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ABSTRACT

The 1982 Canadian Charter of Rights and Freedoms guarantees equal protection and equal benefit of the law to all individuals without discrimination "and, in particular, without discrimination based on...mental or physical handicap." This report identifies and clarifies policy-making questions and issues that are arising as educators translate the law into viable policies and programs for handicapped children. The report is divided into the following sections: (1) an overview of legislative and judicial trends in accommodating handicapped children's right to an appropriate education; (2) a survey of public interest group responses to current provincial legislative policies and programs for handicapped children (including representative examples of how these individuals and groups perceive current legislative initiatives); (3) an overview of recent United States constitutional and legislative developments in handicapped education and a discussion of Canadian legal trends in light of the American experience; and (4) possible applications and implications of the Charter's equality provisions that illustrate the meaning of equal benefit for handicapped children in education. Appendices include letters to ministers of education, special interest/advocacy groups, and human rights commissions (used in the research reported in section 2); a list of 24 references; and a table of 17 cases. (IW)

Special Children and the Charter: Constitutional Implications for the Legal Right to an Appropriate Education

A Report Submitted to the
The Human Rights Law Fund
Department of Justice

by

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July 15, 1986

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Once again, as on previous occasions, we thank Ann Cardus and Eileen Mallory for their unfailing good humour, and excellent secretarial and word processing support.

Preface

Presenting a brief recently to a task force on public educational policy in British Columbia, George Lawson poignantly and passionately recounted his early experience in school:

> When I was eleven months old I came down with encephalitis (sleeping sickness) which put me in the hospital for six weeks. It destroyed part of my brain which controls my hand-eye coordination and my speech. Until I was nine I could barely be understood as I used to stutter all the time. I also had, and still have perception problems and problems learning how to write. Therefore what was expected of an elementary school kid was hard on me. The school did not know how to handle me except that I was failed in grade one. I was put into special classes and then mainstreamed in grade five. My grade six teacher told me that I was at least four years ahead of the other students in my understanding in social studies. In grade five I could understand a political issue so I wrote my M.P. and I still have his letter in reply. But I was still having problems at school, so in grade seven the area counsellor who I had never seen before, said that I had two choices: fail grade seven or go into the occupational class. For me it was like asking a condemned man to choose his method of execution. Did I want to be hanged or electrocuted? Despite my obvious problems with hand/eye coordination and dexterity the school counsellor thought I would make a good tradesman. Thus I went into occupational class in 1968, when I should have been going into grade eight.
>
> I was a disaster in woodwork, cooking, and metalwork. My counsellor in High School was my P.E. teacher and later was my woodwork teacher. I desperately wanted to be part of the regular school system and in grade nine I got my wish but I was not allowed to take creative writing, drama, music or anything creative. I remember that I wanted to take up academic science, law and math. I did not get any help so I bombed. Could they not see that this was just a case of me trying to show them that I was not retarded? Very shortly afterwards I was back into the non-academic program, taking cooking and typing. I stayed in school until the end of grade twelve.

George Lawson subsequently recounted his frustrations in having his disability recognized and diagnosed. For him this did not happen until he entered the King Edward Campus of Vancouver Community College.

His case and experience, and those of doubtless others like him across the country, provoked the questions posed in this research project. What claim, if any, can a person with disabilities or handicaps make to an appropriate education under the Charter? Does the Charter confer an entitlement to an educational service appropriate to the needs of such a student? If it does, how can such an argument be framed?

I. INTRODUCTION: ISSUES AND OBJECTIVES

> ...the problem of providing full educational opportunities to handicapped children is a task that has, with few honourable exceptions, been grievously neglected in Canada.
>
> OECD Report on National Policies for Education (Paris, 1976)

> It is essential that we take just a moment to say a few words about the right to an appropriate education. Many Canadians are denied this basic right referred to in the International Covenant and subscribed to by Canada and the Provinces...There is indeed the need to entrench the right to an appropriate education...Without the entrenchment of that value...Canadians who live with a handicap condition are at the outse denied the means of access to many of the benefits of Canadian society.
>
> Representation Made to the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada (Ottawa, 1980)

In the decade following the OECD's critical appraisal of Canadian attempts to provide appropriate educational services for handicapped children, the debate surrounding Canadian minority rights intensified and finally culminated in the 1982 entrenchment of the Canadian Charter of Rights and Freedoms. Among the unique and widely acclaimed provisions of Canada's new rights' bill is the wide-ranging equality guarantee that: "...every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on...mental or physical handicap." Whether this novel assertion will translate into viable policies and programs aimed at ameliorating historical inequities in the treatment of handicapped children, is still very much an open and contentious issue.

This report focuses on one particular aspect of the hard-fought campaign in which handicapped Canadians and their supporters are currently engaged, namely,

the right of handicapped children to the benefit of a free appropriate public education. What educational provisions address the needs of handicapped children? How do advocates of special needs children evaluate these policies and programs? Will the Charter have a significant impact on current educational opportunities for handicapped children? In order to shed light on these questions a letter/questionnaire (Appendix A) was sent to all provincial education ministries, to a cross-section of Canadian handicap organizations, and to provincial human rights commissions. Representative responses to the letter/questionnaire submitted from November, 1985 to March 1986 are discussed below.

The report is divided into four major sections. The first section provides an overview of legislative and judicial trends with respect to the accommodation of handicapped children in the educational sector. The second part surveys public interest group responses to current provincial legislative policies and programs regarding educational opportunities for handicapped children and includes representative examples of how these individuals and groups perceive current legislative initiatives. The third section of the report provides an overview of recent U.S. constitutional and legislative developments regarding education for the handicapped. Canadian legal trends are then discussed in the light of the American experience. Finally, the last section of the report focuses on possible applications and implications of the Charter's equality provisions for handicapped children in education.

In view of Canada's recent constitutional developments, the issue of equal educational opportunity for handicapped children has become even more complex and pertinent. This initial report is merely intended to identify and clarify questions and issue areas that are increasingly appearing on the agendas of Canadian educational policymakers. The issue in focus is a multi-faceted one which is only partially addressed in this preliminary report.

II. THE RIGHT TO AN APPROPRIATE EDUCATION: LEGISLATIVE AND JUDICIAL TRENDS

Canada's "most ignored minority"[1] has historically been denied both common law and statutory guarantees of equality. The entrenchment of constitutionally entrenched equality rights for mentally and physically handicapped persons thus represents a long overdue addition to Canadian anti-discrimination laws. This section of the report provides an overview of legislative and judicial trends in Canadian anti-discrimination laws and devotes particular attention to recent Charter developments in this area.

Anti-Discrimination Legislation, Education, and the Handicapped

The common law does not elaborate any express principle entitling the handicapped to equality of rights under the law, or even due process of the law.[2] The absence of such guarantees stems in part from broader common law principles which deny remedies in tort and contract for individual or public acts of discrimination.[3] It was not until the 1970s that statutory anti-discrimination statutes were promulgated to correct this anachronistic situation. Enacted in the post World War II period as part of the West's heightened human rights consciousness, anti-discrimination legislation was

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[1] The terms "handicapped" and "disabled" are used interchangeably throughout the report while recognizing that the "language of disability" is itself a contentious issue. For example, the 1984 Abella Report points out that the World Health Organization distinguishes between "impairment," "disability," and "handicap." For the purposes of this report, handicap and disability denote both the loss or reduction of functional ability and activity, and the disadvantage consequent thereon. For a discussion of these definitions, see Rosalie Abella, Equality in Employment (Minister of Supply and Services Canada, 1984) pp. 38-46, and Philip H.N. Wood, World Health Organization, WHO/IC90/REV. CONF/75.15.

[2] R v. Saxell, (1980) 59 C.C.C. (2d) 176.

[3] For a more in-depth discussion, see Cameron v. Nel-Gor Castle Nursing Home et al., (1984) 5 C.H.R.R. D/2170.

initially targeted at problems associated with ethnic and racial discrimination. These early human rights statutes did not, however, provide remedies for discrimination based on the grounds of handicap or disability. Only in the last 15 years have legislative amendments in all the provinces and the federal government afforded protection against discrimination based on handicap.[4] The handicapped, in almost all jurisdictions, were the last minority group to receive such statutory relief. Today, physical disability is included explicitly or implicitly in all anti-discrimination legislation. Mental disability, however, is only addressed in Ontario, Quebec, Manitoba, the Northwest Territories and federal legislation.

