

THE CONVERGENCE OF EDUCATION AND LAW: A NEW CLASS OF EDUCATORS AND LAWYERS

SARAH E. REDFIELD*

TELL ME A STORY¹

*The state courts have again decided the constitutionality of the school finance system. The legislature has yet to resolve the matter satisfactorily. School budgets are in jeopardy, personnel will need to be let go in the face of uncertainty . . . or teachers' pay will have to be made equitable state wide . . . The school boards could have known, should have planned?*²

With the enactment of the sweeping No Child Left Behind Act of 2001, state departments and local education agencies are faced with the actual implementation even as the Federal Department of Education issues its policy guidance and implementing regulations. By anyone's count the bill is over 500 pages and the implications staggering and often immediate.³ Notices must go out about teacher

* Professor, Franklin Pierce Law Center, Concord, New Hampshire; Founder and Chair, Education Law Institute, Franklin Pierce Law Center. Professor Redfield is the author of *THINKING LIKE A LAWYER: AN EDUCATOR'S GUIDE TO LEGAL ANALYSIS AND RESEARCH* (2002). She can be reached by e-mail at sredfiel@maine.rr.com.

1. When I was writing this article, I asked a handful of my lawyer and educator colleagues to "tell me a story" illustrating my premise that schools would operate more effectively if more educators were trained in the legal context of their work and if more lawyers were more aware of the reality of day-to-day life in schools. One colleague asked, "Where do I begin?" and, indeed, the stories were numerous and salient. Only a few are reproduced here, but as the rest of the article suggests, there are many more.

2. Litigation like this is common and ongoing. While the constitutional interpretation is important, the day-to-day implications for schools are often ill-considered or misunderstood. *See, e.g., DeRolphe v. State*, 780 N.E.2d 529 (Ohio 2002), *Tenn. Small Sch. Sys. v. McWherter*, 91 S.W.3d 232 (Tenn. 2002)); Joetta L. Sack, *Court Orders Tennessee To Level Teacher Pay*, EDUC. WK., Oct. 16, 2002, at 17, available at <http://www.edweek.org/lew>; Mary Ann Zehr, *Ohio Court Rejects State School Aid System*, EDUC. WK., Jan. 3, 2003, at 13, available at <http://www.edweek.org>.

3. No Child Left Behind Act (NCLB) of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (codified at 20 U.S. § 6301 (2002)). The need for educators to be involved in the process by which such laws are made and to understand the implications of both the process and the final results has been illustrated repeatedly in large and small matters. *See, e.g., Joetta L. Sack, "No Child" Law Vies for Scarce State Resources*, EDUC. WK., Jan. 8, 2003, at 16, available at <http://www.edweek.org>. *See generally* Andrew Trotter, *Flagrante Delicto*, 177 AM. SCH. BD. J. 12, 14 (Dec. 1990) (giving examples where knowing enough law to know to call an attorney would be valuable).

qualifications⁴ The school boards could have known?

The professor just posted final grades for the class. She used the student numbers from the registrar, which happen to be social security numbers. The lists are always in alphabetical order. Some of the students complained that their privacy rights have been violated. The professor and registrar should have known?

In a rural town with no noticeable Jewish population, the teacher forbade a young Jewish student's wearing a Star of David, noting that it was a gang symbol. The teacher should have known?⁵

The Titusville school district just settled a case with gay student Timothy Dahle for \$312,000. Dahle, now nineteen, alleged that he had been physically and verbally harassed since sixth grade; the school district claimed Dahle brought the treatment on himself.⁶ The case is eerily like the million-dollar case brought by James Nabozny against his Wisconsin school district in 1997.⁷ The Pennsylvania district should have known?

The lawsuit alleged that the principal failed to report a child abuse situation of which she had been informed. A teacher alleged that she had informed the principal about the abusive situation in a hallway conversation. The lawyer should have known? The teacher?

Luke, a middle school student not classified as a student with disabilities, wore an obscene T-shirt in class, and when told to wear it inside out, lost his temper and lashed out at the teacher. The principal suspended Luke for ten days (making Luke's total for the year to date thirteen days). Luke's parents asked for the school records on the incident and other disciplinary incidents involving their son and other students, the parents having previously indicated to the school that they were seriously concerned about their son's inability to control his emotions. Someone should have known?

4. See, e.g., 20 U.S.C. §§ 6311(h)(4) (2002).

5. See *Doodles Don't Look Dangerous*, TIMES PICAYUNE (New Orleans), Aug. 23, 2000, at 6. See generally *Chalifoux v. New Caney Indep. Sch. Dist.*, 976 F. Supp. 659 (S.D. Tex. 1997) (ruling it was unconstitutional to prohibit wearing rosary outside of clothing); *City of Harvard v. Gaut*, 660 N.E.2d 259 (Ill. App. Ct. 1996) (holding gang ordinance overbroad which included six-pointed star, worn as gang symbol).

6. *Dee McAree, Gay Student Settles Harassment Suit*, NAT'L L.J., Feb. 11, 2002, at A6; *School District Settles*, PITT. POST GAZETTE, Jan. 18, 2002, at B-9.

7. *Nabozny v. Podlesney*, 92 F.3d 446 (7th Cir. 1996); see also *Sexual Harassment in Public Schools: Speeches from the 2000 HWLJ Symposium*, 12 HASTINGS WOMEN'S L.J. 123, 137 (2001) [hereinafter *Sexual Harassment in Public Schools*].

Most of these short stories are fairly simple. Several illustrate some simple legal principles, the knowledge of which could have saved the schools involved substantial amounts of money, not to mention time, resources, and peace of mind.⁸ Others illustrate some simple school contextual realities that would alert attorneys to factual and legal concerns. There are of course more complicated stories, like the last obscene T-shirt scenario that highlights constitutional Due Process⁹ and First Amendment¹⁰ concerns arising under the Individuals with Disabilities Education Act (IDEA)¹¹ and the Family Educational Rights and Privacy Act (FERPA).¹²

INTRODUCTION: NEW CLASS

As the preceding stories suggest, sometimes knowing a few basics is all that is called for; sometimes knowing when to call for expert advice is the answer; sometimes knowing the school culture and practice offers the clue to resolution. For educators and their attorneys to have the requisite information and knowledge, there is a need to define a new class of educators and a new class of lawyers, each attuned to the contextual reality of the other's discipline.¹³ Such a new class will establish law-informed educators and leaders who can act preventively to avoid or minimize legal entanglements and proactively to influence both litigation strategy and government policy. Such a class will also establish education-informed lawyers, apprised of both school practices and important educational research and policies, who can work collaboratively and preventively with their clients.

Support for a call for a new class of lawyers and educators is provided by a

8. See *infra* notes 78-79 and accompanying text (discussing frustration with legal concerns). See generally *Limiting Your School's Exposure to Negligent Supervision and Safety Claims* (John W. McIlveen ed., LRP Publications 2001) [hereinafter *Limiting Your School's Exposure*].

9. U.S. CONST. amend. XIV, § 1; see also *infra* note 43. See generally *Goss v. Lopez*, 419 U.S. 565 (1975) (examining constitutional due process).

10. See U.S. CONST. amend. I; *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (holding that symbolic black armbands cannot be prohibited absent disruption); *Catorina ex rel. Rewt v. Madison County Sch. Bd.*, 246 F.3d 536 (6th Cir. 2001) (finding T-shirts with confederate flag protected speech under *Tinker*, school suspension under dress code remanded); *Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465 (6th Cir. 2000) (upholding school suspension for refusing to remove Marilyn Manson T-shirt); *Chambers v. Babbitt*, 145 F. Supp. 2d 1068 (D. Minn. 2001) (finding plaintiffs likely to prevail on "Straight Pride" T-shirt); see also *infra* note 43.

11. 20 U.S.C. § 1400 (2000).

12. *Id.* § 1232g.

13. The terminology "new class of lawyers, new class of educators" was coined in an interview with Dr. William C. Boshier, Dr. R. Daniel Norman, Dr. Richard Vacca, & Kate Kaminsky, Esq., Commonwealth Educational Policy Institute (CEPI), Richmond, VA. Dr. Boshier, Director of CEPI, and Dr. Norman, Deputy Director of CEPI, have served as State Superintendent and Assistant Superintendent of Public Instruction for the Commonwealth of Virginia. Interview with CEPI, Richmond, VA (Oct. 29, 2001) [hereinafter CEPI interview].

review of the current situation in education law and by an analysis of the difficulties presented by this reality. This paper addresses the convergence of education and law in four parts: 1) the growth of the field of education law; 2) the increasing difficulties caused for schools by such growth; 3) the institutional infrastructure that contributes to such difficulties; and 4) the advantages of reformed structures and relationships.

In Part I, Growth, Complexity, Convergence, this paper outlines the extensive increase in the sources and scope of education law¹⁴ since the Supreme Court found "separate but equal" inherently unequal in *Brown v. Board of Education*.¹⁵ Part I also discusses the ways in which such an increase has caused a convergence between the law and education on many of the significant issues forming the legal context of schools today.

Part II, Too Much Law, focuses on the difficulties caused by this growth and convergence. It recognizes evidence of instances where the law is overbearing and where the presence or threat of law and litigation causes educators to make unnecessary or inappropriate decisions. Part II also recognizes areas where what lawyers "don't know" causes them to make decisions that hurt their clients.

In an effort to understand why educators do not know more about the legal context and vice versa, Part III of this paper, Issues of Infrastructure, reviews the current national and state standards for educators focusing (or not) on the requirements for knowledge of the legal context in which educators work. Part III also briefly surveys the current school law offerings in schools of education and in law schools. This part concludes that the current regime is neither clear nor direct, observing that the academic disciplines which nurture educators and lawyers do not readily offer interdisciplinary opportunities for professionals. This paper finds that the current status of educating educators and lawyers about education and law issues is not serving either community well.

Part IV of the paper, A New Class, discusses the advantages of law-informed educators and education-informed attorneys. Drawing examples from existing school and court practices, this part highlights improvements to the difficulties delineated in Part II. In its conclusion, this paper recaps the reasons it is important for the educational community to be law-informed and analogously suggests that in order for school lawyers and other advocates involved with education issues to appropriately represent their clients, they must be education-informed. Noting the advantages of a new class of law-informed educators and education-informed lawyers, this paper advocates a serious, interdisciplinary approach to law and education with increased attention to the subject, and with mutual and cross-training. The Conclusion, Tell Me a New Story, observes that the results will be good for educators, education leaders, child advocates, and the lawyers who represent them—and thus good for students and their

14. Education law includes the various sources of law (legislative, administrative, and judicial, as well as related secondary sources) dealing with schools Pre-K-16 and beyond. It encompasses education-specific enactments and decisions, as well as labor, tort, First Amendment, family, juvenile, and civil rights law as they arise in a school context.

15. 347 U.S. 483 (1954), *rev'd*, *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).

schools—which offers a better story, or at least a better ending, than suggested by those at the outset.

I. GROWTH, COMPLEXITY, CONVERGENCE

A review of the burgeoning field of education law begins with the Supreme Court's decision in *Brown v. Board of Education* and its potent acknowledgment of the government's role in education:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.¹⁶

Brown reminds us of the central role law has played in American education. In speaking of the effects of segregation in *Brown*, the Court particularly observes that the manner in which children are educated “may affect their hearts and minds in a way unlikely ever to be undone,” and that the “impact is greater when it has the sanction of the law.”¹⁷

Almost fifty years later, a sampling of current headlines show that the impact and sanction of law are equally present today:

- *Students Accuse High School Of Censoring Yearbook, Sue District*¹⁸
- *Ex-Student Sues State in Rapes at Deaf School*¹⁹
- *SJC Rules School's Search of Student Was Not Legal*²⁰
- *Ex-Coach Joining School Lawsuit—Student Claims Officials Ignored Sexual Abuse*²¹
- *Honors Student's Suit against Putnam School Officials Tossed*²²
- *Students Balk at Being Searched for Guns—A Los Angeles Case Involving A School's Procedures May Clarify Lawsuits Nationwide*²³

16. *Id.* at 493-94.

