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ABSTRACT

The report examines case law in both Canada and the United States with respect to the integration of exceptional pupils into regular classrooms, with particular emphasis given to three concepts: mainstreaming, least restrictive environment, and maximum benefit. Analysis of American and Canadian jurisprudence finds that all exceptional children appear to have a right to an education, but it is a right bestowed on them by specific legislation and is not recognized as a constitutional or inalienable right. Adequate educational progress is the major criterion for United States court decisions; however mainstreaming is such a desired goal that in some cases marginal improvements in educational progress can be sacrificed. Canadian courts have tended to allow school boards to make educational decisions, provided they follow provincial government procedures and no harm is done thereby to the child. In Canada's case, courts tend not to interfere in the decision making of agencies acting in accordance with clear legislation and within their sphere of expertise. In Canada also, no one is entitled to the "best possible service" or "maximum benefit"; a service which ensures some educational progress appears to be sufficient. Further, it should be noted that predictions for the unfolding of case law in this domain can be perilous as all Canadian court decisions are very context- and issue-specific. Includes 33 general references, 10 Canadian legal references, and 12 American legal references. (JDD)

AMERICAN AND CANADIAN CASE LAW ON THE INTEGRATION OF EXCEPTIONAL PUPILS INTO REGULAR CLASSROOMS[1]

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I. INTRODUCTION

Scope of the Research

The purpose of the report is to examine case law in both Canada and the United States related to the integration of exceptional pupils into regular classrooms. Particular emphasis is given to three concepts: mainstreaming, least restrictive environment and maximum benefit.

Mainstreaming, as defined in this study, is the education of children in regular class-rooms, usually in neighborhood schools.

The term "least restricted environment" is the provision of educational services in a setting which most closely resembles the "normal" setting, given the handicaps and abilities of the child.

The term "maximum benefit" is seldom used in the literature, but is taken to mean the provision of a service from wnich a child may derive the maximum benefit, that is progress most rapidly in meeting educational objectives.

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[1]Paper presented to the International Special Education Congress, 1990, Cardiff, Wales, July 31, 1990. This paper draws heavily on the report O'Reilly, R.R., Levesque, D., Cousineau, M. & Duquette, C. (1990). A Review and Analysis of Case Law on the Integration of Exceptional Children into Regular Classrooms. Toronto: Ontario Ministry of Education and OISE Publication Sales. The research for the report was conducted under contract by the Ontario Ministry of Education. The views expressed in this paper are those of the author and not necessarily those of the Ministry.

American and Canadian Case Law

Canada and the United States: Constitutional Issues

Both Canada and the United are common law countries[2]. In both countries, education is a matter for state (in the United States) or provincial or territorial (in Canada) laws. However, in the United States there has been a tradition of federal intervention in educational matters. This takes the form of the federal government allocating large sums of money to the states if they spend it on approved items in accordance with federal regulations. To oversee these programs, the United States Office of Education was created in 1867 and more recently the Department of Education with a cabinet-level officer as Secretary. In contrast, regional interests in Canada have mitigated against any meaningful intervention into education by the federal government. There is no national office of education in Canada.

Although one can, more or less, talk of an American system, especially for those states which have accepted federal funding for special education, there is no Canadian system. For this reason, most of the remarks concerning Canada will describe the situation in the Province of Ontario, Canada's most populous Province, and the first to legislate extensively in the field of special education. The legislation in most other provinces is consistent with Ontario's legislation in most aspects.

Educational Rights of Exceptional Pupils

The question of integration, or "mainstreaming" is based on a number of fundamental questions concerning the rights of individuals to an education and the right to be free of discrimination. Neither Canadian nor American law speaks directly to the issue of one's basic right to an education. Rather, there is an onus on children to attend school, and on their parents to ensure that children do attend school. In Ontario, the Education Act (R.S.O., 1980, c.129) does provide a right to schooling:

> 31(1) A person has the right, without payment of a fee, to attend school in a school section, separate school zone or secondary school district, as the case may be, in which he is qualified to be a resident pupil.

