CHAPTER 1

School Governance

By
Brad Colwell*

Chapter Contents

---

* Associate Professor and Chairman, Southern Illinois University.

§ 1.01 Introduction

To the surprise of many citizens, the term "education" does not appear in the United States Constitution. According to its Tenth Amendment,[1] any issue not directly delegated to the United States government, nor prohibited by the states, is reserved to the individual states. Education, therefore, is deemed to be a function primarily undertaken by the states, each with its own constitutional provision addressing its role in educating its citizenry. These constitutional provisions allocate the primary authority to each state's legislative body in relation to public school governance.[2] As a California appellate court recently stated, "[t]here can . . . be no doubt that our Constitution vests the Legislature with sweeping and comprehensive powers in relation to our public schools."[3]

Each state may approach in different ways its mission to provide for the education of its students. Consequently, all fifty states have statutory laws governing elementary and secondary education, as well as a state education agency that develops educational policies to facilitate the operation of its local schools.

---

[1] U.S. Const. Amend X.

[2] The Arizona Constitution is typical of other states' constitutional language, stating, "The Legislature shall enact such laws as shall provide for the establishment and maintenance of a general and uniform public school system." Ariz. Const. art. XI, § 1. See Wilson v. State Board of Education, 75 Cal. App.4th 1125, 89 Cal.Rptr.2d 745 (1999). However, six states' constitutions provide that local school boards shall operate, control and supervise district schools.

See:
Colorado: Col. Const. art. IX, § 15
Florida: Fla. Const. art. IX, § 4
Georgia: Ga. Const. art. VIII, § 5
Kansas: Kan. Const. art. VI, § 5
Montana: Mont. Const. art. X, § 8
Virginia: Va. Const. art. VII, § 7.

[3] *Wilson*, N. 1 *supra,* 89 Cal.Rptr.2d at 751 (citing Hall v. City of Taft, 47 Cal. 2d 177, 179, *302 P.2d 574* (1956). The California Constitution states, in part, "The Legislature shall provide for a system of common schools . . ." Cal. Const. art. XI, § 5.

§ 1.02 State Education Agencies

Given the states' role in elementary and secondary education, each state has created an administrative body with primary authority to oversee its system of public elementary and secondary education.[1] These bodies, called state boards or state departments of education, are created by constitutional[2] or statutory provision and their powers are established by state statute.[3] For example, the Colorado Constitution empowers its State Board of Education with "general supervision" over public schools.[4] The Supreme Court of Colorado determined these powers to include directing, inspecting, and critically evaluating its public education system from a statewide perspective.[5] Other states' statutes authorize their state boards to prepare annual state public school budgets,[6] develop grade-level learning standards,[7] and grant or suspend teachers' certificates.[8]

State boards of education are considered administrative agencies.[9] By definition, these boards have no inherent authority and must rely

---

[1] *New Jersey:* Board of Education of Englewood Cliffs v. Board of Education of Englewood, 257 N.J. Super. 41*3,* 608 A.2d 914 (1992), *cert. denied* 515 U.S. 991 (1993) (elementary education).

Connecticut: New Haven v. State Board of Education, *228 Conn. 699,* 638 A.2d 589, 592 (1994) (secondary education).

Idaho: Evans v. Andrus, 855 P.2d 467, 468 (Idaho 1993).

Maryland: Board of School Commissioners v. James, 625 A.2d 361, 364 (Md. Ct. Spec. App.), *cert. denied* 631 A.2d 452 (Md. 1993) (secondary education).

[2] The Kansas Constitution provides, "The legislature shall provide for a state board of education which all have general supervision of pubic schools . . ." Kan. Const. art. VI, § 2(a). See also:

Colorado: Col. Const. art. IX, § 1(1).

Louisiana: La. Rev. Stat. § 17:1, 6, & 7.

[3] State Boards have no inherent powers, but only those powers granted them by constitution or legislature. State Board of Education v. Honig, *13 Cal. App. 4th 720,* 16 Cal. Rptr.2d 727, 750 (1993). See also, Board of Education of Talbot County v. Heister, *392 Md. 140,* 896 A.2d 342 (2006).

[4] Colo. Const. art IX, § 1. See also,

Oklahoma: Okla. Stat. tit. 70, § 3-104.

[5] Board of Education of School District #1 v. Booth, 984 P.2d 639 (Col. 1999).

[6] Md. Code Ann., Educ. § 2-205(j)(1).

[7] *Arkansas:* Ark. Code Ann., § 6-15-1012.

California: Cal. Educ. Code § 60605(a)(1)(A).

Colorado: Col. Rev. Stat. § 22-2-109(1)(g).

[8] *Alabama:* Ala. Code § 16-23-1.

Alaska: Alaska Stat. § 14.20.010.

[9] New Town Public School District No. 1 v. State Board of Education of Public School Education of State, 650 N.W.2d 813 (N.D. 2002). But see, Straus v. Governor, *459 Mich. 526,* 592 N.W.2d 53 (1999) (state board of education in Michigan is part of the executive branch of government).

on each state's legislative body to provide the parameters of what they can address.[10] In turn, these boards adopt administrative rules and regulations that have the force of law and supplement the basic policies enacted by the state's legislative body.[11] These boards are empowered to interpret and enforce administrative regulations[12] and serve as the adjudicators of controversies or disputes involving the proper administration of the public school systems.[13] Such administrative decisions are final[14] until such time that they are modified by state statute[14.1] or court order.[15] The judiciary would only become involved to interpret purely legal questions, but still defer to the interpretation of the state board.[16]

---

[10] *Alaska:* Fairbanks North Star Borough School District v. NEA-Alaska, Inc., 817 P.2d 923 (Alaska 1991).

California: State Board of Education v. Honig, *13 Cal. App. 4th 720,* 16 Cal. Rptr.2d 727 (1993).

Delaware: Del. Code, tit. 14, § 104.

[11] *Alabama:* Ala.Code § 16-3-13.

Illinois: 105 ILCS 5/2-3.6 ("to make rules . . . necessary to carry into efficient and uniform effect all laws for establishing and maintaining free schools in the State").

New Jersey: N.J. Rev. Stat. 18A:4-15.

[12] Resetar v. State Board of Education, *284 Md. 537,* 399 A.2d 225 (1979), *cert. denied* 444 U.S. 838 (1979); Board of Education v. McCrumb, *52 Md. App. 507,* 450 A.2d 919 (1982). These departments are not authorized to determine purely legal questions. County Board of Education v. Cearfoss, *165 Md. 178,* 166 A. 732 (1933).

[13] *Illinois:* 105 ILCS § 5/2-3.8.

[14] Mayberry v. Board of Education of Anne Arundel County, *131 Md. App. 686,* 750 A.2d 677, 700 (2000).

[14.1] See Board of Education of Talbot County v. Heister, *392 Md. 140,* 896 A.2d 342 (2006) (where the legislature has delegated broad authority to a state administrative agency to promulgate regulations in an area, the agency's regulations are valid under the statute if they do not contradict the statutory language or purpose).

[15] Carpenito v. Board of Education of Rumson, *322 N.J. Super. 522,* 731 A.2d 538 (1999) (A New Jersey Superior Appellate court determined that the state board is the ultimate administrative decision-maker in reviewing law concerning school matters. Those decisions should not be vacated absent a showing the decision was arbitrary and capricious, lacked support in the record, or violated legislative policies in the statutory scheme of the agency). See also, Hurl v. Board of Education of Howard County, *107 Md. App. 286,* 667 A.2d 970 (1995).

[16] Board of Education of Round Lake Area Schools v. State Board of Education, 292 Ill. App.<$>IU>3d 101, 685 N.E.2d 412 (1997) (an Illinois appellate court ruled that when it considers an appeal of an administrative decision, it reviews the administrative decision and does not defer to the trial court). See also:

Maryland: City Neighbors Charter School v. Baltimore City Board of School Commissioners, *169 Md. App. 609,* 906 A.2d 388 (2006); Miller v. Board of Education of Caroline County, *114 Md. App. 462,* 690 A.2d 557, *cert. denied* 691 A.2d 1312 (Md. 1997).

New Jersey: Board of Education of West Windsor-Plainsboro Regional School District v. Board of Education of Township of Delran, *361 N.J. Super. 488,* 825 A.2d 1215 (2003), *cert. denied* 841 A.2d 92 (N.J. 2004); Nelson v. Board of Education of

A state superintendent[17] serves as the chief administrative officer for a state board of education.[18] The primary administrative responsibility of the state superintendent is to oversee the practical management and direction of the board[19] as well as to have "supervision over all matters pertaining to the public schools."[20] The Wisconsin Constitution, for example, provides that "[t]he supervision of public instruction shall be vested in a state superintendent and such other officers as the legislature shall direct."[21] Just like other administrative leaders, the state superintendent possesses only such power as is expressly conferred or necessarily implied from the statutes under which he or she operates.[22]

Township of Old Bridge, *148 N.J. 358,* 689 A.2d 1342 (1997); Breitwieser v. State-Operated School District of City of Jersey City, *286 N.J. Super. 633,* 670 A.2d 73 (1996).

Texas: Amaral-Whittenberg v. Alanis, 123 S.W.3d 714, 720 (Tex. App. 2003) ("[c]ourts should defer to the Commissioner of Education's reasonable determination in an area where he possesses authority and expertise").

West Virginia: Randolph County Board of Education v. Adams, *196 W. Va. 9,* 467 S.E.2d 150 (1995).

[17] Also referred to as "Commissioner of Education" or "Superintendent of Public Instruction."

[18] *Mississippi:* Miss. Const. art. VIII, § 202.

Oregon: Ore. Const. art. VIII, § 1.

[19] Miss. Code Ann. § 37-3-11(1)(b). See also, State Board of Education v. Honig, 13 Cal. App.*4th 720,* 16 Cal. Rptr.2d 727, 733 (1993).

[20] *Alabama:* Ala. Const. art. XIV, § 262.

Washington: Wash. Const. art. III, § 22.

[21] Wis. Const. art. 10, § 1.

[22] *California:* State Board of Education v. Honig, 13 Cal. App.*4th 720,* 16 Cal. Rptr.2d 727 (1993).

Wisconsin: Madison Metropolitan School District v. Wisconsin Department of Public Instruction, 199 Wis.*2d 1,* 543 N.W.2d 843 (1995).

§ 1.03 State Finance Litigation

School finance scholars agree that most states have a gross disparity in per pupil expenditures,[1] usually resulting from funding schemes heavily dependent on local property tax revenues.[2] In response to this purported need for school finance reform, resolution has been sought both through the legislatures and through the courts.[3] As the states' legislatures failed to address the perceived inequities in school funding, parents and children's advocates increasingly turned to the judiciary for relief.[3.1]

Since the early 1900s, plaintiffs have challenged the constitutionality of public school finance systems in over forty-five states.[4] Since the late 1960s, a growing number of students and educators have pursued funding reform through the judicial system.[5] However, prior to the marked success of judicial intervention in 1989 and 1990,[6] only seven states' school finance systems were found unconstitutional.[7]

---

[1] The Wisconsin Supreme Court stated that absolute uniformity of funding between districts is not required, only that the state guarantee a basic education for all students. While equal access to education is a fundamental right, equal access or allocation of resources is not. Kukor v. Grover, 148 Wis.2d 469, 436 N.W.2d 568, 575 (Wis.), *reconsideration denied* 443 N.W.2d 314 (Wis. 1989).

[2] See Thro, "An Essay: The School Finance Paradox: How the Constitutional Values of Decentralization and Judicial Restraint Inhibit the Achievement of Quality Education," 197 Educ. L. Rep. 477, 79 (2005); Wise, *Rich Schools Poor Schools: The Promise of Equal Educational Opportunity* (1968).

[3] Colwell, "Judicial Review: Issues of State Court Involvement in School Finance Litigation," 24 J. of Educ. Fin., 69-86; Dayton, "An Anatomy of School Funding Litigation," 77 Educ. L. Rep. 646-647 (1992).

[3.1] *Arkansas:* Lake View School District No. 25 v. Huckabee, 2005 WL 3436660 (Ark. 2006) (even though it concluded that public education funding needs violated constitutional school funding requirements, the supreme court would not direct the legislature to appropriate a specific increase in funding amounts).

New York: Campaign for Fiscal Equity, Inc. v. New York, 29 A.D.3d 175, 814 N.Y.S.2d 1 (2006) (court ruled that order directing the state to take specific steps to adequately fund the school district violated the separation of powers doctrine).

Texas: Neeley v. West Orange-Cove Consolidated Independent School District, 176 S.W.3d 746 (Tex. 2005) (the judiciary's role is limited to ensuring that the constitutional standards for public education are met, not prescribing how they should be met).

[4] Schoolfunding.Info, National Access Network, "Litigations Challenging Constitutionality of K-12 Funding in the 50 States as of November 2007," available at http://www.schoolfunding.info/litigation/In-Process%20Litigations.pdf (last viewed July 5, 2011).

[5] McInnis v. Shapiro, 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd sub. nom.* McInnis v. Ogilvie, 394 U.S. 322, 89 S.Ct. 1197, 22 L.Ed.2d 308 (1969) (the *McInnis* decision was one of the first federal cases dealing with the issue(s) surrounding the unconstitutionality of state funding systems of public schools).

[6] See:

Kentucky: Rose v. Council for Better Education, 790 S.W.2d 186 (Ky. 1989).

Plaintiffs challenge most financing systems on the grounds that they violate one or more of the following legal standards: the Fourteenth Amendment equal protection clause of the U.S. Constitution,[8] the equal protection clause of a state constitution,[9] or a state constitution's education article.[10] Historically, each of these three legal bases have been utilized with varying degrees of success. Prior to

---

Montana: Helena Elementary School District No. 1 v. State, 236 Mont. 44, 769 P.2d 684 (1989), *modified* 784 P.2d 412 (Mont. 1990).

New Jersey: Abbott v. Burke, 119 N.J. 287, 575 A.2d 359 (1990).

Texas: Edgewood Independent School District v. Kirby, 777 S.W.2d 391, *writ of error granted* 32 Tex. Sup. Ct. 471 (Tex. 1989).

[7] See:

Arkansas: Dupree v. Alma School District No. 30, 279 Ark. 340, 651 S.W.2d 90 (1983).

California: Serrano v. Priest, 18 Cal.3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976).

Connecticut: Horton v. Meskill, 172 Conn. 615, 376 A.2d 359 (1977).

New Jersey: Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273, *cert. denied sub. nom.* Dickey v. Robinson, 414 U.S. 976 (1973).

Washington: Seattle School District No. 1 v. State, 90 Wa.2d 476, 585 P.2d 71 (1978).