17. *Id.* at 494.

18. SAN DIEGO UNION & TRIB., Aug. 30, 2001, at A5, available at 2001 WL 6481455.

19. PORTLAND OREGONIAN, Aug. 17, 2001, at B02, available at 2001 WL 3611389.

20. Kathleen Burge, BOSTON GLOBE, Aug. 11, 2001, at B3, available at 2001 WL 3946488.

21. Dawn Marks, DAILY OKLAHOMAN, July 19, 2001, at 3A, available at 2001 WL 24250907.

22. Lawrence Messiner, CHARLESTON GAZETTE & DAILY MAIL (W. Va.), July 11, 2001, at 5A, available at 2001 WL 6678009.

23. Daniel B. Wood, CHRISTIAN SCI. MONITOR, June 26, 2001, at 2, available at 2001 WL

- *Star Former Teacher Sued by Victim of Advances—Sexually Abused Female Student Also Sues School*²⁴

Just a few months of summer newspapers yielded these headlines, reminders of just how present law is in our schools—as sanction, as incentive, as director, and as arbiter. The subjects are as diverse as the numbers are great—religion, homosexuality, Internet use and abuse, censorship, violence, students' and teachers' rights, discrimination, curriculum, negligence, malpractice, assessment, adequacy, equity, and on and on. We even litigate about whether there is authority for schools to hire lawyers and for whom those lawyers work.²⁵

As the previous headlines and the opening stories suggest, the legal issues confronting schools are legion. The number of lawsuits against schools is increasing dramatically. In 1960, the education law reporters published some 300 suits with schools named as parties; in 1970, it was about 700; and by 2000, over 1800.²⁶ In 2001, there were a hundred federal court cases addressing just IDEA.²⁷ Reported numbers for jury verdicts and judgments against schools show similar increases.²⁸ And of course, these numbers do not begin to encompass unreported cases and settlements, or the far greater number of other legal issues resolved in law offices every day.²⁹

The amount of legislation and regulation affecting schools has increased at an equally striking pace. In gross terms, sheer page numbers make the point.³⁰ Title 20, the education title of the United States Code, today occupies ten

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24. Bob Morrow, PEORIA J. STAR, June 29, 2001, at B02, available at 2001 WL 7628212.

25. See, e.g., Rathmann v. Bd. of Dirs. of Davenport Cmty. Sch. Dist., 580 N.W.2d 773 (Iowa 1998).

26. These numbers are illustrative of a trend, but admittedly a superficial count. They were obtained by searching the West Education Reporter for cases with school, college, or university in their titles. Of course, there are many more cases that involve these parties and school issues where the words do not appear in the title. A search in the text of cases for these same terms produces about twice the numbers. Nor do these numbers include unpublished, settled, or pending litigation. See Cindy Collins, *Public Education Law . . . Complex Social Issues Drive Growth of Education Law Practice*, 17 NO. 7 COUNS. 16 (1998); Todd A. DeMitchell, *The Educator & Tort Liability: An In-Service Outline of a Duty Owed*, 154 EDUC. L. REP. 417, 420 n.2 (2001). But see Perry A. Zirkel, *The "Explosion" in Education Litigation: An Update*, 114 EDUC. L. REP. 341, 351 (1997) (suggesting a plateau in litigation in 1980s and 1990s).

27. This number is only an estimate based on a search of LRP's *Individuals with Disabilities Educ. L. Rep.* See Mitchell L. Yell & Antonis Katsiyannis, 45 PREVENTING SCHOOL FAILURE 82, 83 (2001) ("There is, perhaps, no area of educational law that has been more highly litigated than the education of students with disabilities."); *Please Miss, What's an IEP?*, ECONOMIST, June 8, 2002, at 31 (majority of recent lawsuits are special education).

28. For example, the LRP Jury Verdict and Judgment directory reported one such verdict in 1989, and 232 by 2001.

29. See, e.g., JAMES A. RAPP, EDUCATION LAW § 1.02 (2001).

30. This is also a superficial method of gauging the increase, but provides some general indication.

volumes. Education did not occupy its own title in the Code of Federal Regulations until 1981, when it encompassed about 1000 pages. Title 34 of the Code of Federal Regulations is now three fat volumes totaling some 2000 pages.³¹ This year, as in the past, Congress, state legislatures, and executive agencies across the country added heavily to this volume of law and regulations as they sought to achieve adequate education and effective school reform.³² The Bush administration's education bill, No Child Left Behind, is itself some 500 pages.³³

In addition to sheer volume, it is noteworthy that virtually all sources of law in this area are subject to substantial, if not constant, change. In this legal area, the Supreme Court has overruled its precedent; this has recently been true in the area of religion,³⁴ and also is true of other legal issues impacting schools.³⁵ In the 2001-2002 Supreme Court term alone, several education-related cases were decided³⁶ and an even larger number sought high court review.³⁷ Education law is also an area where Congress and governmental agencies are continuously evolving their positions. The change contemplated by the No Child Left Behind

31. Like the method for measuring cases, these page numbers are only a superficial illustration to give a sense of the increase.

32. See, e.g., Gary R. Thune, *Was That a Red Flag? The Importance of Working Effectively With Your School Attorney in a Litigious Age*, AASA: The School Administrator Web Edition (Nov. 1997), at http://www.aasa.org/publications/sa/1997_11/thune.htm (last visited Oct. 21, 2001).

33. No Child Left Behind Act (NCLB) of 2001, Pub. L. No. 107-110, 115 Stat 1425 (codified at 20 U.S.C. § 6301 (2002)).

34. See, e.g., *Mitchell v. Helms*, 530 U.S. 793, 835 (2000), *overruling* *Meek v. Pittenger*, 421 U.S. 349 (1975) and *Wolman v. Walter*, 433 U.S. 229 (1977); *Agostini v. Felton*, 521 U.S. 203, 236 (1997), *overruling* *Aguilar v. Felton*, 473 U.S. 402 (1985) and *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985). Further development of the religion/school precedent is offered by the recent voucher cases, including *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (holding that Ohio's Pilot Project Scholarship Program for school vouchers does not violate Establishment Clause of First Amendment).

35. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), *rejecting* *Plessy v. Ferguson*, 163 U.S. 537 (1896) (establishing separate but equal doctrine); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943), *overruling* *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940) (regarding mandatory flag salute); see also *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 663 (1998), *overruling* *Monroe v. Pape*, 365 U.S. 167 (1961) (regarding municipal liability).

36. *Bd. Educ. of Indep. Sch. Dist. No.92 v. Earls*, 536 U.S. 822 (2002) (holding that drug testing students of any extra-curricular activity does not violate Fourth Amendment); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (concluding Ohio's Pilot Project Scholarship Program for school vouchers does not violate Establishment Clause of First Amendment); *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002) (finding no private right of action under FERPA); *Owasso Indep. Sch. Dist. No. 1-011 v. Falvo*, 534 U.S. 426 (2002) (holding that peer grading of classwork does not violate FERPA).

37. See generally National School Boards Association, *Pending Supreme Court School Cases*, at <http://www.nsba.org/cosa/chart.htm> (last visited Feb. 2, 2002).

legislation is expansive and illustrative.³⁸ Special education is another prime example. The regulations³⁹ adopted to implement the 1997⁴⁰ reauthorization of IDEA still seem like “new rules” to many, even as the next reauthorization approaches.⁴¹ Not surprisingly, the number of education lawyers is also on the rise.⁴²

II. TOO MUCH LAW

These growing and evolving sources of law, together with the opening stories and headlines, imply both how closely entangled law is in the everyday life of schools and how quickly the legal context may stretch and change. The impact of these evolving sources of law on institutional structure and decision-making is significant.⁴³ Here, to many, the numbers suggest that there is simply too much

38. No Child Left Behind Act (NCLB) of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (codified at 20 U.S.C. § 6301 (2002)).

39. See 34 C.F.R. § 300 (2001) (proposed in 1997 at 62 Fed. Reg. 55,026 and finally adopted in 1999 at 64 Fed. Reg. 12,406).

40. Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17 (1997).

41. See Reauthorization of the Individuals with Disabilities Education Act, 67 Fed. Reg. 1411 (2002).

42. See, e.g., Robert D. Bickel, *The Role of College or University Legal Counsel*, 3 J.L. & EDUC. 73, 77 (1974); Roderick K. Daane, *The Role of University Counsel*, 12 J.C. & U.L. 399, 399 (1985); Peter H. Ruger, *The Practice and Profession of Higher Education Law*, 27 STETSON L. REV. 175 (1997). See generally Peter S. Popovich, *Education Law Public and Private*, 44 EDUC. L. REP. 927 (1988) (commenting on the increase in education law treatise and textual material).

43. This paper focuses on the involvement of school law with schools in their institutional and administrative capacities. This involves another whole set of reasons why educators should know that the law revolves around the idea that schools are institutions which convey society's democratic values and principles of citizenship. See, e.g., *Campaign for Fiscal Equity v. New York*, 744 N.Y.S.2d 130 (App. Div. 2002) (attempting to define New York's “sound basic education” requirement in part by reference to voting and civic responsibility). Schools teach and exemplify these important values, and for them to do so well requires that those involved with the schools be informed of the leading court cases of the day. See generally Sarah E. Redfield, *Should We Teach the Teachers: Why Educators Need to Know the Law*, Legal Issues in Education, ORBIT MAG. (2002). By way of example, the classic United States Supreme Court opinion in *Goss v. Lopez*, 419 U.S. 565 (1975), held that before a student could be suspended from school for more than ten days, he or she had to be given notice of the reasons for the suspension and an opportunity to respond. *Goss* thus set the minimum standard for fair process for school discipline. In defining terms, the Supreme Court did in *Goss* what the Supreme Court does best—think of *Brown v. Board of Education*—that is, set a standard for constitutional principles to be incorporated into society, in this case into schools. Similarly, in *Tinker v. Des Moines Community School District*, 393 U.S. 503 (1969), the Court set the societal parameters for student freedom of speech by recognizing that neither students nor teachers “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate” and holding that the prohibition of wearing black armbands to protest the

law in schools. This appears to be true of all schools and all manner of government involvement—constitutional, statutory, regulatory, and judicial. To others, law and activist plaintiff litigators appear to deserve the credit for opening access to education. Lawyers, through litigation and subsequent legislation, have been in the forefront of the movement to achieve and assure educational benefits for those children previously unserved or underserved.⁴⁴ It was the *Brown* litigation that made school desegregation the law of the land,⁴⁵ litigation that brought focus to the exclusion of disabled children,⁴⁶ litigation that focused on the needs of immigrant children,⁴⁷ litigation that called attention to educational funding disparities of constitutional proportion,⁴⁸ and litigation that continues to

Vietnam War was unconstitutional “without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline.” *Id.* at 506, 511; *see also* *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (asserting that school newspaper, activities with school imprimatur can be more closely regulated); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) (regarding lewd speech student assembly); *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853 (1982) (regarding removal of books from library).

44. *See generally* LAW AND SCHOOL REFORM: SIX STRATEGIES FOR PROMOTING EDUCATIONAL EQUITY 9-17 (Jay P. Heubert ed., 1998) [hereinafter LAW AND SCHOOL REFORM].

45. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *see also* *Milliken v. Bradley*, 433 U.S. 267 (1977) (citing remedial education plans and state funding upheld); Gary Orfield, *Conservative Activists and the Rush Toward Resegregation*, in LAW AND SCHOOL REFORM, *supra* note 44, at 39 (“No major urban school district except Seattle complied with the constitutional requirement for desegregation until it was ordered to do so, even when the law was perfectly clear.”).

46. *See* *Mills v. Bd. of Educ. of the District of Columbia*, 348 F. Supp. 866 (D.D.C. 1972) (regarding mentally retarded, hyperactive, emotionally and behaviorally disturbed children); *Pa. Ass’n for Retarded Children v. Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972) (examining retarded children); *see also* *Labanks v. Spears*, 60 F.R.D. 135 (E.D. La. 1973) (examining Louisiana consent decree regarding mentally retarded children); *Wolf v. Legislature of Utah*, Civ. No. 182646 (3d Dist. Utah 1969), referenced in Dennis E. Cichon, *Educability and Education: Filling the Cracks in Service Provision Responsibility Under the Education for All Handicapped Children Act of 1975*, 48 OHIO ST. L.J. 1089 (1987) (promoting students with trainable IQ levels to be in public school following *Brown*-type analysis). *But see* *Beattie v. Bd. of Educ.*, 172 N.W. 153 (Wis. 1919) (upholding exclusion of student with cerebral palsy, which did not impact student’s intellect).

47. *See* *Plyler v. Doe*, 457 U.S. 202 (1982) (examining alien children to be educated); *see also* *Lau v. Nichols*, 414 U.S. 563 (1974) (concerning bilingual education).

48. *Compare* *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (holding that education is not a fundamental right under Federal Constitution, funding disparities not subject to strict scrutiny), *with* *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989) (concluding school finance system to be unconstitutional under state constitutional provisions). *See generally* John Dayton, *Serrano and Its Progeny: An Analysis of 30 Years of School Funding Litigation*, 157 EDUC. L. REP. 447 (2001). However, individual state challenges will not address inequality across states or inequality compounded by federal grant/formula funding under statutes such as IDEA or the Equal Educational Opportunity Act. Molly S. McUsic, *School Finance*, in LAW AND SCHOOL REFORM, *supra* note 44, at 94-97; *see also* No Child Left Behind Act (NCLB) of 2001, Pub. L. No.

resolve questions of reform.⁴⁹ From these judicial roots have come the cases, laws, standards, and directions that have moved law and education to the unified place they occupy today.⁵⁰

Regardless of the perspective one has on law—too much or only too valuable, incremental or radical—its presence in education is the reality. As one commentator stated, “In our contemporary political and social environment law has become a primary means of implementing change and a stabilizing force for promoting incremental rather than radical reform in the provision of public education.”⁵¹

Writing five years ago in the *Harvard Educational Review*, educator and lawyer Jay Heubert called for more collaboration between educators and their lawyers to address the growing long-term involvement of law in schools.⁵² Recognizing that there is an “increasing convergence of legal standards and educational norms,” Heubert noted:

There are now many areas of education law in which legal standards and educational principles are intertwined. Under the First Amendment, for example, public school officials may determine the content of the curriculum and of school-sponsored newspapers and assemblies, as long as the educators can show that their decisions were “reasonably related to a valid pedagogical concern” (*Hazelwood School District v. Kuhlmeier*, 1988). In these and many similar situations, it takes a lawyer to know what the legal standard is and an educator to know whether that education-based standard has been met. In sum, it is increasingly the case that neither lawyers nor educators can do their work

107-110, 115 Stat. 1425 (codified at 20 U.S.C. § 6301 (2002)), particularly Title I, Improving the Academic Achievement of the Disadvantaged.

49. See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

50. Writing in the late 1980s, Professor David Kirp observed that, since the Supreme Court’s decisions in *Brown* and *Goss*, the country has been moving steadily away from primarily local, political control of schools to “centralization and legalization.” DAVID L. KIRP & DONALD N. JENSEN, *SCHOOL DAYS, RULE DAYS: THE LEGALIZATION AND REGULATION OF EDUCATION* 1-2 (1986); see also PHILLIP C. SCHLECHTY, *SHAKING UP THE SCHOOL HOUSE* 14-18 (2001) (focusing on discussion of more government involvement in schools); Lawrence W. Friedman, *The Rise and Fall of Student Rights*, in KIRP & JENSEN, *supra*, at 251 (discussing the judicialization of schools); D.M. Sacken, *The Legalization of Education and the Preparation of School Administrators*, 84 *EDUC. L. REP.* 1, 7 (1993).

51. Joseph Beckham, *Meeting Legal Challenges*, in *THE SCHOOL LEADER’S LIBRARY: LEADING FOR LEARNING SERIES*, at xiii-xiv (1996); see also Joseph R. McKinney & Theodore L. Drake, *The School Attorney and Local Educational Policy-Making*, 93 *EDUC. L. REP.* 471, 481 nn.1-5 and accompanying text (1994); Philip M. Corkill & J. Robert Hendricks, *Learning the Law and Loving the School Attorney Less*, *The School Administrator Web Edition* (Nov. 1997), at http://www.aasa.org/publications/sa/1997_11/corkill.htm (last visited Oct. 21, 2001).

52. Jay P. Heubert, *The More We Get Together: Improving Collaboration Between Educators and Their Lawyers*, 67 *HARV. EDUC. REV.* 531 (1997).

independently.⁵³

The opening stories and headlines certainly suggest many more areas of the intertwined expertise Heubert delineates. Each raises a significant area of convergence between law and education where “neither lawyers nor educators can do their work independently.”⁵⁴ The questions are large and multidisciplinary. What is a valid pedagogical concern as it relates to constitutionally protected student speech? What level of actual or potential school disruption is required to justify the inhibition of students’ constitutionally defined free speech?⁵⁵ What is sufficient interference with school discipline or harmony to justify interference with a teacher’s speaking out on school policy?⁵⁶ How much school involvement qualifies as an “impermissibly coercive” endorsement of religion?⁵⁷ What intrusion is justified at its inception and reasonable in its scope when school officials search students?⁵⁸ What is deliberate indifference to harassment in schools?⁵⁹ What level of bilingual

53. *Id.* The internal quotation is from *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 271-72 (1988).

54. Heubert, *supra* note 52.

55. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969).

56. *See Pickering v. Bd. of Educ. of Township High Sch. Dist. 205*, 391 U.S. 563, 570 (1968) (holding that teacher who criticized Board and superintendent in local newspaper regarding proposed tax increase was dismissed in violation of First Amendment because teacher was speaking on matter of public concern).

57. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (holding that student-led, student-initiated invocations prior to football games did not amount to private speech and the school’s policy of permitting such invocations was impermissibly coercive); *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (asserting that state statutes to be unconstitutional under First Amendment because both involved excessive entanglement of state with church because the state had direct control over the way funds were used by religious schools); *Adler v. Duval County Sch. Bd.*, 250 F.3d 1330 (11th Cir.), *cert. denied*, 534 U.S. 1065 (2001) (concluding that school system’s policy of permitting a graduating student, elected by her class, to deliver an unrestricted message of her choice at graduation was not facially violative of the Establishment Clause).

58. *See New Jersey v. T.L.O.*, 469 U.S. 325, 341-42 (1985) (“Determining the reasonableness of any search involves a twofold inquiry: first, one must consider ‘whether the . . . action was justified at its inception,’ . . . second, one must determine whether the search as actually conducted ‘was reasonably related in scope to the circumstances which justified the interference in the first place.’”); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (upholding random urinalysis of student athletes); *see also Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822 (2002); *infra* notes 68-72 and accompanying text.

59. *See, e.g., Title IX*, 20 U.S.C. § 1681 (2000); *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 648 (1999) (“School administrators will continue to enjoy the flexibility they require so long as funding recipients are deemed deliberately indifferent to acts of student-on-student harassment only where the recipient’s response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances.”); *Vance v. Spencer County Pub. Sch. Dist.*, 231 F.3d 253, 261 (6th Cir. 2000).

training and instruction is adequate?⁶⁰ At what point should teachers and school administrators be held to have known the law and be subjected to liability?⁶¹ What qualifies as educational benefit in special education?⁶² What accommodation is a fundamental alteration of the essence of an academic program?⁶³ Or, to ask the conclusory questions, what is an adequate or appropriate (both now legal terms of art⁶⁴) education and what methods are

Where a school district has knowledge that its remedial action is inadequate and ineffective, it is required to take reasonable action in light of those circumstances to eliminate the behavior. Where a school district has actual knowledge that its efforts to remediate are ineffective, and it continues to use those same methods to no avail, such district has failed to act reasonably in light of the known circumstances.

Id.

60. See, e.g., Equal Educational Opportunity Act of 1974, 20 U.S.C. § 1703(f) (1999); see also *Castaneda v. Pickard*, 648 F.2d 989, 1012-13 (5th Cir. 1981) (determining that bilingual education program was inadequate without appropriate personnel).

61. Basic Supreme Court principles of immunity were derived from cases other than education cases. E.g., *Anderson v. Creighton*, 483 U.S. 635, 641 (1987) (defining the reasonable person aspect of the test to be objective in light of clearly established law and the information possessed); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (finding immunity for government officials whose conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known). But immunity principles are relevant to school litigation. See, e.g., *Jenkins v. Talladega City Bd. of Educ.*, 115 F.3d 821 (11th Cir.), *cert. denied*, *Jenkins v. Herring*, 522 U.S. 966 (1997) (finding school officials qualified as immune in a strip search of eight-year-olds for seven dollars).

62. See, e.g., IDEA, 20 U.S.C. § 1400-1487; *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 189 (1982) ("free appropriate public education" satisfied when student benefits educationally).

63. See, e.g., Rehabilitation Act of 1973, particularly Section 504, 29 U.S.C. § 794 (2000); 34 C.F.R. § 104 (2001); the Americans with Disabilities Act, 42 U.S.C. § 12101-12213 (1995), particularly 42 U.S.C. § 12132; *S.E. Cmty. Coll. v. Davis*, 442 U.S. 397, 405 (1979) (finding college not required to affirmatively modify nursing program to eliminate need for oral communication); *Stern v. Univ. of Osteopathic Med. & Health Sci.*, 220 F.3d 906, 908 (8th Cir. 2000) (student not entitled to requested accommodations without showing they would qualify him for medical school); *Bercovitch v. Baldwin Sch., Inc.*, 133 F.3d 141 (1st Cir. 1998) (private school need not exempt student from its discipline plan to provide "reasonable accommodation" for student with attention deficit-hyperactivity disorder, oppositional defiant disorder, and depression).

64. See, e.g., as to a "free appropriate public education," IDEA, 20 U.S.C. § 1401(8), which provides:

The term "free appropriate public education" means special education and related services that—(A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

Id. Or for one of the numerous examples where state courts discuss an adequate education, see

acceptable to achieve reform?⁶⁵

Questions like these have their genesis in federal and state constitutions, statutes, and case law, but the answers cannot and do not lie there alone. Courts do not want to substitute their judgment for that of state policy makers,⁶⁶ nor do they want to be arbiters of educational methodology and pedagogy.⁶⁷ As such questions are raised, the answers will lie where law, education, astute pedagogy, and school administration intersect—that is, when lawyers and educators work dependently, not independently.

The free speech questions offer one example. It is a teacher and principal who can best predict the likelihood of substantial disruption by student speech, and a principal or superintendent who can best understand the impact of critical teacher speech on the school work environment. The school search cases provide a second example of this point. In *New Jersey v. T.L.O.*,⁶⁸ the United States Supreme Court defined the constitutional standard for school searches as justified at the inception, reasonable in scope.⁶⁹ In *Vernonia 47J v. Acton*,⁷⁰ the Supreme Court expanded its views regarding drug testing student athletes;⁷¹ in *Board of Education of Independent School District No. 92 v. Earls*,⁷² the Supreme Court set the standard for drug testing students in other extracurricular activities.⁷³ Under these precedents, lawyers can and will articulate the judicial standards, but educators must provide the factual reality. It is the teacher and school administrators who can best define the justification for a search, and who can best know what is reasonable in scope given the item sought and the age and other characteristics of the students and school milieu.⁷⁴ The constitutionality of any given search depends, therefore, on the application of standards via both

Rose v. Council for Better Educ., Inc., 790 S.W.2d 186 (1989).

