is there for schools (public, private, home) in advancing those aims? What are the limits (if any) of schools?

Third, having thought a bit about the bigger picture questions, turn to the law. We will discuss Pierce and Yoder most extensively, and touch upon the two home-schooling cases only as time allows. Thus, focus most of your attention on Pierce and Yoder, and Yoder in particular. As you

read these cases, think about the competing interests involved and how / why the Court is balancing them.

Week 2: Wednesday, January 25, 2012. *Who's in charge ... and who ought to be?* States, Localities, and School Board Governance

Special Guest, 11 am – 12 pm:

[Ethan Gray](#), Vice President and Director of CEE-Trust, The Mind Trust (Indianapolis, IN)

Reading:

1. Background: Casebook, Chapter 10, pages 372-390; 398-417; 429-443
2. *Nixon v. State of Ohio*, 193 F.3d 389 (6th Cir. 1999)
3. *Mendoza v. State*, 149 Cal.App.4th 1034 (2007)
4. THE MIND TRUST, CREATING OPPORTUNITY SCHOOLS: A BOLD PLAN TO TRANSFORM IPS (2011) [available for pickup and sent via email]

Guide for Week 2 Reading:

In our second week we cover the topic of school district and school governance. Put simply: who's in charge and who should be?

In the first half of class, we will discuss (a) the discretion that states have (over school boards) to run their schools; and (b) the discretion that school boards have (over students) to determine what is taught and how. You can read the cases in pages 372-390 and pages 398-417 relatively quickly, and you should see that this discretion is broad ... but not unlimited. We'll talk about where the limits of those discretionary powers are, and where they raise constitutional concerns. We are reading this background material as the necessary precursor for legally evaluating new proposed governance structures (e.g. the Mind Trust's proposal).

The readings in pages 429-443 focus specifically on school board governance. You can *skim* these pages, as I am going to give a mini-lecture on urban education governance.

One of the issues I will raise is the legality and efficacy of mayoral-appointed school boards. The two cases you have assigned – *Nixon v. Ohio* and *Mendoza v. State* – are both challenges to such laws. The Ohio challenge was unsuccessful, but the California challenge prevailed. As you read these two cases, think about what distinguishes them, what's similar, and whether each case was rightly / wrongly decided.

As we move through this material, you should also be asking: what about the *effects* of these various governance structures. What's best for students? For teachers? For the community? And why?

In the second half of class, we'll continue the discussion but focus it on a new proposal for radically changing traditional school governance. You'll hear from Ethan Gray of The Mind Trust in Indianapolis, IN. While I have assigned only the Executive Summary of their report, I encourage you to take a look at the full report, which is available on the TWEN web site and also here: <http://themindtrust.org/OpportunitySchools/MindTrust-Dec15.pdf>

Week 3: Wednesday, February 1, 2012. *Big Changes in the Big Easy*: Education Reform in New Orleans

Special Guest, 10 am – 11 am:

[Debra Vaughan](#), Assistant Director, Research, Tulane University Cowen Institute for Public Education Initiatives

Reading:

1. LSA-R.S. 17 § 1990. Recovery School District; creation; governance; operation
2. *United Teachers of New Orleans v. State Bd. of Elementary and Secondary Educ.*, App. 1 Cir.2008, 985 So.2d 184, 2007-0031 (La.App. 1 Cir. 3/26/08)
3. TULANE UNIVERSITY COWEN INSTITUTE, [THE 2011 STATE OF PUBLIC EDUCATION IN NEW ORLEANS](#) (2011)
4. TULANE UNIVERSITY COWEN INSTITUTE, [TRANSFORMING PUBLIC EDUCATION IN NEW ORLEANS: THE RECOVERY SCHOOL DISTRICT, 2003-2011](#) (2011)

Guide for Week 3 Reading:

In the first half of class, we will spend a few minutes looking back, as I know that some of you may have additional comments and critiques on the Mind Trust proposal. I will also spend about 15 minutes talking in depth about the papers (and between now and then I'll be posting some examples of Student Notes and Comments on the web site).