Although the common law recognizes that every child has a natural right to an education, only two provincial human rights statutes specifically refer to education as a protected right. The Quebec Charter of Human Rights and

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[4] Alberta: Individual's Rights Protection Act, R.S.A. 1980, c. I-2. British Columbia: Human Rights Code, R.S.B.C. 1979, c. 186, as amended by S.B.C. 1981, c. 15, s. 104, S.B.C. 1981, c. 21, s. 123, and S.B.C. 1982, c. 7, s. 58. Canada: Canadian Human Rights Act, S.C. 1976-77, c. 33, as amended by S.C. 1977-78, c. 22, s. 5, S.C. 1980-81, c. 54, S.C. 1980-81-82, c. 111, and S.C. 1980-81-82-83, c. 143, ss. 1,2. Manitoba: The Human Rights Act, S.M. 1974, c. 65, as amended by S.M. 1975, c. 42, s. 26, and S.M. 1982, c. 23. New Brunswick: Human Rights Act, R.S.N.B. 1973, c. H-11, as amended by S.N.B. 1976, c. 31. Newfoundland: The Newfoundland Human Rights Code, R.S.N. 1970, c. 262, as amended by S.N. 1974, Act No. 114, S.N. 1978, c. 35, s. 18, S.N. 1981, c. 29, S.N. 1981, c. 85, s. 13, and S.N. 1983, c. 62. Northwest Territories: Northwest Territories Fair Practices Ordinance, R.O.N.W.T. 1974, c. F-2, as amended by O.N.W.T. 1978 (2d) c. 16, O.N.W.T. 1980 (2d) c. 12, O.N.W.T. 1981 (3rd) c. 6, O.N.W.T. 1981 (3rd) c. 12. Nova Scotia: Human Rights Act, S.N.S. 1969, c. 11, as amended by S.N.S. 1970, c. 85, S.N.S. 1970-71, c. 69, S.N.S. 1972, c. 66, S.N.S. 1974, c. 46, S.N.S. 1977, c. 18, ss 16, 17, S.N.S., 1977, c. 58, and S.N.S. 1980, c.51. Ontario: Human Rights Code 1981, S.O. 1981, c. 53. Prince Edward Island: Prince Edward Island Human Rights Act, S.P.E.I. 1975, c. 72, as amended by S.P.E.I. 1977, c. 39, S.P.E.I. 1980, c. 26, and S.P.E.I. 1982, c. 9. Quebec: Charter of Human Rights and Freedoms, R.S.Q. 1977, c. C-12, as amended by S.Q. 1978, c. 7, ss. 112, 113; S.Q. 1979, c. 63, s. 275; S.Q. 1980, c. 11, s. 34; S.Q. 1980, c. 39, s. 61; S.Q. 1982, c. 17, s. 42; S.Q. 1982, c. 21, s. 1; and S.Q. 1982, c. 61. Saskatchewan: The Saskatchewan Human Rights Code, S.S. 1979, c. S-24.1. The only jurisdiction lacking handicap as a prohibited ground of discrimination is the Yukon.

Freedoms,[5] for example, provides that: "Everyone has the right to free public education." Even this guarantee, however, is circumscribed by a qualifying clause which adds "...to the extent and in accordance with the standards provided by law." Anti-discrimination legislation in the Saskatchewan Human Rights Code,[6] also guarantees that "every person and every class of persons shall enjoy the right to education" without discrimination. The right to an education for the mentally handicapped, however, is not included in the Code's prohibited grounds of discrimination.

The remaining provincial human rights codes do not refer to education as a protected right, although many statutes do prohibit discrimination with regard to "any accomodation, service or facility customarily available to the public." In the absence of a specific guarantee to the right to an education, the above clause was invoked in a recent Manitoba case. In Winnipeg School Division No. 1 v. MacArthur,[7] it was argued by the Plaintiff that public schools are "an accomodation, service or facility customarily available to the public" and as a result schools should not be able to discriminate against individuals seeking to enforce their right to an education. This argument was dismissed by the Manitoba Court of Queens Bench, which ruled that public schools are not governed by Manitoba's human rights legislation -- a decision tantamount to a declaration that the Manitoba statute does not protect the right to education. Thus despite recent advances in human rights legislation

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[5] R.S.Q. 1977, C.-12, Article 40

[6] S.S. 1979, c.S-24.1, s.13(1).

[7] (1982) 3 C.H.R.R. D/197. For an interesting discussion (but no resolution) of the question of whether public schools fall within the words "any accommodation, service or facility customarily available to the public," see Schmidt v. Calgary Board of Education and the Alberta Human Rights Commission, (1975) 6 W.W.R. 279 (Alta C.A.). For a discussion of this issue as it relates to private schools see Rawala and Souzer v. DeVry Institute of Technology, (1982) 3 C.H.R.R. 0/1057.

generally, apart from the provinces of Saskatchewan and Quebec, handicapped children have very limited opportunities of seeking remedies to discrimination in education through provincial anti-discrimination statutes.

Provincial Educational Policies and Programs

The argument that education is a "natural" or fundamental "human" right of all children has been accepted in theory by most provincial governments. Moreover, during the last decade of increased rights consciousness, policy guidelines released by most provincial governments have acknowledged the right of every child, regardless of mental or physical handicap, to a free appropriate public education. Legislative amendments aimed at providing special needs children with this type of special education have also proliferated during the past several years, as has the commitment to the idea that an "appropriate" education is one which takes place in an integrated setting within a child's own community.

Despite significant inroads made by provincial policymakers into traditional notions that certain special children are "uneducable" or "untrainable" and can therefore be lawfully denied an education, the right of all children to the benefit of an appropriate education is still not uniformly guaranteed and protected by Canadian provincial and territorial governments. Translating theoretical recognition and policy objectives into operative programs has proved to be an expensive and complex undertaking, which arguably no provincial government has successfully implemented. As a result, many mentally and physically handicapped children have not benefitted from the same educational opportunities as their non-disabled counterparts.

Provincial legislation and policy guidelines tend not to confer a categorical and unfettered right to education upon students. Rather, each

province approaches the right to education from a different perspective. Thus, as in so many other areas of educational policy-making, provincial and territorial governments have developed distinct strategies for dealing with educational services for handicapped students. Such strategies are as diverse as the political philosophies bearing on provincial educational policymaking, ranging from Ontario's novel and interesting Bill 82 to British Columbia's cumbersome and highly discretionary Special Education provisions. This subsection of the report surveys special education legislation policies, and programs in the different Canadian provinces and territories, and highlights particular provisions of the legislation as they relate to the right to an appropriate education.

All provincial and territorial education statutes provide the legal right of children to attend school.[8] In the case of Saskatchewan, for example, this right is expanded in the following, more comprehensive provision, s. 144(1) of the Saskatchewan Education Act:[9]

> Every person between the age of six and twenty-one years of age shall have the right to attend school in the division in which he and his parents or guardian are residents, and to receive instruction appropriate to his age and level of educational achievement and in courses of instruction approved by the board of education in the school or schools of the division...

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[8] B.C. School Act, R.S.B.C. 1979, C.375, s.155(1)(a)(i); Alberta School Act, R.s.A. 1970, C.329, s.136(1)(a); Saskatchewan Education Act, R.S.S. 1978, C.#-01, s.144(1)(2); Manitoba Public Schools Act, R.S.M. 1970, c.P-250, s.255(1)(2); Ontario Education Act, S.O. 1974, c.109, ss.31(1), 32(1); Quebec Loi Sur l'Instruction Publique, 1977, C.I-14, s.33; Nova Scotia Education Act, R.S.N.S. 1967, c.81 as amended by S.N.S. 1970-71, C.37, s.2(1)(2); New Brunswick Schools Act, R.S.N.B. 1973, C.S-5, s.5(1); Prince Edward Island School Act, R.S.P.E.I. 1974, C.S-2, s.47(1); Newfoundland Schools Act, R.S.N. 2970, C.346 as amended by S.N. 1974, No. 28, s.8; Yukon Schools Ordinance, O.Y.T. 1974, C.14, s.27; Northwest Territories Education Ordinance, O.N.W.T. 1976, C.14, s.53(1).

[9] R.S.S. 1978 (Supp.), c.E-91.