The Act also requires a child between the ages of six and sixteen years to attend school (s. 20 (1)). Thus, one has both the right

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[2]The Province of Quebec in Canada uses the Code Civile for laws under provincial jurisdiction.

and the obligation to attend school. One can alsc argue that in order to enjoy some of those rights described either in the Canadian Charter of Rights and Freedoms (Part I Schedule B of the Constitution Act, 1982) or the Constitution of the United States of America, one must have access to a free public education (MacKay, 1987a; Poirier & Goguen, 1986). The basis for this latter argument in Canadian law is Section 7 of the Charter which states:

> Everyone has the right to life, liberty and security of person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Since there is a right to schooling, can the State deprive one of that right due to some exceptional condition such as a physical, mental or emotional handicap? The Education Act of the Province of Ontario does not permit pupils to be excused from the obligation of attending school due to "the fact that a child is blind, deaf or mentally handicapped" (s. 20 (3)). As well, the Education for All Handicapped Children of the United States would seem to exclude that option. (Education for All Handicapped Children Act, Public Law 94-142, 20 U.S.C. 1400).

Section 15 of the Charter would seemingly prohibit any exclusion from school of handicapped children. It states:

> Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability (underline added).

Both the Canadian Provinces and Territories and the United States place the onus on public educational authorities to provide educational programs and services for exceptional pupils. Ontario requires its Minister of Education to ensure that services are available for all exceptional children:

> The Minister shall ensure that all exceptional children in Ontario have available to them, in accordance with this Act, and the regulations, appropriate special education programs and special education services, without payment of fees by parents or guardians resident in Ontario,...(s. 8(2)).

Similarly eight other provinces and the two territories have enacted laws which either require school boards to provide educational services to all children regardless of special difficulties or guarantee to exceptional children the right to an

educational program.

The question addressed in this article is the manner in which educational services are provided to the exceptional child. In particular, assuming a range of possible modes of service delivery, ranging from a highly specialized service provided in a segregated institutional setting to services provided in any ordinary classroom in a neighborhood school, in law, under which circumstances can the State or its agencies choose to provide services in one setting rather than another? Is "mainstreaming" an option or a right? Is provision of service always to be the in a "least restricted environment"? Is a "least restricted environment" the same for every child? Is each child entitled to an education which will yield the "maximum benefit" to that child?

Two Dimensions of Educational Rights

Educational rights may be viewed according to two dimensions. The first dimension consists of one's ACCESS to schooling and to a given program or setting. Thus one can have access to a program with a prescribed course of study, a given ratio of pupils to teacher, and the setting for schooling, ranging from a class in the neighborhood school to a specialized, segregated setting.

The second dimension consists the CONTENT of schooling. This dimension refers more to quality and expected outcomes or goals of the educational process. These goals may be highly specific or general; set low or high; set generally for all pupils or tailored for the needs of each pupil.

Viewed from these two dimensions, the "right to education" may be described as the right to attend school, or to attend a particular school, or to have access to certain resources within the school. On the other hand, the "right to an education" may also mean the right to achieve significant learning and growth in keeping with one's potential.

Viewed simplistically, a right to education extends only to access to one of the programs provided by the State or the local school authorities. It is then up to the profession of educators to ensure, that within the constraints of resources provided by the authorities, each child receives the attention required to develop as fully as possible.

The dilemma for educators is that, with respect to PROCESS, the management of school systems is predicated on the principle of mass education. Mass education assumes common objectives, grouping of similar (usually age-related) students, common assessment techniques, with a premium on control. The handicapped child with a unique set of needs is an anomaly which challenges the basic assumptions of school governance and educational

practice in North America as well as elsewhere.