With those preliminaries out of the way, we'll then turn our attention to: (1) the relevant Louisiana statute, which created the Recovery School District; and (2) the *United Teachers of New Orleans v. State Bd. of Elementary and Secondary Educ.* case, which challenges the constitutionality of the Act. As you read these two documents, here is what I want you to think about:

1. As you read the legislation, ask yourself: is this how I would have crafted the legislation? Would I have gone a completely different route? Would I have tinkered with it? Do I like it the way it is? And why? Legislation is one of the most important avenues for turning ideas into real, live public policy. Crafting and drafting legislation for complex public policy is also immensely difficult. Not only must you avoid running afoul of the Constitution (both state and U.S.), you must also try to craft legislation that will be effective, and will mesh with the rest of the Education Code. (If you have time, you might click around other parts of the Code to see how this particular segment fits in).

2. When you don't like a piece of legislation, you try to find ways to block it. One of those ways is to argue that it is unconstitutional. As you read the case, think about these questions: First, is this a substantively good law suit, i.e. would it be a good thing for this Act to be repealed? Second, is the Court wrong in rejecting the arguments that are advanced? Putting the first and second together, what other avenues -- legal or otherwise -- do you think might be effective when faced with legislation such as this (whether in LA or elsewhere)? (If you have lots of time and inclination, you could imagine asking: what if similar legislation had been passed in <insert other state here>, would the constitution of <that other state> led to a different result? Why or why not?

In the second half of class we will welcome Deborah Vaughn, of Tulane's Cowen Institute. She will talk to us about both the recent history of reform in NOLA, and recent evaluations of progress. As background, I encourage you to read / skim the two reports from The Cowen Institute

(both of which are in the reading packet). For more background on their work, see:
<http://www.coweninstitute.com/>

Week 4: Wednesday, February 8, 2012. Religion and Schools: Courts, Controversies, and Why It (Still) Matters

Reading:

1. Casebook: Chapter 6, Part A, pages 169-181
2. Casebook: Chapter 6, Part C, pages 186-205
3. *Hosanna-Tabor Evangelical Lutheran Church And School v. Equal Employment Opportunity Commission Et Al.*, 565 U. S. ____ (2012) [read just the Syllabus]
4. Casebook: Chapter 7, Part B, pages 220-243 **
** Discussion of vouchers may spill over into the next class

Guide for Week 4 Reading:

In class on Wed 2/8, we will engage with material that typically forms part of the core of any Education Law class: the intersection of schools and religion.

It won't take long to see in the cases we read that we will be squarely in the domain of the vexing Establishment and Free Exercise clauses. Much of the case law will concern (what the *Locke v. Davey* case identifies as) the "play in the joints" between these two clauses. You will see that the Supreme Court has evolved in its thinking on these issues, and we will track this development in class.

Unlike some of our previous sessions, in which we've spent time on policy as well as law, in this session we will focus more squarely on legal questions. It will feel more like your 1L Con Law class than your undergraduate policy-related classes. If this seminar were being taught with a final exam rather than a final paper, you can be assured that one of the Exam questions would be a long, winding question related to religion and schools.

In your reaction paragraphs this week, I strongly encourage (but do not require) you to answer one of the questions that is posed in the Notes and Questions section after each case. The casebook presents a series of great questions about the Court's various holdings.

In class, we will start by (relatively quickly) examining the law governing the use of public resources for sectarian schools (the *Cochran*, *Everson*, and *Allen* cases). We will skip over the *McCullum* and *Zorach* cases (which deal with release time for religious instruction). We will then spend considerable time with the seminal case *Lemon v. Kurtzman*. When you see the Lemon Test it will remind you of Con Law. We will also look at the cases *Mueller v. Allen*; and *Aguilar v. Felton*. In the interest of time, we are skipping over the start of chapter 7 (the *Zobrest*, *Agostini*, and *Mitchell* cases), in which the Lemon Test is further revised.

We will, however, talk about the very recent Supreme Court case, *Hosanna-Tabor Evangelical Lutheran Church And School v. Equal Employment Opportunity Commission Et Al*. The case considers the "ministerial exception" and will serve as a contemporary example of how these long-contentious legal issues arise in new, but related contexts.

We will finish the class by spending considerable time on the "voucher" cases: *Zelman* and *Locke v. Davey*. It's likely that this discussion may spill over into the next class.

