Litigation in Education Service Delivery: a Case for Restraint

Kayode O. Fayokun
Faculty of Law, Obafemi Awolowo University

Taking the case of education service delivery, this paper examines the promoters and implications of litigation (hitherto restricted to goods delivered through the market) in the delivery of social services. It examines the facts and implications of two court cases, with the conclusion that litigation in education is a reflection of changes in the social context of education, so educationists should beware of the legal issues facing them. It notes that, nevertheless, litigation could affect the decision-making climate in education, risking some of the ideals and mandates of education service delivery. Citing the peculiarity of education and the legal dilemmas that this peculiarity presents, the paper contends that the law may not guarantee good schooling; improvements in education service delivery require social and political reforms. Thus, stakeholders should focus on making education service delivery responsive to the demands arising out of social change without recourse to judicial interpretation.

Keywords: Litigation, Service quality regulation, Education management

Introduction

Traditionally, litigation has been applied to the resolution of disputes in business transactions. This has been credited as not only ensuring justice and equitability in business practice but also enhancing the effectiveness and overall performance of the business sectors in which the litigation is applied. In particular, litigation processes and, subsequently, verdicts have promoted adherence to standards of fair business practice, where these standards exist; led to development and adoption of these standards, in instances where they did not exist; or highlighted need for closing legal loopholes hindering equitable and effective business practice, in instances where such loopholes exist.

Review of related literature (e.g. Bakibinga, 1993; Bakibinga & Abdulrazaq, 1989) indicates that litigation has been mainly undertaken with respect to the delivery of goods (as opposed to services) that are delivered through the traditional market sector—in which contractual obligations are clear-cut. However, following increasing commoditization of the delivery of social services—under the auspices of economic liberalization and privatization (Lipsey, 1999; Mamdani, 2007)—there is a marked increase in the number of litigation cases in the area of social services delivery (see, for example, Schneider, 2007; 2006; http://www.schoolfunding.info/litigation/litigation.php3).
Nevertheless, relevant legislation is underdeveloped and, in some

instances, entirely non-existent. Precedents are also scanty. This points to need for discourse on the applicability of litigation processes (which have been traditionally applied to market-based business delivery) to the delivery of services that have social dimensions (e.g. education and healthcare)—to inform efforts to develop and enact the required legislation.

This paper undertook to contribute to this discourse, taking the case of education—since education is recognized as a mirror of society and educational institutions are recognized as society in miniature (Aggarwal, 1996). The paper examines the facts, procedure and implications of two cases, namely, Peter Doe and Ianiello. Grounded on the outcomes of the examination, the paper contends that invoking the law in the education sector is not an *intrusion*, considering that the delivery of education is increasingly following a market-based model. In other words, it is argued that litigation in the sector is a mere reflection of the changing social context of education and may only be expected to increase, so education managers and teachers should beware of the legal issues facing them (Shaffer, 1984).

Nevertheless, the litigation could transform the decision-making climate in education undesirably, risking some of the ideals and mandates of education service delivery. Using the considerations made in deciding the Peter Doe and Ianiello cases, the paper highlights the peculiarity of education as a service. Among other things, it is noted that, in education, the effectiveness of service delivery is influenced by the consumer (even if the supplier has an obligation to ensure effective delivery of the service), which presents a legal dilemma on the extent of the suppliers' responsibility for the effectiveness of service delivery. Cognizant of the legal dilemmas that this peculiarity presents, the paper contends that recourse to the law may not guarantee *good* schooling. Rather, it expresses optimism that realistic improvements in education service delivery will result from relevant social and political processes and decisions. Accordingly, the paper urges stakeholders to concern themselves with how educational service delivery can be responsive to the demands arising out of social change without recourse to judicial interpretation, adding that this conclusion may be true for other services that have attributes of both private and public commodities but whose delivery has been significantly commoditized.

Related Literature and Objective

Schools are creatures of law. Their creation, control, management and day-to-day decisions are directly or indirectly products of the law.

