

# FOCUS ON EXCEPTIONAL CHILDREN

## RECENT INFLUENCES OF LAW REGARDING THE IDENTIFICATION AND EDUCATIONAL PLACEMENT OF CHILDREN

*Frederick J. Weintraub*

### LAW AND EXCEPTIONAL CHILDREN

Special education, as an institution of the American educational enterprise, has had a proud history of being that one element of the enterprise which has been an advocate for the learning needs of children. Law has been used by special educators and parents of handicapped children as a "sword of Damocles" to force an unwilling educational system to direct resources to the establishment of special programs for handicapped children (Weintraub, 1969).

However, only recently has this "sword" been found to have a second cutting edge; for, in the zeal to provide for children, it has become apparent that in some cases the basic rights of these children and their families have been violated. In recent years, this realization has resulted in numerous court proceedings, corrective legislation, media condemnations, confrontations, and a general sense of bewilderment on the part of the professional community.

A review of the historical and philosophical development of special education, in terms of the major legal developments pertaining to identification and placement, and the implications of these developments to special education is presented.

### DEVELOPMENTAL OVERVIEW

While the United States Constitution charges government to promote "the general welfare," such purpose has been inherent to all governments at all times, with varying perceptions of "the general welfare." The Greeks of Sparta placed their cripples on the mountain sides; and the U.S. state governments, since the early 1800s, have placed their handicapped in institutions. Even today, "the general welfare" is often construed to legally sanction coercive methods of protecting society from the deviant.

In 1919, the Supreme Court of Wisconsin ruled in *Beattie v. State Board of Education* (172 N.W. 153) that "the rights of a child of school age to attend the public schools of the state cannot be insisted upon, when his presence therein is harmful to the best interests of the school." It was shown that the child in question was not a physical threat and could compete in the academic environment. The major argument

1. Frederick J. Weintraub is Assistant Executive Secretary for Governmental Relations, The Council for Exceptional Children, Arlington, Virginia.

presented by the school district for exclusion was that his physical condition (cerebral palsy) produced a "depressing and nauseating effect on the teachers and school children" and that he required an undue portion of the teacher's time and attention.

Historically, American public education, as conceived by its founders, thought that it would be enough to open the schools to everyone, to rich and poor alike, and then let the youngsters make the most of their opportunities. It was assumed that in a free-for-all contest the prizes would go to those who have the most brains, industry, ambition, and character (Mann, 1968). The Georgia populist, Tom Watson, expressed this philosophy most clearly (Woodward, 1938):

Close no entrance to the poorest, the weakest, the humblest. Say to ambition everywhere, 'the field is clear, the contest fair; come, and win your share if you can!'

However, for many, this limited concept of equality of educational opportunity, coupled with the legal sanctions of cases such as *Beattie v. State Board of Education*, closed the educational door to those who could not compete in the fair race.

By the early 1900s, a growing concern for these children developed (Coleman, 1968):

As families lost their economic production activities, they also began to lose their welfare functions, and the poor or ill or incapacitated became more nearly a community responsibility. Thus the training which a child received came to be of in-

terest to all in the community, either as his potential employers or as his potential economic supports if he became dependent.

While public school special education classes for the deaf received their impetus in the 1860s, the first public school class for the mentally retarded was established in 1896 in Providence, Rhode Island. By 1922, there were 191 public school programs for children with varying handicapping conditions in cities with populations over 100,000 (Weintraub, 1971).

The major stimulus to this growth was an increasing base of state legislation requiring and/or providing financial incentive for the development of such programs. Legislation in New Jersey in 1911, New York in 1917, and Massachusetts in 1920 made it mandatory, for local boards of education to determine the number of handicapped children within their school districts and, in the case of the mentally retarded, to provide special classes when there were 10 or more such children. In 1915 Minnesota provided state aid in the amount of \$100 for each child attending a special class and also required that teachers hold special certificates (Weintraub, 1971).

By 1948, 1,500 school systems reported special education programs; 3,600 in 1958; and 5,600 in 1963. Mackie (1965) reported that as many as 8,000 school districts contracted for special education services from neighboring districts. Today, it is estimated that 40% of the nation's six million handicapped children of school age are receiving special education services.<sup>2</sup>

Of the 60% of the handicapped children not receiving special education services, approximately one million are excluded totally from a publicly supported education. These children languish in homes or institutions or receive private education paid for by their parents or charity. While over half of the states mandate through statutes for education of the handicapped (Abeson and Weintraub, 1971), presently no state is meeting this obligation.

Recent court decisions, however, may portend a dramatic change. In 1969, Judge Wilkens, Third Judicial District Court of Utah, required that two mentally retarded children excluded from education and placed under the Department of Welfare be provided education as a part of the public education system. In his ruling

2. Fiscal Year 1969 Annual Reports submitted by the fifty states and the District of Columbia, under ESEA, Title VI-A, by the State Federal Information Clearinghouse for Exceptional Children (SFICEC) of The Council for Exceptional Children.

