

**Legal Issues in Music Education:  
An Analysis of Court Cases Involving Music Educators**

by

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## Abstract

Although all educators are susceptible to legal challenges, music educators, as a result of their professional responsibilities, have an increased risk of becoming involved in litigation. Reasons for this increased risk include individual and student performances, attendance requirements, additional time with students outside of the traditional school day, and off-campus activities including overnight trips. The purpose of this study was to identify the legal concerns that occurred most often in the United States federal court system involving music educators from January 1, 1995-December 31, 2009, and to provide music educators with an awareness of the law as it pertains to the field of music education through court case analysis.

The LexisNexis Academic Database was used to identify the court cases involving music educators and selected areas of law including Constitutional Law (First, Fourth, Eleventh, and Fourteenth amendments) and other areas of law (tort law, copyright law, disability law, the Family Educational Rights and Privacy Act, and sexual harassment). The search revealed 220 cases that occurred in the federal court system from January 1, 1995–December 31, 2009, that involved music educators in their professional roles. The hierarchy of the court system was used in selecting cases for inclusion in the study, and I sought diversity in the selection of district court cases through consideration of the factual background of each case, the case holding, the subject (band, choir, orchestra, and general music), and grade level (elementary school, middle school, high school, and higher education). A summary of each case selected for the study included the facts of the case, the case holding, and the rationale for the court’s decision.

Music educators were most often involved in federal court cases concerning the Fourteenth Amendment – 26%, Tort Law – 19%, the First Amendment – 17%, Sexual Harassment – 15%, Disability Law – 15%, and the Fourth Amendment – 5%. The information from the court case summaries, the legal considerations used by the court in determining the case holding, and practical application suggestions were provided for each area of law. Through increased knowledge of the laws impacting the field of music education, music educators will be better equipped to provide a safe and comprehensive musical experience for their students.

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## CHAPTER 1. INTRODUCTION

The development of a music program poses challenges for music educators and requires much preparation, time, and effort in order to provide a safe, fair, and comprehensive music education for the students. Conflicts may arise between the music educator and students, parents, or administration in the process of fulfilling instructional and administrative duties. Any conflict has the potential to escalate into a legal dispute. Although all educators are susceptible to legal challenges, music educators, as a result of their duties, may have increased risks for becoming involved in litigation in comparison to other educators. Some of the reasons for this increased risk may include the following:

- additional time with the students outside of the normal school day (such as after school or on weekends),
- off-campus activities (including overnight trips),
- individual and ensemble performances,
- selection of students for leadership positions or “chair” assignments,
- attendance requirements,
- serving the special needs student in performance-based classes,
- the grading process, and
- fee requirement for class participation.

## **Research Questions**

The following research questions were addressed to assist the music educator in the preparation and education of students and provide knowledge in the event of an actual legal concern:

1. What are the legal concerns that most often impact the music educator?
2. What were the holdings in the cases reviewed and what was the reasoning for the holdings?
3. What are the implications for practice in music education from the cases reviewed?

## **Need for the Study**

Little research has been conducted specifically addressing legal issues in the music education profession (Kerr, 2002). A survey administered to music educators by McIntyre (1990) revealed that less than half of the respondents had taken any course in education law. He conducted his research study “in response to an apparent lack of knowledge about education law issues among many music educators as indicated by both the volume and the nature of the court cases found in the search process” (p. 2).

I conducted a preliminary identification of court cases involving music educators for this study. During the time period January 1, 1995 to December 31, 2009, 861 federal court cases occurred involving music educators and selected areas of law. These areas of law included Constitutional Law (concerns involved with the First, Fourth, Eleventh, and Fourteenth amendments) and other areas of law, including tort law, contract law, copyright law, disability law, the Family Educational Rights and Privacy Act, and sexual harassment. Analyses of the

cases revealed that some of the cases were not in direct reference to the field of music education and some were duplicate cases identified under different search terms. However, many of the cases resulted from the music educator's conduct related to professional duties or curriculum and may have been preventable with an improved understanding of the law as it relates to education.

Previous research supports the need for additional information on the law and legal principles for educators. A study conducted in the United Kingdom (Hunter-Jones, 2006) reported that there is an increase in legal concerns in the schools. The author attributed this increase to additional regulations and parental challenges of education decisions. Hunter-Jones recommended providing opportunities for students to have additional training with legal principles, prioritizing the legal instruction to best meet students' initial training needs, and supplying examples of case material pertinent to the subject.

In 1998, Hilliard conducted a study on music copyright law involving music educators. His recommendations identified the need for music educators to seek the available information on copyright legislation. Kerr (2002) stated that music education journals should provide information regarding legal issues for the music educator to assist in providing a proper standard of care for the students while managing an effective music classroom. Recent articles were published in education journals and attest to the interest in the topic of legal issues in education (Darrow, 2009; DuBoff, 2007; Essex, 2005; Hill & Barth, 2004; Kirby & Kallio, 2007; Kruger, 2004; Lapka, 2006; Levin, 2008; Mazur, 2004; Nemire, 2007; Parry, 2005; Russo, Osborne, & Boreca, 2005; Walter, 2006).

The law influences all facets of society in the United States and the need to stay informed of current information is crucial in the field of education. Legislation is constantly added or amended and court holdings interpreting the law are being decided. The law has a tremendous

impact on educators and it is critical for music educators to be knowledgeable about the law and how it impacts their teaching. Music educators must also remain current regarding new legislation, court proceedings, and holdings. “Having an awareness of the law, with little insight into the law itself, is like knowing there is a light switch in a dark room!” (Hunter-Jones, 2006, p. 267). This study provides this insight by equipping the reader with information about the law, identifying how the law directly impacts the field of music education, and specifying how music educators can work within the law to reduce the number of legal concerns being addressed in the court systems.

### **Definition of Terms**

The following terms appeared frequently in the review of court cases and are presented to provide the reader with a working knowledge of the legal terms used in this research. These definitions are quoted from the *Dictionary of the Law* (Clapp, 2000) and additional counsel provided by a doctoral committee source is presented in footnotes.

**Affidavit:** 1. a formal written statement affirming or swearing to the truth of the facts stated, signed before a notary public or similar officer ... (p. 19).

**Affirm:** to uphold the judgment of a lower tribunal in a case that has been appealed (p. 20).

**Appeal:** 1. the process by which one obtains review of a judicial decision by a higher court, or of an administrative decision by a court or by a higher authority within the administrative agency ... (p. 31).

**Certiorari:** a writ issued by an appellate court as a matter of discretion, directing a lower court to certify the record ... in a case that was not appealable as of right. The usual route by which a case reaches the Supreme Court of the United States is by a petition for certiorari from

the party on the losing end of a decision of a United States Court of Appeals or a state's highest court ... (p. 75–76).<sup>1</sup>

**Defamation:** the negligent, reckless, or intentional communication to a third person of a falsehood that is injurious to the reputation of a living individual, or of a corporation or other organization ... (p. 129).

**Defendant:** 1. the person against whom a lawsuit is brought ... (p. 130).

**Dismissal with prejudice:** a dismissal barring the plaintiff or prosecution from ever reinstating the case (p. 141).

**En banc:** referring to consideration of a matter by all of the judges of a court together, as distinguished from a single judge or a panel. Some courts, including the Supreme Court, normally sit en banc ... (p. 157).<sup>2</sup>

**Establishment of religion:** governmental sponsorship of religion, including financial support for a religion or religions at public expense. This is prohibited by the Establishment Clause of the First Amendment to the Constitution. Under current Supreme Court doctrine, a government program having the effect of providing public financial support for religion does not violate the Establishment Clause if it is regarded as (1) having a secular purpose, (2) having a primary effect that neither aids nor inhibits religion, and (3) not involving “excessive entanglement” of government and religion ... (p. 162).

**Freedom of assembly:** the right of people to gather peacefully for political or other purposes. This is guaranteed by the First Amendment ..., subject only to the government's right to impose reasonable restrictions on the time, place, and manner of such assembly (p. 194).

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<sup>1</sup> Principle of limited review, exercised especially by the United States Supreme Court.

<sup>2</sup> From the bench

**Freedom of association:** the constitutional right to join with others for lawful purposes, derived primarily from a combination of First Amendment rights (assembly, religion, etc.) (p. 195).

**Freedom of speech:** the First Amendment right to express oneself. It covers any form or medium of speech, not just speaking and writing, and generally prohibits the government from restricting expression on the basis of content or viewpoint ... (p. 195).

**Free exercise of religion:** the practice of one's religion and observance of its tenets without government interference – a right guaranteed by the Free Exercise Clause of the First Amendment to the Constitution ... (p. 194).

**Free speech:** 1. expression that is not controlled or restricted by government censorship (p. 194).

**Holding:** 1. the ruling of a court in a case, or upon a particular issue in a case, especially an issue of law (as distinguished from fact) (p. 217).

**Immunity:** 1. exemption from a legal duty, responsibility, or liability (p. 222).

**Individual capacity:** one's role as a private individual ... (p. 69).

**Injunction:** 1. a court order directing a person to do or refrain from doing some act (p. 237).

**Liable:** legally responsible ... (p. 272).

**Libel:** 1. the form of defamation in which the defamatory statement is communicated in writing or another medium having a degree of permanence ... (p. 272).

**Motion:** 1. an application to a court for an order, made while a case is pending ... (p. 293).

**Official capacity:** one's role in an organization; one's position in private or public office ... (p. 69).

**Plaintiff:** 1. the person who starts a lawsuit by serving or filing a complaint (p. 329).

**Remand:** 1. to send a case back from an appellate court to the lower court from which it was appealed, for further proceedings in accordance with the appellate court's instructions (p. 369).

**Respondent:** the name given in certain situations to the party who must respond to a procedural step in a case, such as a petition, motion, or appeal ... (p. 374).

**Reverse:** to nullify the judgment of a lower court in a case on appeal because of some error in the court below ... (p. 377).

**Search:** 1. inspection by law enforcement officials of a person's body, home, or any area that the person would reasonably be expected to regard as private, for weapons, contraband, or evidence of criminal activity ... (p. 387).

**Slander:** 1. the form of defamation in which the defamatory statement is communicated by spoken words or transitory gestures (p. 404).

**Statute:** a written law ... (p. 411).

**Statute of limitations:** a statute setting the length of time after an event within which a civil or criminal action arising from that event must be brought ... (p. 412).

**Summary judgment:** judgment entered without a full trial because the evidence (or lack of evidence) brought out in pretrial discovery makes it clear which side must prevail as a matter of law ... (p. 255).<sup>3</sup>

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<sup>3</sup> Judgment on the pleadings

**Tort:** 1. a wrongful act, other than a breach of contract, that results in injury to another's person, property, reputation, or some other legally protected right or interest, and for which the injured party is entitled to a remedy at law, usually in the form of damages (p. 431).

**Vacate:** to nullify a judgment or court order ... (p. 451).

**Vicarious liability:** liability imposed by law upon one person for acts of another ... (p. 271).

**Warrant:** 1. a formal document, usually issued by a court, authorizing or directing an official to take a specific action (p. 460).

### **Delimitation/Disclaimer**

The reader is advised that the information provided in this dissertation is not, in any way, to be construed as legal advice. Every court case is unique and the court's holding is based on many factors which can only be interpreted by that court. This dissertation simply serves as an academic effort to provide information about the law and court cases relevant to music educators. As a practicing music educator, I have 18 years of public school instrumental music instruction experience and five years as a music education instructor in higher education. I do not have any formal law training; rather it is my interest in the law and the influence it has on the field of music education that have guided my research.

### **Study Limitation**

Although this study is limited to court cases involving music educators in their professional roles, it is important to note that there are many other cases, literature, and research involving school law that can inform the music educator. Knowledge of the law and how it directly impacts all aspects of the profession is the responsibility of educators. Not only will this

knowledge provide a better education for the students, but it may also provide guidance for the educator in the event a legal question is raised.

### **Chapter Conclusion**

Through this analysis of court proceedings, information is provided for current and future music educators to use in improving their understanding of the law and how the law applies to the field of music education. Trends in the number and nature of cases that involved music educators were reviewed in consideration of contemporary educational philosophy and practice. This review explored the sociological or pedagogical factors that may have contributed to the trend. Conclusions are drawn in the form of recommendations for music educators to consider when developing their curriculum and program.

## CHAPTER 2. OVERVIEW OF THE LEGAL SYSTEM, CONSTITUTIONAL LAW, AND OTHER AREAS OF LAW

A review of the literature involving legal issues in music education revealed a lack of research in this area. Although much legislation involves the field of education, music educators are generally not provided with guidance in interpreting the legislation nor specific details and support in understanding how the legislation impacts their teaching. This study identified the legal issues that occurred with greatest frequency in the courts for music educators, how these legal issues affect music education, and how music educators can use the information provided in this research to reduce the threat of legal action as well as assist them in their teaching and program development.

When reading a study on legal issues, a basic background in a variety of aspects of the law is important. This chapter addresses the organization of our federal and state court systems, provides an introduction to specific amendments and relevant legislation, and presents an overview of each area of law included in the study.

The United States Constitution establishes the governing laws for our country. Article III of the Constitution provides for the establishment and governing policies of the federal judicial system (United States Government, n.d., *Comparing Federal and State Court Systems*). The legal system of the United States consists of two court systems: the Federal Court System and the State Court System. The Federal Court System handles matters of law that relate to the power it was given by the Constitution (United States Government, n.d., *Understanding Federal*

*and State Courts*). Thus, “the federal courts often are called the guardians of the Constitution because their rulings protect rights and liberties guaranteed by it” (United States Government, n.d., *About U.S. Federal Courts, para. 1*). The State Court Systems handle all matters of law that the United States Constitution did not impart to the federal system or disavow to the states (United States Government, n.d., *Understanding Federal and State Courts*).

### **Structure of the United States Federal Courts**

The United States Federal Court System is comprised of three levels of courts: the district courts, the circuit courts, and the United States Supreme Court.

#### **District Courts**

The trial courts are also known as the United States District Courts. The country is divided into 94 judicial districts. This number includes at least one district court in each state, Washington, D.C., and Puerto Rico (Administrative Office of the U. S. Courts, 2003). Federal cases usually begin in the United States District Court system, and their caseload includes both civil and criminal cases (United States Government, n.d., *Understanding Federal and State Courts*). A civil case is one of non-criminal nature such as contract disputes and negligence (Nolo, 1971a). A criminal case is one in which a person is charged with committing a crime and a lawsuit is filed by a government prosecutor (Nolo, 1971b).

#### **Circuit Courts**

The 94 judicial districts in the United States form 12 regional circuits with one Court of Appeals in each of the regional circuits (Administrative Office of the U. S. Courts, 2003). District court cases that are appealed move to the appellate court of their assigned region. The United States Court of Appeals for the Federal Circuit is located in Washington, D.C. (United States Government, n.d., *Understanding Federal and State Courts*). A case may be sent to the

appellate court if a party is not satisfied with the ruling of the United States District Court. The right to appeal a United States District Court decision is different for civil and criminal cases. In a civil case, either party may appeal the district court's decision. However, a criminal case does not follow the same guidelines. If the defendant of a criminal case is found guilty, they have the right to appeal the verdict. If the defendant is found not guilty, the government does not have the right to appeal the verdict (Administrative Office of the U. S. Courts, 2003).

Once the appeal has been filed, it is the responsibility of the appellant, the person who is filing the appeal, to demonstrate that a legal error was made in the trial court proceedings and that error impacted the court's ruling in the case. The Court of Appeals reviews the District Court's proceedings for mistakes involving the law and makes its ruling on the case based on the facts that were established in the trial court proceedings. The decision from the Court of Appeals is usually final; however, two other situations may occur: the Court of Appeals may send the case back to the trial court, or the losing party may complete a "*writ of certiorari*" petitioning the United States Supreme Court to hear the case (Administrative Office of the U. S. Courts, 2003).

### **United States Supreme Court**

The United States Supreme Court is the highest court in the federal court system. While the Supreme Court can hear cases that have their origin in either state or federal court, it hears only a limited number of cases and the cases "usually involve important questions about the Constitution or federal law" (Administrative Office of the U. S. Courts, 2003, p. 9). If a party is not satisfied with the decision from the Court of Appeals, a State Supreme Court decision, or at times, a United States District Court decision, the party may request the case be heard by the United States Supreme Court by completing a "*writ of certiorari*" (United States Government, n.d., *Understanding Federal and State Courts*). Once a writ of certiorari is filed, the Supreme

Court Justices (comprised of a Chief Justice and eight associate justices) decide whether or not to hear the case (Administrative Office of the U. S. Courts, 2003). Four Supreme Court Justices must agree to hear a case in order for certiorari to be granted (United States Government, n.d., *Understanding Federal and State Courts*). The parties involved in these cases may be referred to as the petitioner (the party who brought the action forward) and the respondent (the party who responds) (Clapp, 2000). As the highest court in the land, the Supreme Court is also referred to as the Court of Last Resort (United States Government, n.d., *About the Supreme Court*).

### **Structure of the State Court Systems**

The State Court Systems of the United States are not structured the same way in each state although there are many similarities in their organization. A common state court system includes the trial courts, the appellate courts, and the state's highest court. Not all states have an appellate court, but many do. If a state does not have an appellate court, the appeal of a trial court decision would proceed directly to the state's highest court (United States Government, n.d., *Understanding Federal and State Courts*).

### **State Trial Courts**

The State Trial Courts are divided into two sets of courts: the courts of limited jurisdiction and the courts of general jurisdiction. The courts of limited jurisdiction can hear cases involving only certain matters, such as family court or traffic court. The courts of general jurisdiction hear all cases not heard by the courts of limited jurisdiction. In the trial courts of general jurisdiction, "the judge decides issues of law, while the jury decides issues of fact" (United States Government, n.d., *Understanding Federal and State Courts*, para. 16).

## **State Appellate Court**

The same process of appeals used in the federal court system is used in the state court system. Each party may appeal a trial court decision if they are not satisfied. The only exception to this is when a defendant involved in a criminal trial receives a verdict of not guilty. The State Appellate Court may only examine mistakes made by the trial court about procedures and law (United States Government, n.d., *Understanding Federal and State Courts*).

## **State High Court**

The state's highest court addresses only issues involving mistakes regarding the law, not the facts of the case. If a state has an appellate court, the state's highest court can decide to hear a case or not hear a case, just as the United States Supreme Court does. However, if the state does not have an appellate court, the state's highest court hears the appeals of the trial court (United States Government, n.d., *Understanding Federal and State Courts*). The state courts make the final decisions in matters involving the state constitution and the state laws (United States Government, n.d., *Comparing Federal and State Court Systems*).

## **Constitutional Law**

The Supreme Court of the United States plays a very important role in the interpretation of the Constitution; thus, its decisions are very important in the discussion of Constitutional Law. The following Supreme Court case summaries represent landmark legislation and are provided as background information for the reader.

### **First Amendment**

The First Amendment of the United States Constitution states:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of

the people peaceably to assemble, and to petition the Government for a redress of grievances. (U.S. National Archives & Records Administration, 2010, *The Bill of Rights*, para. 11)

Many concerns can arise involving the rights guaranteed in the First Amendment in the field of education and these concerns involve areas of both curricular and non-curricular nature. As evidenced by the United States Supreme Court cases identified below, the right to free speech has been challenged on multiple occasions with different holdings. When considering the student's right to free speech, the Court examines many factors with an important consideration being the interference the act may or may not have had on the educational process and the operation of the school.

*Tinker, et al. v. Des Moines Independent Community School District, et al.* (1969) is an example of First Amendment issues involving education. The Tinkers were a part of a group of high school students in Des Moines, Iowa, that opposed America's involvement in the Vietnam War. In December of 1965, the group decided to wear black armbands to display this opposition. The principals of the public schools, after hearing of the plan, implemented a policy stating that students wearing an armband to school would be asked to remove it; if the request was refused, the student would be suspended until the student agreed to return without the armband. Knowing the policy, the Tinkers wore the armbands to school. They were asked to remove the armbands and were subsequently suspended when they failed to remove the armbands. Once the protest was over, the students returned to school.

A suit was filed by the students' fathers in U.S. District Court. The court found that the school acted reasonably to deter disruptions that may have arisen from the protest. The Tinkers appealed the case and a tie vote in the U.S. Court of Appeals affirmed the District Court ruling.

The case was then appealed to the United States Supreme Court. The Supreme Court found that wearing the armbands did not interfere with school operations or others' rights. The United States Supreme Court decision held that the armband protest was protected as free speech under the First Amendment and therefore ruled in the students' favor.

Another United States Supreme Court case involving education and the First Amendment is *Bethel School District No. 403, et al. v. Fraser, et al.* (1986), in which a high school student gave a nomination speech for a fellow student. The speech, containing explicit sexual metaphors, was conducted at a school assembly with approximately 600 students in attendance. The day after the student gave the speech, he was notified that the contents of the speech violated the school's policy that prohibited conduct that interfered with the educational process. The student was informed that he would be suspended for three days and removed from the list of potential speakers at graduation.

After review of the disciplinary action, the student was allowed to return to school after a two-day suspension. His father filed suit in Federal District Court claiming a violation of the First Amendment right to free speech and a Fourteenth Amendment due process violation. The Federal District Court found in favor of the student, holding that the school did violate his free speech and the removal of his name from potential commencement speakers violated the Due Process Clause of the Fourteenth Amendment. This decision was appealed by the school system and the decision was upheld by the Court of Appeals. The case was then heard by the United States Supreme Court. The Supreme Court decision held that the school does have the authority to impose punishment on the student and that the student's First Amendment right to free speech and Fourteenth Amendment right to due process were not violated.

The First Amendment right to free speech was also challenged in *Hazelwood School District, et al. v. Kuhlmeier, et al.* (1988). The students in a high school journalism class had completed the final edition of the school paper in May of 1983. Following established procedure, the advisor for the class submitted a copy of the paper to the principal for review. The principal was concerned with two of the articles in the paper. One of the articles involved teen pregnancy and the other involved divorce.

The principal felt revisions were needed; however, with the impending publishing deadline for this last edition of the paper for the school year, the principal told the advisor to take out the pages containing the articles. The principal's superiors supported the decision. The students were upset about the deletion of the pages. The students filed suit alleging a violation of their First Amendment rights.

The U.S. District Court for the Eastern District of Missouri found in favor of the school stating that the school could place limits on curricular activities for a good reason. The students appealed the decision and the Court of Appeals for the Eighth Circuit found in favor of the students stating that their First Amendment rights had been violated. The opinion of the court noted that the school paper was a part of the curriculum but it was also a public forum. Since the paper was considered a forum, it could be censored only if it interfered with the function of the school or others' rights. The school appealed the decision to the United States Supreme Court. Reversing the decision of the Court of Appeals for the Eighth Circuit, the United States Supreme Court found that the principal's actions were reasonable and did not violate First Amendment rights.

#### **Fourth Amendment**

The Fourth Amendment of the United States Constitution states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. (U.S. National Archives & Records Administration, 2010, *The Bill of Rights*, para. 14)

When applying the rights guaranteed by the Fourth Amendment of the United States Constitution, an educator should be knowledgeable about these rights as they relate to both adults and children.

Illegal search and seizure was the subject of the United States Supreme Court case *Mapp v. Ohio* (1961). Police officers in Cleveland, Ohio, received information that a person who was wanted for questioning about a bombing case and illegal equipment might be found in Doltree Mapp's home. The police went to her home and sought entrance. Mapp refused their demand to enter without a search warrant. The officers alerted headquarters and maintained surveillance of the residence. Several hours later, with additional police officers, the officers again sought entrance and then forcibly gained entry. Mapp's attorney arrived at the home and was denied entrance and was not allowed to see Mapp.

Mapp requested to see the search warrant; a piece of paper, supposedly the warrant, was presented. Mapp took the paper and put it in her bosom. The officers struggled with her to retrieve the paper and then placed handcuffs on her in response to her behavior. A thorough search of the house was conducted; obscene materials were discovered in this search and Mapp was eventually convicted for possession of these obscene materials.

At trial, prosecutors did not produce or provide explanation for the search warrant. The Court doubted the existence of the warrant; however, the Ohio Supreme Court determined that

the evidence gathered against Mapp was not taken using offensive force and that even if the search by the State was unreasonable, it could still use the evidence that was seized. The case was then heard by the United States Supreme Court. The Court reversed the State Supreme Court's decision, and held that the State must respect the Due Process Clause of the Fourteenth Amendment and was not allowed to use evidence that was seized in violation of the Fourteenth Amendment.

The Fourth Amendment right to be free from illegal searches was also challenged in the United States Supreme Court case *New Jersey v. T.L.O.* (1984). Two students at Piscataway High School in New Jersey were caught smoking in the restroom at school. Smoking was not allowed in that area of the school. The students were taken to the office and the Assistant Principal met with the students. One of the students admitted she was smoking and the other student, 14-year old T.L.O., said that she did not smoke.

The Assistant Principal conducted a search of T.L.O.'s purse. Cigarettes were found in the purse. While taking the cigarettes out of the purse, he discovered cigarette rolling papers which he believed to be linked to an involvement with marijuana. He then conducted a more thorough search of the purse and found a tobacco-like substance, plastic bags, a pipe, and writings that provided further implications of marijuana dealing by T.L.O. T.L.O. was then taken to the police station, and there she admitted to selling marijuana at school.

Charges were filed against T.L.O. for delinquency. T.L.O. moved to have the evidence seized in the search suppressed. The Juvenile and Domestic Relations Court hearing the case held that school officials may search a student if they have reasonable suspicion that a crime is, or may be, in process of being committed or if they feel the search is needed to maintain school discipline.

The Juvenile Court's decision was appealed by T.L.O. and sent to the Appellate Division. The Appellate Division affirmed the Juvenile Court's ruling on the search. The case was then heard by the Supreme Court of New Jersey. The Supreme Court of New Jersey reversed the Appellate Division's ruling and held that the search of the purse did violate T.L.O.'s Fourth Amendment rights. The case then proceeded to the United States Supreme Court. The United States Supreme Court found the search by the school official to be reasonable in that it was supported by reasonable suspicion and therefore reversed the Supreme Court of New Jersey's ruling.

Another United States Supreme Court case involving the search of a student was *Vernonia School District 47J v. Wayne Acton* (1995). The Vernonia School District implemented a urinalysis drug testing policy for student athletes. The need for this policy was established by increased student disciplinary problems and drug use as observed by both teachers and administrators. Student athletes were identified as leaders in the drug culture. The school district was concerned that the use of drugs could increase these students' risk of a sports-related injury. The school board policy stated that all students participating in interscholastic athletics had to sign a consent form and the parents also had to provide written consent for the urinalysis drug testing. The policy also stated that the student athletes would be tested at the beginning of the season for the sport they participated in and that 10% of the student athletes would be tested weekly throughout the season.

Acton, a student, was not allowed to participate in the football program because he and his parents refused to sign the consent forms for the drug test. The student and his parents filed suit claiming a violation of the Fourth Amendment right to be free from unreasonable searches.

The “search” in this case involves the collection and testing of the urine as compelled by the drug testing policy.

The District Court denied the claims. The case proceeded to the Court of Appeals and it was determined that the policy violated the Federal and State constitutions. The case was then heard by the United States Supreme Court. The Supreme Court found that the student’s rights were not violated by this drug testing policy, citing that the school district established that there was a student drug problem that needed to be addressed, particularly involving student athletes. Considerations in their decision included the student’s decreased expectation of privacy due to participation in athletics, the fact that the search was not obtrusive, and the importance of the need that the search accomplished.

