

# LAW AND CONTEMPORARY PROBLEMS

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## FOREWORD

The presence of children with special needs in the public schools has been the source of diverse and shifting tensions. In the early and middle decades of this century, educators were uncertain of the capabilities of exceptional children, concerned about their possible adverse effect on other youngsters, and hesitant to modify standard curricula to respond to the unique requirements of such children. Placement in segregated classrooms and exclusion from public schools altogether was a common response. During the 1970's, parents and advocates sought to remove existing barriers and secure greater educational opportunity for handicapped children in public education, insisting that all children can learn and that even nonhandicapped children suffer adverse effects from the exclusion of the handicapped from public schools. The legislation that was the product of their efforts, Public Law 94-142 (the Act or EAHCA),<sup>1</sup> has become central to the continuing debate over the role of public schools in educating children with special needs.

The authors of the essays included in this two-issue symposium, together with others who participated in a conference on children with special needs in the public schools held at the Duke University School of Law on February 24-25, 1984,<sup>2</sup> contribute to that debate in two ways. First, they evaluate the success of the EAHCA and other legal mechanisms designed to ensure that the requirements of children with special needs are adequately met from a variety of historical, empirical, analytical, and comparative perspectives. In doing so, they have assumed a general familiarity with that legislation, discussing its

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1. 20 U.S.C. §§ 1400-1461 (1982) (The Education for All Handicapped Children Act of 1975).

2. In addition to the authors of articles in these issues, participants at the conference included the following: Dr. James Gallagher, director of the Frank Porter Graham Child Development Center in Chapel Hill, N.C.; Dr. Pamela George, professor of special education at North Carolina Central University, Durham, N.C.; Mr. Lowell Harris, director of the Division for Exceptional Children of the North Carolina State Department of Education; Ms. Judith Leonard, former staff attorney for the United States Department of Education; Mr. Jack Nance, director of special programs of the Wake County Public School System in Raleigh, N.C.; Dean John Pittenger of Rutgers School of Law in Camden, N.J.; Professor Victor Rosenblum of Northwestern School of Law; Mr. Ned Stutman, attorney-advisor to the Assistant Secretary for Civil Rights, United States Department of Education; and Professor Paul Tractenberg of Rutgers School of Law, Newark, N.J.

terms in detail only where needed to advance the course of argument. Second, they suggest steps that might be taken to improve the efficacy with which such legal strategems attain their goals. These suggestions respond to many tensions that will continue to shape the response of educators, parents, and the legal system to children with special needs during the years to come.

This issue begins with William Clune and Mark Van Pelt's discussion of the tension between the formal goals of special education legislation and the reality of statutory implementation. Professor Clune and Mr. Van Pelt argue that evaluation of such legislation should not proceed by simple comparison of legislative goals and actual implementation. Instead, they argue that evaluation requires a three-step process: (1) positive political analysis that identifies and explains adjustments that have been made in practice during implementation of the legislative scheme; (2) normative evaluation of each adjustment from the point of view of influential political interests affected; and (3) formulation of a new agenda for public policy development based on an understanding of these political adjustments.

Using this scheme, Clune and Van Pelt examine three major facets of the EAHCA: its procedures for referral and assessment of children who may be eligible for special education services; its requirements for development of individualized educational programs (IEPs); and its provision for due process hearings and associated procedural protections. They conclude that federal legislation has resulted both in notable successes, such as the end of exclusionary practices, the implementation of special programs, and the introduction of beneficial organizational routines within the public schools, and in certain failures, such as the routinization rather than individualization of educational programming and the limited efficacy of parental participation. Clune and Van Pelt suggest that, although statutory provisions for development of IEPs and for due process procedures may have failed to provide all benefits originally foreseen, they have had other beneficial consequences that justify their retention. The authors suggest that additional efforts are needed to address other serious problems that have been identified during the first ten years of the Act's existence, such as the use of educable mentally retarded and learning disabled classifications.

The next two pieces, by scholars with a longstanding interest in special education, focus upon the tensions associated with the due process requirements of EAHCA. The article by David Neal and David Kirp explores the dynamics of adopting a "legalization" model, rather than either a "professional" or a "bureaucratic" model, as a means of giving substance to the public policy objectives underlying the Act. The legalization model focuses on the individual as bearer of rights, with attendant use of legal concepts and reasoning and legal techniques of enforcement. In comparison, the professional model emphasizes professional discretion, while the bureaucratic model relies upon governmental departments to administer public programs under specific criteria.