In dealing with the handicapped, the State attempts to lend precision to what is required. In both American and Ontario law, the assumption is that exceptional children must be provided with resources and programs not normally available to other children. The Ontario law requires school boards, after due consultation with parents, to provide a "placement" in an educational setting in which the child can make educational progress. The American Public Law 94-142 goes further. It requires that parents be a member of the decision-making group which not only decides on "placement" but also establishes an individualized educational plan (IEP) for each exceptional pupil.

Three questions face parents and educational authorities. (1) Which educational setting (placement) will be best for the child? (2) Which set of objectives are most appropriate for the child? And (3), which resources must be allocated to the child in order to achieve those objectives? When there is a dispute over any of these questions, then mediation or appeal procedures are called into play. In the United States, and to a limited extent in Canada, these questions have also found their way to the courts.

Another way of examining the issue is to consider the process of education in a "systems" perspective. In such a perspective, there are INPUTS (resources) which are transformed by the educational process into OUTPUTS (achievement of educational goals). The notion of "rights", is more generally allied to INPUTS. The implicit argument is that with the appropriate set of INPUTS, then the desired OUTPUTS will flow. However, in many realms of human behavior, including such domains as schooling, learning and education, the relationships between INPUTS and OUTPUTS at the level of the individual child are rarely, if ever, predictable. This particularly true if the expected process conflicts with the prevailing orthodoxy and values of the institution. That is when the individualized approach expected in special education conflicts with the mass education practices of regular education (Hill, 1986).

Thus, educational systems are usually provided with some flexibility to select INPUTS, judge progress towards OUTPUTS and modify INPUTS according to the best judgments of the professionals involved. At the same time, some goals may also be modified as progress is perceived to be better or poorer than anticipated.

This distinction between the two dimensions is important. For the courts are typically asked to rule on a child's rights to certain INPUTS (e.g. specially trained personnel, a regular setting, etc.). It seems reasonable that one criteria for assessing the suitability of INPUTS is to guage success in achieving goals (OUTPUTS). In fact, the American courts, as will

be shown later, are basing some of their decisions, in part, on perceived OUTPUTS.

Ontario legislation regarding exceptional children places emphasis on INPUTS. When a child is identified as exceptional, an Identification, Placement and Review Committee (IPRC) of the school board determines the placement for the child in one or another of classes, schools or services. Parents are involved (as consultants to the committee) in the decisions of "identification as exceptional" and "placement". They also have a right to appeal either of those two decisions. Once a Board has accepted an IPRC ruling, the professionals concerned must set educational goals and devise a program for the child. (These procedures vary considerably from those provided for by American legislation for special education).

II. Education and the Canadian Charter of Rights and Freedom and the Constitution of the United States of America

There has been to date only one Canadian court case in the domain of special education in which the Canadian Charter of Rights and Freedoms was involved. (See comments on the case of Bales v. Board of School Trustees, below). On another occasion on which the New Brunswick Court (Queen's Bench) could have pronounced itself on an application of the Charter to special education was eliminated when the parties agreed to a settlement prior to trial. Elwood v. Halifax County-Bedford District Nova Scotia (1988). The issues in Elwood concerned INPUTS, mainly placement in a regular class or in a segregated setting. Elwood argued that placement in anything but a regular classroom was discrimination which is prohibited under Section 15 of the Charter. Luke Elwood is a mentally disabled child who was transferred by the school board from an integrated setting to a segregated setting. The parents received an injunction to prevent the special placement during the litigation proceedings. In the interim, Luke progressed well so the Board reversed its position on his recommended placement. The court-sanctioned settlement called for Luke to remain in a regular classroom for two years. After that time, decisions concerning his further education would be considered. The parents were to be involved in the development of his program, but would not possess veto powers. However, they could appeal any school board decision to an independent arbitrator. Since this decision, the Province has modified its regulations in conformity with this settlement. In the Bales case (cited below) in British Columbia, the courts declared that placement in a segregated setting does not violate a child's rights under the Canadian Charter of Rights and Freedoms.