Drug testing was again challenged in *Board of Education of Independent School District No. 92 of Pottawatomie County, et al. v. Lindsay Earls, et al.* (2002). The Tecumseh, Oklahoma, School District adopted a Student Activities Drug Testing Policy. This Policy required all students who participated in competitive extracurricular activities, such as band, choir, academic team, and athletics, submit to the drug test. The drug test consisted of a urinalysis, and the samples were collected by a teacher who was monitoring the test in the restroom.

The students were required to provide a list of prescription medications they were taking and the drug test was only to detect controlled substances. The results of a positive drug test were kept confidential with the exception being that the parents of the student were notified and a recommendation given about drug counseling. Students would not be taken out of the extracurricular activity unless they repeatedly tested positive or refused drug counseling.

Lindsay Earls, a member of the marching band, show choir, academic team, and National Honor Society, and Daniel James, who wanted to participate in the academic team, brought suit

against the school district claiming the drug testing policy violated Fourth Amendment rights. The United States District Court granted the school district summary judgment. The case was then heard in the United States Court of Appeals for the Tenth Circuit, which reversed the decision of the District Court and held that Fourth Amendment rights were violated by this policy. The case moved to the United States Supreme Court. In its decision the Court cited that the students involved in the extracurricular activities had a limited expectation of privacy, the collection of the urine sample for the drug test was not found to be intrusive, the student's privacy was not significantly invaded, the school district provided evidence to support the need for the policy, and the court had never required a prevalent problem with drugs before allowing suspicion-less drug testing to occur. The Supreme Court held that the drug testing policy was reasonable and the school district had an important interest in both preventing and detecting drug use. Thus, the Supreme Court held that the drug testing policy did not violate the Fourth Amendment rights of the students.

### **Eleventh Amendment**

The Eleventh Amendment of the United States Constitution states:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State. (U.S. National Archives & Records Administration, 2010, *Amendments 11–27*, para. 2)

The Eleventh Amendment issues in question involve state or state institution rights as opposed to the rights of an individual. States' rights refer to the "governmental powers of individual states of the United States ..." (Clapp, 2000, p. 411).

Governmental immunity was the subject in the case *Board of Trustees of the University of Alabama, et al. v. Patricia Garrett, et al.* (2001). Two State of Alabama employees were involved in this case. The first employee was a registered nurse serving as a director in nursing services at the University of Alabama–Birmingham Hospital. Diagnosed with breast cancer, she had to take leave from work to receive her treatment. Once she returned, she was told she would have to relinquish the position of director. She applied for and received a transfer to a position that received lower pay.

The second employee worked with the Alabama Department of Youth Services as a security officer. Due to his asthma, he requested the department amend his duties so that his exposure to cigarette smoke and carbon monoxide would be minimized. He was also diagnosed with sleep apnea and requested to be assigned to daytime shifts. Each of these requests was denied and the employee filed a claim of discrimination with the Equal Employment Opportunity Commission. After the claim was filed, the employee noticed his performance evaluations were lower than previously received.

Both the nurse and the security officer sought monetary damages as they filed suit under Title I of the Americans with Disabilities Act. Title I of the Americans with Disabilities Act prohibits employment discrimination against qualified individuals on the basis of the disability.

The District Court granted summary judgment for the State employers. On appeal by the plaintiffs, the United States Court of Appeals for the Eleventh Circuit reversed the lower court's holding. Certiorari was granted and the case was heard by the United States Supreme Court. The United States Supreme Court held that the Americans with Disabilities Act does not abolish states' Eleventh Amendment immunity (the immunity of states from suit in Federal court), unless

a state has practiced disability discrimination violative of the Fourteenth Amendment, a fact pattern not observed in the instant case.

### **Fourteenth Amendment**

The Fourteenth Amendment of the United States Constitution states:

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (U.S. National Archives & Records Administration, 2010, *Amendments 11–27*, para. 5)

The rights guaranteed by the Fourteenth Amendment impact the field of education in a variety of ways. These include the belief of equal treatment and opportunities for all students in their education and the fundamental right granting due process for all citizens.

*Goss, et al. v. Lopez, et al.* (1975) is an example of a case involving the Due Process Clause of the Fourteenth Amendment. In this case, the plaintiffs were suspended from school in Columbus, Ohio, for up to 10 days and were not provided the opportunity for a hearing. Student unrest was widespread in the Columbus Public School System during February and March of 1971. Six of the plaintiffs attended Marion-Franklin High School and were suspended for 10 days for disruptive or disobedient conduct. The disruptive or disobedient conduct occurred in the presence of a school administrator, who suspended the students. The students were not given a hearing; however, each was provided the opportunity for a conference after the suspension

effective date to discuss the student's future. Public school principals in Ohio were able to suspend a student for up to 10 days or expel a student for misconduct. Principals were required to notify the parents of the suspension within 24 hours of the decision and provide an explanation for the action.

A separate occurrence involved a student at another school who was suspended due to a disturbance in the lunchroom. Another incident in this case involved a student who was present at a demonstration at a high school that she did not attend. The student, and others, were arrested and taken to the police station; subsequently, they were released and not charged. The student was notified that she was suspended for 10 days. Neither the student who attended the demonstration nor the student in the lunchroom incident was provided the opportunity for a hearing.

The students claimed the suspension denied them of their constitutional rights, specifically the Due Process Clause of the Fourteenth Amendment. They felt the suspension denied them of an education without a hearing and wanted records of the suspensions to be cleared. The District Court found in favor of the students, declaring that they had been denied the right to due process and were suspended without being afforded the opportunity of a hearing. The decision was appealed by the school administrators directly to the United States Supreme Court. The Supreme Court affirmed the District Courts holding.

Another United States Supreme Court case involving a claim of Due Process violations is *Ingraham, et al. v. Wright, et al.* (1977). Two students at Drew Junior High School in Florida were paddled as a form of discipline by the school. Corporal punishment was a means of maintaining discipline in the schools and allowed through both Florida legislation and local School Board regulations. Limitations and specific directions were provided in the School Board

regulations concerning paddling. The students, through their parents, brought claims against the school officials involving the use of corporal punishment and the severity of the paddling. The plaintiffs felt that the use of corporal punishment was cruel and unusual punishment and, thus, a violation of their Eighth Amendment rights and a violation of the Due Process Clause due to the fact that the students did not receive notice or a hearing before the punishment was administered.

The complaint was dismissed by the United States District Court. The case was appealed by the plaintiffs and heard in the United States Court of Appeals for the Fifth Circuit. The original ruling by a panel of judges was to reverse the decision by the District Court. However, a rehearing of the case en banc resulted in affirmation of the District Court's ruling. The case was then heard by the United States Supreme Court. The Supreme Court held that the Eighth Amendment right against cruel and unusual punishment was not applicable to corporal punishment in the schools. Concerning the claim of a violation of the Due Process Clause, the Supreme Court found that since the practice of corporal punishment was authorized by common law, a notice and hearing before the administering of the punishment was not required.

The United States Supreme Court case *McLaurin v. Oklahoma State Regents for Higher Education, et al.* (1950) involved equal protection of the laws for all citizens. A Negro student applied to the University of Oklahoma and was denied admission based on his race. As a result of a complaint, the statutes in Oklahoma were modified and his admission was allowed; however, he was subject to segregated conditions. The student was allowed to use the classroom, cafeteria, and library as other students; however, his seating was segregated by requiring him to sit in a designated row or at a designated table.

The District Court found that this treatment did not violate the Fourteenth Amendment provisions. The plaintiff appealed the decision and the case was heard by the United States

Supreme Court. The Supreme Court held that the conditions under which the student was subject to while seeking his education deprived him of the right to equal protection of the laws as guaranteed in the Fourteenth Amendment.

A claim of violation of the equal protection clause of the Fourteenth Amendment was also brought in *Barbara Grutter v. Lee Bollinger, et al.* (2003) and involved a student who was denied admission to law school and the admissions policy of the law school. The admissions policy for the University of Michigan Law School was designed to attain a diverse student body. The admissions officials were required to review all information in the applicant's file (including letters of recommendation, grade point average of undergraduate work, an essay on the contribution the student would make to the law school diversity and life, and the Law School Admissions Test score) and also consider other variables (including the enthusiasm of the recommenders, the quality of the institution where the applicants received their undergraduate degree, and course selections by the applicants in their undergraduate work) when making the admission decision. The admissions policy did not consider diversity as only race or ethnic status.

An applicant, who was a White student, was not accepted into the law school and filed a suit alleging she was discriminated against on the basis of race, a violation of the Fourteenth Amendment. The District Court found in favor of the plaintiff, concluding that the admissions policy was not lawful. The case was appealed by the defendants and the United States Court of Appeals for the Sixth Circuit reversed the judgment. Certiorari was granted by the United States Supreme Court. The United States Supreme Court upheld University of Michigan law school admissions program that considered race in decision process. The court found (1) the law school

had a compelling interest in attaining a diverse student body and (2) the race conscious program was narrowly tailored.

### **Civil Rights Act of 1964**

The Civil Rights Act of 1964 expanded the rights granted under the Fourteenth Amendment (Legal Information Institute, n.d., *Civil Rights*). This act prohibited discrimination in employment and the practice of segregation in public buildings such as public schools and public libraries. Additionally, the act made segregation in businesses unlawful (United States Government, n.d., *Civil Rights Act (1964)*). “This document was the most sweeping civil rights legislation since Reconstruction” (United States Government, n.d., *Civil Rights Act (1964)*, para.1).

The Equal Employment Opportunity Commission was created from Title VII of the Civil Rights Act of 1964 and charged with implementing the law. Federal Statutes that prohibit employment discrimination include:

- Title VII of the Civil Rights Act of 1964 – prohibits discrimination in employment based on “race, color, religion, sex, or national origin” (U.S. National Archives and Records Administration, n.d., *Teaching With Documents*, para. 6).
- Age Discrimination in Employment Act of 1967 – prohibits discrimination of individuals 40 years and older in employment.
- Equal Pay Act of 1963 – discrimination based on gender in the payment of work under similar conditions is prohibited.
- Title I of the Americans with Disabilities Act – prohibits discrimination based on a disability.

- Section 501 of the Rehabilitation Act of 1973 – prohibits discrimination of disabled federal employees.
- Title IX of the Education Act of 1972 – prohibits education programs that receive federal funding from gender discrimination (U.S. National Archives and Records Administration, n.d., *Teaching With Documents*).

### **Other Areas of Law**

In addition to legal concerns involving constitutional law, a variety of other areas of law have affected music educators. These include tort law, contract law, copyright law, disability law, the Family Educational Rights and Privacy Act, and sexual harassment.

#### **Tort Law**

Tort law involves civil wrongs that are recognized by the law as a basis for a lawsuit (Cornell University Law School, n.d., *Tort*). Tort cases are based on the principle that individuals may be held liable for a behavior that causes injury to another. Damages resulting from tort cases could be either compensatory or punitive, and the lawsuit can involve an individual and/or the school system. Negligence, intentional torts, and defamation are the three categories involved in school tort law (Cambron-McCabe, McCarthy, & Thomas, 2004).

#### **Negligence**

Negligence is a failure of an individual's legal duty to protect another from harm (Cambron-McCabe et al., 2004). Negligence usually involves an action but can also be claimed for failure to act if the defendant has a duty to act (Cornell University Law School, n.d., *Negligence*). In order for a claim of negligence to occur, the injury must have been avoidable through exercise of reasonable care. A successful tort claim must address four areas: "(1) the defendant has a duty to protect the plaintiff, (2) the duty is breached by the failure to exercise an

appropriate standard of care, (3) the negligent conduct is the proximate or legal cause of the injury, and (4) an actual injury occurs” (Cambron-McCabe et al., 2004, p. 468).

**Duty to protect.** School officials have a duty to protect the individuals in their care from foreseeable risks. Under this consideration, school officials must provide supervision of students, present adequate student instruction for activities that pose a risk, maintain care of facilities and equipment, and inform the students and parents of any risks they may encounter. Adequate supervision is important in all school settings; however, in areas that are of increased risk (school shops, gymnasiums, laboratories, field trips) the school must show that proper instruction and sufficient supervision were provided. The more risk involved in the activity, the more instruction required on that risk. No set level of supervision is required of the schools; rather, the activity or action involved would determine the appropriate supervision (Cambron-McCabe et al., 2004).

Additional considerations that involve the duty required of the school include equipment and facilities and duty to warn. “School officials have a common law duty to maintain facilities and equipment in a reasonably safe condition” (Cambron-McCabe et al., 2004, p. 473). This does not require that the school district anticipate everything; rather, it compels the schools to keep facilities and equipment properly maintained and to instruct students in safety procedures. Schools must let students and parents know of any risks they may encounter. This gives the parents and students the ability to accept the risk if they so choose (Cambron-McCabe et al., 2004).

**Breach of duty and standard of care.** The next area to address involving negligence is breach of duty. A duty is breached if someone has a duty of care and fails to meet that duty with an appropriate standard of care. School officials must provide an appropriate standard of care for

the students. The courts consider whether the defendant responded as a reasonable person, under similar circumstances, when determining standard of care.

The reasonable person is a hypothetical individual who has (1) the physical attributes of the defendant; (2) normal intelligence, problem-solving ability, and temperament; (3) normal perception and memory with a minimum level of information and experience common to the community; and (4) such superior skill and knowledge as the defendant has or purports to have. (Cambron-McCabe et al., 2004, p. 477)

**Proximate or legal cause.** Proximate Cause is the third area to consider when determining negligence. Proximate Cause is the defendant's wrongful action that led to the injury (Clapp, 2000). If it were not for the Proximate Cause, the injury would not have occurred (Cambron-McCabe et al., 2004).

**Actual injury.** The final area to address involving negligence is injury. An injury must be incurred for negligence to exist, and the injury may be incurred by the individual or to the property of the individual. If a reasonable standard of care is provided and a child is injured, usually no liability is assessed. The Good Samaritan law protects individuals who help others in an emergency; however, only actions that a reasonable person would take are protected (Cambron-McCabe et al., 2004).

### **Intentional torts**

“Intentional torts are those wrongs which the defendant knew or should have known would occur through their actions or inactions” (Cornell University Law School, n.d., *Tort*, para. 5). Intentional torts include “assault, battery, false imprisonment, and intentional infliction of mental distress” (Cambron-McCabe et al., 2004, p. 486). Placing someone in fear of harm constitutes assault. Battery occurs when the physical action of an assault occurs. Examples of

assault and battery in a school setting may include corporal punishment, self-defense, or acting to defend others. Imprisonment occurs when someone is restrained against his or her will.

Restraint in schools can involve having a student sit in a particular seat, walking with a student, or placing the student in an area from which he/she is not allowed to leave (Cambron-McCabe et al., 2004).

### **Defamation**

Written or oral statements that cause injury to a person's reputation are called defamation (Cornell University Law School, n.d., *Defamation*). Two forms of defamation include slander, which is spoken, and libel, which is written (Cambron-McCabe et al., 2004).

### **Contract Law**

Under Contract Law, a contract is an agreement involving a minimum of two parties relative to a specific subject (Larson, 2003). Generally speaking, "contracts are promises that the law will enforce" (Legal Information Institute, n.d., *Contract*, para. 2). The elements necessary in a contract include "mutual assent, consideration, capacity, and legality" (Legal Information Institute, n.d., *Contract*, para. 1).

Mutual assent occurs when the parties involved in the contract come to an agreement of the terms. Mutual assent is usually displayed by an offer and an acceptance (Legal Information Institute, n.d., *Mutual Assent*). Consideration in Contract Law involves the exchange of something of value (Larson, 2003). Capacity, often an established minimum age and the need for the parties to be of sound mind, refers to the ability of the parties involved to meet the requirements of the contract (Legal Information Institute, n.d., *Capacity*). Finally, for the contract to be enforced by law, the subject matter of the contract must be legal (Legal Information Institute, n.d., *Legality*).

The Statute of Frauds requires some contracts to be written and signed by all parties involved in the contract (Larson, 1998–2009, *The Statute of Frauds and Contract Law*).

Statute of Frauds.... The most common kinds of contracts covered by such statutes are agreements to be responsible for someone else’s debt, contracts for the sale of land, contracts for the sale of goods above a certain price, and contracts requiring performance more than a year after the making of the contract. (Clapp, 2000, p. 412)

The topic of oral contracts is also addressed under contract law. Oral contracts can be enforceable by law if the contract terms can be proved. However, providing proof of the terms of an oral contract can be difficult. When creating a contract, it is best to put the terms in writing and receive signatures of all parties involved (Larson, 2003).

A written or oral agreement is not necessary to establish a contract (Legal Information Institute, n.d., *Contract Implied In Fact*). An implied contract, which can also be referred to as a contract implied in fact or a contract implied in law, is “a contract manifested by conduct” (Clapp, 2000, p. 105).

### **Copyright Law**

Copyright law is one part of larger legislation known as Intellectual Property. As early as 1883 at the Paris Convention for the Protection of Industrial Property, the safeguarding of the “creations of the human mind” was established (World Intellectual Property Organization, n.d., *Understanding Copyright and Related Rights*). The Berne Convention for the Protection of Literary and Artistic Works in 1886 moved copyright protection towards international law. The purpose of the convention was to allow the member nations international protection for their creative works (World Intellectual Property Organization, n.d., *WIPO Treaties – General Information*).

Copyright is one of the two categories of Intellectual Property which “refers to creations of the mind: inventions, literary and artistic works, and symbols, names, images and designs used in commerce” (World Intellectual Property Organization, n.d., *What is Intellectual Property?*, para. 1). Specific issues of copyright include “literary and artistic works such as novels, poems and plays, films, musical works, artistic works such as drawings, paintings, photographs and sculptures, and architectural designs” (World Intellectual Property Organization, n.d., *What is Intellectual Property?*, para. 2). Performers and producers also have rights in relation to copyright (World Intellectual Property Organization, n.d., *What is Intellectual Property?*). One of the fundamental rights granted owners of copyright is the ability to prohibit unauthorized copies of their work. A work, once created, is immediately protected under intellectual property laws (World Intellectual Property Organization, n.d., *Understanding Copyright and Related Rights*).

## **Disability Law**

**Americans with Disabilities Act.** The Americans with Disabilities Act (ADA) protects individuals from being discriminated against because of a disability. Protection under the ADA requires an individual to have a disability or close association with someone who has a disability:

An individual with a disability is defined by the ADA as a person who has a physical or mental impairment that substantially limits one or more major life activities, a person who has a history or record of such an impairment, or a person who is perceived by others as having such an impairment. (United States Department of Justice, 2005, p. 1)

A wide variety of provisions are held in the ADA to protect individuals with disabilities:

Title I – Employment: requires qualified disabled individuals an equal opportunity to receive benefits granted others by employers having 15 or more employees.

Title II – State and Local Government Activities: provides that all persons with disabilities must be granted the opportunity to benefit from all public services provided (e.g. public education, recreation, social services, etc.).

Title II – Public Transportation: requires newly purchased transportation to be fully accessible to persons with disabilities and the purchase of used transportation should involve efforts of good faith to meet the same requirements.

Title III – Public Accommodations: requires that private entities that operate public facilities must not allow exclusion or unequal treatment of persons with disabilities.

Title IV – Telecommunications Relay Services: involves telephone and television access for hearing and speech impaired individuals (United States Department of Justice, 2005).

An applicant or employee with a disability is considered qualified if, with reasonable accommodations, he/she can perform the basic functions involved in the job. The employer is required to make these reasonable accommodations provided they do not cause excessive hardships on the business (United States Equal Employment Commission, n.d., *Facts About the Americans with Disabilities Act*). A reasonable accommodation is a change in the work environment that assists a person with a disability to apply for employment, improve performance of the job, or better enjoy the employment (United States Equal Employment Commission, n.d., *Disability Discrimination*).

**Special education law.** Students identified with disabilities are protected under special education laws. These federal statutes include:

- The Individuals with Disabilities Education Act,
- Section 504 of the Rehabilitation Act,
- The Americans with Disabilities Act, and

- The No Child Left Behind Act.

***Individuals with Disabilities Education Act.*** “The Individuals with Disabilities Education Act (IDEA) (formerly called P.L. 94-142 or the Education for all Handicapped Children Act of 1975) requires public schools to make available to all eligible children with disabilities a free appropriate public education in the least restrictive environment appropriate to their individual needs” (United States Department of Justice, 2005, p. 15). This act mandates that the public school systems develop an Individualized Education Plan (IEP) and follow the established procedures in creating this plan. In the IEP, the services and special education received by the child must reflect the student’s individual needs (United States Department of Justice, 2005). The IEP must be developed by a team of individuals that includes the teacher(s), the child’s parents, the student (if appropriate), a special education representative, and any additional individuals that the parent or special education agency may wish to include (United States Department of Justice, 2005).

A child with a disability must meet established requirements in order to qualify for services outlined in the IDEA. The child must:

- be between three and 21 years old;
- display a specifically identified disability; and
- need a special education, including specifically designed instruction, in order to meet the previously stated guidelines of ensuring all students receive a free appropriate public education and be taught in the least restrictive environment that complies with their Individualized Education Plan (Osborne & Russo, 2006).

***Section 504 of the Rehabilitation Act.*** Section 504 of the Rehabilitation Act involves all programs and activities that receive federal funding. In Section 504, qualified individuals are

granted the rights not to be excluded, denied benefits, or be discriminated against (United States Department of Justice, 2005).

***No Child Left Behind Act.*** Enacted in 2002, the No Child Left Behind Act (NCLB) has strong implications for special education (Latham, Latham, & Mandlawitz, 2008). Referred to as the “Four Pillars of NCLB,” “No Child Left Behind is based on stronger accountability for results, more freedom for states and communities, proven education methods, and more choices for parents” (United States Department of Education, 2004, para. 1).

**Stronger accountability for results.** States are working to ensure that all students meet academic proficiency. Annual report cards for the school and school district provide information about the school’s progress in this area. Schools that are not making progress must provide additional services, such as tutoring or assistance after school hours, in order to correct the deficit. If adequate progress is not demonstrated after five years, the school will undergo major changes (United States Department of Education, 2004).

**More freedom for states and communities.** The states and school districts are provided with increased freedom in how they use federal education funds. This freedom allows them to meet the specific needs of their school district (United States Department of Education, 2004).

**Proven education method.** The No Child Left Behind Act encourages school districts to focus attention on education practices that have been scientifically proven to be effective (United States Department of Education, 2004).

**More choices for parents.** Parents of students in low-performing schools are provided options for the education of their child. If a school does not meet the established standards for two consecutive years, the parents are given the right to transfer their children to a better performing school in their school district. Additional services are also available for low-income

families in schools that are not performing up to the established standards and for students that attend a school considered persistently dangerous (United States Department of Education, 2004).

### **Family Educational Rights and Privacy Act**

The Family Educational Rights and Privacy Act (FERPA), is a Federal law applicable to schools that receive United States Department of Education funding. This Act ensures that student education records are kept private by providing rights to the parents regarding the student's education records or to the eligible student when the student turns 18 years old or attends a postsecondary institution. The primary purposes of FERPA involve the rights of the parents and eligible student in regard to the student's education records (United States Department of Education, 2010, *Family Educational Rights and Privacy Act*). Specifically, FERPA provides the parent or eligible student the right to

- review the education records of the student,
- request corrections on school records believed not to be accurate, and
- require written permission to disclose information about the education records of the student except under certain circumstances (United States Department of Education, 2010, *Family Educational Rights and Privacy Act*).

Additionally, institutions must notify the parents or eligible students annually of the rights granted to them under the Family Educational Rights and Privacy Act (United States Department of Education, 2009, *FERPA General Guidance for Students*).

## **Sexual Harassment**

Sexual harassment is prohibited by Federal law in Title VII of the Civil Rights Act of 1964. In this law, employers are responsible for both preventing and stopping sexual harassment in the workplace (Equal Rights Advocates, 2010).

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitutes sexual harassment when submission to or rejection of this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance or creates an intimidating, hostile or offensive work environment. (Equal Employment Opportunity Commission, 2002, para. 2)

As mentioned in the definition, several factors need to be considered when determining if sexual harassment has occurred. The sexual behavior must be unwelcome; a welcome behavior would not be considered sexual harassment. The conduct of the unwelcome "sexual nature" may take many forms including verbal or non-verbal, written, physical, or visual (Equal Rights Advocates, 2010). For the conduct to be determined sexual harassment, it must be either severe or pervasive. If an unwelcome sexual advance interferes with one's work or causes a hostile work environment, it may be sexual harassment. Employers have a duty to try to prevent sexual harassment in the workplace and take corrective measures against sexual harassment that has occurred. However, in order for employers to be held legally responsible for correcting the sexual harassment, they must be made aware that the situation has occurred (Equal Rights Advocates, 2010).

*Meritor Savings Bank, FSB v. Vinson, et al.* (1986) involved the subject of sexual harassment. A female employee alleged she was sexually harassed by a male supervisor. She

claimed she was subject to both public fondling and sexual acts (which she consented to for fear of losing her job). The supervisor denied having a sexual relationship with the employee. She brought this suit against the supervisor and the employer after her employment was terminated.

The District Court ruled in favor of the employer and the supervisor, holding that the relationship, if any existed, was voluntary and not a condition of the employee's job. The ruling also stated that the employer was not liable for the supervisor's alleged actions because they had not received notice of the actions. The United States Court of Appeals reversed the decision and remanded the case. The United States Supreme Court affirmed the Court of Appeals reversal of the District Court's judgment and remanded the case. In the decision, the Supreme Court held that Title VII does protect against "hostile environment" sex discrimination claims, and an employer is not automatically liable in claims of sexual harassment by their supervisors.

Another example United States Supreme Court case involving sexual harassment is *Christine Franklin v. Gwinnett County Public Schools and William Prescott* (1992). Christine Franklin, a high school student in the school district, filed a complaint under Title IX of the Education Amendment of 1972. She claimed continual sexual harassment and abuse by a high school teacher, Andrew Hill. The student stated that the sexual harassment began in the fall of her sophomore year of high school. She alleged that Hill initiated conversations about her sexual experiences, forcibly kissed her, called her to ask if she would see him socially, and three times during her junior year of high school asked that she be excused from another class so that the two could engage in intercourse at school. Franklin also claimed that the school teachers and officials knew of the sexual harassment against her and other female students; however, they did not take action against the behavior and discouraged her from filing charges. Hill resigned his

position after the complaint was filed under the condition that the school close its investigation and all matters against him be dropped.

The District Court dismissed the case on the grounds that an award for damages was not authorized by Title IX. The decision was affirmed by the United States Court of Appeals for the Eleventh Circuit. The case proceeded to the United States Supreme Court. The judgment was reversed concluding that Title IX does allow for a damage remedy and the case was remanded.

### **Chapter Conclusion**

While all teachers are at risk for legal action, music educators may be especially susceptible to the threat of litigation. Reasons for the increased risk may include the nature of the subject matter and the additional requirements involved in developing and implementing a comprehensive music education program. It is the responsibility of educators to know the law and how it directly impacts all aspects of their profession. Not only will this knowledge allow a better education for one's students, but it may also provide guidance for the educator in the event a legal question is raised.

The research methods and procedures utilized in this dissertation are presented in the next chapter. Additional information includes frequency tables that identify the legislation addressed in the federal court system involving music educators and court case analysis procedures. Lastly, the anticipated benefits of the study are described.

## CHAPTER 3. METHODOLOGY

This study sought to identify the legal concerns occurring in our federal court system involving music educators and to examine these cases regarding the background of the cases, the holdings, and the reasoning for the holdings if identified. The court case analysis included in this research provides the music educator with an awareness of the law as it pertains to the field of music education. Recommendations are offered for music educators to use in developing music programs that meet the needs of all students and in following the requirements of the law.

