

# The Legal Context of Education

MARVIN A. ZUKER

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THE ONTARIO INSTITUTE FOR STUDIES IN EDUCATION

# The Legal Context of Education

MARVIN A. ZUKER

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# Preface

Legislatures and our courts at both the provincial and federal levels are playing increasingly greater roles in the area of public education. Laws are being enacted that place additional responsibilities on schools to provide a range of services to meet the educational needs of students. Moreover, judicial interpretations of constitutional and statutory mandates impact on school policies and practices. It is important for all educators to be cognizant of this legal activity because ignorance of the law is not a defence for violating protected rights.

Few school personnel are aware of the burgeoning litigation and legislation and even fewer are familiar with the names of significant case law. Many teachers, administrators, and school board members harbor misunderstandings regarding the legality of the decisions they must make in the day-to-day operation of our schools.

This book is designed to provide basic information on the evolution and current status of the law as of 31 December 1987 pertaining to the organization and administration of our public schools. It will examine laws, regulations, and judicial opinions and their impact on our educational institutions. It will focus on the tension between academic autonomy and individual rights as they affect students' rights, faculty status, sanctions against discrimination, special education, and the current AIDS controversy. The work will also analyse school situations in terms of applicable constitutional and statutory provisions and the rationale for judicial interpretation.

Chapter 1 provides background to facilitate comprehension of succeeding chapters. Included in this chapter is a discussion of areas of underlying importance with which educators may be unfamiliar: an understanding of the legal significance of the sources of law under which educators operate; provincial legislation; applicable school board policies; and the importance of case law in establishing educational policy.

Chapter 2 examines the extent of the province's (in this case Ontario) and local school board's authority when individuals disagree with educational policy. A reading of the decisions in this chapter reveals the attempt to establish a balance between the legitimate demands or objections of in-

dividuals toward education policy and school authorities' perception of their responsibility to the greater population.

How does one become familiar with the law? One becomes familiar by studying it. To do this more effectively one must become familiar with the various techniques and tools of legal research. Chapter 3 introduces the reader to materials that are basic to law libraries and useful in researching education law.

Chapter 4 deals with the law of negligence, the notion that a person should be allowed to recover something, usually money, from the individual who harmed that person. The wrong grows out of harm to an individual by the unreasonable conduct of others. We cannot make the educational environment accident proof but we can take steps to reduce the number of factors which allow for successful actions. This chapter will focus on these factors.

Chapter 5 presents material pertinent to student interests, such as compulsory education, discipline, student records, child abuse, and the Young Offenders Act. Inclusion of particular legal decisions is based on several factors. These include most often selecting the case decided by the highest level court that had addressed the specific issue under consideration. In this way the case that best represented the majority of cases in areas where the law may not be well-settled, or perhaps the case that best illustrates the historic involvement of the case law under consideration, is given the widest applicability.

Notes and questions occasionally follow the edited decisions. These notes are designed to provide helpful background material and information to the reader, additional citations for those interested in further pursuing the issue under consideration, the extent to which the law is well-settled, or other divergent views if the law is not well-settled. Provocative questions are intended to illuminate topics and foster discussion.

Edited verbatim decisions constitute a substantial portion of this book. Such decisions provide a rich source of information, enabling a reader to gain an insight and understanding of school law which cannot be obtained through secondary analysis. The reading of a judge's written opinion, majority, concurring, or dissenting, provides valuable philosophical underpinnings for a thorough understanding of judicial rationale. It also enables the reader to place a court's legal rationale within a specific factual context. Emphasis is on substantive school law issues. Not included in the edited cases are materials unrelated to the issues being examined, material pertaining to technical legal matters, and procedural legal issues which may be of more interest to lawyers.

Substantial controversy has focused on school attendance by students with acquired immune deficiency syndrome (AIDS). This is discussed in Chapter 6 with reference to several court decisions. The controversy of course is not limited to students but also as indicated to teachers and other school professional.

"Equal opportunity" is a principle that has not rung loudly or been translated into school policies and practices in Ontario for very long. Bill 82 in Ontario is the focus of Chapter 7, together with a discussion of special education in the United States which found its statutory roots in 1973. Case law references provide a useful tool in determining the development of the law in special education.

