



Managing the Law in Education: Strategies for Education Leaders and the Organizations That Support Them

By Melissa Junge and Sheara Krvaric

October 23, 2014

Key points:

- Given the myriad rules and regulations in K–12 education, successful implementation of education policies requires attention to the law.
- Unfortunately, many education leaders are uninformed about how to select, inform, and properly utilize lawyers, whereas lawyers often lack sufficient context on the problems that education leaders face.
- Education and legal groups should take concrete steps to train school leaders on how to use lawyers to identify options, understand their risks, and strategically implement decisions.

Americans are increasingly divided over education policy. But education debates overlook one very important and basic fact: even good policies fail if they are poorly implemented, and it is hard to evaluate a policy’s merit if it is not implemented well. That may seem obvious, but time and again we see policies fail because of a lack of attention to the day-to-day issues that affect education leaders’ ability to turn words on a page into reality inside schools.

Consider, for example, a school district whose school board and superintendent spent a great deal of time and political capital establishing a policy to give principals more authority over spending decisions. On paper, principals could decide what goods and services to purchase for their schools. In practice, however, the district continued to maintain its central procurement office to process school purchase requests. As a result, principals still had to route purchase requests through the same central office that had authority to refuse them. Little changed and the policy was deemed a failure.

From our perspective, however, the policy was never truly implemented. Moving from policy to practice would have required a deep dive into procurement law, budget authorities, and organizational structures. Absent that dive into the details, the simple “let principals buy their own stuff” reform fell dead in the water. If something that straightforward can be derailed so

easily, imagine how much greater the challenge is when it comes to launching a major initiative around scheduling, pay, or budgeting. Policymakers and leaders ignore the complexity and impact of the law at their own peril.

In fact, the trend of overlooking these implementation details may help explain some of the rancor in today's education policy debates. Policymakers roll out policy after policy, often without the heavy lifting needed to see an initiative through to full and sound implementation. As a result, schools and systems experience a lot of change but often do not achieve the promised results.

We see this from a unique vantage point. We are lawyers who represent state departments of education and school districts from across the political, pedagogical, and policy spectrums, and we have seen schools and districts using fundamentally different approaches improve the lives of their students. But every success story has a common theme: thoughtful and thorough implementation of the details.

Implementation in education almost inevitably involves dealing with the law. So, as odd or unpleasant as it might sound, lawyers have a role to play in helping leaders realize their visions.

While we agree that education leaders should not need lawyers to do those leaders' jobs, the current legal landscape in education is often so complex that a lawyer's perspective can help. We say this because school systems are subject to thousands of rules, regulations, contractual obligations, and other legal mandates touching issues such as employment, procurement, real estate, how money can be spent, and even how to improve schools.

Other highly regulated fields use lawyers as problem solvers to get around day-to-day roadblocks; however, this is often not the case in education. Instead, when people in education think about lawyers, they often think about lawsuits. While public education has a well-known history of using litigation as a way to push public policy goals, this paper is not about litigation.

Rather, we attempt to highlight ways that education leaders—be they state chiefs, district superintendents, principals, or teachers—can use lawyers to navigate complex networks of legal requirements to successfully implement initiatives. In short, leaders can use lawyers to identify options, understand their risks, and strategically implement decisions.

Developing intentional and productive partnerships with lawyers may require a shift in mindset, so we offer tips to leaders for how to think and act differently when working with their lawyers. We also offer suggestions for ways that groups can help provide the resources and institutional support needed to help leaders more easily navigate the law and, when necessary, use lawyers effectively.

How Leaders Can Use Lawyers to Support Effective Decision Making and Implementation

To be successful, the initiatives leaders put in place must be sound and sustainable. This means they must be implementable—both from a practical and a legal perspective. Lawyers can help if leaders know how to use them. Effective use starts with two things: a leader with a problem-solving mindset and an understanding of a lawyer’s role.

