

“I’M CALLING MY LAWYER”

Public Agenda Pilot Study on How Litigation, Due Process and Other Regulatory Requirements Are Affecting Public Education*

Prepared for Common Good

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For health care providers, litigation is a front-and-center issue. Hospitals, drug makers, and associations that represent doctors and other medical professionals have called loudly and repeatedly for relief. The American College of Obstetricians and Gynecologists, as just one example, has labeled 13 states as “Red Alert” zones. The organization says that the cost of malpractice insurance and the likelihood of being sued now “threatens the availability of physicians to deliver babies” in these states.¹

But is litigation—and the adaptations made by individuals and institutions to avoid it—as urgent a problem for professionals in other fields? In this paper, Public Agenda takes an exploratory look at how litigation, due process and other regulatory requirements are affecting public education and the professionals who work in it.

An Honorable History

In many ways, litigation in public education has an exceptionally honorable history. Lawsuits were instrumental in ending segregation and extending public education to children with disabilities. There are significant lawsuits now in the courts addressing a variety of issues ranging from equality of school funding to vouchers and school choice to whether schools should ask children to pledge allegiance to “one nation under God.”

But can there be too much of a good thing? Are there too many lawsuits over matters that could be resolved in a different way? How does litigation—and the regulations, procedures and policies connected to it—affect professionals working in schools today? In this paper, Public Agenda reports on the results of a small-scale pilot study looking at the views of teachers,

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¹ See, www.ACOG.org. The 13 states named as having a crisis are: District of Columbia, Florida, Georgia, Mississippi, Nevada, New Jersey, New York, Ohio, Oregon, Pennsylvania, Texas, Virginia and Washington.

principals and superintendents, plus a small number of central office administrators, on this topic. The pilot was conducted for Common Good, a bipartisan organization whose mission is to call attention to America's lawsuit culture. Public Agenda is a nonprofit, nonpartisan research organization that examines public thinking about a wide range of social and political issues. Public Agenda itself takes no position on the role of litigation in education or other areas of American life. Common Good gave Public Agenda complete freedom to use our own judgment and expertise in conducting and reporting this research.

The purpose of this small-scale study is to raise questions, stimulate discussion and provide hypotheses for further research—not to suggest definitive conclusions. To conduct the study, Public Agenda reviewed its existing storehouse of research on public education, including hundreds of focus groups and dozens of national surveys of teachers, parents, students, principals and superintendents completed over the last decade. We rely particularly on a small number of questions about litigation and due process included in nationwide surveys of public school teachers, principals and superintendents conducted by Public Agenda.² The primary source of material for this paper comes from three focus groups conducted by Public Agenda and devoted exclusively to this topic: one with superintendents from school districts across the state of Illinois, one with principals and central office administrators in suburban New York City, and another with classroom teachers, also from a school district in a suburb of New York.

Limitations of the Research

The concerns captured in the following pages are often compelling, but it is vital to underscore the limitations of this research. Public Agenda has not conducted a full-fledged study in this area. Instead, we are reporting on a small number of national survey findings combined with a small number of focus groups.

² We refer to three Public Agenda studies frequently throughout this report. *Trying to Stay Ahead of the Game: Superintendents and Principals Talk about School Leadership* (Public Agenda 2001) is a study based on national random samples of 853 public school superintendents and 909 public school principals. *Stand by Me: What Teachers Really Think about Unions, Merit Pay and Other Professional Matters* (Public Agenda 2003) is a study based on a national random sample of 1,345 K-12 public school teachers. Both are available for downloading, free of charge, on www.publicagenda.org. We also refer to findings from a forthcoming study, to be released in November 2003, called *Rolling Up Their Sleeves: Superintendents and Principals Talk about What's Needed to Fix Public Schools*. It will be available for downloading on www.publicagenda.org on November 19, 2003.

Some of the most intriguing and perhaps troubling observations in this paper come from the focus groups. Although focus groups are useful tools for observing how people talk about issues and for generating hypotheses for further research, they are not reliable predictors of how many people hold a particular viewpoint. What's more, this particular project includes only three focus groups confined to two geographic locations. It is easily possible that focus groups conducted in other parts of the country or in different kinds of school districts could produce different results.