Matters of school finance, teacher-to-board relations or teaching service commission/ employment relations, curriculum, policy-making and their effects on teachers, pupils and parents (and a variety of relationships among schools, community and other bodies) derive from the constitution and relevant enabling legislation. Most school problems arise from human interactions that are generated and resolved within the framework of law. As a result, a medley of legal principles known as "education law" has emerged in our *corpus juris.* It refers to the combination of legal principles dealing with the operation and management of educational institutions and consists of issues of law on education-related activities. Its focus is the operation, administration and control of education institution. Interaction of issues of law and schooling are becoming more pronounced by the day as our society continues to witness significant and rapid socio-political and economic changes. In an age that is globally infused with concern for individual and group rights and the delivery of services increasingly rooted in market models that are characterized with high customer focus, court cases challenging the authority and decisions of schools have been registered.

Knowledge of "education law" is becoming a career enhancement at aptitude tests for managers of education at all levels. Understanding the way the constitution works and the place of the judicial function within the legal system is now of importance not only to practicing education administrators but all stakeholders in education. Peretomode (1992) posited that "legal issues in education" have a long history in Europe and America, particularly in the curriculum of graduate and professional schools. The works of Blackmon (1982) and Sorenson (1984) are cited to buttress this point. Blakmon (1982)'s findings revealed that by 1972 about 85% of all teacher training institutions in the United States included a course on education/ school law in their programs. By 1992, the number had increased to 95% and is almost 100% presently.

Since the activities of those involved in education generate legal issues, the extent to which they create ripples for judicial intervention and the ways in which they have contributed to shaping education policies need study. A key justification advanced for the incursion of litigation in the education service delivery sector is that education service delivery needs to be efficient and effective (Owolabi, 2006; Abdulkareem et al., 2008; Adaralegbe, 1978), so courts of law have an obligation to intervene and ensure that schools meet these societal expectations. After all, even if the right to quality education is conferred by national constitutions and broad education policies are taken through national legislative process, detailed rule-making functions are

delegated to education administrators (i.e. ministers, commissioners, directors, school boards, commissions, head teachers, teachers, etcetera) and sweeping powers conferred upon them to implement the right to quality education, the inference being that they are supposed to be held to account for the powers delegated to them and courts have the mandate to demand such accountability from them.

Subsequently, judicial directives are increasingly re-casting school decisions to an extent one can say they have affected the operation of schools and school law has become a pertinent aspect of our *corpus juris*. However, because the legal principles applicable to schools operate in a broader framework, "education law" is hardly regarded as a separate branch of law. Thus, the phrase serves merely as a generic term to cover a wide range of school issues. Therefore, the applicable legal principles discussed under that catchphrase include rules of constitutional law, law of contract, torts, property law and labour rights as they relate to schools and educational management in a given society. As application of law to education practice is increasing (Shaffer, 1984) and school house decisions are increasingly drawn to public glare through litigation, it is important to understand the impact of applying these legislations on education.

Hitherto, however, this impact has not been examined, hence a knowledge gap. The objective of this paper, therefore, is to contribute to the closing of this gap. Methodologically, the paper relies on two prominent court cases that touched on the effectiveness of education service delivery and the contract between school systems and the students that study in these systems (i.e. Peter Doe and Ianiello). The facts articulated in the cases are identified and the verdicts passed, as well as the legal basis of these verdicts, are discussed. Subsequently, the implications of both the facts articulated and the verdicts passed for the delivery of education services are discussed and conclusions drawn.

Peter Doe Case: is "Poor' Teaching a Tort?

Facts in the Peter Doe Case

In the Peter Doe case, the plaintiff, a graduate of a San Francisco high school with 5th grade reading ability—a functional illiterate—charged the defendant school district, board members, and professional staff with negligence for their failure to teach him to read and with misrepresentation for the school's failure to properly apprise his parents of his limited progress in reading skills. The complainant alleged a

series of duties on the defendants (e.g., provide him with appropriate reading materials, appropriate instruction, diagnosis. and remediation); a breach of duty by their failure to perform such duties; and resulting injury to him in thus denying him of his rightful education.

