

Education Law in 2020¹

Laura Lundy

Where will education law be in 2020? The bleakest scenario for those involved in education would be one where teachers are working to comply with a mountain of legal regulation, glancing over their shoulders because of a constant threat of legal action and conscious about the potential legal implications of every act and omission, remark or form of physical contact with pupils. Is this likely to occur? Hopefully not. However, the only thing that can be predicted with any degree of certainty is that the law will play a greater role in schools in the future than it does now. This has been the trend for the last ten years and it is one which will continue for the foreseeable future. The legal invasion of schools is unstoppable. Areas of education which were previously immune from legal intervention are now heavily regulated and litigated. There is perhaps no better example of this than the rules in relation to the statutory curriculum. In 1944, commenting on the new Education Bill, a leading educationalist, H C Dent declared that: "What we do not want is lessons laid down by law". Today we have primary legislation detailing not just the subjects but the specific topics which must be taught in schools. Twenty years ago the law simply guaranteed a child a free school place. Today, an entire tranche of the statute book is devoted to working out how places in popular schools are distributed. The key question and focus of this paper is to examine how much further the law can go and to attempt to identify the areas where this growth will take place.

The emergence of the rights of the child.

In the short term the feature of education law which is most likely to succumb to change is in relation to the legal status afforded to pupils. All of child law (with the exception of education law) has as its primary focus the rights of the child. The landmark legislation of the last decade, the Children (NI) Order 1995, is centred upon the 'welfare principle' which requires decisions affecting children to be made according to their best interests. Education law stands alone in this regard by placing the bulk of rights in the hands of parents. The dominance of parental rights is a direct result of the Conservatives' drive to increase 'consumer' rights in education but which then defined the consumer as the parent. The problem is that, while parents are often best placed to act as advocates for their children, children's interests and wishes are not always identical to that of their parents. Current educational provision is undoubtedly in breach of Article 12 of the United Nations Convention on the Rights of the Child (UNCRC), which requires that children have their views taken into account in relation to all matters affecting them. The UNCRC's monitoring committee highlighted, in 1995, deficiencies in this regard in relation to the lack of representation of pupils on school councils, the treatment afforded to children who are excluded from school and provision for children with special needs. Human rights issues are set to receive more attention generally as a result of the establishment of the Northern Ireland Human Rights Commission and implementation of the Human Rights Act 1998 in October 2000. In this context, it is not difficult to envisage that the next twenty years will witness a shift in the focus of regulation from the rights of parents *vis a vis* the school to the rights of the child independent of both.

Litigation

Litigation involving schools is on the increase. In the past ten years there have been cases on issues which were unheard of ten years before (such as the awards of damages arising from a school's failure to prevent bullying). Litigation in the United Kingdom often shadows that of the United States where it sometimes seems that every inconvenience results in a law suit. A good

¹ In Gardner, J. and Leitch, R. (Eds) (2000) *Education 2020: A Millennium Vision: Issues and Ideas for the Future of Education in Northern Ireland*, pp102-109, Belfast: Blackstaff Press

recent example is a school which had to pay \$2000 to a pupil because the teacher had confiscated and then mislaid a complete set of Pokémon trading cards.

Moreover, the Northern Ireland population is thought to be more litigious generally than our counterparts in the rest of the United Kingdom. Hence the higher car insurance premiums, which are a knock-on effect of the various whiplash suits which are lodged when a car is rear-ended. Education is not unaffected by this litigation-happy attitude - most Northern Irish teachers can recount a story where seven year old Johnny (or his mum or dad) has threatened to sue them. The rise in legal actions is undoubtedly tied into the financial implications of going to law. In particular, publicly-funded legal aid is now available to children in their own right (i.e. not subject to a parental means-test), a position which opens the gates to a flood of legal actions concerning children. Although the legal aid system is currently under review, one of the key proposals is to introduce conditional fees (where the lawyers only get paid if they win). This arrangement is one of the reasons for the meteoric rise in US litigation and might act as a catalyst for a similar growth here.