That said, the concerns and patterns of thinking described here emerged strongly and repeatedly, and they came from a number of different individuals. In many cases, they echo findings from large-scale national studies, and where possible, we cite survey findings to confirm—or at least buttress—the observations we report below.

These are among the most important:

Observation No. 1: For many teachers and principals, the possibility of being sued or being accused of physical or sexual abuse of a student is ever present in their minds. Many say they completely avoid touching students or being alone with them to avoid this hazard.

Observation No. 2: For many principals and superintendents, avoiding lawsuits and fulfilling regulatory and due process requirements is a time-consuming and often frustrating part of the job. Special education, discipline and sexual harassment, and staff issues seemed to be the most problematic areas.

Observation No. 3: According to many teachers and school leaders, litigation and due process requirements often give unreasonable people a way “to get their way” even when their demands are unwarranted. School leaders appeared divided over whether agreeing to an unjust settlement is preferable to going to battle in the courts.

Observation No. 4: Litigation and the threat of litigation often take a personal toll on professionals in education. An unwarranted charge and/or the prospect of dealing with litigation can create enormous anxiety and anguish, sometimes enough to derail a career.

Observation No. 5: Despite their concerns, many educators say protecting children from physical or sexual abuse is a higher priority than reducing the threat of litigation. Many appear to believe that lawsuits and procedures are the price we pay for protecting children.

Observation No. 6: For many educators, the ramifications of the “legalization” of education are distasteful and sometimes disturbing. Still, at the current time, most appear to want modifications, not sweeping change. In fact, many appear somewhat ambivalent about just how much change they would like to see. Special education is an exception. This is one area where superintendents and principals at least are crying out for relief.

Observation No. 1: For many teachers and principals, the possibility of being sued or being accused of physical or sexual abuse of a student is ever-present in their minds. Many say they completely avoid touching students or being alone with them to avoid this hazard.

None of the teachers interviewed for this pilot project had ever been sued for conduct on the job, although a number of principals and superintendents had been named in lawsuits in their districts. But whether educators had personal experience in this realm or not, concerns about litigation cropped up repeatedly during the discussions. Nor is this the first time that Public Agenda has heard teachers especially comment on this fear. In focus groups for other projects over the years, teachers have told stories or expressed anxiety about false accusations and extreme charges from disgruntled parents and students.

Public Agenda survey research also has documented a strong sense of vulnerability among educators, along with a broad belief that parental and community support is no longer a given. In fact, 72% of teachers agree that “too many parents automatically take their children’s side” if there is a dispute with a teacher.³ In Public Agenda’s forthcoming study of superintendents and principals, large majorities predict that parents and community members will blame educators if their schools fail to make progress under the No Child Left Behind Act; only negligible numbers think people will rally to the schools with funding and support.

For the teachers we spoke with, the possibility of an accusation or lawsuit was a perpetual fear—one that seemed to reside just beneath the surface as they went about their daily routine. One veteran teacher, for example, reported that he was no longer so quick to break up a student fight. “...Now the climate is different,” he commented. “It’s more thinking of litigation. What’s going to happen if...? [When I broke up fights] back then, I was thinking about the kids. The two kids are fighting, I don’t want them to hurt each other, and I don’t want other kids to get involved...But that kind of simplistic thinking is over now.”

³ *Playing Their Parts: Parents and Teachers Talk about Parental Involvement in Public Schools* (Public Agenda 1999).

A Comforting Touch Could Be Misinterpreted

For many teachers, the chance that a friendly or comforting touch might be misinterpreted was an entirely realistic danger. Especially among the middle school and high school teachers we spoke with, the rule seemed to be never, ever reach out and touch a student. “There are a lot of things you can’t do,” one teacher reported. “You can’t even go up and put an arm around the kid that you think isn’t doing well today.” Another teacher seconded the advice: “It’s not a good idea.”

A few teachers who taught very young children reported that they themselves rejected the hands-off approach. But even here, their actions were hardly spontaneous and worry-free. “Teaching elementary-level children, it’s so disturbing that you can’t even give them a hug anymore, and they do beg for it,” said one teacher. “I do think twice about it, even though I still do it. I let them do it to me. But it’s just so against my character. I can’t stand it. They want a hug.”