### **Research Methods and Procedures**

#### **Court Case Search Procedures and Parameters**

The selection of court cases for this study followed established procedures and parameters. The LexisNexis Academic Database was used to identify all pertinent court cases. Cases occurring in a United States Federal Court from January 1, 1995–December 31, 2009, were considered for inclusion. The 15-year time span selected for this study provided updated information on the legal issues in music education and court cases involving music educators. The court cases included in this research involved music educators in the K–12 and higher education levels as either the plaintiff or defendant and litigation that was relevant to their profession. Federal court cases that named the school system or school officials as either the plaintiff or defendant are also included if the litigation addressed in the case involved a music

educator or a school music concern. Specifically, the court cases in this study related directly to the music educator's duties in the field of education or a school music issue. The cases were categorized into Constitutional Law and other areas of law.

The term "music educator" is quite broad and includes all teachers and directors involved in instrumental music (band and orchestra), choral music, general music, and elementary music. A variety of search terms was utilized to discover as many court cases involving music educators as possible. These search terms included the following: music educator, music education, band director, band conductor, band instructor, band teacher, choir director, choir conductor, choir instructor, choir teacher, choral director, choral conductor, choral instructor, choral teacher, orchestra director, orchestra conductor, orchestra instructor, orchestra teacher, music director, music conductor, music instructor, music teacher, music specialist, musical director, musical conductor, musical instructor, musical teacher, string director, string conductor, string instructor, string teacher, strings director, strings conductor, strings instructor, strings teacher, and music therapist.

The search for court cases focused on both Constitutional Law and other areas of law. The research concerning the litigation involving music educators and Constitutional Law focused on the First, Fourth, Eleventh, and Fourteenth amendments. Under Constitutional Law, the analysis included court cases that involved music educators and the First Amendment issues encountered in education such as freedom of religion and the right to free speech. Court cases that involved the Fourth Amendment issues of search and seizure, Eleventh Amendment issues involving governmental immunity, and Fourteenth Amendment issues guaranteeing due process and equal protection were also addressed. Other areas of law in this research included tort law, contract law, copyright law, disability law (Americans with Disabilities Act and special

education law), the Family Educational Rights and Privacy Act (FERPA), and sexual harassment.

A separate search was conducted for each term for *music educator* and each area of law listed above (e.g., band director and First Amendment). This search revealed all cases that included the search terms; however, all of these cases did not meet the criteria for consideration in this study. Examples of cases that were revealed in this preliminary search that did not meet the established criteria included the cases in which the search terms were used as a reference to other cases and cases that involved litigation that was not in reference to the professional duties of a music educator. Additionally, in the preliminary search, many cases were identified under each area of law with multiple search terms for *music educator* (e.g., a case was identified using band director and First Amendment and the same case was identified using the search terms music teacher and First Amendment). These duplicate cases were taken out of the findings under each area of law in the refined search to best represent the actual number of cases involving music educators under each area of law. Table 1 displays a list of the number of cases under each search term for *music educator* involving each area of law in the *preliminary search*.

Table 1

*Preliminary Court Case Search Results for Music Educators and Specific Areas of Law (N=861)*

| <b>Search Term</b>   | <b>1st<br/>Amend</b> | <b>4th<br/>Amend</b> | <b>11<sup>th</sup><br/>Amend</b> | <b>14th<br/>Amend</b> | <b>FERPA</b> | <b>Special<br/>Educ</b> | <b>Sexual<br/>Har</b> | <b>Contract<br/>Law</b> | <b>Copy-<br/>right</b> | <b>Tort</b> | <b>Disability</b> |
|----------------------|----------------------|----------------------|----------------------------------|-----------------------|--------------|-------------------------|-----------------------|-------------------------|------------------------|-------------|-------------------|
| Music Educator       | 2                    | 0                    | 0                                | 2                     | 0            | 0                       | 0                     | 0                       | 1                      | 0           | 1                 |
| Music Education      | 7                    | 0                    | 4                                | 12                    | 0            | 8                       | 5                     | 0                       | 2                      | 8           | 14                |
| Band Director        | 19                   | 10                   | 4                                | 35                    | 0            | 9                       | 23                    | 0                       | 0                      | 26          | 11                |
| Band Conductor       | 0                    | 0                    | 0                                | 0                     | 0            | 0                       | 0                     | 1                       | 0                      | 0           | 0                 |
| Band Instructor      | 1                    | 1                    | 0                                | 5                     | 0            | 2                       | 4                     | 0                       | 0                      | 13          | 3                 |
| Band Teacher         | 8                    | 5                    | 2                                | 15                    | 1            | 9                       | 13                    | 0                       | 0                      | 11          | 9                 |
| Choir Conductor      | 0                    | 0                    | 0                                | 0                     | 0            | 0                       | 0                     | 0                       | 0                      | 1           | 1                 |
| Choir Director       | 26                   | 4                    | 1                                | 8                     | 0            | 1                       | 10                    | 3                       | 2                      | 8           | 13                |
| Choir Instructor     | 3                    | 0                    | 2                                | 3                     | 0            | 0                       | 0                     | 0                       | 1                      | 2           | 1                 |
| Choir Teacher        | 4                    | 2                    | 1                                | 5                     | 0            | 3                       | 2                     | 0                       | 0                      | 5           | 5                 |
| Choral Conductor     | 0                    | 0                    | 0                                | 0                     | 0            | 0                       | 0                     | 0                       | 0                      | 0           | 0                 |
| Choral Director      | 2                    | 0                    | 0                                | 2                     | 0            | 1                       | 1                     | 0                       | 1                      | 1           | 1                 |
| Choral Instructor    | 0                    | 0                    | 0                                | 0                     | 0            | 0                       | 0                     | 0                       | 0                      | 0           | 0                 |
| Choral Teacher       | 1                    | 0                    | 0                                | 1                     | 0            | 0                       | 0                     | 0                       | 0                      | 0           | 0                 |
| Orchestra Conductor  | 1                    | 0                    | 0                                | 0                     | 0            | 0                       | 2                     | 1                       | 2                      | 0           | 1                 |
| Orchestra Director   | 1                    | 0                    | 0                                | 1                     | 0            | 0                       | 2                     | 0                       | 0                      | 1           | 1                 |
| Orchestra Instructor | 0                    | 0                    | 0                                | 0                     | 0            | 0                       | 0                     | 0                       | 0                      | 0           | 0                 |
| Orchestra Teacher    | 2                    | 0                    | 0                                | 3                     | 0            | 1                       | 1                     | 0                       | 0                      | 2           | 1                 |
| Music Conductor      | 0                    | 0                    | 0                                | 0                     | 0            | 0                       | 0                     | 0                       | 1                      | 0           | 0                 |
| Music Director       | 30                   | 0                    | 0                                | 8                     | 0            | 0                       | 13                    | 1                       | 10                     | 17          | 10                |

(table continues)

| <b>Search Term</b> | <b>1st<br/>Amend</b> | <b>4th<br/>Amend</b> | <b>11<sup>th</sup><br/>Amend</b> | <b>14th<br/>Amend</b> | <b>FERPA</b> | <b>Special<br/>Educ</b> | <b>Sexual<br/>Har</b> | <b>Contract<br/>Law</b> | <b>Copy-<br/>right</b> | <b>Tort</b> | <b>Disability</b> |
|--------------------|----------------------|----------------------|----------------------------------|-----------------------|--------------|-------------------------|-----------------------|-------------------------|------------------------|-------------|-------------------|
| Music Instructor   | 8                    | 0                    | 0                                | 7                     | 0            | 1                       | 1                     | 0                       | 1                      | 1           | 5                 |
| Music Teacher      | 37                   | 9                    | 5                                | 45                    | 1            | 25                      | 25                    | 1                       | 4                      | 46          | 52                |
| Music Specialist   | 0                    | 0                    | 0                                | 0                     | 0            | 0                       | 0                     | 0                       | 0                      | 0           | 0                 |
| Musical Conductor  | 0                    | 0                    | 0                                | 0                     | 0            | 0                       | 0                     | 0                       | 0                      | 0           | 0                 |
| Musical Director   | 4                    | 0                    | 0                                | 2                     | 0            | 0                       | 0                     | 2                       | 8                      | 2           | 4                 |
| Musical Instructor | 0                    | 0                    | 0                                | 0                     | 0            | 0                       | 0                     | 0                       | 0                      | 0           | 0                 |
| Musical Teacher    | 1                    | 0                    | 0                                | 1                     | 0            | 0                       | 0                     | 0                       | 0                      | 0           | 1                 |
| String Director    | 0                    | 0                    | 0                                | 0                     | 0            | 0                       | 0                     | 0                       | 0                      | 0           | 0                 |
| String Conductor   | 0                    | 0                    | 0                                | 0                     | 0            | 0                       | 0                     | 0                       | 0                      | 0           | 0                 |
| String Instructor  | 0                    | 0                    | 0                                | 0                     | 0            | 0                       | 0                     | 0                       | 0                      | 0           | 0                 |
| String Teacher     | 0                    | 0                    | 0                                | 0                     | 0            | 0                       | 0                     | 0                       | 0                      | 0           | 0                 |
| Strings Director   | 0                    | 0                    | 0                                | 0                     | 0            | 0                       | 0                     | 0                       | 0                      | 0           | 0                 |
| Strings Conductor  | 0                    | 0                    | 0                                | 0                     | 0            | 0                       | 0                     | 0                       | 0                      | 0           | 0                 |
| Strings Instructor | 0                    | 0                    | 0                                | 0                     | 0            | 0                       | 0                     | 0                       | 0                      | 0           | 0                 |
| Strings Teacher    | 0                    | 0                    | 0                                | 0                     | 0            | 0                       | 0                     | 0                       | 0                      | 0           | 0                 |
| Music Therapist    | 0                    | 0                    | 1                                | 1                     | 0            | 5                       | 0                     | 0                       | 0                      | 2           | 6                 |
| <b>TOTAL</b>       | <b>157</b>           | <b>31</b>            | <b>20</b>                        | <b>156</b>            | <b>2</b>     | <b>65</b>               | <b>102</b>            | <b>9</b>                | <b>33</b>              | <b>146</b>  | <b>140</b>        |

## **Court Case Selection Criteria**

A review of all cases from the preliminary search was conducted to determine those that met the established criteria for this study. The cases included in this research involved music educators at the K–12 and higher education levels named as the plaintiff or defendant in the case and the facts of the case related directly to the music educator’s professional roles. Court cases that involved the school system or school officials as either the plaintiff or defendant were also included if the litigation resulted from the music educator’s actions or involved school music concerns. In this refined search, duplicate cases were omitted from the findings as the search progressed through the terms. This provided an accurate total of the court cases involved in each area of law. Table 2 displays a list of the number of cases under each search term for *music educator* involving each area of law in this *refined search*.

Table 2

*Refined Court Case Search Results for Music Educators and Specific Areas of Law (N=220)*

| <b>Search Term</b>   | <b>1<sup>st</sup><br/>Amend</b> | <b>4<sup>th</sup><br/>Amend</b> | <b>11<sup>th</sup><br/>Amend</b> | <b>14<sup>th</sup><br/>Amend</b> | <b>FERPA</b> | <b>Special<br/>Educ.</b> | <b>Sexual<br/>Harass</b> | <b>Contract<br/>Law</b> | <b>Copy-<br/>right</b> | <b>Tort</b> | <b>Disability</b> |
|----------------------|---------------------------------|---------------------------------|----------------------------------|----------------------------------|--------------|--------------------------|--------------------------|-------------------------|------------------------|-------------|-------------------|
| Music Educator       | 2                               | 0                               | 0                                | 2                                | 0            | 0                        | 0                        | 0                       | 0                      | 0           | 1                 |
| Music Education      | 5                               | 0                               | 1                                | 5                                | 0            | 1                        | 3                        | 0                       | 0                      | 6           | 6                 |
| Band Director        | 11                              | 2                               | 1                                | 17                               | 0            | 2                        | 11                       | 0                       | 0                      | 10          | 3                 |
| Band Conductor       | 0                               | 0                               | 0                                | 0                                | 0            | 0                        | 0                        | 0                       | 0                      | 0           | 0                 |
| Band Instructor      | 0                               | 1                               | 0                                | 1                                | 0            | 0                        | 1                        | 0                       | 0                      | 9           | 0                 |
| Band Teacher         | 1                               | 3                               | 0                                | 6                                | 1            | 3                        | 4                        | 0                       | 0                      | 3           | 2                 |
| Choir Conductor      | 0                               | 0                               | 0                                | 0                                | 0            | 0                        | 0                        | 0                       | 0                      | 0           | 0                 |
| Choir Director       | 3                               | 2                               | 0                                | 3                                | 0            | 0                        | 1                        | 0                       | 1                      | 0           | 0                 |
| Choir Instructor     | 0                               | 0                               | 0                                | 0                                | 0            | 0                        | 0                        | 0                       | 0                      | 1           | 0                 |
| Choir Teacher        | 1                               | 1                               | 0                                | 4                                | 0            | 0                        | 1                        | 0                       | 0                      | 2           | 0                 |
| Choral Conductor     | 0                               | 0                               | 0                                | 0                                | 0            | 0                        | 0                        | 0                       | 0                      | 0           | 0                 |
| Choral Director      | 0                               | 0                               | 0                                | 0                                | 0            | 0                        | 1                        | 0                       | 0                      | 1           | 0                 |
| Choral Instructor    | 0                               | 0                               | 0                                | 0                                | 0            | 0                        | 0                        | 0                       | 0                      | 0           | 0                 |
| Choral Teacher       | 1                               | 0                               | 0                                | 1                                | 0            | 0                        | 0                        | 0                       | 0                      | 0           | 0                 |
| Orchestra Conductor  | 0                               | 0                               | 0                                | 0                                | 0            | 0                        | 0                        | 0                       | 1                      | 0           | 0                 |
| Orchestra Director   | 0                               | 0                               | 0                                | 1                                | 0            | 0                        | 1                        | 0                       | 0                      | 1           | 1                 |
| Orchestra Instructor | 0                               | 0                               | 0                                | 0                                | 0            | 0                        | 0                        | 0                       | 0                      | 0           | 0                 |
| Orchestra Teacher    | 2                               | 0                               | 0                                | 2                                | 0            | 0                        | 0                        | 0                       | 0                      | 0           | 0                 |
| Music Conductor      | 0                               | 0                               | 0                                | 0                                | 0            | 0                        | 0                        | 0                       | 0                      | 0           | 0                 |
| Music Director       | 0                               | 0                               | 0                                | 3                                | 0            | 0                        | 0                        | 0                       | 0                      | 1           | 0                 |

(table continues)

| <b>Search Term</b> | <b>1<sup>st</sup><br/>Amend</b> | <b>4th<br/>Amend</b> | <b>11th<br/>Amend</b> | <b>14th<br/>Amend</b> | <b>FERPA</b> | <b>Special<br/>Educ.</b> | <b>Sexual<br/>Harass</b> | <b>Contract<br/>Law</b> | <b>Copy-<br/>right</b> | <b>Tort</b> | <b>Disability</b> |
|--------------------|---------------------------------|----------------------|-----------------------|-----------------------|--------------|--------------------------|--------------------------|-------------------------|------------------------|-------------|-------------------|
| Music Instructor   | 3                               | 0                    | 0                     | 2                     | 0            | 0                        | 1                        | 0                       | 0                      | 1           | 0                 |
| Music Teacher      | 9                               | 2                    | 1                     | 10                    | 1            | 7                        | 10                       | 0                       | 0                      | 6           | 9                 |
| Music Specialist   | 0                               | 0                    | 0                     | 0                     | 0            | 0                        | 0                        | 0                       | 0                      | 0           | 0                 |
| Musical Conductor  | 0                               | 0                    | 0                     | 0                     | 0            | 0                        | 0                        | 0                       | 0                      | 0           | 0                 |
| Musical Director   | 0                               | 0                    | 0                     | 0                     | 0            | 0                        | 0                        | 0                       | 0                      | 0           | 0                 |
| Musical Instructor | 0                               | 0                    | 0                     | 0                     | 0            | 0                        | 0                        | 0                       | 0                      | 0           | 0                 |
| Musical Teacher    | 0                               | 0                    | 0                     | 0                     | 0            | 0                        | 0                        | 0                       | 0                      | 0           | 0                 |
| String Director    | 0                               | 0                    | 0                     | 0                     | 0            | 0                        | 0                        | 0                       | 0                      | 0           | 0                 |
| String Conductor   | 0                               | 0                    | 0                     | 0                     | 0            | 0                        | 0                        | 0                       | 0                      | 0           | 0                 |
| String Instructor  | 0                               | 0                    | 0                     | 0                     | 0            | 0                        | 0                        | 0                       | 0                      | 0           | 0                 |
| String Teacher     | 0                               | 0                    | 0                     | 0                     | 0            | 0                        | 0                        | 0                       | 0                      | 0           | 0                 |
| Strings Director   | 0                               | 0                    | 0                     | 0                     | 0            | 0                        | 0                        | 0                       | 0                      | 0           | 0                 |
| Strings Conductor  | 0                               | 0                    | 0                     | 0                     | 0            | 0                        | 0                        | 0                       | 0                      | 0           | 0                 |
| Strings Instructor | 0                               | 0                    | 0                     | 0                     | 0            | 0                        | 0                        | 0                       | 0                      | 0           | 0                 |
| Strings Teacher    | 0                               | 0                    | 0                     | 0                     | 0            | 0                        | 0                        | 0                       | 0                      | 0           | 0                 |
| Music Therapist    | 0                               | 0                    | 0                     | 0                     | 0            | 2                        | 0                        | 0                       | 0                      | 0           | 3                 |
| <b>TOTAL</b>       | <b>38</b>                       | <b>11</b>            | <b>3</b>              | <b>57</b>             | <b>2</b>     | <b>*15</b>               | <b>34</b>                | <b>0</b>                | <b>2</b>               | <b>41</b>   | <b>*25</b>        |

\*These totals were combined to address Disability. When combining the cases in these areas of law, there were eight duplicate cases. These duplicate cases have been subtracted from the overall number of cases in the *refined search* and Disability Law total.

I used the hierarchy of the court system as the first step in determining the specific cases included in the study. The higher the court, the higher the precedent of the court's holding; thus, cases were considered for inclusion based on the hierarchy of our court system: United States Supreme Court, United States Courts of Appeals, and the United States District Courts. Specific United States District Court cases were selected incorporating the following additional considerations to achieve balance and diversity in the selection of cases and represent a wide variety of music education settings:

- case summary of facts and background information;
- geographical location of court;
- similar case facts with different court holdings;
- grade level (elementary, middle school, junior high, high school, higher education);
- subject (band, choir, orchestra, general music, etc.); and
- gender of music educator.

Once the target federal court cases were identified, 50 example cases were selected for review. The number of cases selected for review under each area of law was in proportion to the overall percentage of cases discovered in the search process (e.g., 17% of all cases involved a claim of First Amendment violations, thus 17% of the cases that were selected for review involved the First Amendment). A summary of each of the selected cases was written and data taken from each court case were entered in a database. The database included the following information:

- case citation;
- holding date;
- search terms used;

- cause of action;
- grade level (elementary, middle school, junior high, high school, higher education);
- subject (band, choir, orchestra, general music, etc.);
- brief description of case;
- court holding; and
- appeal information.

This court case identification process was comprehensive with the exception of the cases that provided a written notice. Cases that provided a written notice not to publish and cases that provided a written notice not to publish without written consent from the ruling court are examples of written notices. Cases that provided a written notice not to publish were not included in this study. Court cases outside of the established date range and court cases not involving music educators were included in the study to provide significant additional information and background for the reader.

This research included only federal court cases that involved music educators in their professional roles and school music concerns. It is very likely that considerably more litigation was settled at the local or state level of our legal system. Therefore, this study may not provide an accurate representation of the actual frequency of all cases brought forward involving music educators. Rather, the intention of this study was to address federal court cases that involved the selected areas of law to address frequency and utilize the hierarchy of the court system to reflect magnitude.

### **Reliability and Validity**

Reliability in this study was supported by multiple methods. Silverman (2005) stated, “for reliability to be calculated, it is incumbent on the scientific investigators to document their

procedure and to demonstrate that categories have been used consistently” (p. 224). Therefore, strict adherence to the case selection and analysis procedures previously addressed was maintained. The data collected were used to interpret, code, and organize the findings. The information and findings were then submitted to a paralegal and the legal specialist on the doctoral committee to review for accuracy and consistency involved in the legal interpretation and coding analysis. This process provided a thorough review of the information collected and conclusions drawn from the data interpretation to ensure reliability of the study. An additional aid to the reliability of this study is that the information included in this document analysis is a matter of public record. The reader may choose to review the actual court case summaries as presented in court records or online to determine his/her own perspective on the issue.

A variety of methods of analysis was utilized to establish the validity for this research. The constant-comparative method, comprehensive data treatment, deviant case analysis, and use of appropriate tabulations could assist in providing more validity to qualitative data analysis (Silverman, 2005) and each method was utilized in this study. The constant-comparative method requires researchers to continually seek additional cases to test their hypothesis (Silverman, 2005). This study included an initial review of all federal court cases involving K–12 and higher education music educators serving in their professional roles. Comprehensive data treatment and deviant case analysis refer to the comprehensiveness of the cases included in the analysis and addressing deviant cases (Silverman, 2005). The selection of court cases for this study was both comprehensive and diverse as I sought to represent a wide variety of music education settings. The use of appropriate tabulations could offer a way for the reader to survey all data in a qualitative research study (Silverman, 2005). Tabulations were included in this study to identify the number of court cases that involved each of the search terms and each area of law in both a

preliminary and refined search. These tabulations addressed the frequency that each area of law impacts music educators in the federal court system. A database was also included to provide a brief overview of each case for the reader. These methods of analysis supported the validity of this study through demonstrated attention to all cases that met the established criteria and the provision of the findings in both tabulations and original court case proceedings.

### **Court Case Analysis**

The summary of each court case selected for review was placed in the area of law it addressed. If a case involved multiple areas of law, such as a claim of violations against the plaintiff's First and Fourteenth amendment rights, the case was included under only one area of law. Cases that involved multiple violations of the law were placed under one area of law through review of the factual background of the case and the relevance the facts provided in reference to the legislation. Once organized by area of law, coding was used to identify themes to provide the focus of the analysis. The information gathered from each court case—citation, holding date, search terms used, cause of action, grade level (elementary, middle school, junior high, high school, higher education), subject (band, choir, orchestra, general music, etc.), brief description of case, court holding, and appeal information—provided specific value to the research conducted. The citation, search term factors, grade level, subject, and a brief description of the case provided information for reference, analysis, and further study. The impact each area of law had on the music education profession was addressed through the legislation involved in the case considering both magnitude and frequency. The selection and review of court cases utilizing the hierarchy of the court system revealed the cases that represent a higher level of precedence. The lower courts in our court system base their holdings on previously established, higher court holdings; therefore, the magnitude in this study was

addressed through the precedent of the higher court cases. Frequency was determined by tallying the number of court cases that involved music educators under each area of law. This tally identified the areas of law that were addressed most often in our federal court system involving music educators.

The identification of the areas of law that most frequently impact the profession provided an area of focus for this research. The tally and comparison of the number of court cases under each area of law by year, from 1995 to 2009, was used to determine trends in the areas of law involving music educators. Additional information collected included identification of the court holdings and the appeal information, if applicable, for each case. This information was necessary to report the holding and provided insight into how the music educator may reduce vulnerability to these types of legal concerns.

### **Anticipated Applications and Benefits of the Study**

The case document analysis in this research focused upon practical applications and implications for music educators. The information is intended to support and strengthen teaching in the field of music education and empower music educators to provide the best education possible for each of their students. A summary of court cases and case analysis is presented in the next chapter. This information, based on the court proceedings and holdings, provides music educators a greater awareness of the law and how it has impacted the field of music education.

## CHAPTER 4. COURT CASE ANALYSIS AND FINDINGS

This chapter presents four components in the analysis of the court cases selected for inclusion in this study: a chart summarizing the frequency of areas of law in federal cases involving the music education profession, case summaries according to area of law, summaries of the legal considerations employed by the courts in establishing the holdings for the cases, and a concise synopsis of each selected case. Through this analysis, information is provided that will allow music educators to have an improved understanding of the law and assist them as they work within the guidelines of the law in their teaching and music program development.

### **Court Case Analysis**

A chart was generated to tally the frequency and percent of federal court cases that met the established criteria for this study from January 1, 1995–December 31, 2009. The federal court cases included in this study directly involved K–12 and higher education music educators in their professional roles as either the plaintiff or defendant or a school system or school administration involved in a federal court case as the result of a school music concern or the music educator’s actions. The percentage of cases under each area of law determined the number of court case summaries included in the study (e.g. 17% of the court cases involved the First Amendment; thus, 17% of the court case summaries are included under the First Amendment). Table 3 identifies the percentage of cases included under each area of law.

Table 3

*Federal Court Cases in the Refined Search and the Resulting Percentage of Cases under Each Area of Law (N = 220)*

| Area of Law          | # of Cases Identified in Refined Search | Percentage of Cases in Refined Search |
|----------------------|---|---------------------------------------|
| First Amendment      | 38                                      | 17%                                   |
| Fourth Amendment     | 11                                      | 5%                                    |
| Eleventh Amendment   | 3                                       | 1%                                    |
| Fourteenth Amendment | 57                                      | 26%                                   |
| FERPA                | 2                                       | <1%                                   |
| Sexual Harassment    | 34                                      | 15%                                   |
| Contract Law         | 0                                       | 0%                                    |
| Copyright            | 2                                       | <1%                                   |
| Tort                 | 41                                      | 19%                                   |
| Disability           | 32                                      | 15%                                   |

Each area of law is represented in this chapter. The information provided includes an introduction stating the frequency that the area of law impacted music educators, the subject matter(s) revealed in the court case analysis involving that area of law, and the organization of the cases presented under that particular area of law. Next, the court case summaries are presented. These summaries include the facts of the case, the plaintiff's claims, and the case holdings. Once all cases under each area of law are addressed, legal considerations for the court holdings are presented. Information in this section includes the rationale or established procedures, facts, and tests the courts used to determine the holdings in the cases involved under that particular area of law.

Many federal court cases allege multiple violations of the law. In this study, each court case is represented under only one area of law; however, all legislation addressed in each case is identified. The placement of cases involving multiple areas of law was determined by the factual background provided in the case in reference to the legislation.

### **First Amendment**

The First Amendment of the United States Constitution states:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. (U.S. National Archives & Records Administration, 2010, *The Bill of Rights*, para. 11)

The analysis conducted for this study revealed that 17% of the cases involving music educators heard in federal court from January 1, 1995–December 31, 2009 were directly related to the First Amendment. These cases involved freedom of speech, the Establishment Clause, the Free Exercise Clause, and freedom of association. The litigation considered for case analysis included spoken, written, and music performance forms of speech. The First Amendment court cases were organized under three categories: Violation Claims Involving Music Selections, Violation Claims Involving Employee First Amendment Rights, and Violation Claims Involving Student First Amendment Rights.

#### **Violation claims involving music selections**

*Skarin, et al. v. Woodbine Community School District, et al. (2002)*. Donovan and Ruby Skarin were members of the Woodbine High School Choir. The choir participated in the school's graduation ceremony each year and the members were expected to participate in the

rehearsals and performance. The students were given the option of completing another music activity to compensate for a missed rehearsal or performance. A musical setting of “The Lord’s Prayer” was the selection to be performed at the graduation ceremony.

The Skarins claimed they were offended by having to either perform and rehearse “The Lord’s Prayer” or be excluded from the activity. Christine Skarin, the student’s mother, went to the principal and a school board member to express this concern. The initial decision was to stand behind the music selection claiming that the majority view should prevail. However, the principal and choir director decided, in December, that “The Lord’s Prayer” would not be sung at the graduation ceremony. After hearing of this decision, the school board discussed the matter and decided “The Lord’s Prayer” should be performed at the graduation ceremony along with a secular song. The Board decided to keep “The Lord’s Prayer” in the ceremony because they felt the Christian prayer was important to the students of Woodbine and the graduation attendees. The musical significance of the selection or educational value of the selection were never discussed in the decision to include the work in the ceremony.