Leaders and the Problem-Solving Mindset. Education leaders frequently face roadblocks—for example, when a teacher wants to use an intervention tool to help a struggling student but is told the tool cannot be purchased under procurement rules, a principal wants to adjust class schedules but is told that is impossible because of a collective bargaining agreement, or a district superintendent wants to offer wraparound supports to help students in poverty but is told that the funding stream he or she wishes to use cannot be spent for that purpose.

Effective leaders see these as problems to be solved, not as dead ends. Lawyers can help leaders solve problems by (1) identifying the leader’s options and (2) assessing the risks of each option so the leader can make a strategic decision about what solution he or she wants to pursue.

In our legal practice, we work with highly regulated federal grants. We were once hired by a school improvement leader who did not think the way her district’s schools were spending federal funds made sense. She was particularly concerned about a struggling, high-poverty school that faced myriad challenges—namely, a weak curriculum, lack of aligned instruction, and a disruptive school climate.

Yet, the school was spending federal funds only on add-on services for a few selected students, which did nothing to address the root causes of the school’s challenges. Central office staff told the leader that this kind of spending was required by federal law; that did not make sense to her, so she sought our perspective.

We discussed her options under the law and she—along with the school principal, school teachers, and others in the community—developed a plan to use federal funds to redesign the school day to incorporate music and art time, activities that the school had not previously supported. The idea was that music and art would not only provide an important new opportunity for students but would also give regular classroom teachers time to collaborate on grade-level teams.

During music and art time, the teams could analyze data and share different instructional approaches, lesson plans, and classroom-management strategies. The leader believed this approach would have a far greater impact on the school’s culture, professional community, student behavior, and instruction than the school’s past spending on add-on services.

While the school was enthusiastically on board with this approach, the leader knew she would have a hard time selling this plan at the central level and to her state, as it was a radical change

from anything that had been done in the past. So we helped her facilitate conversations among district staff so they could feel comfortable that the new spending plan was permissible under the law. We then helped her secure the state's approval, which was not easy.

The leader faced a series of “nos” before this idea was approved by all necessary parties. Most of these “nos” were based on what people presumed were legal requirements. So, a significant part of our role was teasing out what was actually required by law versus what was custom or practice.

While using lawyers was only a small part of this leader's strategy for improving the school she was concerned about, we helped her identify previously unknown legal options, dispel myths about what the law required, craft correspondence behind the scenes to advocate for her position, and assess possible risks and roadblocks. We were able to help this leader because she identified a specific problem and wanted help solving it.

Leaders and the Role of Lawyers. A lawyer's job is to provide advice, not make decisions, for leaders. But in public education we often see lawyers act as gatekeepers. This means the lawyer, not the leader, frequently makes the final decision on a given course of action. This can play out in two ways.

One way is when a lawyer gives policy advice cloaked as legal advice, reflecting his or her opinion about what an organization should do rather than presenting all of a leader's legal options and their risks. To be sure, a lawyer should flag the risks of a given course of action and speak freely about his or her opinion, but the lawyer should be clear about what is personal or policy opinion versus what is an actual legal requirement. A lawyer's role is not to artificially close out options because he or she disagrees with leadership's direction.

Another way lawyers act as gatekeepers is when an education leader pushes his or her lawyer to serve as final decision maker, refusing to act until the leader gets his or her lawyer's blessing. This happens in part because the consequences of a misstep can be significant, and a lawyer's sign-off can feel like it provides security. However, a lawyer's role is to assess risk, frame options, and help solve problems, not to make the decision as to how much risk the organization should take on, or what the right course of action is in a given situation.

Recognizing and addressing the lawyer-as-a-gatekeeper problem is important because it gets to the heart of effective implementation, which starts with good, well-informed education leaders at all levels. While lawyers can help leaders understand the legal issues that affect implementation, leaders—not lawyers—should be the ultimate decision makers.