65. See LAW AND SCHOOL REFORM, *supra* note 44, at 1-36. One such method, vouchers, was recently before the Supreme Court. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

66. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42 (1973); *G.I. Forum v. Tex. Educ. Agency*, 87 F. Supp. 2d 667, 671 (W.D. Tex. 2000).

67. See, e.g., *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985) (examining academic discipline); *Bd. of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 92 (1978) (highlighting deference regarding academic discipline); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1963) (regarding curriculum). See generally Anne P. Dupre, *Disability, Deference, and the Integrity of the Academic Enterprise*, 32 GA. L. REV. 393, 398 (1998) (contrasting higher education to lower education); Blakely Latham Fernandez, *TAAS and GI Forum v. Texas Education Agency: Critical analysis and Proposal for Redressing Problems With Standardized Testing in Texas*, 33 ST. MARY'S L.J. 143 (2001).

68. 469 U.S. 325 (1985).

69. *Id.*

70. 515 U.S. 646 (1995).

71. *Id.*

72. 536 U.S. 822 (2002).

73. *Id.*

74. The school context is not to be underestimated. See, e.g., ROLAND S. BARTH, *LEARNING BY HEART* (2001).

lawyers and educators, and it behooves each to work, co-dependently, with knowledge of the context of each discipline.⁷⁵

Unlike the aphorism, “what you don’t know doesn’t hurt you,” in the quest for meaningful answers to difficult law-education questions, what you don’t know does in fact hurt. Lack of cross-disciplinary knowledge hurts educators, lawyers, and the educational infrastructure and system.

This damage is obvious from principal and educator surveys and from reports of frustration, resistance, and hostility. Evidence of the difficulty is obvious from a recent principals’ survey that reports that educators spend too much time litigating or worrying about litigating.⁷⁶ Apparently this worry is well founded.⁷⁷ Surveys show that too often, educators decide not what is good for their students, but what they believe will best limit their potential legal liability.⁷⁸ When public moneys are paying for litigation, the expedient settlement is attractive, even if it is at the expense of pedagogical wisdom or student welfare.⁷⁹ Too often, such decisions may be made with less than the necessary information. It may well be that one approach *is* as legally sound as another, and the educator is free to choose the most effective educationally. But unless informed of the legal context, educators may *think* their options are limited.⁸⁰ Acting without a

75. An education professor who has studied professional preparation and development and reviewed this manuscript doubted that many administrators would seek out legal advice proactively on search questions. This may well be the case, and calls for more legal education for educators, at least in broad terms. E-mail from Dr. Mark Littleton, Professor of Educational Administration, Tarleton State University, to Sarah E. Redfield, Faculty, Franklin Pierce Law Center (Oct. 16, 2002) (on file with author).

76. Press Release, National Association of Elementary School Principals, School Principal Survey Reveals Fear of Liability Limits Educational Opportunities for America’s Children (available from National Association of Elementary School Principals, 1615 Duke Street, Alexandria, Virginia, 22314; naesp@naesp.org); see also Martin F. Connor, *Lawsuit Abuse and Punitive Damages: The Need for Reform*, 57 SCH. BUS. AFF. 16 (1991); Marilee C. Riss, *High Attorney Fees Lead Some Schools to Compromise*, 177 AM. SCH. BD. J. 17 (Dec. 1990).

77. See *Please Miss, What’s an IEP?*, *supra* note 27. The *Economist* article reports on a Los Angeles teacher winning a \$4.35 million dollar verdict against her school district in a case involving extreme offensive pornography directed at the teacher in a rogue student newspaper. The teacher won on a sexual harassment, hostile environment claim. See Sandy Banks, *A Missed Lesson in Limits of Vile Speech*, L.A. TIMES, Mar. 19, 2002, at Part 5, 1.

78. See Press Release, *supra* note 76.

79. Settlements themselves are, of course, often costly. See *Limiting Your School’s Exposure*, *supra* note 8, at 1; see also *Please Miss, What’s IEP?*, *supra* note 27 (reporting that one in four principals has been involved in a lawsuit and that schools superintendents report that winning does not matter because “[b]efore the cases ever reach court most schools succumb to what they call ‘legal blackmail,’ settling just to avoid lawyers’ fees.”).

80. One example is the area of discipline. The United States Supreme Court directly addressed school discipline in 1975 in *Goss v. Lopez*, 419 U.S. 565 (1975). In *Goss*, the Court found that constitutional Due Process requires appropriate notice and hearing before a student could be suspended from public school for more than ten days. *Id.* at 576. *Goss* is a suspension case, not

thorough understanding of the legal context, school administrators may make a “wrong” educational decision out of fear of litigation, when a “right” one would be just as good in legal terms.

The infiltration of law into schools presents direct difficulties such as the spending too much time worrying about litigation or making inadequately informed decisions. It also presents more subtle difficulties, such as too much confusion and frustration. As administrators and educators find themselves forced to spend their resources to implement court or legislatively imposed legal requirements these feelings are extant. As one education lawyer noted:

I believe that the whole focus of education has been changed by our overly litigious society. Many like to blame lawyers for over litigation, and in part, they may be to blame, but every lawyer must have a client to pursue an action. The more responsibility that we place on schools, the higher the expectation of the consumer. When the impossibly high expectations are not met, which we know that they can never be based upon the societal pressures and financial limitations described above, parents turn to litigation to try to solve the problems with education. This drains districts of resources and the attention to the educational program is diverted to defend the lawsuit. More significantly, however, educators feel as though they are under attack; the veterans with experience and expertise are fleeing to retire and many bright young people are not entering the field of education at all. This just exacerbates the problems that already exist in education.⁸¹

This frustration and hostility evinces at least a lack of understanding between the policy makers and local deliverers and a mutual lack of understanding of the law’s genesis and impact:

an expulsion case. *Id.* As schools tried to put *Goss* into practice, a lack of basic understanding as to the core concepts of *Goss* led to the parameters of the disciplinary actions of schools becoming clouded. As Judge Wilkinson observed: “Once again, school officials, as far as constitutional law is concerned, are not really enlightened as to what it is they are supposed to do. In many instances, they have kept the suspension under ten days not because a student deserved a suspension under ten days, but because the law dealing with suspensions longer than ten days is so unclear. *Panel II: Due Process and Public Education*, 1 MICH. L. & POL’Y REV. 339, 340 (1996); *see also* Sacken, *supra* note 50, at 6.

81. Interview by Dr. Carol Roberts with Rosemary Mullaly, Esq., Legal Department, Chester County (PA) Intermediate Unit (Sept. 2001); *see also* LAW AND SCHOOL REFORM, *supra* note 44, at 5; *Selecting and Working with a School Attorney: A Guide for School Boards*, at <http://www.nsba.org/cosa/About/aboutschlaw.htm#historic> (last visited Oct. 2, 2001). The idea that school leaders must feel in control is not unique. *See* SCHLECHTY, *supra* note 50 (“To change a system leaders must control that system and feel that they are in control. Today many education leaders—policymakers, administrators and teachers—feel powerless If educational leaders are to improve these systems, however, they must learn to control them; for without control there can be no systematic improvement To improve the systems they lead leaders must first understand those systems.”).

The present legalistic web has been spun not by central design, but by uncoordinated drift. Time and time again, in situation after situation, courts, legislators and regulators have promulgated policy without paying attention to how local deliverers of social service could comply. Despite some success, the following frustrating cycle of implementation often has unfolded: Legislation, regulations, or court decision are met at the local level by confusion, resistance, or painfully slow and half-hearted compliance; judges, agencies and regulators eventually respond by tightening rules and toughening enforcement; and local institutions ultimately “comply” by adhering narrowly and legalistically to the letter of the law, which has become by then exceedingly intricate This legal tangle creates numerous problems . . . most importantly, disappointing outcomes for the laws’ intended beneficiaries.⁸²

Recognizing this cycle of expectation, litigation, and even frustration, the inescapable reality is that educators need some grounding and some method for staying current with the relevant law, and lawyers need to understand and be current with today’s educational reality to lessen the negative impacts of potential litigation and legislation. To work together successfully, denial of the other’s discipline is no longer possible and naiveté is no longer acceptable for either discipline.⁸³

Admittedly, educators perhaps do not come to their attorneys in the best frames of mind—generally they have a problem, often a problem they may not have the expertise to handle. Their attorneys may not be overly prepared either.⁸⁴ Educators observe that lawyers are often ill informed about education, administration, and research.⁸⁵ This is not surprising, given that the typical law student focuses on legal research and will not necessarily be exposed to the methodology for research in the social sciences, even though such research may well be the turning point in a case. Indeed, *Brown* itself offers the classic example. The social science research of Dr. Kenneth Clark, through his historic experiment showing black and white dolls to black children who consistently preferred the white dolls, demonstrated that segregation caused low self-esteem.⁸⁶ While such research may have been crucial to the initial desegregation decisions, such understanding seems to be lacking in today’s decisions to terminate

82. See, e.g., Paul Berman, *From Compliance to Learning: Implementing Legally-Induced Reform*, in KIRP & JENSEN, *supra* note 50, at 46; Beckham, *supra* note 51, at xiv.

83. Jan G. Borelli, *Who’s the School Lawyer Working For?*, AASA: The School Administrator Web Edition (Feb. 2000), at http://www.aasa.org/publications/sa/2001_02/reeves_side_lawyer_work_for.htm (last visited Oct. 31, 2001) (quoting one superintendent: “I have to admit to being blatantly naïve about the what’s what and who’s who of school legal operations.”).

84. See *Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*, 1992 ABA SEC. LEGAL EDUC. & ADMISSIONS TO THE BAR, The MacCrate Report.

85. See, e.g., LAW AND SCHOOL REFORM, *supra* note 44, at 6; Trotter, *supra* note 3, at 12.

86. See Gordon Beggs, *Novel Expert Evidence In Federal Civil Rights Litigation*, 45 AM. U. L. REV. 1, 9 (1995).

desegregation plans where lack of meaningful collaboration between educators and lawyers on the factual situation of schools “has often led to decisions that read very selectively from the law and to plans that create highly segregated and unequal schools.”⁸⁷ Desegregation thus offers one example of a need for education-informed lawyers. But even beyond the issues of identification and use of social science research, legal research is not organizational design. Legal analysis does not offer an equivalent framework for understanding discretion in school decision making or the like.⁸⁸ Still, it is in these arenas, and in the areas of convergence previously discussed, where education-informed lawyers who are able to move inside the schoolhouse, will be so important.

III. ISSUES OF INFRASTRUCTURE

To increase the likelihood of wise decision-making and to avoid the difficulties outlined as law and education converge, many legal and education experts have written for years about the importance of teaching educators about the law.⁸⁹ A recent study of Texas educators by Dr. Mark Littleton, Professor of Educational Administration at Tarleton State University (Texas), and his colleagues reviewed the existing research on educator legal knowledge. Dr. Littleton concluded that while more research is needed⁹⁰ the existing research has “identified that school officials displayed an alarming lack of knowledge about

87. Orfield, *supra* note 45, at 41. *See generally* *Belk v. Charlotte-Mecklenburg Bd. of Education*, 269 F.3d 305 (4th Cir. 2001), *cert. denied*, 122 U.S. 1538 (2002) (being the most recent in a line of twenty years of litigation regarding desegregation and unitary status).

