Managing Legal Affairs

By Richard H. Weeks

On a rainy day in September 1999, the most serious legal matter brought to my attention was a small herd of belted Galloway cows trespassing on the grounds of North Grafton Elementary School. Amid the confusion of Hurricane Floyd, the herd had bolted from farmer Steve Bowman's fenced pasture and roamed the adjacent school property to the unabashed entertainment of the school's K–3 students.

The school's custodian Archie Achilles contacted farmer Bowman, and they herded the belted Galloways back into their corral. The resolution of this situation was simple and expeditious. I did not have to contact local or state authorities or the school department's legal counsel for advice and assistance. I passed through one more eventful day without having to incur legal fees.

Unlike this potential legal situation, most matters are serious and can become expensive for school districts and communities. Procuring legal services has become a basic necessity for school committees and senior central office administrators (see Figure 1). Early intervention to defuse a potential crisis, should commonly occur. However, schooling does not occur in a perfectly manageable world. Effective school management necessitates the retention of a good, experienced legal counsel.

Don't Play Lawyer

Unless you are a law school graduate who has passed the bar in your state or province, offering a legal opinion to anyone is illegal. Attending a law institute or reading a legal brief in a professional journal may inform you of legal issues, but there are simply too many nuances between your situations and those in other communities. A judicial ruling in one state court could result in a diametrically opposite judicial ruling in a similar court in a different state.

A law can be plainly stated in an annotated book on your desk. The temptation is to quote and interpret the law to whoever is concerned. It takes a trained legal professional to do research, such as a case law review, to bring legal relevance to your particular situation.

Law and Morals

Rules of law are often entirely separate from morals, or what an individual considers to be ethically correct, or just plain common sense. This issue can be problematical for school administrators.

For example, the situation of students standing on moving school buses is one in which law and morals share common ground. In most jurisdictions, laws prohibit students from standing while being transported. Bus company owners and their insurance underwriters be-
lieve it to be ethically correct for students to sit—not stand—while the bus is in motion.

Rules of law separate from morals on many school issues. Frequently, when contract negotiations break down between a school committee and a public employees’ union, a member of the school committee will take it on him-or herself to “inform” the community of the demands and perceived consequences of the union’s position. He or she may feel ethically correct in his or her actions. Unfortunately, rules of law through several sources typically prohibit such actions. A state labor relations commission could issue a charge of prohibited practice against the school committee for the member’s actions.

An effective school administrator must attempt to dissect a situation, separating rules of law from morals. For example, a school principal may believe that he or she is acting with good conscience by permitting a 4-year-old child to enroll in kindergarten. However, if school committee policy clearly states that the child must be 5 years old on a particular date for admission, the school committee policy, as a local rule of law, must be followed.

**Sources of Law**

In the United States, the supreme law of the land is the U.S. Constitution. Interestingly enough, the Constitution does not mention education or the obligations of its citizens policies to school personnel. School administrators should have quick access to school board policies for daily decision making.

*Case law,* or “common law,” has been established through the judicial system. Under the principle of stare decisis (to stand by decisions), the courts depend on opinions or rules of law announced and applied in previous decisions involving similar circumstances. For example, can public school students openly pray before school events, such as football games? Can students receive public tax money, in the form of vouchers, to attend parochial schools? Legal counsel can prepare opinions for such questions after examining court decisions and legislation.

**Administrative law** is the part of public law that addresses the regulatory functions of government. It would be difficult to list all of the public officials, departments, boards, and commissions that can impose regulations on public schools. Effective legal counsel can assist a school system with administrative law (see Figure 2).

Through respective legislation, the president of the United States, state governors, and school superintendents have the authority to issue laws, called executive orders. In the form of memorandums or letters, superintendents issue direc-

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**Figure 1**

**A Plethora of Legal Services**

School districts retain law firms for services that seem remote from their mission of providing quality classroom instruction and improving student achievement:

- Banking and commercial lending
- Contract law
- Creditors’ rights and bankruptcy
- Education law
- Employee benefits and executive compensation
- Environmental law
- Health law
- Insurance and coverage litigation
- Labor and employment law
- Land use
- Mediation
- Municipal law
- Not-for-profit law
- Professional malpractice defense
- Civil rights law