Interviews with principals and superintendents tended to confirm the prevalence of a “do not touch” rule: “At high school,” one principal told us, “we have a discussion in a faculty meeting at the beginning of the year that we should never touch kids...Period. A good touch can be interpreted as sexual harassment, and the other touch can be interpreted as corporal punishment. But you’re on shaky ground, depending on what the student goes home and tells mom and dad.” In fact, in our survey to be released mid-November 2003, the findings suggest that over half of both superintendents and principals agree that the threat of litigation has made educators “wary of being alone with kids or showing them affection.”

Principals said they too often see themselves as vulnerable to false accusation or misunderstanding. “You’re aware of where kids sit at your table so they’re beyond an arm’s length...just so if there are any accusations, you can say ‘How could I touch him, he’s ten feet away?’...These are things you just have to make part of your subconscious all the time.” As one administrator confessed, “...When I go to some of the schools, and kids hug me, I’m always very uncomfortable—even if they’re like 7 years old. So I always make sure there’s an adult around. I’m serious. In case I need a witness, I’ll remember teacher so-and-so saw this.”

The Door Stays Open

Based on this pilot, today's environment seems most problematic for male educators. For many that we spoke with, avoiding giving a child a hug or a supportive pat on the back was merely the beginning. It was clear that the men in the focus groups routinely took extra steps to insure that they were never alone with a student, never in a situation that could lead to questions or where a student's word could be pitted against theirs. "A lot of times, it's not even a hug anymore," said one male teacher. "...I've been told it's not even a good idea to have a student in the room, especially being a male, where it's just you and that other student. There should always be a third person."

Another male teacher said: "If I had any control over the situation, I would never allow myself to get in a position where I'm in a room, particularly [with] a young lady...If it has to be a private conversation, the door stays open." Yet another teacher, this time a woman, also agreed: "Yes, we're told to leave the door open. We tell the new teachers, never be alone with the kid and always leave the door open."

One teacher related a story that might be funny if there weren't genuine anxiety and unease beneath the surface. "Even today," he told us, "the buses are called, and children go out one at a time. It so happened I have one child left waiting for the bus. I was like a bee in the room, and it was on my mind the whole time I was there, that kid was there and now what do I do? Do I ship him to another classroom because he's the only one left in the room? How would he feel? He was sitting there quietly doing his work, but I just flitted around the room. It was on my mind. Here it was of no fault of my own, but here I was in a room with a kid."

Observation No. 2:

For many principals and superintendents, avoiding lawsuits and fulfilling regulatory and due process requirements is a time-consuming and often frustrating part of the job. Special education, discipline and sexual harassment, and staff issues seemed to be the most problematic areas.

Teachers, principals and superintendents could all face lawsuits as a result of their own conduct on the job, but principals and superintendents have an added layer of responsibility. It is their role to establish policies and procedures that guard against litigation. Based on the focus group comments from this as well as other Public Agenda research, most superintendents and principals see legal issues as just part of a day's work, albeit one that is often aggravating and disheartening. In Public Agenda's 2001 survey, 50% of superintendents said that in their district legal issues and litigation got more attention than they deserved, while 43% said they got the right amount.⁴

“A Constant Threat”

“On a regular basis people are saying, ‘If you don't do this, I'm going to sue you,’ one administrator told us. “My response is always, ‘That's fine, get a lawyer, we'll address this situation the way it should be addressed...’ It's a constant threat. I think it's just the nature of society at this point. Sometimes they may sue, more often than not they won't...But once you know this exists, I'm always very mindful about how I speak and what I say and the words I choose and how I present myself. You always want to be on the side of the child and do what's right for the child and all of that first.”

⁴ *Trying to Stay Ahead of the Game: Superintendents and Principals Talk about School Leadership* (Public Agenda 2001).

A superintendent said something similar: “I think we live in a litigious society, and you hear that all the time. People say, ‘Well, we are going to take you to court. We are going to sue you for this.’ But the reality is they don’t that often...I mean you have an unhappy event, and they use that as a threat...We are always conscious of it, so that you don’t put yourself in that situation.”

Concerns about litigation and the procedures needed to deter it covered many areas. Based on this pilot and other surveys Public Agenda has conducted in recent years, special education is a top concern for principals and superintendents. It’s safe to say that most respect the good intentions and the real benefits that special education legislation offers to children who need more help, but many also see it as a magnet for litigation. Our upcoming study of superintendents and principals, for example, will show that very large majorities believe special education law gives parents a sense of entitlement and make them “too quick to threaten legal action to get their way.”