West Virginia: Pauley v. Kelly, 162 W. Va. 672, 255 S.E.2d 859 (1979).

Wyoming: Washakie County School District No. 1 v. Herschler, 606 P.2d 310 (Wyo. 1980), *cert. denied* 449 U.S. 824 (1980).

See also, McUsic, "The Use of Education Clauses in School Finance Reform Litigation," 28 Harv. J. on Legis. 307 (1991).

[8] U.S. Const. amend. XIV, § 1. Reliance upon the equal protection clause ended in 1973 when the United States Supreme Court ruled that education was not a fundamental right and that wealth was not a suspect classification. San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973), *rehearing denied* (1973). Thirteen days later, the New Jersey Supreme Court declared that New Jersey's school finance system violated the education clause of its state's constitution. Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273 (1973), *cert. denied sub. nom.* Dickey v. Robinson, 414 U.S. 976 (1974).

[9] After the Court's *Rodriguez* decision, N. 8 *supra,* denying plaintiffs relief under the Federal Constitution's equal protection clause, typically, plaintiffs now allege violations of the various state constitutions' equal protection clauses. Using this strategy, plaintiffs claim that: (1) education is a "fundamental right," (2) government action is discriminating against a "suspect class" of individuals, and/or (3) that the finance system is irrational. If a court finds either a fundamental right or a suspect class exists, then it must review the allegations under a "strict scrutiny" analysis. This analysis requires that the state actor provide a compelling reason for its discrimination and show it chose the least restrictive alternative. Usually, such analysis is detrimental to the state. If a court rules that neither a fundamental right nor suspect class are present, then it will review the case under a "rational relationship" standard. An action will pass a rational relationship standard if it has a rational relationship to legitimate state purposes.

[10] *Alabama:* Ala. Const. art. XIV, § 256.

Alaska: Alaska Const. art. VII, § 1.

Arizona: Ariz. Const. art. XI, § 1.

1989, most plaintiffs' claims centered around a state constitution's equal protection argument. Then in 1989 and 1990, plaintiffs changed their strategy and successfully focused on states' education clauses to accomplish school finance reform.

Most states' education clauses mandate the maintenance of some system of free public education.[11] The success of litigation depends,

---

Arkansas: Ark. Const. art. XIV, § 1.
California: Cal. Const. art. IX, § 5.
Colorado: Col. Const. art. IX, § 2.
Connecticut: Conn. Const. art. VIII, § 1.
Delaware: Del. Const. art. X, § 1.
Florida: Fla. Const. art. IX, § 1.
Georgia: Ga. Const. art. VIII, § I(I).
Hawaii: Haw. Const. art. X, § 1.
Idaho: Idaho Const. art. IX, § 1.
Illinois: Ill. Const. art. X, § 1.
Indiana: Ind. Const. art. VIII, § 1.
Iowa: Iowa Const. art. IX, § 12.
Kansas: Kan. Const. art. VI, § 1.
Kentucky: Ky. Const. § 183.
Louisiana: La. Const. art. VIII, preamble.
Maine: Me. Const. art. 8, pt. 1, § 1.
Maryland: Md. Const. art. VIII, § 1.
Massachusetts: Mass. Const. pt. 2 ch. V, § II.
Michigan: Mich. Const. art. VIII, § 2.
Minnesota: Minn. Const. art. XIII, § 1.
Mississippi: Miss. Const. art. 8, § 201.
Missouri: Mo. Const. art. IX, § 1.
Montana: Mont. Const. art. X, § 1(3).
Nebraska: Neb. Const. art. VII, § 1.
Nevada: Nev. Const. art. XI, § 2.
New Hampshire: N.H. Const. pt. 2, art 83.
New Jersey: N.J. Const. art. VIII, § IV(1).
New Mexico: N.M. Const. art. XII, § 1.
New York: N.Y. Const. art. XI, § 1.
North Carolina: N.C. Const. art. IX, § 2(1).
North Dakota: N.D. Const. art. VIII, § 1.
Ohio: Ohio Const. art. VI, § 2.
Oklahoma: Okla. Const. art. XIII, § 1.
Oregon: Ore. Const. art. VIII, § 3.
Pennsylvania: Pa. Const. art. III, § 14.
Rhode Island: R.I. Const. art. XII, § 1.
South Carolina: S.C. Const. art. XI, § 3.
South Dakota: S.D. Const. art. VIII, § 1.
Tennessee: Tenn. Const. art. XI, § 12.
Texas: Tex. Const. art. VII, § 1.
Utah: Utah Const. art. X, § 1.
Vermont: Vt. Const. ch. II, § 68.
Virginia: Va. Const. art. VIII, § 1.
Washington: Wash. Const. art. IX, § 2.
West Virginia: W. Va. Const. art. XII, § 1.
Wisconsin: Wis. Const. art. X, § 3.
Wyoming: Wyo. Const. art. VII, § 1.

in part, on the strength of the constitutional language.[12] For example, the Constitution of Washington states that education is a "paramount duty,"[13] while other states' constitutions may provide for a "thorough and efficient"[14] or "general and uniform"[15] system of public education. The Oregon Supreme Court has determined that the guarantee of a "general and uniform" system of common schools provided in its state's constitution does not mean that levels of local school funding must be precisely equal.[15.1] Rather, that provision describes an education system that must be uniform "in terms of prescribed course of study and educational progression from grade to grade."[16] Since the early 1990s, the prevailing judicial trend has been to expand the notion of school finance beyond equal resources and look at the "adequacy" of a state's education program in trying to provide students a fair opportunity to learn at high standards.[17] The focus on adequacy

---

[11] Over twenty-five states make explicit constitutional reference to free schools ("without charge"). See N. 10, *supra*. See also, Bush v. Holmes, 919 So.2d 392 (Fla. 2006) (Education Clause of the state constitution provides that income and interest from the State School Fund may be appropriated only to the support and maintenance of free public schools).

[12] Dayton, "Serrano and Its Progeny: An Analysis of 30 Years of School Funding Litigation," 157 Educ. L. Rep. 447, 456-464 (2001).

[13] Wash. Const. art. IX, § 1.

[14] *Maryland:* Md. Const. art. VIII, § 1.
Minnesota: Minn. Const. art. XIII, § 1.
New Jersey: N.J. Const. art. VIII, § IV(I).
Ohio: Ohio Const. art. VI, § 2.
Pennsylvania: Pa. Const. art. III, § 14.
West Virginia: WV. Const. art. XII, § 1.
In 1979, the Supreme Court of West Virginia determined the state's constitutional mandate of a "thorough and efficient system of free schools" made education a fundamental right. Pauley v. Kelly, 162 W. Va. 672, 255 S.E.2d 859, 878 (1979). See *Neeley*, N. 3.1 *supra* (an "efficient" system of public schools requires that children who live in poor school districts and children who live in rich school districts must be afforded a substantially equal opportunity to have access to educational funds).

[15] *Idaho:* Idaho Const. art. IX, § 1.
Indiana: Ind. Const. art. VIII, § 1.
Minnesota: Minn. Const. art. XIII, § 1.
North Carolina: N.C. Const. art. IX, § 2(1).
Oregon: Ore. Const. art. VIII, § 3.
South Dakota: S.D. Const. art. VIII, § 1.
Washington: Wash. Const. art. IX, § 2.

[15.1] Olsen v. Oregon, 276 Ore. 9, 554 P.2d 139 (1976).

[16] *Id.,* 554 P.2d at 148 (*quoting* Serrano v. Priest, 5 Cal. 3d 584, 96 Cal. Rptr. 601, 487 P.2d 1241, 1249 (1971)).

[17] *Montana:* Columbia Falls Elementary School District No. 6 v. Montana, 326 Mont. 304, 109 P.3d 257 (2005) (funding system for public schools was inadequate to meet the constitutional obligation to provide a quality public education).

has been even further heightened with the adoption of the No Child Left Behind (NCLB) Act and its requirement that students meet high education standards.[18] Consequently, courts focus primarily on the "outputs" of student performance rather than the "input" of equal expenditures between districts.[19]

New Hampshire: Londonderry School District SAU #12 v. New Hampshire, 2006 WL 2571757 (N.H. 2006) (state failed to define a constitutionally adequate education).

North Carolina: Hoke County Board of Education v. State of North Carolina, 358 N.C. 605, 599 S.E.2d 365 (2004).

[18] Dayton, Dupre, and Kiracofe, "Education Finance Litigation: A Review of Recent State High Court Decisions and their Likely Impact on Future Litigation," 186 Educ. L. Rep. 1, 10 (2004).

[19] Odden & Picus, *School Finance: A Policy Perspective*, 35-45 (2004). See also:

Kansas: Montoy v. State of Kansas, 282 Kan. 9, 138 P.3d 755 (2006) (supreme court held that outputs, or costs of achievement of measurable standards of student proficiency, are necessary elements of a constitutionally adequate education).

Massachusetts: Hancock v. Commissioner of Education, 443 Mass. 428, 822 N.E.2d 1134 (2005).

Montana: Columbia Falls Elementary School District No. 6 v. State of Montana, 326 Mont. 304, 109 P.3d 257 (2005) (supreme court ruled that the funding system for public schools was inadequate to meet the constitutional obligation to provide a quality public education).

New Hampshire: Opinion of the Justices, 145 N.H. 474, 765 A.2d 673 (2000) (state constitution mandates statewide adequacy of an education, not statewide equality); Claremont School District v. Governor, 147 N.H. 499, 794 A.2d 744 (2002).

New York: Campaign For Fiscal Equity, Inc. v. New York, 295 A.D.2d 1, 744 N.Y.S.2d 130 (2002).

Oklahoma: Grimes v. City of Oklahoma City, 49 P.3d 719 (Okla. 2002).

§ 1.04 Special Schools and School Districts

[1]—Charter Schools

The charter school concept is one of the fastest growing alternatives developed in response to calls for educational reform.[1] Since the first charter school law was enacted in Minnesota in 1991, forty states and the District of Columbia have enacted statutes that provide for the creation of charter schools.[2] The constitutionality of charter schools has been upheld.[3]

Charter schools are premised upon a contractual agreement between the charter school and either a local school district or the state board of education.[4] The charter concept is designed to remove statutory mandates,[5] allow flexibility to implement innovative methods of education, utilize alternative forms of student assessment, meet the needs

---

[1] Weishaar & Borsa, *The Inclusive Educational Administration: A Case Study Approach,* 161 (McGraw-Hill 2001). See also, http://uscharterschools.org (last visited Oct. 2006).

[2] The Center for Education Reform 2003, see www.edreform.com/charter_schools (last visited Oct. 2006). In October 2006, there were nearly 4,000 public charter schools operating in the United States and serving nearly 1.15 million students, an eleven percent increase from the 2005-2006 school year. In the 2005-2006 academic year, over 425 new charter schools were opened in thirty states and the District of Columbia.

[3] U.S. Department of Education, National Center for Education Statistics, *The Condition of Education 2002*, Washington, DC: U.S. Government Printing Office, 2002.

See also:

Michigan: Council of Organizations and Others for Education About Parochiaid, Inc. v. Governor, 455 Mich. 557, 566 N.W.2d 208 (1997) (Supreme Court of Michigan upheld its Charter School Act against constitutional challenge, rejecting an argument that Michigan's constitutional provision prohibiting use of public funds for nonpublic schools prohibited funding of charter schools); Wilson v. State Board of Education, 75 Cal. App. 4th 1125, 89 Cal. Rptr.2d 745 (1999) (a California court of appeals also rejected a constitutional challenge to its state's Charter Schools Act).

New Jersey: In re Grant of Charter School Application of Englewood on Palisades Charter School, 164 N.J. 316, 753 A.2d 687 (2000) (the Supreme Court of New Jersey upheld the constitutionality of its state's Charter School Program Act, ruling that it was an appropriate legislative enactment so long as the constitutional mandate to provide a thorough and efficient system of education was satisfied).

[4] *Alaska:* Alaska Stat. § 14.03.255.

Arizona: Ariz. Rev. Stat. § 15-183C.

However, as public schools, charter schools must comply with the federal accountability standards provided by the No Child Left Behind Act of 2001. See http://www.ed.gov/nclb/choice/charter/charter-faq.html.

[5] *Colorado:* Colo. Rev. Stat. § 22-30.5-104(6).

New Hampshire: N.H. Rev. Stat. § 194-B:3(I)(a).

of at-risk students,[6] and encourage community involvement.[7] A charter school must be organized as a public,[8] nonsectarian,[9] and nonprofit school[10] that is governed by a separate board of directors. The state legislature sets the number of charter schools within each state.[11]

The length of charters usually ranges between three[12] and five years.[13] Applicants for a charter school must submit a detailed plan

---

[6] Villanueva v. Carere, 85 F.3d 481 (10th Cir. 1996).

[7] *Arkansas:* Ark. Code § 6-23-102.
California: Cal. Educ. Code § 47601.
Colorado: Colo. Rev. Stat. § 22-30.5-102.
Utah: Utah Code 53A-1a-503.
Wyoming: Wyo. Stat. 21-3-304.

[8] King v. United States, 53 F. Supp.2d 1056 (D. Col. 1999), *rev'd on other grounds* 301 F.3d 1270 (10th Cir. 2002) (District court in Colorado deemed charter schools a "public entity" for purposes of coverage under its state's tort immunity statutes).

[9] *Arizona:* Ariz. Rev. Stat. § 15-183E(2).
Delaware: Del. Code Ann. tit XIV, § 502.
New Hampshire: N.H. Rev. Stat. 194-B:7.

[10] Mo. Rev. Stat. 160.400(5). See Arizona State Board for Charter Schools v. United States Department of Education, 464 F.3d 1003 (9th Cir. 2006) (for-profit charter schools were ineligible for federal funding under IDEA and ESEA).

[11] The maximum number of charter schools in the following states are listed below in parentheses:
Alaska: Alaska Stat. § 14.03.250 (sixty).
California: Cal. Educ. Code § 47602 (250, plus 100 more per year after 1998).
Colorado: Colo. Rev. Stat. § 22-30.5-109 (sixty).
Connecticut: Conn. Gen. Stat. § 10-66bb(c) (twenty-four).
Idaho: Idaho Code § 33-5203 (maximum of six newly-chartered schools per year).
Illinois: 105 ILCS 5/27A-4(b) (sixty).
Massachusetts: Mass. Gen. L., tit. 71 § 89 (fifty).
Mississippi: Miss. Code § 37-28-7 (six).
Nevada: (two schools for every 75,000 public school students), Nev. Rev. Stat. § 386.510.
New Mexico: N.M. Stat. § 22-8b-11 (no more than seventy-five new schools in a five year period).