A less extensive right to education is provided by s. 155(1)(a)(i) of the British Columbia School Act:[10]

> The Board of each school district shall...provide sufficient school accomodation and tuition, free of charge to...all children of school age resident in that school district.

Probably the most striking difference between the two provincial acts is the inclusion of the provision for an "appropriate" education in the Saskatchewan legislation, as contrasted with the absence of any similar guarantee in the B.C. statute. Thus, while Saskatchewan and provinces with similar provisions (e.g., Quebec and the Northwest Territories) are willing to take children to the classroom door and step over the threshold to supervise the content of their education; B.C. and like provinces and territories (Alberta, Manitoba, Ontario, Newfoundland, New Brunswick, Prince Edward Island, Nova Scotia, the Yukon) have merely allowed for attendance at school and not for the quality of education following from that attendance. Such differences have obvious implications for the legislated educational rights of disabled children as discussed below.

Even more significant consequences arising from differences in wording exist with respect to the exclusionary nature of many provincial education statutes. For example, while British Columbia, Ontario, Prince Edward Island, New Brunswick, the Northwest Territories and the Yukon all allow for a legal right to education, this right is explicitly qualified by the exclusion of certain specified classes of individuals. Thus, for example, s. 47(1) of the Prince Edward Island School Act,[11] states that: "The Minister shall provide free school privileges...for every child...", it also excepts from the right

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[10] R.S.B.C. 1978, c. 375.

[11] R.S.P.E.I. 1974, c.S-2.

to "free school privileges...students for whom the Minister has provided special services such as the deaf, blind and cerebral palsy (sic)."[12] While different wording is adopted in the B.C. School Act, the effect is similar. Thus, Section 155(2)(b) of the B.C. legislation excuses school boards from admitting to primary school a child who has not "attained a standard of education equivalent to that of pupils attending Grade One."

The remaining provinces, while not explicitly denying education to certain classes of children, are also suspect with respect to the provision of an appropriate education for all children. For example, although Alberta does not explicitly exempt certain groups from educational rights, i.e., school boards are obliged to admit all children with no other distinction than residence, this does not mean in fact that cases of exclusion do not occur. Such a situation was illustrated by the case of Carriere v. County of Lamont No. 30,[13] where a court Order compelled the Lamont School Board to admit a child with cerebral palsy to a regular classroom. Although the court was able to order the school's acceptance of the youngster, once she was admitted the court had no jurisdiction to compel the school board to provide her with an "appropriate" education. Even Ontario's widely-touted Bill 82 amendments do not prevent exclusionary treatment of the handicapped in certain cases. For example, s. 34 of the Ontario Education Act[14] enables a school principal or parent of a child who is, "because of a mental or a mental and one or more additional handicaps, unable to profit by instruction offered by the board," to refer the child to a committee of three appointed by the school board.

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[12] Regulations of Prince Edward Island, c.S-2 School Act Regulations, Part V. s. 5 238(d).

[13] August 15, 1978, Unreported, (Alberta Supreme Court).

[14] 1974, S.O. 1974 c.109 and amendments.

This committee, to consist of a psychiatrist and "a supervisory officer or principal neither of whom the matter has been previously referred," is charged to determine the extent of the child's disability, and where circumstances warrant, to assist the parent to locate a "suitable" program outside the public school system, at no cost to the parent.

As the above examples demonstrate, current legislative policies provide several different routes for school boards to exclude handicapped children from the equal benefit of an appropriate education. One such route concerns the absence of explicit provisions for an adequate or appropriate education. In cases where this guarantee does not exist, disabled children might in fact be admitted to a public school, but (as in Carriere) do not receive the services to meet their special needs and enhance their educational potential. Another less obvious dimension of this problem relates to procedural concerns. For example, even in the few provinces requiring school boards to provide an appropriate education, few regulations and procedural guidelines exist for the actual implementation of the ideally stated objectives. Ontario, which has in fact outlined detailed procedures to determine suitable educational programs, is a notable exception in this regard.

In summary, it appears that while on the one hand provincial education legislation often provides that all children are entitled to an appropriate education, on the other hand, the existence of exclusionary policies often poses a significant obstacle to attaining such an education. The challenge, therefore, is not what kind of education the disabled child receives once in the classroom, but whether the disabled youngster will be admitted to the classroom at all. A second related concern is the question of procedural fairness. If it is conceded that exclusion for certain classes of children is

acceptable, how do parents ensure that their child is afforded the procedural protection that will technically result in a fair and equitable determination of future schooling plans? The right to due process of law, including the right to appeal a school placement decision are, therefore, intrinsically important considerations; not surprisingly these concerns are currently on the agenda of handicap rights activists.

Judicial Interpretation of Provincial Legislation

Prior to 1985, constitutional guidelines that might help shape national standards in education of the handicapped did not exist. Under the old rules of the game, i.e., in the pre-Charter years, courts only were mandated to interpret legislation on procedural grounds and did not have recourse to an instrument which would allow them to strike down provincial statutes on the basis of a substantive defect. Thus, even in cases where provincial legislation blatantly discriminated against a handicapped child in the provision of educational services, traditional norms of parliamentary supremacy limited judicial decision-making to interpretations of how that legislation had been applied, not whether it should have ever been applied at all.

The narrow scope of pre-Charter judicial decision making, the expense of legal proceedings, and the remote chance of successfully challenging provincial legislation, appear to be factors that have prevented parents of handicapped children from seeking judicial redress in cases of unequal treatment. Of the few cases that have come before the courts, decisions have seldom required school boards to implement educational services consistent with specific legislative provisions (e.g., Carriere v. County of Lamont No.

30;[15] McMillan v. Commision Scholarie de Ste. Foy).[16] In other judicial decisions school boards have not been required to provide special services to handicapped children on the basis of the relevant legislation (e.g., Bales v. Board of School Trustees District No. 23),[17] and still other interpretations have neither denied a child certain educational services nor have they required school boards to offer equal educational opportunity (Dore et Lapointe v. La Commission Scholarie de Drumondville).[18]

The pre-Charter constraints on the judiciary to address substantive inequities in Canadian society and the power of provincial legislatures and school boards to make discretionary decisions in the area of education, were recently highlighted in the highly illustrative case of Bales v. Board of School Trustees.[19] Decided just prior to the coming into force of s. 15 of the Charter, this case involved 8 year old Aaron Bales, whose mental age was less than half his years because of a brain dysfunction that occurred in his infancy. Aaron was removed in the fall of 1983 from the regular school he had been attending in Kelowna and assigned by the school board, against his parents' wishes, to a special segregated school for the handicapped. Aaron's parents requested that the Court compel the school board in question to restore Aaron to the special class in the regular school he had been attending for three years prior to his re-assignment. The Bales' contended that the school board had no authority to operate a segregated school for handicapped children such as Aaron, and maintained that his assignment to such a school

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15 Supra at note 13.

16 (1981) Cour Superieure 172 (Quebec C.A.).

17 (1984), Unreported, (B. C. Supreme Court).

18 June 1983, Unreported, (Quebec C.A.).

19 Supra at note 17.

denied him the right to an education with his non-handicapped peers in the ordinary school environment. Aaron's parents, moreover, asserted that Aaron's attendance at the special school for the handicapped would not merely be less beneficial to him than continued attendance at the ordinary school where he was previously registered, but would actually do him harm.

In a carefully reasoned decision which canvassed the concept of educational "mainstreaming," American case law and B.C. provincial policies regarding special education, Mr. Justice Taylor reluctantly concluded that while educational, sociological and other other expert evidence supported the argument that Aaron would benefit from continued enrollment in a regular school, the decision of the school board was procedurally correct and therefore constituted a lawful exercise of the placement authority given to the school board by Section 155(1)(b) of the B.C. School Act. Moreover, in dismissing the Bales' claim, Mr. Justice Taylor held that the operation of a segregated school for the handicapped was within the general authority of the school board as provided by Section 160(h) of the School Act. He remarked in this regard (at 33) that the school board had followed correct procedural requirement as it had

> ...provided "sufficient accomodation and tuition" for moderately-handicapped pupils within the meaning of Section 155(1)(a)(i) because the board has not been shown to have acted unreasonably in the establishment of the facility in 1977 -- when most moderately-handicapped children in the province were educated in similar schools -- or in failing thereafter to close it in response to subsequent developments in educational philosophy.