After tracing the historical roots of the legalization model in the special

education context, Neal and Kirp assess its appropriateness on the basis of empirical evidence and their evaluation of the wider context of the education system. They conclude that due process procedures have had mixed success at best, in view of the formalistic compliance that characterizes some schools' implementation of the Act's IEP requirements and the limited use made of the Act's hearing opportunities. While the legalization model empowers actors who have previously lacked access to resources and allows for principled decisionmaking, the authors argue that the model has several more troublesome features, such as its inability to address questions of quality and substance in special education, its failure to deal with questions of resource allocation, and its tendency to promote distrust between parents and teachers and to inhibit the discretion of professionals whose judgment should be used on behalf of children. These features lead Neal and Kirp to suggest that as the education system comes to accept the presence of handicapped children and recognizes the legitimacy of their claims, less reliance will be placed on some aspects of the legalized structure of special education.

The article by Peter Kuriloff focuses more specifically upon competing factors which influence outcomes in due process hearings. Acknowledging that there is no real way to establish the "accuracy" of special education hearings, he attempts to measure how well these hearings serve "justice," which he defines in terms of the ability of parents to affect hearing outcomes. In his empirical examination of the results of due process hearings involving mentally retarded children in Pennsylvania during 1972-76, Professor Kuriloff addresses several questions. Of those who use due process hearings, who wins? Does winning depend on the quality of use of procedural safeguards by parents and by schools? Do hearing officers' biases affect hearing outcomes? Do other variables, such as the age and gender of the child or the size of the district, which should be irrelevant to outcome in most or all cases, operate to skew the results while undermining any conclusions that can be drawn from the due process variables themselves?

Professor Kuriloff concludes that outcomes in due process hearings reflect a combination of substantive factors and, although perhaps to a lesser extent, adversarial techniques. He reports that parents with severely handicapped children are more likely to prevail in due process hearings than those whose children are less substantially impaired. But, he points out that parents of severely handicapped children tend to present their cases most effectively. Not surprisingly, these parents, as well as other parents, who present their cases better, also tend to prevail more frequently. In contrast, Kuriloff reports that schools' use of lawyers in due process hearings tends to correlate negatively with the quality of presentation and with compliance; however, this correlation may suggest that schools use lawyers more when they know they have a weak case. Kuriloff also indicates that, for a number of possible reasons, parents tend to win more frequently in larger districts than in smaller ones.

William Buss brings a comparative perspective to the role of both proce-

dural protections and substantive attributes of legal schemes in ensuring the responsiveness of public schools to children with special needs. After noting fundamental differences in the structure of American and British legal rights, the nature of the federal system, and the role of the judiciary, Professor Buss focuses on the 1981 British Education Act, which governs the provision of special education in England and Wales. Using the provisions of the EAHCA as a foil, he highlights a variety of tensions which underlie both statutes. He first describes the narrower class of children protected under the new British statutory scheme and discusses the substantive guarantee of beneficial, individualized educational programming it creates. He contrasts the Education Act's mainstreaming provisions with those included in the EAHCA, stressing distinctions in the degree of integration required and the conditions controlling the duty to integrate under each of these statutory schemes. Finally, Professor Buss discusses the extensive procedural protection afforded parents under the British legislation and the more limited administrative and judicial review available under that system. In doing so, he highlights recurrent questions of the deference to be accorded professional decisions and the role of the judiciary, which are evident in both the American and British legal schemes.

Next, Judith Wegner and Kate Bartlett address major tensions which have influenced interpretation of the EAHCA's substantive requirements. Professor Wegner argues that tensions resulting from the Act's attempt to afford handicapped children educational opportunities "equal" to those enjoyed by their nonhandicapped peers have subtly, but significantly, complicated the courts' interpretation of statutory educational programming mandates. She suggests that recent debates concerning the level and extent of services to be provided handicapped children, the scope of needs to be addressed, and the availability of certain non-educational "medical" services reflect competing approaches to the application of the notion of "equal educational opportunity." Professor Wegner concludes that no single definition of equal opportunity can successfully resolve all these questions; rather, careful assessment of competing equality-based interpretations, in light of each particular context in which the definition of equality is sought, can significantly aid the process of statutory interpretation.