What types of action might schools be facing in 2020? One area where the seeds have been sown for a major harvest of litigation relates to teaching quality. A landmark House of Lords' decision (*X v Bedfordshire County Council, 1995*) opened the possibility of local education authorities being held liable in negligence for a failure to identify and provide appropriately for special educational needs. The courts have grappled with the inherent difficulties in such actions (namely establishing that the school was at fault and determining what would be appropriate compensation for the damage). Following on from the Bedfordshire decision, education lawyers lodged a series of test-cases involving children with high intelligence quotients who failed to achieve expected grades in schools which were 'failing' inspection reports (see for example, O'Sullivan: "D? E? Get me a lawyer", *The Independent* 20 May 1997). These claims are in their early stages of development but twenty years from now could be the norm. What is perhaps most worrying about this for teachers is that it is their actions in the classroom today which might be scrutinized in 14 years time when a child has left school and is in a position to lodge an independent action.

Another area where schools are likely to see increased litigation is in relation to allegations of discrimination. Equality issues have had a high profile in Northern Ireland largely as a result of the public focus on religious discrimination. One consequence of this is that the average person is fully conversant in the language of discrimination. This can translate into a tendency to claim discrimination every time a person experiences differential treatment which they do not consider to be fair. The reality is that unlawful discrimination only occurs where the treatment is a result of something which society as a whole (and not just J. Bloggs) deems sufficiently unacceptable to prohibit by law such as religion, sex, race or disability. However, these categories are on the move. For instance, the Northern Ireland Act 1998 has introduced a new statutory equality duty on public authorities in a range of areas include age and sexual orientation. The legal frameworks are in place to facilitate allegations of discrimination and people are increasingly inclined to use them. In the near future schools can expect to deal with a range of anti-discrimination issues including: girls wanting to wear trousers and boys to have long hair or earrings; travelling children to be treated in the same manner as settled children; ethnic minority children to be taught their first language in school; and the primacy given to Christianity in our schools to be queried. There will be many positive things to be gained by this enhanced attention to equality. The danger is that the teachers who have to work in a politically-correct classroom will feel so restricted in their speech and actions that it inhibits their natural behaviour and preferred classroom demeanour.

The final issue which might be anticipated to become more litigious is in relation to parental control over the child's day at school. Twenty years ago it would have been rare for a child to be on a vegetarian diet or for a parent to have lodged an objection to the use of corporal punishment. In the future there will be other issues - philosophical, religious or simply political - where parents will insist that their child receives or does not receive the same treatment as his or her class-mates. There are already a number of issues surfacing in relation to the provision of sex education. Unlike England and Wales the issue in Northern Ireland is completely devoid of regulation - a position which is an open invitation to litigation. Moreover, there are a whole host of other moral issues which may culminate in litigation: parents who do not want children to learn about evolution; parents who do not want children to participate in cross-community contact schemes under EMU; parents who do not want their children to read certain books which feature people/religions that the parent is hostile towards.

There are also more general situations when parents will object to the child's participation at school. The recent withdrawals of pupils in response to Martin McGuinness's appointment as Minister for Education are perhaps a fore-taste of what is to come as are the protests which occur outside Catholic schools which have invited the RUC to talk to pupils about drugs. A feature of the next 20 years will undoubtedly be a more politically active body of parents who are prepared to take a public stand against their child's school on a issue on which they have strongly held beliefs. Some of these incidents will undoubtedly end up in court, particularly now that it will be possible to go to the High Court in Belfast and argue that there has been a breach of Article 2 of Protocol 1 of the European Convention on Human Rights - the right of a parent to have his or her child educated in accordance with his or her religious or philosophical convictions.

Regulation

Education statutes seem to have grown like Topsy since 1989. In 1986 all education legislation was able to be consolidated in one order, the Education and Libraries (NI) Order 1986, which has a total of 157 pages. Since then there have been six education orders. The Education Reform (NI) 1989 Order alone runs to 202 pages. However, the real growth in regulation is to be found in delegated legislation and in particular in the regulations which flesh out the detail of the law which is found in the Orders. There is now statutory provision where it would never have been envisaged. The example of the curriculum was given earlier. Another case in point is the rules in relation to detention, previously unregulated and now covered in detail by article 5 of the Education (NI) Order 1998. Why so much legislation? Statute law serves a variety of purposes. For a start legislation is seen to be the quickest and most effective way to deliver a policy objective. In the 1960s, the move to comprehensive schools in England and Wales was delivered by a government circular. That would be unthinkable today where manifesto promises eventually translate into legislation. For example, the 1997 Manifesto promise to raise standards in school eventually led to the School Standards and Framework Act 1998. This includes provisions on school development plans and target setting which now form part of the Education (NI) Order 1998. It can be anticipated that in today's rights-based educational environment new government policies (whether originating at Westminster or the Northern Ireland Assembly) will be implemented in a legal framework rather than by a departmental circular.

