

The Worrisome State of Legal Literacy among Teachers and Administrators

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Abstract

Globally, societies are becoming more litigious. As one consequence, educators are developing an increased sensitivity to the legal context that shapes their professional work. While this trend is being led by the United States, its effects are felt in Canada and elsewhere. Accordingly, there has been an observed increase in the fear of litigation amongst educators, which, in turn, impacts their educational practices. This paper argues, however, that this fear is borne more of a lack of legal knowledge amongst educators than it is of the actual prospects of being involved in a lawsuit. It also suggests possible means by which this lack can be overcome which would also serve as a corrective to educators' misplaced fears.

Introduction

Indubitably, society is becoming a more legally complex phenomenon (Gullatt & Tollett, 1997a). Schools, deeply nested within this complexity, are burdened with the ever-more difficult challenge of navigating themselves through the litigious labyrinth that is modern schooling. Right through, educators wait with an unpromising hope for a time when the lawsuits, accusations of negligence, and threats of litigation will diminish. Zirkel (2006) has noted that increasingly educators are becoming more fearful of the law. However, some of the legal qualms school personnel worry about are more exaggerated fears than they are hard realities. The grave fear of litigation that has permeated the teaching profession is, in part, the function of a pervasive inadequacy of understanding, and thus lack of confidence, vis-à-vis all matters legal (Findlay, 2007; Zirkel). Set within the context of an increasingly litigious society, the worryingly low levels of educators' legal literacy will be assessed in this paper by an examination of the implications of the fear and lack of knowledge nexus and by suggesting some possible means of rectifying the problem.

Literature Review

A review of the literature regarding the legal literacy of teachers and administrators is characterized by a preponderance of studies that are more than a decade old, reflecting a need for more current research to be conducted in this area. The literature reveals a scarcity of Canadian studies in the areas of educators' legal literacy and, therefore, one must augment with content generated from studies and data gathered elsewhere. For instance, international research seems to indicate that the lack of legal knowledge amongst educators is a condition of worldwide proportions. Studies of educators from Botswana (Moswela, 2008) and Australia (Ramsay, 1988) imply the same general lack of knowledge that is found in the United States from which the bulk of the research emanates. The few Canadian studies that have been completed (Findlay, 2007; Peters & Montgomerie, 1998) are consistent with other international findings.

Key findings from the research will be discussed and premises about low levels of legal literacy held by educators will be developed as this paper unfolds. Suffice it to say here, however, that included among the most significant discoveries are the following:

- Society is becoming more litigious and this has implications for educators (Schachter, 2007);
- Widespread fear of litigation is coupled with a lack of legal knowledge to produce a state of affairs wherein defensive teaching is becoming more common (Common Good, 2004; Zirkel, 2006);
- Coursework in educational law is noticeably missing from the curriculum of teacher preparation programs and lack of knowledge of the law is prevalent (Clear, 1983; Davis & Williams, 1992; Gullatt & Tollett, 1997b; Reglin, 1992; Sametz, McLoughlin, & Streib, 1983; Schimmel & Militello, 2007);
- There are corrective measures that can be taken to help remedy the problems ignorance and fear pose for the profession (Gordon, 1997; Hillman, 1988; Wagner, 2007).

Evolution of the Litigious Society

Litigation involving schools is not new, nor should it be regarded disapprovingly. Many substantive educational and societal improvements have resulted from lawsuits. For one, it was a lawsuit that helped end racial segregation in the United States (Duff, 1999). The U.S. Supreme Court's 1954 unanimous landmark decision in *Brown v. Board of Education of Topeka* invalidated the 'separate but equal' legacy of *Plessy v. Ferguson* of 1896. Through these cases, the constitutionality of separate schools for blacks and whites had been deemed valid. By way of a second example, fifteen years after the *Brown* decision America's top court rendered another groundbreaking verdict in *Tinker v. Des Moines Independent Community School District*. In this case, the court ruled that students do not relinquish their constitutional guarantees to freedom of speech, or other rights protections, once they are on school grounds. Specifically, the court ordered that students were entitled to wear black armbands to school to protest the Vietnam War, despite the objections of the school's administration (Gordon, 1996).

