LEGAL CONCERNS IN CLASSROOM MANAGEMENT: ROLE OF THE COUNSELLOR

LARRY EBERLEIN
University of Alberta

Abstract

Counsellors are expected to assist teachers in discipline and other classroom management problems. An awareness of potential civil and criminal legal responsibilities which affect educational staff is essential to proper planning strategies. Three basic sources of legal authority to control student behaviour are discussed as are court cases relating to improper discipline. While counsellors probably share a teacher's legal protection in a disciplinary situation, this is less clear when counsellors are involved in behavioural management programs. Suggestions are made for counsellor and teacher action to achieve desired classroom goals while still protecting student and parental rights to freedom from unlawful interference with the person or invasion of family privacy. Examples of both positive and negative reinforcement and punishment are considered, and the legal implications of each are discussed.

Résumé

On s'attend à ce que les conseillers secondent les professeurs en matière de discipline et en toutes autres situations problématiques reliées à la gérance de la salle de classe. Pour réussir de bonnes stratégies de plannification, il faut être conscient des responsabilités légales, tant civiles que criminelles, qui concernent le personnel éducateur. L'auteur discute 3 sources fondamentales d'autorité légale comme moyens de contrôler le comportement des élèves, ainsi que plusieurs cas juridiques ayant trait à l'indiscipline scolaire. Bien que les conseillers aient sans doute la même protection légale que le professeur, et cela lors d'une situation disciplinaire cette protection s'avère moins bien définie lorsque les conseillers s'impliquent dans des programmes d'administration comportementale. L'auteur présente plusieurs suggestions en ce qui concerne les moyens dont disposent les professeurs et les conseillers de réussir, en salle de classe, les objectifs désirés, et cela tout en protégeant les droits de l'élève et des parents, tout particulièrement, le droit de la protection contre toute intervention non-légale ou contre tout attentat à l'intimité familiale. L'auteur considère plusieurs exemple de punition et de renforcement positif et négatif; il en considère aussi les implications légales.

Counsellors have special training in areas of major concern to teachers who desire a classroom climate conducive to optimal learning. Whether working with an individual problem student or assisting the teacher with a group discipline situation, teaching is an important component of the counsellor's role. The legal concerns of the teacher are very relevant to the counsellor and affect the kind of information he/she provides to teachers and the programs he/she sets up in a classroom.

Clarke and Hunka (1977) found that lack of strict discipline continues to be a major concern for Canadian and Alberta schools. Allan, Doi, and Reid (1979) found that management of discipline problems and consultation with teachers (often about classroom management) were the two non-counselling skills most required of elementary counsellors. They also found that B.C. elementary teachers and principals prefer specially trained members of the teaching staff to serve as elementary counsellors.

Counsellors have traditionally walked a tightrope in disciplinary situations. On the one hand there is an expectation of assistance by administration and staff. On the other hand is the philosophy that one cannot maintain a trusting, confidential relationship with a student when seen by that student as a disciplinarian. Writers in the counselling field have tended to support the latter view while the realities of the school system reflect the former.

Counsellors have recently become more involved with classroom management and behaviour modification programs, many of which are indirectly related to discipline and control. Certain techniques advocated by counsellors have raised questions of legality which must be considered by both teachers and counsellors (Budd & Baer, 1976; Martin, 1975). Accordingly, this paper will

focus on both discipline and other classroom management concerns.

Intentional Interference with the Person

Like all people in our society, students are legally protected from the wrongful conduct of others, including counsellors, teachers, and school administrators. In Canada, as in all common law jurisdictions, the adjudication of wrongful action must focus first on the area of intentional interference with the person. Through regimentation and discipline, the freedom of students at school is controlled in a variety of ways that in other settings would lead to lawsuits or criminal charges (Eberlein, 1978). The most obvious ways of interfering with a student are assault and false imprisonment. As Barnes (1977) points out:

> Assault may be committed by the application of unreasonable force, by improperly searching the person of a child, or by imporperly subjecting a child to punishment such as standing in the corner. Unlawful detection of a child after school may constitute . . . false imprisonment. (p. 209)