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**Figure 2**

**Regulatory Organizations That Affect School Districts**

School districts need legal assistance to interact on their behalf with the following federal, state, and local entities:

- State department of education
- American Arbitration Association
- Department of social services
- State labor relations commission
- State board of conciliation and arbitration
- State department of revenue
- Office of civil rights
- Local district attorney offices
- Division of youth services
- U.S. Department of Agriculture
- Office of the secretary of state
- U.S. Department of Justice
- U.S. Department of Education
- Civil Service Commission
- State environmental protection agency
- Office of Federal Contract Compliance Programs
- State commission against discrimination
- U.S. Equal Employment Opportunity Commission
- Internal Revenue Service
tives covering a wide range of issues. A superintendent may amend, revoke, or supersede an existing executive order. It is always prudent for school personnel to retain this correspondence. Personnel should not assume that "all deals are off" when there is a change at the helm. If it is time to restate your district's procurement and purchasing policy, send it to staff on letterhead with the signature of your superintendent. Sent by you, it is only correspondence. Sent by your superintendent, it is the law.

At the local level, cities and towns have limited authority to pass ordinances, by-laws, and resolutions. Frequently, individuals within local government have legislative authority to establish policies and procedures that affect the operation of services within the school department.

Retaining Legal Counsel

Associate Justice Thayer Fremont-Smith of the Massachusetts Superior Court offers this: You want to hire the best individual to get the job done. An effective attorney is someone who has expertise in the law, is intellectually capable, dependable, provides answers when needed, and is accessible. You don’t have to have the same firm for everything that comes up. Different types of counsel are needed for the different types of work (personal communication, April 2000).

Local, state, and provincial statutes may regulate the parameters of retaining legal counsel. School districts commonly advertise requests for proposals, inviting law firms to submit their résumés for consideration. Smaller firms can often charge smaller fees because they have less overhead (personal communication, April 2000).

The entire school committee should interview candidates considered for legal counsel in open session. Legal author Merit Bennett (1997) offered this advice to school board members: Upon meeting the lawyer, it is important for the client to remember that the decision whether or not to hire the lawyer is the client’s, and, if hired, the lawyer will serve as the client’s employee subject to termination at the client’s pleasure. The client does not need to please the lawyer, and the client has every right to pointedly question the lawyer about his or her honesty. The client is entitled to ask direct questions and to demand clear and direct answers. The client does not have to be intimidated by the lawyer’s legal education or social status. The client should prepare in advance a list of specific questions designed to illuminate the person behind the law degree.

Managing Legal Counsel

As the representative of the citizens of the school district, the school committee retains legal services. The attorney does not represent the superintendent of schools or any other school personnel. The superintendent should not bring personal or professional confidences to the school attorney. In practice, the superintendent is the person who works most closely with the school attorney. The school committee’s internal rules direct how legal counsel is used and specify individuals who are authorized to contact the school attorney. Frequently, only the school committee chair and the superintendent have this authority. This arrangement controls costs and directs matters through proper channels. Before telephoning the attorney, the superintendent should outline the conversation either mentally or in writing. This practice

Pyrrhic legal victories ring hollow to cash-strapped school districts.

Associate Justice Thayer Fremont-Smith, Superior Court, Massachusetts
A Case Study: East Bridgewater (Massachusetts) Public Schools Hires a Law Firm

The distinguished Boston lawyer who represented East Bridgewater Public Schools for 25 years retired in 1999. School Superintendent Judith A. Riordan conferred with the school committee and agreed to retain new legal counsel. Discussions produced the following selection criteria:

- The attorney had to be well qualified and expert in education law.
- While being the best that money could buy, the attorney’s fee structure had to be workable for East Bridgewater.
- The firm had to have experience working with school districts of similar size (2,500 students and 268 employees).
- One primary attorney had to serve as the district’s contact for general counsel services. Other attorneys had to be available for specific areas of expertise, including collective bargaining.
- The firm had to offer professional development services to the administrators in the district.

Dr. Riordan contacted the Massachusetts Association of School Committees and Massachusetts Council of School Attorneys Association for a listing of possible candidates. From the dozens of names submitted, she selected about 10 attorneys to receive a letter of invitation. Her letter stated, “On behalf of the School Committee, I would like to invite your law firm to submit a statement of capabilities and experience if your firm is interested in providing service to the East Bridgewater school system. An anticipated fee structure should also be included with a statement of interest.”