The aforementioned examples illustrate that as the values and theories of society change, so does the philosophical orientation of the courts. Notwithstanding the storehouse of precedent rulings that guide the bench in their decision-making processes, rulings often reflect an accommodation of these new societal norms (Peters, 2008). Similarly, new civic principles and societal standards can often segue into the passing of new laws by the legislative branch of government (Gullatt & Tollett, 1997b). It can be said then that the legislature and the judiciary are as much a reflection of society as they are an influence shaping it.

Among the norms that have changed in recent decades was the unquestioned authority of the teacher and the principal. Their authority now demands a rationale and their decisions require explanation (Dunklee & Shoop, 1986). Teachers and principals are not unconditionally invested with the same trust that they were given only a generation or two ago (Common Good, 2004; Gullatt & Tollett, 1997b). Sametz, McLoughlin, and Streib (1983) and Davis and Williams (1992) claimed parents and students have become more willing to litigate unpopular school decisions, a point affirmed more recently by Moswela (2008) who found little indication that parents' willingness to refer matters to the courts has lost momentum. Furthermore, society in general and education in particular, are becoming increasingly more litigious and suing is becoming the new action those wanting to change public education. Legal activism is often preferred over the more protracted alternative of lobbying for legislative change (Duff, 1999; Gullatt & Tollett, 1997b; Reglin, 1992). Today, the omnipresent credo of accountability, in which the litigious society finds its philosophical roots, continues to expand and with it comes the amplified sense that someone, somewhere, must be held to account whenever something goes wrong; someone must be found liable for any damage done or deemed done (Stewart, 1998).

Litigation is taking on the characteristics of a secular religion, and sue-conscious Americans have morphed the time-honoured maxim every wrong has a right to every wrong has a legal remedy (Dunklee & Shoop). However, with this shift in perspectives also comes the enticement for excessive litigation and a proliferation in questionable lawsuits (Lewis, 2001). Take, for instance, the lawsuit for \$6 million brought against eleven Ohio teachers for issuing failing grades to a student who was chronically absent (Carpenter, 2001), or the San Francisco high school graduate who sued the school system for his inability to read beyond a fifth grade level (Ramsay, 1988). Merely hearing about such cases only helps to exacerbate the fear already present within teaching ranks. However, if educators actually followed the entire unfolding of such cases through the court system perhaps some of their fears would be allayed, if not outright dispelled. In Louisiana, for example, typically one third of cases are settled out of court, one third are dismissed, and while the rest may go to trial, judges have historically been more likely to rule in the school's favour (Gullatt & Tollett, 1997a). Indeed, what people can be sued for is quite different from what they will actually lose in court (Schachter, 2007). As well, parents or students threatening to sue are not necessarily in the right, may not have

accurately assessed the legal terrain, and are not guaranteed entitlements to any type of redress (Zirkel, 2006) given that being wrong is not necessarily synonymous with culpability (Peters, 2008).

North American judges have exercised considerable judicial restraint in cases involving education. Courts are very reluctant to place themselves in a position where they would be forced to make judgments about the merits of various educational practices (Ramsay, 1988; Zirkel, 2006). On balance, the courts have been deferential to the school system, recognizing educators are much better technically-equipped than the courts with the expertise needed to make sound educational and pedagogical determinations (MacKay & Sutherland, 2006; Peters, 2008). For one, this means educational malpractice suits have thus far been extremely rare. Ineffectual teaching presupposes an undisputed set of performance standards against which a teacher's behaviors can be measured. To date, such precise standards have proved elusive and very difficult to define. There is a wide diversity of opinion over the very nature of teaching itself, let alone the most optimal way to teach (Clear, 1983; Ramsay).

Imber and Gayler (1988) cautioned that the extent of lawsuits may not be as bad as educators think; school oriented lawsuits just attract more media attention than in previous decades. This point is consistent with Zirkel (2006) who takes aim at what he sees as a gross distortion of the real effect of law on education, and regards the fear it has engendered as being largely without foundation. He contended that often we are using fear-driven subjective perceptions of the law, rather than ordinary objective data, to drive our policy-making. Further, because our analyses of legal issues are often oversimplified, or even baseless, they only serve to make bad policy and buttress ill-informed opinions of litigation and legalities. In short, he claimed educators are overestimating the specter of law in education and erroneously assuming that the courts are delineating legal boundaries more tightly than they truly are (Zirkel, 1996).