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Executive and Editorial Offices  
6635 East Villanova Place  
Denver, Colorado 80222  
Telephone (303) 757-2579

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(*Fred G. Wolf, et al. v. The Legislature of the State of Utah*, Div. No. 182646, 1969), he noted:

Today it is doubtful that any child may reasonably be expected to succeed in life if he is denied the right and opportunity of an education. In the instant case the segregation of the plaintiff children from the public school system has a detrimental effect upon the children as well as their parents. The impact is greater when it has the apparent sanction of the law. The policy of placing these children under the Department of Welfare and segregating them from the educational system can be and probably is usually interpreted as denoting their inferiority, unusualness, and incompetency. A sense of inferiority and not belonging affects the motivation of a child to learn. Segregation, even though perhaps well intentioned, under the apparent sanction of law and state authority has a tendency to retard the educational, emotional, and mental development of the children.

In January, 1971, the Pennsylvania Association for Retarded Children on behalf of the parents of thirteen retarded children brought suit in the United States District Court for the Eastern District of Pennsylvania against the state of Pennsylvania, its agencies, and school districts for failure to provide their children and other retarded children a publicly supported education. The plaintiffs argued that the denial of such education was a violation of the equal protection clause of the Fourteenth Amendment of the Constitution of the United States. Or, more simply, if education is provided by government to some, it must be made available to all. In October of 1971, a consent agreement was reached between the parties; the court ordered the state to provide education to all mentally retarded children including those living in state institutions within one year (*Pennsylvania Association for Retarded Children et al. v. Commonwealth of Pennsylvania, David H. Kurtzman, et al.*, Civil Action No. 71-42).

While there may be many social and professional issues related to the task of identifying and placing children in special education programs, the existing body of law addresses itself to four major issues: (1) the acceptability of present standardized achievement tests as a criterion for placement for minority group children; (2) the liability of the evaluator; (3) the placement process, (4) the grouping of children by ability.

#### ACCEPTABILITY OF ACHIEVEMENT TESTS FOR MINORITY CHILDREN

All state education codes contain a definition or enumeration of the types of handicapped children entitled to

receive special education services.<sup>3</sup> The statutes vary greatly ranging from New York's (Laws of New York, Article 89, Section 4401) broad statement,

One who, because of mental, physical, or emotional reasons cannot be educated in regular classes, but can benefit by special services.

to New Mexico's (77-11-3) disability enumerations,

'Handicapped children' includes all persons of school age to twenty-one years of age inclusive who require special education in order to obtain the education of which they are capable because they are educable mentally handicapped, trainable mentally handicapped, blind, partially sighted, deaf, hard of hearing, speech defective, crippled or neurological and other health impaired or are emotionally maladjusted to the extent that they cannot make satisfactory progress in the regular school program.

to California's (6901) definition by disability approach,

'Mentally retarded minors' means all minors who because of retarded intellectual development as determined by individual psychological examination are incapable of being educated efficiently and profitably through ordinary classroom instruction.

to Georgia's (H.B. No. 453) highly specified definition by disability approach,

Exceptional Children: are those who have emotional, physical, communicative, and/or intellectual deviations to the degree that there is interference with school achievements or adjustments, or prevention of full academic attainment, and who require modifications or alterations in their educational programs. This definition includes children who are mentally retarded, physically handicapped, speech handicapped, multiple handicapped, autistic, intellectually gifted, hearing impaired, visually impaired, and any other areas of exceptionality which may be identified.

State statutes proceed in similar varying fashion in specifying the procedures for certifying a child to be handicapped and placing such child in a special program. However, when statutes are combined with regulations, a general consistency can be observed among the states.

All states serve a classification of children generally referred to as "mentally retarded" or "mentally handicapped." The major criterion for certification is an intelligence quotient derived from an individual psychological test administered by a state-approved, certified, or licensed psychologist or psychometrist. The most commonly recognized tests are the Stanford-Binet and the

3. Appreciation is extended to CEC's State-Federal Information Clearinghouse funded by the Bureau of Education for the Handicapped, U.S. Office of Education, for researching the state statutes and regulations on this issue.

WISC. Other tests sometimes mentioned include the Bender Gestalt, the Draw-A-Person, and the Wide Range Achievement Test. The I.Q. ceiling is usually 75-79. Many states require additional data for certifying a child to be educable mentally retarded. These often include physical examinations, social work case studies, and school counselor and teacher reports.

### Recent Decisions

In the last several years, there have been four major cases directed at challenging the legality of placement of children in classes for the mentally retarded on the basis of I.Q. tests which are prejudicial to the children in regard to their native language, cultural background, and normative standardization. The most significant case to date is *Diana v. State Board of Education* (c-70 37 R F R).

In January, 1970, a suit was filed in the District Court of Northern California on behalf of nine Mexican-American students, ages 8 to 13. The children came from homes in which Spanish was the major, if not the only, language spoken. All had been placed in classes for the mentally retarded in Monterey County, California. Their I.Q.'s ranged from 30 to 72 with a mean score of  $63\frac{1}{2}$ . They were retested bilingually; seven of the nine scored higher than the I.Q. cutoff line, and the lowest score was three points below the cutoff line. The average gain was 15 I.Q. points.

The plaintiffs charged that the testing procedures utilized for placement were prejudicial in that the tests place heavy emphasis on verbal skills requiring facility with the English language, the questions are culturally biased, and the tests were standardized on white, native-born Americans. The plaintiffs further pointed out that in "Monterrey County, Spanish surname students constitute about  $18\frac{1}{2}\%$  of the student population, but nearly one-third ( $33\frac{1}{3}\%$ ) of the children in EMR classes."