The Skarins filed suit claiming that the rehearsal and performance of “The Lord’s Prayer” violated the Establishment Clause of the First Amendment. Finding that the performance of this selection had no secular purpose and did foster an “entanglement” between the Christian religion and government, the court granted plaintiff’s request for an injunction to prohibit the rehearsal and performance of the selection. The injunction was to remain in effect as long as the plaintiffs attended the high school.

*Doe, et al. v. Duncanville Independent School District, et al. (1995).* The next case also alleged violations of First Amendment rights; however, the pedagogical value of the music was considered in this case. Jane Doe was a seventh grade student in the Duncanville Independent

School District in 1988. Doe was on the school basketball team and was put in the athletic class for team members. This class was held at the end of the school day and then extended into practice after school hours. Academic credit was given for this class. Prayer was a part of every basketball practice, in the locker room, on the basketball court after games, and while traveling to games. The prayers were a tradition and the coach participated in and initiated prayer.

In an attempt to not be singled out, Doe participated in the prayers. Doe's father, John Doe, attended a basketball game and saw his daughter participating in prayer. In a discussion with her father, Jane stated that she would rather not participate in the prayer and her father said that she did not have to participate. Doe did not participate in prayer with the team and this drew attention and comments from students, spectators, and teachers. John Doe complained to the assistant superintendent about the prayers. While the prayers at pep rallies were stopped, the assistant superintendent claimed he could not do anything about the prayers after the games.

Jane Doe joined the choir and received academic credit for the class. The choir had a religious-based theme song that she was required to sing and the theme song was sung at many events and during class. The Duncanville Independent School District had several other religious customs including prayers, distribution of pamphlets with religious songs in them, student initiated prayer before football games, and Gideon Bible distribution to fifth grade students.

The plaintiffs claimed these practices were a violation of the Establishment Clause. The District Court prohibited the Duncanville Independent School District from allowing its employees to participate, encourage or lead prayers with students at curricular and extra-curricular events. The Court also prohibited the religious-based theme song to be sung by the choir and the Gideon Bible distribution to fifth grade students. The school district appealed this

decision and the United States Court of Appeals affirmed the District Court's holding that the faculty-led prayer and participation in prayer with students was a violation of the Establishment Clause of the First Amendment. The United States Court of Appeals reversed the injunction on the choir theme song recognizing the song's musical value rather than viewing it as a religious exercise. Lastly, the injunction on the distribution of the Gideon Bible was vacated.

*O.T., et al. v. Frenchtown Elementary School District Board of Education, et al. (2006)*. The following case involved an individual student's selection of religious music to perform at a school function. The Frenchtown Elementary School hosts after-school talent shows for student and adult participation. The talent show, known as Frenchtown Idol, was organized and run by the music teacher, Erica Bruner. All students were invited to perform and participation was voluntary. Specific guidelines governed the talent show. The guidelines stated that the acts had to be reviewed by a committee comprised of the music teacher and other faculty. Questionable acts were subject to approval by the Superintendent.

The plaintiff signed up to sing one song; however, she changed the selection to "Awesome God" at the preview. Bruner was familiar with the song and told the student that the superintendent would have to review the song to check its appropriateness for the talent show. After review, the superintendent determined that it was not appropriate for the talent show due to its religious message. The plaintiff was told that she could not perform "Awesome God" and was provided books of songs to select another, including a religious song, if she desired.

This matter was addressed at the Frenchtown Elementary School Board meeting that same evening. Mrs. Turton attended the meeting and provided information on the protections of the First Amendment. The school told Mrs. Turton that they would contact their attorney to provide advice on the matter. The School Board, based on information from the school attorney,

decided that O.T. would not be allowed to sing “Awesome God” at the talent show due to the religious content of the selection.

The plaintiffs filed a complaint alleging First Amendment violations. Both the plaintiffs and defendants filed for summary judgment. The United States District Court granted summary judgment for the plaintiffs and denied the motion for summary judgment by the school board.

This Court rejects the notion that the Frenchtown Idol audience would perceive Plaintiff’s song as the ‘public expression’ of anyone other than Plaintiff herself. Thus, I find that Defendant has not established a valid Establishment Clause concern that would justify discriminating against Plaintiff’s speech. (O.T., et al. v. Frenchtown Elementary School District Board of Education, et al. 2006, p. 13)

*Mike McCann, et al. v. Fort Zumwalt School District, et al. (1999)*. The right to free speech involving instrumental music was challenged in the next case. Fort Zumwalt High School offered marching band as part of the curriculum for the course entitled “Symphonic Band.” Students enrolled in this course are required to attend performances and competitions and are only excused for good reason. Students received grades and earned credit for participation in Symphonic Band.

Robert Babel, the band director at Fort Zumwalt, was in charge of selecting music and organizing performances. The theme selected for the marching band show in 1998–99 was rock music of the 1960s and 70s. Included in the selections to be performed was “White Rabbit”, a song by Jefferson Airplane. Following a preview of the band’s halftime show, a parent and school board member, Lisa Leake, contacted the Superintendent, Bernard DuBray, with concern about including “White Rabbit” in the marching show because she believed the song referred to drugs. She sent a copy of the lyrics to DuBray; however, the band did not sing any of the lyrics.

After reviewing the song, DuBray determined it inappropriate for the band to play in their halftime show. He felt it relayed a message to the students that conflicted with the school's anti-drug policy. The band had to cancel one of its competitions due to the fact they needed to prepare another selection. The band added another song in the halftime show that allowed them to retain their original show theme.

The plaintiffs, individual members of the Fort Zumwalt High School Marching Band, claimed a violation of their First Amendment right to free speech. The defendants claim they had the right to "regulate" the speech since it was a school-sponsored event and their actions involved legitimate teaching concerns. The Court agreed and summary judgment was granted to the defendant.

*Stratechuk v. Board of Education, South-Orange Maplewood School District, et al. (2008/2009)*. The following case involves the implementation of an Arts Policy created to avoid a First Amendment violation in the district's musical performances. Until the 2004 school year, the concerts in the South Orange-Maplewood School District included the performance of traditional Christmas and Hanukkah songs. A parent complained to the music director that she did not want her child to play the music at the concert. The music director contacted the Director of Fine Arts and Assistant Superintendent to inform them of the complaint. Later, the same parent contacted the Superintendent, Peter Horoshak, stating that the 2003 South Orange Middle School December Concert focused on religious holidays and that was in violation of Board policy. The Superintendent responded to the letter citing that through the performance of both secular and holiday selections, no particular religious views were attempting to be advanced. He also stated that additional discussions would be held on the topic to ensure the music programs met with the Board policy.

The School Board decided that the policy should be implemented consistently. In the fall of 2004, the Director of Fine Arts conducted a meeting with the department. He told the music directors that he would have to approve their music programs and that religious holiday music could not be performed. A later meeting with the Superintendent, Director of Fine Arts, Assistant Superintendent and the School District attorney was held to clarify the issue. The School District received many complaints about the new policy that was implemented.

Michael Stratechuk, father of two children in the school district, claimed that the actions by the Board demonstrated a disapproval of religion. He claimed this disapproval of religion was a violation of the First Amendment Establishment Clause. The District Court granted the defendant's motion for summary judgment. The plaintiffs appealed and the decision was affirmed in the United States Court of Appeals for the Third Circuit.

*Bauchman v. West High School, et al. (1995/1997).* Music selections were not the only aspect of the music education setting in reference to First Amendment concerns that were challenged in court. Multiple aspects involving the choir program and the actions of the choir director were challenged in the following case. Rachel Bauchman was a student at West High School in Salt Lake City, Utah. Bauchman auditioned for and was selected to participate in the choir during the 1994–95 school year. Bauchman, who is Jewish, alleged that the music instructor, Mr. Torgenson, promoted his religious beliefs in the public school classroom and in choir performances. She cited many claims, including: the choir performed a large number of Christian devotional selections, the songs were selected according to the portrayed message, the choir was required to perform the Christian songs at religious venues, the religious venues were selected to develop an association between the choir and religious institutions, the instructor selected some choir students to go on a tour where they performed religious selections in

religious venues, and the instructor selected two religious selections to be performed at the 1995 graduation ceremony. Bauchman presented an additional list of Torgenson's alleged constitutional violations dating back to well before she was a student in the choir. She alleged that the other defendants in this case knew of Torgenson's promotion of religion in his class and did nothing to stop it. Bauchman enrolled in a private school for her senior year, 1996–97.

After the 1994–95 school year, Bauchman filed a complaint claiming Constitutional violations of the Establishment, Free Exercise, and Free Speech Clauses along with a State Constitution violation of the Religion and Speech Clauses. The school district and music instructor moved for the complaint to be dismissed. The United States District Court found in favor of the school system and Bauchman appealed the court's decision. The United States Court of Appeals affirmed the dismissal of federal claims and the decision to deny her leave of the amended complaint. The state constitutional claims were remanded to district court where they were instructed to dismiss without prejudice. The claim for injunctive and declaratory relief was dismissed as moot.

### **Violation claims involving employee First Amendment rights**

*Lewis v. City of Boston (2002/2003)*. The First Amendment guarantee of freedom of speech also includes protection from retaliation suffered by a party in reference to the speech. The plaintiff, Murphy Lewis, was employed by the City of Boston as a music instructor in the Boston Public Schools from 1975–1995. In 1995 he was appointed acting Music Director and subsequently, permanent Music Director for the City; he served in this role until August of 1999. The responsibilities of this role were many and included developing and implementing policies regarding music education, supervising the music curriculum, maintaining instrument inventory, support of the music teachers, serving as a liaison between the City and music organizations, and

organizing a Martin Luther King, Jr. celebration. The position of Music Director was one of ten Senior Program Directors. The ethnic diversity of these Senior Program Directors in 1999 included four African Americans, one Asian, and five Caucasians.

Lewis served as an advocate for music education. In 1997, an article in the Boston Herald stated that Lewis wanted to increase instrumental music instruction by hiring music instructors to travel between the elementary and middle schools. He put this proposal in writing and gave it to a City Councilor. This proposal stated that the City was not in compliance with the Arts Policy by not offering instrumental music instruction. Lewis proposed that the City hire twenty additional teachers to achieve compliance with the Arts Policy. Lewis did not share this information with his superiors before he discussed it with the City Councilor. Smith, the Director for the Department, testified that he expressed concern for a violation of protocol issues by Lewis and informed Lewis that the Superintendent was upset that he had spoken to the City Councilor. Lewis was also quoted in another article concerning a statement about instruments that are not being used within the school system. A system-wide reduction in force occurred in the Spring of 1999. The position of Music Director was eliminated and the responsibilities were distributed to other positions. Thirty-one other supervisory positions were also eliminated.

A position was open at the only magnet school for music in the school system. Candidates for the position were required to have experience in school-based management and a master's degree. Lewis applied; however, he did not have a master's degree and was not granted an interview. None of the candidates interviewed for the position were offered the job and the City decided to allow the acting director to continue in the role for the academic year. The position was posted again in 2000. Lewis was invited to interview by mail for the position even though he did not have a master's degree. He was called the morning of the interview to

confirm. Lewis did not attend the interview. He stated that he did not receive the written invitation and had a prior commitment when he received the phone call. The position was offered to an African American but he did not accept.

Lewis filed suit against the City claiming that eliminating his position as Music Director and not hiring him for the magnet school was retaliation for his public statements in violation of First Amendment rights and due to his race. The United States District Court granted summary judgment for the City. Lewis filed an appeal and the judgment was affirmed by the United States Court of Appeals for the First Circuit.

*Valenti v. Torrington Board of Education and John Hudson (2009)*. The following case also alleged a violation of free speech. Matthew Valenti was the music teacher at Torrington Middle School and the president of the Torrington Educational Association (TEA). John Hudson was hired to serve as the principal of Torrington Middle School and Valenti, in the capacity of president of the TEA, expressed his opposition to Hudson's appointment to colleagues and was also quoted in newspapers. Hudson read the articles and was informed by the Superintendent that Valenti had contacted teachers at his former school who had negative opinions of him.

Before the school year began, changes were made that affected Valenti and the other music teacher. These changes included Valenti's keyboard class being cancelled and the addition of supervisory duties that they had previously been excluded from performing. Valenti filed a grievance and a resolution was reached.

Additional actions occurred over the course of the next several months. Examples of these included school detention hall being moved to Valenti's classroom from the cafeteria; a petition, distributed by Valenti, protested disciplinary action taken against a custodian; a

Prohibited Practice Complaint filed by Valenti alleging retaliation for his speech in the interest of TEA; an investigation on Valenti because a student claimed that he yelled at students and was working on other things during class time; and accusations by students that Valenti had looked at pornographic material during class time on his computer. This last accusation resulted in Valenti being put on administrative leave. An examination of Valenti's computer by the school system's computer technician concluded that the computer had not been used to view pornographic material.

The Superintendent met with Valenti's union representatives and stated that Valenti should resign or he would have to continue the investigation and involve the police. Valenti did not resign and the allegations were submitted to the Torrington Police. The police contacted the Department of Children and Families (DCF), which should have been completed by the school system within 48 hours of the allegation. Approximately six weeks later, in February of 2005, the DCF closed the case on Valenti citing the allegations as unsubstantiated. Susan O'Brien, the new Torrington Superintendent, reinstated Valenti after learning that both the DCF and Torrington Police had closed the case against him.

Matthew Valenti, plaintiff, filed suit against the Torrington Board of Education citing violations against his First Amendment right to freedom of speech and freedom of association, his Fourteenth Amendment right to equal protection, and state statutes. The school board's motion for summary judgment was granted by the Court in regard to Valenti's equal protection claims. The Court denied their motion for summary judgment involving the freedom of speech and freedom of association claims.

## **Violation claims involving student First Amendment rights**

### ***McLaughlin, et al. v. Board of Education for the Pulaski County Special School***

*District, et al. (2003)*. Thomas McLaughlin, plaintiff, was a student at Jacksonville Junior High School in 2003. He and his parents filed this lawsuit alleging a violation of the First Amendment right to free speech and the Establishment Clause, a violation of the right to parental autonomy and the Equal Protection Clause of the Fourteenth Amendment, and the right to privacy.

The affidavit testimony provided by Thomas McLaughlin and his mother alleged:

- McLaughlin's choir teacher, Ms. Blann, asked him after class one day in mid-November of 2002 if he was gay. Responding that he was, Ms. Blann offered him scriptures on what the Bible says about homosexuality.
- Approximately November 17, 2002, a few days after the previous conversation, Blann informed McLaughlin that she did not want to hear about him being gay. She told McLaughlin that continued talk on the subject may eliminate him from participating in the All Region Choir Competition claiming it would give the choir a bad name.
- Ms. Blann called McLaughlin's mother to complain about Thomas telling his friends that he was gay. She told Ms. McLaughlin that she did not want to hear about Thomas being gay because the boys' choir would get a bad name.
- The computer teacher, Ms. Derden, in a conversation outside of class told McLaughlin that he was "abnormal" for being gay. McLaughlin argued with her about this, and he was sent to the Assistant Principal's office. Mr. McGhee, the Assistant Principal, asked how McLaughlin knew he was gay and preached to him about homosexuality.

- McLaughlin was called to the office of Assistant Principal Sharon Hawk and informed that due to his openness in regard to his sexual orientation, another student named Thomas, who was mistaken for McLaughlin, was frequently beaten up and that his open talk of his sexual orientation may endanger his younger brother's safety.
- Ms. McLaughlin, after hearing of the events in Mr. McGhee's office, requested a conference where she stated that her son "had the right to talk about his sexual orientation during non-instructional time" (McLaughlin v. Board of Education for the Pulaski County Special School District, et al., 2003, p.4) and provided Mr. McGhee with a copy of *Tinker v. DesMoines*.
- Ms. Derden requested a parent conference around November 25, 2002, to complain about Thomas' talk of his sexual orientation while in school. The principal, Mr. Allen, and Mr. McGhee were both present at the conference and agreed that it was not appropriate for Thomas to talk about his sexual orientation at school.
- In early February of 2003, before computer class started, a friend of Thomas' was commenting about a referral received in another class for complaining. Thomas commented to her "that at least she didn't get suspended for something stupid like he did" (McLaughlin v. Board of Education for the Pulaski County Special School District, et al., 2003, p. 4). Thomas was sent to Mr. McGhee's office. McGhee informed Ms. McLaughlin that Thomas would be suspended for four additional days for discussing his suspension with classmates and that he was made to read the Bible. Ms. McLaughlin came to the school to meet with McGhee. The principal, Ms. Allen, and Ms. Derden both spoke to Ms. McLaughlin and Thomas stating that hearing about suspensions would disturb other students.

The Court asked the defendants to state why they opposed a preliminary injunction, why the speech in question is not protected under the First Amendment, and were asked to state if the facts alleged were not true. Additionally, the Court stated that the motion would be moot if a commitment from the defendants not to prohibit McLaughlin's speech about his sexuality or past discipline concerns was made. The defendants were asked to respond.

### **Legal Considerations for Court Holdings–First Amendment Issues**

First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. (*Tinker, et al. v. Des Moines Independent Community School District, et al.*, 1969, p. 10)

School officials do have the authority to restrict student speech in school-sponsored expressive activities provided they do so in relation to legitimate concerns of pedagogy. In *Hazelwood School District, et al. v. Kuhlmeier, et al.* (1988), the Supreme Court held “that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns” (p. 13).

As recognized in the case summaries, the First Amendment right to free speech and the Establishment Clause have been challenged in relation to the selection of music for performance by school ensembles.

A position of neutrality towards religion must allow choir directors to recognize the fact that most choral music is religious. Limiting the number of times a religious piece of music can be sung is tantamount to censorship and does not send students a message of

neutrality. Where, as here, singing the theme song is not a religious exercise, we will not find an endorsement of religion exists merely because a religious song with widely recognized musical value is sung more often than other songs. Such animosity towards religion is not required or condoned by the Constitution. (Doe, et al. v. Duncanville Independent School District, et al., 1995, p.7)

Music educators, when working within the established rights of the First Amendment, must take into consideration the pedagogical value of the music selected for study (Bauchman v. West High School, et al., 1997).

#### **Fourth Amendment**

The Fourth Amendment of the United States Constitution states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. (U.S. National Archives & Records Administration, 2010, *The Bill of Rights*, para. 14)

The analysis conducted for this research revealed that 5% of the cases involving music educators heard in federal court from January 1, 1995–December 31, 2009 were directly related to the Fourth Amendment of the United States Constitution. These cases displayed a diverse subject matter and factual background. Although the Fourth Amendment did not provide a large percentage of the overall cases in this research, the information that resulted from these cases will assist music educators in student management and appropriate administrative actions. The Fourth Amendment court cases were organized under two categories: Claim of Illegal Search and Claim of Illegal Seizure.

### **Claim of illegal search**

*Seal v. Allen Morgan, et al. (2000)*. Dustin Seal was a student at Powell High School in Tennessee. A friend of his, Ray Pritchert, had a dispute with another student and as a result, began carrying a hunting knife. Seal was aware that Pritchert had a knife. Driving his mother's car, Seal picked up Pritchert, his girlfriend and another friend. Pritchert placed the knife behind the driver's seat, and the other friend in the car moved the knife to the glove box when Seal was out of the car.

The next evening, Seal was again driving himself, his girlfriend, and Pritchert to the Powell High School football game. All were members of the band. When they arrived at the game, they were told they did not need to be in uniform and went to the car to get their change of clothes. After they had changed clothes, the band director, Gregory Roach, asked Pritchert if he and Seal had been drinking. Pritchert said that they had not been drinking and since there was no smell of alcohol on the student's breath, they were allowed to enter the bandroom.

A short while later, Pritchert and Seal were called to the band director's office and met there by the school's vice-principal. They were told that other students had reported seeing them drinking alcohol. A search of the student's uniforms and instrument cases provided no evidence that the students had been drinking. An assistant band director also reported that he saw one of the two students with a flask and both of them chewing gum and checking each other's breath. Seal consented to a search of his car; the search did not yield a flask but did reveal cigarettes, antibiotics for which Seal had a prescription, and the knife that was in the glove box.

Seal was suspended for possession of a knife. At the hearing, Seal testified that he knew Pritchert had a knife but did not know that he had placed it in the car. Both the friend that originally put the knife in the glove box and Seal's girlfriend testified that Seal was not aware

that the knife was in the car. The hearing upheld the suspension and stated that expulsion by the Board was pending. The Board did vote to expel Seal.

Claims by the plaintiff, Seal, included the violation of the Equal Protection and Due Process Clauses of his Fourteenth Amendment rights for his expulsion and a violation of his Fourth Amendment rights in the search of his car. The District Court granted summary judgment for the Superintendent and the Board on the claims of the Fourth Amendment violation and the Equal Protection claim but denied summary judgment on the claim of due process. The Court of Appeals affirmed the District Court's holding to deny summary judgment for the Board, reversed the District Court's holding on liability, and remanded the case.

***Konop v. Northwestern School District, et al. and Genzler v. Northwestern School District, et al. (1998).*** The next case for review involved a strip search conducted on students in the search for missing money. A student in the Northwestern School District reported to the principal, Sauerwein, that money was stolen from a locker in the girl's locker room. The amount reported missing was approximately \$200.00; however, it was later determined that the actual amount of money missing was \$57.00 or \$59.00. The principal, feeling that the money was either in the locker room or in the possession of one of the girls, decided to lock the locker room and have the girls report to the lunchroom instead of the locker room after gym class. The boys were allowed to leave the lunchroom after they finished eating; however, the girls were asked to stay. The girls received a lecture by the principal and were told they were going to be searched, including a strip search if necessary, to find the money.

Principal Sauerwein had the students place the contents of their pockets on the table for inspection. The plaintiffs, Konop and Genzler, picked lilacs on their return from gym class and Genzler placed her flowers on top of the money on the table. Konop reached to touch the

flowers. Genzler, claiming to be very nervous, was shaking and whispering about the money that was missing.

School employees (and relatives of the girl that the money was taken from) were observing the search and claimed that Genzler was reaching into her pockets under her shirt, trying to pass something to another student, and attempting to hide something under the flowers. One of these employees grabbed the money in front of her and gave it to the principal. Since the event occurred near the end of the school year and the principal knew that the students usually bring more money to school to pay for fines, he concluded that this was not the stolen money.

At this point, the band teacher, Patnode, suggested that the student's bras and shoes be checked. The principal then directed several school faculty and employees to take the girls in the bathroom, two at a time, to conduct this search. The plaintiffs, Genzler and Konop, were searched first. One of the school employees stated that she did not feel the search was necessary and Patnode conducted the search. The plaintiffs were very upset during the search and the search did not lead to the stolen money.

The plaintiffs brought suit against the school officials claiming a violation of their Fourth and Fourteenth Amendment rights, intentional infliction of emotional distress and battery. The defendants sought qualified immunity; however, the Court found that the search was excessive and not permissible. The Court concluded that the strip search was not reasonable and the facts supported the plaintiffs' claim for intentional infliction of emotional distress.

#### **Claim of illegal seizure**

*Hilton v. Lincoln-Way High School, et al. (1998)*. The preceding cases involved actions of search and seizure administered by school officials or authorities. The following case resulted from the alleged actions involving both school personnel and students. The plaintiff, Hilton, was

a student at Lincoln-Way High School and a member of the Lincoln-Way Band. She was required to attend a retreat for the marching band. Once at the retreat, the first year band students were sent to the auditorium for, what they were told, a rehearsal. While in the auditorium the students were given paper bags and instructed to color a picture of their face on one side and a picture of the upper classman assigned to them on the reverse side of the bag. The students were then told to put the bags in their pockets and keep them in their possession at all times to avoid punishment or hazing.

Later, the students were required to attend a pizza party that was held in a locked room with chaperones barring the exits. The band members were next sent to the football field and all members, with the exception of first year band members, were allowed to leave. The first year band members were instructed to place the paper bags they had previously colored on their heads. Holes had not been cut in the bags to enable the students to see out of or for air to come in. Marching commands were then given to the students to execute, the execution of these commands caused the students to bump into one another. After this activity, the first year band students were sent to their rooms and instructed not to leave. Hilton, who felt humiliated, left in tears.

Another incident at the retreat required the students to get on a bus and put their bag over their head. When the students left the bus, they were instructed to hold the shoulders of the person in front of them as they walked through the woods a short distance to a clearing. Once in the clearing, they were required to participate in what was alleged by Hilton as a knighting ritual. After this, the students were told to put the bags back on their head and get on the bus. Hilton was frightened, resulting in her having trouble breathing, and she did not want to put the bag on her head. Claiming someone put the bag on her head, she began to hyperventilate and eventually

blacked out and fell. She claimed that the school officials on the retreat knew of her condition but ignored it. When the band arrived home from the retreat, Hilton was taken by her mother to the emergency room for breathing difficulties and anxiety.

The plaintiff filed suit against the defendants claiming a violation of the right to be free from unlawful seizure under the Fourth and Fourteenth Amendments and a multitude of other claims including hazing, battery, intentional infliction of emotional distress, conspiracy, and false imprisonment. The conspiracy and hazing claims were dismissed by the court. The court holding also stated that the plaintiff's claim sufficiently alleged violations of the Fourth and Fourteenth Amendments.

### **Legal Considerations for Court Holdings—Fourth Amendment Issues**

“As the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is ‘reasonableness’” (Vernonia School District 47J v. Wayne Acton, et al., 1995, p. 12). In *Board of Education of Independent School District No. 92 of Pottawatomie County v. Lindsay Earls* (2002), introduced in Chapter 2, the Fourth Amendment was challenged due to mandatory drug testing. Mandatory drug testing on students who participate in extracurricular activities has been effective in deterring drug use in a school system (Board of Education of Independent School District No. 92 of Pottawatomie County v. Lindsay Earls, 2002). The school system does not have to demonstrate a problem with drug abuse in the schools to validate the testing program.

The need to prevent and deter the substantial harm of childhood drug use provides the necessary immediacy for a school-testing policy. Indeed, it would make little sense to require a school district to wait for a substantial portion of its students to begin using drugs before it was allowed to institute a drug testing program designed to deter drug use.

(Board of Education of Independent School District No. 92 of Pottawatomie County v. Lindsay Earls, 2002, p.11)

The courts also consider the intrusion on privacy interest involved in a search (Vernonia School District 47J v. Wayne Acton, et al., 1995). In regard to strip searches, “the case law is pervasive that a strip search, the objective of which is to recover money, is illegal absent some reasonable indication that a particular student stole the money” (Konop v. Northwestern School District, 1998, p. 16).

### **Eleventh Amendment**

The Eleventh Amendment of the United States Constitution states:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State. (U.S. National Archives & Records Administration, 2010, *Amendments 11–27*, para. 2)

The analysis conducted for this research revealed that 1% of the cases involving music educators heard in federal court from January 1, 1995–December 31, 2009 were directly related to the Eleventh Amendment. The following case provides an example of the Eleventh Amendment providing governmental immunity to employee claims.

*Stucky v. Hawaii, et al. (2008)*. Stucky was an intermediate school music teacher. Her class was moved to the cafeteria and she alleged the location was not suitable for teaching and was infested with fleas. She sent a notice to both school administration and her students’ parents with this information. Kilborn, the principal of the school, met with her to discuss the notice she sent and complaints from parents. Another incident involved a student that was injured in her class when a bench collapsed. The parent alleged that Stucky did not offer any assistance to the

student. Stucky claimed that she sent the injured student, with the assistance of other students, to the school nurse for medical treatment. The vice-principal was directed to conduct an investigation on the incident. In January of 2006, Stucky filed a complaint alleging retaliation.