Chapter 8 presents an overview of provincial requirements pertaining to teacher employment, contracts, tenure, and related conditions of employment. Reference is made to teachers' evaluation of performance. There is also comment associated with teachers' rights, be it free expression, academic freedom, freedom of association, freedom of choice in appearance, and privacy rights, as well as of course the right to equal protection and due process.

The final chapter deals with the Canadian Constitution and its entrenched Charter of Rights and Freedoms. The potential effect of the Charter on education has yet to be determined, but cases to date have impacted substantially on the substantive rights of students and teachers, whether we speak again of equal treatment within the school setting, determinational rights in education, or the Charter's minority language education guarantees. Decided cases are referred to.

The book represents an attempt to convey to the educator a view of the law, whether emanating from common law, statute, or constitutional law. It was not written in a spirit of being for or against views espoused by school administrators, teachers, or students. Rather, its purpose is to provide those who are involved in public education with rudimentary knowledge basic for making educationally sound decisions within a legal framework. The work stresses the descriptive, not the prescriptive.

Finally, a book is not intended to serve as a substitute for competent legal advice should it be needed. However, in addition to learning about school law, an understanding of the materials should be of assistance in fostering a more fruitful exchange with a lawyer when that situation occurs.

The various topics are not intended to be rigid or all-inclusive; the law is dynamic, continually evolving from legislative enactments and judicial interpretations. I have attempted to be responsive to emerging issues of legal concern.

The divisions of topics are primarily for organizational purposes. No topic should be viewed in isolation because all areas are interrelated. For example, precedents from cases involving students may be relied upon in litigation pertaining to teachers' rights. Indeed, in analysing a given school situation, one may apply principles of law established in a variety of contexts that extend beyond the educational domain.

Understanding legal principles is a cumulative process. Discussion, debate, and analysis methods must be used to explore these complex interrelated topics.

I wish to acknowledge my many students at The Ontario Institute for Studies in Education (OISE) over the years. They deserve a special word of thanks not only for their penetrating questions, but also for sharing with me what school law topics they have deemed important as they carry out their school-related responsibilities. Of course, any failure or omission in this book is the sole responsibility of the author.

A number of individuals contributed to the completion of this book. Ted Humphreys and Anne Wilson of OISE provided excellent critiques of the chapters relating to Teachers and the Law and Special Education respectively. Irene Del Duca, of the Toronto Board of Education, was also most helpful on the chapter on special education. Susan Reid, University of Guelph, provided inciteful comments on the Young Offenders section. I

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This book was based on a student manual designed and written with the assistance of Liz Burge, Head of the Instructional Resources Development Unit at OISE. Some of the introductions were written as part of the creation of a coherent and sequential course manual for distance-mode classes. I shall be forever grateful for IRDU's contribution to the original course manual.

Special thanks go also to Marion Morgan, Mary Howes, and Chris Elie, who helped with the typing, and especially Marion, whose late nights on Bloor Street could be blamed on me.

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Marvin A. Zuker

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# The Legal Foundations of Education

## Preventive Law for School Personnel

It usually costs less to avoid getting into trouble than to get out of trouble! Avoiding litigation and legal difficulties is a theme that cannot be underestimated. You need to know how the law operates, under what conditions, and how you can avoid meeting the law head-on in a court case. The following pages delineate problem areas that may create legal difficulties, school-based situations that are ripe for acquiring preventative measures, and some of the strategies for educators who are able to implement preventative measures.

Too often school officials find themselves in court defending causes that are not easily defended. Litigation in education has evoked an untenable relationship between schools and the courts that demands examination. In education, *preventive law is the voluntary revision of school policies and procedures to lessen or obviate potential litigation*. The concept of preventive law has one basic premise: the greater the use of the preventive law strategies in schools, the less the need for conflict resolution through litigation.

Disagreements amongst boards too often result in adjudication, that is, the intervention of the judiciary in conflict resolution. When a dispute moves to this level of decision-making, the legal system replaces educational administration as the key to the search for justice.

There are various problem areas that may contribute to wrongful actions by school boards and administrators in the context of legal liability:

- Board-owned vehicles;
- corporal punishment;
- teacher performance evaluations;
- inappropriate due process;
- inadequate duty of care through employment of untrained personnel;
- unsafe school buildings;

- overcrowded physical space in certain types of instruction;
- failure to correct identified hazards.