“I Want Them in that Private School”

One administrator offered a typical example: “[We made some] clear procedural errors, [but] it was not something that...resulted in the child being offered an inappropriate education. [But for the parents] it was all about ‘I want them in that private school, and I want you to pay the tuition,’ when they could absolutely be served appropriately in the public school. But they want them in the private school.” A superintendent complained about the money and the time his district had lost in a special education case: “The only area that we really faced any litigation [was] in areas of special ed...We’ve had a hearing going on for over 30 days on a special ed issue. A parent objecting to her child’s education has cost that district over half a million dollars in legal fees. We acquit murderers in shorter times than we spend on an issue like this.” A Public Agenda survey of parents of children with special needs showed that threatening legal action is hardly a rarity: 16% of special ed parents say they have considered suing; the number jumps to 31% among parents of children with more severe disabilities.⁵

⁵ *When It’s Your Own Child: A Report on Special Education from the Families Who Use It* (Public Agenda 2002).

Sexual harassment—whether it concerned teachers and students or behavior among the students themselves—was another problem area, one that presented dilemmas and demanded judgment calls. “...If we don’t pursue it,” said one administrator, “and [we] look at it as two little kids and one just grabbed another...[If] we see it as a discipline problem, and the parent sees it as sexual harassment. If it happens again, well, we didn’t take any steps the first time, so are we liable?...I think so many of our decisions now are complicated.”

“We Have a Document That Shows...”

So complicated in fact that many educators we spoke with described the detailed policies schools have in place in this area. “Every year we subject everyone to a refresher course, and for our newest employees, a training section on sexual harassment...To protect the interests of the district, we...make sure everyone has had the opportunity to be involved...The compliance officer in our office does the preliminary information about it and gives some examples, and we show the video. We do have people sign that they’ve seen it. We do that because if there’s any kind of litigation, let’s say there’s a situation where an employee is being accused of sexual harassment. The employee might say, ‘Oh, I had no knowledge that this is the wrong thing to do.’ We can go back into their file and say, ‘Wait a second. You went through the training, and in the training we did X, Y and Z. We have a document that shows you were present at the training.’”

In the focus groups, the responses were mixed on whether such explicit procedures tie their hands or offer a way for them to get past sexual harassment issues and tend to other business. One principal described the drawbacks: “With the new sexual harassment mandates...we have to report things if we have information about student behavior, and it’s out of our hands. We don’t have any decision-making authority. It’s dictated to us how we do it, so we do reports. In some ways you lose that connection. The parents are angry; the student is sometimes bewildered. You’re trying to explain, ‘This is what the policy is. I’m mandated to report this.’”

“I Go Right to the Compliance Officer”

But another principal seemed more comfortable with—and perhaps even relieved by—the procedures his district had set up. “If I think there might be anything, if I get any kind of clue at all, I go right to the compliance officer immediately. I just kick right into the procedure. I don’t want to talk to anybody about it. I don’t want my judgment in any way to come in... Before... I probably would have used my judgment more about whether or not I would report it—and now it’s just automatic. Anything that I think is in the ballpark, I call her up and I talk to the lawyers.”

A Six-Year-Old with a Pocket Knife

Discipline and zero tolerance policies presented another series of dilemmas. Based on findings from our forthcoming study, majorities of superintendents and principals say today’s emphasis on “documentation and due process” makes it “difficult to take action against students who are discipline problems.” But policies and procedures can result in too much punishment as well. “I’ll always cherish the day that the 6½-year-old on the third day of school brought a pocketknife to school because her grandpa gave it to her,” said one administrator. “It was a very special thing, and the teacher asked the children to bring in something that they cherished. So the 6½-year-old girl... brought this in, and I had to suspend her for several days. You can imagine the conversation with the parent... There was no discretion on my part at that time, and I wish there could have been because this clearly was not being brought in to do anybody harm. The child was following the teacher’s instructions... and never would have imagined this little thing being anything different than a cherished item.”