In other words, Peter Doe alleged that the defendants tortuously injured him by their individual and collective negligence and thus entitled him to a remedy in money compensation ($500,000 in damages to be exact). The facts indicated that Peter Doe was of average or above-average intelligence, attended school regularly, and was passed along from grade to grade on schedule. Upon the parents' inquiries about Peter's academic progress, the defendants assured them that he was doing satisfactory work. In fact, Peter was not performing satisfactorily in reading and, despite state laws mandating specific reading levels as conditions precedent to graduation, Peter was graduated from high school with only fifth grade reading ability. After leaving high school, Peter undertook tutorial assistance in reading and progressed rapidly, evidence that he was indeed, capable of learning to read.

The complainant stated seven counts, one alleging negligence by the defendant for its failure to properly instruct the plaintiff, another charging the defendant with misrepresentation of the plaintiff's true progress to his parents, and five counts alleging the defendant's violation of specific statutory and constitutional duties imposed by the California State Constitution and the California School Code. The sum of Peter Doe's complaint was: ''school, you had a legal duty to teach me to read, you negligently failed to teach me, and I have been injured in the sum of $500,000 by your negligence".

The defendants demurred to all causes of action, arguing in effect that even if the alleged facts were true, they failed to state a cause of action for the reason that defendants have no legal duty to teach Peter to read. The complaint rests on the theory that the defendant school and its operators are under a tort duty to teach Peter to read, such duty based on the cited statutory and constitutional mandates to provide an education, employ qualified teachers, provide appropriate curriculum and to provide any other kind of support that a student may require to succeed in his or her learning endeavours. The duty, according to the complainant, is not merely to offer certain instructions and go through mandated pedagogical dances but rather is a duty to produce certain reading skills, the breach of which duty is negligence and imposes tort liability on the schools.

The defendants argued on the contrary. They submitted that the several duties are not intended to vest rights in a specific person but express legislative intent to operate schools in certain ways. The

statutory mandates, if breached by the defendants, do not create actionable rights in specific pupils or parents and even if there was a violation of a duty, the violation is no negligence in the tort sense.

Salient Issues in the Peter Doe Case

The case was decided in favour of the defendants. However, the issues raised in the case are important to all social and governmental units charged with the delivery of services to the public. If a pupil's failure to learn to read or write (or to develop any other skill) is chargeable to the school's failure to teach, at least two other problems arise. First, can the law establish the proximate causation between the school's performance (alleged negligent teaching) and the pupil's injury (the failure to learn)? Second, can the courts define the school's legal duty in such terms (of performance) as to know when and where the school falls short? To infer negligent teaching from pupil achievement may be attractive but is not supported research evidence. Few educators would deny that the school's fundamental duty is to instruct pupils. However, it does not follow that pupil learning stems from the school's instruction or that the quality of instruction is the proximate cause of the learning. In essence, the *Peter Doe* asks the court to make a legal connection between teaching (as a series of specific qualitatively and quantitatively assessable acts) and learning (as a series of specific assessable performances) (i.e. a cause-effect relationship on which there is no definitive data, despite a multiplicity of studies delving into it).

For the law to find negligence in teaching, it must define the standard against which the defendant's performance is measured vis-à-vis the quality of teaching to which the school subjected the learner. Furthermore, to use the negligence concept in instruction, the court must link the defendants' breach of duty to the plaintiff's injury (i.e. failure to learn). If a child fails to learn, can this failure be linked proximately to his or her teachers' behaviour? Incidentally, this question is controversial, especially when it is taken into account that, although some pupils may not learn well, their cohorts, who are subjected to the same quality and quantity of instruction, learn. This appears to clear the school, and its teachers, of possible negligence and/ or bad will against the learners that fail to learn, the inference being that, for court to qualify a case against them, it must define the duty they breached (but cognizant of the duty that they fulfilled towards the learners that made satisfactory progress). This discourse also points to several dilemmas. Even if the courts undertake to define the schools' duty to teach, one wonders what would happen if the school, and its teachers, follow the

court's mandate and a child still doesn't learn. If teachers are found liable in tort for the pupils' failure to learn, should the child, in turn, be liable in tort for his or her failure to learn from *good* teaching?