Week 5: Wednesday, February 15, 2012. *School Choice: Charter Schools and School Voucher Programs*

Special Guest, 11 am – 12 pm:

[Neerav Kingsland](#), Chief Strategy Officer, New Schools for New Orleans

Reading:

1. New Schools for New Orleans, *Expanding Experiences, Changing Perspectives* (Annual Update 2010).
2. Paul O’Neill and Renita Thukral, The Unique System of Charter Schools in New Orleans after Hurricane Katrina: Distinctive Structure, Familiar Challenges, *Loyola Journal of Public Interest Law* (July 2010)
3. Benjamin Siracusa Hillman, *Is There A Place For Religious Charter Schools?* 118 *Yale L.J.* 554 (2008) [first 7 pages are assigned]

Guide for Week 5 Reading:

This will be our final week in which we explicitly discuss charter schools. Our special guest will be Neerav Kingsland (http://newschoolsforneworleans.org/aboutus_ourteam.php). Neerav is a graduate of Yale Law School, and now works in education policy here in NOLA. In the second hour of class, we'll listen to him give a brief presentation and then we'll launch into discussion. In your reaction paragraphs this week, you might generate questions you'd like to ask him. (I've also asked him to say a few words on his professional journey from law school into education policy, as I think that might be of interest to some of you).

In the first hour of class, we'll wrap up our vouchers discussion and then turn our attention to the question posed by Benjamin Siracusa Hillman: *Is There A Place For Religious Charter Schools?* I will walk through the Note both substantively and as an illustration of how to craft an academic legal argument (which you will be doing on a smaller scale in your seminar paper).

As a transition into Neerav's presentation we'll read Paul O’Neill and Renita Thukral, *The Unique System of Charter Schools in New Orleans after Hurricane Katrina: Distinctive Structure, Familiar Challenges*, *Loyola Journal of Public Interest Law* (July 2010). This is a short (<25 pages) article that will get you quickly up to speed on charter schools in Louisiana. As you read the piece, think like a lawyer and ask yourself: are there unforeseen consequences from the wording of this statute? Are there possible constitutional challenges? And so forth. We'll take up the policy question -- what effects does this emphasis on charters have, and is it a good thing? -- in the second hour.

Week 6: Wednesday, February 22, 2012. *Who pays for all this and where does the money go?*
Equity, Adequacy, and School Finance

Reading:

Casebook: Chapter 4, Part A (and introduction to Part B), pages 71-111

Laurence O. Picus, *How Schools Allocate and Use Their Resources*.

R. Craig Wood, *Justiciability, Adequacy, Advocacy, and the "American Dream"*, 98
Kentucky L. J. 739 (2010).

Guide for Week 6 Reading:

Recognizing that we will be meeting next week immediately after Fat Tuesday, and repeating my note above: your reaction paragraphs may be submitted any time up until the start of class (i.e. until 9:59 am on Wednesday morning). I will also do a bit more lecturing in this class than I typically do, in order to give you some perspective on school finance policy, e.g. where revenues come from and how expenditures are made. If you are interested in a brief review of "where the money goes" look at the four-page Picus summary piece.

The centerpiece of our discussion will be the cases presented in the casebook, most especially the landmark Rodriguez case. The casebook devotes nearly 25 pages to this case, and with good reason. It is one of the most important cases in Education Law, and indeed many would say in Constitutional Law more generally. If you can read only one thing, please read this case and be prepared to dive into it in some detail. We will then discuss two additional post-Rodriguez cases in the casebook: Plyler v. Doe and Papasan v. Allain.

What we'll learn (and of course debate) from the federal case law is that the Supreme Court has not found a fundamental right to public education. This has consequences for what states are (and are not) required to do in their funding of education. Most notably, it allows for a number of disparities across localities within states.

Part B in the casebook -- which I am not assigning but will talk about in class -- shifts the legal focus to state courts, where the real action of school finance litigation lies. I will provide an overview of this legal landscape, and draw your attention to the concept of "adequacy". I ask that you read Part III (pages 769-775) in the Wood article, where he discusses state litigation related to adequacy. (For those interested in this topic, you'll want to look at the rest of the Wood article, which nicely summarizes the variation in recent state school finance litigation.)

As you review these materials, I want you to think carefully both about what fundamental rights exist, and -- assuming some agreement about a right -- how you would conceptually define and practically implement a school finance regime. Would you use the concept of "adequacy" and if so, what would it look like?