[12] *Arkansas:* Ark. Code Ann. § 6-23-201(b)(3).
Colorado: Colo. Rev. Stat. § 22-30.5-110.
Delaware: Del. Code Ann., tit. XIV, § 503.
Oklahoma: Okla. Stat. tit. 70, § 3-137.

[13] *California:* Cal. Educ. Code § 47607.
Georgia: Ga. Code § 20-2-2067.1(b).
Mississippi: Miss. Code Ann. § 37-28-13 (four years).
New Hampshire: N.H. Rev. Stat. 194-B:3(iii)(f).
New Jersey: N.J. Rev. Stat. 18A:36A-17 (four years).
New Mexico: N.M. Stat. § 22-8b-12.
Oregon: Or. Rev. Stat. § 338.065.
Virginia: Va. Code § 22.1-212.12A.
Wyoming: Wyo. Stat. 21-3-309 (not to exceed five years).

outlining their proposed mission statement,[14] organizational structure, fiscal plan,[15] description of the facility,[16] plans for student achievement and evaluation, and the grade levels to be served.[17] Charters should be denied to those applicants proposing to convert an existing private,[18] parochial or non-public school to a charter school,[19] or fail to adhere to state health and safety standards.[20] If a local school district denies an application, most states provide an appeal process, ultimately to the state's board of education.[21] Nonetheless, applicants do

---

[14] *New Mexico:* N.M. Laws § 22-8B-8.

[15] Central Dauphin School District v. Founding Coalition of the Infinity Charter School, 847 A.2d 195 (Pa. Commw. 2004). See also, Comprehensive Community Solutions, Inc. v. Rockford School District No. 205, 351 Ill. App. 3d 1109, 815 N.E.2d 483 (2005) (denying a charter school application based upon school district's grave financial situation did not violate the state's Charter School Law).

[16] See Jersey City Educational Ass'n v. City of Jersey City, 316 N.J. Super. 245, 720 A.2d 356 (1998), *cert. denied* 158 N.J. 71, 726 A.2d 935 (1999) (a New Jersey superior court ruled that revenue from a municipal bond sale that would go toward the construction of a facility to house a proposed charter school did not violate a statutory prohibition against charter schools using public funds to construct a building. The court ruled that it was the city and not the charter school that would construct the building; the charter school would lease it from the city.).

[17] *Arizona:* Ariz. Rev. Stat. Ann. § 15-183A.

Colorado: Colo. Rev. Stat. § 22-30.5-106.

Connecticut: Conn. Gen. Stat. § 10-66bb(d)(1-14).

New Hampshire: N.H. Rev. Stat. § 194-B:3(II)(a-cc).

See In re Grant of Charter School Application of Englewood on Palisades Charter Schools, 164 N.J. 316, 753 A.2d 687 (2000) (legal standard regarding quality and detail of a charter school application).

[18] Cal. Educ. Code § 47605(d)(1).

[19] 105 ILCS 5/27A-4(c).

[20] Beaufort County Board of Education v. Lighthouse Charter School Committee, 516 S.E.2d 655 (S.C. 1999), *vacated on other grounds* 353 S.C. 24, 576 S.E.2d 180 (2003).

[21] See:

Colorado: Board of Education of School District #1 v. Booth, 984 P.2d 639 (Col. 1999) (the Colorado Supreme Court ruled that the state board of education did not violate local school district authority when it overruled a local decision to deny an application for a charter school). See also, Academy of Charter Schools v. Adams County School Dist. No. 12, 32 P.3d 456 (Col. 2001), *reh'g denied* (2001) (Supreme Court of Colorado reaffirmed that disputes between a charter school and a school district arising out of implementation of the charter contract were reserved for resolution by the State Board of Education).

Florida: Fla. Stat. § 1002.33(6) (repealed law by which local school board could override the State Board's decision to approve/deny charter application. It provides that the district school board shall implement the decision of the State Board.) See School Board of Osceola County v. UCP of Central Florida, 905 So.2d 909 (Fla. Dist. App. 2005).

New Hampshire: N.H. Rev. Stat. § 194-B:3(IV)(a).

Oklahoma: Okla. Stat. tit. 70, § 3-134(F) (provides that an unsuccessful charter school applicant may proceed to mediation or binding arbitration as provided in the

not have a constitutionally protectable interest in obtaining a charter.[22] Once approved, a charter can be revoked for a material breach of the terms of the charter,[22.1] unsatisfactory progress in student achievement, or for imprudent fiscal management.[23] After the charter has expired, it can typically be renewed for no more than a five year period.[24]

Charter schools are primarily funded by the local school district.[25] One funding plan has local school districts paying the charter school based upon a percentage of the average per pupil expenditure of the

---

Dispute Resolution Act). However, in 2005, the Supreme Court of Oklahoma concluded that binding arbitration was not possible because the Dispute Resolution Act does not include arbitration. See Pentagon Academy, Inc. v. Independent School District No. 1 of Tulsa County, 82 P.3d 587 (Okla. 2005).

Pennsylvania: Carbondale Area School District v. Fell Charter School, 829 A.2d 400 (Pa. Commw. 2003).

Wyoming: Wyo. Stat. 21-3-310.

[22] Shelby School v. Arizona State Board of Education, 192 Ariz. 156, 962 P.2d 230 (1998).

[22.1] School District of the City of York v. Lincoln Charter School, 889 A.2d 1286 (Pa. Commw. 2006).

[23] *Connecticut:* Conn. Gen. Stat. § 10-66bb(i).

District of Columbia: D.C. Code § 31-2820.

Missouri: Mo. Rev. Stat. § 160.405.7.

New Hampshire: N.H. Rev. Stat. Ann. § 194-B:16.

Virginia: Va. Code § 22.1-212.12B.

Wyoming: Wyo. Stat. § 21-3-309(c).

[24] *Arizona:* Ariz. Rev. Stat. Ann. § 15-183I (except after a school's fifteenth year, then such renewal will be for a fifteen year period).

Arkansas: Ark. Code § 6-23-204 (not to exceed a three year period).

Delaware: Del. Code tit, XIV, § 503.

Georgia: Ga. Code § 20-2-2067.1.

Nevada: Nev. Rev. Stat. § 386.530(2) (three years).

Pennsylvania: Pa. Cons. Stat., § 17-1720-A.

Wyoming: Wyo. Stat. 21-3-309(a).

But see:

Alaska: (Alaska Stat. § 14.03.275) (not more than ten years).

New Hampshire: (N.H. Rev. Stat. §194-B:3(X)(a) (renewal period shall be seven years).

See also, State of Missouri v. Williamson, 141 S.W.3d 418 (Mo. App. 2004) (court of appeals upheld school district's refusal to renew a charter school's application and concluded that the school district was not required to hold a hearing before making its decision not to renew the charter); I/M/O Grant of Renewal Application of the Red Bank Charter School, 367 N.J. Super. 462, 843 A.2d 365 (2004) (an adjudicatory hearing is not required in every contested case regarding a decision on a charter school's renewal application).

[25] *Colorado:* Colo. Rev. Stat. § 22-30.5-112(2).

Connecticut: Conn. Gen. Stat. § 10-66ee.

See Taos Municipal Schools Charter School v. Davis, 136 N.M. 543, 102 P.3d 102, 104 (2004).

local school.[26] Another funding method focuses on student attendance. In the second case, the premise is that charter students are included within the attendance count of the local public school district for purposes of determining state financial aid. The charter school then bills the local public school for the amount the public school claimed on behalf of the charter students.[27] Charter schools can only charge tuition to students that do not reside within the local school district.[28] The goal is to provide charter schools with approximately the same level of funding that would be available to similar schools with similar populations.[29] Consequently, an increasing number of legal issues have arisen between local school districts and charter schools regarding how they will share resources and infrastructure, primarily involving the topics of shared transportation of students[30] and use of facilities.[31]

Students cannot be required to attend a charter school. On the other hand, in the case where there is a surplus of applicants, some form of lottery is typically held,[32] with preference given to students that

---

[26] N.H. Rev. Stat. § 194-B:11(I-II). See City Neighbors Charter School v. Baltimore City Board of School Commissioners, 169 Md. App. 609, 906 A.2d 388 (2006) (a charter school should receive funds proportionate to those expended for the education of similar student populations, all determined on a per pupil basis).

[27] *Alaska:* Alaska Stat. § 14.03.260.

Illinois: 105 ILCS 5/27A-11.

[28] *New Hampshire:* N.H. Rev. Stat. § 194-B:11(I).

New Jersey: N.J. Rev. Stat. § 18A:36A-7.

Utah: Utah Code § 53A-1a-507(2).

[29] Cal. Educ. Code § 47630.

[30] Moreau v. Avoyelles Parish School Board, 897 So.2d 875 (La. App. 2005) (Louisiana appellate court ruled that there was no evidence that the legislature intended to deprive charter school students of the same benefit of free transportation to and from school provided to other public and nonpublic school students). But see, Racine Charter One, Inc. v. Racine Unified School District, 424 F.3d 677 (7th Cir. 2005) (federal appellate court ruled that a local school district and a charter school district were not similarly situated for purposes of having the local school district provide free transportation to the charter school students). See also, Board of Education of Town of Hamden v. State Board of Education, 278 Conn. 326, 898 A.2d 170 (2006) (public school districts are not required to provide transportation services to preschool children attending charter schools).

[31] Ridgecrest Charter School v. Sierra Sands Unified School District, 130 Cal. App. 4th 986, 30 Cal. Rptr.3d 648 (2005) (state appellate court concluded that local school district was not in compliance with state requirement to provide "reasonably equivalent" facilities to accommodate all in-district charter students when it provided classroom space at five different school sites separated by a total of 65 miles). See also, Environmental Charter High School v. Centinela Valley Union High School District, 122 Cal. App. 4th 139, 18 Cal. Rptr.3d 417 (2004) (state appellate court determined that a charter school must submit its enrollment projections when it presents its request for use of school facilities).

[32] Alaska Stat. § 14.03.265.

already have siblings enrolled at the school.[33] Lastly, charter schools cannot utilize discriminatory admission criteria[34] and cannot alter a court-approved desegregation plan.[35]

Teachers in the local school district cannot be assigned to teach at a charter school without their consent.[36] Some states mandate that a teacher who consents to a transfer must make a final decision regarding whether to stay at the charter school or return to the school district,[37] but in no situation will they lose certification or salary rights should they return to the school district.[38] Charter teachers are usually covered by the local school district's collective bargaining agreement.[39]

[2]—Alternative Schools

The term "alternative school" has many different uses.[40] In an increasingly popular response to address violent or disruptive students, many states have adopted legislation creating alternative schools.[41] Alternative schools allow school districts to transfer disruptive students[42] or students at-risk of academic failure[43] to a sepa-

---

[33] Ariz. Rev. Stat. Ann § 15-184A.

[34] *California:* Cal. Educ. Code § 47605(d)(1).
New Jersey: N.J. Rev. Stat. § 18A:36A-7.

[35] See:
Arizona: Ariz. Rev. Stat. Ann. § 15-184D.
Arkansas: Ark. Code § 6-23-106(a).
Illinois: 105 ILCS 5/27A-4.
See also, Berry v. School District of Benton Harbor, 56 F. Supp.2d 866 (W.D. Mich. 1999), *clarified* 206 F. Supp.2d 899 (W.D. Mich. 2002) (federal district court was asked to resolve whether state financial assistance to a charter school would impair a local school district's ability to comply with a desegregation decree).

[36] *Alaska:* Alaska Stat. § 14.03.270(a).
Arkansas: Ark. Code § 6-23-201(d)(1).
Idaho: Idaho Code § 33-5206(2).

[37] 105 ILCS 5/27A-10(b) (Teacher must make a final decision within five years).

[38] Ariz. Rev. Stat. Ann. § 15-187(A).

[39] Alaska Stat. § 14.03.270(b). But see, 105 ILCS 5/27A-7(11) (a bargaining unit of charter school employees shall be separate and distinct from any bargaining units formed from employees of a school district in which the charter school is located).

[40] In some states, alternative schools serve students who cannot be adequately trained or educated in existing public school programs (Tex. Educ. Code § 26.01(8)). See also, Barr and Parrett, *Hope Fulfilled for At-Risk and Violent* Youth (Allyn & Bacon, 2001).

[41] In the 2000-2001 academic year, there were nearly 11,000 alternative schools with 612,900 students enrolled; see http://www.ecs.org/html/IssueSection.asp?issueid=10&s=Quick+Facts. See also, National Center for Education Statistics, Public Alternative Schools and Programs for Students at Risk of Education Failure: 2000-2001 (Sept. 2002), available at http://nces.ed.gov/pubs2002/2002004.pdf.

[42] 105 ILCS 5/13A-2.5.

[43] *North Carolina:* N.C. Gen. Stat. § 115C-105.45.
South Carolina: S.C. Code § 59-63-1300.

rate educational setting where they will receive educational services.[44] Alternative schools typically provide services to middle or high school students[45] that are eligible to be suspended or expelled[46] from the public school district.[47] The purpose of alternative schools is to provide public school students the opportunity to learn in a safe environment.[48]

Disruptive students may be transferred immediately to an alternative school.[49] As soon as practicable thereafter, personnel from the transferring school district and the alternative school must develop an alternative educational plan for the student.[50] This plan should include specific behavioral and academic provisions as well as provide a definite ending period, at which time the student would return to the regular school district. A student's coursework completed while in an alternative school shall be transferred back to the student's local school.[51] Schools should make every effort to ensure that students with special education needs continue to receive services according to the Individuals with Disabilities Education Improvement Act of 2004[52] and not be arbitrarily placed in an alternative school.[53]

Alternative schools may be operated by an individual school[54] or jointly operated by multiple school districts. Typically, the funding for

---

[44] La. Rev. Stat. § 17:100.5. See Nevares v. San Marcos Consolidated Independent School District, 111 F.3d 25 (5th Cir. 1997) (Texas student's due process rights were not violated when student was transferred to an alternative school; student was not deprived of an education, but rather was only transferred from one school program to another program with stricter discipline).

[45] Both Ohio (Rev. Code § 3313.533(A)(2)) and Tennessee (Tenn. Code § 49-6-3402(a)) provide that an alternative school may serve students in kindergarten/first grade through twelfth grade.

[46] Neb. Rev. Stat. § 79-266.01.

[47] *Illinois:* 105 ILCS 5/13A-2.5.

Mississippi: Miss. Code Ann. 37-13-92(1)(a).