Staff Issues Too

There was one other area that worried many of the superintendents and principals we spoke with. “Some of it is staff issues too,” said one of them. “It’s not just student issues or community issues.” Among the complaints were time-consuming processes for removing unsatisfactory teachers, confining work rules and, sometimes, an antagonistic “gotcha” attitude from the unions.

“I am always very mindful of contracts with the union [and] potential litigation,” said one of the superintendents in the focus groups. “The last big litigation that occurred...where I am at was a teacher litigation. A clause in our contract about vacancies and transfers, and it went on for about a year and a half...it was expensive for a district our size.”

If There’s a Problem...

But the complaints were not always about litigation per se. Sometimes educators seemed to resent the atmosphere created by contracts and regulations and procedures for due process. One principal blamed contentious union reps for creating a less-than-ideal working environment in his school. . “I work with the union leadership a lot...What you can begin to surmise is one of their non-stated goals is to perhaps undermine...relationships...[between] teachers and principals, while at the same time building the relationships between the union leaders and the members... [If there is an issue] they try almost to teach new teachers not to [go to] the building principal but to trust the union rep.”

There is also frustration about teacher tenure and the strong job protection it provides. In *Trying to Stay Ahead of the Game*, Public Agenda’s 2001 study about school leadership, majorities of superintendents and principals said they wanted more freedom to remove ineffective teachers and reward outstanding ones. Roughly 7 in 10 said that “making it much easier for principals to remove bad teachers—even those who have tenure” would be a “very effective” way to improve leadership in public education. In fact, out of 11 different ideas measured in the survey, making it easier to remove poor teachers was the top vote-getter.

Not surprisingly, attitudes among teachers are quite different. Although nearly half (47%) of teachers agree that “the union sometimes fights to protect teachers who really should be out of the classroom,” more than 8 in 10 say that “without a union, teachers would be vulnerable to school politics or administrators who abuse their power.”⁶

⁶ *Stand by Me: What Teachers Really Think about Unions, Merit Pay and Other Professional Matters* (Public Agenda 2003).

Observation No. 3

According to many teachers and school leaders, litigation and due process requirements often give unreasonable people a way “to get their way” even when their demands are unwarranted. School leaders appeared divided over whether agreeing to an unjust settlement is preferable to going to battle in the courts.

Looking back at some of the historic lawsuits in education—especially those aimed at insuring civil rights and ending segregation—it would be natural to think of litigation as a way for people who have been wronged to find justice. Trial attorneys involved in lawsuits against major social institutions often make precisely this case.

“They Settled and Got a Ton of Money”

But the first thought among the educators interviewed for this project seemed to be exactly the opposite. Repeatedly, they saw litigation as a way for unreasonable, greedy or irresponsible people to get their way. For one principal we interviewed, the motive for litigation was all too obvious. “[In] my experience, I really believe that they do it for money. I don’t think right or wrong has anything to do with it, in my experience. Sometimes it does. Sometimes I think we are wrong. But I think what gets people to lawsuits most of the time is they just want money. If you’re willing to stoop low enough, you’ll always get the money.”

This principal went on to tell one particularly riling story: “It’s just amazing to me. My first experience was I used to be principal at [school name]. This child came running down the hallway and fell and hit the wall and broke a tooth. Sitting there with the lawyers, the kid says, ‘Oh yes, first this teacher told me to walk, then this teacher told me to walk’ [and then a third. But the attorney says] ‘Why didn’t you have number four teacher around the corner...how come number four wasn’t there?’ They settled and got a ton of money... They did it because they could.” This same principal told us: “In two cases I’m involved with, I’ve gotten friendly with the family. I’ve known them for ten years. I know what they’re doing—they try to get money. At the emotional level it’s very draining, and it never goes away.”

The Affluent, Feel-Entitled Community

Even in special education cases, the prevailing sense was that money is the root cause, not a legitimate claim. “That’s certainly the case with special education,” one administrator explained. “No matter what you do...In the last three years, it’s been an incredible number of people. By and large, it’s more affluent, feel-entitled community members who want a private school education for their child, and they don’t want to pay for it. What frustrates me is [that] in not [a] single one of the cases have we been offering the child inappropriate education. They just want ‘private school’ education. So they come in with very high-powered attorneys, and find the one page where you didn’t dot the ‘i.’ So we ended up settling because it would be much too costly to go through litigation.”

