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The courts vs. educational standards

MICHAEL HEISE

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EW aspects of the current school-reform effort rival the prominence accorded to educational standards. The federal government's most comprehensive and far-reaching reform project, *Goals 2000*, underscores educational standards' key role in a nationwide effort to improve student achievement. Whether the development of educational standards will do so is, as of yet, unclear. It is clear, however, that standards will serve as a catalyst for the next generation of educational litigation.

By converging with emerging legal doctrines forged by school-finance litigants at the state level, educational standards, even voluntary ones, will attract litigation designed to turn standards into legal entitlements. When courts find that funding increases are necessary to meet educational standards, states will be required to provide the additional funding. The new litigation that will follow from the development of standards will thrust the courts further into educational policy making, with the results more likely to benefit lawyers than

students.

Setting aside the question of whether the courts ought to be crafting education policy at all, little is even known about whether litigation is an effective mechanism for achieving desired educational policy goals. The courts' influence over schools exploded after the Supreme Court's *Brown v. Board of Education* decision in 1954. Today, it is difficult to imagine any aspect of schooling not influenced by laws, regulations, and courts. Yet, legal scholars and lawmakers do not fully comprehend the nature, extent, and contours of the courts' profound influence on schools. Indeed, legal impact research on the relation between courts and educational policy is scant, qualitative data thin, and quantitative data all but nonexistent. Despite this substantial void in the research base, the pursuit of educational standards seems certain to stimulate litigation. The inevitability of such a result is unfortunate, illustrating how well-intentioned educational policies and existing legal doctrines can sometimes work at cross-purposes.

State constitutions distorted

The success of courts in using state constitutions to mandate education policy suggests that *Goals 2000* will be used to much the same effect, sparking a new wave of education litigation. The state constitution expresses a state's obligation to provide educational services to its residents, and dictates that the legislature possesses plenary authority to delegate this obligation through whatever administrative mechanism it likes. To school-finance litigants, however, state constitutions, particularly education clauses, provide a mechanism to achieve judicially what they are unable to achieve legislatively.

During the 1970s and 1980s, school-finance equity lawsuits sought to equalize per-pupil spending. Traditional equity-based lawsuits asked courts to assess whether per-pupil spending gaps between school districts with high property values and those with lower property values offended state constitutions. In *Serrano v. Priest*, the California Supreme Court ruled the state's school-finance system unconstitutional because it could not find a compelling reason to justify the gaps in per-pupil spending among school districts within the state. The *Serrano* decision, an important equity-lawsuit victory, awakened the

country to the constitutional dimensions of unequal per-pupil spending.

Since 1989, school-finance litigation has differed in some important respects. Specifically, adequacy-based school-finance lawsuits have replaced equity lawsuits. In adequacy lawsuits, plaintiffs ask the court to assess the underlying sufficiency of the school funding and educational services provided to school-children. Courts now find school-finance systems unconstitutional not because wealthy districts spend more money on their students than do less-affluent districts but because the quality of educational services delivered to students in less-affluent school districts—regardless of per-pupil spending—is inadequate. Courts have already reached such decisions in a handful of states, including Kentucky, Massachusetts, and Alabama, with more decisions likely in the future.

The recent emergence of school-finance adequacy lawsuits alters school-finance reform and related litigation. Most scholars agree that an emphasis on the quality of education provided by school districts, rather than gaps in per-pupil spending, represents the future of school-finance litigation. Recent school-finance court decisions suggest that the future has arrived.

A recent state-court decision in Alabama is illustrative, demonstrating the startling scope of school-finance court decisions. In *Alabama Coalition for Equity v. Hunt*, the plaintiffs asserted that the substantially unequal educational opportunities provided by the state's public elementary and secondary schools violated the Alabama Constitution. The court agreed, invalidating the state's school-finance system and concluding that Alabama's education clause guaranteed substantive entitlements, including "adequate" educational services. Considerations such as the political-question and separation-of-powers doctrines proved not to be a barrier.

A comparison of the actual constitutional text with the judge's order illustrates the extent of the court's reach. The education clause in Alabama's constitution, similar to those found in other state constitutions, provides that "The legislature shall establish, organize, and maintain a liberal system of public schools throughout the state for the benefit of the children thereof." The court in *Hunt* concluded that this lan-

guage created a substantive legal entitlement to an "adequate" education. The court went on to note that an adequate education provides students with an "opportunity to attain" such factors as "sufficient mathematical and scientific skills to function in Alabama, and at national and international levels." Further, an educational system should offer "support and guidance so that every student feels a sense of self worth and ability to achieve." By articulating minimum educational standards where none existed before, the court in *Hunt* injected itself into a crucial educational dispute, which will unfortunately continue to occupy many state legislatures well into the next century.