While litigation is demoralizing for educators, our democratic mode of governance demands that students and parents have an adequate avenue of legal recourse to challenge those in authority (MacKay & Sutherland, 2006). After all, if such an outlet is nonexistent then it is the very legitimacy of the education system itself that suffers (Dunklee & Shoop, 1986), a position consistent with the view that the benign dictatorship of the schoolmaster no longer resonates with 21st century sensitivities. A legalization of relationships has taken place across a wide swath of society and as other institutions and societal values breakdown (i.e. the family, the neighborhood, trust) people look to the courts to establish principles that can be relied upon with steady assurance (Ramsay, 1988). When those supports fail, individuals are now more inclined than ever to call upon their lawyer.

Low Levels of Legal Literacy

International research consistently reveals a low level of legal literacy among teachers and administrators (Moswela, 2008; Peters & Montgomerie, 1998; Ramsay, 1988). The lack of comprehension of the law, when connected to a perceived sense of vulnerability, produces a palpable fear. Membership in the American Federation of Teachers (AFT) and National Education Association, America's two largest teacher unions, is increasing in large measure, because of the liability coverage they provide over and above the near-complete coverage employing districts already provide. When AFT surveyed its membership, liability protection was ranked as the third most important service the union provided, ahead of healthcare benefits and handling grievances (Wagner, 2007). Oddly, the paradox is that a better-insured teacher makes for a more enticing defendant (Lewis, 2001). Private insurance providers are also increasing their market share. Between 1995 and 2000 there was a 25% increase in the purchase of private liability insurance from Forrest T. Jones and Company, America's largest private insurer for teachers. For \$136 a year, teachers can purchase a \$2 million liability protection plan (Wagner).

School personnel typically regard the law with anxiety, misunderstanding, and a sense that it is there to trap them (Wagner, 2007). In a national American survey designed to assess the state of fear, 66% of teachers and 40% of principals claimed that they were just as preoccupied with potential legal challenges as they were with garnering positive standardized test results (Common Good, 2004). Some would argue the fear can be substantiated when one considers that in the same survey 62% of principals reported being threatened with a legal challenge by parents (Common Good). Given that the system is, in part, premised on the rights of students and parents, it is inescapable that the schools are often placed in an adversarial position relative to students and parents (Schachter, 2007).

On the other hand, several scholars countered that a great deal of this fear is misplaced. Stewart (1998) suggested that the cynical beliefs many principals hold regarding liability are unrealistic, and do not take proper account of the preventative measures principals expend to minimize the chances for harm being done. His research of Australian principals revealed that 78% of them mentioned that legal concerns are a source of professional stress, and 30% said it caused more stress than any other part of their job. Their fear can, in part, be attributed to knowledge deficits, for a lack of knowledge can prompt fear. Zirkel (2006) argued that educators have committed serious errors in overestimating the onerous nature of the law, and have errantly branded the courts as being radically pro-plaintiff.

Study after study reveals that a lack of understanding of the law is normative (Stewart, 1998). A study of the legal knowledge of teachers from South Carolina disclosed that only 50% of the teachers could correctly answer 80% of the questions posed to them (Reglin, 1992). In Botswana, 82% of teachers were deemed legally illiterate (Moswela, 2008). In western Canada, educators readily owned up to a deficiency of legal insight. On six of fourteen legal vignettes posed, 40% of those questioned said they did not know what the legal course of action was. Even more telling, on only five of the fourteen questions did the majority of subjects respond correctly (Peters & Montgomerie, 1998). In Canada this lack of comprehension of the law is further compounded by a general lack of familiarity with quasi-legal documents, such as a professional code of conduct and the *Charter of Rights and Freedoms* (Peters & Montgomerie). Equally as troublesome was Findlay's (2007) discovery in her study of Saskatchewan administrators, that principals' lack of knowledge led to a lack of confidence, in some cases causing them stress and anxiety when making decisions and thus affecting their ability to lead their schools with a sense of self-assurance.