Studies conducted by the California State Department of Education corroborated the inequity. In 1966-67, of 85,000 children in EMR classes, children with Spanish surnames comprised 26% while they accounted for only 13% of the total school population.

The plaintiffs sought a class action on behalf of all bilingual Mexican-American children then in EMR classes and all such children in danger of inappropriate placement in such classes. On February 5, 1970, a stipulated agreement order was signed by both parties. The order required that:

1. Children are to be tested in their primary language. Interpreters may be used when a bilingual examiner is not available.
2. Mexican-American and Chinese children in EMR classes are to be retested and evaluated.
3. Special efforts are to be extended to aid misplaced children readjust to regular classrooms.
4. The state will undertake immediate efforts to develop and standardize an appropriate I.Q. test.

In 1968, a case very similar to *Diana* was initiated in the Superior Court of Orange County, California, on behalf of eleven Mexican-American students, ages 5 to 18 (*Arreola v. Board of Education*, Santa Anna School District, No. 160 577). To date, no ruling has been delivered; and it is questionable as to the status of the charges due to the changes occasioned by *Diana*.

A third case, *Covarrubias v. San Diego Unified School District*, is also similar in argument to the *Diana* case except for two distinctions. First, twelve of the seventeen student plaintiffs are black; secondly, the plaintiffs seek \$400,000 in punitive damages for the period they spent in EMR classes. The suit was filed with the school district in April, 1970.

The California cases have resulted in several amendments to the California statutes and substantial amendments to the state's regulations. Senate Bill 1317 was the major substantive legislation passed by the California legislature. The following is the Legislative Counsel's digest of the statute:

Requires verbal or nonverbal individual intelligence testing of minors in specified primary home language prior to admission to a special education program for the mentally retarded.

Prohibits placement of minor in special education class for the mentally retarded if he scores higher than two standard deviations below the norm on a specified individual intelligence test.

Prohibits placement of minor in special education program for the mentally retarded if, when being tested in a language other than English, he scores higher than two standard deviations below the norm on a nonverbal intelligence test or on nonverbal portion of an individual intelligence test including both verbal and nonverbal portions.

Permits placement of minor in such program if he scores two standard deviations, or more, below the norm on specified individual intelligence tests and after examination by credentialed school psychologist.

Prohibits placement of minor in such class without parents' written consent obtained after complete explanation of special education program.

Requires Department of Education to submit annual report to Legislature on testing and placement of minors in programs for mentally retarded minors.

Provides for termination of act two years following its enactment.

The cases have also had impact at the federal level. On May 25, 1970, an HEW memorandum was sent from J. Stanley Pottinger, Director of HEW's Office for Civil Rights, to 1,000 school districts with large numbers of bilingual children. The memo noted that schools would not be in compliance with Title VI of the Civil Rights Act if students whose predominant language is other than English were assigned to classes for the mentally retarded on the basis of criteria which essentially measure or evaluate English language skills.

*Stewart et al. v. Phillips et al.* (70-1199-F), filed in October, 1970, before the Federal District Court of Massachusetts on behalf of seven black students and parents, took another major step in the attack on I.Q. testing and EMR placement. As in *Diana*, the children were tested, adjudged mentally retarded, and placed in Boston EMR classes. Private retesting found the students were not retarded. Several retesting studies of minority group EMR children in Boston have found 50% to be misclassified. The plaintiffs sought class action to enjoin further testing or placement until a Commission on Individual Needs is appointed to oversee testing and classification. Two of the Commission's members would be parents of children in the schools. The plaintiffs also seek \$20,000 per individual for damages.

#### LIABILITY OF THE EVALUATOR

On the basis of recent findings of large numbers of children misclassified as mentally retarded by school psychologists or other examiners, the question has been raised as to whether such persons may be sued for libel or slander. None of the aforementioned cases have brought such action, and no ruling has yet been given on punitive damages. However, two tangential cases may help to understand this issue.

In *Iverson v. Frandsen* (237 F. 2d 898, Idaho, 1956), suit was brought by the parents of a nine-year-old girl against a psychologist at a state hospital for the mentally ill. The child had been taken to the hospital for treatment of fear of enclosed places. Hospital regulations required a psychological examination. A Stanford-Binet test showed the girl to be a "high grade moron." Upon request by the school guidance counselor, the findings were forwarded to school officials.

The U.S. Court of Appeals ruled that "where a psychologist, as a public official, made a professional report on plaintiff's mental level. . . in good faith, and as representing his best judgment, such report was free from actionable malice and was not libelous."

A case quite different (*Kenny v. Gurley*, 94 So. 34) in nature does provide helpful thinking regarding libel and misclassification. In 1923 in Alabama, a girl was sent home from college after the school doctor had diagnosed her as having venereal disease. A letter was sent by the doctor to the parents explaining her dismissal. Further medical examination disproved the doctor's original diagnosis of venereal disease. Suit was then brought against the doctor for slander. The court ruled that the doctor behaved without malice, that the action of dismissal was justifiable to his responsibility to maintain the health of the general student body, and that his letter was privileged communication to a legitimate recipient.

#### PLACEMENT PROCESS

Until recently, very little was said in the statutory or regulatory provisions of the states regarding the process of placing a child in a special education program. There does appear to be a trend toward the requirement for admissions committees to review the child's records (Alabama, 1965):

A placement committee appointed by the local superintendent shall be established for determining the eligibility of exceptional children for placement in special classes. Such a committee should be composed of representation from medicine, education, and psychology, if possible.