Week 7: Wednesday, February 29, 2012. The law and policy of preschool education

Reading:

1. Casebook: Chapter 5, read pages 143-160 (Part A: the two cases); and skim (if time allows) pages 161-168 (providing additional background).
2. James E. Ryan, *A Constitutional Right to Pre-school?*, 94 CAL. L. REV. 49 (2006) (read pages 49-54; 69-90; full version is posted to the TWEN site).
3. James J. Heckman, *Schools, Skills, and Synapses*, Discussion Paper No. 3515 (May 2008) (appendices and references are omitted, but are available in the full version posted to the TWEN site).

Guide for Week 7 Reading:

In Week 7 I will start class by presenting a discussion of the social science and emerging neuroscience of early childhood development. As background, I encourage you to read through the piece by Nobel Laureate economist James Heckman. And if you want to see more of Heckman's work in this area, see: <http://www.heckmanequation.org/>. If you are interested in the science of child development, I suggest that you browse through the many resources made available by the Harvard Center on the Developing Child: <http://developingchild.harvard.edu/>.

Having reviewed the science, we will then turn to the law and ask: what, if anything, should the law do in light of these findings (and in light of our own intuitions)?

We will focus first on the two cases in Chapter 5 of the casebook (Pages 143-160). We will then move into a discussion of James Ryan's arguments in *A Constitutional Right to Pre-school?* I am not assigning the entire article, but rather only: pages 49-54; 69-90. These are the sections where he lays out his legal arguments.

I suspect that we will all agree on the value of good life circumstances in the earliest years of life. Where disagreement typically arises, and quite reasonably, are: (1) precisely what the aims should be; (2) the proper role of law in ensuring / encouraging such aims; and (3) the proper balance between law and legislation in crafting policy. Thus, as you read through the materials for Week 7, think carefully about what your aims in this policy domain are, and what role you see for legislation and law in pursuing those aims.

Week 8: Wednesday, March 7, 2012. *Special Education: Individualized Education Plans, Equity, Cost, and Effectiveness*

Special Guest, 11 am – 12 pm:

[Eden Heilman](#), Senior Staff Attorney, Southern Poverty Law Center

Readings:

Casebook: Chapter 14, Part A and Part B, pages 713-760

P.B., et al. v. Pastorek (2010) [read the complaint]

Southern Poverty Law Center, *Access Denied: New Orleans Students and Parents Identify Barriers to Public Education*

Guide for Week 8 Reading:

Start with the casebook, but before reading take 10 minutes to skim. You'll notice from skimming that the six major headings in Part B each start with "**The Statutory Duty**" ... Why is this the case? The answer is that special education in the United States is governed by **statute**, and in particular the federal statutes that the casebook introduces in Part A (and which are cited in the case materials that Eden has supplied). The case law presented in Part B have to do with working out some of the many complexities of the statutes.

Ten to fifteen minutes of skimming should put you in a position to answer two questions: (1) what are the major federal statutes that matter in this area of education law? (2) where have some of the most important legal battles been fought in interpretation / application of those statutes?

What 10-15 minutes of skimming won't get you is an answer to the deeper questions: how have those legal battles been fought, who has won (and lost), and on what (sometimes contradictory, always complex) principles have courts decided these cases? If you have time, and of course I hope you do, you'll find it worthwhile to read through all of Part A and B. If you are pressed for time, then read Part A and focus in on some subset of the Part B subsections (and write your reaction on that subset of issues).

After reading the casebook materials, you'll be in a great position to read and evaluate the claims being made in *P. B., et al. v. Pastorek* (2010). For your reactions, I encourage you to prepare questions for our guest. (Though feel free to offer questions / comments on just the casebook materials if that is of more interest to you). For context and background I've also given you: Southern Poverty Law Center, *Access Denied: New Orleans Students and Parents Identify Barriers to Public Education*. You can skim that after or before reading the P.B. case. If you want to learn more about the SPLC's special education work, and also see more material on this case, see: <http://www.splcenter.org/get-informed/case-docket/new-orleans-special-education>

Finally, you're not being assigned Part C in Chapter 14 (where IEPs are discussed in more detail), nor are you reading Part D (where the costs of special education are considered). I'll say maybe :60 seconds on each of these, but if you're interested in the topic you'll want to read them in full.