Dr. Riordan submitted four firms’ résumés to the School Committee for consideration. One-hour interviews were held in open session with all School Committee members questioning the lawyers. At a subsequent meeting, the School Committee voted to retain new legal counsel. They selected a large law firm not unlike the one that had represented them for 25 years.

The district observed that it could not operate for very long without qualified legal counsel. Dr. Riordan replied, “We are ordinarily a very quiet district, but this has been an exceptional year. Negotiations are consuming much of our time.”

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will minimize the cost of the telephone call and focus the matter being brought to the attorney's attention. Merit Bennett (1997) stated, "From the professional perspective, the lawyer needs to know exactly what the client wants the lawyer to do. Nothing can be left to assumption. The client needs to know exactly what steps the lawyer will take on the client's behalf and why."

Correspondence sent to the superintendent by an attorney representing a client with a matter in dispute should be forwarded to the school attorney. The unwritten rule is that lawyers should respond to all correspondence from other lawyers and that superintendents can respond to most anything else. It is inadvisable for the superintendent to respond in writing to an attorney's correspondence because the superintendent could say things that have damaging ramifications. Telephone calls to the superintendent from a client's lawyer should be handled carefully. The superintendent should request that the lawyer state such business in writing and send it to the superintendent.

All legal documents, including correspondence, are owned by the school district and are governed by state or province public records laws. Unlike the private sector, attorney-client privilege may not prevent the public from examining the school committee's legal documents and correspondence between the school committee and its legal counsel. This includes personal notes, letters, and e-mail between the superintendent and the school attorney. During the past decade, the public has gained expansive rights to view legal documents through legislation and the courts.

Disputes with Legal Counsel

Instead of blaming the lawyer for an unsuccessful or acrimonious relationship, the lawyer can take responsibility for unwisely acceding to the client's desires or agreeing to represent the client in the first place. Unsuccessful legal relationships do not happen by accident. They are created step by little step. (Bennett, 1997)

In addition to personal relationships that may not work out between the school district and the attorney, there is the issue of money. The fee structure may become too burdensome for the school committee. "I review all legal bills. Any discrepancies between what I presumed was procured and what I was billed are brought to the attorney's attention," said Superintendent Riordan (personal communication, April 2000).

Courts, Torts, and Conflict Resolution

"Unresolved matters that reach my court could cost school districts thousands or hundreds of thousands of dollars in legal fees—and that's before any actual settlements are reached," said Associate Justice Fremont-Smith (personal communication, April 2000). An unresolved matter is frequently the result of recalcitrance on the part of a school committee to resolve the matter amicably. At other times, it may be poor judgment or inexperience on the part of the superintendent.

Some of the more common reasons school districts find themselves in court are re-employment or money damages for perceived wrongs to an employee, reinstatement of a student, or expunging of a student record. Employee matters often go to arbitration when they are not resolved through the grievance process with the school committee. Pyrrhic legal victories ring hollow to cash-strapped school districts. For example, legal bills of $68,000 to defend a school system's rightful termination of a teacher's aide—who earned $9,428 a year—in a seniority issue is difficult to justify.

"The business of the schools is education—not trial litigation. This is a significant drain of time and attention away from education. Legal counsel should tell the superintendent that the cost of the battle is not worth the battle. What are the prospects for recovery? What are the counterclaims for the district? With staff dismissals, advice is needed on all alternatives. The superintendent should look at all of the options. Approximately 85% of all matters should be resolved before going to court," said Attorney O'Connell (personal communication, April 2000). Superintendent Riordan added, "Using common sense has kept us from incurring considerable legal services."

The doctrine of sovereign immunity protects school districts from tragic occurrences on school property, such as the death of a student at the hands of another student. In recent years, however, this protection has been narrowed greatly. Courts have awarded judgments to people via juries who felt sorry for those who were injured. If a district can buy

You have the ability to successfully manage your school district's legal affairs.

Judith A. Riordan, Superintendent of Schools, East Bridgewater, Massachusetts

SCHOOL BUSINESS AFFAIRS
Insurance, then why cannot plaintiffs collect?