One might expect that the legal wisdom of administrators' fares better than that of teachers, but research highlights the inaccuracy of this assumption. It cannot be presupposed that simply promoting teachers to the principalship confers upon them an instant legal expertise by mere virtue of the position they newly occupy (Gordon, 1996; Taylor, 2001). According to studies conducted with principals in West Virginia (Gordon, 1996, 1997), Canada (Peters & Montgomerie, 1998) and Australia (Stewart, 1998) researchers reported no noteworthy differences between the legal knowledge base of teachers and administrators, and also discovered a high rate of incorrect answers provided by principals on a wide range of legal questions and scenarios. Variations in training, teaching experience, administrative experience, and school district size divulged no discernible correlation to legal knowledge and savvy (Gordon, 1996, 1997). The only exception to this was that principals in the state's largest cities scored 7% higher on a Legal Knowledge Index (Gordon, 1996); suggesting urban principals might have slightly more expertise than their rural counterparts, perhaps due to added exposure to legal affairs.

As well, teachers turn to their union, their undergraduate training, the media, a lawyer, their parents, and school administration as sources of legal information. However, the main source for teachers is other teachers (Schimmel & Militello, 2007). Likewise, administrators turn to their colleagues, as was revealed in a study of Ontario principals and vice principals in which half of in-school administrators reported consulting with their administrative peers when making routine legal decisions not requiring an immediate response (Leschied, Lewis, & Dickinson, 2000). This parallels a 1988 study of Massachusetts educators that showed that 66% of administrators rely on each other for legal information (Hillman, 1988). It also matches my own seven years of practice as a principal, in which I too have turned to other principals for their opinions on a variety of situations that had legal implications. The problem becomes individuals principals are consulting are no more knowledgeable than they are with respect to the law. The same Massachusetts study referenced above also disclosed a few other interesting points, such as elementary principals were more likely to consult with their colleagues than secondary principals; district lawyers, if they existed, were a key source of information and relied on heavily; and, legal knowledge is primarily transmitted orally rather than in textual form, raising questions about its accessibility (Hillman).

Principals also frequently turn to their superintendent when confronted with legal challenges (Leschied, Lewis, & Dickinson, 2000). Superintendents, as the top officers of school districts, have a critical role to play and must have a solid appreciation of the law. Stelck's (2009) study of two British Columbia superintendents involved in high profile cases underscores how a superintendent can use the law strategically to 'manage' the issue before it ends up in court. Skilled superintendents are aware of the influence that they have in framing a case while it is evolving and know that a district's control over a situation is largely lost once the case is deferred to counsel and the courts (Stelck). Principals then are best served when their superiors have a thorough understanding of the law and adeptness in working with its nuances and subtleties.

There can be ruinous consequences for education when fear and ignorance are merged within the collective psyche of teachers and administrators, namely, a spirit of ‘defensive teaching’ can take hold. This is when teaching decisions are not pedagogically driven, but instead are motivated by a desire to avoid legal action (Common Good, 2004). In a 2004 study, 82% percent of American teachers and 77% of principals declared that ‘defensive teaching’ defined the current educational climate (Common Good). The perception of ever-present legal threats inhibits teachers in the use of their professional judgment in everyday decision-making. This is further emphasized in the same study’s report that 63% of teachers and 64% of principals feel that the increased potential for lawsuits impedes their ability to perform their job duties (Common Good). Notwithstanding the duty of care owed to students, a ‘de-policing effect’ ensues in which teachers and administrators are more inclined to be unduly lenient on discipline and be more reluctant to intervene in conflicts with students for fear of repercussions, lest their actions are ruled amiss or excessive (Davis & Williams, 1992; Lewis, 2001; Moswela, 2008).