Although the *Hunt* decision reflects a growing trend in school-finance litigation, judges in some school-finance cases decline the invitation to join the growing and already messy policy battles over educational funding. Judges who balk when asked to assess the adequacy or sufficiency of school-funding systems or educational resources typically cite the absence of relevant standards, judicial or otherwise. Such judges find it difficult to hold states accountable to non-articulated standards and are unwilling to fill the void from the bench. Educational standards, however, will fill this void, thereby facilitating even greater judicial involvement in school-finance issues.

Enter *Goals 2000*

The decision to establish educational standards presents states with an interesting dilemma. On the surface, educational standards appear to be a relatively inexpensive way to improve student achievement. Also, *Goals 2000* offers federal funds to encourage states to join the education-standards movement. Many states will find the financial lure irresistible. However, a closer look reveals that educational standards increase states' exposure to potentially costly litigation—particularly school-finance lawsuits.

States' increased legal exposure stems from at least three factors. First, policy makers do not yet agree on what content and opportunity-to-learn standards should look like. Policy questions about what students should know and what constitutes an adequate opportunity to learn will quickly become legal

questions. Second, the task of translating policy goals into statutes, rules, and regulations invites ambiguity, particularly in the education area. Litigants will ask courts and judges to resolve these ambiguities. Third, and most important, educational standards will encourage emerging judicial efforts to assess school systems and their finance systems. Successful lawsuits will result in courts extracting increased educational spending from state legislatures. Each of these factors individually will create more business for civil-rights lawyers and education-law specialists. Cumulatively, these factors establish the foundation for the next wave of educational litigation.

The unlikely prospect for agreement over the composition of educational standards is one source of increased judicial involvement with schools. Of course, it remains possible that a consensus could emerge on content standards. Residents in a state could agree, for example, that its students must master fundamental mathematical concepts as a condition for high-school graduation. However, it remains far from clear what those specific mathematical concepts should be. As daunting as this task sounds, developing a consensus on content standards—what constitutes an acceptable core curriculum—is at least a plausible proposition.

In contrast, agreement over the composition of opportunity-to-learn standards is less likely. Opportunity-to-learn standards are supposed to help ensure that schools and school districts provide students with the resources needed to achieve chosen content standards. Their creation will involve identifying what contributes to a successful learning environment. For example, it would strike many as unfair to expect that a student master the fundamentals of geometry if that student's school did not offer a geometry class, lacked relevant textbooks, or failed to provide a competent geometry teacher. Similarly, it would be unfair to require a student to reach world-class levels of achievement in science if schools did not have the necessary scientific or laboratory equipment.

Apart from extreme situations, the debate over opportunity-to-learn standards will uncover a vast area where reasonable people can differ on what constitutes an adequate opportunity for students to meet specific educational standards. Because few agree on the determinants of student achievement,

it will be difficult to assess whether appropriate or adequate learning facilities exist. Many of these debates will spill into the courts.

Even if policy makers were in perfect agreement over content and opportunity-to-learn standards—and they are not—a substantial risk of future litigation remains. Statutory ambiguity is a second and perhaps inevitable source of future lawsuits. The difficult task of translating policy goals into statutory language always invites a certain level of imprecision. Sometimes lawmakers intentionally create statutory ambiguity for political reasons. In other instances, problems arise from the large number of politicians that educational-reform legislation usually attracts.

One reason for their avid attention is obvious—votes. Schools, teachers, administrators, schoolchildren, and parents are found in every state and congressional district. Moreover, the amount of money involved in education-reform efforts is substantial, and the interest groups (e.g., teacher unions) are powerful. These factors thrust numerous lawmakers into policy debates over educational legislation, increasing the need for political compromise and thereby increasing the likelihood of statutory imprecision. Ultimately, litigants will call on judges to resolve these inevitable ambiguities.

Opening the litigation floodgates

The third and most important factor that will accelerate future educational litigation involves the interaction of educational standards and school-finance litigation. Most likely, a gap will emerge between a state's idealistic educational standards and existing student achievement. School-finance litigants will attempt to leverage this gap and force states to provide the additional resources supposedly needed to enable students to meet a state's educational standards.

The eight national education goals that serve as a lodestar for many state content and opportunity-to-learn standards are idealistic and, sadly, unrealistic, particularly in light of current American student-achievement data. For example, one national education goal established a target date, now five years away, for American students to lead the world in math and science achievement. Yet, American students now place near or at the

bottom of most reputable international math and science assessments.