This committee, after the study of all data available on each child, shall make recommendations concerning each child's admission to the special class on a trial basis.

A second trend is for the requirement of parental involvement and/or approval in the placement of a child in an EMR program (Colorado statutes 123-22-7 [2]; Arizona ARS 15-1013 [e]).

The determination of the mental handicap of a child shall be made by individual examination conducted by a psychologist with the consent of the parent or guardian of the child. In the event that the parents or guardian of the child disagree with the determination of the psychologist or the placement of the child, they may refer the child to a psychologist of their own choice, and at their own expense, and submit such evaluation to the Board of Education. The Board of Education shall have the ultimate right of placement of children attending the public schools within their jurisdiction.

The Chief Administrative Official of the school district or county or such person as designated by him as responsible for special education shall place the child, except that no child shall be placed or retained in a special education program without the approval of his parent or guardian.

The following cases may help clarify some of the considerations when preserving the rights of children in the placement process.

In the 1961 New York case, *Van Allen v. McCleary* (211 NYS 2d 501), the plaintiff sought a court order requiring the board of education to release the school records on his son, particularly the psychological report to a private physician who was treating his son. The court ruled in favor of the plaintiff noting that "the parent's right (to the records) stems from his relationship with the school authorities as a parent who, under compulsory education, has delegated to them the educational authority over his child."

An old but pertinent case is *State ex. rel. Kelley v. Ferguson* (95 Neb. 63, 144 N.W. 1059) in which in 1914 the Supreme Court of Nebraska ruled in favor of the right of a parent to select courses for his child. The plaintiff had for some time instructed his daughter not to attend a required domestic science course provided at a neighboring school one mile away, since such attendance would conflict with her music course. As a result, the daughter was expelled from school. The court, in its wisdom, ruled:

But no pupil attending the school can be compelled to study any prescribed branch against the protest of the parent that the child shall not study such branch, and any rule or regulation that requires the pupil to continue such studies is arbitrary and unreasonable. There is no good reason why the failure of one or more pupils to study one or more prescribed branches should result disastrously to the proper discipline, efficiency, and well-being of the school. Such pupils are not idle but merely devoting their attention to other branches; and so long as the failure of the students, thus excepted, to study all the branches of the prescribed course does not prejudice the equal rights of other students, there is no cause for complaint.

The state is more and more taking hold of the private affairs of individuals and requiring that they conduct their business affairs honestly and with due regard for the public good. All this is commendable and must receive the sanction of every good citizen. But in this age of agitation, such as the world has never known before, we want to be careful lest we carry the doctrine of governmental paternalism too far, for, after all is said and done, the prime factor in our scheme of government is the American home.

A 1950 Iowa Supreme Court decision may qualify the principle established in *Kelly*. The case *Petty in re* (41 N.W. 2d 672) concerned the refusal of the parents of a deaf child to send their child to a state school for the deaf after evidence was shown that the child could not be educated adequately in a local school. The court ruled against the parent, stating that:

To obtain an education for a normal child with facilities presented in an average school means one thing, but to obtain an education for a handicapped child, particularly one who is deaf, would mean another thing. A child who has a physical defect necessarily must receive a different type of instruction than one who is not handicapped.

In 1967, the Supreme Court of the United States in *In re Gault* (887 U.S. 1, 87 S. Ct. 1428, 18 L. Ed 2d 527) established that children and their parents are entitled to counsel and to be furnished counsel if they are unable to afford it in matters which could lead to commitment to an institution for delinquency. *Madera v. Board of Education of City of New York* (267 F. Supp. 356, 386 F. 2d 778) expanded the *Gault* principle to situations more closely related to the placement of children in special education programs. The child of the plaintiff had been suspended from school. The parents were required to appear before the "superintendent's guidance conference" comprised of various school personnel. The purpose of the meeting was to review alternatives for meeting the educational needs of the child. Among the alternatives considered were reinstatement, placement in a special school for maladjusted children, referral to the Bureau of Child Guidance which would evaluate the child and recommend appropriate placement, and referral to the Bureau of Attendance for court action. The parents were denied the opportunity to be represented by counsel.

The U.S. District Court ruled that the guidance conference could result in a loss of personal liberty for the child and that the parents as a result of the "conference" would be in jeopardy of legal proceedings for child neglect. The court concluded:

that the due process clause of the Fourteenth Amendment to the Federal Constitution is applicable to a District Superintendent's Guidance Conference. More specifically, this court concludes that enforcement by defendants of the 'no attorneys provision' . . . deprives plaintiffs of their right to a hearing in a state initiated proceeding which puts in jeopardy the minor plaintiff's liberty and right to attend the public schools.

The U.S. Court of Appeals reversed the findings of the lower court noting that the guidance conference is a preliminary conference and not an adjudication. The court did note, however, that:

what due process may require before a child is expelled from public school or is remanded to a custodial school or other institution which restricts his freedom to come and go as he pleases is not before us.