Finally, in his concluding remarks (at 33-34), Mr. Justice Taylor endorsed the merits of the Bales' legal challenge:

> In the circumstances as I have found them, the question whether Aaron ought to receive the benefits which integration is thought to provide in the education of the handicapped is not a question which a Court may decide.

> ...It seems to me, however, that the plaintiffs were justified in seeking a declaration of their rights...it is to be hoped that understanding of Aaron's educational needs and those of the handicapped generally have been advanced by the efforts which Mr. and Mrs. Bales and their counsel have devoted to this case, and for which they are to be commended.

The Charter's Impact on Judicial Decision-making

Even as Mr. Justice Taylor rendered his decision in the Bales case, winds of change were being felt across Canada. Slowly and cautiously Canadian courts at all levels, including the Supreme Court of Canada, have begun to use the Charter to impugn legislation not judged to be consistent with the fundamental values embodied in Canada's new constitution. Thus, while still deferring to the well-entrenched notion of parliamentary sovereignty, the courts have nonetheless demonstrated that they also intend to use the Charter as a vehicle of social change and social justice in the face of unconstitutional legislation. Certainly initial trends in Charter case law suggest that Canadian courts are slowly but perceptibly establishing an increasingly activist trend in judicial decision-making.[20]

The new Charter course Canadian courts have embarked upon has attracted both enthusiastic support and critical condemnation. The majority of those individuals and organizations who advocate the right of handicapped children to an appropriate education welcome the more activist role the judiciary is cautiously assuming. Having experienced decades of frustration, however, advocates of equal educational opportunities for the handicapped are realistic when assessing the possible speed and substance of any future legal change in this area. In order to gain a more complete perspective of these attitudes

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[20] See T.A. Sussel and M.E. Manley-Casimir, "The Supreme Court of Canada as a 'National School Board': Educational Reform in Canada." Canadian Journal of Education (Fall, 1986).

and perceptions, the following section reports different individual and organizational responses to the current state of educational policies and programs for handicapped children, particularly as they relate to the Charter's new equality guarantees.

III. EDUCATIONAL RIGHTS AND THE HANDICAPPED: PUBLIC ORGANIZATION RESPONSES

The opinions expressed by public interest organizations with respect to provincial legislation and policies discussed above, generally correspond to the conclusions reached by the 1976 OECD study.[21] Thus, while these individuals and groups recognize that some progress has occurred with respect to special education programs and policies in Canada, strong feelings still exist that the issue of providing an appropriate public education for handicapped children has been overlooked, sidestepped, and "grievously neglected." For example, many advocates and organizations describe provincial human rights and provincial education efforts in this area as "discriminatory," "unjust," "inadequate," "unresponsive," and "discretionary" to use only some representative examples. Across the board, moreover, these interest group organizations maintain that in many cases current education policies and anti-discrimination statutes fail to respond to the magnitude and complexity of the problems facing handicapped children.

Opinions Regarding Human Rights Codes

A frequent criticism of provincial human rights legislation relates to the failure of legislation to even mention education as an inalienable right, or at least a "special service or facility customarily available to the public."[22] Recognition of "handicap" as a protected group from discrimination is heralded

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[21] A number of interest group responses to our letter/questionnaire (Appendix A) referred us to their submissions to the Sub-Committee on Equality Rights. This non-partisan parliamentary sub-committee travelled across Canada during 1985 in order to hear representations from Canadian citizens regarding their expectations of the Charter's equality provisions. See, Department of Justice, Towards Equality. Ottawa: Minister of Supply and Services, 1986.

[22] See Winnipeg School Division, No. 1, supra at note 7.

as a major advancement in overall rights of handicapped;[23] the exclusion of education as a designated and protected area, however, significantly lessens interest group enthusiasm for and trust in human rights legislation.

Another complaint in this regard goes beyond the existence or non-existence of a guaranteed right to education and instead attacks the inherent value of human rights legislation as it exists in Canada today. Thus, critics suggest that because human rights commissions are mandated only to deal with overt (as opposed to systemic) discrimination on a case by case basis, they are placed "in the position of stamping out brush fires when the urgency is in the incendiary potential of the whole forest."[24] Finally, a reservation about the practical utility of including educational rights in provincial human rights codes has been raised:[25]

> The advantage of including adequate clauses in the provincial human rights codes is that the costs of seeking remedies is greatly reduced by applying to human rights commissions rather than initiating legal action in civil Courts.

Opinions Regarding Provincial Education Statutes

Public interest organizations have advanced an equally critical perspective of provincial education policies. While recognizing that resource allocation is a central consideration of all provincial governments, advocates of equal educational opportunities are also quick to point out that no greater public priority should exist than the provision of an appropriate public education to all Canadian children, particularly those with special needs. Criticism of provincial responses to the educational needs of handicapped

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[23] For example, Huck v. Odeon Cinemas, (1985) 3 W.W.R. 717.

[24] Abella, supra at note 1, p. 8.

[25] Robert R. O'Reilly, "Educational Rights for Disabled Children," in Just Cause, Volume 2, No. 3, Fall 1984, p. 5.

children are varied, ranging from complaints regarding lack of financial commitment, to perceptions that some provinces have not placed the handicapped on the top of their political agenda. Still other critics have suggested that federalism and the division of powers are the major sources of most resource-based problems in this area. For example, one interest group representative maintains:

> There has been much tiptoeing in the labyrinth of federal and provincial relations. We appreciate and we believe in the appropriate decentralization of powers. But in the tiptoeing too many rights have been trampled upon, have been omitted, or have not been given the priority they deserve. What this has resulted in, tragically, is a misapplication of resources, or inadequate resources; an abuse of individual rights; and particularly of the rights of those who need them most.
>
> From this tiptoeing, particularly in the field of education, has emerged the whole range of programs emerging from the federal level. That is the whole vocational field. We do not even dare use the word "education," for fear that somehow we are going to offend the provinces.
>
> Well, this tiptoeing has to stop. Some sense collectively must begin to be made between the provinces and federal government.[26]

Having persistently and resolutely campaigned to have the handicapped and disabled included in the final draft of the Charter's equality guarantees, the handicapped community has generally endorsed the idea that Canadian courts will eventually succeed in advancing equality for all Canadians and will remedy deficient provincial programs and policies. The Manitoba League of the Handicapped, for example, views the Charter's equality rights guarantees as having a great potential for change:

> First of all, I will offer some comments on how we perceive the Charter here in the Manitoba League. We perceive this particular Charter both in terms of firstly its redress for past inequities, wrongs and denied opportunities, and secondly as a means of ensuring and safeguarding rights and

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[26] Yude M. Henteleff, Q.C. (Solicitor, Canadian Association for Children and Adults with Hearing Disabilities), Sub-Committee on Equality Rights, Issue No. 29, p. 34 (1985).

> opportunities. We definitely see the value of having something more concrete and substantive to shore up our efforts of equality striving than to merely rely upon administrative policies, programs and practices which can be of an effervescent nature and changed or revised according to changes in political climate. Without the solid guarantee of the Charter, reliance on government programming and policies may be less than edifying.[27]

Similar disenchantment with current government responses to the handicapped and optimism regarding future Charter-based changes is also offered by the Vancouver Association for Children and Adults with Learning Disabilities:

> I feel rather strongly -- and can muster some evidence to substantiate this -- the implementation of Section 15 provisions in the educational system of British Columbia is effectively resisted by agencies with whose resources we cannot begin to compete. I believe the resolution of this conflict will await specific decisions of the Supreme Court of Canada -- a very expensive , slow and laborious process...I fully anticipate that we shall achieve equality of educational opportunities in time -- but not likely within this generation.[28]

As a minimum entitlement, public interest organizations representing the handicapped and disabled argue for changes in provincial legislation and policy to confer a right to "an appropriate education in the least restrictive environment." Even this language, if enacted however, creates problems of interpretation as is demonstrated in the recent U.S. experience with Public Law 94-142.

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[27] Bruce Whitman (Member, Provincial Council, Manitoba League of the Handicapped), Sub-Committee on Equality Rights, Issue No. 11, p. 53 (1985).

[28] Roman Piontkovsky, Executive Director, Vancouver Association for Children & Adults with Learning Disabilities (December 12, 1985).

