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EDUCATIONAL ACCOUNTABILITY AND MALPRACTICE

Overview

Experts agree that *accountability* is a driving force changing both the policy-making and operational aspects of every public school system in this nation. More specifically, the impact of *accountability for student academic progress* is evident at every level of contemporary public education, from pre-school to college and university.

The genesis of the *accountability movement* in public education, as we know it today, can be found in a much larger reform movement. It can be directly traced to the confluence of the following occurrences between the mid-1980's and 2000: the

- publication of books, articles and reports proposing needed reform in public education;
- sustained publication of national and international data showing the performance and progress of our nation's public school students in reading, science, mathematics, history, and geography;
- organized efforts of such powerful groups as *The National Alliance for Business* and *The Business Roundtable* to impose a "business, market/competition-oriented, data-driven model" on the management of public schools;
- impact of the *Total Quality Movement* (especially the teachings of T. Edwards Deming) on school system operations and quality control;
- efforts of parent and teacher organizations to establish site-based (school building-level) management as the primary means of school governance;
- initiatives of United States Presidents to establish national goals for public education, including specific national standards for student academic performance;
- avalanche of court challenges in over half of the states seeking *fiscal equity* and *adequacy* in public school funding;
- legislative efforts in several states (e.g., Kentucky) to totally restructure public education from the top down;
- growing consumer attitude of the general public and a shift from measuring inputs to measuring outputs (i.e., measuring the financial investment in public education by analyzing the relationship between dollars spent and results expressed in student performance outcomes);
- emphasis on ensuring that *all* students receive an *adequate* (basic, minimal) educational opportunity;

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- implementation of statewide student competency testing (e.g., end of course examinations, end of grade examinations) to measure student educational progress;
- establishment of statewide academic standards (in English, mathematics, science, social studies), and connecting student academic performance indicators to school accreditation, to school funding levels, and to administrator and teacher evaluation;
- introduction of such terms as “educationally bankrupt schools,” “failing schools,” “low performing schools,” and “academically successful schools;”
- publication and dissemination of “school report cards,” for regions, states, individual school systems, and individual schools, detailing such data as statewide student test scores, the frequency of student disciplinary actions, the number of teachers certified in the subjects they teach;
- initiation of state “takeovers” by state boards of education (e.g., New Jersey), in situations where local school systems are judged as “failing;” and
- implementation of state mandated exit examinations as a precondition of high school graduation (currently, *more than twenty states* have established such a requirement).

A capstone event in the *educational accountability movement* came in January, 2002, when President George W. Bush signed into law the *No Child Left Behind Act of 2001 (P.L. 107-110)*. This new and broad-based federal law requires, among other things, that students in low performing “failing” schools (as measured by standardized test results) be given an opportunity to transfer to a higher performing “successful” school (with free transportation provided by the local school district). The law also requires that school officials inform parents of teachers in their child’s school who are not qualified to teach what they are teaching.

Thus, in the new millennium, public pressure is on state and local school officials to accomplish three *accountability-driven* objectives. *First*, to ensure taxpayers that all dollars earmarked for public education are being wisely spent. *Second*, to demonstrate a positive return (expressed in terms of student academic progress) on the growing financial investment made in this nation’s future citizens. *Third*, to show that quality control measures are in place in every school, holding school officials, administrators, and teachers *directly accountable* for student achievement or the lack thereof.

It must be emphasized, however, that *accountability* is not a simple concept. It is a multifaceted process involving reporting, analyzing, explaining, justifying, and taking responsibility for results. While contemporary public school systems are well into the reporting and analyzing dimensions, and the explaining and justifying activities are now underway, the last piece of the *accountability* puzzle, *responsibility for results* (expressed in terms of student academic outcomes) has most recently become the focus of a national debate.

Emerging Issues

Who is directly responsible when students fail to achieve acceptable scores on statewide student academic competency tests (local school boards, superintendents, building principals, classroom teachers, parents, or students)? Who is at fault when an entire school system, or a particular school in a school system, fails to meet state-mandated accreditation standards? Will parents of “failing students” in “failing schools” go to court seeking remedy? Will litigating parents allege that school officials and staff have “failed in their duty” or “breached their responsibility” to provide students with an adequate (basic, minimal) education? Will dissatisfied parents charge local school officials and staff with “educational malpractice?” What will the courts say? Currently it is unclear as to any definite answers to these questions; however, one can reexamine past case law from various states and speculate.

Case Law

In the late 1970's, two state court decisions (one from California and one from New York) gained considerable attention in the education community. In the California case, Peter W. v San Francisco Unified School District (1976), a high school graduate went to court seeking damages from his former school system for what he alleged was "inadequate instruction." His inability to read and write, he said, was caused by the negligence of his teachers. Ruling in favor of the school system, the court focused on the complexities of fixing fault where a student has "failed to learn." In the court's view, "Unlike the activity of the highway or the marketplace, classroom methodology affords no readily acceptable standards of care, or cause, or injury. The science of pedagogy itself is fraught with different and conflicting theories of how or what a child should be taught.... [T]he achievement of literacy in the schools, or its failure, are influenced by a host of factors which affect the pupil subjectively, from outside the formal teaching process, and beyond the control of its ministers."