An excessively cautionary ethic among teachers and administrators can result in disadvantageous consequences for student learning. For instance, many schools have outright banned teacher-student contact (i.e. the no-touch rule), sadly subduing the natural impulse of elementary students to innocently hug their teachers (Carpenter, 2001). In the same vein, one observer commented that:

In fact, actual lawsuits and the fear of them are remaking school policies on everything from school discipline to science lab, from what kids can eat for lunch to what they can do in gym class. ... A recent report in the St. Petersburg (Fla.) Times found science teachers reluctant to let kids do dissections that required scalpels for fear of accidents. Also gone was a time-honored experiment where kids scrape cells off the inside of their cheek and examine them under a microscope – for fear of someone contracting HIV or hepatitis. ... The survey of principals found instances where schools canned driver's ed and shop programs and banned sports like baseball and football – all for fear of lawsuits. And many districts around the country ban peanut-butter sandwiches, so a child who is allergic can't come into contact with it. (Duff, 1999, pp. 1–2)

In a system where students and parents are envisaged as potential plaintiffs, it is understandable, albeit unfortunate, that a rigid and formalized approach to teaching would surface. One need only walk through schools where rigid approaches to education have replaced creativity, flexibility, and spontaneity to witness firsthand that the key features of a good education tend to go by the wayside and clearly the students lose (Ramsay, 1988; Stewart, 1998). This is not to suggest, however, that this rigidity is exclusively due to fear of potential lawsuits. There are other contributing factors that include, but are not limited to, curriculum constraints, lack of resources, and underdeveloped teaching skills.

Educators enter the profession because they want to focus on learning, not litigation. However, fear and ignorance can deflect teachers from their primary purpose and passion—to teach. Teachers and administrators are spending valuable time keeping a lot more documentation than in the past for protection (Common Good, 2004; Gullatt & Tollett, 1997b). By sizeable majorities, both groups also report that their colleagues often likely avoid making difficult decisions that they feel are right, for fear they might be legally challenged on the decision by a disgruntled parent or student. Among other things, this hedging can include avoiding candid student evaluation or repealing a class suspension (Common Good).

One cannot underestimate the apprehension that the fear of embarrassment or being wrongly accused can cause. Teachers are often required to make instantaneous decisions, but do not always have the time to contemplate a variety of alternatives, so they rely on professional and personal instinct (Wagner, 2007). There is no guarantee that those instincts will serve them well in each and every instance. No teacher wants to go through a potentially humiliating hearing that could result from one of those mediocre decisions. Even if the teacher wins the case, they have nonetheless endured stress, lost time, the stigma of public accusation, and potentially unrecoverable legal costs (Gullatt & Tollett, 1997b; Reglin, 1992).

As the leaders of the school, principals are placed in an especially precarious position. Less and less can they afford to be unaware of the law, because a lack of legal knowledge can lead to unnecessary risk exposure (MacKay & Sutherland, 2006; Peters, 2008). Drawing on my own personal observations, the point is made plain that the law is not stagnant, so principals must ensure they also keep current. School communities often have an expectation that the principal is an expert in pertinent areas of the law, even if they are new to the role (Stewart, 1998). Taylor (2001)

implored that principals learn proper protocols for solving legal problems, understand current legal issues and major court rulings, know where they are situated in the decision-making chain-of-command, appreciate the limits on the scope of their authority, appreciate the role of the constitution and applicable legislation, and be aware of district and school-level policies. The fact that many administrators do not adequately comprehend the legal milieu in which they function on a daily basis raises concerns insofar as they are often the same officials who are developing schooling policies, yet are doing so without accurate knowledge of student, staff and parental rights (Peters & Montgomerie, 1998).

Recommendations

Coursework in educational law is noticeably missing within the vast majority of teacher pre-service programs (Gullatt & Tollett, 1997b; Schimmel & Militello, 2007). Yet, as a preventative measure, it would be preferable if teachers and administrators could learn the law by foresight, rather than hindsight (Dunklee & Shoop, 1986). Despite surveys showing that teachers yearn for more professional formation in the law and rank it near the top of issues they deem essential in teacher education, the universities have, by and large, not responded with provision of educational law courses (Davis & Williams, 1992). As obstacles to providing educational law course offerings, teacher education departments cite an already pressed curriculum, a lack of faculty expertise, a lack of budgetary resources, a discussion of legal topics included elsewhere, and an absence of need for legal education, (Gullatt & Tollett, 1997a; Schimmel & Militello).