[48] N.C. Gen. Stat. § 115C-105.45. See C.N.H. v. Florida, 927 So.2d 1 (Fla. Dist. App. 2006) ("Alternative schools have an even greater need to maintain discipline and safety for the protection of students and staff, and create a healthy learning environment, than regular public schools based on the nature of their students population").

[49] Louisiana statutes provide that a student who has been expelled shall be placed in an alternative school, unless the school board is exempt as provided by law. La. Rev. Stat. § 17:416(2)(c).

[50] *Mississippi:* Miss. Code Ann. § 37-13-92(2)(a).

North Carolina: N.C. Gen. Stat. § 115C-105.48(b).

Ohio: Ohio Rev. Code § 3313.533(A)(3)(a-c).

[51] Tenn. Code § 49-6-3402(b).

[52] Pub. L. No. 108-446, 20 U.S.C. §§ 1400 *et seq*. See also, Final IDEA Part B Regulations, 71 Fed. Reg. 156 (Aug. 16, 2006) (to be codified at 34 C.F.R. pp. 300, 301).

[53] Tenn. Code § 49-6-3402(e-f).

[54] *Mississippi:* Miss. Code Ann § 37-13-92(6).

Nebraska: Neb. Rev. Stat. § 79-266.

Ohio: Ohio Rev. Code. § 3313.533(E).

alternative schools comes from state resources.[55] Nonetheless, student attendance at an alternative school cannot be made dependent upon the parents' ability or willingness to reimburse the state or local school district for the cost.[56]

[3]—School District Boundary Changes

State legislatures have the right to determine school district boundaries.[57] State laws set the parameters by which school boundaries may be established or changed.[58] Most states require voters to approve any modifications before they can become final, but there is no constitutional right to vote on local school boundary changes.[59]

School district boundaries may be changed by many methods: detachment, annexation, dissolution, consolidation, or any combination thereof. Each method may have its own respective requirements for timelines; petitions; maps; dates; compensation; hearings; notice; elections, if applicable; and review. The action may be initiated through a resolution of the respective boards of education or by the citizens at large. However, once a boundary change petition is pending, a second petition for a different change involving all or a part of the same property cannot be concurrently maintained.[60] This principle is followed to eliminate the possibility of incongruous results under the separate petitions.[61]

[a]—Annexation/Detachment

The most typical boundary changes are the result of the annexation or detachment from one district to another.[62] Annexation/detachment

---

South Carolina: S.C. Code § 59-63-1300.
Tennessee: Tenn. Code § 49-6-3402(e-f).
Texas: Tex. Educ. Code § 37.008(d).

[55] *Mississippi:* Miss. Code Ann. § 37-151-83.
South Carolina: S.C. Code § 59-63-1310.

[56] Cathe A. v. Doddridge County Board of Education, 200 W. Va. 521, 490 S.E.2d 340, 349 (1997).

[57] Sherwood School District 88J v. Washington County Educational Service District, 167 Ore. App. 372, 6 P.3d 518, 525, *review denied* 19 P.3d 354 (Ore. 2000). But see, Morsman v. City of Madras, 203 Ore. App. 546, 126 P.3d 6 (2006).

[58] Kings Mountain Board of Education v. North Carolina State Board of Education, 159 N.C. App. 568, 583 S.E.2d 629, 633 (2003).

[59] La. Rev. Stat. § 17:1371.

[60] Board of Education of Center Cass School District No. 66 v. Sanders, 161 Ill. App. 3d 723, 515 N.E.2d 280 (1987).

[61] Rogers v. Desiderio, 274 Ill. App. 3d 446, 655 N.E.2d 930 (1995), *cert. denied* 517 U.S. 1164 (1996).

[62] Annexation is the formal act of attaching, adding, joining, or uniting one thing to another; generally, the connection of a smaller, subordinate territory to another

issues typically originate from parents who live in one district but wish to send their child to a closer school in another district[63] or to take advantage of curricular or extra-curricular offerings in another district.

A petition for detachment and/or annexation of school territory should be granted only where the overall benefits to the annexing school district clearly outweigh the resulting detriment to the losing school district and the community as a whole.[64] Factors to be considered when determining whether to grant a petition for detachment or annexation of school property include a comparison between school facilities and curricula in competing school districts, distance from the petitioner's home to the respective schools,[65] the effect detachment would have on the ability of either district to meet state standards of recognition, and the impact of proposed boundary change on tax revenues of both districts.[66] The South Dakota Supreme Court also considered the following factors when determining the approval of a minor boundary change: whether the current boundary is arbitrarily drawn, whether there is available bus service, whether the child has special needs that only one district can meet, and the family's alignment to the social and economic life of the community.[67] Courts will also consider the racial impact a district boundary change may have on both districts to ensure that a dual school system based upon race, national origin, or color does not result.[68]

---

larger, principal, adjacent territory. Detachment describes the consequent procedure of formally separating a territory from the district that loses the real property. *Black's Law Dictionary,* 98 (8th ed. 2004).

[63] See Sherwood School District 88J v. Washington County Education Services District, 167 Ore. App. 372, 6 P.3d 518 (2000). But see, Morsman v. City of Madras, 203 Ore. App. 546, 126 P.3d 6 (2006).

[64] Board of Education of Community Unit School District No. 337 v. Board of Education of Community Unit School District No. 338, 269 Ill. App.3d 1020, 647 N.E.2d 1019, 1026,*appeal denied* 163 Ill.2d 549; 657 N.E.2d 616; 212 Ill. Dec. 415 (1995).

[65] Trout v. Ohio Department of Education, 2003 WL 758121 (Ohio App. 2003).

[66] *Id*. See also, Hicks v. State Board of Education, 2003 WL 21791276 (Ohio App. 2003).

[67] S.D. Code 13-6-85. See Johnson v. Lennox School District No. 41-4, 649 N.W.2d 617 (S.D. 2002); Oelrichs School District 23-3 v. Sides, 562 N.W.2d 907 (S.D. 1997).

[68] See:

New Jersey: In re North Haledon School District, 363 N.J. Super. 130, 831 A.2d 555 (2003), *modified* 181 N.J. 161, 854 A.2d 327 (2004).

Texas: Texas Education Agency v. Goodrich Independent School District, 898 S.W.2d 954 (Tex. App. 1995).

[b]—Consolidation/Dissolution

Two lesser used types of school district boundary changes are consolidation and dissolution. In consolidation, a new school district is formed by the combination of two or more school districts. Dissolution, on the other hand, is the formal act of dissolving or terminating a district's legal existence with the effect of annulling the binding force of the agreement.[69] A dissolution can be undertaken voluntarily by a district or involuntarily by "administrative " state board action.

---

[69] *Black's Law Dictionary,* 506 (8th ed. 2004).

§ 1.05 Local School Boards: Members, Meetings and Authority

A local school district is a political subdivision of the state.[1] It possesses only those powers expressly or implicitly conferred upon it by the state's legislative body.[2] The United States Supreme Court has consistently emphasized the virtue of local control of schools. A primary component of local control is local governance by a board of education. In *San Antonio v. Rodriguez*,[3] the Court noted that local control of schools by a board of education permits tailoring of educational programs to meet local needs.[4] One source of local control is written policies adopted by local school boards. Written policies ensure legal compliance, establish board processes, articulate district goals, delegate authority, and define operational limits.[5]

[1]—School District Board Members

Board of education members serve as the policy-making body of the local school district,[6] and may only take action as a full board at a legal meeting, with no member acting alone to exercise board powers.[7] Membership on a board ranges between three and seven members,[8] depending upon the state statute, and may be either elected[9] or

---

[1] Department of Finance v. Commission on State Mandates, 30 Cal.4th 727, 68 P.3d 1203, 134 Cal. Rptr.2d 237 (2003).

[2] *Colorado:* Barbour v. Hanover School District No. 28, 2006 WL 1493836 (Col. App. 2006).

New Jersey: Atlantic City Education Ass'n v. Board of Education of Atlantic City, 299 N.J. Super. 649, 691 A.2d 884 (1997), *cert. denied sub nom*. Keyport Teachers' Ass'n v. Board of Education, 152 N.J. 192, 704 A.2d 22 (1997).

South Dakota: Edgemont School District 23-1 v. South Dakota Dep't of Revenue, 593 N.W.2d 36 (S.D. 1999).

[3] San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973).

[4] The Supreme Court of Colorado concurred when it stated, "The historical development of public education in Colorado has been centered on the philosophy of local control." Lujan v. Colorado State Board of Education, 649 P.2d 1005, 1021 (Col. 1982).

[5] Lunenberg and Ornstein, *Educational Administration: Concepts and Practices,* 335 (4th ed. 2004).

[6] Smith v. Dorsey, 530 So.2d 5 (Miss. 1988).

[7] Moore v. Brewster, 116 S.W.3d 630, 636 (Mo. App. 2003), *reh'g denied* (2003).

[8] A Florida court ruled that a constitutional requirement for "uniform" schools did not prohibit a disparity in the number of school board members between districts throughout the state, and thus a special act providing for the enlargement of school board membership of a particular district from five to seven members did not violate the Florida Constitution. School Board of Escambia County v. Florida, 353 So.2d 834 (Fla. 1977).

[9] There is no fundamental right that a school board be elected. See:

Eighth Circuit: Hawkins v. Johanns, 88 F. Supp.2d 1027 (D. Neb. 2000).

appointed.[9.1] However, the United States Supreme Court ruled that once it is determined that a school board election will be held, the decision as to who may vote in that election is subject to strict scrutiny.[9.2] Specifically, the Court struck down a New York statute that allowed only certain citizens (property owners and parents of school children) to vote in school board elections, while other New York districts allowed all qualified voters to vote on school board membership, with board members in still yet other districts appointed. The Court focused on the issue of the right to vote and ruled that the state could not condition the right to vote in an election without a compelling justification.[10] A Ninth Circuit court reflected this legal ruling when it held, "Once citizens are granted the right to vote on a matter, the exercise of that vote becomes protected by the constitution even though the state was not obliged to allow any vote at all."[11] Finally, voters from Cleveland challenged the state's statute that altered the manner in which their school board members were selected.[11.1] Before the statutory change, the board members were elected; the statutory change allowed the mayor to appoint a five-member board of education. The Sixth Circuit ruled, "although plaintiffs have a fundamental right to vote in elections before them, there is no fundamental right to elect an administrative body such as a school board, even if other cities in the state may do so."[12]

State statutes usually provide the qualifications for serving on a school board[13] as well as determine what creates a vacancy and how it should be filled. Most states require board members to be a minimum age,[13.1] a resident of the district, and a citizen of the state.[14] A

Eleventh Circuit: Holley v. City of Roanoke, 162 F.Supp.2d 1335 (M.D. Ala. 2001).

[9.1] In some larger metropolitan cities, the mayor appoints members of the board of education. See, e.g., N.Y. Educ. Law § 2553(3).

[9.2] Kramer v. Union Free School District No. 15, 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583 (1969).

[10] *Id*.

[11] Hussey v. City of Portland, 64 F.3d 1260 (9th Cir. 1995), *cert*. *denied* 516 U.S. 1112 (1996).

[11.1] Moore v. Detroit School Reform Board, 293 F.3d 352 (6th Cir. 2002), *cert*. *denied* 537 U.S. 1226 (2003) (upholding statute that allowed for appointment of board members in Detroit public schools).

[12] See *id*., 293 F.3d at 403; Mixon v. State of Ohio, 193 F.3d 389 (6th Cir. 1999).

[13] Unified School District No. 501 v. Baker, 269 Kan. 239, 6 P.3d 848 (2000) ("The legislature decides who may qualify for public office").

[13.1] *North Carolina:* N.C. Const. art. XI, §6.

[14] La. Rev. Stat.17:52 (statute also requires that each board member be able to read and write). See:

board vacancy can occur due to removal from office,[15] death or disability,[16] board member's choice (move outside of district boundary[17] or resignation), or because of holding an incompatible office[18] (such as being a teacher and board member within the same district).[19] Once a vacancy exists, it may be filled by appointment until the next regularly scheduled election[19.1] or a special election may be held.

[2]—Powers of School District Boards

States set educational policy via enactment of statutory laws to be carried out by local school districts and boards of education. Since a local school district is considered a political subdivision of the state, it possesses only those powers expressly or implicitly conferred upon it by the state legislature.[20] Any attempt by a local school board to enter into a contract or formulate a policy that violates the specific statutory provisions governing school boards is *ultra vires* and void.[21]

Even though state legislatures have a list of mandated functions of a school board, most states also have a law that permits a local board of education to enact necessary local policy as long as it is not inconsistent with state laws.[22] For example, Wisconsin law provides, "The school board . . . may do all things reasonable to promote the cause

---

Florida: Perez v. Marti, 770 So.2d 284 (Fla. Dist. Ct. App.), *review denied* 773 So.2d 56 (2000) (board candidate was not a legal resident of the school district).

Louisiana: Knott v. Angelle, 846 So.2d 825 (La. App. 2003) (court affirmed residency of board candidate).

[15] McKnight v. Hayden, 65 F. Supp.2d 113 (E.D.N.Y. 1999) (court upheld constitutionality of statute that authorized special measures, including removal of board members, to remedy school districts with financial and academic problems).

[16] 105 ILCS 5/10-11 (Illinois).

[17] Tovar v. Board of Trustees of Somerset Independent School District, 994 S.W.2d 756 (Tex. App. 1999), *reh'g overruled* (2000).

[18] Kan. Stat. Ann. § 72-8202b-2d (Kansas statutes prohibit superintendents, assistant superintendents, supervisor, principals, treasurer or clerk from serving on a board of education).

[19] *Alabama:* Alabama v. Martin, 735 So.2d 1156 (Ala. 1999).

New Jersey: Visotcky v. City Council of Garfield, 113 N.J. Super. 263, 273 A.2d 597 (1971).

Utah: Utah Laws 20A-14-202(3).

Wyoming: Haskins v. State ex rel. Harrington, 516 P.2d 1171 (Wyo. 1973).

[19.1] N.C. Gen. Stat: 115C-37(f).

[20] Board of Education of the County of Taylor v. Board of Education of the County of Marion, 213 W. Va. 182, 578 S.E.2d 376 (2003); Napier v. Lincoln County Board of Education, 209 W. Va. 719, 551 S.E.2d 362 (2001); Stubaus v. Whitman, 339 N.J. Super. 38, 770 A.2d 1222 (2001).

[21] Swinney v. Deming Board of Education, 117 N.M. 492, 873 P.2d 238 (1994).

[22] *Arizona:* Ariz. Rev. Stat. Ann § 15-341.