Kilborn met with Stucky to discuss concerns, presented her with a list of corrective actions, and notified her that disciplinary action could result if she failed to meet the actions stated. The vice-principal completed the investigation on the incident involving the student injury and concluded that multiple Department of Education policies were violated by Stucky. Stucky was suspended.

Plaintiff alleges that she was suspended and terminated in retaliation for filing discrimination complaints against the DOE and Kilborn. Defendants deny any retaliation on their part and argue that Plaintiff was suspended and terminated because she was unable to perform her job in a satisfactory manner. (*Stucky v. Hawaii*, 2008, p. 1-2) Motions were filed by the defendants requesting summary judgment. They claimed, in part, that the Eleventh Amendment barred several of the claims. The defendants were granted summary judgment.

### **Legal Considerations for Court Holdings–Eleventh Amendment Issues**

In *Stucky v. Hawaii* (2008), the Eleventh Amendment barred claims that sought money damages for the defendants acting in their official capacities and the Department of Education.

### **Fourteenth Amendment**

The Fourteenth Amendment of the United States Constitution states:

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State

shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (U.S. National Archives & Records Administration, 2010, *Amendments 11–27*, para. 5)

The analysis conducted for this research revealed that 26% of the cases involving music educators heard in federal court from January 1, 1995–December 31, 2009 were directly related to the Fourteenth Amendment of the United States Constitution. The Fourteenth Amendment was the area of law that occurred most often in the federal court system under the case selection parameters. The claims included in these cases involved both due process of law and equal protection of the laws. The Fourteenth Amendment court case summaries were organized under four categories: Curriculum Concerns, Employment Concerns, Alleged Teacher/School Actions, and Alleged Student Actions. Curriculum Concerns addressed under this area of law involved the topics of assessment and performance selections. The Employment Concerns category addressed adverse personnel actions. The category of Alleged Teacher/School Actions included cases involving harassment and performance of duties. Lastly, the court cases included in the Alleged Student Actions involved student fines and student participation.

### **Curriculum concerns**

#### ***Dunn and McCullough v. Fairfield Community High School District No. 225 (1998).***

Shaun Dunn and Bill McCullough were members of the Fairfield Community High School Band Program. The grading policy for the band program required the students to perform at various events and exhibit professional conduct throughout the performance. Dunn and McCullough were performing at a basketball game with the band and decided to play unauthorized solos. The

band director instructed the students to stop playing; however, they ignored the command. The students testified that they knew that playing the unauthorized solos was forbidden and that they did expect to be punished.

As punishment, the band director did not award the students any points for the performance and referred the matter to the school principal. Determining that the students showed a lack of respect for the faculty and staff, a Classification III offense of the school rules, the principal removed the students from band class and did not allow them to attend home basketball games for the remainder of the year. Due to their removal from band class, the students received a failing grade in band. As seniors, they both did graduate; however, the failing grade in band resulted in one of the students not graduating with honors.

The students' claimed that the school district violated their constitutional rights of substantive due process and the guarantee to be free of cruel and unusual punishment. The District Court rejected the students' charges. In this decision, it was noted that the Eighth Amendment issue involving cruel and unusual punishment aspect of the case was not mentioned in the plaintiff's motion and therefore was not considered in the appeal. The United States Court of Appeals affirmed the decision of the District Court to grant summary judgment for the school district.

*S.D. and M.P. v. St. Johns County School District, et al. (2009).* This case involved the selection of a religious song that was to be performed at an elementary school assembly. Third grade students in The Webster School, a public school, were given lyrics to the songs they would be performing at the school's end-of-the-year assembly. The students were informed that they would practice the songs regularly in class in preparation for the performance. One of the songs, "In God We Still Trust," upheld a strong religious viewpoint. The students were told that if they

had objections to the song, they did not have to sing it at the assembly; however, they were also instructed that if they did not sing this song, they could not perform in the assembly at all. Parents of two of the students filed complaints including a motion for preliminary injunction. The plaintiffs claimed a violation of the student's right to free exercise under the First and Fourteenth Amendments by the teachers, administration, and school district for imposing religious beliefs on the public elementary school students. The same day the complaint and injunction were filed, the defendants removed the song from the assembly program and the song was not rehearsed or played in the classrooms again. The District Court found that

Defendants are incorrect in asserting that the Song has a valid secular purpose that eclipses a merely incidental religious reference. The challenged song is not a sacred example of a choral music used to instruct students in music theory and appreciation.

(S.D. and M.P. v. St. Johns County School District, et al., 2009, p. 14)

The District Court granted the preliminary injunction.

*Ashby v. Isle of Wight County School Board (2004)*. Ashby, the plaintiff, was a member of the 2003 senior class at Windsor High School. Ashby and another student wanted to sing at the graduation ceremony. The selection Ashby wanted to sing was "The Prayer." However, she admitted that she was never told she could sing at the ceremony. The lyrics were sent to the school principal and he sent them to the superintendent for advice on the appropriateness of the selection at the graduation ceremony. The song was deemed not appropriate, and Ashby was notified that she and the other student would not be able to sing any song at graduation. They were encouraged to sing at other events related to graduation. A time constraint in the graduation ceremony was the reason provided for the students not to perform.

Ashby notified her mother that the song was not to be included in the ceremony. Mrs. Ashby claimed she called the principal and was told the song was not appropriate for graduation. The principal claimed he told Mrs. Ashby or her husband, Bishop Ashby, that the song was not being performed due to time constraints in the program. Bishop Ashby claimed the superintendent told him that the school lawyer advised against including the song. Bishop Ashby asked a member of the school board how he should handle the situation, and the board member recommended that he meet with the school board in a closed session. This meeting occurred; the parties did not agree as to all the facts and comments made at the meeting. The plaintiff alleged the song was not allowed to be sung due to its religious nature; however, the defendant denied this. The student, Ashby, attended graduation and the only selection performed was the school alma mater sung by the senior class.

The plaintiff brought suit with a claim of violations against the right to free speech as provided in the First Amendment and the right to equal protection as provided in the Fourteenth Amendment. The United States District Court granted summary judgment for the school board.

*Nurre v. Whitehead (2007/2009)*. The following case also claimed an alleged violation of the Equal Protection Clause and involved the band arrangement of "Ave Maria." Musical selections for the 2005 high school graduation ceremony at Jackson High School had to be submitted to the principal, Mr. Chesire, for approval. He reviewed the title of each and approved the selections. At the graduation ceremony, one of the selections that was performed had a strong religious theme and the School District received complaints. Additionally, letters to the editor were sent to and printed by the local newspaper about the religious statement made in the music selection.

The next year, as the 2006 graduation ceremony was approaching, Mr. Chesire wanted to review the musical selections. Each year the band director allowed the graduating students of the Wind Ensemble to pick the selection to be performed at the ceremony. The students selected “Ave Maria.” Recognizing this selection as religious in nature, the principal forwarded the musical selection list to the associate superintendent. The administration met and decided that the audience would recognize this selection as religious in nature and they asked the band to perform another selection. The students selected another piece to perform at the graduation ceremony.

The plaintiff, Nurre, was one of the seniors in the Wind Ensemble. She filed suit claiming a violation of her First Amendment right to free speech and a violation of the Establishment Clause in that the superintendent “acted with hostility toward religion” (Nurre v. Whitehead, 2009, p. 6). She also claimed a violation of the Equal Protection Clause in the Fourteenth Amendment since her graduating class was treated differently than previous students. The United States District Court found that the student’s constitutional rights were not violated. On appeal, the United States Court of Appeal for the Ninth Circuit affirmed the decision.

### **Employment concerns**

*Mark Kadetsky v. Egg Harbor Township Board of Education, et al. (2000).* Mark Kadetsky was hired to serve as the band director of Egg Harbor Township High School in 1995. He received contracts renewing his employment until 1998. If rehired for the 1998–99 school year, Kadetsky would receive tenure under New Jersey law. In early 1998, Kadetsky alleged that the high school principal, Ralph Ridolfino, and the Music Supervisor, Dr. Jean Levine, created false records to prevent him from achieving tenure.

There were several actions brought into fact for the case. Kadetsky alleged that in 1996, Ridolfino, who was Assistant Principal at the time, was chaperoning a band trip. Kadetsky reported him to the Principal of the school because Ridolfino had beer in his possession and he had consumed alcohol on the band trip. Ridolfino was no longer allowed to serve as a band chaperone. When Ridolfino became principal of the school, Kadetsky alleged that he was told that he was not a team player and was going to be fired.

In January of 1998, Kadetsky alleged that Ridolfino and Levine began to place letters of reprimand in his personnel file and denied him of his right to contest these documents with the assistance of union representation. Kadetsky took an emergency personal day in February 1998 to meet with a union representative to discuss the previous letters of reprimand. Due to this action, Ridolfino gave Kadetsky another negative letter for insubordination. Kadetsky alleged he filed a formal grievance and notified the Superintendent of the improper actions of Levine.

The third set of allegations by Kadetsky involved a letter sent by the parents of one of the male band members. The letter stated that Kadetsky had sexual relations with their son on a band trip. When Ridolfino discussed the letter with Kadetsky, he threatened that the information might get to the newspapers if Kadetsky did not keep the information private and resign. Kadetsky alleged that Ridolfino misled the parents into thinking something improper had occurred and that one of the board members told parents of the accusations so they would not support him in his attempt to keep his job.

Kadetsky was granted a meeting with the Egg Harbor Board of Education to discuss his tenure status and the actions taken by Ridolfino and Levine. After the investigation by the Board, Kadetsky's personnel file was destroyed, Levine was no longer in a supervisory position,

and Kadetsky received tenure. Following these Board actions, Kadetsky alleged that Levine and Ridolfino continued to harass him.

Kadetsky brought suit alleging multiple claims including violations of his First Amendment right, Fourteenth Amendment right to due process, and additional state claims involving the New Jersey Constitution and New Jersey's Conscientious Employee Protection Act (CEPA). The defendant's motion to dismiss was granted in part and denied in part by the Court. The motion to dismiss the Fourteenth Amendment claim and CEPA claim was granted to the defendants.

*Rogovin v. New York City Board of Education, et al. (2001)*. The next case also involved employment concerns that resulted in alleged Fourteenth Amendment violations. Rogovin was hired to a probation position teaching orchestral music at Newcomers High School in New York. Newcomers served non-English speaking students. Rogovin received an unsatisfactory on his performance review and was recommended for termination by the school principal. He was only employed at the school one semester.

Rogovin claimed that his failure at Newcomers was due to the fact that he was not provided with a curriculum established for ESL students, not provided instruments for the program, and not provided instructional materials. He requested a review of the recommendation to terminate his contract. The review occurred and the majority of the committee recommended Rogovin's termination. The Chancellor affirmed this decision. Due to his termination, Rogovin was not permitted to teach orchestral music in any high school within the Chancellor's jurisdiction. His teaching license was not revoked.

Rogovin did not contest the school system's authority in terminating his probationary employment. He does contend that he was denied due process as granted in the Fourteenth

Amendment and that the Board of Education “constructively revoked his license as Teacher of High School Instrumental Music in the public high schools of New York City” (Rogovin v. New York City Board of Education, et al., 2001, p. 4). Rogovin stated that the Board of Education had two options in his termination. The first was to terminate his probationary employment at Newcomers; however, not let this eliminate him from employment at another high school in New York using the same license. The second would have been for the Board to revoke his license in the termination process which would have granted him a pre-revocation hearing. Rogovin stated that the termination process that was used by Board against him, in effect, terminated his teaching license. The plaintiff’s claims were dismissed by the Court.

*Konits v. Valley Stream Central High School District, et al. (2004/2005)*. The following case also addressed adverse employment actions that resulted in Fourteenth Amendment claims. Konits, a music teacher in the Valley Stream Central High School District in 1996, brought suit against the school district, the board of education, and several administrators alleging that she had received adverse personnel actions in response to her assisting another school employee, Kenny, with a gender discrimination claim. During the time she was assisting Kenny, Konits alleged that she was removed from her position as orchestra teacher, was assigned to teach special education general music, and was denied seniority rights. Konits claimed a violation of First Amendment retaliation and the case was settled in 1999.

According to Konits, the adverse treatment continued between July 1999 and September 2001. During this time she had applied for several band and orchestra positions but was not hired. Defendants from the previous suit were on the hiring committees. Konits filed suit again and her “complaint alleges retaliation in violation of the First Amendment and deprivations of

equal protection and due process under the Fifth and Fourteenth Amendments as well as state law claims” (Konits v. Valley Stream Central High School District, 2005, p. 3).

The district court granted summary judgment for the defendants claiming that the suit in 1996 was speech that was not a matter of public concern. Thus, Konits could not establish a retaliation claim. Konits appealed this decision. The appeals court stated that retaliation by the state toward someone for speaking against discrimination can be addressed under the First Amendment. They held that the lawsuit in 1996 “was speech on a matter of public concern” (Konits v. Valley Stream Central High School District, 2005, p. 5). The appeals court vacated the summary judgment granted by the district court and remanded the case for additional proceedings.

*Cruse v. Clear Creek I.S.D. (1997).* The next case involving adverse employment actions under the Fourteenth Amendment also addressed reassignment of teaching duties. The plaintiff, Susan Cruse, was a high school music director in the Clear Creek Independent School District. She was reassigned to an equivalent position at an elementary school. Cruse, upset with the reassignment, brought suit against the school district. She contended that the decision to reassign her was arbitrary and an abuse of discretion resulting in a violation of her substantive due process rights, equal treatment, in addition to school district policy.

Cruse’s claim was unsupported in the evidence. She also alleged due process violations as the result of her reassignment. However, the plaintiff’s contract stated that she was hired as a teacher and that she is subject to reassignment at the school district’s discretion. Since there was not an established property interest in one particular position within the school district, and “without a property right there can be no due process violation” (Cruse v. Clear Creek I.S.D.,

1997, p. 4), the due process claim was dismissed with prejudice. Additionally, the Court dismissed with prejudice the plaintiff's state claims.

### **Alleged Teacher/School Actions**

*K.U. v. Alvin Independent School District and Virgil Tiemann (1998)*. K.U. was a fourteen-year old student attending Alvin High School in the Alvin Independent School District. A brain injury to K.U., occurring in 1991, resulted in frontal lobe syndrome. Over the years, K.U.'s parents had been very outspoken with school personnel in regard to K.U.'s education and opportunities at school. The plaintiffs alleged retaliation by the school system in response to their conduct and claimed that the school system failed to meet K.U.'s educational needs. Other allegations against the school system included that K.U. was denied "the opportunity to participate in school-related activities" (*K.U. v. Alvin Independent School District and Virgil Tiemann, 1998, p. 4*) including basketball, journalism, and other classes because of his family and that the school system wanted to classify him in need of special education. The parents did not want this classification alleging it would negatively affect his academic records.

Many incidents were identified by the parents over the years to support their allegations. A few specific incidences include the band director implying K.U. was "drain damaged," K.U.'s English teacher not assisting him with the subject, removal from the basketball team, and that K.U.'s teachers did not follow his Section 504 plan. K.U.'s parents requested a hearing "under section 504 of the Rehabilitation Act of 1973" (*K.U. v. Alvin Independent School District and Virgil Tiemann, 1998, p. 4*). The Section 504 Hearing Officer found that the school system had implemented the 504 Plan in good faith and that the plaintiffs did not show how the school district had violated K.U.'s rights involving Section 504. The plaintiffs alleged violations of due process, equal protection, retaliation, and discrimination involving Section 504. The District

Court found that the Section 504 plan was appropriately designed to meet K.U.'s needs and that the student could not identify how his education was damaged by any of the defendant's actions. The defendant's motion to dismiss was granted, and the District Court ordered that the claims by the plaintiff be dismissed with prejudice. Summary judgment was denied on the defendant's counterclaim.

*Shinn v. College Station Independent School District, et al. (1996).* The performance of the band director's duties was brought into question by a parent in the following case. Jonathan Shinn, plaintiff, was a member of the A & M Consolidated High School Band. Jonathan's parents were very disappointed with the performance of the band director. The plaintiffs made multiple claims, including that the band director, Kenneth Wilbanks, did not display leadership or discipline, was disrespectful to the assistant band director, did not distribute the band rules in a timely manner, entered the girl's locker room, was verbally abusive to a student, and yelled at their son when he was attempting to turn in his instrument.

The parents went to the school officials to complain about the band director and alleged the school officials did not provide them with an adequate response. The plaintiffs then asked the Texas Education Association (TEA) to investigate the band director's behavior. The TEA did not feel the parent's allegations were supported. The plaintiffs then brought suit against the school system claiming a violation of their son's First and Fourteenth Amendment rights. In their suit they cited a violation of the right to be free from emotional harassment, the right to be free from punishment without personal guilt, and the right to free speech. The court upheld the district court's decision to grant summary judgment to the defendants.

### **Alleged student actions**

*David B. Gauder v. Leckrone, et al. (2005)*. Fourteenth Amendment violations also occurred in the field of music education as the result of student actions. This was evidenced in the next case summary where fines were imposed on university band members for inappropriate behavior. The plaintiff, David Gauder, was a member of the University of Wisconsin-Madison Varsity Band. In February of 2004, the band was returning from a trip, and the bus driver complained that the students were too loud for him to drive the bus safely. Both the driver and the Band Field Assistant, who served as the supervisor, informed the students that if they did not quiet down, the bus would be stopped and the police would be called. A student yelled something to the driver, consequently the driver pulled the bus over, and the police were called. The student was taken off the bus to speak with the police. He apologized to the driver and was allowed to get back on the bus. The University Band Director, Leckrone, called the Band Field Assistant to tell the students that their behavior would be addressed at the next band rehearsal. It is unknown how the band director was informed of the problem on the bus.

Leckrone, at the next band rehearsal, informed the students that a group fine of \$1,200.00 was assessed for the conduct that occurred on the bus. There were 29 band members on the bus, thus each person's share of the fine amounted to \$41.38. Holds were placed on the student's accounts until their portion of the fine was paid.

Gauder completed his degree requirements and graduated in Spring of 2004. He refused to pay the fine, and therefore he was unable to obtain a final transcript or graduation certification. After multiple attempts to resolve the situation with university officials, Gauder contacted a lawyer. A letter was sent to the university stating that Leckrone had ignored university procedures and due to the hold on the plaintiff's record, he was unable to get his final transcripts.

The University legal counsel responded stating that the conduct of the band members had been a problem for a long while, and the Chancellor told the band administration that the poor conduct must stop. The fines imposed by the band director were made to gain control of the situation. This correspondence also stated that Gauder's fine would stand; however, the university would not take action to collect the fine and the record would report that the fine was unpaid. The hold on the plaintiff's records was lifted, and the band administration was told not to issue fines for misconduct.

The plaintiff filed a suit alleging violations of his procedural and due process rights guaranteed by the Fourteenth Amendment. The District Court found that the plaintiff was not denied his procedural due process rights because he was notified of the reason for the discipline and provided an opportunity to present his version of the events to the band director and university officials. The court found in favor of the defendants.

*Trefelner v. The Burrell School District (2009)*. Student participation in school music programs has been challenged under the rights guaranteed by the Fourteenth Amendment. Pennsylvania Public School Code was amended to allow students who are home schooled and students who attend charter schools, in some instances, to participate in the extracurricular activities that are offered by the school district in which they live. A.T. was a student in the Burrell School District, and as an eighth grade student, participated in the marching band during the 2008–2009 school year. A.T. enrolled at St. Joseph's Catholic School for the 2009–2010 school year. St. Joseph's did not offer marching band or jazz band. The plaintiffs requested A.T. to be allowed to participate in Burrell's High School Band Program; however, they received notification that parochial students were not allowed to participate.

The plaintiffs filed a complaint alleging First and Fourteenth Amendment violations. Specifically, they alleged that refusing to permit A.T. to participate, but allowing other students not enrolled in Burrell Schools to participate, deprived them of their free exercise and equal protection of the laws. They requested a temporary restraining order to allow A.T. the opportunity to participate in extracurricular activities offered in Burrell Schools. The temporary restraining order was granted by the Court.

*Mazevski v. Horseheads Central School District, et al. (1997)*. The following case summary was an example of a student being denied participation in the school music program based upon their actions and the resulting claim of Fourteenth Amendment violations. George Mazevski, a junior in the Horseheads High School Marching Band, had been given the opportunity to participate in a Macedonian Music Festival. This Festival held special meaning to him due to his culture. The dates of the Music Festival conflicted with two events on the Horseheads High School Marching Band's schedule. One conflict was an exhibition performance and one was a competition.

Mazevski discussed the conflict with the band director, Carichner, and contends that he was told he would be excused from one performance but not from both performances. Carichner said that he told George he could be excused from the exhibition and not the competition. George attended the band's performance at the exhibition but did not attend the competition.

Subsequently, George was told he was not a member of the marching band any longer because he had an unexcused absence from a performance. The parents, counselor, band director, and principal met and the parents were told by Kent, the principal, that he would make a final decision on the matter after discussing it with the members of the music department faculty.

The faculty all agreed that George should be removed from the marching band and the parents were notified.

The plaintiffs claimed that George's right to due process was denied by the defendants. The defendants claimed that participation in a marching band is not a right. The matter for the court to consider was if the plaintiff, George, was denied a right guaranteed by the constitution. "Therefore, because the property interest that exists is in the entire educational process, there is no constitutional right to any one specific curricular or extracurricular activity, meriting due process protections" (Mazevski v. Horseheads Central School District, 1997, p. 5). The defendants were granted summary judgment by the District Court.

### **Legal Considerations for Court Holdings–Fourteenth Amendment Issues**

Procedural due process provides the right to fair procedures before one is deprived of life, liberty, or property (David B. Gauder v. Leckrone, Berg, and Wiley, 2005). Substantive due process involves the results of an action by the government and maintains that there are things that the state cannot do (David B. Gauder v. Leckrone, Berg, and Wiley, 2005). Students have a right to an education; however, the exclusion from one part of the educational process, such as a course or activity, does not violate constitutional rights (Mazevski v. Horseheads Central School District, 1997). Suspension or expulsion of a student denies a student of her/his educational process. Therefore, students in public schools may not be suspended without the opportunity to have a hearing unless an emergency is involved. Longer suspensions or expulsion must follow minimal due process standards (Goss v. Lopez, 1975).

### **Tort Law**

The analysis conducted for this study revealed that 19% of the cases involving music educators heard in federal court from January 1, 1995–December 31, 2009 were directly related

to tort law. Although each of the cases included in this research alleged concerns involving the music educator, the factual background in the cases vary considerably. The cases included in this research were divided into two categories for review: Physical Concerns and Emotional Concerns.

### **Physical concerns**

*Sharon Lee v. Pine Bluff School District and Darrell McField (2007)*. The next case summary alleged that the school officials did not adequately attend to a student under their care. Courtney Fisher, an eighth grade student, was a member of the band at a junior high school in the Pine Bluff School District. The band was invited to attend a competition in Atlanta, Georgia, and Courtney participated in the trip. Courtney's mother, Mrs. Lee, completed a medical form listing, among other information, an emergency contact, the name of the family physician, insurance information, and that there were no physical problems that would prohibit exercise. Additionally, the form contained a statement giving consent to the band director to secure medical treatment for the student in the event of an injury. Mrs. Lee signed the form, feeling confident that if an emergency occurred, the emergency contact would be notified.

Once in Atlanta, Courtney became ill. He did not attend the competition or participate in the other events of the trip due to his illness. Mrs. Lee claims that the adults on the trip recognized his condition and did not seek medical attention or call the family. When the band returned from the trip, Courtney was taken directly to a medical center and then transported to a children's hospital. Suffering cardiac arrest upon admittance to the hospital, Courtney died the next day. The cause of death was undiagnosed diabetes. Mrs. Lee contended that his death would not have occurred if the trip chaperones and band director, Mr. McField, had sought medical attention for Courtney.

Negligence claims and a violation of Courtney's constitutional rights were filed against Mr. McField and the school district. The claim of a constitutional rights violation was based on the signed consent form for the trip and that the school representatives had the duty to care for the student's medical need, and they failed to provide this care. The United States Court of Appeals affirmed the district court's holding which dismissed with prejudice the constitutional claims. "The constitutional duties derived from substantive due process analysis are carefully circumscribed, and the events alleged here do not implicate the limited circumstances in which the Constitution obligates a State to care for an individual's medical needs" (Sharon Lee v. Pine Bluff School District and Darrell McField, 2007, p. 5).

*Matthew Twist, et al. v. Alfredo Lara, et al. (2007)*. The following case included multiple allegations of misconduct, including that of a sexual relationship between a music educator and student. Matthew Twist and his father, Robert Twist, filed a suit in 2006 involving the Sheriff's Department, the School District, and Norquest-Vasquez based on alleged events occurring between 1999–2000. The events addressed in the suit include an alleged sexual relationship between Matthew and Norquest-Vasquez, who was the assistant orchestra director; a provision of alcohol to Matthew and other boys by Norquest-Vasquez; and the transporting of Matthew to Mexico to participate in these actions. Matthew was 15 years old at the time these events were alleged to have occurred. During December of 1999 to Spring of 2000, Matthew had moved from Edinburg. During this time, the plaintiffs alleged that Norquest-Vasquez called Matthew daily and sent sexually explicit letters to him. The alleged sexual relationship continued when Matthew returned to Edinburg in the Spring of 2000.

Matthew Twist went missing on October 25, 2000 along with a considerable amount of money from Robert Twist's home. Matthew's brother, who is married to Norquest-Vasquez's

sister, called Norquest-Vasquez asking for information about Matthew. A missing person's report was filed by Robert Twist with the Hidalgo Sheriff's Office, and he also gave them Norquest-Vasquez's telephone number.

Matthew Twist called Norquest-Vasquez and told her that he had gone to Mexico with \$70,000.00. The plaintiffs alleged that Norquest-Vasquez did not tell anyone of Matthew's whereabouts when she received the call. Norquest-Vasquez was interviewed by a Sheriff's Deputy and during the interview she admitted to having an inappropriate relationship with Matthew and told him where Matthew was. Allegedly, the Sheriff's Department waited more than a day before informing Robert Twist that his son was in Mexico. Robert found Matthew in Mexico and returned him home. The investigation was sent to the Criminal District Attorney but only the theft was included in the report.

The plaintiff's claim that all the defendants had a duty to report these activities to Robert Twist and Child Protective Services. In April of 2005, while inquiring about the theft previously mentioned, Norquest-Vasquez's written confession was discovered by Robert Twist. The plaintiffs filed suit on September 26, 2006. Matthew also filed a sexual assault tort claim against Norquest-Vasquez. Due to the statute of limitations, all of the plaintiff's claims were dismissed with the exception of the sexual assault tort claim against Norquest-Vasquez.

*Jeanette Chancellor v. Pottsgrove School District, et al. (2007).* The next case summary involved another alleged inappropriate relationship. The plaintiff, Jeanette Chancellor, was selected as drum major for her school band. She engaged in a sexual relationship with the band director, Christian Oakes, from the summer of 2003 to April of 2004. The sexual encounters took place during band camp, in the school, in Oake's car, and in a hotel room while on a school band trip. Oakes was involved in a sexual relationship with another female student in April of

2004. The student's mother suspected the relationship and notified the police department. After an investigation, Oakes was arrested and plead guilty to two counts of corruption of a minor. After Oake's arrest, Chancellor suffered from a depressive disorder and was hospitalized on multiple occasions. The plaintiff sued the defendants for violation of Fourth and Fourteenth Amendment rights and for intentional infliction of emotional distress. The District Court denied the defendants request for summary judgment.