Legal proceedings carry a financial, administrative, professional, and emotional price, thus the goal of legal education is not to win in court, but to avoid litigation (Schimmel & Militello, 2007). Likewise, it should also be remembered that the goal for teacher preparation should not be for teachers and principals to obtain law degrees, but rather become educators with sufficient legal content, knowledge, skills, and training to perform their tasks well (Clear, 1983; Stewart, 1998). Given the significant influence teachers have over their students they have a duty to both know and abide by the law (Gullatt & Tollett, 1997b). Undoubtedly, their ability to do this is compromised if they have not received adequate training.

The Canadian Association for the Practical Study of Law in Education (CAPSLE) provides a forum for studying legal issues as they pertain to education (CAPSLE, 2009). Its American equivalent NOLPE (National Organization on Legal Problems of Education) has deliberated the issue of legal education curriculum for teachers (Gullatt & Tollett, 1997a). Since 1993 their recommendations included five broad areas for study: governmental and court systems; students and the law; teachers and the law; teachers and district liability; and laws regarding people with disabilities (Gullatt & Tollett). Lawsuits involving special needs students have increased in the U.S., and this phenomenon helps explain one of NOLPE's recommendations (Schachter, 2007). Unlike the content of newspapers, which focuses on the most vivid court cases, university content must also include a strong research base and give due consideration to the more ordinary legislative and administrative agencies, rules and regulations whose functioning does not typically get reported in mainstream media (Wagner, 2007). Regardless of course content, however, one cannot assume knowledge transforms into action; that is, having knowledge does not mean one will necessarily act on it. For example, a principal might know that the duty of care provision means she should increase supervision on the playground, but politically she may be reluctant to add to teachers' supervision assignments if she predicted teacher resistance to more assigned supervision time.

In addition to university coursework in educational law, there are a variety of other remedies that can help lessen the current inadequacy of understanding. These include ongoing professional development of in-service teachers on the latest advances in educational law and recent court rulings, and appointing a staff member who serves as a resource person for keeping staff abreast of any timely legal changes. Other suggestions are having educational staff attend legal conferences designed for practicing teachers and administrators, and the department or ministry of education disseminating periodic updates to school jurisdictions regarding relevant legal issues (Dunklee & Shoop, 1986; Gullatt & Tollett, 1997b). There are also positive practices that should be present in an educator's professional repertoire, though these practices might not be explicitly taught in any university law course or mentioned at any legal workshop. These practices could include developing, understanding and adhering to sound policies and procedures, seeking advice, keeping accurate documentation, fostering open communication, building relationships with those you serve, treating all cases seriously and promptly, and using common sense and reasonable judgment (Schachter, 2007; Taylor, 2001).

Conclusion

The daily functioning of a school, upon closer inspection, appears to hold the potential for many possible transactions and interactions that could go awry and land in a legal forum for resolution (Dunklee & Shoop, 1986). It was in pondering the complex nature of some of my own personal engagements with legal issues, as a school principal, that propelled me to write this manuscript. While there is a sizeable research base to explore, it is overwhelmingly dated and American in kind. From the research that does exist, one can categorically conclude that fear and lack of knowledge of the law is widespread amongst educators worldwide.

A culture of litigiousness, lawsuits, courts, and the prospects of legal action play much more prominently in people's lives and psychic awareness than before. Some, but not all, of the fear is over-exaggerated. This may, in part, be the result of the misunderstandings that educators have of the law. Together, fear and ignorance can yield an unfortunate result. Teachers and administrators may adopt a defensive posture and retreat from sound activities, teaching methodologies, and disciplinary standards that may run the risk of being open to legal challenge, even if the probability for such a challenge is relatively small.

Improving legal literacy could start with addressing the lack of educational law requirements that exist as part of the undergraduate and graduate training of teachers and administrators. Few jurisdictions seem to require legal coursework for teacher certification or administrator licensure. Notwithstanding the need for improvements in university-level legal training, because the law is not a static phenomenon, it is imperative that educators keep up with changing legal developments. A case can certainly be made that on-going legal education ought to be a recurrent feature in the professional development plans of active educators.

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