In the New York case, Donohue v Copiaque (1979), an unemployed, eighteen-year old, former student and his parents brought a "failure to educate" claim against a public school system. The young man could neither read menus nor take the written portion of test for a driver's license, and his mother had to help him fill out job applications. The parents claimed that school officials (1) should have provided their son with special help (in the lower grades), (2) should not have promoted their son from grade to grade, (3) should have advised them of their son's reading problem, and (4) should have provided appropriate personnel and facilities to respond to their son's needs. The court ruled in favor of the school system, because there was no precedent for holding public school officials liable for "failure to educate a student."

In 2000, a Connecticut appellate court decided a parent's claim that his three-year old daughter had been exposed to "reckless instruction of an improper curriculum." Vogel v Maimondes Academy (2000), involved a father's objection to his daughter's enrollment in a family life education-type program intended to help children develop interpersonal skills, make sound value judgements and moral decisions. More specifically, he took issue with a part of the course that involved teaching children the difference between "proper and improper touching." Characterizing the father's lawsuit as one of "educational malpractice," the court was unreceptive to his claim. In the court's view, "vast numbers of states have rejected educational malpractice claims sounding in tort." Citing both Peter W. and Donohue, the court opined that claims of educational malpractice put the judiciary in the awkward position "of defining what constitutes a reasonable educational program and deciding whether that standard has been reached." The appellate court added that an educational malpractice claim based on a contract theory also would be unsuccessful.

In 2001, a Louisiana appellate court heard a related case where a parent sued the Orleans Parish School Board on behalf of his son and 2,600 other students. More specifically, in Tollett v Members (2001), the parent alleged that the school board allowed students to be taught Algebra 1 by teachers who were not certified. Subsequently, students were denied credit (for the course) applied toward high school graduation. In his complaint the parent charged board members with "willful neglect, and intentional disregard of their duties," for knowingly allowing students to be taught by uncertified teachers. The court ruled in favor of the school officials. In such a case as this one, said the court, public school board members can be found liable only if plaintiff can show that the damage suffered by students was directly caused by "willful and wanton misconduct" of school board members. In the court's view, the burden is on the plaintiff parent to show this and he failed to carry his burden.

Evident in the above (albeit limited) case law is the traditional attitude of judicial restraint regarding matters of pedagogy and student learning. Judges hearing past complaints of educational malpractice maintained their role of deciding questions of law, and resisted an opportunity to decide what is or is not educationally sound policy

or practice. In this writer's opinion, the case law examples cited above demonstrate a reluctance on the part of judges to recognize a student's "failure to learn" as grounds for granting remedy in a court of law. In essence, it was not possible to fix blame using existing tort law and contract law standards. Thus, absent a showing of deliberate, willful, or wanton conduct on the part of school officials or classroom teachers to deny a student access to a basic educational opportunities, parents will not prevail in settling educational accountability disputes through litigation.

Policy Implications:

In the current climate of *accountability for student academic progress*, the policy implications are clear. It is vitally important that school officials assume a proactive posture. Therefore, it is recommended that the policies of a school system clearly state that:

- the board, administration, and staff are committed to providing every student in the school system with equal access to a quality academic education;
- the curriculum at each school incorporates and is consistent with the basic academic requirements articulated in the mandated statewide standards of learning;
- all student's are regularly assessed and evaluated to determine their (1) levels of mastery in the required academic subjects, (2) needs for remedial help and assistance in each of the required academic subjects, and (3) eligibility for participation in required remedial programs;
- all parents are (1) kept regularly informed of their child's academic progress, (2) treated as active and responsible partners with administrators and classroom teachers in their child's educational program, (3) invited to actively participate (*e.g.*, as tutors, volunteers, readers) at school, and (4) encouraged to request immediate help and early assistance for their children if and when problems are evident;
- all classroom teachers will receive regularly scheduled in-service training and other professional assistance intended to develop and improve their teaching methodologies and strategies, especially in the required academic subjects; and
- *accountability for student academic progress* (*i.e.*, progress toward mastering the basic curriculum) is an important item in evaluating the qualifications, effectiveness, and productivity of every administrator and staff member (especially classroom teachers), and *is factored into every personnel decision* (*e.g.*, *recruitment, hiring, assignment, salary, non-renewal, and dismissal*).

Resources Cited

No Child Left Behind Act (P.L. 107-110), 20 U.S.C. 6301, et. seq. (2002)

Donohue v Copiaque Union Free School District, 418 N.Y.S. 2d 375 (N.Y. App. 1979)

Peter W. v San Francisco Unified School District, 131 Cal. Rptr. 854 (Cal. App. 1976)

Vogel v Maimonides Academy, 754 A. 2d 824 (Conn. App. 2000)

Tollett v Members of Orleans Parish School Board, 782 So. 2d 681 (La. App. 4th Cir. 2001)

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