One of the most significant aspects of the Pennsylvania Association for Retarded Children case discussed earlier (*Pennsylvania Association for Retarded Children et al. v. Commonwealth of Pennsylvania, David H. Kurtzman, et al.*, Civil Action No. 71-42) was the court's stipulations regarding due process rights of children and their parents in regard to education. In examining the question of

whether children had the right to an education, the court was disturbed by the fact that the schools were totally autonomous in their decisions to place or not to place. The court ordered the state to adopt regulations regarding procedures for "change in educational status" of mentally retarded children. These are to include the following:

Whenever any mentally retarded or allegedly mentally retarded child, aged five years, six months, through twenty-one years, is recommended for a change in educational status by a school district, intermediate unit or any school official, notice of the proposed action shall first be given to the parent or guardian of the child.

Notice of the proposed action shall be given in writing by registered mail to the parent or guardian of the child (N.B. being changed to certified mail).

The notice shall describe the proposed action in detail, including specification of the statute or regulation under which such action is proposed and a clear and full statement of the reasons therefor, including specification of any tests or reports upon which such action is proposed.

The notice shall advise the parent or guardian of any alternative education opportunities, if any, available to his child other than that proposed.

The notice shall inform the parent or guardian of his right to contest the proposed action at a full hearing before the Secretary of Education, or his designee, in a place and at a time convenient to the parent, before the proposed action may be taken.

The notice shall inform the parent or guardian of his right to be represented at the hearing by legal counsel, of his right to counsel, of his right to examine before the hearing his child's school records including any tests or reports upon which the proposed action may be based, of his right to present evidence of his own, including expert medical, psychological, and educational testimony, and of his right to confront and to cross-examine any school official, employee, or agent of a school district, intermediate unit or the department who may have evidence upon which the proposed action may be based.

The notice shall inform the parent or guardian of the availability of various organizations, including the local chapter of the Pennsylvania Association for Retarded Children, to assist him in connection with the hearing and the school district or intermediate unit involved shall offer to provide full information about such organization to such parent or guardian upon request.

The notice shall inform the parent or guardian that he is entitled under the Pennsylvania Mental Health and Mental Retardation Act to the services of a local center for an independent medical, psychological, and educational evaluation of his child and shall specify the name, address, and telephone number of the MH-MR center in his catchment area.

The notice shall specify the procedure for pursuing a hearing, which procedure shall be stated in a form to be agreed upon by counsel, which form shall distinctly state that the parent or guardian must fill in the form and mail the same to the school

district or intermediate unit involved within 14 days of the date of notice.

If the parent or guardian does not exercise his right to a hearing by mailing in the form requesting a hearing within 14 days of receipt of the aforesaid notice, the school district or intermediate unit involved shall send out a second notice in the manner prescribed above, which notice shall also distinctly advise the parent or guardian that he has a right to a hearing as prescribed above, that he had been notified once before about such right to a hearing and that his failure to respond to the second notice within 14 days of the date thereof will constitute his waiver to a right to a hearing. Such second notice shall also be accompanied with a form for requesting a hearing of the type specified above.

The hearing shall be scheduled not sooner than 20 days nor later than 45 days after receipt of the request for a hearing from the parent or guardian.

The hearing shall be held in the local district and at a place reasonably convenient to the parent or guardian of the child. At the option of the parent or guardian, the hearing may be held in the evening and such option shall be set forth in the form requesting the hearing aforesaid.

The hearing officer shall be the Secretary of Education, or his designee, but shall not be an officer, employee or agent of any local district or intermediate unit in which the child resides.

The hearing shall be an oral, personal hearing, and shall be public unless the parent or guardian specifies a closed hearing.

The decision of the hearing officer shall be based solely upon the evidence presented at the hearing.

The local school district or intermediate unit shall have the burden of proof.

A stenographic or other transcribed record of the hearing shall be made and shall be available to the parent or guardian or his representative. Said record may be discarded after three years.

The parent or guardian or his counsel shall be given reasonable hearing by legal counsel of his choosing.

The parent or guardian or his counsel shall be given reasonable access prior to the hearing to all records of the school district or intermediate unit concerning his child, including any tests or reports upon which the proposed action may be based.

The parent or guardian or his counsel shall have the right to compel the attendance of, to confront and to cross-examine any witness testifying for the school board or intermediate unit and any official, employee, or agent of the school district, intermediate unit, or the department who may have evidence upon which the proposed action may be based.

The parent or guardian shall have the right to present evidence and testimony, including expert medical, psychological or educational testimony.

No later than 30 days after the hearing, the hearing officer shall render a decision in writing which shall be accompanied by written findings of fact and conclusions of law and which shall be sent by registered mail to the parent or guardian and his counsel.

Pending the hearing and receipt of notification of the decision

by the parent or guardian, there shall be no change in the child's educational status.

### GROUPING BY ABILITY

The final issue to which an increasing body of legal examination is being given is the placement of children in self-contained special classes limited to children of a single ability classification.

Traditionally, special education meant special classes. This is not so today. There is a distinct movement to encourage other program options such as resource aides to the regular classroom teachers, resource rooms, itinerant services, etc. This trend is not meant to discredit the special class, but rather to view it as a more extreme placement on a continuum of special education services that should be used with caution.

Slowly, this trend is being reflected in changes in state statutes and regulations. One major deterrent to the swing from the special class is the structure of state financial incentive to administrative practices which may be in conflict with appropriate educational practice. The Analytic Study of State Legislation for Handicapped Children (Ackerman and Weintraub, 1971) found that local school districts often use the state funding procedures as the prime source of planning for the educational needs of handicapped children. This reality is diminishing as more comprehensive legislative authorities are created; however, the situation nationally is far from healthy. A number of recent cases have bearing on this issue.