How do these problem areas relate to preventive law? Preventive law recognizes the transfer of risk through not only adequate insurance protection, but it also stresses the reduction of claims through the systematic review of operational policies and procedures. Putting a school's own house in order will not only lessen the number of legal wrongs but will also increase the capability of a board to obtain and maintain adequate insurance protection.

There are at least several situations that provide opportunities to improve prevention measures. These are:

- lack of school policy(ies),
- vague and unclear policies,
- disregard for affirmed policies
- inconsistent application of existing policies, and
- unwillingness to admit error.

Case law is full of litigation arising from poorly administered policies. Three essential dimensions relating to people that affect the implementation of preventive law are *commitment*, *communication*, and *compromise*. It is clear that before tangible benefits will fully accrue, a commitment to the proactive approach basic to preventive law is necessary. Communication is a major aspect of any plan to exercise increased prevention. To be effective, audiences of communication should include levels of faculty, staff, and parents. In the legal arena there must be give and take. Progress often must be incremental when changes are attempted. Compromise depends upon a willingness to engage in efforts to identify and accept trade-offs.

There are a number of strategies that are useful to educators ready to implement preventive law practice in schools. For example:

- increase communication on a regular basis among teachers, administrators, and parents;
- improved understanding of education law;
- consistent strengthening of the implementation of policies and procedures;
- periodic internal review of school district policy;
- development of systems for external preventive law audits.

Education law represents the intersection of two bodies of knowledge and practice, both absolutely integral to a flourishing society. It is necessary that institutionalized education function within bounds recognized as the law. The legal constraints are articulable as (1) prescriptions (something must be done — cause shown before terminating a contract); (2) proscriptions (something must not be done — employment decisions based on gender); (3) optional powers (something may be done — moderate corporal punishment administered to students). Value judgments essentially are derived not from the law but from considerations of educational expertise, public policy, and ethical considerations. Laws suggest what is mandatory and what is permissive, not what is wise or often feasible.

Even though some litigation is beyond the control of educators and even lawyers, certain areas for study and joint action can be identified. Many cases can be avoided simply by understanding the law pertaining to the relevant subject. What should be in writing? For example, poor teacher performance, pupil suspension, notice to terminate? How should a notice be worded to avoid misunderstanding? Appropriate prevention involves both knowledge of legal meanings and connotation of words that also are used in general communication, and knowledge of the subject area, including the types of problems that may arise under the policy.

It is in the area of resolution of disputes that perhaps the greatest challenges to ingenuity may lie. The resolution of disputes in an adversarial manner needs reassessment. Perhaps it has become too easy to activate complex mechanisms to deal with minor and idiosyncratic complaints. Light punishments for misconduct and trifling adverse academic decisions regarding students, as well as trivial matters related to employees, increasingly seem to be contested in courts. Are such matters the proper province of courts, or would other types of tribunals better serve society? The extent to which the issue is educational would seem to be the measure of the need for expertise in the decision. Although mediation or arbitration could provide this, selection and functioning of arbitrators frequently makes the process little different from the courtroom.

## What Is Law?

- Is it a rule of action to which people are obliged in order to make their conduct comfortable?
- Is it a command?
- Is it a principle of conduct?
- Is "law" merely the expression for a uniformity of action which has been observed?
- What are human laws?

In its widest sense, law in general is a regime of adjusting relations and ordering human behavior through the force of a socially organized group.

With reference to its origin, law is derived from judicial precedents (*Stare Decisis*), from legislation, or from custom. That part of the law of England which is derived from judicial precedents is called **common law**, equity, or admiralty, probate or ecclesiastical law, according to the nature of the courts by which it was originally enforced. That part of the law which is derived from legislation is called the **statute law**. Many statutes are classified under one of the divisions mentioned, because they have merely modified or extended portions of it while others have created altogether new rules. That part of the law which is derived from custom is sometimes called the **customary law**.

The ordinary, but not very useful, division of law into written and unwritten rests on the same principle. The written law is the statute law, the unwritten law is the common law.

With reference to its subject-matter, law is either **public** or **private**. **Public law** is that part of the law which deals with the State, either by