Despite the apparent injustices involved—and the perceived give-away of taxpayer dollars—many of the school leaders we spoke with said that settling cases, rather than fighting them, was standard operating procedure. “They write the checks out and go. They try not to go to court, they try to settle it,” said an administrator. A principal added: “I think they mostly settle, so that’s good. But I think, personally, they take a big toll on you.”

“We Would Have Just Rolled Over”

But the focus group with superintendents suggested the tension and compromise that accompanied these decisions. “I am personally against [settling a case]. I don’t care if it is a special ed case, an expulsion. I think if you are right, you are right. [But] you are not always in a district that has the financial resources. Our attorneys are \$200 an hour. The clock starts ticking when I pick up the phone.” Another superintendent responded: “Do you have the resources—we would have just rolled over. There is no way we could [fight]. We would have said, ‘Fine, O.K.’ We are not going to spend taxpayer money. We don’t have the taxpayer money.”

For one administrator, the real injustice was a fundamental lack of respect and appreciation for what schools do: “A school district like ours, made up of more than 800 adults, we’re going to make mistakes...everyone makes mistakes. When kids make mistakes, when their parents make mistakes, we go about trying to fix those mistakes in very tender, nurturing, holistic kinds of ways. When we make mistakes, the reaction to our mistakes is punishment by the State Education Department, and our name goes on a list, and public humiliation or lawsuits, things

like that. I've always maintained an educational institution probably has the utmost responsibility to treat people it comes in contact with in the most humane way, yet that's not how we're treated by all of our constituents out there."

Observation No. 4

Litigation and the threat of litigation often take a personal toll on professionals in education. An unwarranted charge and/or the prospect of dealing with litigation can create enormous anxiety and anguish, sometimes enough to derail a career.

Public Agenda's interviews with educators, both administrators and those in the classroom, brought out another aspect of the litigation issue—the personal toll it can take on professional educators suddenly thrust into the legal system. More than one talked about the trauma of being named in lawsuits and the shock of being cross-examined. “But once you’ve been deposed,” said one administrator, “you know how serious it is, and every single word you say is a potential lawsuit waiting to happen. The way you phrase something or the way you state it can be totally taken out of context. So I know I am very mindful of everything we do.”

Another principal described what it was like to go through the experience: “Catch me at a bad time. Part of it is I’ve been named now three times in lawsuits, and it’s where they sued the superintendent and then [name me] as principal and personally. That’s what these lawsuits say. You try to blow it off, and you know you’re covered by our insurance company. But then you go to these depositions and they’ll ask you about a conversation I had three years ago in the hallway. ‘Who was there? Who else heard? What exactly did you say? Did you keep any notes?’ I think it’s devastating.”

Careers Could Be Ruined

Teachers, too, talked about the unpleasant consequences of being targeted. For them, a complaint or charge—no matter how false or unreasonable—could be completely unnerving, even to the point of driving some to leave the profession. One teacher told this story about a colleague: “I know an incident where this kid said, ‘The teacher said this to me.’ It was interpreted the wrong way. That teacher was called in and is no longer working there. The teacher quit because he didn’t want to go through the whole legal process. The guy was older...He said, ‘This isn’t worth it. If I have to go through the whole legal system because she said this, and I said that.’”

Another teacher related a similar episode: "...Accusations were made, and sometimes the teacher retired or resigned rather than face the aggravation of going through it. Sometimes they were beyond retirement age and decided to walk away from it."

A skeptical observer might reasonably wonder whether the incidents these teachers describe were really so clear-cut, whether teachers who are truly innocent would leave their jobs rather than defend themselves. But the educators we spoke with had no trouble whatsoever believing that this was the case. For them, the prospect of being accused of sexual or physical abuse of a child was shattering, in a very immediate and personal sense.

What's more, surveys suggest that public school teachers already feel vulnerable and unprotected by the school systems and communities they work for. In *Stand by Me*, Public Agenda's 2003 study on the teaching profession, 76% of teachers said that teachers have become "the scapegoats for all the problems facing education." Should they face unfair charges, 77% said they would have "nowhere to turn" other than their union. A St. Louis teacher interviewed for that study put it this way: "We live in a world where all they have to do is whisper that we hit them, and we're gone. I already had this year a kid accuse me of hitting him. A lot of the kids know they can go over your head..."