"Because of the erosion of the doctrine of sovereign immunity in recent years, and its restriction or elimination by statute in many jurisdictions, it makes a school system vulnerable to lawsuits alleging negligence. Negligence may include, arguably, a failure to protect students, a failure to detect proclivities to violence of other students, or a failure to provide state-of-the-art security systems within the school," said attorney O’Connell (personal communication, April 2000).

Sooner or later, a school district will find itself in court. The strategy for handling the matter in court is generally worked out between the school district and its counsel. Since approximately 80% of most matters are handled in front of a judge, not a jury, it is important to know the judge. Effective legal counsel will know the judge. If not personally, legal counsel will know the judge’s past rulings on similar matters. Judges interpret laws differently. Some are very liberal, whereas others are very conservative.

General Counsel Services

A quick review of your district’s most recent legal bill will see general counsel services as an important billing matter. Your school committee depends on counsel for advice on hiring and supervising a new superintendent, parliamentary procedure, open-meeting laws, and public record laws. A superintendent needs assistance in day-to-day operational matters—from help on contentious personnel problems to bricks-and-mortar issues, such as school construction. Beginning superintendents require more general counsel services than more tenured superintendents do. School committees should expect to budget sufficient funds for this purpose when hiring a new superintendent. Effective legal counsel should offer practical, sound advice to school committees and superintendents to avoid problems. Representation should be timely and cost-effective.

Education Law

The volume, diversity, and complexity of education legislation are eclipsed only by the public’s preoccupation with and intent to create more education legislation. Coupled with case law, it can overwhelm school board policy makers and administrators (see Figure 3).

Education historians may one day declare the 1990s as the most irresponsible era for education legislation in the country’s history. During the euphoria of former House Speaker Newt Gingrich’s passage of the Contract with America in 1995, and the public’s perception that 1980s’ reform measures failed, states rushed to pass new education reform legislation. In exchange for increased school funding, educators were deluged with new measures of accountability. What set apart 1990s’ education reform legislation from legislation in previous decades were the uncompromising consequences spelled out for those who did not “reform.” In the upcoming decade, we could see an unraveling of 1990s’ legislation via more legislation and the courts.

Special-Education Legal Matters

It is not uncommon for approximately 20% of a school district’s legal bills to be consumed by special-education matters. Beginning in the 1970s, every state adopted legislation protecting the rights of children with special needs. This area of the law has evolved into a highly specialized practice. By the 1990s, school districts began retaining attorneys who were experts in special-education law.

Generally, children with special needs are those aged 3 through 21 who have not received a high school diploma. They are defined in regulations set forth by each state. Special-needs children have disabilities—physical, emotional, health-related, or otherwise—that prevent them from progressing effectively in regular education settings. Certain special-education services are necessary for these children to successfully develop their educational potential. Whenever possible, the law requires that these students be educated in the least restrictive environment alongside children without special needs.

Special-education students have individual education plans (IEPs) that spell out the supplementary instructional services provided by the school district. IEPs are developed and approved by the district’s “team,” consisting of the special-education director, regular and special-education teachers, and other district-level specialists. Legislation
provides due process for parents and guardians of special-needs students who reject IEPs assigned to their children. The process may become one of eventual mediation, handled by a third party. If mediation is unsuccessful, the next step is a prehearing conference. If still unresolved, the parent can request a formal special-needs hearing. A hearing officer, with the legal authority of an administrative law judge, presides at the hearing and generally ends the dispute with a ruling.

Frequently, at the moment a parent rejects the student’s IEP, your district’s legal meter begins to run. Not only will you need expert legal counsel, state legislation often entitles the student with the disputed IEP to legal counsel. Your district may be obliged to pay for all attorneys’ fees and expenses.

Once a parent rejects the IEP, it is best to try to resolve the matter at the team level before either the team or the parent calls a lawyer. Attorney Mary Ellen Sowyrda of Murphy, Hesse, Toomey and Lehane, LLP, in Quincy, Massachusetts, is a special-education law specialist who represents numerous school districts and is a frequent workshop presenter at ASBO International meetings.