The American Supreme Court has not accepted the argument that

there is a constitutional right to an education. In Board of Education of the Hendrick Hudson Central School District v. Rowley, the court interpreted the Education for All Handicapped Children Act as granting the right to access to a free and appropriate education, rather than any right embedded in the Constitution. This is the only case of this nature in which a decision has been rendered by the United States Supreme Court. As such it has been closely examined (Heaney, 1984; Osborne, 1988; MacKay, 1987a; Turnbull, 1986; and Yanok, 1986). As the major court decision in the United States, all subsequent decisions in all other federal and state courts have been guided by the interpretation that the Court gave to the Act.

All exceptional children appear to have a right to an education. But it appears that it is a right bestowed on them by specific legislation. No court has yet recognized that they have a consitutional or inalienable right to education.

Mainstreaming

For North Americans, the ideal education for any child is in a heterogeneous classroom in a neighborhood school. There has been a major trend in Western society to de-institutionalize the handicapped and to integrate them into the larger society. In education, this process of normalization takes the form of mainstreaming or placing handicapped children in regular classes in neighborhood schools with such additional support as might be required. These include the provision of teaching assistants or aides, medical and nursing services, special equipment, required routines and therapies. There is a great deal of controversy about this issue. Some hold that any inconveniences caused by mainstreaming are greatly out-weighed by the social and educational benefits which accrue. Proponents of mainstreaming also argue that segregated facilities and programs do not provide the benefits that are claimed for them.

The notion of mainstreaming in the literature on special education has evolved in recent years. Reynolds and Birch (1982) equated mainstreaming with (a) physical space integration, (b) social integration and (c) instructional integration. Turnbull and Turnbull (1978) give the following criteria for determining a least restricted environment:

1. physical accessibility;
2. the physical presence of handicapped and nonhandicapped learners in age appropriate settings;
3. opportunities for these students to interact together; and
4. the dispersal of these classes throughout the school

system.

The most recent guideline shifts the major emphasis from the handicaps of the students to the improvement of the setting. Gaylord-Ross and Peck (1985) advocate the active enhancement of school settings such that environments become least restrictive. To achieve mainstreaming, settings should become sufficiently supportive so that handicapped children can achieve educational progress. (Brady, McDougall and Dennis, 1989).

Many others claim that for some children, a specialized setting is best, for it is there that specialized help and progams can be provided. They claim that it is uneconomic, if not impossible to provide such services in regular classes. They also claim that the presence of such children has a disruptive influence on the other children.

School authorities are routinely faced with requests of parents of exceptional children for placements and programs that are either mainstreamed or segregated. In the absence of clear rules on such allocations, and in the absence of consensus within the educational literature on the benefits of either option, the problem on occasion is directed to the courts.

The American EHA is more specific on this issue than are any Canadian laws or regulations. It states that:

> To the maximum extent appropriate, handicapped children ... are to be educated with children who are not handicapped, and that ... removal of handicapped children from the regular educational environment [should occur] only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. 1412 (5).

The American courts interpret this regulation quite strictly when they must address the issue of mainstreaming. In Roncker v. Walter, et al. (1983 EHLR Dec. 554: 381) the Court of Appeal for the Sixth Circuit stated that an integrated setting was preferable. If a segregated setting was at first deemed to be more appropriate, then the school officials had to attempt to provide similar services in the integrated setting. Note that the Court appeared to concur with the notion of mainstreaming posited by Gaylord-Ross and Peck. The issue in the case was whether or not the child's "...needs requires some service which could not feasibly be provided in a class for handicapped children within a regular school...." The court would allow three reasons for not

integrating children: (1) either the child would not benefit from mainstreaming or any marginal benefits of mainstreaming are outweighed by the benefits gained from services which could not be provided in the non-segregated setting; (2) the behavior of the handicapped child is a disruptive force; (3) the cost is such that excessive spending on one child would deprive other handicapped children of services.