Observation No. 5

Despite their concerns, many educators say protecting children from physical or sexual abuse is a higher priority than reducing the threat of litigation. Many appear to believe that lawsuits and procedures are the price we pay for protecting children.

The teachers and administrators we spoke with for this pilot study were quick to suggest that children sometimes make false charges of abuse, but they were equally quick to acknowledge that genuine abuse—both physical and sexual—could take place in schools. The bottom line for them: the children must be protected, even at considerable cost. In fact, most of the teachers we spoke with seemed to believe that formal reporting procedures, zero-tolerance mandates and increasing numbers of complaints and lawsuits are an improvement over the days when abuse was sometimes swept under the rug. Educators in the focus groups pointed out the downside of today’s approach, but, in the end, they did not quarrel with it.

“It’s a [state] law,” said one teacher when he was asked about some of the requirements in his district. “Poor Lisa Steinberg who got killed by her father, right? That’s how they put that law into place. It was reported to the teacher. The teacher saw the child being abused and never reported it until [the child] died. The law was written and came into [state] education law. We are obligated to report any incident. Obligated by law, and I believe we’re liable somewhat if we don’t report it to the proper authorities in the school, the nurse, the assistant principal.”

Erring on the Side of Caution

The educators in our focus group seemed to have absorbed the message and accepted it. Many had acted on it and believed—even in less-than-clear circumstances—that their actions were correct. One teacher told this story: “There was a girl walking down the hall, and one of my students was after her and wanted to kiss her. She really didn’t look like she wanted to be kissed...so I reported it because I thought a lot of kids do feel uncomfortable...Some of the boys want to kiss the girls. I don’t know if they really want them to. Are they kidding around? She said it was no big deal. I don’t know if she didn’t want to make it a big deal. But she didn’t look like she was happy about it, so I felt I should report it.”

One educator saw pros and cons, but he too believed the district's approach had merit. "I think it falls on the side of caution: things do happen. The negative side of it is we're being held accountable for everyone's behavior. We're all responsible for it. The positive side of it is the children are safe. I've seen it, and I'm very happy that [schools have] intervened..."

Another teacher, this time referring to a child who might be depressed and suicidal, made a similar point: "I err on the side of being safer than sorry. A kid writes in his journal, 'I hate school. I'm going to kill myself.' You don't let that sit. 'Good job, nice penmanship.' You have to take that seriously and [ask] a psychologist or somebody [to] take it further and see if anything is bothering the child."

"If We're Protecting One Kid..."

One principal seemed to sum up the general feeling: "I think, to a great extent, as horrible as the litigation is sometimes, if we're protecting one kid because of that, it's probably worth it. I don't think you can just ignore that all these terrible things are happening in the world to kids by adults in positions of responsibility, seemingly every day...98% of people in responsibility don't do anything like that, but certainly for the last two years, nearly every time I pick up a newspaper, there's something."

Even before the publicity surrounding sexual abuse scandals in the Catholic Church, Public Agenda's research among parents suggested that fears about children being physically or sexually abused are high. In a study about child care, for example, Public Agenda found that more than 6 in 10 parents of younger children said they were "very concerned" that children could "suffer physical or sexual abuse" at day care centers, with another 26% saying they were somewhat concerned. In that same study, perhaps analogous to what we heard from the educators here, 56% of child care professionals and activists said that parents are "being sensible when they express such concerns."⁷

⁷ *Necessary Compromises: How Parents, Employers and Children's Advocates View Child Care Today* (Public Agenda 2000).

One parent interviewed for the child care study acknowledged that the real risk to her child was very small, but even that, she said, was unacceptable. “I could never live with myself if I put my kids in a situation where they could be jeopardized.” The teachers we interviewed seemed to echo this point-of-view: When it comes to the children they teach, this kind of risk is simply not something they are prepared to accept.

Observation No. 6

For many educators, the ramifications of the “legalization” of education are distasteful and sometimes disturbing. Still, at the current time, most appear to want modifications, not sweeping change. In fact, many appear somewhat ambivalent about just how much change they would like to see. Special education is an exception. This is one area where superintendents and principals at least are crying out for relief.