*Baby Doe, et al. v. Methacton School District, et al. (1995).* This case involved the sexual abuse of a nine-year-old girl, Baby Doe, by her music teacher, Gregory DiFonzo. The abuse took place in the band room in December of 1992. Prior to this action, DiFonzo served as a music teacher in the Methacton School District from 1970–1979. During this time, he had a romantic relationship with one of his female students that lasted for several years. Students and parents were suspicious of an inappropriate relationship. The parents of the student with whom Difonzo was having the relationship found love letters that confirmed the suspicion in 1978. The parents notified the school administration, and the administration provided a warning to DiFonzo to not spend time or have the student stay after school with him. Ignoring the warning, he continued to spend time with the student. In March of 1979, allegedly due to illness, Difonzo made arrangements for both he and the student to be excused from school, and the two engaged in inappropriate behavior.

Difonzo was confronted by school administration the next day about the incident, and he admitted the behavior. A resignation letter had been prepared prior to this meeting, and DiFonzo was told that if he signed the letter he would avoid investigation and suspension. The letter indicated that he was resigning for personal reasons. DiFonzo signed the letter of resignation.

The Methacton school officials did not notify anyone of the abuse or place any information in the school files about the actual reasons for his resignation.

DiFonzo then applied for a music teacher position in the Philadelphia School District. The Philadelphia School District requested a reference from the Methacton School District, and they received the response that his service was satisfactory. No information was provided about the previous problem. Difonzo was hired by the Philadelphia School District. Soon after Difonzo was hired, Giamo, the Director of Music for the Philadelphia School District, learned of the previous events. He confronted DiFonzo about the events, and DiFonzo admitted the behavior. As stated in the complaint, Giamo did not report his discovery. Approximately 14 years later, while still employed by the Philadelphia School District, Difonzo sexually abused Baby Doe.

The plaintiffs alleged, with multiple counts in their complaint, both a violation of the constitutional rights of Baby Doe and negligence against the defendants. The District Court found that “Plaintiffs have adequately pleaded facts to show a policy, procedure or custom of deliberate indifference to Baby Doe’s constitutional rights, as well as pleading causation between the policy, procedure or custom and the abuse” (Baby Doe, et al. v. Methacton School District, et al., 1995, p. 6). Citing that the Methacton School District had no affirmative duty to Baby Doe, the District Court dismissed this count of the complaint.

***Jane Doe, Jane Roe v. Fall River School District and Jeffrey A. Mroz (2004).*** Rachel Amato came to the Fall River School District as a sixth grade student for the 2000–2001 academic year. She joined the band and played percussion. In late October of 2001, Rachel’s mother contacted the school district administrator to report that Rachel had commented that the band director, Jeffrey Mroz, had touched her inappropriately and made an inappropriate

comment in class in reference to the “male end” and the “female end” of an electric connection. The school administrator and principal met with Rachel and her parents the next morning. Rachel told the school administration that Mroz would touch the boys on their knee or thigh to assist in keeping the beat. She stated that she was uncomfortable when he would touch her on her upper leg and thigh while she was seated and playing her drum. When standing and playing her drum, she stated he would stand behind her and brush up against her. Rachel stated that these actions usually occurred in individual lessons with Mr. Mroz. Rachel wanted to stay in band; however, she did not want to attend lessons with Mroz. The school administration told the Amatos that they would talk to Mroz and that Rachel would not have to go to band lessons with Mroz.

Mroz met with the school administration. He explained that he assists his students with rhythm in different ways including at times placing his hands on their hands while playing the rhythms. He stated that Rachel struggled as a percussionist, and he would try to help her with rhythm by saying or clapping them; however, if this proved unsuccessful he would tap the beat on her leg or shoulder. He explained that the comment in relation to the electrical connection was very common among carpenters and plumbers. Mroz was told not to have any physical contact with Rachel, that she would not have lessons with him, and that the school district would investigate the allegations.

The principal, Johnsrud, met with Mroz the next day to discuss the allegations and review his personnel file. Mroz did not have any previous complaints in regard to these allegations. Johnsrud also met with several band students and asked questions in reference to Mroz touching them. The students reported touching such as tapping on their thighs or shoulders to assist with establishing the beat. One student reported that Mroz stood behind her and took her hands to

assist in playing the music. None of the students interviewed reported that the actions by Mroz made them feel uncomfortable. Johnsrud concluded and reported to the school administrator that Mroz's action "were not of a sexual nature but intended as an instructional technique" (Jane Doe, Jane Roe v. Fall River School District and Jeffrey A. Mroz, 2004, p.4). The school administration also reported these findings to the Amatos and informed them that Mroz had been directed not to have physical contact with Rachel and that Rachel should go to the guidance counselor if she felt uncomfortable or concerned.

Mrs. Amato contacted the Columbia County Department of Health and Human Services in regard to Rachel's allegations. The police department became involved, and Rachel was interviewed at the police station. During this interview, Rachel stated that Mroz would touch private areas of her body and brush against her. Mroz was interviewed and the police concluded that the allegation was not supported through the inconsistency of Rachel's comments and the fact that Mroz had no record of previous inappropriate behavior. The case was then closed.

Another student, Alanna Mortensen, was also in band and took part in the investigation by the principal in regard to Mroz's touching during band lessons. After the interview, Alanna asked Rachel about the questioning in the interview. Rachel told her that it was in response to Mroz touching her inappropriately and that it made her feel uncomfortable. The next day, Alanna told her parents that Mroz had touched her inappropriately. After a discussion with her parents and other students, Alanna determined that the touching was sexual. Alanna's parents did not contact the school district about the behavior, and Mroz did not touch Alanna again. The students reported that Mroz's teaching style changed, and he no longer tapped the beat on their legs.

Alanna and Mroz had disagreements in band class. Mroz had given a detention to Alanna for missing a band lesson. Alanna's father and Mroz discussed the detention and resolved the matter. Another incident involved Alanna writing a letter to a senator for civics class. In the letter, she stated that she was being harassed by Mroz. The letter was not sent. A separate occurrence involved Alanna receiving a grade of "C" in band. Her parents met with Mroz to discuss the grade believing that Alanna was being treated unfairly due to an illness. This matter was resolved; however, Mr. Mortensen stated that Alanna was frustrated with Mroz for making belittling comments toward her. Unaware of any recent comments, Alanna was told to speak to the school guidance counselor if she felt uncomfortable. Later that same school year, Mrs. Mortensen contacted the guidance counselor about Alanna's self-esteem and requested she join Alanna in her band lessons. The guidance counselor reported that the band lesson went fine and encouraged Alanna's parents to keep her practicing. Mrs. Mortensen contacted the guidance counselor again about the band lessons. At this point, the guidance counselor encouraged her to step back from the situation and know that Alanna was a good student and Mroz was a good teacher. Mrs. Mortensen replied that she had Alanna's best interest at heart and would not step away from the situation since Alanna felt uncomfortable with Mroz. There was no mention, through any of this correspondence, of inappropriate touching occurring.

In October of 2002, additional confrontations occurred between Mroz and Alanna. After one of these incidents, Alanna called her father to inform him. Mr. Mortensen came to the school and went to the bandroom. He yelled at Mroz and Mroz directed him to the school office. Mroz filed a report with the police in reference to Mr. Mortensens' conduct. Disagreements continued between the two parties.

The Mortensens and the Amatos met with the school board to discuss Mroz's actions. On a later date, Rachel wrote a letter to the school board in response to her claims against Mroz. The school board concluded that the evidence did not warrant cause to discipline Mroz. Additional interviews were conducted by law enforcement with both Rachel and Alanna. In these interviews, specific actions of inappropriate touching were described. In May of 2003, the district attorney informed Mroz that he would not be charged.

The plaintiffs claimed violations of equal protection and retaliation against the school district and Mroz. A claim of battery was also made against Mroz. The court granted the school district's motion for summary judgment. Mroz also received summary judgment involving the battery and retaliation claim; however, his motion was "DENIED as to plaintiffs' claim of violation of equal protection grounded on gender-based inappropriate physical touching of plaintiffs" (Jane Doe, Jane Roe v. Fall River School District and Jeffrey A. Mroz, 2004, p.15).

*Sandra T.E. and Rufus E. v. Robert Sperlik, et al. (2009).* Robert Sperlik was a music teacher in Berwyn, Illinois. The elementary school where he taught conducted a personal safety program for their students. After the presentation, two students felt that actions taken by their music teacher, Robert Sperlik, during private instruction made them uncomfortable. The students wrote a letter to the counselor that had provided the program describing the actions and comments that Sperlik had made to them.

The counselor gave the letter to Karen Grindle, the school principal. She met with Sperlik and showed him the letter. After this meeting, the principal met with the girls and each elaborated on the occurrences mentioned in the letter involving inappropriate touching of their private areas by Sperlik. The principal then met with the students' parents and told them that the students were overreacting to the seminar that was presented. She stated that the touching was

on the legs or shoulder and was meant to assist them with keeping the beat or stopping. Grindle also spoke with the school social worker about the complaints and demonstrated the action to her by placing her hand above her knee, on her leg without moving it. Grindle did not show the parents or the social worker the letter the girls had written. Grindle filed an incident report as instructed and informed Sperlik not to be in physical contact with students or comment about their appearance.

Sperlik's continued actions caused additional complaints from students and parents. Grindle did not inform the school system's Superintendent, William Jordan, about this matter until she received an anonymous complaint about Sperlik touching a girl's fingers during band. At this point, Grindle told Jordan of the previous complaints regarding Sperlik but claimed they were of pedagogical concern. The Superintendent had the Principal and Director of Curriculum speak to Sperlik about his teaching methods.

It was revealed from the plaintiff, C.E., to her mother that Sperlik would bind her during band using duct tape. This was reported to the police and after an investigation Sperlik was arrested. Multiple victims were identified after the arrest and each made similar complaints in reference to Sperlik's abusive behavior.

The plaintiff's parents contend that the school officials ignored the abuse reports and thus contributed to the sexual abuse. Plaintiffs' claims included a violation of Fourth and Fourteenth Amendment rights and state claims including intentional infliction of emotional distress. The court granted summary judgment for the school officials, with the exception of Sperlik, in the Fourth Amendment claims. Additionally, the court granted summary judgment to the school officials, with the exception of Grindle and Sperlik to the claim of substantive due process.

## **Emotional concerns**

*Brackens v. Ennis Independent School District (1998)*. Parental involvement over an incident between a student and the band director was the subject in the next case. An incident occurred involving the band director and the Brackens' son. The parents, upset over the incident, decided to go to the school to talk to the principal. Before they left to go to the school, Mrs. Brackens called the police anonymously and told them that there may be trouble at the school in a few minutes with verbal abuse. The police notified the school of the call and the secretary called the principal, who was off-campus at the time. The principal returned the call to the police and requested they go to the school. Once the Brackens arrived at the school, they attempted to go into the principal's office but were escorted out of the building by the police. A criminal trespass charge was filed against the Plaintiffs and they were told they could be arrested if they came back to the school. The Brackens brought suit alleging state and federal claims. The court granted summary judgment for the school.

*Wagner v. Tuscarora School District, et al. (2006/2007)*. The next case summary included under tort law alleged defamation. Fred Wagner served as the band director for approximately 20 years at James Buchanan High School in the Tuscarora School District. Before August of 2003, Wagner had received mostly favorable reviews and had not been subject to any disciplinary action. Wagner was a member of the Tuscarora Education Association and had achieved tenure status in the school district.

Dr. Stapleford became the new Superintendent for the school district on July 1, 2003. He had a meeting with the high school principal and orchestra teacher and the orchestra teacher complained that Wagner had sexually harassed her on multiple occasions. Dr. Stapleford had received complaints prior to this from a student and parent of the student in regard to Wagner

touching the student inappropriately. Additional complaints from other students were also made known to Stapleford and he decided an investigation should be conducted and law enforcement be notified.

Representatives from the Tuscarora Education Association were notified of the complaints against Wagner and were requested to be in attendance at the meeting with Stapleford and Wagner to discuss his employment. Wagner was notified of the meeting but was not told of the allegations against him by the orchestra teacher or what the meeting was about. The meeting took place on August 12, 2003. Stapleford informed Wagner of the employee and student claims against him. Wagner was given the opportunity to respond to the charges and he denied them. Wagner was not given the names of his accusers. Stapleford gave Wagner the choice of resignation or termination and stated that if he did not resign, he would be placed on administrative leave and that he should not report to work. Wagner agreed to administrative leave pending the investigation into the charges that he touched a student inappropriately. After Wagner was placed on leave, the school district discovered pornography on his office computer, financial concerns with the high school band program, and additional students that alleged inappropriate behavior by Wagner.

Wagner filed a grievance against the school district in November of 2003; however, the grievance was cancelled pending additional discussion. Wagner was provided a Statement of Charges and Notice of Hearing by the School Board which contained instructions informing him that he had 10 days from receipt of the Statement of Charges to request a hearing. If a request was not received, he waived his rights to contest his termination. Wagner did not request a hearing and was terminated August 9, 2004.

Wagner filed multiple claims including procedural due process, civil conspiracy, defamation, contract interference, and breach of contract in his suit. The District Court found in favor of the defendants granting summary judgment and partial dismissal. Wagner appealed and the United States Court of Appeals for the Third Circuit affirmed the District Court's decision.

*Gosche v. Calvert High School, et al. (1998)*. The final case summary addressing tort law claims involved the non-renewal of a music teacher. Connie Gosche was a music teacher at St. Mary's School, a Catholic elementary school. As part of her contract, she was required to reflect the Catholic Church values. Gosche and her husband divorced in 1994, and she began a sexual relationship with a married man a few months later. The man, Schalk, had three children that attended the Tiffin Catholic Schools. Suffering from depression following her divorce, Gosche was placed on medical leave in early 1995.

Father Murd, the pastor of St. Mary's Parish, received complaints concerning allegations of a relationship between Gosche and Schalk. Gosche's teaching contract was not renewed for the next year. Father Murd determined that Gosche had violated the values of the Catholic Church. The plaintiff, Gosche, brought suit with a claim of wrongful discrimination and failure to renew her teaching contract. Included among the many counts was a claim for invasion of privacy and a claim for intentional infliction of emotional distress "although it is not styled as such" (*Gosche v. Calvert High School, et al., 1998, p. 5*). The school system was granted summary judgment in this case.

### **Legal Considerations for Court Holdings–Tort Law**

Behavior by an individual that causes injury to another individual is the basis for a claim under tort law. The areas involved in school tort law include negligence, intentional torts, and defamation (Cambron-McCabe et al., 2004).

## **Contract Law**

The analysis conducted for this study revealed that there were no cases involving music educators heard in federal court from January 1, 1995–December 31, 2009 directly related to Contract Law. The findings must not minimize the importance of contracts in maintaining proper records and accountability for music educators.

## **Copyright**

The analysis conducted for this study revealed that less than 1% of the cases involving music educators heard in federal court from January 1, 1995–December 31, 2009 were directly related to Copyright Law. Due to the nature of the field of music education this number seemed surprisingly low. However, the study parameter of including only federal court cases may be the reason such few cases were revealed. The limited number of federal court cases involving copyright should in no way be interpreted that this area of law is not important to music educators. Artistic works are protected by copyright for an established time period and are then considered public domain. The issue of public domain and a change in the number of years a work is protected by copyright was the subject of the case summary included under this area of law.

### **Public domain**

*Golan, et al. v. Gonzales, et al. (2007)*. Two Congressional acts impacting the Copyright Clause were challenged in this federal court case: the Copyright Term Extension Act (CTEA) and the Uruguay Round Agreements Act (URAA). The CTEA increased the number of years for both existing and future copyrights to life plus 70 years from life plus 50 years. Thus, some works already in the public domain would be removed and have copyright protection.

The plaintiffs in this case are numerous and vary in profession from orchestra conductors to educators to distributors of motion pictures. The plaintiffs depend on works in the public domain as a matter of livelihood. The CTEA meant a 20-year delay in works entering public domain. The plaintiffs also performed works by foreign artists that were in the public domain. The Berne Convention afforded foreign authors of member countries the same protection of copyright provided by each individual country; thus, these works would be affected also. The URAA resulted in higher fees for performance, sheet music rental, and royalties that prohibited use of these works in certain circumstances.

A suit was filed by the plaintiffs claiming that the CTEA and URAA are unconstitutional. This suit alleged that the additional 20 years before works enter the public domain violates the “limited times” provision in the Copyright Clause, that URAA’s removal of works from the public domain exceeds the authority given to Congress in the Copyright Clause, and that the URAA has inhibited free expression and must be reviewed for First Amendment violations. The United States Court of Appeals affirmed the District Court’s holding that the claim against CTEA is dismissed and that URAA does not violate the Copyright Clause. The Court of Appeals remanded, for First Amendment review, the claim of violation of freedom of expression created by the additional copyright protection.

### **Legal Considerations for Court Holdings–Copyright Issues**

In reference to public domain and copyright protection, “one of these traditional contours is the principle that once a work enters the public domain, no individual -- not even the creator -- may copyright it” (Golan, et al. v. Gonzales, et al., 2007, p. 8).

**Disability Law (Disability, Americans with Disabilities Act, Special Education Law, Individuals with Disabilities Education Act)**

The analysis conducted for this study revealed that 15% of the cases involving music educators heard in federal court from January 1, 1995–December 31, 2009 were directly related to disability. In my research, this area of law encompassed both disability and special education law. Additional analysis was conducted to eliminate the duplicate cases under the combined disability and special education searches. The court cases included under disability law involved both student disability claims and music teacher disability claims. The student disability claims involved reasonable accommodations to assist with the disability and thorough support of evidence involving the disability. The music teacher disability claims involved reasonable accommodations and employment termination.

**Student Disability Claims**

*Corey v. Western Connecticut State University (2004)*. The following court case summary identified the need for reasonable accommodations for student success. Richard Corey was a student at Western Connecticut State University. He is blind and an accomplished musician who received his Bachelor of Music degree from this same institution in May of 2000. He was accepted into the Grade K–12 Music Education Certification Program at Western Connecticut State University and enrolled in the program in September of 2002. Corey claimed that he sought accommodations for his disability from the university; however, reasonable accommodations were not provided. Corey was not successful in the program at the university and did not return. He alleged this was due to the failure by the university to provide reasonable accommodations for him.

Corey brought a suit against the university claiming a violation involving the Americans with Disabilities Act and the Federal Rehabilitation Act. The university sought dismissal of the charges. The university was granted the motion to dismiss in regard to the Federal Rehabilitation Act. The court's holding denied the dismissal in regard to violations of the Americans with Disabilities Act and stated that Corey's allegations, if proven true, would establish discrimination based on a disability. "Specifically, Corey may be able to establish that WCSU officials failed to provide him with a reasonable accommodation because of their mistaken and irrational belief that Corey would never be able to become a competent music teacher" (Corey v. Western Connecticut State University, 2004, p.4).

*Thomas v. Hamline University and Kathy McLane (2008)*. The next case summary describes some accommodations made by the university to assist the student with her disability; however, additional factors impacted the student's educational goals. Jenelle Thomas was a student at Hamline University, a private university in Minnesota. She was pursuing majors in both music and education to receive her music education license. Her advisor was Dr. Kathy McLane, an associate professor in the music department. Thomas suffered from depression and "her symptoms include a lack of energy, a sense of hopelessness, lack of motivation, insomnia, oversleeping, and lack of appetite" (Thomas v. Hamline University and Kathy McLane, 2008, p. 2). Her depression had also caused her to contemplate suicide.

Thomas began having problems in her Educational Psychology class. These problems included missed classes, failure to turn in assignments, and limited interaction and participation in class. Thomas informed the professor of the class that she suffered from depression and was allowed extra time for her assignments. Even with the extra time, Thomas did not finish the

required work for the class and received a medical withdrawal from the class. According to at least three other professors, Thomas had similar problems in their classes.

Dr. McLane, as Thomas' advisor, met with Thomas to express concern about her performance. Thomas' performance did not improve. McLane sent an email to the Chair of the Education Department, Dr. Watson, expressing her concern over Thomas seeking music licensure. In this email she states that she had met with Thomas concerning her suitability for the field of music education and that Thomas wanted the music license and would do what was necessary to obtain it. She further stated that the only barrier that was in place that would inhibit Thomas' receipt of the degree was if she failed student teaching.

Dr. Watson held a conference with Thomas and many faculty members who addressed the student's strengths and weaknesses. Thomas requested specific concerns from the faculty. A few of the concerns included attendance, meeting of deadlines, and interaction with people. Thomas acknowledged the concerns; however, she stated that she is a different person when she is teaching. The faculty instructed her to schedule to teach a lesson so they could observe her teaching.

Thomas felt that the requirement of teaching this lesson was discriminatory. She went to the University's Disability Services Center to ask if the actions required of her involved discrimination. A student worker listened to Thomas' statements regarding the conference details. The student worker sent an email to disability advocates and inquired if teaching the lesson was discrimination. Responses from the disability advocates came in, and some felt that it was discriminatory. Thomas did not set up a lesson to teach.

Thomas failed two music classes in the spring semester of 2006. Hamline University decided that Thomas should not pursue the music licensure based on the failure of these two

central music courses and the failure to complete the lesson they had requested at the earlier conference. Thomas requested another case conference, and it was granted. At this conference, Thomas discussed her depression, and a discussion of accommodations occurred. Although Thomas was told she could not pursue her music licensure, she took classes required for the program. She was once again informed that she did not meet the requirements of the program and would not be allowed to pursue music education licensure.

Thomas filed suit in July of 2007 against Hamline University alleging a violation of the Americans with Disabilities Act and state claims. Dr. McLane was included in the suit with the allegation that the advisor aided the discrimination by attempting to establish an added barrier by requiring Thomas to teach a lesson for the faculty to observe. Dean Delgado met with Thomas and informed her that the requirement to teach the additional lesson was waived and that she would be allowed to pursue licensure if she met the other necessary requirements. Thomas decided not to continue classes at Hamline or her pursuit of music education licensure. The defendants were granted summary judgment in this case.

*K.C., et al. v. Mansfield Independent School District (2009)*. The next case involved a student's disability and alleged failure by the school to meet the individual needs. K.C. was diagnosed with Williams Syndrome, a genetic disorder that can result in a degree of mental retardation and learning difficulties. People with this disorder often have an interest in music and research suggests that music may assist in the academic development of a student with Williams Syndrome. K.C.'s parents contend that the school district did not meet K.C.'s needs with her Individualized Education Program and sought placement for her at the Berkshire Hills Music Academy. They contend that this institution not only provided a focus on living skills but also music education, which K.C. displayed an interest in.

After K.C.'s enrollment in the Academy, K.C.'s parents sought reimbursement from the Mansfield Independent School District for the cost of the Academy. A committee was sent to evaluate the program at the Academy and concluded that the school district could provide adequate services to K.C. under an amended Individualized Education Program. The request for reimbursement for the Academy was denied. Deeming the new Individualized Education Program was still insufficient, K.C.'s parents requested another hearing before the special education hearing officer. The officer denied the relief sought by the parents, and the case was appealed to the District Court.

The parents of K.C. filed a complaint alleging the Mansfield Independent School District did not provide a free appropriate education for K.C. as is required in the Individuals with Disabilities Education Act. The Court found that the plaintiffs, K.C. and her parents, had not met the burden of proof in establishing that K.C. was not provided a free appropriate education. Therefore, the Court entered judgment in favor of the school district.

*Costello, et al. v. Mitchell Public School District 79, et al. (2001).* The following case was evidence of the documentation necessary to determine a disability for a student and the resulting services through the special education department of a school district. Sadonya Costello attended elementary school in Morrill, Nebraska. She received special education services for grades one through four; however, she did not qualify for special education services in the fifth grade. After Sadonya had completed sixth grade, in May of 1996, it was once again determined that she was disabled and further testing was needed. According to Nebraska law, a physicians report stating the current status of the student's health and implications must accompany a request for special education services and this report was not provided to the school.

Sadonya was entering the seventh grade in 1996, and her parents transferred her education records from the elementary school to the high school. Members of the administration and faculty of the high school met to discuss Sadonya's needs and found that under Nebraska's law, she did not meet the requirement for special education services because her disability was not verified. Sadonya did receive informal monitoring throughout the first semester, and it was noted that she was receiving average grades, was accepted by her peers, and was social. The staff determined that she did not need special education services. Her grades were lower in the latter part of the semester, and at the end of the semester, she was failing band.

The Costello's became aware that Sadonya was not receiving special education services and contacted the school in reference to Sadonya's status. They requested Sadonya's doctors send information regarding her health to the school; however, the information the school received was outdated and did not provide information on her current health status.

Late in the first semester, Sadonya was having trouble with her band teacher, Mr. Kercher. She claimed he ridiculed her in front of her classmates, threw a notebook at her, and at a basketball game "told her that she could no longer play in the band because she was too stupid and that he did not have to teach students like her" (Costello, et al. v. Mitchell Public School District 79, et al., 2001, p. 4). After a meeting with school officials and Sadonya's therapist to discuss the concerns in band, Sadonya was removed from band class and placed in music appreciation, which was also taught by Kercher.

At the beginning of the second semester, a meeting was held to discuss ways to improve Sadonya's academic performance. Her grades continued to drop, she was becoming less social, and was accruing more absences than the previous semester. The school attempted to receive additional medical records about Sadonya's current health from health professionals and also

contacted the Costellos in an attempt to gain the additional medical information needed by the school system. The information was not received; therefore, Sadonya did not receive special education services. Sadonya began home-school in May of 1997. She suffered from depression and thoughts of suicide.

The Costellos filed suit in District Court alleging violations of the Due Process Clause and the Equal Protection Clause; violations of the Individuals with Disabilities Education Act, the Americans with Disabilities Act, and the Rehabilitation Act; and intentional infliction of emotional distress. Summary judgment was granted for the defendants and the plaintiffs filed an appeal. The United States Court of Appeals for the Eighth Circuit affirmed the decision of the District Court to grant summary judgment for the defendant school system and individuals.

#### **Music teacher disability claims**

*Grace Porter v. Mesquite Independent School District (1998)*. The need for reasonable accommodations was the primary factor in the following court case involving a music teacher. Grace Porter served as an elementary music teacher in the Mesquite Independent School District. During her tenure of over 17 years, she received many teaching awards. Porter fell on ice in the school parking lot on March 2, 1995, and received injuries to her knee and back. She received medical attention for the injuries, and was unable to return to work for the remainder of the school year. Her doctors released her to return to work under the restrictions that she not teach more than 45-47 classes in a week and that she not participate in extracurricular activities. The Personnel Administrative Officer received these restrictions and stated that they would not be a problem for the school district.

Porter returned to work and found her schedule to be too demanding although it met the class requirements the doctor recommended. Uneven distribution of classes throughout the week

was the cause of this demanding schedule, and Porter made a request to the principal to have her classes re-arranged to allow for some breaks. She was told to talk to the teachers, and this resulted in some changes. Porter felt the schedule was now manageable.

Still within the first week of school, Porter's schedule was changed to move a class. This change resulted in her teaching 12 classes in one day and additional instructional and preparation time to accommodate the new lower grade class into her previously established schedule of higher grade music instruction. She requested the class to be changed back, and this was denied. When she requested the change, she did not mention that the change was necessary to accommodate her physical limitations. She stated that the reason for the move was that it was less effective to teach the class at the new time.

During the second week of school, teachers asked Porter when she would begin assisting for the upcoming P.T.A. program. Porter spoke with the principal and stated that she would not be able to assist with the program since it was extra-curricular work. The principal stated that teaching 47 classes each week was not enough and that the students deserved more.