< *Spring Break Week* >

Week 9: Wednesday, March 21, 2012. *Race, Class, and Schools*: Segregation, Desegregation, Choice and Equality

Reading:

1. Casebook: Chapter 12, Part A, pages 469-503
2. Casebook: Chapter 12, Part C, pages 556-587

Guide for Week 9 Reading:

Race is a fault line for many areas of law, and we could easily spend an entire semester just on the topic of race and education policy / law. Indeed, the rise of "Critical Race Theory" (and the subsequent rise of critiques of that approach to law) speak to how contentious discussions of race and law can be.

In our readings this week we will explicitly narrow our focus on a subset of the many race-and-education questions we could ask. I did not assign any additional supplementary materials because

you have more than enough to read with just the case law. I ask that you really dig into the cases this week, asking yourselves questions such as: what *exactly* does this case stand for? What *could* it have stood for? How can we reconcile the series of cases on race? What questions remain unanswered? As you ask these questions you will inevitably consider more general questions (which you've encountered before in this class) such as: What is the proper role of courts and legislatures? What is the role of law in remedying social ills? And so forth.

The specific assignment is for you to read Part A and Part C in Chapter 12 in the casebook. We are skipping Part B (on affirmative action in higher education) because we have limited time and our focus is on K-12. I do hope, though, that you may have encountered these cases at least once previously. We are also skipping for now Part D (on gender equality) simply due to time constraints, but we are working part of this section back in during Week 12. We will spend at least an hour (and perhaps a bit more) on the cases in Part A, and then turn to the PICS case in Part C for the remainder of class.

In Part A of Chapter 12, you will start with *Brown v. Board of Education*. You have all read the case before, but as you start this week's reading I suggest that you read it anew, this time drawing on the education law knowledge you now have at your disposal. Once we establish the principles of *Brown*, we will move into a series of post-*Brown* cases (Swann, Keyes, Freeman v. Pitts, and Missouri v. Jenkins), all of which will require you to think about: what is the court's role in enforcing *Brown* (and its progeny), and how does that role change in light of differences in the realities of segregation (both de jure and de facto); differences across localities (which may have different racial histories) and over time (as demographics shift)? You should also try to formulate, as clearly as possible in your head, what is problematic (about racial patterns of school attendance and achievement) and why.

Part C presents just one case, but it is a recent and very important one: *Parents Involved in Community Schools v. Seattle School District*. Known as "PICS", this case -- just decided in 2007 -- completely divided the Court. Thus, our first goal will simply be the (not so straightforward) task of figuring out: what exactly is the holding here? What are school districts allowed (and not allowed) to do with respect to consideration of race in student assignment? Once we establish the holding, we will then consider the merits of the various Justices' opinions. Whose view do you agree with most and why? How would you have ruled?

Our goal in class will not be to definitively answer all of these questions, or indeed, even to ask every question we could. Rather, our goal will be to work through some of the most fundamental questions / tensions posed by this week's cases. Feel free to write your reactions on any element of the case law that strikes you. If you like writing in response to one of the Notes and Questions, do that. If you prefer to offer a question or observation independently of the Notes, that's fine as well. As in weeks past, I will integrate your reactions into our discussion.

Week 10: Wednesday, March 28, 2012. *Students' Rights*: Religious Expression and Free Speech

Reading:

1. Casebook: Chapter 8, Part B and Part C, 281-319
2. Casebook: Chapter 13, Part A, pages 631-666
3. *Evans v. Bayer*, 684 F.Supp.2d 1365 (2010).

Guide for Week 10 Reading:

On Wednesday, March 28th, we will have our tenth class and cover the topic of students' rights, with a focus on religious expression and free speech in school. If we had more time, we would

split this week into two weeks. But, in light of time constraints, I have merged the two related (though distinct) bodies of law.

In the first part of the class we will talk about religious expression in schools. I did not assign Part A in Chapter 8, but I will say just a few quick words in class to get you up to speed on where the Court stands on prayer, Bible reading, and moments of silence. As Note 1 on page 253 writes, and as just about every commentary you will ever read on these cases will observe, the Court in these cases must strike a balance between the Establishment Clause and the Free Exercise Clause. As you can already anticipate, this is a hard line to draw.