Her advice to the team:
Listen to the parents! Buried in the dispute are kernels of resolution that can be helpful in identifying the issues so that the parties can get back on track to resolving the problems. Parents will often come to the meetings with out-of-district tests of their children, complete with recommendations. To the extent that the district can incorporate the suggestions, this will help resolve the dispute (personal communication, April 2000). Frequently, other central office issues contribute to excessive special-education legal bills. Attorney Sowyrda’s advice to superintendents:
To the extent that you have a well-staffed special-education department, parents will be happier with the services. The investment in your district will result in cost savings when compared to outside placements. Be supportive of sped directors. The expectation is that they know what they are doing. They are the ones in the trenches with the parents and students. If you get a request from the sped director for funding for staff and services, think long and hard before you say no. When in doubt, say yes. Give the sped director what is needed to get the job done (personal communication, April 2000).

**Labor and Employment Law**
Substantial federal and state legislation governs the affairs of the workplace, requiring school districts to retain well-informed labor and employment attorneys (see Figure 4). The laws concerning relationships between employer and employee cover a domain remarkably different from that of education law, which concerns the relationships between society and students. Most labor law is generic, applicable to both the private and public sectors. Case law and administrative law have shaped the most significant labor legislation of the past 25 years. Labor attorneys receive daily briefings from state and federal agencies and regulatory boards on rulings, interpretations, procedures, and hearings on the important labor laws.

At the end of the 20th century, labor and employment law practices in American law firms have diminished to only a whisper of their dominance in the 1930s through the 1960s. In the 2000s, there could be resurgence in labor and employment law due to the explosive growth in high technology and e-commerce. The economic disparity between the haves and have-nots continues at an alarming rate. School districts can expect to see increased labor activism, including unions pressing for increased wages and benefits and improved working conditions. Groups of your employees who have been content for years with self-representation could be subjected to considerable pressure from half a dozen major labor unions to negotiate on their behalf. Plan to increase usage of labor law specialists in the 2000s.

**Professional Development**
School business managers need ongoing professional development regarding legal matters. Legislation
**Collective bargaining and the negotiation of contracts and agreements are how most school districts use legal counsel. However, other employment law issues, many involving federal legislation, are of equal importance. Make certain you use expert labor counsel for the following:**

- Civil Rights Act of 1964 and Title IX issues
- Fair Labor Standards Act of 1938 (minimum wage laws and "exempt versus nonexempt" employment status)
- Worker Adjustment and Retraining Notification Act of 1988
- Right to know law
- Occupational Safety and Health Act of 1970
- Internal Revenue Service regulations
- Employee notifications and conspicuous workplace postings of

**benefit and unemployment information**

- Family and Medical Leave Act of 1993
- Women's Health and Cancer Act of 1998
- Immigration and Nationalization Service (I-9 forms)
- Health Insurance Portability and Accountability Act of 1996
- Fair Credit Reporting Act of 1997 (employer obtaining individual credit reports for employment purposes)
- Employer obtaining individual criminal or sex offender records
- Consolidated Omnibus Budget Reconciliation Act of 1985 (for departing employees’ continuing health care coverage)
- Americans with Disabilities Act of 1990

and the courts are pouring considerable information at educators daily. Most professional journals contain reviews of court decisions and annotations or recently enacted legislation.

Methods of professional development vary. School districts should take responsibility for sponsoring legal seminars for their school administrators. For the cost of only a few billable hours, a school district's legal counsel can brief it on all of the current hot-button issues surrounding student discipline, employee misconduct complaints, discipline and discharge of teachers and other school personnel, and education reform statutes. Expensive for-profit legal seminars and materials are always available. More relevant and less expensive are ASBO affiliate-sponsored legal seminars. The Massachusetts Association of School Business Officials, Inc., has sponsored an annual law institute since 1978. The 1-day institute reviews recent legislation and relevant court decisions using a case-study approach.

**In Conclusion**

Managing legal affairs is a significant responsibility. As long as you are a school business manager, there will be plenty of legal matters and attorneys capable and willing to assist you. Remember, you have the ability to successfully manage your school district's legal affairs.

**Reference**


Richard H. Weeks is the business manager for Grafton (Massachusetts) Public Schools. In the 1980s, he was director of administration for law firms in Boston and Connecticut.

Brian A. O'Connell, Esq., of Cosgrove, O'Connell and Blatt in Worcester, Massachusetts, assisted in editing this article for publication.