The question of what is feasible is also not clear in many situations. However, court decisions have pushed school officials to do as much as possible to bring services to regular schools and classes. In a consent decree in 1982 (PARC v. Pennsylvania) the judge mandated a school district to up-date its program for severely handicapped students. When the school officials protested that what they did was comparable to what was available in other urban districts, the judge indicated that keeping up with the "state-of-practice" was insufficient. School districts were expected to keep up with the "state-of-the-art".

Mainstreaming was the major criterion for a decision of a Virginia federal court. Parents of a learning disabled child requested placement in a private school for the learning disabled. The court ruled that the public school provided a program whereby there would be gradual integration facilitiating the transition from special to regular services. (Rouse v. Wilson, 675 F. Supp. 1012 (W.D. Va. 1987)).

However, providing educational services in a least restricted environment is not the first criterion of student placement.

Educational Benefit

The first criterion for the placement of handicapped children under the American P.L. 94-142 relates to meeting the instructional needs of students so that there may be educational benefits. The justification for this position is found in the statute itself.

> (17) The term 'related service' means transportation, and such developmental, corrective , and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counselling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.

> (18) The term 'free appropriate public education' means special education and related services.... (20 U.S.C. 1402, emphasis added).

The Supreme Court in Rowley examined both the intent of Congress and the articles cited above to indicate that any educational program for a handicapped child must have some educational benefit, that is, there would be a prognosis for some satisfactory progress towards educational objectives. The Supreme Court in Rowley relied on this norm to suggest that the first criterion in determining a program for a handicapped child is that it must admit of some educational progress. For instance, in a 1985 case before the New Jersey Federal District Court, the parents requested that their auditorially handicapped child remain in the regular school and receive supplementary services, while the board argued for placement in a school for the hearing impaired. The court ruled that since the child was clearly benefitting educationally from the present regular environment, there was no need for a segregated environment. The court even allowed that although there may be some sacrifice in educational quality, the mainstreamed environment was providing those instructional services most crucial for her intellectual development (Bonadonna v.Cooperman, 619 F. Supp. 401 (D.N.J. 1985)).

The rules were also seemingly applied in another case with the opposite outcome. Parents of a severely mentally retarded son wanted a regular elementary school placement with a special teacher whereas the board recommended a state school for the mentally handicapped. The federal district court, and later the Eighth Circuit Appeal Court held that the minimal benefit for the child and the high cost to the district for a special teacher did not justify the regular school placement. (A. W. v. Northwest R-1 School District, 813 F.2d 158 (8th Cir. 1987). Thus the special school placement was preferred on the basis that it would be the setting where reasonable educational progress could be obtained.

Similar reasoning was applied in a case where parents of a child with cerebral palsy asked the court that their child be educated in the local school district, rather than in an adjoining district where more qualified personnel were available. The school authorities argued for the more expensive alternative program. The parents used Rowley to argue that their child did not require the best education. The court found that satisfactory educational progress would only be attained in the specialized facility, and ruled that the EHA did not require mainstreaming at the expense of satisfactory educational progress. (Wilson v. Marana Unified School District of Pima County, 735 F. 2d 1178 (9th Cir. 1984)

American and Canadian Case Law

The definitions of "least restricted environment" and "educational benefit" appear to be intertwined. One court offered that the "least restricted environment" is one "in which educational progress rather than educational regression can take place" (Board of Education v. Diamond, 808 F. 2d 987 (3rd Cir. 1986)). Similarly, a New York Federal District Court rendered a decision in which it claimed that for one multiply handicapped student, a private specialized facility offered the least restrictive environment (Taylor v. Board of Education, 649 F. Supp. 1253 (N.D.N.Y. 1986)).

Costs

Although the question of potential costs to a school board do not normally influence court decisions neither are they ignored. The Supreme Court in the Roncker case did list costs as one factor to consider in making decisions concerning a child's placement. The case of A.W. further justified cost as a vaild criterion for decison-making on the basis that the law specified that mainstreaming is to occur "to the maximum extent appropriate" (A.W. v. Northwest R-1 at 163).

Conclusion: U.S. Decisions

Adequate educational progress continues to be the major criterion for court decisions.