Facts in the Ianiello Case

The case of *Ianiello* was an action against the University of Bridgeport for breach of contract and fraud. It raises the issues of educational malpractice at the tertiary level. The plaintiff, preparing to qualify as a teacher, enrolled in a required course at the University of Bridgeport (defendant), completed the course (with an "A" grade) and thereupon sued to recover damages against the defendant for its alleged breach of contract and fraudulent misrepresentation. The complaint alleged that the course as given was substantially different from the course described in the college bulletin and, further, the course received was worthless and of no benefit to the plaintiff. Specific allegations about the instructional mode, the absence of tests and evaluation, and the nature of the breach of contract were included in the complaint. The gist of the complaint focused on the alleged promise by the university concerning the course description, the performance breach, the misrepresentations by the defendant upon which Mrs. Ianiello relied, to her injury. She sought, as damages, an amount equal to tuition, fees, books, lost income, and attorney fees.

The University's defence amounted to a denial of breach of contract or misrepresentation plus several "special defences" that the University complied fully with the contract, if any contract existed; the course description is not a contract and, further, the content description is subject to change by the University and the professor to satisfy "the current needs, developments during the course and desires of the students''; the plaintiff took the course, took the grade and any benefits from the course, including the three credits toward her degree and she is stopped from complaining now; the plaintiff cannot retain the course credits and claim her money back at the same time; and the plaintiff's claim for relief does not represent a proper measure of damages under her complaint.

What are the consequences of Ianiello? This case, if decided in favour of the plaintiff, represents difficult questions for schools and schooling. The problem raised is familiar enough: the school promised more than it delivered. To correct the problems raised may require fundamental changes in the schooling process. It could be simple to describe courses more clearly and frame the syllabi to reflect the course descriptions. However, if the course outlines, syllabi and catalogues are treated as

contractual terms then some intricate consequences may follow. Instruction could stray from the outline, even for urgent interests or related matters, albeit at the risk of suit by a non-consenting member of the class. To deviate from the instructional contract would call for renegotiated contracts with the students. If the "worth" of the course is a key issue for the court, we should expect the courts, over time to delineate criteria by which the worth of courses is ascertained. It seems unlikely that the courts would undertake to legally determine the structure of knowledge or the elements of academic disciplines by evaluating the worth of course content.

Discussion and Conclusions

The complaint in Ianiello raises the issue of the instructor's teaching competency and his evaluative judgment in grading the plaintiff's work. As in Peter Doe, to find malpractice, the court must define good practice as a measure of minimum accepted practice. Once these legally acceptable standards of performance are defined, close adherence to them would protect teachers, administrators, professors against malpractice suits but this may be at the expense of learning and relevance. Accordingly, turning to courts of law to correct inadequacies in the teaching and learning process may be no guarantee that learners' needs will be better satisfied and that their teachers and/ or schools will act in their best interest. The law can mandate some processes, practices and elements of educational equity and can discourage some iniquities in education service delivery. However, it may not design and implement the corrective action needed to secure the rights claimed in *Peter Doe or Ianiello*.

From the foregoing analyses and comments, some implications and observations about social change and educational reform seem plausible. Clearly, involvement of the law in education is hardly an intrusion. Rather, it is a proper and predictable relationship. In this regard, Peter Doe and Ianiello point to gaps in the understanding of the contract that exists between educational institutions and their students, especially before the law. This has implications for legislation relevant to education. These implications are mostly true for the education institutions themselves as it is only reasonable to expect that as this legislation develops, the schools' scope of (legal) responsibility towards their students, and the parents/ guardians of these students, will increase phenomenally. The cases also point to the fact that recourse to litigation in the education sector is in response to perceived malpractice. Notwithstanding the legal dilemmas and controversies regarding the

legal obligation of schools towards their publics, both Peter Doe and Ianiello put education service providers on the spot to be legally accountable and challenge court to define educationists' legal obligation when it comes to the quality of teaching and the learning that they offer. Therefore, those involved in education service delivery can no longer sit back and preside over the status quo; people are demanding greater accountability from them and they will seek legal redress if they do not realize this accountability.

Unlike in business, however, in education, litigation is more complicated, due to the complex nature of education service delivery. First, it is a necessary condition of being a student that the latter is ignorant of the course of study until he or she has gone through it (Gilroy et al., 1999), the inference being that, at the time of starting a course of study, the learner is technically incapable of entering a legally binding contract with the school. Second, even in the unlikely event that the contract reached between the school and the learner in the matter of what is to be taught and its anticipated deliverables, the need to ensure the relevance of curricula to learners' and society's needs has conventionally required reviews of curriculum and rigid adherence to the content agreed upon may in fact be in disfavour of the learner (who, at the same time, is a potential plaintiff).