In 1962, a woman was taken into custody by police in the District of Columbia after being found wandering about the city in a state of confusion. After psychiatric observation which indicated the woman was suffering from senility, the woman was committed to a mental hospital. The psychiatrist noted that the woman was not a threat to the community, only a threat to herself. The woman filed a writ of habeas corpus. The trial court denied her petition (*Lake v. Cameron*, 364 F. 2d 657). The U.S. Court of Appeals reversed the trial court and in doing so laid down a most important principle:

Deprivations of liberty solely because of dangers to the ill persons themselves should not go beyond what is necessary for their protection. . . .

Appellant may not be required to carry the burden of showing the availability of alternatives. . . .(She) does not know and lacks the means to ascertain what alternatives, if any, are available, but the Government knows or has the means of knowing and should therefore assist the court in acquiring such information. . . .

From this ruling, it would seem that when there exists a continuum of treatments varying in degree of deprivation of individual liberty that government can only require that appropriate treatment which is least delimiting to the individual's rights. It is also important to note that the court placed the burden on the government to be familiar and make known the alternative treatments.

In two school desegregation cases, *McLaughlin v. Florida* (379 U.S. 184, 1964) and *Loving v. Virginia* (388 U.S. 1, 1967), the Supreme Court established a "yardstick" for determining when a procedure was constitutionally offensive. The high court ruled that racial distinctions, differentiations, and classifications are constitutionally offensive, unless the state is able to justify them as essential to the accomplishment of an otherwise permissible state policy. As in the *Lake* case, the court emphasized that when alternatives were available, it would be difficult to justify a practice that limited or discriminated individual liberty.

### Track System

The most cited case by protagonists of traditional special education programming is *Hobson v. Hansen* (269 F. Supp. 401) from the U.S. District Court of the District of Columbia in 1967. The case centered around the question whether the "track system" utilized in the Washington, D.C. public schools which separated children into five ability groupings (honors track for gifted students; regular track for college preparation; general track, vocational or commercial program for most students; the special or basic track for those with I.Q.'s below 75; junior primary track for readiness before first grade) was an illegal, discriminating practice. Judge Wright noted that:

The track system was based on three assumptions.

First, a child's maximum educational potential can and will be accurately ascertained. Second, tracking will enhance the prospects for correcting a child's remediable educational deficiencies. Third, tracking must be flexible so as to provide an individually tailored education for students who cannot be pigeon-holed in single curriculum (p. 446).

The track system. . . translates ability into educational opportunity. When a student is placed in a lower track, in a very real sense his future is being decided for him; the kind of education he gets there shapes his future progress not only in school but in society in general. Certainly, when the school system undertakes this responsibility it incurs the obligation of living up to its promise to the student that placement in a lower track will not simply be a shunting off from the mainstream of education, but rather will be an effective mechanism for bringing the student up to his true potential (p. 473).



None of this is to suggest either that a student should be sheltered from the truth about his academic deficiencies or that instruction cannot take account of varying levels of ability. It is to say that a system that presumes to tell a student what his ability is and what he can successfully learn incurs an obligation to take account of the psychological damage that can come from such an encounter between the student and the school; and to be certain that it is in a position to decide whether the student's deficiencies are true, or only apparent (p. 492).

. . . it should be made clear that what is at issue here is not whether defendants are entitled to provide different kinds of students with different kinds of education. Although the equal protection clause is, of course, concerned with classifications which result in disparity of treatment, not all classifications resulting in disparity are unconstitutional. If classification is reasonably related to the purposes of the governmental activity involved and is rationally carried out, the fact that persons are thereby treated differently does not necessarily offend (p. 511).

As in *Diana*, Judge Wright emphasized the prejudicial nature of present standardized aptitude tests, which are based on the white norms, when applied in school systems such as Washington, D.C. with a black student population in excess of 90%.

Judge Wright further noted:

. . . any system of ability grouping which, through failure to include and implement the concept of compensatory education for the disadvantaged child or otherwise, fails in fact to bring the great majority of children into the mainstream of public education denies the children excluded equal educational opportunity and thus encounters the constitutional bar (p. 515).

Judge Wright's final remarks reflect the difficulty faced by the court in its decision and portend the possible future nature of such court decisions.

It is regrettable, of course, that in deciding this case this court must act in an area so alien to its expertise. It would be far better indeed for these social and political problems to be resolved in the political arena by other branches of government.

The *Hobson v. Hansen* decision was appealed in *Smuck v. Hobson* (F08 F. 2d 175) in 1969 and upheld on a four to three decision by the U.S. Court of Appeals. The appeal was complex since two new dimensions had been initiated. First, the Congress had established a board of education for the District, elected by the people and given full responsibility for educational policy. Second, the board had accepted the findings and recommendations of the Passow Report, an independent study of the D.C. schools conducted by Teachers College, Columbia University. The report provided remedies to many of the discriminatory issues raised in the initial case. The appellants argued that the sweeping ban on the "track system" was no longer necessary. While the majority upheld Judge Wright's decision, latitude was

provided for the board to bring alternative plans before the court for consideration.

Judge Burger (now Chief Justice of the Supreme Court) delivered a dissenting opinion. In his dissent, Judge Burger cited the following comment from the *Harvard Law Review*:

[T]he limits upon what the judiciary can accomplish in an active role are an additional reason for circumspection, particularly in an area where the courts can offer no easy solutions.