Porter did not return to her teaching position after the second week of school. She used her sick leave days and requested days from the sick leave bank when her sick days expired. The request for sick leave bank days was denied by the school district. Through additional sources she was able to receive her pay while off work. She applied for and was provided unpaid temporary disability from November of 1995 until her retirement in May of 1997. She did not request to return to work with accommodations nor did she notify the administration regarding the principal's unwillingness to support her non-participation in extra-curricular activities. Porter's doctors maintained contact with the school district regarding her inability to work and need for accommodations of leave credit and disability.

The plaintiff, Porter, filed suit against the school district alleging a violation of the Americans with Disabilities Act claiming that they denied her reasonable accommodations and constructively discharged her. The school district was granted summary judgment by the United States District Court citing that Porter did not provide sufficient evidence that the school district did not provide her accommodations.

***Sally Nyrop v. Independent School District No. 11 (2009)***. Discrimination and lack of reasonable accommodations were the claims in the following disability case in which a music teacher was seeking an administrative position within the school district. Sally Nyrop was hired as the music teacher at Wilson Elementary School in 1987. She was diagnosed with multiple sclerosis in 1995 and requested accommodations be made to assist with her symptoms. These accommodations included air conditioning and a microphone headset. The school district granted the requests and created an Employee Accommodation Plan that was renewed each year until the 2002 school year. Nyrop took a sabbatical during the 2002 school year to work on her education specialist degree in pursuit of a principal's license. She completed her degree and began teaching music at Wilson again in the fall of 2003.

She obtained an interim assistant principal position at another elementary school and remained there until the end of the school year 2004–2005. The next two years, she worked on special assignment within the district. This assignment included administrative and special education responsibilities. She was informed by the school district that her administrative duties would be replaced with half-time music teaching responsibilities in the 2007 school year.

Nyrop filed a charge of discrimination against the school district. The alleged discrimination charge resulted from the school district not hiring her for a full-time

administrative position and placing her in a location that did not have air conditioning. The school district's motion for summary judgment was granted.

*Susan A. Treiber v. Lindbergh School District (2002)*. The following court case results from a claim of violation of the Americans with Disabilities Act as a result of the music teacher's termination. Susan Treiber taught band and strings in the Lindbergh School District from 1995-1999. She was diagnosed with breast cancer in February of 1999 and was told she would need surgery. She completed a form requesting sick leave and stated that the reason for the leave was for surgery. Her leave was granted, and her doctor provided a letter stating that Treiber was in his care and would be unable to work from February 12-February 26. There was no explanation for the surgery. She had the surgery and received another note on March 1 from her doctor stating that she could return to work, with limited duty. She returned to work one day later and was granted her request for sick leave for the previous day. While Treiber was on sick leave, she received notice that her performance evaluation was completed and was ready to be reviewed. A comment was made in the notice that she would have been contacted if there were concerns.

Treiber and Union representatives met with the Assistant Superintendent for Personnel, Shelton Smith, and informed him that she had breast cancer and would be receiving chemotherapy. Prior to this meeting, the only people that Treiber had told about her cancer were the Union representatives. Smith commented that the District was contemplating hiring specialists in each area of music, and this would result in Treiber's contract not being renewed. Treiber was hired because she could teach both band and strings; it was noted that she was not the strongest candidate in either area.

Smith, in correspondence dated March 24, informed Treiber that the unsatisfactory marks on her performance evaluation were amended to "meets expectations." Written comments stated

that she needed additional study on strings. Smith sent additional information to Treiber in regard to her performance stating specific concerns including parent and student statements that she does not express enthusiasm for music and that improvements in the program were initiated by others. The School Board voted not to renew Treiber's contract for the next school year.

Treiber alleged that her teaching contract was not renewed due to her breast cancer in violation of the Americans with Disabilities Act. The school district, in their argument, stated that the contract decision makers had no knowledge of her breast cancer, she did not have a disability, and the contract decision makers had a legitimate reason not to renew her teaching contract. Summary judgment was sought by the school district and was granted by the United States District Court.

### **Legal Considerations for Court Holdings–Disability Law**

The Americans With Disabilities Act (ADA) protects individuals from discrimination due to a disability (United States Department of Justice, 2005). Reasonable accommodations are required to be made to assist a qualified individual in performing the basic functions of a job (United States Equal Employment Opportunity Commission, n.d., *Facts About the Americans With Disabilities Act*). The law also protects students with disabilities; these federal statutes include the Individuals With Disabilities Education Act, Section 504 of the Rehabilitation Act, the Americans With Disabilities Act, and the No Child Left Behind Act (Latham et al., 2008).

### **Family Educational Rights and Privacy Act (FERPA)**

The analysis conducted for this study revealed that less than 1% of the cases involving music educators heard in federal court from January 1, 1995–December 31, 2009 were related to the Family Educational Rights and Privacy Act. The findings must not diminish the importance of an individual's right to privacy in the educational setting.

## **Sexual Harassment**

The analysis conducted for this study revealed that 15% of the cases involving music educators heard in federal court from January 1, 1995–December 31, 2009 were directly related to sexual harassment. The sexual harassment cases included in this study primarily involved physical actions; however, written and verbal actions were also noted in some of the case proceedings. The sexual harassment court case summaries were organized under two categories: Inappropriate Relationships and Inappropriate Touching/Abuse/Actions.

### **Inappropriate relationships**

*J.M., et al. v. Hilldale Independent School District and Brian Giacomo (2008).* An alleged inappropriate relationship between a music educator and students was presented in the following case. A band teacher in the Hilldale Public Schools, Brian Giacomo, engaged in an improper relationship with two of his students, J.M. and S.R. The relationship with J.M. was sexual and began in December of 2005. Giacomo claimed the sexual acts were consensual; however, the plaintiffs claimed that a 14-year-old student cannot consent to a sexual act with a teacher. J.M. also testified that she was told by Giacomo to keep the relationship secret.

Giacomo took some band students, including J.M., on a school-sponsored band trip to St. Louis. A student, M.P., claimed that J.M. was in Giacomo's hotel room alone with him, which is a violation of school district policy. J.M. testified that she, and other students on occasion, went to Giacomo's hotel room to "hang out" and that the door was always open to allow students to just walk in.

At the band award's ceremony, Giacomo gave J.M. an award for being one of the most improved band students. M.P. called J.M. a name and stated that her "pedophile boyfriend" was the only reason she received the award. J.M. informed Giacomo of this comment, and Giacomo

informed the Assistant Principal. A meeting was held between the Assistant Principal, Giacomo, and M.P. M.P. testified that when he was trying to tell the Assistant Principal about Giacomo's conduct, the Assistant Principal became very angry and told him to stop spreading rumors that could ruin Giacomo's career. He told M.P. that he did not want to handle the problems that could result from the rumors. The Assistant Principal testified that the allegations made by M.P. were recanted. M.P. testified that there was another meeting with the Assistant Principal in which he was threatened with suspension if the rumors regarding Giacomo did not stop. The Assistant Principal claimed this meeting did not occur.

The Assistant Principal contacted M.P.'s parents to discuss the comments made by M.P. There is disagreement about who was present at this meeting. Giacomo testified that M.P.'s parents were told to stop their son from commenting about sexual misconduct between Giacomo and J.M. and that the parents commented that they had heard rumors about Giacomo being a pedophile.

An inappropriate relationship between Giacomo and another student, S.R., began in August of 2006. S.R.'s mother discovered messages that suggested the inappropriate relationship and took them to the high school principal and assistant principal. The superintendent was notified, and Giacomo was suspended immediately. The Superintendent ordered an investigation. S.R. denied a relationship with Giacomo but later testified that she had promised to keep the relationship secret. An unconditional resignation was submitted by Giacomo, and law enforcement became involved. Giacomo entered guilty pleas to the charges that arose from his behavior with the students J.M. and S.R.

The plaintiffs in this case claimed violations of both federal and state laws including the rights guaranteed by the Fourteenth Amendment, specifically Title IX, and a state law claim

against the school district for the negligent supervision of the teacher, Giacomo. The school district sought summary judgment to the charges, and the District Court denied this request.

***Sondra Hansen, et al. v. Board of Trustees of Hamilton Southeastern School Corporation (2007/2008)***. Dmitri Alano was hired to serve as the Assistant Band Director at Hamilton Southeastern in 1998. Prior to this position, he was the band director at Waldron High School. C.H., a student in the band, alleged she and Alano had a sexual relationship during her freshman and sophomore years of high school. C.H. took caution to keep the relationship hidden from her parents and school officials. After her sophomore year, C.H. quit band and the sexual encounters ended as well.

Two years later, C.H. was put in the hospital by her parents to receive substance abuse treatment and while in the hospital, told her therapist about the inappropriate sexual relationship with Alano. The hospital told C.H.'s parents about the relationship and this led to an investigation and charges filed against Alano. Alano resigned his position as Assistant Band Director and plead guilty to sexual battery.

Investigators became aware that Alano had previous relationships with two of his former students. The first was his wife, the romantic relationship began after she graduated. The other relationship began while the student was still in school and continued after graduation. No one knew of these relationships until the investigation.

The Hansens filed claims based on Title IX of the Education Amendments Act of 1972 and multiple state law claims against both Alano and the School. The School sought summary judgment on all claims. The District Court granted this motion. On appeal, the Court found that the plaintiffs had not established that the school knew or should have known of the misconduct by Alano nor that they acted negligently based on the facts they had. The decision was affirmed.

*John and Jane Doe, Jane Doe II v. Granbury ISD, et al. (1998).* In the next case, the plaintiffs alleged that Jane Doe II was sexually harassed and assaulted by her middle school band director, John David Talmage, while she was a student at Granbury Middle School and that she was sexually harassed and assaulted by her high school band director, Richard Lee, while she was a student at Granbury High School. Harris, the Superintendent for Granbury ISD, was new to the school district and began his employment in August of 2006. He was notified on October 7, 2006, that Talmage and Lee were under investigation for charges of engaging in indecency with a child and was asked to attend a meeting with Police Services and District Attorney's representatives. Lee submitted his letter of resignation to the school district and Talmage was suspended from his duties and told not to have contact with students.

The principal at Granbury High School, Green, was informed of an allegation involving Lee and Jane Doe II in which they made inappropriate contact with each other in Lee's office. Green met with Lee to discuss the allegation. Green told his supervisor of the allegation against Lee on October 1, 1996. They met with Lee and informed him that an investigation would be conducted and provided him general information on the allegation against him.

A meeting was held with Jane Doe II and her mother, Jane Doe. Jane Doe II denied an inappropriate relationship with Lee. Jane Doe also denied the allegations; she stated that Lee was a family friend. Jane Doe informed Green that Jane Doe II's former boyfriend had told her about inappropriate behavior between Doe II and Lee; however, she felt it was jealousy. Green, Lee, and investigating officers met and Lee was informed of the charges against him. He resigned and did not return to the school.

Grissom, the principal at Granbury Middle School, was informed by a parent that Talmage was seen holding hands with a young woman at the middle school open house. The

young woman he was holding hands with was the daughter of the woman he was romantically involved with at the time. Grissom had seen Talmage, the woman, and the young woman all holding hands previously and felt that the mother was aware of the behavior. Grissom spoke to Talmage about holding hands with the young woman at open house and requested he not continue that behavior. On December 4, 1995, Grissom received a call from a detective from Police Services stating that the evening before, the security alarm sounded at the middle school and an officer responded. The officer reported he saw Talmage in an embrace with a female who appeared to be in her early teens. Police Services did not want to confront Talmage just then, instead they looked through yearbooks to try and identify the female. Unable to do so, they felt that the woman was not a student at the school and told Grissom not to report the incident to anyone.

After Jane Doe II brought the claims against Talmage and Lee and had withdrawn from the school district, she attempted to make contact with another male faculty member stating that she would be able to drive in the near future and could come to the school on her own. Grissom informed Harris about this, and Harris stated that he would contact Jane Doe II's parents and request that she not come to the school.

The District Court granted both the school district and school personnel's request for summary judgment and dismissed the plaintiff's claim with prejudice.

### **Inappropriate touching/actions/abuse**

*Rogers v. Muscogee County School District and Carr (1999)*. The next case provided another example of alleged inappropriate conduct by a music educator. The plaintiff, Robbie, was a student at Richards Middle School. He participated in the boys' chorus class that was taught by Herman Larry Carr. Robbie admired Carr, and when Carr asked him to come to the

school to assist him with some work on a vacation day, Robbie came eagerly. Carr molested Robbie while the two were alone in his office. Initially, Robbie did not tell anyone what had occurred; however, several weeks later he told his girlfriend and an adult about the incident. Robbie then told the school counselor what had happened and the counselor informed the principal.

The principal spoke to Carr about Robbie's claims, and Carr did not deny the claims. Carr was suspended and admitted to the superintendent that he had molested Robbie. Carr was given the option of resignation or termination, and he resigned.

It became known at school that Robbie was responsible for Carr being suspended. Some students believed Robbie was lying. The principal did not inform the students or parents that Carr had confessed. Robbie and his mother moved to another state.

The plaintiffs alleged a violation of Title IX of the Education Amendments of 1972 claiming that the school district was vicariously liable for the abuse. After the plaintiffs had presented their case, another witness came forward claiming that he had been molested repeatedly by Carr and that he had told the principal about the abuse. The defendants claimed that allowing this witness to be heard without them having the opportunity to investigate would be prejudicial. The District Court did not allow the testimony, and the holding was in favor of the school district. The United States Court of Appeals for the Eleventh Circuit affirmed this decision.

*Nicole Delgado v. James C. Stegall and Western Illinois University (2004)*. Alleged inappropriate conduct by a music educator occurred in a university setting in the next case. James Stegall was the Choral Director at Western Illinois University. He hired one of his students, Nicole Delgado, to be his office assistant. After she became his office assistant, Stegall

made multiple advances toward her including asking if she loved him and inappropriate touching. Delgado told a female music teacher about the advances, and the teacher told Delgado to inform her parents, inform the chair or dean, to take herself out of the situation, and seek counseling. Delgado did seek counseling. Neither the counselor nor the female music teacher reported Stegall's inappropriate behavior to university officials. Delgado transferred to another university and filed a complaint against Stegall and Western Illinois University. The University directed Stegall to receive training in appropriate behavior when working with female students and placed a letter in his file describing the action taken and method for evaluating the effectiveness of the action. It was discovered that three additional female students had also received advances from Stegall; however, these women did not file complaints and university officials were not aware of these incidences.

The plaintiff, Delgado, filed suit against the defendants alleging a violation of Title IX of the Educational Amendments of 1972. The District Court granted summary judgment to the University and Stegall. Delgado appealed this decision. The United States Court of Appeals for the Seventh Circuit affirmed the District Court's decision to grant summary judgment for the University. The court reversed and remanded the District Court's grant of summary judgment to Stegall.

*Kingsbury v. Brown University (2003)*. The next case involved a previous allegation of sexual harassment contributing to termination of employment. Kingsbury was initially hired in July of 1990 as a visiting adjunct Assistant Professor of Music. Brown University's Music Department appointed him as an Assistant Professor in October of 1990 for a term of three years. Kingsbury discovered he had a brain tumor, and after surgery suffered from impaired speech and

vision. Brown University placed him on medical leave. He remained on medical leave for 18 months and then requested to return to teaching.

A medical examination was conducted on Kingsbury's condition and the Dean of the Faculty, Dean Shepp, notified Kingsbury that he would not be allowed to return to duty. Dean Shepp cited facts in the medical examination report that he felt would impede Kingsbury's performance of duties such as visual and speech problems. Shepp also requested a neurological assessment of Kingsbury. The results identified improvement in his condition and that there was no reason to believe he would not be successful in a return to teaching. Kingsbury's lawyer sent a letter to Dean Shepp claiming discrimination against his client and stating that Kingsbury could perform the essential functions of the job. Dean Shepp requested the Chairman of the Music Department to provide a list of responsibilities for the position. The Chairman, with the assistance of music faculty, created a list of essential functions of the position. Dean Shepp sent this list of essential functions to Kingsbury's physician to determine if Kingsbury would be able to return to teaching the next semester. Kingsbury filed a discrimination claim with the State of Rhode Island Commission for Human Rights against Brown University alleging a failure to make reasonable accommodations and that he was discriminated against because of his disability.

A previous incident is now introduced that played a significant role in the case. A graduate student filed a sexual harassment complaint against Kingsbury in 1991 but stopped the complaint process after learning that Kingsbury was to undergo surgery. The student stated that she did not want to file charges at that time. Kingsbury was not notified of the sexual harassment charge against him. The complaint was reactivated by the student in November of

1993 and investigated by the university. Kingsbury received a letter of reprimand for seeking a relationship with the graduate student.

He was reinstated to his duties as Assistant Professor in September of 1994. The annual review of his work in 1995 posed concerns that were addressed with Kingsbury. However, in the fall of 1996, his annual review and reappointment review resulted in the decision not to renew his contract. Four reasons were given by the Provost for the non-renewal: “1) inadequate scholarship, 2) inadequate teaching, 3) Kingsbury’s strong conveyance of the false impression that his colleagues in the Music Department had interfered with the publication of his scholarly works, and 4) the sexual harassment reprimand” (Kingsbury v. Brown University, 2003, p. 19). The plaintiff, Kingsbury, filed a claim against Brown University alleging discrimination as a result of his disability and retaliation. The employer sought summary judgment.

This case was referred to a magistrate. The magistrate found that the first two reasons cited above for Kingsbury’s non-renewal were not true and that Kingsbury did identify a causal connection based on his previous discrimination claim filed with the Commission on Human Rights and the sexual harassment reprimand which was a factor in his non-renewal. The magistrate recommended the defendant’s motion for summary judgment be denied.

*Cross v. Chicago School Reform Board of Trustees (2000)*. The final case regarding sexual harassment involved a music educator, administrator, and students. Camuel Cross taught music at Gordon Hubbard High School from 1992-1996. The principal at Gordon Hubbard High School was Charles Vietzen. Cross, the plaintiff, alleged he was sexually harassed by Vietzen while teaching at this school. Multiple specific incidences were cited by Cross including Vietzen showing him a sexually explicit card in front of others, Vietzen touching Cross in the cafeteria and a separate incident of Vietzen putting his arm around Cross in the cafeteria, an invitation by

Vietzen to Cross to join him for cocktails in the presence of other teachers, and a request by Vietzen for Cross to take off his clothes. Other allegations included Vietzen sharing sexually explicit jokes with Cross. Cross continued to serve as band director at the school.

The school counselor reported to Vietzen, in January of 1995, that two female students claimed Cross was involved in an inappropriate relationship with them. An investigation occurred by the Cook County Attorney's Office; however, no actions were taken against Cross. While this investigation was being conducted, Cross told Vietzen that he had been involved in inappropriate activities involving students. These activities included going to a restaurant with a student, having a student ride in his car, and going to a student's house. Due to his inappropriate conduct, Cross' efficiency rating was lowered to satisfactory. During this year, he also had many absences which led to conferences with Vietzen.

Vietzen left the school for a brief time, and Valerie Doubrava served as the acting principal. Cross received reprimands from her in regard to his excessive absences and failure to provide notification prior to absences. Cross wrote a letter to the superintendent complaining about the administration at the school and the reprimand he had received. In this correspondence, he made no reference to sexual harassment or inappropriate behavior by Vietzen toward him. Vietzen returned to the school. Cross completed a leave form in May of 1996 but did not receive approval for the leave. Without approval, he took the leave and when he returned to school, he did so with his union representative. They wanted to meet with Vietzen, however, Vietzen refused to meet with them.

Cross filed suit claiming allegations of sexual harassment and retaliation against the Board under Title VII of the Civil Rights Act of 1964. The District Court granted the defendants

summary judgment “because Cross has not produced any evidence from which a reasonable jury could find in his favor” (Cross v. Chicago School Reform Board of Trustees, 2000, p. 7).

### **Legal Considerations for Court Holdings—Sexual Harassment**

Sexual harassment by a teacher toward a student constitutes sex discrimination (Chancellor v. Pottsgrove School District, et al., 2007).

A high school student who is assigned to a teacher’s class does not have the capacity to welcome that teacher’s physical sexual conduct. Under these circumstances, the teacher’s conduct is deemed unwelcomed. Unwelcome sexual conduct constitutes a sexually hostile educational environment, a form of sexual harassment. And sexual harassment constitutes discrimination on the basis of sex. Thus, a teacher who has sex with a high school student who is assigned to his class discriminates against the student on the basis of sex in violation of Title IX. (Chancellor v. Pottsgrove School District, et al., 2007, p.14)

The previous cases are presented for review in table format. Table 4 displays this concise synopsis of the example court cases included in the study.

Table 4

*Synopsis of Each Selected Court Case (N = 50)*

| Citation   | Year | Search Terms                                    | Cause of Action                                   | Grade Level      | Subject | Brief Description  | Holding   | Appeal Information            |
|--|------|---|---|------------------|---------|--|---|-------------------------------|
| Ashby v. Isle of Wight County School Board, 354 F. Supp. 2d 616 (E.D. Vir. 2004).  | 2004 | Choral teacher                                  | 1st Amendment, 14th Amendment                     | High School      | Choral  | Suit involving performance of religious selection by student at graduation | Summary judgment for school   |                               |
| Baby Doe, et al. v. Methacton School District, et al., 880 F. Supp. 380 (E.D. Pa. 1995).   | 1995 | Music teacher                                   | Constitutional rights, negligence                 | Elementary       | Music   | Alleged sexual abuse of student  | Court dismissed count against the school system on affirmative duty |                               |
| Bauchman v. West High School, et al., No. 95-CV-506, (D. Utah 1995), dis'd, rem'd, aff'd, 132 F.3d 542 (10th Cir. 1997).               | 1997 | Choir director, choir instructor, choir teacher | 1st Amendment, state claims                       | High School      | Choral  | Suit involving choir performance of religious music selections             | Dismissed federal claims, state claims remanded, dismissed relief   | Dismissed, remanded, affirmed |
| Brackens v. Ennis Independent School District, Civil Action No. 3:97-CV-2502-H, 1998 U.S. Dist. LEXIS 19824 (N.D. Tex. Dec. 15, 1998). | 1998 | Band director, band teacher                     | State and federal claims                          | High School      | Band    | Problem between student and band director, parents became involved         | Summary judgment for the school                                     |                               |
| Chancellor v. Pottsgrove School District, et al., 501 F. Supp. 2d 695 (E.D. Penn. 2007).   | 2007 | Band instructor, band teacher                   | 4th Amendment, 14th Amendment, emotional distress | High School      | Band    | Alleged inappropriate teacher-student relationship                         | Denied summary judgment for the school                              |                               |
| Corey v. Western Connecticut State University, No. 3:03CV0763, 2004 U.S. Dist. LEXIS 3982 (D. Conn. Mar. 10, 2004).                    | 2004 | Music education, music teacher                  | ADA, Federal Rehabilitation Act                   | Higher Education | Music   | Blind student allegedly not receiving accommodations                       | Court denied school's motion to dismiss ADA claims                  |                               |

| Citation   | Year | Search Terms  | Cause of Action   | Grade Level      | Subject | Brief Description  | Holding  | Appeal Information           |
|--|------|---|---|------------------|---------|--|--|------------------------------|
| Costello, et al. v. Mitchell Public School District 79, et al., (D. Neb.), aff'd, 266 F.3d 916 (8 <sup>th</sup> Cir. 2001).                      | 2001 | Band teacher, choir teacher                                 | 14th Amendment, IDEA, ADA, Rehabilitation Act, emotional distress | High School      | Band    | Student not receiving special education services                                   | Summary judgment for the school  | Affirmed                     |
| Cross v. Chicago School Reform Board of Trustees, 80 F. Supp. 2d 911 (N.D. Ill. 2000).   | 2000 | Music teacher   | Sexual harassment, retaliation                                    | High School      | Music   | Alleged sexual harassment from administration, inappropriate conduct with students | Summary judgment for the school  |                              |
| Cruse v. Clear Creek I.S.D., 976 F. Supp. 1068 (S.D. Tex. 1997).   | 1997 | Music director  | Due process, equal protection, district violations, state claims  | Elementary       | Music   | Teacher reassignment from high school to elementary school                         | Claims dismissed   |                              |
| Delgado v. Stegall and Western Illinois University, No. 01-1332, (C.D. Ill.), aff'd, rev'd, rem'd, 367 F.3d 668 (7th Cir. 2004).                 | 2004 | Choral director, music teacher                              | Title IX  | Higher Education | Choir   | Alleged inappropriate conduct by music teacher                                     | Summary judgment for the university, denied summary judgment for teacher, remanded | Affirmed, reversed, remanded |
| Doe, et al. v. Duncanville Independent School District, et al., No. 3:91-CV-921-T (N.D. Tex.), aff'd, rev'd, vac'd, 70 F.3d 402 (5th Cir. 1995). | 1995 | Choir director, choir teacher                               | 1st Amendment   | High School      | Choir   | Suit involving prayer and performance of religious selection as theme song         | Employees not allowed to lead prayer, theme song allowed due to pedagogical value  | Affirmed, reversed, vacated  |
| Doe and Doe II v. Granbury ISD, et al., 19 F. Supp. 2d 667 (N.D. Tex. 1998).   | 1998 | Band director   | Sexual harassment   | JH/High School   | Band    | Alleged sexual harassment toward student   | Summary judgment for school  |                              |
| Doe and Roe v. Fall River School District and Mroz, No. 03-C-0728-C, 2004 U.S. Dist. LEXIS 25802 (W.D. Wis. Dec. 20, 2004).                      | 2004 | Music education, band director, band teacher, music teacher | Equal protection, retaliation, battery                            | Middle School    | Band    | Alleged inappropriate conduct by music teacher                                     | Summary judgment for school, partial summary judgment for teacher                  |                              |

| Citation   | Year | Search Terms   | Cause of Action  | Grade Level      | Subject   | Brief Description  | Holding  | Appeal Information |
|--|------|--|--|------------------|-----------|--|--|--------------------|
| Dunn and McCullough v. Fairfield Community High, No. 96-4328JLF (S.D Ill.), aff'd, 158 F.3d 962 (7 <sup>th</sup> Cir. 1998).   | 1998 | Band director, band instructor                                 | Due process, free from cruel and unusual punishment  | High School      | Band      | Students performed unauthorized solos and were removed from band | Summary judgment for school  | Affirmed           |
| Gauder v. Leckrone, et al., 366 F. Supp. 2d 780 (W.D. Wis. 2005).  | 2005 | Band director  | Due process  | Higher Education | Band      | Fines imposed due to behavior                                    | Decision in favor of defendants  |                    |
| Golan, et al. v. Gonzales, et al., No. 1:01-cv-01854, 2005 U.S. Dist. LEXIS 6800 (D. Colo. Apr. 19, 2005), aff'd, rem'd, 501 F.3d 1179 (10 <sup>th</sup> Cir. 2007). | 2007 | Orchestra conductor  | Copyright Term Extension Act, Uruguay Round Agreements Act, 1st Amendment                          | Not applicable   | All music | Change in number of years for music entering public domain       | CTEA claim-dismissed, URAA claim-not unconstitutional, 1st Amendment claim-remanded                                | Affirmed, remanded |
| Gosche v. Calvert High School, et al., 997 F. Supp. 867 (N.D. Oh. 1998).   | 1998 | Music teacher  | Discrimination, emotional distress, invasion of privacy  | Elementary       | Music     | Teacher non-renewed due to actions                               | Summary judgment for the school  |                    |
| Hansen, et al. v. Board of Trustees of the Hamilton Southeastern School Corporation, No. 05 C 670 (S.D. In.), aff'd, 551 F. 3d 599 (7 <sup>th</sup> Cir. 2008).      | 2008 | Music education, band director, band instructor, music teacher | Title IX, state claims   | High School      | Band      | Alleged inappropriate teacher-student relationship               | Summary judgment for the school  | Affirmed           |
| Hilton v. Lincoln-Way High School, No. 97 C 3872, 1998 U.S. Dist. LEXIS 508 (N.D. Ill. Jan. 14, 1998).   | 1998 | Band director  | 4th Amendment, 14th Amendment, hazing, battery, emotional distress, conspiracy, false imprisonment | High School      | Band      | Hazing, seizure at band camp                                     | Dismissed conspiracy and hazing claims, plaintiffs sufficiently alleged Fourth and Fourteenth Amendment violations |                    |
| J.M., et al., v. Hilldale Independent School District and Brian Giacomo, No. CIV 07-367-JHP, 2008 U.S. Dist. LEXIS 57098 (E.D. Ok. July 25, 2008).                   | 2008 | Band teacher   | 14th Amendment, Title IX, negligence   | High School      | Band      | Alleged inappropriate teacher-student relationship               | Summary judgment denied to the school  |                    |