We will pick up the story in Part B. In *Lee v. Weisman* the Court must decide whether a Rabbi reading a non-sectarian prayer at a middle school graduation ceremony violates the Establishment Clause. We will move through this case quickly, in order to spend significant time on *Santa Fe Indep. School District v. Doe*, in which the Court must make a similar decision about student-led, student initiated prayer at high school football games. (But note that in order to understand the Santa Fe case you need to understand Lee.) As you read the two cases, try to uncover the rule(s) which the Court is developing. Think about other hypothetical situations -- how would you expect the Court to decide and why?

Having wrestled with the prayer question, we will then move to the Pledge of Allegiance case law. The first case -- *Barnette* (1943) -- gives us a clear answer to the question: Can a state *require* that all students recite the Pledge and salute the Flag? (Answer: no). But, so long as students are allowed not to salute / Pledge, a public school can still start the day with the Pledge. (There are some further intricacies, but we won't dive too deep). We will, however, look at Frankfurter's dissent vs. the majority opinion.

We will then move to the controversial *Newdow* case. When you read it, you should first ask yourself: what, exactly, is the legal question here? And what rules / principles does the 9th Circuit employ to reach its conclusion?

We will accomplish all of our religion and Pledge debate in the first hour, leaving us a full hour to talk about other types of student expression.

In Chapter 13 I have assigned just Part A, which covers political expression, "indecent" speech, school-sponsored expressive activities (i.e. the school newspaper), speech advocating illegal drug use, and dress codes.

When we turn to these cases, we will begin with a brief presentation from Sami, who recently completed his law review comment: "Time to Stop Limiting Student Free Speech and Start Tinker-ing". This Comment is directly on point with some of the questions we'll be asking and debating this week. Sami has agreed to say a few words about his Comment during class, and as his reaction paragraph this week he will post an abstract of the Comment.

As you read the cases, pay particular attention the *Tinker* case, as it is a landmark in this area and the rest of the cases will refer back to it. In *Tinker*, the Court articulates the fundamental tension we will discuss (and surely not resolve).

On one hand, "it can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." But "on the other hand, the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." Thus, "our problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities."

At the end of class, we will explore this collision in the case of *Evans v. Bayer*, 684 F.Supp.2d 1365 (2010). This is a case where a student created a Facebook group called "Ms. Sarah Phelps is

the worst teacher I've ever met." The student was suspended, and we will focus on the First Amendment arguments considered by the Court.

Week 11: Wednesday, April 4, 2012. *Teachers' Rights: Collective Bargaining, Tenure, and Merit Pay*

Special Guest, 10:30 am – 12 pm:

[Larry Samuel](#), General Counsel, Louisiana Federation of Teachers

Background: Casebook: Chapter 17, Part A, pages 857-862

Background: Casebook: Chapter 18, Part A and Part B, pages 937-954

Background: *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985)

Oliver v. Orleans Parish School Board, 25 So.3d 189 (2009) (and for additional background: Background: New Orleans Public Schools Employees Justice <http://www.nopsejustice.com/index.html>)

Louisiana Federation of Teachers, Et. Al. v. Louisiana State Elementary and Secondary Education Board, Suit No. 592,208 (2011) [The "Red Tape Act" case]

Guide for Week 11 Reading:

1. Start by a quick skim (it should take about 5 minutes) of the front page of this web site: <http://www.nopsejustice.com/index.html> . You will see that the case has been argued, and Attorney Samuel will be able to talk in more detail about the nature of the case.
2. So that you have a basic sense of the disagreement (on the substance of the claims) read the attached 5 minute primer on the case. The Primer includes excerpts from 2009 briefs. You might also want to go back and refresh your memory on the case we read in Week 3: *United Teachers of New Orleans v. State Bd. of Elementary and Secondary Educ.*, App. 1 Cir.2008, 985 So.2d 184, 2007-0031 (La.App. 1 Cir. 3/26/08).
3. Having looked at the web site and the Primer, you can then move very quickly through the case in the supplemental materials, as the case focuses most of its attention on the class certification questions. Given that the class was certified, and trial already completed, I don't think Atty. Samuel will dwell much on the details of the certification. But it's useful for you to skim through this so you have a sense of the procedural history. (And note the state's argument that there's no cause of action).
4. Read the final case in the supplemental materials (*Louisiana Federation of Teachers, Et. Al. v. Louisiana State Elementary and Secondary Education Board*). It should be a quick read, and it includes at the end the text of the legislation being challenged. Make sure you read about the due process claims.
5. With the time remaining, you can turn to the casebook for background cases on due process in the teacher employment context. I have provided the Loudermill case in the supplemental readings, but you only need to skim it.

