Lore v. Law

Prevailing Beliefs and Objective Knowledge

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Make sure that you know when it’s OK to kiss the frog and when you need to check the facts.
Principals and other educators often have perceptions about key issues in school law that are remarkably wrong. When that is the case, they help reinforce those prevailing perceptions by sharing them with teachers, parents, and other administrators and by contributing to misguided practices and policies.

**Sources of Confusion**

Where do educators get such misperceptions? The sources are numerous and varied. Many organizations share an interest in promoting the perception of an “explosion” of education litigation and the resulting perils of liability. In their competition for public consumption, the mass media report the sensationalized stories of school lawsuits, rarely providing intensive investigation and follow-up coverage. School insurance companies obviously also profit from such perceptions, as do professional organizations in a more subtle way when they recruit and retain members by offering the benefit of professional liability insurance.

Tort reform groups and broader legal reform organizations, such as Common Good (www.commongood.org), promote images legal fear and government paralysis, using the public schools as a leading example. Periodically, politicians respond with reinforcing public pronouncements and, on occasion, immunity laws, such as the Coverdell Teacher Protection Act. Even the school law profession, which includes law firms that represent school districts and such authoritative organizations as the nonpartisan Education Law Association, benefits from skewed information that emphasizes the importance of and need for specialized—including preventive—services.

Moreover, other education professions, such as special education, often confuse expert recommendations with legal requirements in their efforts to promote prophylactic best practices. For example, experts commonly characterize IDEA as requiring positive behavioral strategies and behavior intervention plans for students with disabilities whose behavior impedes their learning or the learning of others. But IDEA only **requires** the IEP team to “consider” behavioral interventions, including but not limited to positive strategies, in such circumstances, and it only **requires** behavior intervention plans in the wake of disciplinary removals that exceed 10 days.

Finally, because the principalship is such a multifaceted and demanding position, incumbents often do not have the time to keep up with pertinent legal requirements, so they end up relying on outdated information and reinforcing peer hearsay.
Examples of Confusion
This brief examination of what I call “school lore,” as compared with school law, is limited to the five leading examples of school law misperceptions. They cover the volume and the outcomes of education litigation in general education, which includes employee tort liability and student rights, and in the highly legalized subfield of special education.

The Explosion of Education Litigation
Contrary to the continuing perception of an exploding volume of education litigation, the litigation boom occurred in the late 1970s and early ’80s, with an uneven but gradual net decline during the rest of the 20th century. The first decade of the new millennium marked a moderate resurgence of overall education litigation, but closer examination revealed that the growth could be attributed to a continuing ascension of special education litigation in the federal courts (Zirkel & Johnson, 2011).

Instead of reinforcing notions of a booming specter of liability, the outcome trends for K–12 litigation overall and the student and employee categories specifically (D’Angelo & Zirkel, 2008; Gavin & Zirkel, 2008) have been clearly in favor of the school defendants, and those in the special education subcategory have been moderately school friendly. The facts show that educators must adopt a more situation-specific approach to analyzing and responding to litigation patterns and avoid knee-jerk reactions.

The Nightmare of Negligence Liability
Because of the hype, it is not uncommon for administrators and teachers to have nightmares about being liable for negligence that arises from a tragic student injury. Television and newspaper stories of student suicides and catastrophic student athletic injuries sometimes include reports of lawsuits for alleged negligence against teachers, counselors, and coaches. Yet objective and systematic study of the published court decisions arising from such suits reveal that the student-plaintiffs conclusively won at least partial damages in only 11% of the cases and that in none of these cases was an individual—in contrast to institutional—defendant liable (Zirkel & Clark, 2008).

One of the contributing factors is the doctrine of governmental and official immunity, which—contrary to the common perception—is far from dead in most states (Maher, Price, & Zirkel, 2010). Even in the tragic area of student suicides, the plaintiff-parents have not fared well in court decisions premised on negligence (Fossey & Zirkel, 2011). Similarly, in the specialized area of K–12 science teaching (including high school laboratories), the low volume and district-favorable outcomes of published court cases refute the perception promoted by science education organizations and literature (Zirkel & Barnes, 2011). There is good reason to take a preventive approach in such risk-rich areas as student safety, but fear of liability is the wrong reason; it is an overreaction that can impede laboratory learning experiences.

The Rise of Students’ Rights
The common impression of the power of student rights is notably outdated and overstated. As an overall matter, the outcomes of K–12 litigation on behalf of students have shifted to a more district-favorable position from the late 1970s to the late 1990s. With regard to student speech under the First Amendment’s guarantee of freedom of expression, the trajectory of the court decisions has shifted in the direction of school districts since the 1969 student victory in Tinker v. Des Moines Independent Community School District (Zirkel, 2009). Similarly, the various lines of law that concern touching students—such as negligence, battery, and Section 1983 claims—generally favor district defendants and support this conclusion: “The belief, whether held by students or school personnel, that teachers cannot touch students, including but not limited to reasonably intervening to stop student bullying, is lore, not law” (Zirkel, 2011b, p. 77).
The Guaranteed Job Security of School Employees

Contrary to the public belief that the law provides a Teflon shield that protects bad teachers and administrators, the National Center for Education Statistics (2009) found that districts often choose not to execute their legal authority (Zirkel, 2010). Yet when school leaders did exercise their authority to evaluate and remove incompetent teachers, the vast majority of court decisions found were in favor of the defendant districts, regardless of whether a tenure law covered the plaintiff teacher. Similarly, Cox & Zirkel (2009) found that the case law strongly favored school boards that exercised their authority to terminate or take other disciplinary action against their superintendents, and that trend continues.

The Legal Paralysis of Administrative Action Against Student Violence

Another popular myth is that fear of litigation liability paralyzes administrators, preventing them from taking action against student violence and keeping public school personnel, including teachers and principals, from interfering in interfering in student fights. Yet research revealed that legal liability was not a major consideration for teachers when they calculated their response to student fights (Holben, Zirkel, & Caskie, 2010). And on the basis of case law, the odds of teacher liability in the event of intervention or nonintervention are negligible—less than 1 in 40,000 (Holben & Zirkel, 2011).

The prevailing perception is that public school educators can’t take strong disciplinary action, such as suspensions and expulsions, against miscreant students, especially those in special education. Yet, again, research showed that the case law is moving in the opposite direction from the common perception. For example, recent studies, (Chouhoud & Zirkel, 2008) of student suspension cases in the general education population, revealed that the courts have been extremely deferential to school districts, and more recent cases follow the same pattern. Similarly, although legal protections for students with disabilities are more extensive, federal legislation does not generally apply to suspensions of up to 10 days and the major legal safeguard for lengthier removals—determining whether the misconduct is a manifestation of the student’s disability—generally has not favored parents in relatively recent legislation or litigation (Zirkel, 2010). Finally, the case law concerning functional behavioral assessments and behavior intervention plans under IDEA has cumulatively moved in the direction of defendant districts, revealing that professional recommendations should not be confused with legal requirements (Zirkel, 2011a).

Conclusion

Most principals prevailing perceptions of and practices regarding school law are, for various reasons, askew. The primary legal lesson gained through a systematic look at cases and outcomes is that principals and other school officials should take a more particularized approach to liability issues and base their legal decisions on the distinguishable basis of professional discretion and research-based best practices. In other words, don’t confuse lore with law.

REFERENCES


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