This issue marks the 25th year of the “It’s the Law” column. What are the most important legal issues of particular importance to K–8 principals that this column has addressed since 1980? After revisiting the many issues we have dealt with over the years, especially those that continue to seek solution in the nation’s courts, we have selected these 10.

1. **Academic Freedom**
   If the principal enforces the use of prescribed materials or particular methods, such as team teaching, does a teacher have the right, based on First Amendment freedom of expression, to refuse on pedagogical grounds, or to independently employ an innovative or controversial method? One of the earliest columns revealed a split in the case law. But more recent columns show the majority of courts providing wide deference to school authorities with regard to the methods and materials that constitute the school curriculum.

2. **Home Schooling**
   Home schooling has become increasingly prevalent in the United States, predominantly at the elementary and middle-grade levels. As an early column revealed, the parents of home schoolers have not generally fared well in the courts on such claims that First Amendment free exercise of religion or Fourteenth Amendment parental liberty provide a broad constitutional right to home instruction. More recent columns concerning home schoolers’ lawsuits seeking access to school activities, such as music or sports programs or special education services, show that the primary scene of legal activity has become state legislatures. There, the advocates of home schooling have been increasingly but not universally successful. Where the legislature has continued to impose restrictions, such as not allowing home schoolers the right to access school curricular and extracurricular activities, the courts have held the line.

3. **Child Abuse Reporting**
   Given the increased national awareness of child abuse, marked by the federal Model Child Protection Act and the states’ adoption of statutes based on this model in the 1970s, litigation continues to arise regarding the duty of school officials to report suspected child abuse. As a series of columns have reported, the courts have made clear that:

   - Mandatory reporters have qualified immunity against liability when their reports were wrong but made in good faith;
   - Failure to report may result in criminal penalties and, with due process, administrative discipline;
   - School psychologists and counselors in most states are not excused from reporting based on confidentiality; and
   - Administering corporal punishment, even in the decreasing number of states where it is permissible, may result in being listed on a child abuse registry.

   As the most recent column confirmed, the principal plays a pivotal duty in enforcing the reporting duty and that “the balance of interests leans clearly, but not without limits, toward society’s interest in protecting students from abuse.”

4. **Religious Objections to Curricula**
   As the religious right has become more prominent in our society, objections to curricular materials that parents view as offensive to their religion have been increasingly frequent. Some of the judicial challenges have been based on the First Amendment’s free exercise clause and others on its establishment clause. As 1986 and 1995 columns have illustrated, the courts have generally rejected such challenges, largely leaving the scope of the curriculum, including any right of excusal, to state and local authorities.

5. **Noncustodial Parents**
   Given the high rate of divorce and the increasing fracturing of families in our society, it is surprising that there is not more litigation concerning the educational rights of noncustodial parents. As a 1988 column revealed and a 2004 column confirmed, courts have rejected constitutional claims of noncustodial parents and have interpreted applicable legislation and regulations in such a way that principals should have no undue fear of liability. More specifically, the courts have interpreted the Individuals with Disabilities Education Act as providing noncustodial parents with the right to notice, the Family Education Rights and Privacy Act as providing records access to them, and divorce decrees as...
controlling which parent has the right to direct a child’s education. Finally, as the more recent of the two columns showed, principals are not likely to be held liable for mistakes in releasing children to the wrong parent, as long as they are duly diligent about documentation and consultation.

6. Consent and Release Forms

As 1985 and 2005 columns illustrate, school forms that purportedly release school authorities for liability for certain activities, such as sports or field trips, have been subject to continuing litigation, and the results vary significantly from one jurisdiction to the next. In some states, such as Washington, the courts have struck down such forms as violating public policy. In other states, such as North Dakota and Massachusetts, the courts have considered the specific language of the form and the immediately surrounding circumstances as controlling whether the waiver of liability constituted informed consent. Moreover, jurisdictions vary as to whether the release is effective if signed by a minor child. This issue is complicated and warrants consultation with legal counsel in assessing the advantages and disadvantages of such forms. The more recent column advised “principals...to carefully assess the tradeoffs rather than automatically assume that such forms are either absolutely worthwhile or absolutely worthless.”

7. Pledge of Allegiance

Whether students have a constitutional right to opt out of the Pledge of Allegiance is one of the few issues in which the Supreme Court has reversed itself. In 1940, the Court said no. But three years later it re-examined the issue and ruled that state and school authorities may not compel students to salute and pledge allegiance to the flag.