If you read in this way, you should be prepared to engage the material as we will discuss it:

In the first 30 minutes of class our goal will be to arrive at a basic understanding of the due process rights owed to teachers. We'll do so through a discussion of the Roth (in your casebook), Sindermann (see Note 5 after Roth), and the Loudermill cases (in the supplemental package). Given our limited time, I will lecture just a bit more than normal in order to ensure that we cover

the basic rules. Given that we'll move through this quickly, and that I'll review the cases in class, you can probably read these cases a little faster than you normally might.

Note that we are skipping the sections in the casebook concerning teacher expression and academic freedom. Although a distinct body of caselaw, these cases are similar in spirit to the student expression cases we covered. We could spend an entire class working through the teacher issues, but given limited time we can't. We're also skipping over the teacher discrimination sections -- again, not because they are less important, but because we simply don't have time to cover it all (and you don't have time to read it all).

The other topic we will cover in the first 30 minutes is background caselaw on professional and contractual rights of teachers (Chapter 18 in your casebook). Focus especially on the 12 pages of Part B (pages 943-954), covering tenure and collective bargaining.

After the first 30 minutes, you will have a basic sense of some (though certainly not all) of the pertinent law related to teacher employment. We will then welcome Attorney Samuel to walk us through several aspects of this law in more detail. Although I do not know for sure, I anticipate that our discussion in the second half of the class will revolve around the two cases in your supplemental reading packet: *Oliver v. Orleans Parish School Board*, 25 So.3d 189 (2009) and *Louisiana Federation of Teachers, Et. Al. v. Louisiana State Elementary and Secondary Education Board*, Suit No. 592,208 (2011) [The "Red Tape Act" case].

Week 12: Wednesday, April 11, 2012. *No more dodgeball?* School Liability for Student Well-Being || *Just part of growing up?* Harassment, bullying and student safety

Note: We will cover two related, but legally distinct, topics this week. My expectation is that our discussion of harassment and bullying will spill over into the final session.

Tort Liability Reading:

1. Casebook: Chapter 15 (all: pages 779-810)
2. San Diego Unified School District, *Position on Dodgeball in Physical Education*
3. Lauren Sher, *Student Suspended for Breaking School's No-Hugging Policy* (November 4, 2011)
4. Charles J. Russo, et. al., *Twelve Safety Tips For Avoiding Liability* 257 Ed. Law Rep. 544 (2010)

Harassment / Bullying Reading:

5. Casebook: Chapter 12, pages 607-628
6. LA HB 112 (2011), "Safe Schools Bill" [printed separately on legal paper]
7. Bill Barrow, *House Rejects Anti-Bullying Bill Opposed By Social Conservatives, Backed By Gay Rights Advocates* (The Times-Picayune, May 19, 2011)
8. Winnie Hu, *Bullying Law Puts New Jersey Schools on Spot* (New York Times, August 30, 2011)

Guide for Week 12 Reading:

I have assigned all of Chapter 15 in the casebook, which consists of 30 pages. This reading will bring back memory of 1L Torts class. If you liked Torts, you'll like this chapter. If you didn't like Torts, you'll probably find this reading less enjoyable. In any event, my recommendation is that you read Part A (which gives you the overview of the chapter in 5 pages), skim the strict liability case (because it's more straightforward law), and then dig into the cases in Part C (on Negligence).

As you'll (hopefully) recall from Torts, the negligence standard requires a breach of a duty of care. In our cases for next week the central question is: what duty of care is owed to students (by educational professionals and administrators)? We'll ask this question in the context of: an injury in a 1st grade game of London Bridge (*Johnson v. Millard*); a shirt catching fire in a welding class (*Norman v. Ogallala*); a pencil in a 5th grader's eye while a teacher was outside the classroom (*Simonetti v. Philadelphia*); and injuries on a field trip (*Glankler v. Rapides Parish*). As you read these cases, you can read them relatively quickly. I won't grill anyone on the holdings, but I will ask you to think about how they help us to understand the negligence standard in the schools context.