IV. EQUAL EDUCATIONAL OPPORTUNITY AND THE HANDICAPPED: THE AMERICAN EXPERIENCE

> In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.
>
> Brown v. Board of Education[29]

The issue of equal educational opportunity for handicapped children continues to be one of the most important and controversial concerns facing American educators and public interest groups. Historically, provision for education of the handicapped by U.S. state governments (whose jurisdiction over education is comparable to their provincial counterparts in Canada) was glaringly inadequate. Legislation lacked, for example, both uniform standards and sufficient financial support to back up what programs were available. This situation changed dramatically in the early 1970s when public interest groups made an end-run around traditionally unresponsive institutions and mounted successful legal challenges to the systematic exclusion of handicapped children from educational programs.

The 1972 Judicial Decisions

Two significant legal decisions provided the initial impetus for increased judicial and governmental attention to the plight of handicapped children. In the first case, Pennsylvania Association for Retarded Children (PARC) v. Commonwealth of Pennsylvania,[30] the parents of seventeen retarded children brought a constitutional challenge to a Pennsylvania law which

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[29] 347 US 483 at 493 (1954).

[30] 343 F. Supp. 1257 (E.D. Pa. 1972).

allowed for the exclusion of severely handicapped children certified by psychologists as "uneducable and untrainable" and "incapable of benefitting" from publicly subsidized instruction. The federal district Court held that denial of equal educational opportunity to handicapped children was indeed unconstitutional. The consent decree issued in the decision accordingly stated in part that providing free education to non-handicapped students while depriving mentally handicapped youngsters of an equivalent right, established a clear constitutional claim. Thus, the Court remarked:[31]

> All children are capable of benefitting from instruction, if only in the sense that they can be rendered relatively less dependent on others.

Shortly following the PARC decision, a federal district Court in the District of Columbia ruled on a suit challenging exclusionary practices that resulted in approximately 18,000 handicapped children during 1972-1973 being denied public education. In Mills v. Board of Education of the District of Columbia[32] the Plaintiff claimed that denying handicapped children the right to education -- in view of the District of Columbia law that mandated a free public education for all children between the ages of 7 and 16 -- violated the children's constitutional rights. The Court upheld this claim and ruled that when a state provides free public education to normal and handicapped children, all handicapped children have the right to education under the U.S. constitution's equal protection clause.

The judicial victories of PARC and Mills sparked considerable public attention and marked the first of many similar lawsuits launched in over thirty states. By the mid-1970s, it was apparent that the flurry of legal

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[31] Ibid, p. 293.

[32] 348 F. Supp. 866 (D.D.C. 1972).

activity had extended the scope of the 14th Amendment equal protection clause to include the right of special needs children to receive all educational services regularly provided by the state to the non-handicapped.

Even as popular awareness and judicial support of the handicapped increased, however, the practical dilemmas of defining equality with respect to handicapped children in the educational setting steadily emerged. For example, despite attempts by the states to enact special education laws in response to the PARC and Mills decisions, it soon became apparent that such legislative initiatives were not substantially improving educational services to the handicapped. This situation prompted Congress to enter this debate and to advocate the creation of federal legislation and funding to assist in the education of the handicapped.

Public Law 94-142

Federal involvement and Congressional initiatives came to a head in 1975 when Congress enacted the Education for all Handicapped Children Act.[33] This legislation, popularly known as Public Law (P.L.) 94-142, shifted the focus from constitutional to statutory rights by mandating a "free appropriate public education and related services" for all handicapped children between the ages of 5 and 18. The state legislatures were given the option of participating in P.L. 94-142, and to date, every state except New Mexico has opted to take part in the program.[34]

A central feature of the federal legislation is that to the fullest extent possible, handicapped youngsters are to be educated in the "least

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[33] 20 U.S.C.A. SS 1401-61 (1976 Supp. IV 1980).

[34] See Christiane H. Citron, The Rights of Handicapped Students (Denver: Educational Commission of the States, 1982).

restrictive environment," namely in classes with the non-handicapped (a process also known as "mainstreaming"). Thus, the Act contemplates that a regular classroom setting with appropriate supplemental services is preferable to special, segregated classes; special classes are preferable to separate special schools; and special schools are preferable to private institutions in a home setting. In addition, P.L. 94-142 provides that where no public facilities are available, private schools supplemented by public funds may be used as an alternative.

Extensive procedural protections (that go well beyond those stipulated in PARC and Mills) are also provided by the EAHCA to ensure that such placement decisions are made in accordance with stringent due process requirements. Such procedural protections are also applicable to the evaluation and monitoring of handicapped children. For example, an "appropriate" educational program is tailored to meet the educational needs of each handicapped youngster. The "individualized education program" (IEP) sets out the educational objectives and goals designed for each child and describes the specific services to be provided. Re-evaluation of the IEP must be conducted annually. If objections are raised with respect to a particular IEP, parents are entitled to a hearing before a local school board where they may voice their complaints. If this hearing does not result in a satisfactory resolution of the complaint parents may file a civil suit in state or federal court.

The US Supreme Court and the Meaning of "Appropriate" Education

The skeletal nature of the rapidly enacted Education for all Handicapped Children Act opened the door to a variety of problems and unanswered questions. In particular, P.L. 94-142 failed to consider what in fact and

practice constituted an "appropriate education." Lower courts grappled with the meaning of this open-ended provision in almost 300 federal and state cases before the U.S. Supreme Court finally entered the fray in 1982.

In Hendrick Hudson District Board of Education v. Rowley[35] the Court rendered the first authoritative decision on the meaning of an "appropriate" education for handicapped children. In a 6 to 3 decision, the Court held that an "appropriate" education as provided by P.L. 94-142 only requires instruction targetted at achieving a "beneficial" result, and does not require maximizing the potential of the handicapped student "commensurate with their non-handicapped counterparts" (at 203-4). Such a narrow interpretation of "appropriate" education was regarded by many as an unfortunate limitation on the scope of P.L. 94-142 and has been the source of a certain degree of pessimism among handicap advocates in the United States.[36]

The Rowley case first arose in New York when Amy Rowley's parents challenged the appropriateness of the IEP provided by the Hendrick Hudson School District for their deaf child. The crux of the Rowleys' complaint was that Amy's IEP did not provide her with a full-time qualified sign-language interpreter for her academic classes. In reply, the school district maintained that Amy's needs were adequately met by a sophisticated FM hearing aid and weekly instruction from a tutor and special therapist.

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[35] 358 US 176 (1982).

[36] See for example, Betsy Levin, "Equal Educational Opportunity for Special Pupil Populations and the Federal Role," (1983) 85 West Virginia Law Review, 159-85, and Laura F. Rothstein, "Educational Rights of Severely and Profoundly Handicapped Children," (1982) 61 Nebraska Law Review, 586-620.

In reversing the decisions of the federal district court[37] and the federal Court of Appeals[38] that "the goal of the Act is to provide each handicapped child with equal educational opportunity" and to maximize each child's potential "commensurate with the opportunity provided other children,"[39] the U.S. Supreme Court asserted that there was no evidence of congressional intent to achieve strict equality of opportunity or services. Thus, the Court held that the New York school was not required to provide a sign-language interpreter for Amy. In the ruling the Justices determined that although P.L. 94-142 requires schools to offer "personalized instruction with sufficient support services to permit the handicapped child to benefit educationally from instruction," they do not have to ensure that handicapped students reach their "full potential."

After almost a decade of legal and scholarly speculation, both supporters and opponents of P.L. 94-142 agree that the Rowley decision narrowed the scope and applicability of the Act. Presumably, the Court's decision was significantly influenced by both financial considerations, and congressional intent, including what one commentator has described as "the unwillingness of the federal government to articulate clearly its priorities for the handicapped and its stinginess in assisting the states and school districts."[40] Despite the indictment of the Rowley decision the same author also points out that the case must be viewed with some perspective:[41]

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[37] 483 F. Supp. 528 (S.D.N.Y. 1980).

[38] 632 F 2d 945 (2d Cir. 1980).

[39] Ibid, p. 534.

[40] Mark G. Yudof, "Education for the Handicapped: Rowley in Perspective," (1984) 92 American Journal of Education, 163-177.

[41] Ibid, p. 174.

> There have been some dramatic improvements in the plight of handicapped youngsters since the dark days before the adoption of the Education for all Handicapped Children Act, and the surge of state legislative reforms. The dialogue is now over how to educate the handicapped, not over whether to do it at all.