Promoting Productive Relationships Between Lawyers and Education Leaders

While there are many ways to promote more productive relationships between education leaders and lawyers, this paper focuses on two categories in particular. The first offers suggestions for

how leaders can make full use of lawyers when working through implementation issues. The second is more future-oriented, describing some ways the education and legal communities could better support leaders in understanding the law and using lawyers.

Some might look at the situation and conclude that we need more “education” lawyers. But providing leaders with increased access to lawyers will be of little value if leaders do not use those lawyers effectively. And from our perspective, education advocates should build this mindset among leaders first.

Leaders need to flip the paradigm of the relationship that often develops in K–12 education among leaders, the law, and lawyers. If lawyers have been acting as gatekeepers, leaders need to reassert their positions within their education organizations. To use a boating analogy, the leader is the captain, setting an organization’s direction, while the lawyer is the pilot, helping the organization navigate difficult waters to help it arrive at its intended destination.

With that in mind, what follows are suggestions for how leaders can work more productively with lawyers and how the education and legal communities can support leaders in that effort.

Embrace the Three Cs of Lawyering: Context, Context, and Context. Many joke (or cite frustration) about the fact that lawyers rarely give a straight answer and instead say, “It depends.” But it is true that a lawyer’s advice depends on that lawyer’s understanding of a situation’s context.

Why does context matter? Legal analysis without sufficient contextual understanding will miss the mark. First, without a sufficient understanding of all the relevant facts and circumstances, a lawyer may not be able to see all of the potential risks. As a result, down the road an issue may come up that catches the organization off guard, which could threaten to derail the organization’s goals. Second, without a comprehensive understanding of the problem that needs to be solved, the lawyer may not be able to offer alternative ways to achieve the organization’s goals.

Why might a lawyer lack context? Lawyers may lack context because they were not provided all the relevant facts, they do not understand leadership’s goals, or they do not understand the nature of the organization’s work.

To help lawyers understand the context of a given situation, leaders can:

1. Be open about leadership’s needs and goals. A lawyer is best positioned to help an organization when he or she understands the organization’s goals. Leadership must set the tone by being clear about their objectives and open about challenges.
2. Get lawyers out of their offices. While this is a bit of an overstatement, the basic point is that lawyers need to understand the practical facts on the ground to give the best counsel. Many times, lawyers—be they part of a general counsel’s office or external counsel engaged by an organization—do not have a good understanding of the day-to-day

situations faced by their public education clients. Practical exposure to the organization's day-to-day operations can better position lawyers to provide meaningful and effective counsel. Lawyers cannot help with what they cannot see.

Trust Your Instincts. To be sure, there are lots of hard stops—legal requirements that either mandate or prohibit a certain type of action—in public education. However, very frequently, what an organization believes is a legal requirement is not. Instead, practice becomes the cultural norm, and over time, the organization grows to believe it is a legal requirement. If something does not make practical sense, be sure to ask about it, as there may be a lot more legal options than people assume.

Unfortunately, neither are lawyers immune to believing practices are required by law when they are not. Leaders should never feel like they must simply accept a “no” from their lawyers. They should feel free to press lawyers to explain what legal requirement they are relying on and why that requirement supports their legal analysis.

Ask Open-Ended and Follow-Up Questions. Rather than ask, “Can I do this?” ask, “I want to accomplish X. How can I achieve this?” Another useful question can be, “Is there anything I have missed?” In addition, leaders should feel comfortable engaging with their lawyers, pushing them to further explain their conclusions and to clarify whether their advice is based on legal or policy concerns. Understanding where a lawyer is coming from can help a leader weigh the lawyer's recommendations.

Know That Different Lawyers Can Be Helpful in Different Situations. Public education entities are complex and multifaceted organizations that face a multitude of issues that have legal implications. For example, it is not uncommon for a school district to face issues related to contract law, employment law, public finance law, labor law, real estate law, land-use law, health law, construction law, procurement law, civil rights law, privacy law, special education law, and federal education law—and that is not an exhaustive list. While a lawyer with experience in a specific area is not always needed, it can be helpful to access lawyers with experience in a specific content area when undertaking a major change or confronting a thorny problem.