Both assault and false imprisonment can form the basis of criminal or civil proceedings. Usually only the teacher will be charged in a criminal action but both the employing School Board and teacher will be named in a civil lawsuit, such as one for excessive corporal punishment. If the wrongful discipline was inflicted contrary to school rules, the Board can recover compensation from the teacher (Barnes, 1977). To the extent that teachers and counsellors act with legitimate consent or legal authority, however, and stay within the bounds of reasonableness, they are protected by the law from charges of wrongful conduct. Linden (1977) cites the privilege which furnishes this defence to charges of intentional interference with a student's rights:

> Although most of the cases deal with the alleged misdeed of police officers during the course of making arrests, this privilege is also available to parents, school teachers, shipmasters, and others who forcibly discipline children or crew members under their control. Minor assaults, batteries, and detentions for disciplinary purposes are excused, if they are reasonable, but not if any excessive force is employed. (p. 73)

With the exception of approving criminal activity, people can consent to the intentional interference with their personal interests. But consent, to be valid, must be real consent, voluntarily given by one who understands the nature and consequences of the act. The age of consent presents real problems and there are differences of opinion among Canadian legal authorities on this age. For example, Linden (1977) suggests that "young children cannot give a valid consent. Their parents must do so on their behalf" (p. 56). Klar (Note 1) suggests the law is not this clear. While agreeing that "young" children cannot consent, older children do regularly consent in a variety of situations in schools. Teachers regularly control or restrict the child's behaviour and other students have physical contact in the course of play activity. Klar suggests that minors probably have a greater power to consent or not consent than has been often recognized. He also suggests that there are limits to which parents may consent on behalf of the child when physical acts to which the child objects are involved.

Legal Authority

There are three basic sources of legal authority to control student behaviour. The common law doctrine of *in loco parentis*, the provincial school acts, and the Canadian Criminal Code.

In loco parentis. This concept is not extensively defined but at common law refers to a person who has put himself in a situation of a lawful parent by assuming the obligations incident to the parental relationship without the formalities of a legal adoption. It embodies both the idea of assuming parential rights and discharging parental duties (*Niewiadomski,* 1947). In usage it commonly refers to parent surrogates during a child's minority years. These include step-parents, foster parents, or the relationship of master-apprentice (*Powys,* 1836; *Shtitz,* 1927).

Traditionally when a parent delegated authority over a child to school personnel, the parent could restrict the actions of school officials and withdraw the authority at any time. Today, most public school personnel will listen to parental requests regarding their children and may even solicit their help, but in actual fact the school now has the final say and parental restrictions do not have to be honored (*Baker,* 1975). When it concerns discipline or corporal punishment the *in loco parentis* concept thus has little relevance today, even though it is still prevalent in the literature. When discussing corporal punishment, writers (such as Spitalli, 1976) and courts (such as in *Trynchy,* 1970) assume the doctrine gives educational personnel the right to discipline and control. Hawkins (1976) asks what happens when the teacher believes in striking a child but the parent does not. Under the *in loco parentis* doctrine, no striking would be permitted. Yet, no court has refused permission to teachers for reasonable control and discipline, including striking the child. Some have restricted the degree

Note

1. Personal communication to the author dated January 4, 1979, from Professor L. Klar, University of Alberta Law School, Edmonton, Alberta.

of authority to something less than the latitude or discretion allowed a parent. There is also the restriction that the teacher does not have the same authority as a parent to exercise lay judgment when dealing with treatment of injury or disease. *Guerrieri* (1942) involved two teachers who immersed a child's infected finger in scalding water against the child's will. The court held the teachers liable for damages since the doctrine did not extend beyond the question of discipline.

The *in loco parentis* concept applied to schools at a time when education was not compulsory. It probably still applies to private schools or schools and teachers not covered by provincial acts. What has happened with the public and separate schools, however, is that a restricted form of the doctrine has been written into legislation in most jurisdictions. The authority of school personnel thus stems from this legislation rather than from the common law doctrine.

Provincial school acts. Section 368 of the pre-1970 School Act in Alberta[1] required a certificated teacher to "maintain proper order and discipline." This section was eliminated in the 1970[2] revision but is probably covered in Section 65 which authorizes a Board of Trustees to "make rules for the administration, management and operation of schools" and also to settle disputes between a parent or child and a teacher or other Board employee. Section 146 permits teachers and principals to suspend pupils and the Board to expel them. Section 167 makes parents as well as students responsible for intentional or negligent damage to school property.