Post-Rowley Supreme Court Decisions

Since the 1982 Rowley decision, the U.S. Supreme Court has had three opportunities of interpreting the controversial P.L. 94-142. In Irving Independent School District v. Tatro[42] the Court ruled that a Texas school was required to provide sterile, intermittent catheterization services for a child with spinal bifida. In its judgement, the Court opined that the legislation's "related services" provision requires schools to provide services such as catheterization if such services enable a handicapped child to remain at school during normal school hours. In making its decision, the Court ruled that catheterization -- a procedure that prevents kidney damage to children who cannot voluntarily empty their bladders -- and other similar services "are no less related to the effort to educate than are services that enable the child to reach, enter, or exit the school."

A second case heard by the U.S. Supreme Court in 1984 was that of Smith v. Robinson.[43] In this challenge the Court ruled that the parents of a Rhode Island child with cerebral palsy who won a case brought under P.L. 94-142 could not be awarded legal fees for identical claims brought under the Rehabilitation Act, 1973.[44] The Court held that: "Congress intended that P.L.94-142 be the exclusive avenue through which a plaintiff may assert an equal-protection claim to a publically financed special education." As P.L. 94-142 does not contain a provision providing for awards of Court costs, this

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[42] 104 S. Ct. 3371 (1984).

[43] 1984, Unreported, U.S.S.C.

[44] 29 U.S.C. SS 794 (Supp. III 1979).

decision has the effect of essentially prohibiting plaintiffs from receiving such fees if they are the successful party in a special education case.[45]

Finally, in 1985 the Court interpreted a provision of P.L. 94-142 regarding the appropriateness of a child's "educational placement." In School Committee of the Town of Burlington v. Department of Education of the Commonwealth of Massachusetts,[46] the Court held that the parents of a handicapped child in Massachusetts could be reimbursed for tuition even though they took their son out of a public school and placed him in a private school without the approval of public school officials. The Supreme Court decision stated that parents can be reimbursed in such situations if a judicial decision is made that the move was in the child's "best interests." The Court cautioned, however, that parents would not be entitled to such payments if such a subsequent decision ruled that the student's public school placement was "appropriate" as defined under P.L. 94-142.

These three decisions have the effect of clarifying aspects of the application of P.L. 94-142 and provide interesting examples of the variety of legal challenges that may confront Canadian courts. They do not, however, materially or substantially alter the meaning of "appropriate education" as laid down by the Supreme Court in Rowley. Thus, the reasoning in that case is instructive and highlights, at least conceptually, the kinds of issues to be confronted in Canada when interpreting "equal benefit" of the law in cases concerning the provision of educational services to handicapped and disabled students. It is to these considerations that the report now turns.

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[45] A 1985 Congressional bill nullifies the effect of the ruling by permitting the award of legal costs under P.L.94-142.

[46] (1985) U.S.S.C. Unreported.

V. THE MEANING OF EQUAL BENEFIT

> The full reach of the four guarantees set out in section 15 -- equality **before** the law, equality **under** the law, equal **protection** of the law and **equal benefit** of the law -- is unclear at this point. Section 15 has opened up new horizons for individual rights, but the scope of these horizons will only be determined as courts decide individual cases and governments create new social policy.[47]

In this observation Minister of Justice John Crosbie acknowledged the lack of clarity around the meanings and operational definitions of the equality provisions of the Charter. While in a definitive sense it will indeed be necessary to await judicial decisions on individual cases or parliamentary moves to enact new legislation, it is useful to undertake an analysis of the possible meanings that may attach to this language in future legal challenges. This analysis thus offers a brief review of these four bases of equality.

Section 15 and the Bases of Equality

The guarantee of "equal benefit of the law" is one of four bases of equality guaranteed in s. 15(i) of the Charter. It is distinctively Canadian in language and design, and while it is linked conceptually to the "equal protection of the law drawn from the Fourteenth Amendment to the U.S. Constitution, "equal benefit" was intentionally included in the Charter so as to go beyond the concept of "equal protection." While an indepth discussion of how s.15 might be interpreted goes beyond the scope of this report, it is useful to consider briefly each of the four components of the equality section.

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[47] Supra at note 21, p. 2.

"Equality before the law" is essentially a form of procedural equality based on the idea that all persons are subject to the law and that no one is above the law. Such a principle guarantees that people have equal access to social services but does not guarantee that all will reach the same place. "Equality under the law" simply means that the substance and administration of the law should be evenhanded; it emphasizes the substance of law.

"Equal protection" is a term which harkens to the U.S. constitutional experience. There it has developed two meanings: equality of opportunity and equality of results, and is concerned with both the substance of equality and the effects of legislation. The equality of opportunity emphasis focuses on the relationship between legislative classification and legislative purpose. Legislation may classify; the classification is a means to achieve some end; and the equal protection of the law requires that the classification is related to that end. The notion of equality of results directs attention to the needs of individuals or groups and the allocation of resources to meet those needs. Equality of results will sometimes require inequality of opportunity. Unequal allocations of resources and services are required to overcome historic or real disadvantages.

"Equal benefit" of the law, a uniquely Canadian constitutional concept, extends the idea of equal protection to ensure that people enjoy equality of benefits as well as protection of the law. There is no existing body of jurisprudence that definitively clarifies the meaning of "equal benefit" but the development and inclusion of this phrase in the Charter certainly "suggests that equality of results is a goal which section 15 was intended to satisfy."[48]

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[48] For a more extensive discussion of these distinctions see Anne F. Bayefsky, "Defining Equality Rights" in Anne F. Bayefsky and Mary Eberts, (Eds.), Equality Rights and the Canadian Charter of Rights and Freedoms (Toronto: Carswell, 1985) pp. 1-79.

These four definitions reflect fundamental shifts in Canadian socio-legal thinking about equality; a shift in emphasis from procedural to substantive guarantees of equality, and a shift from merely guaranteeing equality of opportunity to also ensuring equality of outcomes. But how would these cursory distinctions be used in constitutional adjudication? How might they apply to the provision of educational services to disabled and handicapped students? For some tentative illustrations consider two cases that are in some important respects analogous to the issues under discussion here.

Illustrative Cases

While the cases discussed below do not directly confront the meaning of "equal benefit of the law" in the Canadian constitutional context, they are nevertheless highly instructive. The reasoning in these decisions identifies some of the central problems of definition and application inherent in constitutional adjudication of claims invoking equal benefit. As such, the cases are relevant to the claim of disabled and handicapped students to equal benefit of the law in their access to and receipt of educational services, and for the question of the provision of such services.

Rowley and Equal Benefit. Earlier in this report the Rowley decision was discussed at some length to show how the U.S. Supreme Court decision had narrowed the meaning of "an appropriate education." Although the decision is based on the interpretation of legislative versus constitutional language, the United States Supreme Court reasoning nonetheless contributes to an understanding of the "equal benefit" concept.

The central tension in Rowley focused upon the extent of the benefit that Amy Rowley was receiving and was entitled to receive under the Education for all Handicapped Children Act. The District court, subsequently affirmed by the Court of Appeals, held that Amy was not receiving a "free appropriate public education" meaning "an opportunity to achieve (her) full potential commensurate with the opportunity provided to other children."[49] Clearly such a decision implies a conceptual framework of equal benefit, such that the criterion of equal benefit for a disabled or handicapped student is an opportunity that enables her to achieve a level of performance commensurate with that available to her non-disabled, non-handicapped peers. Operationally, such a definition focuses on proximate equality of outcome; it is a measure of educational effects and proposes that resources be allocated to special children to render the educational effects as nearly as possible equal to those of other children.

The Supreme Court held, however, that the statutory obligation imposed by the E.A.H.C.A. "...is satisfied when the State provides personalized instruction with sufficient support services to permit the handicapped student to benefit educationally from that instruction."[50] Under this ruling it is explicitly not necessary for the student to benefit equally with other students; it is enough to satisfy the statute if an educational benefit occurs.

Essentially the reasoning in Rowley suggests several distinctions relevant to this discussion of "equal benefit." Such distinctions concern the scope of the opportunity provided to the handicapped student, on the one hand, and the effect of the services provided on the other, and can be reflected schematically as follows:

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[49] Supra at note 35.

[50] Ibid, p. 204. Emphasis added.