88. *See* KIRP & JENSEN, *supra* note 50, at 6; Sacken, *supra* note 50, at 10.

89. *See, e.g.*, ISAAC ERSOFF, *LAW AND THE PROFESSIONAL EDUCATOR* (2000); NATHAN L. ESSEX, *SCHOOL LAW AND THE PUBLIC SCHOOLS: A PRACTICAL GUIDE FOR EDUCATIONAL LEADERS*, at xvii (Allyn & Bacon 1999); VICKI NORD PETZKO, *PREVENTING LEGAL HEADACHES* 34-37 (Apr. 2001); Brenda Davis & James Williams, *Integrating Legal Issues into Teacher Preparation Programs* (1992) (ERIC Document Reproduction Service No. ED 347 139); ECS Law and Education Center, *Footnotes* (1980) (ERIC Document Reproduction Service No. ED 203 455); D. Gullatt & J. Tollett, *Education Law: A Relevant Course for All Teacher Education Programs* (1995) (ERIC Document Reproduction Service No. ED 389 695); Robert J. Simpson, *Teaching Law and Education Outside Law Schools* (1975) (ERIC Document Reproduction Service No. ED 163 826); *Teaching Teachers About Law in the 90s: Models, Methods, and Means* (1993) (ERIC Document Reproduction Service No. ED364 482); Mark G. Yudoff, *Law and Educators: Research Past and Future* (1979) (ERIC Document Reproduction Service No. ED 220 447); InfoGuide, *School Law* (1993), available at <http://www.lectlaw.com/files/lwr05.htm> (last visited Oct. 17, 2001).

90. MARK LITTLETON ET AL., *ANALYSIS OF LEGAL KNOWLEDGE OF SCHOOL OFFICIALS IN TEXAS*, Education Law Association 6 (2001), available at <http://www.tarleton.edu/mlittleton/ELAPaper.pdf> (last visited Dec. 1, 2001); Kathleen A. Sullivan & Perry A. Zirkel, *Education Law Texts Usage: Survey Results*, 27 J.L. & EDUC. 423 (1998) (“Despite increasing interest in education law, research regarding training in education law for teachers and administrators, remains limited.”).

legal issues that affect them on a daily basis.”⁹¹ Significantly, even where school leaders do demonstrate legal knowledge, they have “difficulty applying that knowledge to situations that occur on a daily basis.”⁹² The Texas study is consistent with other surveys showing that educators’ knowledge of core legal principles is limited and that educators themselves recognize the need to learn more about education law.⁹³

Despite the many studies and reviews, the progress toward educating educators about the law seems slow.⁹⁴ Admittedly, it is difficult to gauge the advent or extent of education law required to be or actually offered to educators. Rather than a clear system to assure such education, there is an accumulation of standards that are diverse and largely indirect.⁹⁵ There are national frameworks, which may or may not become part of state law by means of statute or regulation. Even when states adopt a national framework, that framework may or may not be actualized into educator education schema through schools of education and other professional development providers.⁹⁶

Relevant national frameworks and standards for requiring educators to be informed about the law exist at the educator level and at the institutional level. Together they could be read to support the idea that educators, particularly administrators and those involved with special education, need knowledge of the legal context in which they work and should be exposed to it during their own educations. But the message is not straightforward, uniform, or universal. The delivery is even less clear. This part of the paper first discusses frameworks and standards of various types and levels that begin to shed light on the extent of efforts to incorporate the legal context into educating educators. Teacher, special educator, and administrator requirements are reviewed via national frameworks, state law, and schools of education. The translation of standards to schools of education is also reviewed. Against this background, this part at least poses the question of why we find the current patchwork. The next part discusses the value of moving to a more realistic and interdisciplinary approach.

91. LITTLETON ET AL., *supra* note 90, at 3. See also CEPI interview, *supra* note 13.

92. LITTLETON ET AL., *supra* note 90, at 4.

93. See, e.g., LOUIS FISHER & GAIL PAULUS SORENSON, SCHOOL LAW FOR COUNSELORS, PSYCHOLOGISTS, AND SOCIAL WORKERS 215-25 (1996); LITTLETON ET AL., *supra* note 90, at 12, 24; PETZKO, *supra* note 89, at 34; Gary L. Reglin, *Public School Educators’ Knowledge of School Law*, ILL. SCHOOL J. (1990). Interestingly, the author was unable to find similar surveys of legal professionals.

94. From anecdotal information and observation of the author, the reverse seems equally true.

95. Telephone interview with Pamela Ehrenberg, National Council for Accreditation of Teacher Education (Apr. 1, 2002) [hereinafter Ehrenberg interview].

96. This could be because of state law or because of such institutions’ own initiatives. For further discussion of the standards applicable to such institutions, see *infra* note 130 and accompanying text.

A. *The National Scheme*

1. *Teachers.*—At the teacher level, except for special education teachers, there seem to be few consistent requirements for educators being law-informed.⁹⁷ To reach this conclusion requires review of a patchwork of models, standards, and applications, starting at the national level and working through to schools of education. Beginning at the national level, there are two national groups that offer the leading models for standards for teachers, the Interstate New Teacher Assessment and Support Consortium (INTASC)⁹⁸ and the National Board for Professional Teaching Standards (NBPTS).⁹⁹

Principle #10 of INTASC's Model Standards for Beginning Teacher Licensing and Development provides an umbrella for several subsections. Principle #10 states: "The teacher fosters relationships with school colleagues, parents, and agencies in the larger community to support students' learning and well-being." Principle #10 is more specifically elaborated in its Knowledge section as:

The teacher *understands and implements laws related to students' rights and teacher responsibilities* (e.g. for equal education, appropriate education for handicapped students, confidentiality, privacy, appropriate treatment of students, reporting in situations related to possible child abuse).¹⁰⁰

In comparison, the NBPTS describes its standards as offering a "consensus among accomplished teachers and other education experts about what accomplished teachers should know and be able to do."¹⁰¹ They are endorsed and encouraged but not mandatory.¹⁰² The NBPTS Standards for teachers,¹⁰³

97. For purposes of this paper, standards were specifically reviewed for regular teachers and special education teachers but not for individual disciplines such as math, history, etc. Special educator standards are discussed further. See *infra* note 105 and accompanying text.

98. Interstate New Teacher Assessment and Support Consortium, *Model Standards for Beginning Teacher Licensing and Development: A Resource for State Dialogue* (1991), available at <http://www.ccsso.org/intascst.html#draft> [hereinafter INTASC, *Teacher Licensing*] (last visited Mar. 28, 2002) (emphasis added). These are not standards. They are principles or models. The INTASC describes itself as a starting point for dialogue. *Id.* at 1. See also NBPTS standards discussed *infra* notes 110-13 and accompanying text (describing state law as recognizing them and offering incentives for following).

99. INTASC, *Teacher Licensing*, *supra* note 98.

100. *Id.*

101. NBPTS Standards FAQs, at <http://www.nbpts.org/standards/stds.cfm>.

102. In terms of the applicability of its standards NBPTS notes

A partial list of organizations who have encouraged and supported the work of the National Board includes the American Association of School Administrators (AASA), the Council of Chief State School Officers (CCSSO), the National Conference of State Legislatures (NCSL), the National School Boards Association (NSBA), and the National Association of State Boards of Education (NASBE). In addition, nearly forty

applicable after three years experience, do not appear to include knowledge of the legal context in which teachers must work among their Five Core Propositions or related subsections.¹⁰⁴

2. *Special Education Teachers*.—Similar national frameworks for special education teachers are more precise. For all general and special education teachers working with students with disabilities, Principle #1 of INTASC's Model Standards for Licensing General and Special Education Teachers of Students with Disabilities ("General and Special Education Teachers") provides as an overarching standard: "The teacher understands the central concepts, tools of inquiry, structures of the discipline(s) he or she teaches and can create learning experiences that make these aspects of subject matter meaningful for students."¹⁰⁵ In explaining the "implications for students with disabilities" INTASC indicates:

Both general and special education teachers demonstrate an understanding of the primary concepts and ways of thinking and knowing in the content areas they teach as articulated in INTASC subject matter principles *and other professional, state, and institutional standards*. They understand the underlying values and implications of disability legislation and special education policies and procedures as they relate to their roles and responsibilities in supporting the educational needs of students with disabilities.¹⁰⁶

states and numerous localities have adopted legislation that provides support or incentives for teachers who pursue or achieve National Board Certification.

Id. NBPTS reports that as of March 2003, legislative and policy action creating incentives and recognition for National Board Certification has been enacted in forty-nine states and in approximately 476 local school districts, including the District of Columbia. See <http://www.nbpts.org/about/state.cfm> (last visited Apr. 16, 2003). In regard to its relationship to NCATE, discussed *infra* note 130, NBPTS notes that the "National Council for Accreditation of Teacher Education (NCATE) requires that, as a condition of accreditation, advanced degree programs show the influence of the NBPTS mission." NBPTS Standards FAQs, *supra* note 101.

103. "At the core of the National Board Certification process are standards that describe the highest level of teaching in different disciplines and with students at different developmental levels." *Id.*

104. NATIONAL BD. FOR PROF'L TEACHING STANDARDS, FIVE CORE PROPOSITIONS, <http://www.nbpts.org/about/coreporps.cfm>. These standards are meant to apply to teachers after their third year of teaching. They are apparently meant to be cumulative with the new teacher standards, i.e., NBPTS candidates are presumed to have the competencies of beginning teachers and build on them. Additionally, individual subject matter standards may include reference to equity and to law or ethics, *see, e.g.*, Telephone interview with Mary Lease, NBPTS (Mar. 28, 2002) [hereinafter Lease interview].

105. INTERSTATE NEW TEACHER ASSESSMENT AND SUPPORT CONSORTIUM MODEL STANDARDS FOR LICENSING GENERAL AND SPECIAL EDUCATION TEACHERS OF STUDENTS WITH DISABILITIES: A RESOURCE FOR STATE DIALOGUE 10 (2001) [hereinafter MODEL STANDARDS], available at <http://www.ccsso.org/intasc.html>.

106. *Id.* (emphasis added).

This, in comparison to the *Teacher Licensing* standards and the NBPTS standards, clearly acknowledges the role that federal and state law play in education students with disabilities. The last sentence, which requires that “[a]ll teachers provide equitable access to and participation in the general curriculum for students with disabilities”¹⁰⁷ seems particularly in tune with IDEA’s least restrictive environment requirements,¹⁰⁸ as well as with the civil rights laws aimed at eliminating discrimination in education.¹⁰⁹ This intent is expanded in the specific requirements supporting Principle #1, which states, that all teachers working with students with disabilities must know the relevant major legislation, § 504 of the Rehabilitation Act of 1973, IDEA, and the ADA.¹¹⁰ Section 1.04 of the Model Standards for Licensing General and Special Education Teachers of Students with Disabilities outlines the following as core legal concepts of disability law:

They understand key concepts such as special education and related services; disability definitions; free appropriate public education; least restrictive environment and continuum of services; due process and parent participation and rights; and non-discriminatory assessment. They also understand the purpose and requirements of Individualized Education Programs (IEPs), including transition plans, and Individualized Family Support Plans (IFSPs), both of which are specified in IDEA, and Individual Accommodations Plans (IAPs), which are specified in Section 504, and their responsibility for implementing these plans.¹¹¹

This Principle, also incorporates relevant law at the procedural and policy level:

1.05 All teachers know about and can access resources to gain information about state, district, and school policies and procedures regarding special education, including those regarding referral, assessment, eligibility, and services for students with disabilities. Examples of resources include special education teachers, support professionals, social service agencies, Internet sites, professional education organizations, and professional journals, books and other

107. *Id.*

108. *See* 20 U.S.C.A. § 1412(a)(5) (2002) (providing that children with disabilities are educated with children who are not disabled to the maximum extent appropriate).