New Jersey: N.J. Rev. Stat. 18A:11-1(d).

of education, including establishing, providing and improving school district programs, functions and activities for the benefit of pupils. . . ."[23] A court may not disturb the decision of a school board where there is substantial evidence supporting the board's determination and there is no evidence of fraud, bad faith or abuse of discretion.[24]

A local school board usually has the following powers or duties: hire administrative, certified and non-certified employees and fix their salaries;[25] lease, purchase and convey property;[26] issue tax levies;[27] borrow money or issue general obligation bonds;[28] reduce or terminate personnel;[29] and promote pupils between grades.[30]

One power of the board that serves as a continual source of litigation for most school boards is student discipline. A board of education is usually empowered to enact student expulsions[31] and review student suspensions.[32] A local board of education may expel a student if he or she is guilty of "gross disobedience or misconduct"[33] or "repeated refusal or neglect to obey rules."[34] State law[35] and/or local board policy must list specific acts subject to discipline by expulsion; otherwise, such state statutes are deemed vague and fail to provide students prior notice of prohibited behavior.[36]

In fulfilling this disciplinary power, a board must ensure that students receive due process of law.[36.1] Without providing specific

---

[23] Wis. Stat. § 120.13.

[24] United Independent School District v. Gonzalez, 911 S.W.2d 118 (Tex. App. 1995), *writ denied* 940 S.W.2d 593 (1996).

[25] *Florida:* Fla. Stat. § 1001.42(5).

Nebraska: Neb. Rev. Stat. § 79-501.

[26] Ariz. Rev. Stat. Ann. § 15-341.

[27] Fla. Stat. § 1001.42(10).

[28] 105 ILCS 5/10-22.14 (Illinois). See 105 ILCS 5/17-2.11 (grants school boards authority to borrow money and issue bonds for fire prevention, safety, energy conservation, disability accessibility, and school security).

[29] Col. Rev. Stat. § 22-63-302. See Daddow v. Carlsbad Municipal School District, 120 N.M. 97, 898 P.2d 1235 (1995), *cert. denied* 516 U.S. 1067 (1996) (local board is the only entity with power to terminate employees).

[30] *Arizona:* Ariz. Rev. Stat. Ann. § 15-341.

Florida: Fla. Stat. § 1001.42(6).

[31] *Texas:* Tex. Educ. Code § 21.301.

West Virginia: W. Va. Code § 18A-5-1a(g).

[32] *Florida:* Fla. Stat. § 1001.42(c).

Mississippi: Miss. Code Ann. § 37-9-71.

[33] 105 ILCS 5/10-22.6(a) (Illinois).

[34] Wis. Stat. § 120.13(c)(1).

[35] W. Va. Code § 18A-5-1a(a).

[36] Linwood v. Board of Education of City of Peoria, 463 F.2d 763 (7th Cir. 1972), *cert. denied* 409 U.S. 1027 (1972).

[36.1] In the Interest of T.B. v. Board of Trustees of the Vicksburg Warren School District, 931 So.2d 634 (Miss. App. 2006).

requirements, the United States Supreme Court ruled in *Goss v. Lopez* that the legal requirements for an expulsion are more formal than those established for a student suspension.[37] Case law from various states provide that due process would minimally include prior notice of the charges, notice of witnesses to be heard, a summary of proof to be presented, an opportunity to present evidence, and a fair hearing.[38]

[3]—School District Board Meetings

Boards of education are public bodies, and residents of a school district have a right to be informed about how the board conducts its business. Most states have enacted statutes called Open Meetings Acts or Sunshine Laws to ensure that boards openly conduct appropriate deliberations and final actions.[39] The parameters of such laws only impact school boards,[39.1] not school administrators, even though administrators attend meetings, steer deliberations and help prepare the meeting's agenda.[40]

A board of education can conduct its business in either open or closed session. It is assumed, however, that all final business of a board will be conducted in open session, including all final votes.[41] A written record of such votes and general deliberation must be kept.[42] However, exceptions to the public's right to attend a school board meetings do exist.

Board members may deliberate about certain topics in closed (or executive) session,[42.1] but it is a violation of the Act for the board to

---

[37] Goss v. Lopez, 419 U.S. 565, 95 S.Ct. 729, 41 L.Ed.2d 725 (1975). *Goss* addressed the due process requirements necessary for a student suspension. The Supreme Court ruled that a student be given "oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story." *Id*., 419 U.S. at 581.

[38] Williams v. Dade County School Board, 441 F.2d 299 (5th Cir. 1971). See also, Dixon v. Alabama State Board of Education, 294 F.2d 150 (5th Cir.), *cert. denied* 368 U.S. 930 (1961).

[39] *Illinois:* 5 ILCS 120/1-120/6.

Michigan: Mich. Comp. Laws § 15.263(2).

Texas: Tex. Gov. Code § 551.002.

[39.1] See Howze-Campbell v. Mound Bayou School District, 915 So.2d 1284 (Miss. App. 2005) (a function attended by a public board, whether informal or impromptu, is a meeting within the meaning of the Open Meetings Act only where there is to occur "deliberative stages of the decision-making process that lead to formation and determination of public policy).

[40] Knox v. District School Board of Brevard, 821 So.2d 311 (Fla. Dist. App. 2002); Barrett v. Lode, 603 N.W.2d 766 (Iowa 1999).

[41] Kleinberg v. Board of Education of Albuquerque Public School, 107 N.M. 38, 751 P.2d 722 (1988).

[42] 5 ILCS 120/2.06 (Illinois).

[42.1] But see, Ohio Rev. Code § 121.22(A) (law requires public officials to conduct all 'deliberations' in open meetings). Piekutowski v. South Central Ohio Educa-

discuss in closed session topics other than those listed on the agenda[43] or provided in the motion to go into closed session.[44] Statutory exceptions authorizing a closed session are limited to issues in which the public's interest would be clearly endangered or the personal privacy or guaranteed rights of individuals would clearly be in danger of unwarranted invasion.[45] Examples of topics that could be addressed during a closed session include: appointment, compensation, and discipline of employees,[45.1] collective bargaining matters, purchase or lease of real estate,[46] establishment of emergency security procedures, student disciplinary cases, placement of students in special education programs, discussion of current or pending litigation,[46.1] and deliberations as a quasi-judicial body.[47] Most states require that minutes of closed session deliberation be released to the public after such time as the confidential components of the closed deliberation have passed.

The Open Meetings Act only applies to public "meetings." A Michigan statute defines a "meeting" as "the convening of a public body at which a quorum is present for the purpose of deliberating toward or rendering a decision on a public policy."[48] This definition

---

tional Service Center Governing Board, 161 Ohio App. 3d 372, 830 N.E.2d 423 (2005) (court clarified that 'deliberations' involve more than information-gathering or investigation, but rather involve weighing and examining of reasons for and against a course of action.)

[43] Okla. Stat. tit. 25, sec. 307(E).

[44] N.M. Stat. sec. 10-15-1(I). See Ridenour v. Board of Education of City of Dearborn School District, 111 Mich. App. 798, 314 N.W.2d 760 (1981).

[45] 5 ILCS 120/1 (Illinois).

[45.1] Jones v. Sandusky City Schools, 2006 WL 146210 (Ohio 2006) (executive session discussion regarding the "employment and/or dismissal of public employees" did not violate Sunshine Law's open meeting requirement; there was no allegation that the board's decision not to renew administrator's employment contract resulted from "nonpublic deliberations" made in the board's executive session).

[46] Tanque Verde Unified School District No. 13 v. Berini, 206 Ariz. 200, 76 P.3d 874 (2003), *cert. denied* 2004 Ariz. LEXIS 20 (Ariz. Feb. 10, 2004) (court ruled that site selection process for new school conducted in executive session violated the state's open meetings law).

[46.1] Henry v. Anderson, 356 Ill. App.3d 952, 827 N.E.2d 522 (2005) (state appellate court ruled that a school board discussed an impermissible topic in closed session when it did not make the requisite findings necessary to discuss 'potential litigation').

[47] Okla. Stat. tit. 25, sec. 307(B); N.M. Stat. sec. 10-15-1(H).

[48] M.S.A. § 4.1800(12)(b); Mich. Comp. Laws § 15.262(B). See:

Illinois: 5 ILCS 120/1.02.

Texas: Tex. Gov. Code § 551.001(4).

See also, Schmiedicke v. Clare School Board, 228 Mich. App. 259, 577 N.W.2d 706 (1998) (a Michigan appellate court held that a school board rendered a public policy decision when it concurred with a committee's closed-session recommendation to take no action on a matter).

includes committee meetings of the board,[49] meetings held in which only closed session topics will be discussed,[50] Members who participate via electronic methods,[50.1] and study sessions,[51] but does not include an arbitration hearing between a school board and a private contractor.[52] Therefore, board members may informally discuss board business without calling a meeting as long as a majority of a quorum is not present.

Boards of education must give advance notice of their meetings. Moreover, the public has a right to attend all meetings at which any business of a public body is discussed or acted upon in any way. Meetings must be held at a specific date, time and location that is convenient for members and the public, and the public and media must be notified of any change in the date, time, or location of any meeting.[53] State laws also require that an agenda containing the subject(s) of each meeting be posted prior to the occurrence of the meeting. Given the public's increased use of technology, some states now require school districts to list meeting dates/times as well as agendas on the district's Web site.[53.1] The notice must be worded with such clarity that the public will understand what the board proposes to accomplish.[54] A Texas appellate court held that it was legal for an agenda to generally list the topics for deliberation (i.e., "discussion of personnel" and need not list the specific employees);[55] however, as

---

[49] *Id*. But see, Jae v. Board of Education of Pelham Union Free School District, 22 A.D.3d 581, 802 N.Y.S.2d 228 (2005) (local board of education's subcommittees, advisory committees, and ad hoc committees were advisory in nature, and thus not subject to open meetings laws, even though they each contained at least one board member).

[50] Cox Enterprises, Inc. v. Board of Trustees of Austin Independent School District, 706 S.W.2d 956 (Tex. 1986).

[50.1] *Illinois:* 5 ILCS 120/1.02 (meeting defined to include those members who participate by video or audio conference, which could include telephone calls, electronic mail, electronic chat, and instant messaging).

[51] Spokane Education Ass'n v. Barnes, 83 Wash.2d 366, 517 P.2d 1362 (1974).

[52] Johns Construction Co., Inc. v. Unified School District No. 210, 233 Kan. 527, 664 P.2d 821 (1983).

[53] Board of Education of Community Unit School District No. 337 v. Board of Education of Community Unit School District No. 338, 269 Ill. App.3d 1020, 647 N.E.2d 1019, 207 Ill. Dec. 526 (1995); Iowa Code § 21.4(1).

[53.1] *Illinois:* 5 ILCS 120/1.02.

[54] *Texas:* Point Isabel Independent School District v. Hinojosa, 797 S.W.2d 176 (Tex. App. 1990).

Iowa: KCOB/KLVN, Inc. v. Jasper County Board of Supervisors, 473 N.W.2d 171 (Iowa 1991).

[55] Stockdale v. Meno, 867 S.W.2d 123 (Tex. App. 1993), *writ of error denied* (1994).

expected public interest in a particular subject increases, notice must become more specific.[56]

School board meetings are classified as either:

(1) regular meetings,
(2) special meetings, or
(3) emergency meetings.

This classification is important because the degree of public notice depends upon the type of meeting. For instance, at the beginning of each school year most school boards will set their regular meeting schedule for the entire school year. Typically, an agenda must be posted either 48 or 72 hours before the meeting.[57] Sometimes, though, unforeseen issues arise that demand the attention of the school board and a special meeting is called. A special meeting denotes that official business that is not considered an emergency has arisen between regularly scheduled meetings and advanced notice and an agenda must be posted. Special meetings are often conducted to comply with the timelines in student disciplinary cases. There are, however, rare instances that require the immediate attention of a school board because of a bona fide emergency.[58] The only notice that is usually required in these situations is that the news media be notified.[58.1]

The Open Meetings Act usually includes a provision for criminal or civil sanctions when the Act's terms are violated.[59] In addition to criminal and civil sanctions, there remains the issue of the validity of any final action taken as a result of a violation of the Open Meetings Act. State courts are mixed on this issue, but many states have statutory provisions that declare void any final action taken at a closed

---

[56] *Point Isabel,* N. 54 *supra*.

[57] Cal. Govt. Code sec. 54954.2 (post agenda seventy-two hours prior to the meeting).

[58] McConnell v. Alamo Heights Independent School District, 576 S.W.2d 470 (Tex. App. 1978), *writ of error refused* (1979). See also, Wolf v. East Liverpool City School District Board of Education, 2004 WL 1088390 (Ohio App. 2004), *review denied* (2004) (court ruled that board meeting to review candidates for new superintendent's position constituted an emergency meeting).

[58.1] *Ohio:* Ohio Rev. Code § 121.22(F) (In the event of an emergency meeting, the member(s) calling the meeting shall notify the news media that have requested notification immediately of the time, place, and purpose of the meeting).

[59] Tex. Gov. Code art. § 551.144. See McKee v. Orange Unified School District, 110 Cal. App.4th 1310, 2 Cal. Rptr.3d 774 (2003) (court granted non-district resident standing to sue a school district for violations of the state's open meetings law). But see, Russo v. Atlantic City Board of Education, 2006 WL 686592 (N.J. 2006) (Open Meetings Act dopes not give an individual the right to seek damages for a violation of its provisions).

meeting in violation of the Act.[60] However, courts only have to render void those specific actions during a meeting which violate the Act.[61] On the other hand, some states' courts will not render void any final act that violates the Open Meetings Act as long as there is some form of public deliberation and a final vote is taken in open session.[62] For example, the Supreme Court of Tennessee ruled that even though the board of education violated the Open Meetings Act by approving a settlement offer outside of public session, a dismissed teacher was not entitled to reinstatement after the board approved it at a subsequent meeting in open session.[63]

---

[60] *North Carolina:* N.C. Gen. State. sec. 143-318.16A.

See Goetschius v. Board of Education of the Greenburgh Eleven Union Free School District, 281 A.D.2d 416, 721 N.Y.S.2d 386 (2001).

[61] United Independent School District v. Gonzalez, 911 S.W.2d 118 (Tex. App. 1995).

[62] See Chicago School Reform Board of Trustees, v. Martin, 309 Ill. App. 3d 924, 723 N.E.2d 731 (1999); Shipman v. North Panola Consolidated School District, 641 So.2d 1106 (Miss 1994).

[63] Van Hooser v. Warren County Board of Education, 807 S.W.2d 230 (Tenn. 1991).