Level of Opportunity	Extent of Benefit
Basic floor of opportunity.	Access to specialized instruction and related services which are individually designed to provide an educational benefit to the handicapped child.
Opportunity fully responsive to the unique needs of the handicapped student.	Access to specialized instruction and related services which are individually designed to provide an educational benefit commensurate with that available to other children.

Huck v. Canadian Odeon Theatres. Just as the Rowley decision involved a matter of statutory rather than constitutional interpretation, so too the Huck case involved an appeal under the Saskatchewan Human Rights Code rather than a challenge on constitutional grounds. Nevertheless, the reasoning of the Saskatchewan Court of Appeal is again instructive. At issue in this case was whether the theatre had discriminated against Huck by requiring him to sit in his electric wheelchair between the front row of seats and the screen rather than providing him with the some range of choice enjoyed by non-handicapped persons. In a decision which found that the defendant had discriminated against Mr. Huck, Judge Vancise concluded at 744-745:[51]

> The failure to provide Mr. Huck with a choice of places from which to view the movie is prejudicial treatment because of the complainant's disability and handicap. It makes little sense to provide access ramps and bathroom facilities for the physically handicapped and not to make provision for them to view the movie itself.

[51] Supra at note 23.

> On the facts [illegible] am of the opinion that the respondent's [illegible] quiring Huck to agree to transfer to a regular aisle seat, or to view the movie from an area in front of the first row of seats before selling him a ticket, and, failing to provide him with a choice of a place from which to view the movie comparable to that offered to other members of the public, is exclusion and restriction of treatment based on physical disability. It is discrimination as contemplated by s. 12(1)(b) of the Code. It is no defence that the acts complained of were not intended to be discriminatory; the result of the respondent's action is discrimination.

Several aspects of this decision are noteworthy. First, the test of discrimination is whether the service or facility offered varied significantly from that offered to the general public. Had Huck been a school age student seeking to attend school, the test would perhaps have been couched in terms of whether the service or facility varied significantly from that offered to the general student population. Second, and extending the school parallel, it makes little sense to provide access ramps and bathroom facilities in schools and not make provision for handicapped students to "view the movie," that is, to benefit from educational services. Third, the notion of discrimination is not simply a matter of intention; it is, and perhaps more seriously, a matter of effect. Discriminatory effects can and often do result from treating similarly people who are differently situated. Clearly, "affirmative action" as a remedy for historic, structural or systemic discrimination is predicated on the recognition that the achievement of equality may require the differential allocation of resources.

Implied throughout this decision, however, is the notion of equality and equal benefit. For Huck to have been treated equally with other members of the public, it was necessary for Canadian Odeon Theatres not only to install ramps and bathrooms in recognition of his need for access to the movie but to provide him with a broadly similar range of choice of place from which to view the movie. In effect, the Court held -- admittedly not in this language --

that Huck was entitled to the equal benefit of the law; with "benefit" here meaning not only access but quality of the service and the character of the experience. The absence of any of these guarantees would, in effect, constitute discrimination and by implication unequal treatment open to constitutional challenge.

Equality in Education

What then is the significance of the above cases with regard to the meaning of the equal benefit of the law? In particular, what do they imply for the claim of a handicapped or disabled student to the 'equal benefit' of the law in respect of educational services?

At the heart of the claim of a disabled person to the equal benefit of the law in the provision of educational services is the meaning of 'equality'. While the meaning of equality in education has received extensive discussion in the recent literature, it is instructive to briefly discuss the 1964 analysis of this complex subject by Komisar and Coombs.[52] In their conceptual analysis of the term 'equality', the authors distinguish between two concepts of equality: "equal as same" and "equal as fitting." This distinction relates directly to this discussion of 'equal benefit'; each concept will be considered in turn.

Equal as same. The notion of equality meaning "sameness" simply implies that on some attribute, characteristic or set of facts and circumstances, two (or more) situations, events or persons are the 'same'. That is, with regard to these particular features there is neither a prima facie difference nor when compared or contrasted with one another is a relevant difference evident.

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[52] Paul Komisar and Jerrold R. Coombs, "The Concept of Equality in Education," (1964) III(3) Studies in Philosophy and Education, 223-244.

Equal as fitting. The notion of equality as "fittingness" is more complex and implies that to treat people equally requires that the 'treatment' (whatever that may be) takes into account the relevant facts and circumstances of the particular case. So equal treatment implies a 'fit' between the treatment and the needs of the instant case. In contrast to the generally understood notion of 'equal educational opportunity' as the equal chance to use one's native and culturally acquired endowments to best advantage, the fittingness definition of equality places the issue explicitly in the context of acknowledging these differences and developing an appropriate educational response. "What is equal treatment is a matter of moral choice, not factual reporting, and this yields contesting, not uniform views."[53]

Equal benefit subsumes equality as "fittingness". The argument advanced here is that the notion of equal benefit subsumes the definition of equality as "fittingness." For a disabled or handicapped child to receive the equal benefit of the law with respect to educational services requires that the educational service provided to that child be appropriate, i.e., fitting to his/her unique characteristics or needs. If this point be granted, then it must follow that the 'benefit' the child receives must also be assessed in terms of the 'fittingness' of the services provided.

Conclusions

While ultimately the meaning and application of equal benefit of the law attends the decisions of the Supreme Court of Canada, some tentative conclusions can be made in the form of propositions.

1. The legislative history and process of constitutional revision preceding the proclamation of the Charter of Rights and Freedoms

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[53] Ibid, p. 244.

suggests strongly "...that equality of results is a goal which section 15 was intended to satisfy."[54]

2. Social policies that allocate essentially equal resources to distinctively (historically grounded, socially impoverished, and systemically deprived) unequal individuals or groups in specific circumstances guarantee the persistence and reinforce the existence of inequality. Such an effect may very well be clearly unconstitutional under s. 15 and could become the subject of judicial censure. The production of inequality is not the intent of s. 15; it is the eradication of inequality that this section requires.
3. While few provinces in fact confer the right to a free appropriate public education, a student could launch a legal challenge using the equality provisions in an attempt to secure access to and benefits from educational services.
4. Given the apparent intent and commitment of the constitutional framers's to equality of results, a disabled or handicapped student could initiate a constitutionally grounded action that he/she was -- in a particular set of facts and circumstances -- being denied the equal protection and equal benefit of the law.
5. The first element of a test might be whether the service or facility offered varied in any significant manner from that offered the general public; the second element, whether the service or facility was designed with the unique needs of the disabled and handicapped student in mind, that is, that the service or facility was 'fitting'; the third element would focus not only on questions of access to the service, but on the effects of access in terms of the quality of the

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[54] Bayefsky, supra at note 47, p. 24

service provided, the character of the experience and the 'fittingness' of the benefits received.

6. Section 24(1) of the Charter empowers the courts to fashion remedies to unconstitutional programs or policies. This unique and potentially powerful section theoretically would not only permit a court to make a finding of discrimination with respect to a handicapped or disabled child, but also to mandate a remedy to such discrimination.

Having stated these general propositions, the following points are also important to keep in mind:

1. Section 1 of the Charter establishes the possibility of 'reasonable limits prescribed by law' being invoked to restrict the interpretation and application of the equal benefit clause to disabled and handicapped persons. In this respect it is likely that a defense to a s. 15 challenge will be that provision of equal benefits will place an "unreasonable" strain on governmental resources and is therefore legitimate discrimination.
2. Section 15(2) sanctions programs designed to ameliorate the positions of the four targetted groups, including the handicapped and disabled. This "affirmative action" section could be invoked to defend a s. 15 challenge in the case of separate schools. Thus, if a plaintiff contended that, for example, placing learning disabled children in a separate school environment apart from the public school system constituted discrimination, it could be countered by an argument that such placement was constitutional as contemplated by s. 15(2)
3. Section 33(1) of the Charter expressly confers the power of legislative override on the provinces. Since the override extends to

Section 15(1) and 15(2), a given province can 'opt out' of these provisions and their requirements for a five year (renewable) period.

4. Despite the powers the Charter confers on the judiciary, there is a significant amount of resistance within the judiciary itself and from the general public to the courts assuming a public policy-making function. This resistence may slow down any major "social engineering" in the near future.