It should be clear from reading these few sections that parents cannot restrict rights of school personnel by saying, "You can't suspend my child!" These rights to take action come from statutory authority in Alberta and not from the delegation of parental authority. Similar statutes exist in all provinces (Bargen, 1961). It is for this reason that a large group of North American legal scholars, attempting to codify the common law in this regard, conclude that teachers are public officers and do not act as delegates of the parents (Restatement of the Law, 1977). When public officers are in charge of the education or training of a child they have a privilege to use force or impose reasonable confinement unrestricted by a parents' prohibitions or wishes. Teachers act for the state or school board in carrying out public policy.

Canadian Criminal Code.[3] Two sections of this federal law also provide a degree of legal authority to school personnel.

> 43. Every schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable under the circumstances.
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> 26. Every one who is authorized by law to use force is criminally responsible for any excess thereof according to the nature and quality of the act that constitutes the excess.

This provision, and its earlier antecedents, have been long used as the basis of the claim of "privilege" that is made by school officials in Canada when dealing with issues of assault and false imprisonment. No Canadian court has yet faced the issue of *Baker* (1975) where a parent tried to prevent a school from using corporal punishment. There is no reason to believe, however, that the issue would be decided differently in Canada.[4]

The Courts and Improper Discipline[5]

In the past many of the cases involving excessive corporal punishment have been tried in the criminal courts, usually at the instigation of a parent. A civil lawsuit for damages is available, however, and the required proof of wrongdoing is

1. The School Act, Stat. Alta., 1952, c. 80.
2. The School Act, Stat. Alta., 1970, c. 100.
3. R.S.C. 1970, c. C-34.

4. Much as Canadians would like to ignore it, American decisions have had a significant impact on Canadian law. This is especially true in teacher assault cases (Bargen, 1961). It has to be the logic of the decision, however, that will cause a Canadian court to adopt the same posture as an American court. Prestige is sometimes a factor. When the Supreme Court of the United States speaks all courts will listen, although it is only American courts which must obey. That court has heard many cases involving the educational system in recent years and *Baker v. Owen* (1975) dealt specifically with corporal punishment. In that case, the court rejected the mother's argument that she alone could decide whether her child could be punished in school, but did set down some rather rigorous rules for schools and teachers to follow. For an American school system to meet these tests the following should be observed: 1. Written rules specifying exact offenses which lead to corporal punishment. 2. The explicit offence must be serious enough to merit corporal punishment (nothing vague like "insubordination"). 3. Except in the most serious case, another alternative must be tried first. 4. One must document the failure of the alternative. 5. When alternatives fail, another warning must be given. 6. Punishment must be administered in front of a witness who is informed of the reason and agrees to be listed as a witness on an official document. 7. Written records must be maintained in detail. 8. Written guidelines about severity and nature of punishment must be prepared in advance.
5. Hursh (1955) discusses a teacher's civil liability in corporal discipline situations. Warren (1963) points out the difference between excessive punishment and unauthorized or inexcusable punishment. Feld (1973) collects many cases dealing with the difficult problems of determining how much of a pupil's out-of-school life is the concern of the school. Many cases have been found where the conduct being regulated had a direct and immediate effect on the discipline and general welfare of the school. Good examples are school punishment of students for drug and alcohol offences occurring outside school. In the United States one Federal court has suggested that corporal punishment may violate the prohibition of the U.S. Constitution against cruel and unusual punishment (Doernberg & Warren, 1974).

easier to establish. For example, in *Andrews* (1932) a father and his eleven year old daughter recovered civil damages for assault when the teacher negligently struck the girl's breast while strapping the hands. An opposite result was reached, however, in *Murdock* (1954) when both the School Board and the teacher were found not responsible for an alleged assault. After a full trial the judge found the facts did not prove "unreasonable and excessive force." Win or lose, the teacher was still obliged to defend a lawsuit with all the time, money and anxiety which that produced. At this writing there are no recorded cases in Canada involving a school counsellor and a student discipline problem.