In the second issue of this symposium, Kate Bartlett explores the challenge to legal reform posed by the high cost of special education. She first traces the diverse judicial efforts to resolve the question of whether cost should be taken into account in defining school district responsibility under the EAHCA. She then identifies several areas of tensions between the EAHCA and the institutional context in which that legislation must be implemented that have exacerbated the fundamental problem of allocating scarce resources between handicapped and nonhandicapped children in the public schools. These include the tension between individualized and collective decisionmaking, between need and merit, and between federal and state/local decisionmaking. Professor Bartlett then proposes an approach to taking cost

into account in educational decisionmaking for the handicapped that she argues would mediate these underlying tensions more adequately than current approaches and would better resolve the cost issue. The model she develops, which would require parity between the quality of educational programs offered to handicapped children and those offered to nonhandicapped children in a particular school district, would allow decisionmakers to take the cost of particular programs into account but would protect handicapped children from absorbing more than their fair share of the effects of resource scarcity.

Rounding out the discussion of the Act's substantive requirements are two pieces by student authors and a comment by a practicing attorney with substantial special education casework experience. The first of the student contributions explores the difficulties associated with defining education for purposes of the EAHCA where unconventional goals and programs are substituted for more standard objectives and offerings. This note advocates a broad definition of education under the Act to reflect the broad range of handicaps possessed by individuals intended to benefit from the legislation. The second student-written piece discusses the additional problems raised by demands for placements that are age-appropriate and concludes that the age of the surrounding peer group should be a factor to be taken into account in determining whether a program is educationally appropriate for a given student.

The comment written by Karen Sindelar, an attorney with the North Carolina Governor's Advocacy Council for Persons with Disabilities, offers an analysis of the causes of the gap between the substantive requirements of the EAHCA and its implementation. Ms. Sindelar discusses services to retarded children to illustrate her arguments that the EAHCA has not resulted in the substantive improvements in education for handicapped children envisioned by its framers and that policymakers must analyze areas of noncompliance and failed implementation individually in order to better target efforts to achieve change. She examines the reasons that services for retarded children continue to be unnecessarily segregated and inferior despite legal mandates. She discusses, in particular, attitudes of local administrators and parents, lack of state leadership, state fiscal incentives that promote segregated placements, and funding patterns and bureaucratic relationships that make it difficult for retarded students to gain access to "mainstream" educational services. She also analyzes the role that some of the same factors have played in promoting change. Ms. Sindelar concludes by proposing a multi-faceted strategy designed to bring about greater equalization of services to, and integration of, retarded students. Her proposal includes suggestions for training at the local level as well as federal regulatory revision heightened federal monitoring, and a federal incentive program that would encourage states to abandon fiscal subsidies for segregated educational placements.

The symposium concludes with articles discussing two universal tensions that arise not only in the context of special education, but also in other cases

where the traditional practices of public schools are reshaped to respond to children with special needs. Martha Minow argues that a common dilemma—the “dilemma of difference”—underlies efforts to develop satisfactory programs of special and bilingual education. She suggests that both types of programs confront a single, fundamental question: How can schools deal with children defined as “different” without, on the one hand, recreating opportunities for discrimination which come with separate treatment, or, on the other hand, leaving intact a neutral system that advances the dominant group while it simultaneously hinders others? Professor Minow considers efforts to redesign programs or constrain power as possible ways out of the dilemma. She concludes, however, that the dilemma reappears despite these efforts. She recommends that future reform should begin with the recognition that the dilemma is one shared by the entire student group, and that solutions should seek to reconstruct the relationships that associate difference with stigma.

Betsy Levin addresses the problems of designing educational programs for children with special needs within the context of a federal system of government. In a comparative study of the Australian and American legal and educational systems, Dean Levin explores the tensions created by federal educational activism designed to provide equal opportunity to special pupil populations whose needs cannot be fully addressed by local authorities. After tracing the historical role of the Australian Commonwealth in setting educational policy, she considers the constitutional basis for federal intervention within the Australian system. She then describes current Australian grant-in-aid programs designed to serve language-minority, handicapped, and economically disadvantaged populations and notes a number of differences in the ways that the tension between federal and local interests has been mediated in the Australian and American systems.

Further understanding of the dimension of federalism in the American system is provided by a student note analyzing state special education laws. This useful note compares the federal law framework of the EAHCA and other federal legislation, with the state law network that complements and in some cases imposes stricter duties upon school districts than does federal law.

The contributions in this symposium issue tackle many of the most important legal and policy issues concerning children with special needs in public education. While these efforts do not resolve forevermore the issues, they continue and enlarge a debate upon which sensible solutions depend.