A P P E N D I C E S

1. Letters to Ministers of Education, Special Interest/Advocacy Groups, and Human Rights Commissions

2. List of References

3. Table of Cases

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December 9, 1985

Letter to Ministers of Education

Dear :

Re: Policy, Procedures and Guidelines Governing the Provision of Educational Services to Handicapped and Disabled Students

As no doubt you are well aware, the coming-into-force of the Equality Provisions of the Canadian Charter of Rights and Freedoms in April of this year may well have serious implications for educational policy. Earlier this year my research associate Terri Sussel and I conducted an analysis of the preparations being made across Canada by Departments and Ministries of Education with respect to the implementation of the Equality Provisions. We sent you a copy of the paper resulting from this inquiry -- the paper will, incidentally, shortly appear in Interchange.

My reason for writing to you again is to seek your assistance once more on a further research study funded by the Human Rights Law Fund in the Department of Justice. This study is an inquiry into the meaning of **"The Equal Benefit of the Law: Constitutional Implications for the Provision of Educational Services to Handicapped and Disabled Children."** The study has five research objectives:

i) to conduct a statute audit across Canada regarding the presence of statutes (e.g., Bill 82 in Ontario) and legislative provisions respecting the provision of educational services to the handicapped in an attempt to identify provisions that contain ambiguous or unclear language upon which the U.S. experience may shed light;

ii) to conduct an analysis of provincial policies and guidelines governing the provision of educational services to handicapped and disabled children;

iii) to consult with provincial Human Rights Commissions to identify and include in the analysis any discussion papers, policies or guidelines developed through their aegis;

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iv) bearing in mind the distinctiveness of the Canadian legal tradition, to conduct a legal analysis of U.S. case law involving the provision of educational services to handicapped students, to document and clarify the meanings and interpretations ascribed to 'equal protection' and 'benefit' in these decisions and, subsequently, to develop guidelines for use in judging similar cases in Canada; and

v) to develop on the basis of the above legal analyses a set of standards respecting the possible meaning of "equal benefit" for handicapped persons with reference to educational services, devoting special attention to ways in which compliance with both the letter and spirit of the Charter may be successfully implemented.

We are specifically seeking your assistance with the second of these objectives -- the analysis of current provincial policies and guidelines governing the provision of educational services to handicapped and disabled children. In particular, we would very much appreciate receiving from your Ministry the following:

i) a copy of your Special Eduation policy, together with the approved procedures and guidelines relating to the provision of educational services for handicapped and disabled children;

ii) any other administrative circulars or directives issued by your Ministry to provincial school boards regarding these matters;

iii) the name of a contact person in your Ministry who is primarily responsible for this policy area.

Thank you in advance for your cooperation in this matter. Once our study is complete we shall send you a copy of the report.

Yours sincerely,

Mike Manley-Casimir
Associate Professor
Co-Director, Law & Education Project

MMC:em

SIMON FRASER UNIVERSITY

FACULTY OF EDUCATION

BURNABY, BRITISH COLUMBIA V5A 1S6
Telephone: (604) 291-3395

December 9, 1985

Letter to Special Interest/Advocacy Groups

Dear :

Re: Policy, Procedures and Guidelines Governing the Provision of Educational Services to Handicapped and Disabled Students

As no doubt you are well aware, the coming-into-force of the Equality Provisions of the Canadian Charter of Rights and Freedoms in April of this year may well have serious implications for educational policy. Earlier this year Terri Sussel, research associate in law and education, and I conducted an analysis of the preparations being made across Canada by Departments and Ministries of Education with respect to the implementation of the Equality Provisions. I enclose a copy of the paper resulting from this inquiry -- the paper will, incidentally, shortly appear in Interchange.

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iii) to consult with provincial Human Rights Commissions to identify and include in the analysis any discussion papers, policies or guidelines developed through their aegis;

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iv) bearing in mind the distinctiveness of the Canadian legal tradition, to conduct a legal analysis of U.S. case law involving the provision of educational services to handicapped students, to document and clarify the meanings and interpretations ascribed to 'equal protection' and 'benefit' in these decisions and, subsequently, to develop guidelines for use in judging similar cases in Canada; and

v) to develop on the basis of the above legal analyses a set of standards respecting the possible meaning of "equal benefit" for handicapped persons with reference to educational services, devoting special attention to ways in which compliance with both the letter and spirit of the Charter may be successfully implemented.

We are specifically seeking your assistance because of your interest in the arena of the rights of the handicapped and disabled under the Charter and section 15 especially. Since your organization may already have confronted or be in the process of confronting issues related to our study, we seek the following kinds of information if such are available and if you feel free to share these with us:

1) A copy of the brief submitted by your organization to the House of Commons Sub-Committee on Equality Rights;

2) A copy of any internal policy analysis/document relating to the provision of services to handicapped/disabled persons under section 15 of the Charter;

3) A copy of any legal memoranda, opinions or briefs prepared at your request by legal counsel on these or related matters;

4) Finally, any documents or materials that expressly confront the rights of handicapped/disabled students to educational services under the law.

Thank you in advance for your cooperation in this matter. If it is at all possible we would appreciate receiving this material before January 15th. Once our study is complete we shall send you a copy of the report.

Yours sincerely,

Mike Manley-Casimir
Associate Professor
Co-Director, Law & Education Project

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SIMON FRASER UNIVERSITY

FACULTY OF EDUCATION

BURNABY, BRITISH COLUMBIA V5A 1S6
Telephone: (604) 291-3395

December 9, 1985

Letter to Human Rights Commissions

Dear :

Re: Policy, Procedures and Guidelines Governing the Provision of Educational Services to Handicapped and Disabled Students

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i) to conduct a statute audit across Canada regarding the presence of statutes (e.g., Bill 82 in Ontario) and legislative provisions respecting the provision of educational services to the handicapped in an attempt to identify provisions that contain ambiguous or unclear language upon which the U.S. experience may shed light;

ii) to conduct an analysis of provincial policies and guidelines governing the provision of educational services to handicapped and disabled children;

iii) to consult with provincial Human Rights Commissions to identify and include in the analysis any discussion papers, policies or guidelines developed through their aegis;

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iv) bearing in mind the distinctiveness of the Canadian legal tradition, to conduct a legal analysis of U.S. case law involving the provision of educational services to handicapped students, to document and clarify the meanings and interpretations ascribed to 'equal protection' and 'benefit' in these decisions and, subsequently, to develop guidelines for use in judging similar cases in Canada; and

v) to develop on the basis of the above legal analyses a set of standards respecting the possible meaning of "equal benefit" for handicapped persons with reference to educational services, devoting special attention to ways in which compliance with both the letter and spirit of the Charter may be successfully implemented.

We are specifically seeking your assistance with the third of these objectives -- the consultation with provincial Human Rights Commissions. In particular we would very much appreciate receiving the following kinds of information from your organization:

i) a copy of any discussion or background papers prepared for or by you relating to the focus of the study;

ii) a copy of any draft policies or guidelines developed under your aegis respecting the access to and delivery of social and educational services to handicapped or disabled persons;

iii a copy of any material (published or unpublished) that confronts the meaning of the "equal benefit" of the law;

iv) a copy of any decisions handed down by your Commission or related agencies in matters relating to the focus of the study.

Your assistance in this matter is greatly appreciated. If it is at all possible we would appreciate receiving this material before January 15th. Once the study is complete we shall send you a copy of the report.

Yours sincerely,

Mike Manley-Casimir
Associate Professor
Co-Director, Law & Education Project

MMC:em

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4. Carriere v. County of Lamont, No. 30, August 15, 1978, Unreported, Alberta Supreme Court.
5. Dore et Lapointe v. La Commission Scholaire de Drummondville, June 1983, Unreported, Quebec Court of Appeal.
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7. Huck v. Odeon Cinemas, (1985) 3 W.W.R. 717.
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10. Mills v. Board of Education of the District of Columbia, 348 F. Supp. 866 (D.D.C. 1972).
11. Pennsylvania Association for Retarded Children (PARC) v. Commonwealth of Pennsylvania, 343 F. Supp. 1257 (E.D. Pa. 1972).
12. R. v. Saxell, (1980) 59 C.C.C. (2d) 176.
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14. Schmidt v. Calgary Board of Education and the Human Rights Commission, (1975) 6 W.W.R. 279.
15. School Committee of the Town of Burlington v. Department of Education of the Commonwealth of Massachussets, Unreported, (1985, U.S.S.C.).
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17. Winnipeg School Division No. 1 v. MacArthur, (1982) 3 C.H.R.R. D/197.