Bargen (1961) has detailed many legal situations which affect the school pupil and includes a discussion on discipline. He concludes that courts must ask three questions when considering a discipline case:

> 1. Was the teacher acting within the scope of his legal authority? This question involves the statutory authority of the teacher as well as his authority *in loco parentis*.
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> 2. Was there cause for punishment? In answering this question the Courts have indicated their reluctance to set aside a teacher's judgment.
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> 3. Was the punishment reasonable under the circumstances? This question generally constitutes the heart of any litigation and must be answered on the basis of precedent and common law. (p. 117)

It is usually this last question upon which the reported decisions focus. Canadian courts have tended to follow early Nova Scotia decisions (*Gaul*, 1904; *Robinson*, 1899). One American line of decisions held that a teacher was responsible only when a pupil received permanent injury, or punishment was inflicted with malice, hate, ill will, anger or for revenge. The Nova Scotia Supreme Court rejected this extreme view in *Gaul* (1904). The court concluded that a schoolteacher who inflicts unreasonably severe chastisement upon a pupil is criminally responsible under the Criminal Code for the excess of force used, although the punishment resulted in no permanent injury and was inflicted without malice.

In *Campeau* (1951) the Quebec Court of King's Bench approved this more narrow rule and held a teacher guilty of assault upon three children who attended the school in which he was teaching. The evidence showed that the defendant had punished an eight year old by taking his arm by the wrist and striking with the back of his hand the corner of the teacher's desk several times. The judges agreed that this was unreasonable:

> Le savant juge de première instance a considéré que'aucune circonstance démontrée par le dossier ne justifiait la peine assez sévère infligée par l'instituteur. Sur la question de faits, il me paraît que cette Cour ne saurait intervenir. Le verdict ne peut pas être considéré comme déraisonnable. (p. 216)

Non-teachers and discipline. Can others beside teachers use force in disciplinary situations? In *Prendergast* (1917) a U.S. court held a superintendent was not a teacher and thus was not privileged.[6] By contrast, two recent Canadian criminal cases accepted the defence offered in the Criminal Code although the Code does not spell out who besides teachers would stand in the place of a parent. A Saskatchewan court held that a vice-principal was able to punish three pupils who shouted names at him on their way home from school (*Haberstock*, 1970). In *Trynchy* (1970) a Yukon magistrate's court extended the right of discipline or control to a school bus driver. On several occasions the driver had warned the students to behave. He was charged with assault after he had stopped the bus and picked up a seven year old boy who had been running in the aisles and hitting other students. The driver asked the lad if he were going to "smarten up" and upon receiving an "O.K." dropped him in a seat, the boy's head possibly hitting the side of the bus. The court found that when a parent sends a child to school via public transportation, the parent has given over the teaching and discipline of the child to the educational authorities. This extends to the bus driver charged with the safe transportation of the children. The court concluded that although the driver could have used other means of discipline, the corrective force used was in fact not unreasonable under the circumstances.

The Counsellor's Role

Counsellors have a personal stake in court decisions regarding discipline and legal trends

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6. The defendant in the *Prendergast* (1917) case contended that he had taken active charge of the high school and was therefore a teacher. The court rejected this contention on the ground that nothing in the school rules authorized the defendant to do this to the exclusion of the teachers in the school. The superintendent also claimed that if he were not a teacher, then he was a "public officer" charged with the duty to maintain order in the high school. The Texas court said the law does not confer on a public officer (if such he/she be) any right to chastise the pupil. The defendant finally argued that custom recognized a right of a superintendent to chastise pupils. The court's response to this last suggestion was that if such a custom existed it was in violation of both well-established principles of law and a provision of a criminal statute.

> For the reasons stated, we do not think appellee was a "teacher" within the meaning of the law that authorizes a teacher to chastise his pupil. The teacher the law has in mind, we think, is one who for the time being is *in loco parentis* to the pupil; who, by reason of his frequent and close association with the pupil, has an opportunity to know about the traits which distinguish him from other pupils; and who, therefore, can reasonably be expected to more intelligently judge the pupil's conduct than he otherwise could, and more justly measure the punishment he deserves, if any. (p. 247)

involving classroom management schemes. When school counsellors are also teachers and exercising a teaching role, they will usually have the legal authority to maintain control of the classroom or other area in the school that they are supervising. They can also be protected by the statutory authority of the School Board when assigned certain responsibilities. One can conclude that if a counsellor is involved in a disciplinary situation within a school, personal use of reasonable force would probably be accepted.