In the focus group with teachers, many talked somewhat wistfully about the “do not touch” and other child-protection policies in their schools. For the most part, they seemed to accept these as “the price we pay” for protecting kids. Administrators railed against the unfairness and sheer greed they saw in many of the lawsuits in their districts.⁸ But few seemed ready to start a revolution. For all the complaints in focus groups, less than half of the superintendents and principals questioned in our upcoming survey on school leadership say they would “do things differently” if they were freed from “the constant threat of litigation.”

So, are litigation, due process and related regulatory procedures considered serious problems in public education? What kind of changes do educators want? Given the preliminary nature of this research, it is impossible to suggest a definitive answer. Few of those we interviewed appeared to have given much thought to alternatives. Most of the concern seemed to focus on egregious abuses of the system, as opposed to concern about the system itself. Some actually resisted the idea of changing the status quo extensively.

“Injustice on the Other Side”

“If you were to go the other way and limit suits...” said one principal, “then you have...injustice on the other side, as well. People who are misrepresented or given a raw deal...There’s talk of legislation now of limiting the amount of suits and how much people can get. That’s just for the benefit of the insurance companies. I don’t think...they’re really trying to be altruistic.” An administrator agreed: “I don’t think you can stop it because people need an opportunity to take action when they’ve been wronged.”

⁸Teachers, for their part, seemed surprisingly unaware about the existence of lawsuits in their schools.

To the degree that the educators offered solutions, they seemed to be “inside the box” ideas such as limiting monetary damages or reining in lawyers. “One of the things is for there to be a better system evaluating what the harm [has] been,” offered one administrator. “Sometimes the harm is very, very slight and yet parents are going after a lot of money...with sexual harassment...have the child go through an evaluative kind of process to see what kind of real harm has that caused...Is it worth \$300,000 for the district to pay? I think sometimes far too often it’s about the money.”

Another suggested: “Regulate attorneys...[so they are] not suing on every little single issue. It’s like a code of ethics...that they shouldn’t be ambulance chasers and after money on behalf of students. As somebody else said, ‘You’re hurting the community that you’re paying your taxes in.’ I certainly have high regard for attorneys. It’s not that, but it seems there should be some kind of regulation, like the Hippocratic Oath for doctors...”

Who Pays the Bills?

From the outside looking in, litigation does not appear to be as urgent an issue to educators as it seems to be to doctors and other health care providers, although that may change over time if problems multiply. For example, while it’s not unusual for doctors to be sued at some point in their career, a teacher being sued is big news. Similarly, doctors in private practice see insurance bills for tens of thousands of dollars routinely arriving in the office mail. A perhaps surprising number of teachers and administrators in focus groups have told us that they were in fact insuring themselves against litigation, but the financial impact does not appear to be nearly as great.

The fact is that educators may simply be more used to dealing with rules and formal processes and regulatory procedures than doctors are. Education, as a public institution, is rife with them. In the focus groups for this pilot project, there was an overriding sense that handling all the rules and procedures is just part of the game. As one of the superintendents we interviewed put it: “Litigation is not an issue that dominates our [thinking], but it is something that is always in the back of our mind.”

Apparent Contradictions

There are also some mixed signals in Public Agenda’s survey data suggesting that many educators may have ambivalent or unresolved views in some areas—something that also emerged in the focus groups. Our upcoming survey findings will show, for example, that most superintendents and principals complain that due process and documentation interfere with their ability to handle students who are discipline problems. But our previous survey with school leaders showed that large majorities—roughly 8 in 10—said they already “have enough freedom and autonomy” in dealing with student discipline.⁹ It’s unclear what lies beneath the surface of this apparent contradiction.

Too Quick to Call Their Lawyers

Special education is the one area where the survey data is more definitive and where superintendents and principals at least seem to be crying out for relief. In both our 2001¹⁰ and 2003 surveys of superintendents and principals, large majorities said special education allocates a disproportionate amount of money for a small number of children. In the forthcoming study, very large majorities also complain about the paperwork and procedures demanded by the law—and that too many special ed parents are far too quick to call their lawyers. To date, Public Agenda has not explored the alternatives school leaders might support to address these problems, but it does seem clear that there is an eagerness to pursue such a discussion.

⁹ *Trying to Stay Ahead of the Game: Superintendents and Principals Talk about School Leadership* (Public Agenda 2001).

¹⁰ *Ibid.*