Legislation is not just used pro-actively to deliver policy. It is also commonly used to plug 'litigious gaps' that is, to introduce uniform practice where there is a threat of public resources being used to defend court actions. The various rules on school discipline are a prime example of this. Corporal punishment was abolished in the wake of *Campbell and Cosans v United Kingdom* a decision by the European Court of Human Rights. It has since been deemed necessary to introduce legislation which defines the circumstances when it is appropriate for a teacher to restrain a pupil physically. Schools exclusions have gone down the legislation route for similar reasons. What is missing is some form of legislation defining the general authority of a teacher to impose disciplinary measures. This was called for in the Elton Report (1989). Such a power would usefully clarify the extent of teacher's authority and in particular whether a school has the power to discipline for behaviour occurring outside school or for actions (e.g. smoking or an outrageous haircut) which a parent expressly condones.

The final area where an increase in legislation can be anticipated in is relation to provision for children with special educational needs. The area is already subject to fairly extensive legislation in the Education (NI) Order 1996 yet the detail of how the rules are implemented remains in a non-legally binding Code of Practice. The chances of litigation in this area are high since parents of children with special needs may have very strong feelings as to what is appropriate for their child. The most significant issue facing government right now is the whole issue of resources *versus* needs. There has been case law which suggests that once a child has a need, an education authority must meet that need irrespective of the resource implications. However, if the judicial trend of prioritizing need over cost continues, there will almost certainly be a re-evaluation which will result in legislation proscribing how the limited pool of public resources should be allocated. One issue which might receive special treatment in this context is the legal presumption that a child with special needs should be educated in a mainstream school. The current provision is qualified by the ubiquitous qualification: "... insofar as this is compatible with efficient education or the efficient use of resources". The rights of disabled people may advance quite dramatically in the

next ten years or so. Accompanying this may be a recognition that the right to receive an education alongside one's peers is not one which can be set aside on economic grounds alone.

Education about law

The focus of this paper is on the law which relates to education. However, the author would not wish to give a paper which casts an eye into the future of the relationship between law and schools without mentioning something about education about law. The current position is that, apart from the odd A-level class, students can go all the way through school without learning any law. One US commentator drew an interesting analogy between a lack of education about law in schools and sending children into a baseball game without having explained the rules. Moreover, article 4 of the Education Reform (NI) Order 1989 requires schools to prepare children for the 'responsibilities and experiences' of adult life. What adult has not been involved in a legal transaction (e.g. house purchase or employment contract) or dispute (e.g. complaints about faulty goods or services), sued or been sued? Change is afoot. In England and Wales, the publication of the Crick report has resulted in civic education being brought into the heart of the statutory curriculum. There are various discussions and pilot initiatives underway in Northern Ireland as well. Twenty years from now, it would be nice to see pupils emerging from school knowing not just their legal rights but their responsibilities at law and understanding the importance of law as a mechanism in the regulation of social behaviour in a democratic society.

Conclusions

Will an increase in legislation and litigation be good for schools in the long run? There is no doubt that increased legalization can produce positive benefits such as advancing children's rights or providing teachers with protection from personal liability. Beyond this, an increase in regulation and litigation would be welcomed by no school and would undoubtedly have adverse effects on teacher morale at a time when surveys show it to be at an all time low. One possibility is that a rise in litigation would produce a backlash effect from both the judiciary and government. The courts have already shown themselves willing to protect the broader public interest in the education system by refusing to award compensation to individuals whose educational needs have been neglected. Likewise, prior to the 1997 general election the Labour government declared that they would act to give teachers a statutory indemnity if the litigation around poor quality teaching is ever successful. It is understood that there are broader public interests at stake: being taught by an unhappy teacher or having no teacher at all is in no child's interest. In conclusion, it is to be hoped that our schools do not evolve into institutions where disillusioned teachers are forced to teach, talk and act uniformly to stave off potential litigation. Instead, it is to be hoped that what emerges over the next two decades is a healthy balance between children's rights and parent's rights in a legal framework which facilitates rather than hinders teachers in carrying out their key function: children's education.