109. *See, e.g.*, 20 U.S.C.A. § 1681 (2002) and 34 C.F.R. § 106.1 (2002) (prohibiting sex discrimination in education); 42 U.S.C.A. § 2000(d) (2002) and 34 C.F.R. § 100.1 (2002) (prohibiting race discrimination in federally-assisted programs); 29 U.S.C.A. § 794 (West 1999 & Supp. 2002) and 34 C.F.R. § 104-1 (2002) (prohibiting discrimination on the basis of disability or handicap in a federally-sponsored program); 20 U.S.C. § 1400-1487 (2002) and 34 C.F.R. § 300 (2002) (ensuring free public special education to children with disabilities).

110. *See* MODEL STANDARDS, *supra* note 105, at 10.

111. *Id.* § 1.04.

documents.¹¹²

While the above apply to all teachers who teach students with disabilities, there are additional provisions regarding special education teachers as such. The specific requirements supporting Principle #1 for special education teachers focus on responsibilities for developing and implementing

individualized education programs (IEPs), individualized family service plans (IFSPs), and individual accommodation plans (IAPs) for students with disabilities:¹¹³ *They know what the law requires with regard to documents and procedures and take responsibility for ensuring that both the intent and the requirements of the law are fulfilled.*¹¹⁴

The standards recognize that special education teachers will be a major source of such legal knowledge:

Special education teachers serve as a resource to others by *providing information about the laws and policies that support students with disabilities (e.g., IDEA, Section 504, Americans with Disabilities Act) and how to access additional information when needed.*¹¹⁵

In comparison, NBPTS refers to legal matters in less detail in its standards and certificate information for experienced special education teachers.¹¹⁶ Standard II, Knowledge of Special Education includes the following: “Accomplished teachers of students with exceptional needs draw on their knowledge of the philosophical, historical, and *legal foundations* of special education and their knowledge of effective special education to organize and design instruction”¹¹⁷

C. Administrators

At the level of national frameworks for administrators, the Interstate School Leaders Licensure Consortium’s (ISLLC) Standards for School Leaders explicitly address the legal context. Standard Six provides that a “school administrator is an educational leader who promotes the success of all students by understanding, responding to, and influencing the larger political, social,

112. *Id.* § 1.05.

113. *Id.* § 1.11. This standard offers further guidance. “For example, they know who needs to be involved in the development of the plan and how to facilitate their involvement, and what needs to be included in the plan (e.g., a description of the student’s present level of performance, a behavior support or transition plan if needed, long term goals and short term objectives or benchmarks).” *Id.*

114. *Id.* (emphasis added).

115. *Id.* § 1.12 (emphasis added).

116. See NBPTS Standards, available at <http://www.nbpts.org> (last visited Apr. 6, 2002).

117. ISLLC, Guide to National Board Certification, Early Childhood Through Young Adulthood/Exceptional Needs Specialists Standards, available at http://www.nbpts.org/standards/brief/br_ecya_ens.pdf (last visited Apr. 6, 2002) (emphasis added).

economic, *legal* and cultural context.”¹¹⁸ The Knowledge requirements under this Standard include an understanding of government, democratic society, conflict resolution, and “the political, social, cultural and economic systems and processes that impact schools.”¹¹⁹ Here the standards recognize both the knowledge of law and the role of law. They acknowledge the role administrators play not only in policy development but also in assuring that the fairness mandated by constitutional or statutory provisions is assured. The Knowledge requirement of Standard Six demands that administrators have a knowledge and understanding of: “*the law as related to education and schooling*, the dynamics of *policy development and advocacy* under our democratic political system, and the importance of *diversity and equity* in a democratic society.”¹²⁰

The next layer, termed Dispositions, under this same Standard provides for active participation “in the political and *policy-making context* in the service of education” and “*using legal systems to protect student rights and improve student opportunities.*”¹²¹ Performances under this Standard include another reference to legal requirements: “The school community works within the *framework of policies, laws, and regulations* enacted by local, state and federal authorities.”¹²²

The national frameworks are neither inherently consistent in their message nor binding across levels or among groups. Standards such as those put forth by INTASC, NBPTS, and ISLCC are model standards, and their exact translation or adoption is not clear.¹²³ The requirement, to the extent there is one, for educators learning law is derived from state statutes and regulations for licensure, certification, and recertification, and less directly from state standards for approval of colleges and universities teaching educators. The National Association of State Directors of Teacher Education Certification compiled a manual comparing certification requirements among the states.¹²⁴ Law is not specifically tabulated. However, the familiarity with the U.S. Constitution and

118. See INTERSTATE SCH. LEADERS LICENSURE CONSORTIUM, STANDARDS FOR SCHOOL LEADERS (Washington D.C., Council of Chief State School Officers 1996), Standard Six, *available at* <http://www.ccsso.org> (last visited Mar. 27, 2002) (emphasis added). Thirty-four states report that they have adopted ISLLC standards or standards in close correlation with ISLLC standards. ISLLC, ISLLC Projects and Participating States (2002), *available at* <http://www.ccsso.org/pdfs/isllcchart00.pdf> [hereinafter ISLLC Projects] (last visited March 29, 2002).

119. *Id.*

120. *Id.* at 20 (emphasis added).

121. *Id.* (emphasis added).

122. *Id.* at 21 (emphasis added). See also ISLLC, Standards Three and Five.

123. For example, ISLCC’s listing of projects and participating states offers two categories of check off for compliance, one for “states reporting that they have adopted or adapted the ISLLC Standards for their state school leader standards” and another for states reporting a “close correlation to the ISLLC standards or reported consistent with the ISLLC Standards.” See ISLLC Projects, *supra* note 118.

124. NASDTEC MANUAL ON THE PREPARATION AND CERTIFICATION OF EDUCATIONAL PERSONNEL (2001).

the constitution in that particular state is listed as a requirement for seven states: Arizona, California, Connecticut (described as U.S. history), Florida, Montana, Nevada, and Wyoming.¹²⁵ There appears to be no cumulated, comparative data on such state requirements specific to law.¹²⁶ What research does exist specific to state law and requirements for educators learning the legal context seems to show that in most states, no law courses are required at the teacher level.¹²⁷ Administrator level law requirements are more common (as ISLLC would suggest)¹²⁸ as are special educator requirements (as INTASC would suggest). Given this, as discussed in the next section, ultimately the actual reality of educators learning law lies in the curricula, courses, and other professional development opportunities offered.¹²⁹

D. Schools of Education

Translation of national frameworks for teachers and administrators, with or without state statutory or regulatory requirements, to educator curricula is obviously dependent on those institutions teaching educators. Here, the reference to law also remains obscure. Just as translating the national frameworks and recommendations for law education for teachers and administrators into state law is hard to track, so too it is difficult to see how those

125. *See id.*, Table B-3.

126. Telephone interview with M. Jean Miller, Director, INTASC, Council of Chief State School Officers (Mar. 28, 2002). There is information on standards available through the mandatory reporting requirements of Title II of the Higher Education Act of 1998, though access appears to be limited to state-by-state inquiry. *See* Title II Reporting, Technical Assistance Services, available at <http://www.title2.org> (last visited Mar. 28, 2002); *see also* State Title II Reports on the Quality of Teacher Education, available at <http://www.title2.org/statereports/BkgInfo.pdf> (last visited Apr. 4, 2002) (noting difference and non-comparability of state licensure and certification requirements).

127. *See, e.g.*, LITTLETON ET AL. *supra* note 90, at 6. An informal e-mail survey conducted by Heather Logan at Franklin Pierce Law Center in December and January confirms this [hereinafter Logan e-mail survey]. Of the fourteen states which responded regarding required legal education for teachers, one (New Mexico) indicated that a course in detecting and reporting child abuse was required, one (Utah) indicated that law training was required, nine indicated that it was not, and three suggested this was a decision made at the college level.

128. ISLLC reports that thirty-four states have “adopted or adapted the ISLLC Standards for their state school leader standards.” ISLLC Projects, *supra* note 118. This is an area where further comparative and cumulative research would be useful. In Logan’s informal survey, of the fourteen states that responded, five indicated that there are state requirements for law knowledge for administrators. *See* Logan e-mail survey, *supra* note 127.

129. For example, NBPTS indicates that master teachers are life-long learners and will acquire the knowledge they need from magazines and other publications as well as professional conferences and the like. Lease interview, *supra* note 104. *But see* BARTH, *supra* note 74, at 22 (observing marked decrease in interest in professional development from beginning to more experienced teachers).

state requirements that do exist are translated into practice.

As with the individual-oriented standards, there are also national groups involved with institution-oriented standards. The National Council for Accreditation of Teacher Education (NCATE) is recognized by the Department of Education as the “national professional accrediting agency for schools, colleges, and departments of education that prepare teachers, administrators, and other professional school personnel.”¹³⁰ As with the application of model standards for individuals, NCATE accreditation standards are not mandatory.¹³¹ Over forty states are partners with NCATE, but not every institution in these states is NCATE accredited.¹³²

NCATE’s Professional Standards for the Accreditation of Schools, Colleges, and Departments of Education¹³³ directly address legal matters only in the supporting explanation for “professional knowledge and skills for other school personnel,”¹³⁴ which provides, in part, that “They understand and are able to apply knowledge related to the social, historical, and philosophical foundations of education, professional ethics, *law*, and policy.”¹³⁵

More generally, the NCATE standards speak to both candidate performance and unit or institutional capacity,¹³⁶ and in each case incorporate by reference indication that both meet “professional, state, and institutional standards.”¹³⁷ To the extent that such state or professional standards require knowledge of the legal context,¹³⁸ these proficiencies would seemingly be translated through such NCATE standards to institutions educating educational personnel.

Likewise, to the extent such proficiencies are part of other professional standards they would be incorporated as well. NCATE expressly aligns its standards with the INTASC new teacher standards.¹³⁹ It also uses standards of other professional groups. For example, NCATE lists among its program standards specialty associations, the Council for Exceptional Children (CEC).¹⁴⁰

130. NATIONAL COUNCIL FOR THE ACCREDITATION OF TEACHER EDUCATION, PROFESSIONAL STANDARDS 6 (2002) [hereinafter NCATE, PROFESSIONAL STANDARDS], *available at* http://www.ncate.org/2000/unit_stnds_2002.pdf (last visited Mar. 28, 2002). There is also The American Association of Colleges for Teacher Education (AACTE), which is “a national voluntary organization of colleges and universities that prepare the nation’s teachers and other educational personnel.” Introducing AACTE, *available at* http://aacte.org/Membership_Governance/intro-aacte.htm (last visited Apr. 4, 2002).

131. NCATE, PROFESSIONAL STANDARDS, *supra* note 130, at 1.

132. About 550 institutions are currently NCATE accredited, accounting for some two-thirds of teachers. Ehrenberg interview, *supra* note 95.

133. NCATE PROFESSIONAL STANDARDS, *supra* note 130.

134. *Id.* at 16.

135. *Id.* at 19 (emphasis added).

136. *Id.* at 9.

137. *See, e.g.*, Standard 1 and Standard 6. *Id.* at 10-11.

138. *See supra* note 114 and accompanying text.

139. NCATE PROFESSIONAL STANDARDS, *supra* note 130, at 17-18.

140. *Id.* at 42.