Having laid out some case law, I will then ask you to put on your lawyer hat and advise the Shen School Board on what to do in terms of policy on: dodgeball (see San Diego policy in packet); hugging (see newspaper article); and peanut allergies (see page 809 in casebook). As background, you may find the "12 Safety Tips" reading helpful.

After we deal with the tort questions, which I think will run about 1 hour and 15 minutes, we'll use the remainder of class to tackle questions related to sexual harassment and bullying. In Chapter 12, there are two cases related to the scope of available Title IX remedies. The question we ask will be: when is a school district liable for teacher-on-student sexual harassment (the Gebser case) and student-on-student sexual harassment (the Davis case). As you read these cases, the underlying policy question will become clear: for what should we hold schools responsible?

Those two cases are decided under Title IX, but we'll end our class by moving into the policy world and recent anti-bullying legislation (which provides a new answer to the "What are schools to be responsible for?" question).

Week 13: Wednesday, April 18, 2012. *Can we do better?* The Future Of Education in America (and How Different People Want to Change It)

Special Guest, 11:00 am – 12 pm:

[Jonathan "Jay" Augustine](#), Deputy Executive Director at Louisiana Workforce Commission

1. Governor Jindal Unveils Education Reform Plan (Jan 17, 2012)
2. U.S. Department of Education, *Race to the Top Program: Executive Summary* (November 2009)
3. Abolish the Education Department? Abandoned Idea Gets New Life (FoxNews.com September 23, 2011)
4. Paul Hill & Christine Campbell, *Growing Number of Districts Seek Bold Change With Portfolio Strategy* (June 2011)
5. NEA Priority Schools Campaign (brief excerpts)
6. NAACP, *Misplaced Priorities* (only the Executive Summary is assigned)
7. Bill Gates, *Speech to American Federation of Teachers* (2010)

8. Diane Ravitch, *Waiting for a School Miracle* (May 31, 2011) (Op-Ed)
9. Jay Augustine, [*America's New Civil Rights Movement: Education Reform, Public Charter Schools and No Child Left Behind*](#), Louisiana Bar Journal (March 2012)

Guide for Week 13 Reading:

For our final week, we leave the great hugging debates behind and take a step back to reflect upon the semester, think critically about the intersection of education law and education policy, and offer you an opportunity to collect your thoughts about what ought to be done (and by who) next.

The readings this week include no cases, and should be relatively easy reads / skims. The readings present a range of views about what ought to be done in public education. There are disagreements between them, but also much overlap.

Unlike previous weeks, in which our goal was to dive into the readings, this week our goal is to use the readings as a springboard to dive into *your* views. I will briefly summarize some of the readings, but then quickly turn the floor over to you.

In the second hour we welcome Jay Augustine, Executive Counsel for the Louisiana Workforce Commission. Jay will speak both about his personal experiences (as a Tulane Law alum who has represented a variety of clients in the education law arena) and about his vision for the next great challenge to be tackled in the education sector. Other than some details of the current state legislation in Louisiana, which because of his state employment he cannot comment on, Jay will be open to discussing a wide range of topics. I encourage you to read his short (4 page) commentary on charter schools, and if you are interested in seeing more of his writing you can turn to: http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=1656844 .

For your written reactions this week, I would like you to choose at least one of these three options. (If you feel so moved to do more than one, feel free, but there is no expectation or requirement that you do so).

1. Pose a question(s) for Attorney Augustine, and/or comment on his article.
2. In roughly the same amount of space as your usual written reaction, write an OpEd which discusses one to three of the most pressing challenges to providing better public education in the United States.
3. In roughly the same amount of space as your usual written reaction, write an OpEd which discusses one to three of the most promising avenues for providing better public education in the United States.
4. In roughly the same amount of space as your usual written reaction, write an OpEd which discusses the (limited, moderate, or expansive) role of education law (i.e. the courts) in the future of education reform.
5. In roughly the same amount of space as your usual written reaction, write an OpEd which discusses the aims of public education.
6. In roughly the same amount of space as your usual written reaction, write an OpEd with the title, "The Most Important Topic We Haven't Talked About All Semester".

You should view this final reaction assignment as an opportunity to reflect upon your own views and freelance. They need not be polished. They should simply be genuine.