. . . A court applying the *Hobson* doctrine must necessarily resolve disputed issues of educational policy by determining whether integration by race or class is more desirable; whether compensatory programs should have priority over integration; whether equalization of physical facilities is an efficient means of allocating available resources for the purpose of achieving overall equal opportunity. There is a serious danger that judicial prestige will be committed to ineffective solutions, and that expectations raised by *Hobson*-like decisions will be disappointed. Furthermore, judicial intervention risks lending unnecessary rigidity to treatment of the social problems involved in foreclosing a more flexible, experimental approach.

The *Hobson* doctrine can be criticized for its unclear basis in precedent, its potentially enormous scope, and its imposition of responsibilities which may strain the resources and endanger the prestige of the judiciary.

In *Swann v. Charlotte-Mecklenburg Board of Education* (300 F. Supp. 1358) the U.S. District Court of North Carolina ruled in 1969 that:

There is no legal reason why fast learners in a particular subject should not be allowed to move ahead and avoid boredom while slow learners are brought along at their own pace to avoid frustration. It is an educational, rather than a legal, matter to say whether this is done with the students all in one classroom or separated into groups.

## CONCLUSIONS

As mentioned in the beginning of this paper, law has been the "sword of Damocles" that has forced an unwilling educational enterprise to develop a system of educating handicapped children, and it is this same law that is now being used to rectify the injustices in that system. Law is the corrective method of a democratic society when assurances of good conduct have not been forthcoming from citizens' groups (Berger, 1967).

Today there are many who question whether law can command the behaviors it seeks; if it cannot, then its role as a teacher of the citizenry must be enhanced through every vehicle possible. Perhaps the true value of the cases mentioned in this paper and others yet to come will not be measured by volume of litigation, but rather by the educational community's implementing strategies to prevent further injustices. I would hope that

some of the following points will be given serious consideration.

1. Perhaps the best motto for education would be "to each child, in his own way, in his own time." Philosophically, education has long accepted this motto; however, its conscience has gotten lost in administrative realities. And so we took the tool—the intelligence test, for example—overworked it, legalized it, and made it become, against our own warnings, a weapon of discrimination. The recent court decisions must be construed as saying, in a fashion similar to gun control legislation, that if you cannot control these tools they will have to be taken away. The court has not banned intelligence testing for the purpose of placement; it has said, clean your own house. In doing so, caution will have to be utilized to assure that children are measured on tests that are consistent with their major language, that reflect their environment and cultural heritage, and that are standardized on similar children.

2. Throughout our history, children have not been considered citizens having the basic freedoms granted by the Constitution. Numerous cases in recent years, reaching far beyond the scope of this paper, have granted American youth the rights of American citizenship. One of the most cherished of these rights is the entitlement to due process of law in our interactions with the varying elements of government.

The importance of this right was stressed at the recent White House Conference on Children (Forum 22, 1970):

Unfortunately, procedures initially designed to be rehabilitative but not retributive, informed but not abusive, enlightened but not willful, have too frequently become the opposite of their intent. Children have been forced to seek redress from their presumed benefactors.

For those of us concerned about the education of handicapped children, the cases relating to due process offer several important guidelines (Weintraub, Abeson, & Bradock, 1971):

Evaluation on the basis of norms consistent with the culture of the child.

Evaluation conducted in the primary language of the child.

Parental right to obtain an independent evaluation of their child at public expense if necessary.

A due process hearing in which the parents meet with school officials to determine appropriate placement. In this regard, parents should be entitled to advance notification, access to appropriate school records, representation by legal counsel and provision of additional evidence concerning their child.

Official transcripts of the due process hearing should be maintained, and parents should have the right to appeal decisions resulting from such hearings to the state education agency or directly to the appropriate court.

3. One of our most important legal rights is privacy and maintenance of our personal dignity. In a radio speech (SRS, 1969) in 1968, President Nixon noted that government must "do more than help a human body survive, it must help a human spirit revive, to take a proud place in the civilization that measures its humanity in terms of every man's dignity." Often in our zeal, we deny those we are trying to help. We do not need to go far beyond these cases, our schools or our institutions to affirm this reality.

A review of the major cases on libel or slander has been presented. Very little can be learned from this review other than the fact that professionals are safe in their judgments (whether they be correct or incorrect) as long as they did not have malice in their hearts and did not circulate information beyond appropriate channels. However, we can anticipate greater litigation and protective legislation in this regard.

The tragedy is that many professionals see the growing rights movement as a threat. Instead, the movement should be seen as enabling the professional to behave in a professional rather than a bureaucratic manner. But the message must be clear—individual rights must transcend bureaucratic and professional needs or limitations.

We have institutionalized many persons knowing that an unavailable, less harsh treatment would have been more appropriate. Similarly, we have accepted many children into special classes for the lack of an alternative. Thus, in many ways, we have allowed ourselves to aid the education system avoid its responsibility to offer children the wide range of services needed. Those concerned with identification and placement of handicapped children can settle for no less than what is appropriate.

Much of the material contained in this article was originally developed as a discussion paper for the President's Committee on Mental Retardation.