Subsequent lower court decisions clarified that although this constitutional right was based on First Amendment expression, and not limited to religious objections, the plaintiff-student must prove coercion, such as punishment for failing to participate. However, another issue is whether the Pledge of Allegiance violates the First Amendment establishment clause. As a 2004 column reveals, the answer is not uniform; in Newdow, the 9th Circuit Court decided that the words “under God” in the pledge violates the establishment clause, whereas the 7th Circuit and federal district courts in Pennsylvania and Virginia decided the opposite. Since then, the Supreme Court initially agreed to review the 9th Circuit’s decision but subsequently ducked the issue by ruling that Newdow did not have standing as a custodial parent to challenge the pledge language.

8. Full Inclusion

While education litigation has gradually abated in recent years, with outcomes generally favoring school authorities, the leading exception is special education. One of the primary issues under the IDEA that directly affects principals is its “least restrictive environment” mandate. This translates into whether an individual child is entitled to be in a regular classroom for most of the school day. As two columns on this subject reported, the answer—as it is for many legal questions regarding special education—is “it depends.” However, the tendency is to favor inclusion, with the school having responsibility to provide appropriate supplementary aids and services for children with disabilities. Nevertheless, not every child who is IDEA-eligible is entitled to inclusion, much less full inclusion.

9. Touching Students

In the wake of public perception that teachers are second only to priests in terms of sexual abuse of children in their charge, “don’t touch” has become the watchword for dealing with students in many schools. As the earlier of two pertinent columns illustrated, litigation concerning alleged sexual abuse of students by staff members is on the rise in varying forms and forums. Nevertheless, as the more recent column confirmed, the legal lesson is to adopt a balanced approach, giving due consideration to the nurturing nature of schools and the professionalism of teachers. Schools should carefully document and investigate reported incidents and avoid knee-jerk reaction.

10. Classroom Evangelism

An issue particularly meriting a balanced approach is perceived religious evangelism in the classroom by teachers or students. This perception, typically expressed by complaining parents, merits this consideration: Would the reasonable observer, from the vantage point of a student, view an activity as promoting or endorsing religion? If the target is a classroom teacher or an administrator leading prayers, displaying religious posters, or distributing Bibles, they are engaging in activities that are clearly unconstitutional. If the target of the perception is a student activity, the relevant factors include the student’s age, the relationship of the activity to the curriculum, and the use of accommodating alternatives, such as restricting the activity to areas outside the classroom.

However, employee wearing of religious apparel, such as a cross, requires a more measured, multifactor determination. Much depends, for example, on whether the apparel is conspicuous or ambiguous in terms of religion, to what extent the employee has contact with children, and whether the problem can be resolved through reasonable accommodations.

Conclusion

Selecting the top 10 legal issues for K-8 principals involved some difficult and debatable decisions. There are a number of other issues worthy of revisiting, including:

- Liability for on-site (e.g., playground) and off-site (e.g., field trip) injuries;
- Verbal abuse of students;
- Use of movies and videos;
- Student threats of violence;
- Assaults on school personnel; and
- Employee expression.
This retrospective of 25 years of education litigation reflects the larger, more abstract, and often overlapping features of our national fabric.

First is the interrelationship of societal and educational trends. For example, the topics of child abuse reporting and touching students mirror the significantly increased national awareness and media coverage concerning sexual molestation of children by educators and other significant adults. Similarly, the case law concerning noncustodial parents is an inevitable product of the weakening of the traditional family unit, particularly in terms of the high rate of divorce.

Another feature is the relationship between courts and schools. Court decisions in the categories of academic freedom and religious objections to curricula reflect a pendulum-like return to the doctrine of judicial deference to the educational expertise of educators.

A third overlapping theme is the institutional relationship between courts and legislatures. The home schooling and full inclusion topics illustrate the importance of federal and state legislation for groups who have not been satisfied with the courts’ interpretation of broad constitutional concepts. Where a state legislature has gone beyond constitutional boundaries, the courts provide the requisite checks and balances. Otherwise, the judiciary is bound to follow the directions established in the legislation.

Fourth, the rise of the religious right is evident not only in the legislative and executive branches, but also in education litigation. The topics of home schooling, religious objections to curricula, the Pledge of Allegiance, and classroom evangelism are all illustrations of the continuing delicate and difficult balance needed to demonstrate neutrality regarding religion in public schools.

Finally, all of these legal issues highlight the pivotal role of the principal in dealing with competing interests. In addition to maintaining balance with regard to religion, consider as another example the competing interests of student safety and employee dignity in response to claims of staff molestation of students. For all of these issues, the key decision, which may or may not lead to litigation, is the principal’s.

Notes

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