In this case, the CEC states, “the professional conduct of entry-level special educators is governed foremost by the CEC Code of Ethics,” which provides:

Special education professionals

- Seek to uphold and improve, where necessary, *the laws, regulations, and policies* governing the delivery of special education and related services and the practice of their profession.
- Do not condone or participate in unethical or *illegal acts*, nor violate professional standards adopted by the Delegate Assembly of CEC.¹⁴¹

A second national group, the Association of Teacher Educators (ATE), offers Standards for Teacher Educators, that is, those who educate educators. The ATE standards do not seem to recognize the significance of legal knowledge in the educational setting, although they do recognize the law’s significance in the community. Standard Six provides that master teacher educators should “[s]erve as informed, constructively critical advocates for high-quality education for all students, public understanding of educational issues, and excellence and diversity in the teaching and teacher education professions.”¹⁴² The Potential Sources of Evidence listed under Standard Six include the following policy-oriented activities:

Promote education through community forums, activities with other professionals and *work with policymakers*.

Informs [sic] and educate those involved in making *governmental policies and regulations* at local, state, and/or national levels to improve teaching and teacher education.¹⁴³

The translation of these frameworks and aspirations into actual course offerings seems sporadic in terms of a serious effort to inform educators of the legal context they need to know. Like the national teacher and administrator models, these standards are largely aspirational, and it is difficult to compare the offerings at this level. Even a cursory survey suggests that such requirements are far from universal and certainly not uniform.¹⁴⁴ At one end of the spectrum of law courses offered by schools of education is perhaps Columbia University Teachers College. Ranked second in the *U.S. News and World Reports*

141. CEC INTERNATIONAL STANDARDS FOR ENTRY INTO PROFESSIONAL PRACTICE, Common Core of Knowledge and Skills for all Beginning Special Education Teachers (Council for Exceptional Children), at <http://www.cec.sped.org/ps/ps-entry.html> (last modified May 10, 2002) (emphasis added).

142. ATE, STANDARDS FOR TEACHER EDUCATORS (The Ass’n of Teacher Educators), available at http://www.ate1.org/teampublish/120_620_2298.cfm (last visited Mar. 28, 2002).

143. *Id.* (emphasis added). As evidence of this, the Standard cites “contributions to educational policy or regulations at local, state, and national levels (e.g., presentations, member of accreditation review teams, commissions or task forces, testimony at state hearings).” *Id.*

144. This is another area where more research would be useful.

rankings,¹⁴⁵ Columbia offers Education and Public Policy; Policy Seminar; Law & Educational Institutions: Equality Issues; Community Politics, Community Policies, and Administrators; Law and the Educational Institutions: Free Speech, Religion, Safety, and Issues of Authority; Role of the State in Education Governance, Policy, and Practice; Education Policy Decision Making; Law and Educational Institutions: College Operation, Private School Operation; Federal Politics, Federal Policies and Administrators; Topics in Policy Analysis for Administrators; Topics in Policy Planning and Implementation; Purposes and Policies for Higher Education; and Basic Practicum in Conflict, Resolutions and Mediation Skills.¹⁴⁶ Harvard School of Education, ranked number one, offers Research Seminar: Civil Rights Enforcement, Law and Social Change; Evaluation of Programs and Policies; Schools and the Law; Higher Education and the Law; Legal Issues Affecting Urban Schools in the Post-*Brown* Era.¹⁴⁷

By comparison, Michigan State University, ranked number one in Elementary Education and number nineteen in Special Education, does not list a law course in its special education program as described on its website.¹⁴⁸ Similarly, the University of California, Berkeley, ranked number four, indicates that it offers no education law courses, although its website lists Legal Issues in Educational Practice and Concepts in Educational Law.¹⁴⁹ Likewise, information from the University of Maryland, ranked number one in Counseling and Personnel Services, number fifteen in Elementary Education, and number ten in Special Education, was also somewhat unclear; its website indicates that it does not require any law courses for undergraduate or Special Education students,¹⁵⁰ but they indicate that they do offer Leadership in Law. The University of Kansas, ranked number one for special education, offers the course Law of Special Education, but it is not required for undergraduates with a Special Education minor¹⁵¹ or for master's level students in early Childhood Special Education.¹⁵²

145. U.S. NEWS & WORLD REP. (2002), available at <http://www.usnews.com/usnews/edu/beyond/bced.htm>.

146. The school describes these courses as its law offerings. Telephone Interview by Brooke Meyer, Columbia University Teachers College (Apr. 4, 2002).

147. Telephone interview by Brooke Meyer, Harvard School of Education (Apr. 4, 2002).

148. See Special Education Course Description (Michigan State University), at <http://ed-web3.educ.msu.edu/cepse/ungrad/course.htm> (last visited Jan. 4, 2002).

149. Telephone interview by Brooke Meyer, University of California, Berkeley (Apr. 4, 2002).

150. See, e.g., University of Maryland College of Education, *A Very Special Undergraduate Education Program at the University of Maryland at College Park Undergraduate Program Description*, at <http://www.education.umd.edu/Depts/EDSP>. The school has offered a summer course on IDEA, but is not aware of the Leadership Law offering. Telephone interview by Linda Dragon with Judy Foster, University of Maryland (Jan. 7, 2002).

151. See University of Kansas, Department of Special Education, *Early Childhood—Special Education*, at http://www.soe.ku.edu/sped/doas/pdf/EarlyChildhood10_01.pdf (last visited Jan. 4, 2002). The website is unclear as to how often the Special Education law course is offered.

152. See University of Kansas School of Education, Department of Special Education,

The developing mid-career programs are similar. The University of Pennsylvania's innovative mid-career program, for example, does not appear to include any law courses among its forty-six modules, though a course entitled Responding to and Shaping Public Policy may be one.¹⁵³ In addition to course limitations, those who teach in this arena do not seem to have the same networking and professional development opportunities as do teachers in other disciplines.¹⁵⁴

The prior examples support the view that there is no coherence in the approach to legal training in education schools. Why is there a dearth of law training for educators and education policy-makers and vice-versa? As the variation and ambiguity of standards suggest, there is little coherence within the education community on the subject. Educators and those who form their curricula either fail to directly acknowledge the relationship and importance of the law to their profession, or they do not know how to incorporate its lessons. Or perhaps the problem runs the other way. Law schools are not much further along in providing education law curricula, particularly in multidisciplinary aspects.¹⁵⁵ Or perhaps the problem arises at a deeper level and is more serious. One commentator observed: "At times education litigation appears to outpace educators' ability to cope—and the result is confusion, frustration and even hostility towards the law."¹⁵⁶ If the underlying problem is this kind of denial or the naiveté previously discussed, the time has come to overcome these barriers and define a way for lawyers and educators to work dependently, not independently.

Undergraduate Minors, at <http://www.soe.ku.edu/sped/undergraduate/index.html>.

153. University of Pennsylvania Graduate School of Education, The Mid-Career Doctorate Program in Educational Leadership, *Curriculum Modules*, at http://www.gse.upenn.edu/midcareer/program_modules.html.

154. For example, it is common for groups of law professors to use subject matter listservs, e.g., a listserv for administrative law professors. However, there is no such forum for education law professors. There are professional development opportunities for this working group, most notably via the Education Law Association, which includes educators, lawyers, and education professors, but they are limited.

155. See generally The Association of American Law Schools (AALS), *Education Law*, at <http://aals.org/sections/index.html>. AALS lists about 140 professors teaching in this field. AM. ASS'N OF L. SCH., *DIRECTORY OF L. TEACHERS* 1232-33 (West 2001). This appears to be another area where information is difficult to ascertain and where further comparative and cumulative research would be useful. Not surprisingly, often these lawyers begin without specific subject matter expertise and without the background to understand the reality of school issues. Heubert, *supra* note 52, at 6; McKinney & Drake, *supra* note 51, at 481; see also Jeffrey Horner, *Ten Ethical Commandments for School Lawyers*, 137 EDUC. L. REP. 5, 6 (1999).

156. Merle Steven McClung, *Preventive Law and Public Education: A Proposal*, 10 J.L. & EDUC. 37, 37 (1981).

IV. A NEW CLASS

What you don't know can hurt you. The converse aphorism is also true. What you do know can help you. How can difficulties engendered by too much law and not enough knowledge of the legal context be ameliorated? What will be the benefits? To return to the opening stories, at a very basic level, law education assures that the requisite internal reports and calls are made to report abuse.¹⁵⁷ It assures that social security numbers are not posted as student IDs. It assures that a teacher knows enough to question whether a Star of David raises a gang issue or a religious issue. At a more intricate level, it assures that educators recognize stories such as the T-shirt story as complicated.

More generally, being law-informed allows schools to avoid costly conflict and litigation, either by keeping themselves out of court, or by prevailing (quickly) when litigation arises. As two Arizona superintendents reflected concerning how administrators respond to a threat to call a lawyer:

Such threats often trigger superintendents or their administrative teams into a panic-driven "circle the wagons" frenzy. Their knee-jerk reaction is to immediately call the school district's legal counsel and consume billable minutes exploring the issue. While some matters require this dialogue, we suggest that superintendents who are knowledgeable about the law, understand its application to the basic principles of school operation and insist upon ongoing training of site administrators are less likely to be mired in threatened lawsuits. These superintendents are also more inclined to address the day-to-day issues with minimal consultation with attorneys.¹⁵⁸

157. *E.g.*, Kentucky provides: "Any person who knows or has reasonable cause to believe that a child is dependent, neglected or abused shall immediately cause an oral or written report to be made to a local law enforcement agency or the Kentucky State Police . . ." KY. REV. STAT. ANN. § 620.030(1) (2002); New Hampshire states:

Any physician, surgeon, county medical examiner, psychiatrist, resident, intern, dentist, osteopath, optometrist, chiropractor, psychologist, therapist, registered nurse, hospital personnel (engaged in admission, examination, care and treatment of persons), Christian Science practitioner, teacher, school official, school nurse, school counselor, social worker, day care worker, any other child or foster care worker, law enforcement official, priest, minister, or rabbi or any other person having reason to suspect that a child has been abused or neglected shall report the same in accordance with this chapter.

N.H. REV. STAT. ANN. § 169-C.29 (1990). *See also* Child Abuse Prevention and Treatment Act, 42 U.S.C. § 5101-5107 (2000); *see generally* FISHER & SORENSON, *supra* note 93, at 215-25; U.S. Dep't of Health & Human Servs., *National Clearinghouse on Child Abuse and Neglect Information, State Laws or Maltreatment*, at <http://www.calib.com/nccanch/statutes/index.cfm> (last visited Dec. 1, 2001).

158. Corkill & Hendricks, *supra* note 51. *See generally* Herbert M. Kritzer, *The Professions Are Dead, Long Live the Professions: Legal Practice in a Postprofessional World*, 33 L. & SOC'Y REV. 713 (1999), available at <http://www.polisci.wisc.edu/users/kritzer/research/legalprof/postprof.htm>.

Current standards for liability for sexual harassment offer just one of many possible examples where the knowledge described by these Arizona administrators would work. A superintendent or principal who knows the law about sex discrimination will know the standard for imposing liability on the school district for harassment, including peer-to-peer sexual harassment. For the latter, the law requires that the complaining student show that the school acted with deliberate indifference.¹⁵⁹ An administrator who knows the deliberate indifference standard¹⁶⁰ can address potential problems by putting in place an adequate reporting and investigating system to eliminate situations where such problems will be ignored. Since the liability will lie only where there is "deliberate indifference," a reasonable, preventive, pre-existing system for review and response to harassment claims (this does not mean all claims are valid, rather that there is a system to investigate, respond and follow up) can put the administrator in a position to avoid school liability.