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## RESOURCE MATERIALS

A collection of essays from the back issues of *Focus on Exceptional Children* is now available in book form. The title is *Strategies for Teaching Exceptional Children*, and the volume is edited by Edward L. Meyen, University of Missouri, Columbia; Glenn A. Vergason, Georgia State University; and Richard J. Whelan, University of Kansas and the University of Kansas Medical Center.

*Strategies for Teaching Exceptional Children* may be purchased from Love Publishing Company, 6635 East Villanova Place, Denver, Colorado, 80222. The price is \$6.00.

## ISSUES & TRENDS

Roger Kroth, Ed.D., University of Kansas

When organizing our time most of us tend to put our activities into categories of some sort. This organizational procedure, we feel, helps us be more effective and effi-

cient individuals and reduces the amount of free floating anxiety time.

Children, too, learn to structure their work activities in order to have more free time. For instance, when a little girl is asked to clean up the living room before she goes out to play, it is interesting to note that she picks up dishes and glasses on one trip because they go to the kitchen sink, magazines because they go to the magazine rack, and papers, etc., because they go into a wastebasket. The ordering of tasks in this manner is a functional approach to attaining a behavioral objective—that of having a clean living room in order to go out to play.

What do these observations have to do with the issue of categorization/noncategorization that is currently being discussed in Special Education? First of all, it seems we have placed children in various categories because it is an efficient way of using teacher time. It appears to be easier to group together all children with low academic ability so that lesson plans may be prepared quickly or so that educational materials may be gathered for certain groups of students. Secondly, it seems to be an effective way to provide appropriate educational programs for groups of students. Slower students need not wait for additional explanations which might be necessary while the teacher works with faster students.

Many special education teachers have been questioning the functionality of our present categorical system. They maintain the *concept* of grouping is not wrong, but that our present way of grouping or categorizing children is not as functional as it could be. For instance, would it be more efficient to group children who have a language deficit because of bilingual homes rather than categorize them as mentally retarded?

Various strategies that enhance the child's opportunity to learn are now in operation. Not only are there special classes, but also there are resource rooms for children who need special help in special areas only; there are itinerant Methods & Materials specialists who provide assistance to special children in regular classes; and regular class teachers are provided inservice training to build skills for maintaining or accepting special children in regular classes.

Exceptional children have a right to the best we can offer and a right to the opportunity to be recategorized in ways that will facilitate their education. Special educators must become facilitative educators rather than categorical educators. Eventually, all educators may become *special* educators, because all children are exceptional in their own right.

# CLASSROOM FORUM

*Edited by Austin J. Connolly, University of Missouri*

## PROBLEM 17

*I have great difficulty getting my special class to work productively in small groups. Do you have some suggestions that would facilitate group work?*

So much attention has recently been focused on the individualization of instruction that I welcome the opportunity to discuss the benefits that can accrue from retaining "well planned" group work as part of the instructional program. The qualitative descriptor "well planned" excludes having each child participating in the same page of the same text and similar practices which have given group work an undesirable connotation.

Quality group work provides benefits that are extremely difficult to acquire through an individualized independent study format. Group work makes more efficient use of teacher time than can be obtained through a one-to-one student-teacher ratio. It promotes affective learning, peer interaction, and social skills. It also encourages the use of cognitive and affective learning in application situations.

Several factors influence the effectiveness of group work—the age level and ability of the children, the content under consideration, clarity of group goals, time of day, size and homogeneity of class, etc. It is somewhat difficult to respond to the problem which has been posed, since it provides little insight relative to the variables just mentioned.

Let me initiate my response by indicating that student performance in group work situations is a *learned* behavior. Thus, it will be necessary for your class to "un-learn" some negative behaviors and "learn" some positive group work behaviors. To create positive group work behaviors you will probably need to engage the class as a whole in some particular task. In this way your class activity will serve as a model for the kinds of activity you would desire from small group efforts.

Most academic tasks and lesson plans can profit from a group work component; however, for the purpose of

initiating a desirable model, I would recommend a non-academic task. For example, if your class were at the intermediate level, I would suggest you encourage them to sponsor a hobby show, spring track meet, or bicycle rodeo for the elementary school or the number of classrooms you think would be within the capabilities of the group. A task of the magnitude described can serve as a catalyst for getting children involved in planning, working cooperatively, and following through on assigned responsibilities. These skills are as essential for functional living as traditional academic learning.

It takes a great deal of teacher confidence and ability to have a class which is able to work productively in small groups. Generally, small group work falters from lack of specified goals and inappropriate group dynamics. In early group work, the teacher should provide the group with clear goals and leading questions. In later group work activities, she can assume a more subtle role. It is important for the teacher to gradually assume an indirect guidance function. Her physical presence and overt involvement in the group tend to alter group dynamics and often foster dependency on the teacher. Hopefully, she and her class will grow to the point that groups can respond in a self-directed manner to teacher-structured "in basket" problems and tasks that require the collection and evaluation of information.

## PROBLEM 19

*As a teacher of an intermediate EMR class, I find the area of science instruction quite confusing. While it seems to be of interest to them, I don't know what they should be taught. Can you help?*

All readers are invited to send their solutions to Problem 19. The September 1972 issue will summarize contributions by readers. Complimentary subscriptions will be awarded each month for the best solutions. Send your response to the Editorial Offices, *FOCUS ON EXCEPTIONAL CHILDREN*, 6635 East Villanova Place, Denver, Colorado 80222.

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