§ 1.06 School District Financial Affairs and Procurement of Contracts

School districts are funded by three main sources of revenue: state, local and federal monies. The largest funding source for school districts is local property taxation. Each state's laws make provision for the amount of revenue that can be levied by such taxation.[1] An equal taxing levy may not fall on every property owner. For example, a Michigan appellate court upheld a constitutional challenge against one of its state's laws that authorized local school districts to issue a tax levy on local property for school operating purposes, but exempted homesteads and qualified agricultural property.[2] The court denied recreational property owners' equal protection claim and ruled that there was a rational basis for the state protecting and promoting homestead property. Some states also have a limit on the percentage increase that a local taxing body can levy each year.[3]

In addition to local property taxation, school districts receive general state aid from their state's government. The state legislatures adopt a funding formula to determine the cost of a minimum foundation program of education in all public elementary and secondary districts. Other funding formulas, including the flat grant, reward-for-effort, guaranteed tax base, or a weighted-student plan, are available in most states, but the benefit of each formula is determined by the wealth of the local district as well as the levied tax rate.

A lessor source of school district revenues for most school districts is generated by federal assistance. The monies are usually committed for specific programs and not general expenditures. Reimbursements for special education expenditures and grant funding for Title programs are but a few of the major programs funded by federal support.

Once all these monies have been received, school boards have a fiduciary responsibility[4] to spend the monies in the best interest of students and the district. For some boards of education this responsibility would include:

> (1) not using public monies or property to aid or maintain any private or denominational elementary or secondary school;[5]

---

[1] Ky. Const. ¶ 157 (provides maximum tax rates to be levied by taxing districts).

[2] Citizens for Uniform Taxation v. Northport Public School District, *239 Mich. App. 284,* 608 N.W.2d 480 (2000), *cert. denied* 531 U.S. 993 (2000). See also, Powder River County v. Montana, *312 Mont. 198,* 60 P.3d 357 (2002).

[3] 35 ILCS 200/18-205 *et seq.* (Illinois) (also known as "tax caps").

[4] See Miss. Code Ann. § 37-61-9; Armstrong v. School District Five of Lexington and Richland Counties, 26 F. Supp.2d 789 (D.S.C. 1998).

[5] *Michigan:* Mich. Const. art. VIII, § 2.

(2) having members abstain from voting on contracts in which they have a conflict of interest;[6] and

(3) adopting an investment policy.[7]

School districts should adopt an investment policy for surplus revenue or money that will not be needed for immediate expenditure.[8] The policy should make provisions for investing deposits in such funds as to maximum the rate of return. The policy should also include protections against extensive loss of principal, which may include the purchase of insurance.[9]

As a matter of fiscal and ethical public policy, boards of education must bid contracts for certain goods/services that exceed a specified dollar amount.[10] Most states have laws that describe the bidding process and determine the dollar amount when bidding is required (minimally ranging between $10,000-$50,000). Statutes usually mandate the bidding of contracts for major repairs, erection of buildings, or for other structural improvements.[11] Excepted from this bidding requirement are contracts requiring highly specialized skills, contracts with other government agencies, or repair of goods under warranty.[12]

A school board must award the contract to the lowest responsible bidder.[13] The lowest responsible bidder is determined after submitting

---

New Hampshire: N.H. Const. part 2, art. 83.

Ohio: Ohio Const. art. VI, § 2.

[6] *North Dakota:* N.D. Cent Code § 15.1-07-17.

Michigan: Mich. Comp. Law. §388.1769b.

Mississippi: Miss. Code Ann. § 37-11-27.

[7] *Kansas:* Kan. Stat. Ann. § 72-17,126.

New Hampshire: N.H. Stat. Rev. Ann. § 197:23-a.

[8] Fla. Stat. § 218.415.

[9] *Id*. Unfortunately, even with these revenue sources, some school districts do not have enough money and are forced to hold a referendum to increase the tax levy or else borrow money or issue bonds.

[10] B&C Electric v. East Baton Rouge Parish School Board, 849 So.2d 616 (La. App. 2003) (public bidding law only applied to public works contracts, not to service contracts). See Motta v. Philipsburg School Board Trustees, 110 P.3d 1055 (Mont. 2005) (a contract to provide workshops for school employees constituted a professional services contract, which is subject to public bidding requirements, and could not awarded directly to a local provider).

[11] See:

Arkansas: Ark. Code § 22-9-203.

Iowa: Iowa Code § 73A.18.

[12] 105 ILCS 5/10-20.21 (Illinois). See Shively v. Belleville Township High School District No. 201, *329 Ill. App. 3d 1156,* 769 N.E.2d 1062, *264 Ill. Dec. 225*, *appeal denied* 201 Ill. 2d 616, 786 N.E.2d 200 (2002).

[13] See: Ark. Code § 22-9-203(d). See also, Ry-Tan Construction, Inc. v. Washington Elementary School District, *210 Ariz. 419,* 111 P.3d 1019 (2005) (a public

a sealed bid in accordance to a bid specification.[14] The bids are typically opened at a public meeting,[15] and the board makes a selection of the lowest responsible bidder, after considering conformity with bid specifications, delivery terms, quality, serviceability,[16] the financial status of the bidder, work experience, reputation, and past experience with the bidder.[17]

The board can designate a contractor as lowest responsible bidder even if the bidder varied from terms of a bid specification.[18] A New York court ruled that a contractor's variances from the bid specification constituted technical irregularities, the waiver of which would not deprive the school district of its guaranty that contracts would be performed or grant successful bidders advantage over their fellow competitors.[19] Later that same year, New York's highest court approved a school board's post-bid negotiations with its lowest responsible bidders to procure further cost reductions in connection with transportation contracts.[20] In the end, however, a school board may reject all bids.[21]

---

agency that accepts a bid on a public contract is not bound until the execution of a written contract)."

[14] Ohio Rev. Code Ann. § 9.312. See Fratello Construction Corp. v. Tuxedo Union Free School District, *284 A.D.2d 461,* 726 N.Y.S.2d 705, *leave to appeal denied* 97 N.Y.2d 606, 764 N.E.2d 393, 738 N.Y.S.2d 289 (2001) (construction contract bid accepted by school district was set aside because of low bidder's material noncompliance with the bidding process). See also, Emma Corp. v. Inglewood Unified School District, 114 Cal. App.*4th 1018,* 8 Cal.Rptr.3d 213 (2004), *review denied* (2005) (California legislature intended for mistaken bidders to be relieved of liability on mistakenly low bids resulting from clerical error). See See Martin Engineering, Inc v. Lexington County School District, *365 S.C. 1,* 615 S.E.2d 110 (2005) (low bidder was entitled to correct mistake to avoid a substantial loss)."

[15] Mo. Rev. Stat. § 177.086.

[16] 105 ILCS 5/10-20.21 (Illinois).

[17] Ohio Rev. Code Ann. § 9.312. See Compass Health Care Plans v. Board of Education of the City of Chicago, 246 Ill. App.*3d 746,* 617 N.E.2d 6, *186 Ill. Dec. 767* (1992), *appeal denied* 616 N.E.2d 332 (1993). See also, Steingass Mechanical Contracting, Inc. v. Warrensville Heights Board of Education, *151 Ohio App. 3d 321,* 784 N.E.2d 118 (2003).

[18] Harvey Co. Inc. v. Board of Education of Spring Lake Heights School District, *358 N.J. Super. 383,* 817 A.2d 1023 (2002) (school district should not be required to accept a higher bid solely for technical violations of a lower bidder).

[19] T.F.D. Bus Co. Inc. v. City School District of Mount Vernon, *237 A.D.2d 448,* 655 N.Y.S.2d 549 (1997). See R.D. Brown Contractors v. Board of Education of Columbia County, *280 Ga. 210,* 626 S.E.2d 471 (2006) (requirement for bidders to list subcontractors was immaterial and could be waived by the school board as a technicality).

[20] Acme Bus Corp. v. Board of Education of Roosevelt Union Free School District, *91 N.Y.2d 51,* 689 N.E.2d 890, *666 N.Y.S.2d 996* (1997). See also, Ark. Code § 22-9-203 (in the event that the lowest bid exceeds the appropriate amount for the project, the board can negotiate a lower price, but only if the bid is within 25% of the appropriated amount).

Most school districts have a limited budget and may include bids for alternate or optional projects that may be awarded, depending upon the costs proposed by the bidders. A New Jersey court ruled that it was possible for a bidder to have the lowest base bid, but not be the lowest bidder once the price for the optional projects was considered.[22] Furthermore, a New York court concluded that a school district does not have to prioritize the alternate projects prior to the bid opening because the district would not know the costs until after the bids were opened.[23]

A bidder who alleges to have been wrongfully denied the award of a bid may bring litigation against a school district. Foremost, the unsuccessful bidder must show that it would have been the successful bidder.[24] But even if the bidder was wrongfully denied a contract, courts typically conclude that lost profits are not recoverable. In Florida, an appellate court ruled the bidder was only entitled to equitable relief in the form of future comparable contracts, or, in the alternative, their bid preparation and/or bid protest costs.[25]

---

[21] Mo. Rev. Stat. § 177.086. See Premier Electric Construction Co. v. Board of Education of Chicago, *70 Ill. App.3d 866,* 388 N.E.2d 1088, *27 Ill. Dec. 125* (1979).

[22] Carney v. Franklin Township Board of Education, *365 N.J. Super. 509,* 839 A.2d 936 (2003). See J.S. Rugg Construction, Inc v. Ouachita Parish School Board, 895 So.2d 713 (La. App. 2005) (school board was not fraudulent when it proceeded to let a construction contract for work covered solely by the base bid and not on the alternate bids). But see, Metzger-Gleisinger Mechanical, Inc. v. Mansfield City School District, 2005 WL 1303206 (Ohio App. 2005) (school board could use the base and alternate specifications to compare the cost of equipment to determine if a certain brand of equipment was worth the additional expenditure."

[23] Sicoli & Massaro v. Grand Island Central School District, *309 A.D.2d 1229,* 765 N.Y.S.2d 109 (2003).

[24] Midwest Service Management v. Licking Valley Local Board of Education, 144 Ohio App. 3d 443, 760 N.E.2d 837 (2001).

[25] Miami-Dade County School Board v. J. Ruiz School Bus Service, Inc., 874 So.2d 59 (Fla. App. 2004). See also, La. Rev. Stat. Ann. § 38:2220(B), which requires an aggrieved bidder to pursue injunctive relief in contesting the award of a public contract."

§ 1.07 School District Employment Affairs

The local board of education has the authority to make personnel decisions within the district. Such personnel decisions include hiring and firing, reduction in force, evaluation,[1] transfer, and determination of salary of all certified and non-certified employees.

[1]—Certified Employees

The contract of a full-time certified employee is considered continuing and remains in full effect, unless it is amended or terminated because of just cause, reduction in force, or loss of certification.[2] As part of its assessment of employee performance, boards of education authorize school administrators to evaluate certified employees and to recommend a remedial course of action for those certified employees whose performance is deficient.

All teachers' classroom and teaching skills will be evaluated by an administrator.[3] Probationary teachers are usually evaluated more frequently than tenured teachers.[4] A tenured teacher whose performance is deemed unsatisfactory shall be given a notice of such deficiencies and provided an opportunity to remediate his or her skills,[5] unless the deficiency cannot be corrected.[6] A remediation plan will be developed in conjunction with the teacher, a consulting teacher, and the administrator; the teacher is provided a list of resources to use to correct the deficiency.[7] The teacher will be allowed to improve his or her performance during the implementation of the plan.[8] If at the end of the plan, the teacher has not earned a satisfactory rating, she or he may be dismissed.[9]

---

[1] La. Rev. Stat. Ann. § 17:3904.
[2] Neb. Rev. Stat. § 79-829.
[3] Ark. Code § 6-17-1504(a).
[4] See:
Illinois: 105 ILCS 5/24A-5, A-8 (probationary teachers are evaluated, at minimum, once a year; tenured teachers every other year).
Louisiana: La. Rev. Stat. Ann. § 17:3902 (probationary teachers are evaluated annually; tenured teachers once every three years).
South Carolina: S.C. Code § 59-19-97 (tenured teachers are evaluated once every three years).
[5] See:
Arkansas: Ark. Code § 6-17-1504(c).
Colorado: Col. Rev. Stat. § 22-9-106.
[6] Ariz. Rev. Stat. Ann. §15-539.
[7] Col. Rev. Stat. § 22-9-106(3.5).
[8] Okla. Stat. tit. 70, § 6-101.24 (remediation period is two months.)
[9] Colo. Rev. Stat. § 22-9-106(4.5).

In addition to evaluating classroom performance, a school board may suspend, with or without pay,[10] or dismiss a certified employee for misconduct, depending upon its severity.[11] Causes for such action may be based upon insubordination, incompetence, cruelty, negligence, or failure to successfully complete a remediation plan.[12] State law provides that teachers be given notice of the charges and an opportunity to respond (usually in a hearing before the school board or a hearing officer).[13] The dismissal procedures are extensive for tenured teachers, since they have an expectation of continued employment.[14]

[2]—Support Staff

Support staff, including aides, secretarial and janitorial personnel, hold noncertified positions. Some support staff personnel have renewable annual contracts, while others are considered "at will" employees. An at will employee's contract continues between the parties at their mutual pleasure and either party can end it any time without cause,[15] unless such termination is against public policy.[16] Since an at will employee has no expectation of continued employment, there is no property right and the employee has no Fourteenth Amendment rights to due process.[17]

[3]—Reduction in Force

When the services of certified and noncertified employees are no longer needed due to a decrease in funding or enrollment, the board

---

[10] See:
Alabama: Ala. Code §16-24-9.
Arizona: Ariz. Rev. Stat. Ann § 15-539.
Arkansas: Ark. Code § 6-17-1508.
Missouri: Mo. Rev. Stat. § 168.116.

[11] Me. Rev. Stat. tit. 20, § 13202.

[12] See:
Georgia: Ga. Code § 20-2-940(a)(1-8).
Illinois: 105 ILCS 5/10-22.4

[13] See:
Georgia: Ga. Code § 20-2-940(b).
Missouri: Mo. Rev. Stat. § 168.116.
See also, Jefferson v. Jefferson County Public School System, 360 F.3d 583 (6th Cir. 2004).

[14] Ala. Code §16-24-9 (such procedures may include the right to be heard and present testimony, the right to appear with legal counsel, and the right to cross-examine witnesses).

[15] Ferris v. Texas Board of Chiropractic Examiners, 808 S.W.2d 514 (Tex. App. 1991) *writ of error denied* (1991).

[16] Sheets v. Teddy's Frost Foods, Inc., *179 Conn. 471,* 427 A.2d 385 (1980).