If history is a guide, politicians, litigants, and judges will find it difficult to attribute responsibility for substandard academic performance to students and their families. As a result, attention will immediately be directed towards schools and their educational resources, reflecting the assumption that the schools, and thus the state, are failing their students. Once attention shifts to educational resources, another gap will emerge between a state's existing educational resources and those deemed necessary to meet desired educational goals. By establishing content and opportunity-to-learn standards, states invite lawsuits intended to fill this gap.

Legal impact studies

The prospect of increased judicial activity in educational policy making—stimulated by the development of educational standards—raises important research and policy questions. It is far from certain that the courts are well-suited for achieving desired policy goals in the area of education. Few clear answers emerge from past and current judicial oversight of public schools. The specific question about whether school-finance court decisions are likely to result in sought-after finance reform remains largely unexamined. Results from recent, preliminary quantitative studies are mixed. However, anecdotal evidence from states where recent adequacy lawsuits succeeded, such as Kentucky, demonstrates that court decisions can have significant impact.

Central to the debate about how and what types of court decisions influence social policy is the state of legal impact research. Assessing the impact of court decisions on social policies is an extremely difficult task. Numerous variables move simultaneously in different directions. Also, different people can view a single judicial intervention differently. Despite methodological challenges, a small but growing number of legal scholars is beginning to address such questions, although few with empirical rigor.

However, increased interest in quantitative legal impact scholarship appears imminent. A growing number of legal scholars is calling for the application of the social sciences to tradi-

tional legal research. For example, in his recent book, *Overcoming Law*, Judge Richard A. Posner emphasizes the utility of quantitative methodologies in assessing legal doctrines' impact on social policy. Calls for such research from the nation's preeminent legal scholars will likely increase the amount of work being done in this important new field.

A particularly worrisome aspect of the courts' involvement in social policy is their seeming inability to disengage from supervision once begun. The nation's experience with school desegregation aptly illustrates such difficulties. Although more than 40 years have passed since *Brown v. Board of Education*, federal courts remain embroiled in the desegregation effort. Prolonging the debate about when courts can cease oversight and for what reasons is the realization that certain essential concepts resist consensus, such as the legal definition of a "fully integrated" or "unitary" school system. As litigants continue to fight over definitions in courts, the direct and indirect costs associated with school-desegregation efforts continue to increase.

School-finance litigation will encounter similar problems. The generation-long struggle either assigned to or assumed by the courts over what "equal educational opportunity" means in terms of race is about to be replaced. A strikingly similar struggle will ensue over what equal educational opportunity means in terms of resources. The evolving school-finance debate promises to be just as contentious and protracted. Although much of the current debate resides in state legislatures, the transition to the courts is clear and already underway. School-finance debates will remain in the courts for years to come.

Notwithstanding the problems posed by increased judicial involvement in educational policy making, a "judicial strategy" makes sense for the educational establishment, particularly teacher unions. Education is a highly labor-intensive enterprise, and, accordingly, labor costs consume the bulk of most school districts' budgets. Annual legislative pleas for increased educational resources are beginning to wear thin on taxpayers. Taxpayer revolts flare up with increasing regularity across the country. Communities reject school-board referenda with greater ease. Big-city school districts such as New York and Chicago

do not dare try to raise money through the ballot box. Instead, they must meet their financial needs through the more expensive capital markets. In a few instances, public school systems simply have run out of money and declared an early start to summer vacation.

In such a political environment, it is understandable that those seeking additional resources for school systems are eager to steer away from legislatures and the political process and towards courts and the legal process. Courts provide an alternative to increasingly skeptical legislators and a more discriminating "political marketplace." By recasting school-finance disputes as legal questions, litigants attempt to get from the judiciary what they could not get from the legislature. Of course, state legislators would not take kindly to such a judicial strategy. After all, successful school-finance lawsuits threaten to cost state governments dearly and reduce legislators' discretion over policy making and budgets.

Legal entitlements

Many of the nation's elementary and secondary schools must become more effective for a greater number of children. American students' performance lags behind that of their foreign counterparts, especially in core academic subjects. Past school-reform efforts, even well-meaning ones, largely failed to meet their stated objectives. Improving frustrating student-achievement trends will require changing existing policies and developing and implementing new ones. Decades of unsuccessful reform efforts suggest that future efforts must consider fundamental changes to the current production and delivery of educational services.

Viewed in this context, the push for educational standards reminds us that problems with our educational system endure. However, different problems will emerge when policy battles over education move out of legislatures and into the courts. In particular, the development of educational standards will trigger the next round of school-finance litigation. This litigation will further increase judicial involvement in educational policy making, as litigants struggle to transform content and opportunity-to-learn standards into legal entitlements.