Similarly, knowing the law enables educators to limit their liability under the typical doctrines of qualified immunity.¹⁶¹ The Titusville anecdote in the opening stories is telling.¹⁶² The liability standard is well illustrated by *Nabozny*,¹⁶³ the Wisconsin case (of which the *Dahle* story at the opening appears to be a mirror image) that settled in 1997 for just under a million dollars.¹⁶⁴ In *Nabozny*, Jamie Nabozny sued his school district and several school district officials for what can only be described as a long pattern of egregious treatment, which Nabozny alleged was based on his sexual orientation and gender. The school's response was "boys will be boys."¹⁶⁵ The Seventh Circuit Court of Appeals, reviewing the case before it was settled, explained the standard for liability as whether the school district officials knew or should have known at the time that their actions violated the student's legal and constitutional rights.¹⁶⁶ If so, they faced liability; otherwise, they were entitled to qualified immunity.¹⁶⁷ But how many educators would have known the established state of the law on discrimination and harassment, particularly on equal protection and sexual

159. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 648 (1999). *Davis* also requires that the harassment be severe and pervasive, be known to a person in a position to address the problem, and interfere with the student's ability to receive an education. *Id.*

160. *Id.* at 648, 653-54.

161. See, e.g., *Thomas v. Roberts*, 2003 U.S. App. LEXIS 4153 (11th Cir. 2003) (holding that teachers have qualified immunity for strip searches). The test is whether the law gave "fair warning" that action under given circumstances was unconstitutional.

162. See *supra* notes 6,7 and accompanying text.

163. *Nabozny v. Podlesney*, 92 F.3d 446 (7th Cir. 1996).

164. *Sexual Harassment in Public Schools*, *supra* note 7, at 137.

165. *Nabozny*, 92 F.3d at 451.

166. *Id.*

167. *Id.* at 455. "Thus, the critical questions in this case are whether the law 'clearly establishes' the basis for Nabozny's claim, and whether the law was so established in 1988 when Nabozny entered middle school." Immunity was not found. *Id.*

preference and orientation, as it stood in the 1990s? Where would they have learned the law? Had they actually known (as opposed to should have known) at the time, would the administrators in *Nabozny* have implemented a sex-neutral system for processing complaints of harassment? That the *Dahle* case should be so reminiscent of *Nabozny* gives further grounds for consideration. After *Nabozny*, admittedly in a different state and circuit, how many educators should have known?¹⁶⁸

In our litigious society, it is impossible to completely avoid being sued. However, it is possible to act carefully to limit the risk of litigation, and to increase the probability of quick resolution. In the *Nabozny* and *Dahle* situations, for example, law-informed administrators and educators might have had in place an adequate harassment policy and the whole situation might well have been resolved efficiently and without harm to the student. Similarly, administrators who know the law regarding due process for suspending or expelling a student, or who know the law regarding school searches, can, by following the correct procedures, vastly limit their potential liability.

Knowledge such as this, preventively applied, can save schools and districts in both dollars and time, both of which can be better devoted to education. Indeed, armed with knowledge of the relevant legal parameters, administrators may well choose alternative dispute resolution mechanisms. As the Arizona administrators found:

What benefits will accrue to those who become familiar with legal issues? The most obvious is economic savings in your operations' budget. A suburban district in Tucson, Ariz., recently slashed its legal expenses by 50 percent (\$100,000) by proactively promoting statutory and policy awareness and compliance at every school site, by seeking more internal resolution and intervention, by conducting more in-house research of legal concerns and by consciously decreasing the number of "less necessary" calls to the attorney.

In the past two years, not only has the district's initiative and diligence translated into significant cost savings, but the number of cases in litigation also has been reduced. Moreover, several districts we surveyed indicated a greater sense of autonomy by using legal counsel as one resource but not the key player in making decisions.¹⁶⁹

This last point from the Arizona administrators seems particularly salient in the current era of "reform." Not only can knowing the law help educators act preventively and reasonably, it can also help them play a clearly necessary role in litigation strategy and legal development. It is crucial that educators at all

168. The relatively quick settlement in *Dahle* may suggest that all educators should know.

169. Corkill & Hendricks, *supra* note 51; see also McKinney & Drake, *supra* note 51, at 476 ("The evidence indicates overwhelmingly that lawyers substantially impact local educational policy-making. Attorneys not only legitimize school policies, they initiate, clarify, write and oversee policy implementation.").

levels understand the process by which laws and regulations are enacted. This will enable them to act decisively in their own spheres of expertise.¹⁷⁰ It will assure that their voices will be heard and will be influential as school issues are considered and defined. It is thus very important that educators know some law basics, particularly about the various sources of law, including administrative law.

One clear example of the importance of law informed educators and education informed lawyers is IDEA, truly a legalization of an educational mission. The genesis of what is now a vast statutory and regulatory scheme was a consent order, likely drafted by attorneys.¹⁷¹ One can only speculate now as to what the scheme may have been had educators written that first draft. As it stands, IDEA is extraordinarily detailed in its legal requirements, but it will require more than just legal requirements for the intended outcomes of IDEA to be achieved:

This will happen only if educators and lawyers learn to work together more effectively. The legalistic model does, in fact, have serious limitations. Due process by its nature leads schools and parents to view each other as adversaries. Schools, parents, and lawyers must learn to collaborate, not just litigate. Moreover, the dynamic interaction of school systems with the legal processes established by special-education law often results in an exaggerated focus on process instead of on the needs of individual children.¹⁷²

A second major example here, indeed one that will define education for this decade and decades to come, is the matter of education reform. Such reform has been almost entirely law based, but too little attention has been paid to the way in which the sources and structure of law and the attitude and training of lawyers impose their own limitations on reform and its likely success.¹⁷³ Some surveys and research have discussed the extent to which "educational policy-making has been 'lawyerized'" and observed this to be a dangerous trend toward educators' loss of professional autonomy and sound educational policy-making.¹⁷⁴ As the Education Commission for the States has observed, we do not want only lawyers

170. Corkill & Hendricks, *supra* note 51.

171. See generally Thomas Hehir & Susan Gamm, *Special Education, in LAW AND SCHOOL REFORM*, *supra* note 44, at 213.

172. *Id.* at 207.

173. See generally TODD DEMITCHELL & RICHARD FOSSEY, *THE LIMITS OF LAW-BASED SCHOOL REFORM: VAIN HOPES AND FALSE PROMISES* (1997); *LAW AND SCHOOL REFORM*, *supra* note 44; Todd A. DeMitchell, *The Legal Confines of School Reform*, *Am. Ass'n of Sch. Admin., The School Administrator Web Edition* (Nov. 1997), at http://www.aasa.org/publications/sa/1997_11/DeMitchell.htm ("Although the law has been the vehicle for launching school reform efforts, little attention has been paid to the way legal mechanisms enable and constrain effective school reform."). See also Stacie Rissman Joyce, *The School District Attorney: Trends of Legal Involvement in Education*, 10 *NOLPE SCH. L.J.* 193 (1983).

174. McKinney & Drake, *supra* note 51, at 476.

as our "gatekeepers" for legislative and legal school policy.¹⁷⁵ Nowhere is this more true than in the agenda for school reform where a significant role has been played by equity and adequacy litigation¹⁷⁶ for reform.

Ironically, the crucial lesson to be learned from past litigation is that if lawyers hope to alter the legal distribution of education fundamentally, they cannot rely, as they have in the past, primarily on traditional legal concepts and remedies. Instead, they must turn to advances in educational policy made outside the courtroom and shift their litigation to reflect the knowledge acquired by educators over the past few decades. While standards of equity revolve around concepts familiar to lawyers and legal discourse, a case built around a constitutional right to an "adequate" education demands an educator's input.¹⁷⁷

Both reform and special education thus offer critical examples of the need for a new class of lawyers, those trained and open to education and children-centered issues, those whose skill set includes negotiation, mediation, and long-term planning. They also offer examples of a new class of educator trained to understand and work successfully in the law and policy arenas.

CONCLUSION: TELL ME A NEW STORY

Although law has become almost omnipresent in school issues, the relationship between lawyers, law, child advocates, and educators does not seem to have improved commensurately. It is so much easier to think that all educators need to know is how to teach and that all lawyers need to know the law.

Given advantages like those discussed in the previous part of this paper, how much education should a lawyer know? At least enough to understand the impact of the key pieces of statutory and constitutional law. How much law should an educator know? Enough to assure that our educational institutions reflect

175. ECS Law and Education Center, *supra* note 89. See McKinney & Drake, *supra* note 51, at 480; Trotter *supra* note 3, at 13; HERBERT M. KRITZER, LEGAL ADVOCACY: LAWYERS AND NON-LAWYERS AT WORK 10-11, 193 (1998). See also RAPP, *supra* note 29, at § 1.02(3)(a)(I). But see Suzanne R. Painter, *Superintendents and School District Attorneys: Who's In Charge Here?*, 129 EDUC. L. REP. (1998) (suggesting that the policy role of attorneys may be overstated); see also Suzanne Painter, *School District Employment Practices Regarding School Attorneys*, 27 J.L. & EDUC. 73 (1998).

176. See, e.g., Dayton, *supra* note 48. Here again, the convergence is clear:

But without a thorough understanding of legal developments in this area, it is difficult to make competent decisions about potential or pending school funding litigation. Since those disadvantaged by public school funding systems will likely continue to consider the use of litigation for relief, it is important that the scholars and practitioners that potential litigants turn to for counsel have a comprehensive understanding of the law in the area of school funding litigation.

Id. at 449.

177. McUsic, *supra* note 48, at 909.

society's core decisions on constitutional rights.¹⁷⁸ Enough to anticipate legal problems and avoid them by preventive action, or, if not avoid them, at least know when to consult legal counsel early in the dispute. Enough to consider legal implications of policy setting and to participate appropriately in the legislative and administrative process, that is enough to be themselves the gatekeepers of the educational policy field. At least educators should demand and take that one education law course, preferably one that is a relatively in depth survey of basic principles and introduction to legal reasoning.

Again, the opening stories are illustrative. Educators need some basic knowledge, not necessarily in-depth, but with sufficient breadth, to know that symbols like a Star of David may have implications beyond gang activities, to know that students and parents have statutory privacy rights, and to know the general parameters of free speech and due process. Beyond this, they would be well served by taking another course that deals with civil rights issues, and perhaps a third that deals with the legislative and administrative system. Equally crucial, in light of liability and immunity standards, is educators' need to have access to continuing education conferences and seminars on legal developments.¹⁷⁹

Dr. Ellenmorris Tiegerman, founder and Director of the School for Language and Communication Development, observes,

the interface of education and law creates a nexus, which is both conceptual and pragmatic in nature. You are creating a new professional area that arises out of the plethora of cases in the field of education. The "legal educator" can provide a holistic view of the complex issues, which have historically been handled by either educators or lawyers. It has been my experience that lawyers and educators are trained theoretically to function in different service contexts and, as a result, their viewpoints are limited by their separate training. Although they both contribute to part of the process, the translation of information often results in misunderstanding, miscommunication and limited thinking. The problem that presently exists is that educators and lawyers need to train in each other's field, to establish a common lexicon, theoretical framework and operational system to respond to issues that arise in schools.¹⁸⁰

One way to achieve the cross-disciplinary expertise that Dr. Tiegerman suggests is through more interdisciplinary work, more encouragement by education administration advisors of their students' interest in law, more law professors opening their classes to educators and vice versa. Through these and related

178. See *supra* note 43.

179. See, e.g., Frank Aguila & Jackie Hayne, *Tips for the First Year Principal*, 70 CLEARING HOUSE 77, Nov. 21, 1996, available at 1996 WL 11548237 ("Keep current with changes and new programs. You simply must keep current regarding educational issues (school law, in particular)."). See also *supra* notes 32-33.

180. SARAH E. REDFIELD, *THINKING LIKE A LAWYER*, at ix (2002).

efforts, the response to the call for this new class of lawyers and educators will improve the understanding and workings of our education system for the benefit of those who work within and around it, and for the benefit of those children and students whom it serves.