Disciplinary consulting. The other major role for counsellors is to consult with teachers, both in discipline and non-discipline situations. In the former, the training of the counsellor makes him one of the few people in the school with adequate background and training to suggest appropriate procedures and techniques that would be both inherently fair to students and helpful to principals and teachers in achieving the goal of adequate discipline without undue need for punishment to achieve that goal. Although Canadians have not in the past been required to follow some of the stiff requirements of "due process" as laid down by the American Courts (See Footnote 4), some make psychological sense, and teachers and principals should be encouraged by counsellors to make use of them.

Since there is a decided trend away from corporal punishment in modern education, counsellors can faciliate this trend in their own school. American schools, except in cases which are so anti-social or disruptive in nature as to shock the conscience, may no longer use corporal punishment "unless the student was informed beforehand that specific misbehaviour could occasion its use, and, subject to this exception, it should never be employed as a first line of punishment for misbehaviour" (*Baker,* 1975, p. 302). Workshops can be held to help teachers work out alternatives to punishment. There may well be experimental alternatives and here the counsellor can help the teacher develop a new program. Where this program might infringe on student rights, the counsellor can arrange the prior consultation with parents and help obtain their permission and informed consent.

It makes good psychological sense that students be aware of what the rules are and what system of punishment and reward is operative in the school. It is important that students be able to count on the consistent application of the system. If the counsellor does not want to become specifically involved in disciplinary procedures, he has an obligation to the students to see that the other officials who are involved follow the basic concepts that his training has provided him, and which the courts may require the school to follow.

Non-disciplinary consulting. This area poses some real potential problems for the counsellor. When classroom management situations do not involve discipline, the use of certain techniques becomes suspect. Outside of disciplinary cases, any form of punishment or aversive conditioning technique without informed consent from student and parent is unethical if not illegal. For example, time-out or isolation if reasonable in length and directly appropriate to a disciplinary problem may be a useful technique. However, being seated in a corner or being isolated because of a wrong answer is not acceptable. In a serious case, a lawsuit for false imprisonment would at the least embarrass the school and those involved.

To be safe, consent of both child and parent should be obtained before using time-out or any form of painful stimuli. The consent should be in writing, should specify the nature of the program, contain a description of the purpose, risks and effects of the plan, and contain a statement of the right of the child and/or parent to terminate consent at any time.

Counsellor at times would prefer to leave the parents out of behavioural change programs and try to help students despite their parents. However, parents do have rights (Eberlein, 1977). Often part of the program is experimental in nature. When there are risks to the child as well, a higher standard of informed consent by the parent is essential. The right to refuse and revoke consent must be clear. Lawyers are on the lookout for tests and psychological procedures that might "injure the one, even though . . . procedures improve the lot of the ninety and nine" (Sherrer & Roston, 1977, p. 118).

Reward contingencies or a token economy do not raise the same concerns as long as the child is not denied rights or privileges generally provided the rest of the students. It must be a special privilege, such as freedom from the daily classroom routine, which is used for reward purposes. Even in positive reinforcement programs, however, the child has the right not to be made worse. Programs need to be carefully checked so that improvement in behaviour toward goals selected jointly by student, parent, teacher and counsellor are realized by the program. It is also clear that the strategy selected should be at least as good as other alternatives in achieving the goal set.

In the past few years the U.S. Congress has become sensitive to the public school's invasion of a family's privacy. Ziskind (1975) points out that when the Family Educational Rights and Privacy Act of 1974 was adopted, provisions were omitted from the final draft which would have required parental consent to psychological tests and behaviour modification experiments in schools. This was corrected in the late summer of 1977,

however, when an amendment to the General Education Provisions Act was passed without debate and *seems* to require parental consent in many teaching and counselling situations. This law requires consent before any student can be involved with a psychologist or psychiatrist who inquires into family relationships, friends, political, sexual or moral values, etc. At this writing, lawyers for the Health Education and Welfare Department in the U.S. are uncertain about the meaning or the implications of this legislation for the U.S. school system (Leaderman, 1977).

The role of the counsellor includes classroom management. When not directly involved in discipline, the cloak of legal protection becomes thinner for both teacher and counsellor. In any classroom management problem the counsellor should thus pay special attention to the needs, desires and rights of students and parents.

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