| Citation   | Year | Search Terms   | Cause of Action   | Grade Level      | Subject | Brief Description   | Holding  | Appeal Information |
|--|------|--|---|------------------|---------|---|--|--------------------|
| K.C., et al. v. Mansfield Independent School District, 618 F. Supp. 2d 568 (N.D. Tex. 2009).   | 2009 | Music education, choir director, choir teacher, music teacher, music therapist | IDEA  | not stated       | Music   | Disabled student sought music study to assist with disability                             | Court found in favor of the school district  |                    |
| K.U. v. Alvin School District and Virgil Tiemann, 991 F. Supp. 599 (S.D. Tex. 1998).   | 1998 | Band director, band teacher  | Due process, equal protection, retaliation, discrimination                  | High School      | Band    | Alleged retaliation by school, failure to meet special needs                              | Granted defendant's motion to dismiss  |                    |
| Kadetsky v. Egg Harbor Township Board of Education, et al., 82 F. Supp. 2d 327 (D. NJ 2000).   | 2000 | Band director  | 1st Amendment, 14th Amendment, state claims                                 | High School      | Band    | Retaliation in regard to free speech  | Dismissed Fourteenth Amendment and CEPA claims   |                    |
| Kingsbury v. Brown University, CA 02-068L, 2003 U.S. Dist. LEXIS 25792 (D. RI Sep. 30, 2003).  | 2003 | Music education  | ADA   | Higher Education | Music   | Professor claims discrimination and retaliation was cause for his non-renewal of contract | Magistrate recommended summary judgment denied to the school   |                    |
| Konits v. Valley Stream Central High School District, et al., 2004 U.S. Dist. LEXIS 29479 (E.D.N.Y. Mar. 2, 2004), vac'd, rem'd, 394 F.3d 121 (2 <sup>nd</sup> Cir. 2005). | 2005 | Orchestra teacher, music teacher   | 1st Amendment, 5th Amendment, 14th Amendment, state claims                  | High School      | Music   | Adverse personnel action against plaintiff due to assisting another employee              | Vacated the District Court holding and remanded  | Vacated, remanded  |
| Konop v. Northwestern School District, et al. and Genzler v. Northwestern School District, et al., 26 F. Supp. 2d 1189 (D. SD 1998).                                       | 1998 | Band teacher, music teacher  | 4th Amendment, 14th Amendment, intentional infliction of emotional distress | High School      | P.E.    | Strip search of students to find missing money  | Concluded search not reasonable, facts supported plaintiff's claim of intentional infliction of emotional distress |                    |

| Citation   | Year | Search Terms   | Cause of Action                               | Grade Level        | Subject   | Brief Description   | Holding   | Appeal Information |
|--|------|--|---|--------------------|-----------|---|---|--------------------|
| Lee v. Pine Bluff School District and Darrell McField, (E.D. Ark.), aff'd, 472 F.3d 1026 (8th Cir. 2007).                      | 2007 | Band director  | Negligence, Constitutional rights             | Junior High School | Band      | Student death after trip  | Constitutional claims dismissed                         | Affirmed           |
| Lewis v. City of Boston, 2002 U.S. Dist. LEXIS 6173 (D. Mass. March 29, 2002), aff'd, 321 F.3d 207 (1st Cir. 2003).            | 2003 | Music education, music director, music instructor, music teacher | 1st Amendment, discrimination                 | All levels         | All music | Retaliation from the school due to employee public statements             | Summary judgment for the city                           | Affirmed           |
| Mazevski v. Horseheads Central School District, et al., 950 F. Supp. 69 (W.D. NY 1997).  | 1997 | Band director  | Due process                                   | High School        | Band      | Student missed performance--dismissed from band                           | Summary judgment for the school                         |                    |
| McCann, et al. v. Fort Zumwalt School District, et al., 50 F. Supp. 2d 918 (E.D. Missouri 1999).                               | 1999 | Band director  | 1st Amendment                                 | High School        | Band      | School district would not allow performance of selection                  | Summary judgment for the school                         |                    |
| McLaughlin v. Board of Education for the Pulaski County Special School District, et al., 296 F. Supp. 2d 960 (E.D. Ark. 2003). | 2003 | Choir teacher  | 1st Amendment, 14th Amendment                 | Junior High School | Choir     | Gay student wanted open discussion  | Court ordered the school to state why they opposed this |                    |
| Nurre v. Whitehead, 520 F. Supp. 2d 1222 (W.D. Wash. 2007), aff'd, 580 F.3d 1087 (9th Cir. 2009).                              | 2009 | Music educator, band director, musical director                  | 1st Amendment, 14th Amendment                 | High School        | Band      | Performance of a religious instrumental arrangement not allowed by school | Court found in favor of school                          | Affirmed           |
| Nyrop v. Independent School District No. 11, Civil No. 07-4663, 2009 U.S. Dist. LEXIS 29487 (D. Minn. April 7, 2009).          | 2009 | Music teacher  | ADA, Federal Rehabilitation Act, state claims | Elementary         | Music     | Teacher alleged accommodations not made by school system                  | Summary judgment for the school                         |                    |

| Citation   | Year | Search Terms                     | Cause of Action                             | Grade Level   | Subject   | Brief Description   | Holding   | Appeal Information |
|--|------|----------------------------------|---|---------------|-----------|---|---|--------------------|
| O.T., et al. v. Frenchtown Elementary School District Board of Education, et al, 465 F. Supp. 2d 369 (D. NJ 2006).         | 2006 | Music teacher                    | 1st Amendment                               | Elementary    | Choral    | Individual student wanted to sing religious song at talent show                               | Court allowed performance of the selection  |                    |
| Porter v. Mesquite Independent School District, No. 3:96-CV-3311-BF, 1998 U.S. Dist. LEXIS 9036 (N.D. Tex. June 11, 1998). | 1998 | Music teacher                    | ADA   | Elementary    | Music     | Teacher fell, alleged school did not make reasonable accommodations for her successful return | Summary judgment for the school   |                    |
| Rogers v. Muscogee County School District, No. 94-cv-70 (M.D. Ga.), aff'd, 165 F.3d 812 (11th Cir. 1999).                  | 1999 | Music teacher                    | Title IX, vicarious liability               | Middle School | Choir     | Alleged inappropriate conduct by music teacher  | Holding in favor of the school  | Affirmed           |
| Rogovin v. New York City Board of Education, et al., No. CV-99-3382, 2001 U.S. Dist. LEXIS 11923 (E.D. NY Aug. 17, 2001).  | 2001 | Music education, music teacher   | 14th Amendment                              | High School   | Orchestra | Contract not renewed-teacher claimed license essentially revoked                              | Claims dismissed  |                    |
| S.D. and M.P. v. St. Johns County School Board, et al., 632 F. Supp. 2d 1085 (M.D. Fl. 2009).                              | 2009 | Choir director, music instructor | 1st Amendment, 14th Amendment               | Elementary    | Choir     | Suit involving performance of religious selection in program                                  | Injunction against performance of the selection   |                    |
| Sandra T.E. and Rufus E. v. Robert Sperlik, et al., 639 F. Supp 2d 912 (N.D. Ill. 2009).                                   | 2009 | Music teacher                    | 4th Amendment, 14th Amendment, state claims | Elementary    | Music     | Alleged inappropriate touching by band director   | Summary judgment for school with the exception of band director on Fourth Amendment claims, summary judgment to school with the exception of band director and principal on due process claim |                    |

| Citation  | Year | Search Terms                                     | Cause of Action   | Grade Level         | Subject   | Brief Description   | Holding   | Appeal Information           |
|---|------|--|---|---------------------|-----------|---|---|------------------------------|
| Seal v. Morgan, et al., No. 97-00267 (E.D. Tenn.), aff'd, rev'd, rem'd, 229 F.3d 567 (6th Cir. 2000).                                     | 2000 | Band director                                    | 4th Amendment, 14th Amendment                                     | High School         | Band      | Knife found in student's car                                    | Denied school district summary judgment, reversed, and remanded | Affirmed, reversed, remanded |
| Shinn v. College Station Independent School District, et al., No. CA-H-93-3055 (S.D. Tex.), aff'd, 96 F. 3d 783 (5th Cir. 1996).          | 1996 | Band director                                    | 1st Amendment, 14th Amendment                                     | High School         | Band      | Alleged poor performance of band director                       | Summary judgment for the school                                 | Affirmed                     |
| Skarin, et al. v. Woodbine Community School District, et al., 204 F. Supp. 2d 1195 (S.D. Iowa 2002).                                      | 2002 | Music educator, choir director, choral director  | 1st Amendment   | High School         | Choir     | Suit involving performance of religious selection at graduation | Injunction against performance of selection                     |                              |
| Stratechuk v. B of E, South Orange-Maplewood, et al., 577 F. Supp. 2d 731 (D.N.J. 2008), aff'd, 587 F.3d 597 (3 <sup>rd</sup> Cir. 2009). | 2009 | Music teacher                                    | 1st Amendment   | Middle School       | All music | Claim that the District's Arts Policy violated 1st Amendment    | Summary judgment for the school                                 | Affirmed                     |
| Stucky v. Hawaii, et al., Civil No. 06-00594, 2008 U.S. Dist. LEXIS 5627 (Hawaii Jan. 25, 2008).  | 2008 | Music education, music teacher                   | Retaliation, Title IX, Title VI, State Claims, Eleventh Amendment | Intermediate School | Band      | Termination due to alleged unsatisfactory job performance       | Summary judgment for the defendants                             |                              |
| Thomas v. Hamline University and Kathy McLane, Civil No. 07-3323, 2008 U.S. Dist. LEXIS 94873 (Minn. Nov. 21, 2008).                      | 2008 | Music education                                  | ADA, state claims   | Higher Education    | Music     | Disabled student allegedly not receiving accommodations         | Summary judgment for the school                                 |                              |
| Trefelner v. The Burrell School District, 655 F. Supp. 2d 581 (W.D. Penn. 2009).  | 2009 | Band director, musical director, musical teacher | 1st Amendment, 14th Amendment                                     | High School         | Band      | Parochial student wanted to perform with public school band     | Restraining order granted                                       |                              |

| Citation  | Year | Search Terms                                     | Cause of Action  | Grade Level   | Subject       | Brief Description   | Holding  | Appeal Information |
|---|------|--|--|---------------|---------------|---|--|--------------------|
| Treiber v. Lindbergh School District, 199 F. Supp. 2d 949 (E.D. Missouri 2002).   | 2002 | Music educator, orchestra teacher, music teacher | ADA  | not stated    | Band, Strings | Contract not renewed-claimed it resulted from her breast cancer | Summary judgment for the school  |                    |
| Twist, et al. v. Lara, et al., Civil No. M-06-313, 2007 U.S. Dist. LEXIS 52256 (S.D. Tex. July 19, 2007).   | 2007 | Orchestra director                               | Tort sexual assault  | High School   | Orchestra     | Alleged inappropriate teacher-student relationship              | All claims dismissed except tort claim on teacher  |                    |
| Valenti v. Torrington Board of Education and John Hudson, 601 F. Supp. 2d 427 (D. Conn. 2009).  | 2009 | Music teacher                                    | 1st Amendment, 14th Amendment, state claims  | Middle School | Music         | Teacher expressed opposition to appointment of principal        | Summary judgment for school on equal protection claim, denied summary judgment on other claims |                    |
| Wagner v. Tuscarora School District, et al., Civil No. 04-cv-01133, 2006 U.S. Dist. LEXIS 97582 (M.D. Pa. Jan. 20, 2006), aff'd, 225 Fed. Appx. 68 (3rd Cir. 2007). | 2007 | Band teacher, band director                      | Due process, civil conspiracy, defamation, contract interference, breach of contract | High School   | Band          | Alleged inappropriate conduct by music teacher                  | Summary judgment and partial dismissal granted to school                                       | Affirmed           |

## Summary

The information in this chapter identified the Fourteenth Amendment as the area of law that occurred most frequently in the federal court system involving music educators. The Fourteenth Amendment guarantees the right to due process of the law and equal protection of the law. Music educators can protect themselves from becoming involved in this area of law through study of the law and the legal considerations provided previously under the Fourteenth Amendment. In addition, music educators should use careful consideration in creating policies for their music programs, adhere to the established policies for their school and music programs, take the time to make sound decisions in regard to all aspects of the music program, and treat all students equally in their music classrooms.

Tort law and the First Amendment were the areas of law that occurred with the next highest frequency involving music educators. Tort law involves a claim of injury by one individual to another. The findings revealed a large number of the tort cases included alleged sexual harassment. Music educators can protect themselves from becoming involved in tort litigation through careful monitoring of student behavior, maintaining professional relationships with the students, and demonstrating controlled reactions in accordance with school policy in handling all student/parent matters. The selected cases under the First Amendment primarily involved freedom of speech and the Establishment Clause. Music educators can reduce the risk of litigation in this area of law through careful selection of musical works and through refraining from addressing matters in public that are not a matter of public concern. The increased awareness of the law and an understanding of how the law directly impacts the field of music education may reduce the threat of legal action involving all areas of the law.

A review of the selected court cases did not reveal a trend in the number or nature of cases that involved music educators based upon sociological or pedagogical factors. However, the method of selecting the court cases for inclusion in this study may have contributed to this. The court cases were selected based upon the hierarchy of the federal court system. At the district court level, the cases were selected to provide diversity. This diversity was displayed through the court cases included in this study. Ten of the regional circuit courts and district courts from around the country were included in this court case analysis. Additionally, each year (1995-2009) and subject (band, choir, orchestra, music) were represented in the findings.

The analysis of the selected court cases did reveal several interesting findings. Although each year from 1995-2009 was represented with at least one case, 1998 and 2009 were the years that had the most cases included in the study. Eight cases from 1998 were included in this research. A wide variety of legislation was addressed in these cases and the majority of the cases involved high school band. There were also eight cases included in this study that occurred in 2009. The legislation in these cases focused primarily on the First Amendment, Fourteenth Amendment, and disability law; however, a review of the case facts did not reveal a trend. The subject that occurred most often in the court cases of 2009 was music. A review of the subjects and grades represented in the study revealed that the majority of the court cases involved high school band. The grade level and subject that appeared with the next highest frequency was elementary music.

The evaluation of the study findings presented new questions to be considered.

- Why do high school band directors and elementary school music teachers appear to be involved in litigation in the federal court system more frequently than other grade levels and music subjects?

- A large percentage of federal court cases involving music educators and sexual harassment was identified in the study. What can be done to inform and/or protect music educators from being involved in this type of litigation?

These questions were addressed in the Conclusion of Chapter 5.

## CHAPTER 5. SUMMARY, PRACTICAL APPLICATIONS AND CONCLUSIONS

The purpose of this study was to determine the areas of law involving music educators' professional responsibilities that occurred most often in the federal court system from January 1, 1995–December 31, 2009. Additionally, the study sought to provide the reader with an awareness of the law through a detailed analysis of the United States Court System and specific areas of law, an evaluation of selected court cases and holdings involved in each area of law, and practical implications through legal considerations. This information is intended to provide music educators with an improved understanding of the law and practical applications of legal issues to assist them in carrying out their professional duties.

### **Summary**

The findings in this study support previous work on the subject of legal issues in music education (Kerr, 2002; McIntyre, 1990). The McIntyre (1990) study, representing both state and federal court cases, reported the following results in relation to the distribution of court cases and areas of law:

Due Process cases – 38%

First Amendment cases – 35 %

Negligence cases – 22%

Fourth Amendment cases – 3%

Business Policy cases – 1%

Supplemental Contract cases – 1% (p. 108)

The research conducted for this study, representing only federal court cases, yielded the following results in relation to the distribution of court cases and areas of law:

Fourteenth Amendment cases – 26%

Tort Law cases – 19%

First Amendment cases – 17%

Sexual Harassment cases – 15%

Disability Law cases – 15%

Fourth Amendment cases – 5%

Eleventh Amendment cases – 1%

Copyright cases - <1%

FERPA cases - <1%

Contract Law cases – 0%

While this study and the McIntyre study do not address all of the same areas of law, comparisons may be determined from the findings. Each of the studies identified Fourteenth Amendment issues (due process is a right guaranteed under the Fourteenth Amendment) as the area of law that occurred most often involving music education. First Amendment and tort law cases (negligence cases are included under tort law) were identified as the next most often heard cases in each of the studies. However, McIntyre (1990) reported more First Amendment cases than negligence cases and my findings identified more tort law cases (including negligence) than First Amendment cases. Another similarity in the results of the distribution of cases under each area of law involved the Fourth Amendment; McIntyre (1990) reported 3% and the current study identified 5%.

Similarities with this study were also observed in the research of Kerr (2002). His study revealed prominent court cases involving music educators were included under the First Amendment, Fourth Amendment, Fourteenth Amendment, negligence issues, and business practice issues. My study identified federal court cases under each of these areas of law as well.

The similarities identified in these findings reveal the most frequent areas of legal concern for music educators. Through knowledge of these legal concerns and the study of actual court cases involved in each area of law, music educators may be better equipped to perform their professional duties in the field of music education following the guidelines of the law.

### **Disclaimer**

This study included information regarding court cases that occurred in the United States Federal Court System and utilized the hierarchy of the court system in the case selection process. This decision was made in an effort to address magnitude as well as frequency in the study through the inclusion of court cases with a higher level of precedent. However, it is assumed that many more court cases involving music educators are heard at the local and state levels. Because of the established policies for cases to be heard in federal court, the number of cases that are addressed in federal courts may not be representative of the frequency of complaints and cases at the state or local level.

The research provided in this dissertation is for informational purposes only and should not be interpreted as legal advice.

## **Practical Applications for the Music Educator**

### **First Amendment**

Curriculum decisions are very important to music program success and development. One of the aspects involving a curriculum issue that falls under the protection of the First

Amendment is the music educator's selection of music. Sacred/religious music is a common part of many music programs (Kerr, 2002). As Kerr stated, "due to the influential nature of music, and particular musical compositions containing religious text or associations, tension exists between those who advocate the use of sacred music in the public schools and those who oppose it" (p. 26). Because of the concerns and attention this topic has generated, an established rationale should be drafted so music educators know if they can include religious music in their programs. When devising this rationale, the educator must give consideration to both those in favor of including religious music in the public school curriculum and those persons not in favor of including religious music in the public school curriculum. Although controversial in today's public schools, sacred music is an important part of music history and a key concept in developing a thorough music education for the students (Kerr, 2002). The pedagogical value of a work should be the most important consideration for music educators when selecting music. In its holding, *Bauchman v. West High School, et al.* (1995/1997) cited several secular reasons for the performance of sacred music in the school curriculum. These included the fact that a large percentage of serious choral literature is based on themes that are religious in nature and that through these selections, music educators can teach a multitude of music skills including intonation, harmonization, and expression.

When selecting music as part of the school curriculum, music educators should consider the following to assist in adhering to the rights guaranteed by the First Amendment of the United States Constitution:

- Music selection should be based upon the pedagogical value of the work.
- Sensitivity should be displayed in reference to the beliefs of all participants (students and audience).

- Educators should not promote their religious belief or disbelief in their teaching.
- When, or if, a question arises in the selection of music, educators should consult superiors for input and/or support.
- Educators should listen to the lyrics of instrumental selections for content.
- Educators should follow the school system's policy on the teaching/performance of religious music.

An additional practical application for music educators in issues protected by the First Amendment involves freedom of speech. Personal feelings and speech should not be addressed in public. Matters of public concern may be addressed in public; however, personal concerns and issues should not.

#### **Fourth Amendment**

When applying the rights guaranteed by the Fourth Amendment of the United States Constitution, an educator should be knowledgeable about these rights as they relate to children. Students in a public school setting are afforded the same constitutional rights as all citizens of the United States, and these rights do not diminish just because the students are in school. The relevance of the Fourth Amendment and public school children involves the protection of their privacy (Essex, 2005). Case law does permit school officials, in their role as providers of a safe educational environment, to both search and seize the property of a student (Kerr, 2002).

Although children do have the same constitutional rights as adults, some differences exist in establishing the need for the search of a student while under the care of the school. As Kerr (2002) stated,

music educators should be aware that state and federal courts have determined that in the interest of providing a safe environment conducive to education, in-school searches are not held to the same standard of proof as is generally found in other venues. (p. 63-64)

To conduct a search, a school official must have reasonable belief that the student to be searched is in possession of an item that is prohibited (Kerr, 2002). Additionally, Essex stated that school officials can search a student when they have reasonable belief that the student has something that can inhibit the safety of others but warns school officials that a search without warrant risks the possibility of legal disputes. School officials are charged with maintaining an orderly environment for their students, while doing this, they must also exhibit respect for all students' rights (Essex, 2005).

In an effort to minimize the threat of legal action, while protecting the rights guaranteed by the Fourth Amendment of the United States Constitution in the educational setting, music educators should

- review and follow the school and school board policy on conducting searches,
- consult school administration before conducting a search,
- have the student and a witness present if a search is conducted with the approval of administration,
- be diligent in discussion with students in regard to contraband and maintain a presence in all areas of the classroom, and
- contact administration immediately if restraint of a student is necessary to maintain order in the classroom.

## **Fourteenth Amendment**

A guarantee granted by the Fourteenth Amendment is that of due process of law. Due process is defined as “fair administration of law in accordance with established procedures and with due regard for the fundamental rights and liberties of people in a free society” (Clapp, 2000, p. 148-149).

In providing for due process in the educational setting, the music educator should

- establish all classroom and program policies within the school district guidelines and submit them for approval with school administration;
- upon administrative approval, provide a written copy of all established policies to students, parents, and administration;
- require parent signatures of receipt of these documents and keep this signature on file in a safe location; and
- consistently follow the established policies when making decisions.

## **Tort Law**

Practical applications for music educators in reference to tort law center on supervision and guided instruction. Music educators have a duty to protect the students under their care and must at all times

- maintain a presence in the area students are located;
- provide adequate instruction on the use of equipment;
- ensure proper maintenance of the music facilities and equipment;
- provide adequate supervision on trips; and
- use sound judgment, based on classroom/school/legal policies, in decisions regarding the students.

## **Disability Law**

All students have the right to be involved in a comprehensive arts education (Levin, 2008). Public Law 94-142 states that disabled students are to be taught in the “least restricted environment” and the Individuals with Disabilities Education Act updated laws for special needs students to ensure that they were provided an equal education utilizing inclusion if possible (Mazur, 2004). In support of this, Walter (2006) stated that the Individuals with Disabilities Education Act is an important part of education in America and music educators should be as prepared as possible to teach students with disabilities in their classrooms. “By law, all students with disabilities have the right to a music education with the primary goal of meaningful experiences with music” (Walter, 2006, p.3).

When working with students with special needs, music educators have rights and responsibilities in relation to each student and in working with other faculty. The educator must know which students they teach have special needs and have an Individualized Education Plan to support those needs. Additionally, the teacher should review the Individualized Education Plan, attend all meetings in reference to the children and their plans, and provide input in reference to the plan. Music teachers are required to make the accommodations and/or modifications stated in the Individualized Education Plan (Walter, 2006). As cited in Lapka (2006) and Darrow (2009), successful inclusion involves collaboration.

## **Sexual Harassment**

Practical applications for music educators in reference to sexual harassment involve individual actions. To reduce the risk of accusations of sexual harassment, music educators should

- not touch students,
- not be alone with an individual student,
- not go to social functions or activities with students,
- not make comments in reference to a student's appearance, and
- respect the personal space and identity of each student.

### **Recommendations for Further Research**

Recommendations for further research addressing legal issues in music education include a study of court cases involving music educators occurring at the state and/or local level. This information may be more representative of the actual frequency that each area of law impacts music educators since many legal disputes occur at the state and local levels. Another suggestion for study is an examination of local and state court cases involving music educators in relation to newly passed legislation. This study would provide valuable information for music educators in determining the impact the legislation had on the field of music education in the court systems.

### **Conclusions**

As a result of the research, I have provided the reader with an overview of information about the structure of our legal systems and the laws that affect the field of music education. Music educators, due to their professional responsibilities, are at a heightened risk for becoming involved in legal actions. The reasons for this heightened risk may be due, in part, to the large number of students involved in music classes and the nature of the activities involved in the classes. The study revealed that the subject and grade level involved in the most litigation in the selected court cases were high school band and elementary music. Traditionally, these two classes have large student participation. Additionally, the high school band generally participates in many additional activities outside of the school day such as rehearsals,

performances, and trips. This increased time with the students may lead to an increased opportunity for legal concerns.

The increased time with the students may also play a role in the large percentage of sexual harassment cases involving music educators. Music educators must remain professional in dealing with students, parents, and administration at all times, should refrain from touching their students as part of the teaching process to eliminate a misinterpretation of the action, and must be knowledgeable of the law in regard to sexual harassment and the field of music education. Even the threat of legal action can greatly inhibit the education provided by music educators, in addition to the heavy emotional toll it may play on both their professional and personal lives. This overview was intended to develop music educators' understanding of the law and how each area of law impacts the field of music education. Careful examination of the policies and practices conducted in music classrooms in light of the information gained from the law, case summaries, and legal considerations provided in this dissertation may reduce the risk of future legal action for music educators, thus resulting in a better music education for the students.

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## Appendix

Protocol Letter from Auburn University Institutional Review Board (IRB)



Office of Research Compliance  
307 Samford Hall  
Auburn University, AL 36849

Telephone: 334-844-5966  
Fax: 334-844-4391  
[hsubjec@auburn.edu](mailto:hsubjec@auburn.edu)

July 16, 2010

MEMORANDUM TO: Ms. Carla A. Gallahan  
Department of Curriculum and Teaching

PROTOCOL TITLE: "Legal Issues in Music Education: An Analysis of Court Cases Involving Music Educators"

IRB FILE NUMBER: 10-187D

Thank you for submitting your protocol to the Institutional Review Board for review. According to your description of this project and the intended use, the IRB has determined that your activities as described **do not constitute "human subjects research"** according to the existing guidelines and statutes.

*Research* means a systematic investigation, including research development, testing and evaluation, designed to develop or contribute to generalizable knowledge. Activities which meet this definition constitute research for purposes of this policy, whether or not they are conducted or supported under a program, which is considered research for other purposes. For example, some demonstration and service programs may include research activities.

*Human subject* means a living individual about whom an investigator (whether professional or student) conducting research obtains:

- (1) data through intervention or interaction with the individual, or
- (2) identifiable private information.

If there are any changes made which would constitute human subjects research, or if there are any events adverse or otherwise which concern the investigator(s), we encourage you to contact this office for further consultation.

We wish you success in your endeavors and look forward to working with you in your future research activities.

Sincerely,

Kathy Jo Ellison, RN, DSN, CIP  
Chair of the Institutional Review Board  
for the Use of Human Subjects in Research

cc: Dr. Nancy Barry