Besides, it is important to note that as a commodity, education is usually consumed in a social setting (i.e. class), which points to the question of the extent to which a school, and its teachers, have the liberty to cater for the special needs and interests of an individual learner who may sue, even if at the expense of the needs and best interest of the other learners in the cohort. Finally, the benefits of education to its recipients are relative to those perceiving them and are neither clear-cut nor time-bound, meaning that a school, or its teachers, cannot be charged for the lack of the particular benefits that an individual learner may demand to realize at a certain time after or during his or her course of study. This means that, in education, stakeholders should not be litigious. Though invoking the power of the law to resolve disputes in educational service delivery may discourage ineffective instruction, increase accountability in the sector and prohibit some unacceptable practices, it would be wrong to expect the law to resolve school problems that are created or sustained by complex forces, some of which are conventional and in the best interest of the learners. The law may not guarantee *good* schooling. More realistic, and significant, improvements in education service delivery will come from social and political decisions. Thus, stakeholders should concern themselves more with how educational service delivery can be

responsive to the demands arising out of social change without recourse to judicial interpretation, a view that is corroborated by other authors on litigation in education (see, for example, Bergan; 2004; Glanzer & Milson, 2006). This conclusion may be true for other services that have attributes of both private and public commodities but whose delivery has been commoditized.

References

Abdulkareem, A. Y., Ibitoye, S. A., Bamiduro, J. and Onen, D. (2008). Availability of physical resources and school effectiveness: the case of public secondary schools in Oye, Nigeria. *Kampala International University Research Digest*, 1, 114—118.

Adaralegbe, A. (1978). Efficiency in Educational Administration. *University of Ife Inaugural Lecture Series*. No. 34. Ife: University of Ife.

Aggarwal, J. C. (1996). *Theory and Principles of Education: Philosophical and Sociological Bases of Education*, 10th Edition. Delhi: Vikas Publishing House PVT Ltd.

Bakibinga, D. J. (1993). *Company law in Uganda*. Kampala: Professional Books Publishers & Consultants.

Bakibinga, D. J., Abdulrazaq, M. T. (1989). *Law of trusts in Nigeria*. Ilorin: Department of Law, University of Ilorin.

Bergan, S. (2004). A tale of two cultures in higher education policies: the rule of law or an excess of legalism? *Journal of Studies in International Education.* 8 (2), 172-185.

Blackmon, C. (1982). *The Education Law Component in Educational Programmes in Selected U.S. Colleges*. Paper Presented to the Education Law Interest Group of the National Conference of Professors of Educational Administration, College of Education, Louisiana State University. LA: Baton Rouge.

Fayokun, K. O. (1996). *Education Law and the Legal Aspects of Educational Management in Nigeria*. Faculty Seminar Series. Ibadan: University of Ibadan.

Gilroy P., Long P., Rangecroft M., Tricker T. (1999). The evaluation of course quality through a service template. *Evaluation.* 5(1), 80-91.

Glanzer, P. L., Milson, A. J. (2006). Legislating the good: a survey and evaluation of character education laws in the United States. *Educational Policy*. 20 (3), 525-550.

http://www.schoolfunding.info/litigation/litigation.php3.

Owolabi, S. O. (2006) *Policy making and educational policy analysis.* Kampala: Makerere University Printery.

Peretomode, V. F. (1992). *Education Law: Principles, Cases & Materials on Schools*. Owerri: International University Press.

Schneider, R. E. (2006). *Significant Litigation in FY 2005*. [Online]. Available at: http://www.doe.mass.edu/lawsregs/litigation/fy05report.html.

Schneider, R. E. (2007). *The state constitutional mandate for education: the McDuffy and Hancock Decisions*. [Online]. Available at: http://www.doe.mass.edu/lawsregs/litigation/mcduffy_hancock.html.

Sorenson, G. (1984). Review Essay: Teaching Higher Education Law. *The Review of Higher Education* 7(4) 295 - 319.