Accept That Risk Is Inevitable but Can Be Managed. Many education leaders understandably want to avoid legal challenges—be they contract disputes, regulatory enforcement actions, or lawsuits. Yet legal challenges are inevitable. Accepting that can free a leader to make the best decisions for an organization.

It is also important to consider that risk comes in all shapes and sizes. Lawyers are trained to evaluate legal risk, but leaders can help them understand other kinds of risks that are also mission critical to public education, such as the risks that schools will not improve, good teachers will not thrive, students will not succeed, or parents will not engage. These types of risks should factor into an education leader's decision making; therefore, it is important for leaders to be upfront with their lawyers about those types of risks.

How the Education and Legal Communities Can Cooperate

While the aforementioned ideas are quick tips that leaders could use, more robust supports around the law and legal issues could be offered by organizations that support education leaders, the education schools that train them, and the legal community.

Professional Development and Support. Education leaders receive training and professional development throughout their careers, and while this training may touch on school law, it rarely addresses the management skills needed for productively interacting with lawyers. The education schools and organizations that train and support education leaders can help address this gap.

Education Schools. Education schools can include units within their curricula that address how to use a lawyer. In particular, training could address issues such as:

- What skills to look for in a lawyer (whether hiring outside counsel or staffing a general counsel's office);
- What kinds of questions to ask a lawyer;
- How to use lawyers to get around roadblocks;
- How to understand a legal opinion;
- How lawyers think about risk, how leaders ought to think about risk, and how to balance competing risks; and
- What obligations a lawyer has to both leadership and the educational organization.

Education schools could collaborate with law schools to develop these units. This would make particular sense for leadership training programs that are part of universities with law schools. Directors of these programs, and even university heads, could promote greater collaboration between education training programs and law programs. Education schools developing and teaching units on leader-lawyer partnerships could also solicit the input of practicing attorneys.

Ideally, this training would be broader than just how to use a lawyer, helping leaders understand all of the noneducator professionals they have at their disposal, including, for example, accounting and finance, information technology, and communications staff.

National Organizations. National organizations such as the American Association of School Administrators, Council of Chief State School Officers, and National School Boards Association can also incorporate professional development training on how to use lawyers. This may include induction supports for new leaders and ongoing development for existing leaders.

Teacher and Principal Support Organizations. Organizations that support teachers and principals also have a role to play. While teachers and principals do not often interact with lawyers directly, giving teachers and principals access to legal support would be beneficial for two reasons.

First, we find that teachers and principals can be incredibly effective advocates for their students, schools, and districts when those individuals know what is possible under the law. This is particularly true when it comes to spending issues.

We occasionally conduct workshops for teachers and principals on federal grant rules. Although school-based personnel typically do not have independent authority to spend federal funds, they have the most direct experience with school and student needs and are responsible for working with their districts on school spending plans. Understanding what is possible under the law helps school-level leaders and teachers provide meaningful input that contributes to better spending on students.

For example, one teacher we met was frustrated by her inability to implement a coordinated approach to instructing her school's struggling readers. In large part because it misunderstood federal law, her district purchased different reading materials and segregated reading instruction for special-education students versus non-special-education students, even though both groups of struggling readers had the same needs.

Once she realized that a different and segregated reading curriculum for special-education students was not required by federal law (and in fact is often not permitted), she was able to advocate for a more coordinated instruction approach and ultimately helped restructure the school's reading interventions in ways that made more sense for students (and for the district's budget).

Second, connecting teachers and principals with lawyers helps lawyers gain more insight into the school systems they represent. As we discussed earlier, lawyers need context to provide the most effective legal advice, and no one has better on-the-ground insight than teachers and principals. Teacher and principal support organizations can provide professional development to teachers and principals on school law topics and can facilitate connections with lawyers by including them in conferences and encouraging districts to host semiregular meetings between their lawyers and school-level staff.