[17] Vance v. North Panola School District, 31 F. Supp.2d 545 (N.D. Miss. 1998), *aff'd* 189 F.3d 470 (5th Cir. 1999).

can make a reduction in force (RIF).[18] Most states require that employees be notified before the end of the preceding school year that their services will not be needed for the upcoming school year.[19] No tenured teacher will be RIF'd before a probationary teacher that has the same subject area certification.[20] Typically, all personnel whose salary is paid with non-recurring dollars (e.g., a grant) will be RIF'd every school year and may be rehired for the next school year as money becomes available. Noncertified employees have recall rights after a layoff, and any vacancy must be tendered to the employees removed from that specific category of position if they are qualified to hold such position.[21] Once recalled to full-time employment, the employee will receive credit for seniority previously accumulated up to the time of the reduction.[22]

---

[18] Ky. Rev. Stat. § 161.011 (superintendent has authority to make reduction in force). But see, Wilder v. Grant County School District No. 1, *265 Neb. 742,* 658 N.W.2d 923 (2003) (Supreme Court of Nebraska ruled that a teacher was inappropriately RIF'd because the school district had not adopted a policy that identified any criteria by which a RIF would be made and thus failed to comply with statutory law).

[19] See:

Illinois: 105 ILCS 5/24-12.

Virginia: Va. Code § 22.1-304(F) (school board shall notify teachers of a RIF within two weeks of approval of school budget or no later than June 1).

[20] See:

Kentucky: Ky. Rev. Stat. § 161.800.

Nebraska: Neb. Rev. Stat. § 79-846.

[21] 105 ILCS 5/10-23.5 (Illinois) (one year right of recall).

[22] W. Va. Code § 18A-4-7b.

§ 1.08 School District Facilities

The local board of education has the primary responsibility to oversee the use and operation of local school facilities.[1] The public does not have an unfettered right to enter or utilize school facilities at any time. Moreover, school officials have the authority to assure that parents and third parties conduct themselves appropriately while on school property.[2] Local school boards are afforded deference to exercise ultimate authority for access to school buildings and school property.[3]

Schools have a responsibility to monitor and control access to the school buildings. Foremost, school officials must ensure the safety and welfare of students and school personnel while at school.[4] This includes the regulation of school visitors in the school buildings,[5] including parents, since they have no right of access to their children's classes.[6] Typically, local school boards adopt policies minimally requiring visitors to report to the main office of each building.[7] Any visitor not abiding by these regulations can be considered a trespasser.[8] School officials can also regulate the conduct of spectators at school-related functions.[9] For example, most school boards have a policy that allows school officials to remove an unruly or uncooperative spectator at an extracurricular event.[10] Courts afford school officials broad discretion in restricting visitors on school property.[11]

---

[1] *Illinois:* 105 ILCS 5/10-22.10. (An Illinois statute affords school boards the power to control and supervise "all public schoolhouses in their district . . .").

Missouri: Mo. Rev. Stat. § 177.031 (the school board has "charge of the schoolhouses, buildings and grounds . . .").

Nebraska: Neb. Rev. Stat. § 79-501 (the board of education shall "have the care and custody of the schoolhouse and other property of the district . . .").

[2] Lovern v. Edwards, 190 F.3d 648 (4th Cir. 1999). See also, Hone v. Cortland City School District, 985 F. Supp. 262 (N.D.N.Y. 1997) (schools have authority to protect their employees from unwanted and bothersome contact from a newspaper reporter on school property).

[3] S.C. Code § 59-19-120. See Jacobson by Jacobson v. East Williston Union Free School District, 170 Misc.*2d 93,* 649 N.Y.S.2d 1002 (1996).

[4] La. Rev. Stat. § 17:416.10.

[5] State of Washington v. Allen, *90* Wash. App. 957, 955 P.2d 403 (1998).

[6] Ryans v. Gresham, 6 F. Supp.2d 595 (E.D. Tex. 1998).

[7] Tenn. Code § 49-6-4207 (Tennessee statute allows school districts to use metal detectors at school. Visitors are also subject to this policy).

[8] Minn. Stat. § 609.605.

[9] Nuding v. Board of Education of Cerro Gordo Community Unit School District No. 100, 313 Ill. App.*3d 344,* 730 N.E.2d 96, *246 Ill. Dec. 416*, *appeal denied* 191 Ill. 2d 535, 738 N.E.2d 928, 250 Ill. Dec. 459 (2000).

[10] 105 ILCS 5/24-24 (Illinois schools may deny admission to school extracurricular and sporting events for up to one year for failure to exhibit good sportsmanship).

School districts can have different rules of access and use of facilities depending upon the nature of the organization seeking to use the facility.[12] In 1984, the United States Congress enacted the Equal Access Act,[13] which affords student groups equal access to school facilities.[14] The Act makes it unlawful for any secondary school that receives federal financial assistance and which has a "limited open forum"[15] to deny equal access or discriminate against any noncurricular-related student group desiring to meet on school premises during noninstructional time.[16] The United States Supreme Court upheld the constitutionality of this Act, stating that it did not violate the Establishment Clause of the First Amendment.[17] The Court went on to say that if a school recognizes even one noncurriculum-related student group to meet, obligations of the Act are triggered and the school may not deny other clubs equal access to meet on school premises during noninstructional time,[18] regardless of the content of their speech,[19]

---

[11] Teston v. Collins, *217 Ga. App. 829,* 459 S.E.2d 452 (1995).

[12] Cal. Educ. Code § 38134 (mandate that local schools allow nonprofit organizations that promote youth and school activities to use school facilities).

[13] 20 U.S.C. § 4071 (a-f). Pub. L. 98-377, Tit. VIII, § 802.

[14] Prince v. Jacoby, 303 F.3d 1074 (9th Cir. 2002), *cert. denied* 540 U.S. 813 (2003) ("equal access" requirement within Equal Access Act means that religiously-oriented student activities must be allowed under same terms and conditions as other extracurricular activities, once a secondary school has established a limited open forum).

See also, the No Child Left Behind Act, 20 U.S.C.A. § 7905, in which Congress enacted the "Equal Access To Public School Facilities Act," prohibiting any public school that has a designated open forum or a limited public forum and that receives funds from denying equal access to any group officially affiliated with the Boy Scouts of America.

[15] A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum-related student groups to meet on school premises during noninstructional time.

[16] Herdahl v. Pontotoc County School District, 933 F. Supp. 582 (N.D. Miss. 1996) (a school district did not provide a limited open forum under the Equal Access Act when it afforded students the opportunity to broadcast announcements over the school's public address system. The court rejected student group's claim for equal opportunity to broadcast devotional and prayers, ruling that no other club used the broadcast system for substantive club activities, as opposed to merely announcements).

[17] Board of Education of Westside Community School v. Mergens, 496 U.S. 226, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990).

[18] See;

Third Circuit: Donovan v. Punxsutawney Area School Board, 336 F.3d 211 (3d Cir. 2003) (student activity period is considered noninstructional time).

Ninth Circuit: Ceniceros v. Board of Trustees of San Diego Unified School District, 106 F.3d 878 (9th Cir. 1997) (lunch period is considered noninstructional time).

[19] See:

Ninth Circuit: Colin ex rel. Colin v. Orange Unified School District, 83 F. Supp.2d 1135 (C.D. Cal. 2000).

unless it materially and substantially interferes with the orderly conduct of educational activities within the school.[20]

School boards encounter a different legal standard when a nonstudent group seeks access to school facilities: the First Amendment.[21] A school building is usually considered a "limited public forum," a place where public communications can be limited based on the speaker's identity and subject matter, if the distinctions are reasonable "in light of the purpose served by the forum and are viewpoint neutral."[22] In sum, this means that within constitutionally-permissible guidelines, a school board may legally limit access to its facilities.[23] However, once the school makes its facilities available to an external group (e.g., religious, social, or civic groups), all similar external groups are allowed to utilize school facilities for meetings or special occasions when the facilities are not occupied for school reasons.[24] Once opened to external groups, boards of education cannot prohibit another external group from using a facility because of the viewpoint to which the group adheres.[25] It is imperative that boards of education adopt procedures detailing what groups must do to utilize school facilities.

One legal issue that perpetually plagues school districts involves the use of school facilities by religious organizations. In 2001, the U.S. Supreme Court ruled that it was unconstitutional for a school district to deny use of its facilities to religious organizations based solely on their religious nature.[26] Schools must make sure that these

---

Tenth Circuit: East High Gay/Straight Alliance v. Board of Education of Salt Lake City School District, 81 F. Supp.2d 1166 (D. Utah 1999).

[20] Caudillo v. Lubbock Independent School District, 311 F. Supp.2d 550 (N.D. Tex. 2004) (group's speech would contradict the school's curriculum). But see, Boyd County High School Gay Straight Alliance v. Board of Education of Boyd County, 258 F. Supp.2d 667 (E.D. Ky. 2003) (EAA's material and substantial disruption exception only regulates a disruption originating from the group itself, not a disruption caused by student or community opposition to the group).

[21] U.S. Const. amend I.

[22] Cornelius v. NAACP Legal Defense & Education Fund, Inc., 473 U.S. 788, 806, 105 S.Ct. 3439, 3451, 87 L.Ed.2d 567 (1985).

[23] Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993).

[24] *Illinois:* 105 ILCS 5/10-22.10 (school boards can grant the temporary use of a school facility, when not occupied, to other groups).

Missouri: Mo. Rev. Stat. § 177.031 (school boards may allow for the free use of the buildings/grounds for public debate, and for other civic, social and educational purpose that will not interfere with the primary purposes to which the buildings are devoted).

[25] Full Gospel Tabernacle v. Community School District 27, 979 F. Supp. 214 (S.D.N.Y. 1997), *aff'd* 164 F.3d 829 (2d Cir.), *cert. denied* 527 U.S. 1036 (1999).

[26] Good News Club v. Milford Central School, 533 U.S. 98, 121 S.Ct. 2093, 150 L.Ed.2d 151 (2001) (public school's exclusion of a Christian children's club from

groups are subject to the same facility-use policies as are non-religious groups. Any benefit shown to religious organizations may subject a district to claims of violating the Establishment Clause.[27] However, no religious activity should occur during instructional time.[28]

Lastly, neither school personnel nor students have a right to utilize school facilities in any manner they wish and must abide by the same rules imposed upon visitors. A federal district court in Rhode Island ruled that a teacher had to follow the same procedures as would any visitor when the teacher wanted to come into the school after school hours to videotape alleged health and safety violations.[29]

---

meeting after hours at school based on its religious nature was unconstitutional viewpoint discrimination, where school had opened its limited public forum to activities that served a variety of purposes). See also, The Bronx Household of Faith v. Board of Education of the City of New York, 331 F.3d 342 (2d Cir. 2003) (applying *Good News Club*, the court upheld a preliminary injunction to allow a church to utilize a school facility during non-school hours. The court noted that it could not be said that the meetings of the church constituted only religious worship, apart from any teaching of moral values).

[27] U.S. Const. amend. I. See Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993).

[28] Chandler v. James, 985 F. Supp. 1068 (M.D. Ala. 1997) (private association could not distribute Bibles to school students in their classrooms, even though the distribution took place during noninstructional time).

[29] Cirelli v. Town of Johnston School District, 897 F. Supp. 663 (D.R.I. 1995).

§ 1.09 School District Transportation and Reimbursement

Student transportation is a necessary part of providing a system of public education.[1] It promotes the health, safety, and welfare of the students.[2] Most states have laws setting forth the obligation school districts have to transport their pupils.[3] The typical statute mandates that local boards of education provide free transportation for its pupils;[4] however, a school district cannot require that a student be transported.[5]

Review of statutory law shows that the obligation of the local school district to transport students is dependent upon special provisions, usually classified by:

(1) proximity of home to school facility, and
(2) type of student (e.g., special education students).

Regarding proximity between home and school, local school districts typically do not have an obligation to transport students that live within a certain radius of the school. For example, Florida law provides that students will not be transported unless their homes are more than a "reasonable walking distance . . . from the nearest appropriate school,"[6] while Illinois schools can charge for transporting students who live within 1.5 miles of the school attended,[7] unless it promotes a serious safety hazard.[8]

A school district's obligation to transport children is also dependant upon the type of student being transported. Special rules exist for special education, non-resident, gifted, and parochial/private school students.

[1]—Special Education Students

Under the Individual with Disabilities in Education Act (IDEA)[9] students with disabilities are entitled to a free appropriate public edu-

---

[1] Ohio Rev.Code § 3327.01
[2] Me. Rev. Stat. tit. 20A, ch. 215, §5401 (12).
[3] Fla. Stat. § 1006.21.
[4] 105 ILCS 5/10-22.22, 5/29-1 (Illinois).
[5] Cal. Educ. Code § 35350.
[6] Fla. Stat. § 1006.21(3)(a).
[7] 105 ILCS 5/29-2 (Illinois).
[8] *Illinois:* 105 ILCS 5/29-3.
But see,
Florida: Fla. Stat. § 1006.21(3)(b).
[9] On December 3, 2004, President Bush signed into law the reauthorization of IDEA (20 U.S.C. § 1400 *et seq*., Pub. L. 108-446). The effective date of the law is July 1, 2005.

cation (FAPE),[10] which, with only minimal exception, includes free transportation.[11] Moreover, a federal court in Minnesota ruled that if a disabled student's parents incurred expenses in transporting the student to school, when a proper individualized education program (IEP) would have provided free transportation directly to and from his home, IDEA authorizes an award of transportation expenses.[12] The board of education would still incur this expense even if it must transport the student outside of school boundaries and even if it would impose a substantial burden on the district.[13]

A federal district court ruled that under IDEA a public agency must provide transportation to disabled students if such agency provides the general student population transportation to and from school. If a school district does not provide transportation to the general student population, the issues of transportation for disabled students will be determined on a case-by-case basis.[14] However, door-to-door transportation may not be necessary for every disabled student in order to benefit from their special education program.[15] Lastly, sections 1401(17) and 1413(4) of IDEA do not require schools to transport disabled students from a private school to a public school for therapy because such transportation was not necessary for student to benefit from special education services, absent a showing that student was unable to travel to public school without assistance.[16]

---

[10] 20 U.S.C. § 1401 (9)(a-b) (FAPE means special education and related services that have been provided at public expense, under public supervision and direction, and without charge and meets the standards of the State educational agency).

[11] 20 U.S.C. § 1401 (26)(A) (provides that "related services" means "transportation . . . required to assist a child with a disability to benefit from special education"). But see, Timothy H. v. Cedar Rapids Community School District, 178 F.3d 968 (8th Cir. 1999), *reh'g denied* (1999) (it was not necessary for a district to provide free transportation to another program of the parents' choice within the school district, when the neighborhood school provided the student with a free appropriate education).

[12] Moubry v. Independent School District 696, 9 F. Supp.2d 1086 (D. Minn. 1998).

[13] North Allegheny School District v. Gregory P., 687 A.2d 37 (Pa. Commw. 1996), *appeal denied* 549 Pa. 730, 702 A.2d 1062 (1997). See, Board of Education of Windsor-Plainsboro Regional School District v. Board of Education of the Township of Delran, *361 N.J. Super. 488,* 825 A.2d 1215 (2003) (transportation costs of pupils with autism who live at a group home outside their parents' district should not be paid by the district where the group home is located).

[14] Malehorn v. Hill City School District, 987 F. Supp. 772 (D.S.D. 1997).

[15] *Id*.

[16] Donald B. By and Through Christine B. v. Board of School Commissioners of Mobile County, 117 F.3d 1371 (11th Cir 1997).

[2]—Gifted Students

In Pennsylvania, gifted students in high school are not eligible for transportation expenses for college courses unless specifically agreed to by the public school district where the students attend.[17]

[3]—Nonresident Students

The parent of any child living outside the district shall be responsible for transporting their child, without reimbursement, to a point on the regular bus route of the receiving district.[18]

[4]—Private/Parochial Students

The issue of using public funds to transport students to parochial and private schools has resulted in a wealth of diverse statutory and case law. For instance, the Hawaii Supreme Court interpreted its constitution and rejected the "child benefit" theory as applied to bus transportation for non-public school students.[19] On the contrary, Alaska statutory law affords transportation to private school students that live on the same routes on which public school students are transported.[20] A Delaware statutory provision allows that all rules relative to pupil transportation shall be the same as those applicable to public schools.[21]

In 1997, the United States Supreme Court liberalized the circumstances under which aid to parochial educational institution was permitted under the United States Constitution.[22] In *Agostini v. Felton*, the Court ruled a state could use federal funds to provide remedial educational services on the premises of a parochial school. The Court found it significant that the funds were available to both religious and public schools.

The battle in the state of Kentucky best typifies the long court struggle over the issue of state-funded transportation for children choosing to attend either private or parochial rather that public schools. Dating back to 1942, the Supreme Court of Kentucky ruled that a school board could not provide private school students the same

---

[17] New Brighton Area School District v. Matthew Z., 697 A.2d 1056 (Pa. Commw.), *appeal denied* 550 Pa. 723, 706 A.2d 1215 (1997); Ellis v. Chester Upland School District, 651 A.2d 616 (Pa. Commw. 1994).

[18] Del. Code tit. 14, § 409(a).

[19] Spears v. Honda, *51 Haw. 1,* 449 P.2d 130 (1968).

[20] Alaska Stat. § 14.09.020.

[21] Del. Code tit. 14, § 2905.

[22] Agostini v. Felton, 521 U.S. 203, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997).

transportation rights as public school students without violating the Kentucky Constitution.[23] After the state legislature enacted a statutory provision[24] to override numerous court decisions on this issue,[25] the Kentucky Supreme Court ruled in 1994 that the amended statute was unconstitutional because it only provided benefit directly to select private and parochial schools, to the exclusion of all public school children.[26] In 1999, the Kentucky Supreme Court again addressed this issue and ruled that subsequent amendments to the statute were constitutional because of the child-benefit theory, which disregards any incidental benefit to private institutions.[27] Lastly, the Court determined that financial allocation did not need to be distributed evenly between public and non-public students. The court determined that the state had the authority to provide school bus transportation to all students it deems by its discretion are in need of safe transportation.[28]

Connecticut statutory law provides that any municipality or school district shall provide for its children attending nonpublic, nonprofit schools the same kind of transportation services provided for its children attending public schools when a majority of the children attending the nonpublic school are residents of Connecticut.[29] In 1998, the Supreme Court of Connecticut interpreted this same statute's phrase "same kind of transportation services" to mean that public schools need not be in session the same days as nonpublic schools to provide transportation to nonpublic schools students.[30]

Most states reimburse local school boards a certain percentage of their student transportation costs.[31] Often, the state board of education has a reimbursement formula that takes into consideration such fac-

---

[23] Sherrard v. Jefferson County Board of Education, *294 Ky. 469,* 171 S.W.2d 963 (1942).

[24] Ky. Rev. Stat. § 158.115.

[25] Jefferson County Board of Education v. Jefferson County, Ky., 333 S.W.2d 746 (Ky. 1960); Rawlings v. Butler, Ky., 290 S.W.2d 801 (Ky. App. 1956); Nichols v. Henry, 191 S.W.2d 930 (Ky. App. 1945).

[26] Fiscal Court of Jefferson County v. Brady, 885 S.W.2d 681 (Ky. 1994).

[27] Neal v. Fiscal Court, Jefferson County, 986 S.W.2d 907, 912 (Ky. 1999).

[28] *Id*., 986 S.W.2d at 912-913.

[29] *Connecticut:* Conn. Gen. Stat. §10-281.

Wisconsin: Wis. Stat. §121.54 (the State of Wisconsin has a similar statute that mandates public high schools to provide private school students with transportation to and from their school).

[30] Board of Education of Stafford v. State Board of Education, *243 Conn. 772,* 709 A.2d 510 (1998).

[31] 105 ILCS 5/29-5 (Illinois) (a minimum of 80% reimbursement to Illinois schools).

tors as number of transported students, number of miles traveled by school buses, minimum bus driver salaries, maintenance costs, safety training, and climate.[32] Such reimbursements shall not exceed the actual costs incurred.[33]

---

[32] Ga. Code. § 20-2-188.
[33] *Id*.

§ 1.10 Tort Liability

As members of society increasingly turn to the judiciary to resolve their disputes, it is incumbent upon school boards to know the law surrounding liability for tortious conduct. This includes knowledge about what actions constitute tortious conduct as well as how board members and district employees can avail themselves of the immunities provided by law.

A tortious act is broadly defined as a civil (not criminal) wrong for which there is a legal remedy.[1] Torts are primarily classified into two categories: negligent act or intentional misconduct. A negligent act is one where the actor does not desire to bring about the consequences which follow, but the risk of such consequences is great enough to lead a reasonable person to anticipate and guard against them. Courts recognize four elements of a negligent act:

(1) a duty to conform to a certain standard of conduct;
(2) a breach of that duty;
(3) a close connection between the act and the resulting injury; and
(4) an actual loss or injury.[2]

On the other hand, an intentional act is one that demonstrates an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property.[3]

The fear of liability can be a hindrance when board members try to make decisions in the best interest of the school district and its students. It is impracticable to require board members to know every applicable regulation and understand the intent behind its adoption. Therefore, it is considered wise public policy to provide elected officials immunity from liability for mistakes made in good faith while exercising discretion within the scope of their official duties.[4]

Most states have enacted tort immunity statutes to protect school boards from liability for negligent acts.[5] Tort immunity statutes pro-

---

[1] A breach of contract is usually not considered a tort. Keeton, Dobbs, and Owen, *Prosser and Keeton on Torts,* Ch.1, § 1 (5th ed. 1984).

[2] *Id*.

[3] 745 ILCS § 10/1-210 (Illinois) (some state statutes also refer to intentional acts as "willful and wanton" or "reckless" misconduct).

[4] Davis v. Scherer, 468 U.S. 183, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984).

[5] *Arizona:* Ariz. Rev. Stat. Ann § 15-341(E).

Illinois: 745 ILCS 10/1-101/11 (Local Governmental and Governmental Employees Tort Immunity Act).

tect school boards from liability arising from the operation of official governmental functions. Moreover, states such as Arizona, provide absolute immunity for those acts a board undertakes that are policy-making in nature.[6]

School board members can be sued and held liable for certain tortious acts. Liability is typically premised upon whether a board member is acting in their official or individual capacities when the alleged conduct occurred.[7] Board members act in their official capacities when they serve in an official legislative or executive capacity. Board members are usually immune from liability for acts taken in their official capacity. Yet, it is possible for a board member's conduct to be so egregious that their actions take them outside their scope of authority as board members.

Immunity from liability is premised upon whether the board member's alleged misconduct constitutes a state or federal law deprivation. Regarding allegations of state law deprivation, members of a board of education are entitled to qualified (or "good faith") immunity. Qualified immunity from state law deprivations "shields public officials from liability in their individual capacity for failure to properly perform a duty involving judgment and discretion, where the official was acting within the scope of his authority, in good faith and without any corrupt motive."[8] Therefore, school officials sued under a state law theory of liability do not lose their qualified immunity merely because their conduct violated some statutory or administrative provision.

In 1975, in *Woods v. Strickland*,[9] the United States Supreme Court addressed the issue of individual liability for school board members for damages for federal constitutional or statutory deprivations. The

---

[6] Ariz. Rev. Stat. § 12-820.01. See Warrington v. Tempe Elementary School District No. 3, *187 Ariz. 249,* 928 P.2d 673 (1996), *appeal after remand 197 Ariz. 68,* 3 P.3d 988 (1999).

[7] Teston v. Collins, *217 Ga. App. 829,* 459 S.E.2d 452, 455 (1995) ("Merely naming a defendant individually in a complaint is not conclusive as to the capacity in which that defendant is sued. Instead, the reason for the lawsuit is the determinative factor as to a defendant's capacity.").

[8] Peelman v. Delaware Joint Vocational School District Board of Education, 763 F. Supp 268, 269-270 (S.D. Ohio 1991). See Green v. Lebanon R-III School District, 13 S.W.3d 278 (Mo. 2000) (board members' determination of a tax levy is a discretionary act). See also, Ariz. Rev. Stat. § 15-381(C) ("Members of a governing board are immune from personal liability with respect to all acts done and actions taken in good faith within the scope of their authority during duly constituted regular and special meetings").

[9] Woods v. Strickland, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975), *overruled on other grounds* Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982).

Court ruled that board members are entitled to immunity unless they "knew or reasonably should have known that the action they took within their sphere of official responsibility would violate the constitutional rights of the student affected, or if they took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student."[10] The Court ruled that this standard contained subjective and objective standards of good faith regarding knowledge of any deprivation of students' constitutional rights.[11] Seven years later, the Supreme Court modified this legal standard to eliminate the subjective standard and rely solely on an objective standard of good faith.[12]

Lastly, school boards are authorized to purchase liability insurance and provide for the indemnification[13] of its employees and board members against litigation incurred while lawfully performing their duties to the school district.[14] School personnel must have acted in good faith and in a manner that they believe to be in the best interest of the school district. In dealing with alleged criminal misconduct, school personnel will only be indemnified if they had no reasonable cause to believe that their conduct was unlawful.[15]

---

[10] *Id*., 420 U.S. at 322. See also, Stoneking v. Bradford Area School District, 882 F.2d 720, 726 (3d Cir. 1989), *cert*. *denied* 493 U.S. 1044 (1990).

[11] *Woods*, N. 9 *supra,* 420 U.S. at 321.

[12] Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982).

[13] Neb. Rev. St. § 79-516 (providing that indemnification for expenses includes attorney's fees, judgments, fines, and amounts paid in settlement).

[14] 105 ILCS 5/10-20.20 (Illinois).

[15] Neb. Rev. St. §79-516.

§ 1.11 School Construction

Each year school districts enter into contracts for the construction of a new school facility, for infrastructure improvements, or to remodel an existing school building. The district will work with its architect to prepare plans and specifications of the project. Depending upon the size and nature of the project, a school district will invite bids from general contractors to oversee the construction work, and possibly, from subcontractors, in such areas as electrical, plumbing, and heating and ventilation.[1]

After the contract has been let by the school board, but before work can begin on the project, it is necessary for the contractors to provide the necessary performance and surety bonds. These bonds serve to ensure that the contractor will complete the work in a timely and satisfactory manner. If the contractor cannot complete the project, it is a surety's obligation to secure a new contractor to complete the project at the original price.[2] However, a school district will be in material breach of the bond if it failed to provide the surety timely notice to cure the alleged breach prior to default.[3]

The architect is the school district's on-site representative for the construction project. The district and architect will agree to the length of time the architect will provide direct on-site supervision. In addition to ensuring the work is in compliance with the specifications, the architect will certify monthly pay requests from the contractor, including ensuring the contractor is paying its employees statutory prevailing wages.[4] Usually, a district will withhold a certain percentage from each payment (usually a ten percent retainer) that will be paid after the project is successfully completed.

One area of possible contention between the contractor and a school district is when changes have to be made to the scope of the project after the contract is awarded. Called change orders, this legally binding addendum to the contract can be the result of unforeseeable conditions on the construction site or due to the preference of the board to modify the project. No change order should be completed until all parties agree to the scope and cost of the work.

---

[1] Mechanical Contractors Ass'n of Eastern Pennsylvania v. Dept. of Education, 860 A.2d 1145 (Pa. Commw. 2004).

[2] See School Board of Broward County v. Great American Insurance Co., 807 So.2d 750 (Fla. Dist. App. 2002) (since a surety had a duty to correct the original contractor's default, which entailed an obligation to fully perform the contract, it did not complete its obligation by simply attempting to broker a financial deal).

[3] Seaboard Surety Co. v. Town of Greenfield, 370 F.3d 215 (1st Cir. 2004).

[4] See: Herrmann v. Wolf Point School District, *319 Mont. 231,* 84 P.3d 20 (2004); Mortenson v. Leatherwood Construction, Inc., 137 S.W. 3d 529 (Mo. App. 2004).

Once the project is complete, all parties will review the work and sign a checklist indicating that all items of the contract are completed to the district's satisfaction. A school district should confer with the architect to make sure all components of the project are complete, because once the checklist is approved, school districts are usually prohibited from later saying the work was incomplete.

Lastly, if there are problems with the construction project, the first issue is to determine whether an arbitrator or the judiciary is the proper forum to resolve the dispute. Typically, the construction contract will address what issues are to be resolved through arbitration. Any issues not precluded by the arbitration provision may be brought to court.[5] After determining the proper forum, the parties must file any claims within the statute of limitations. Courts have held that the statute of limitations runs from the point the school board became aware of the problem, not when it knew the full extent of the damage.[6]

---

[5] New Concept Construction Co. v. Kirbyville Consolidated Independent School District, 119 S.W.3d 468 (Tex. App. 2003).

[6] Board of Education of Estill County v. Zurich Insurance Co., 180 F. Supp.2d 890 (E.D. Ky. 2002). See also, Albany Specialties v. Shenendehowa Central School District, *307 A.D.2d 514,* 763 N.Y.S.2d 128 (2003).