Building Legal Toolkits and Online Libraries. While we believe lawyers can help leaders access and understand the law, seeking legal advice should not always be necessary and is not always feasible. A leader who is unhappy with the legal counsel he or she gets may not have the option to get a second opinion. Additionally, many education leaders do not have access to lawyers at all. This is why we believe part of the solution has to give leaders easy, straightforward, and transparent access to legal information and in some cases, to lawyers. Two ideas could increase such access.

Online Law Libraries. Education organizations or law schools could support the creation of open-access libraries of legal materials relevant to K–12 education. Laws, relevant court cases, and law-related materials can be hard for nonlawyers in the K–12 sector to access. And even

though some tailoring would be necessary because the law varies from state to state and district to district, in general, having open access to sources of law can increase transparency.

In addition, there are multiple quasi-legal resources (such as in our practice, guidance or letters on legal topics from the US Department of Education) that would be helpful to capture in an easy-to-search database that is user friendly for nonlawyers.

A university with both a public policy or education program and a law school would be uniquely positioned to create and host such a library. Another option would be an open-source, Wikipedia-style platform where people can post information (such as guidance and regulatory documents) that would be relevant to others in the education field.

Legal Toolkits for Leaders. National organizations could support the development of toolkits or issue briefs that help leaders digest how various kinds of laws affect their organizations. Our clients are often surprised to learn about all the ways (many of which are not obvious) that federal grant rules influence their day-to-day operations, even in the classroom. Unpacking how different kinds of laws impact educational organizations and highlighting the flexibility available under given laws may help leaders better navigate existing rules and accomplish their own leadership objectives.

Increasing Leaders' Access to Lawyer Supports. While the focus of this paper has been helping leaders understand how to interact with lawyers, there are also ways that educational organizations can help provide leaders with better access to lawyer supports.

Lawyer-Facilitated Peer Collaboration. National organizations representing state and local education leaders can support their membership by facilitating peer-to-peer collaboration among leaders facing similar challenges. Creating space for education leaders to collaborate on implementation issues, with the support of lawyer advisers, would be valuable. Working groups, networks, or other types of peer collaboration can help frame legal issues and, more importantly, give leaders space to work through shared challenges.

Pro Bono Programs. Educational organizations could work with state and local bar associations to maintain a list of lawyers willing to provide pro bono services to public education entities. Many state and local bar associations sponsor pro bono programs that find, support, and in some cases train volunteer lawyers in high-need disciplines (such as tax, bankruptcy, landlord-tenant relationships, and small-business supports). Existing programs could be expanded to include education, or new programs could be started.

Law Clinics. Another idea is for law schools to sponsor clinical programs on education and school law topics. In a clinical program, law students work under the close supervision of professors or practicing attorneys to provide services to clients. Some law schools already have clinics in areas relevant to K–12 entities—such as clinics on special-education law and civil rights—but a clinic focused specifically on schools and school districts could be helpful.

Because parts of education law are location specific, it may make sense to pilot clinics in a few areas— either near major school districts or in a location that can serve several small districts that may not otherwise have access to legal support. But many strands of education law have common themes that could be addressed through a national technical assistance center that could offer support to states and school districts across the country, inform public policy, and even sponsor relevant research. As with many of our ideas, a university with both an education or public policy program and a law school would be uniquely positioned to support this kind of center.

Conclusion

We recognize how unappealing it might be to contemplate investing precious resources in lawyers or legal supports instead of directly investing in schools. To that end, we wholeheartedly support reducing regulatory burden in education. But the fact is that public education is highly regulated and part of a complex legal landscape. Leaders (and policymakers) ignore that legal landscape at their peril. In this context, lawyers can be an important resource, helping education leaders navigate the web of laws they face so they can accomplish their goals and get things done for the schools, students, and communities they serve.

Author Biographies

Melissa Junge (mcj@fededgroup.com) and Sheara Krvaric (slk@fededgroup.com) are attorneys at the Federal Education Group.