However, mainstreaming is such a desired goal that in some cases marginal improvements in educational progress can be sacrificed. In some cases in which special placement would result in only marginal gains for severely retarded children, the courts rejected special placement for a less restriction alternative in the public school system (Lufler, 1985).

In general then, there is a clear preference for mainstreaming where it affords educational progress. A satisfactory definition of mainstreaming which emerges is education in the same school with non-handicapped peers, even if that service is provided in a specialized class-room within the school.

Canadian Decisions

The Canadian courts do not have the framework of a P.L. 94-142 to fall back on. However, the Supreme Court of Canada has made some interesting remarks concerning the treatment of those who are "unequal". In R. v. Big M Drug Mart, Chief Justice Dickson stated that "...the interests of true equality may well require

differentiation in treatment" ([1985] 1 SCR 295). In the first Charter case on Section 15, McIntyre J. states:

> For the accommodation of differences, which is the essence of true equality, it will frequently be necessary to make distictions. (Law Society of British Columbia v. Andrews, S.C.C.(Feb, 2, 1989, decision not yet reported).

Nevertheless, the courts in Canada have tended to allow the school boards to make educational decisions, provided they follow the procedures laid down by the Provincial government and that no harm is done thereby to the child. To borrow from a statement from the American Supreme Court's decision on Rowley,

> a court's inquiry ... is two-fold. first, has the state complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? (Rowley, 458 U.S. at 206-207)

One Canadian example of how the court will address the possibility of "maximum benefit" is provided by the British Columbia Supreme Court (Antonsen v. Board of School Trustees District No. 39 (Vancouver) and others, Supreme Court of British Columbia, July 14, 1989 unreported). The Court refused the application of a nine-year-old girl with learning disabilities for an order to compel the Vancouver School District Board to provide specific educational services and programs, that is a segregated setting with a lower pupil-teacher ratio and a particular teaching method. Mr. Justice William Trainor, echoing the Rowley decision, stated that boards are under a duty to provide sufficient accommodation and instruction, but that they have no obligation to provide the best education possible. However, in his reasoning, Trainor, J. went beyond the standards set by Rowley:

> However, for a child with a handicap, an individualized education program (I.E.P.) in my opinion must do more than to provide educational benefits...the handicapped child must be given an opportunity to understand and participate in the classroom which is substantially equal to that given to non-handicapped classmates. The granting of that opportunity is subject to the qualification that it must be reasonably possible.

To what extent other Canadian courts will accept this additional standard is unknown. The Judge has also left open the question of costs of specialized program with his phrase "reasonably possible".

American and Canadian Case Law

In the Province of Alberta, the parents of Nicole Yarmoloy, a nine year old development-delayed child, petitioned the court for a mandamus to require the Banff School District to provide an education in the local school (Yarmoloy v. Banff School District No. 102 (1985) 16 Admin. L.R. 147 (Alta. Q.B.)). The District had decided, without consulting the parents, to direct the child to be placed in an institution and to attend a special school in Calgary, approximately 90 kilmotres from their home. The court orderd that the District's placement decision be quashed and that the parents be granted a hearing prior to any placement decision and if the parents are dissatisfied with the final outcome, to permit an appeal to an independent Local Appeal Board. Thus the Court required the District to follow the regulations of the Department of Education but abstained from making any educational placement decision.

Similary, the British Columbia Supreme Court in Bales v. Board of School Trustees, School District 23 ((1984) 54 B.C.L.R. 203, 8 Admin. L.R. 202), the court refused to intervene in a school decision. The parents of Arron Bales, a mentally handicapped child, sought a declaration that their son was entitled to an education in an ordinary school rather than in a school for the mentally retarded. The court ruled that the District had not acted unreasonably and there was no evidence that harm would come to the child in the segregated facility. The court also denied that the child's rights as enumerated in the Canadian Charter of Rights and Freedoms and in the B.C. Human Rights Code were infringed by the School District's actions.

The decisions of the Alberta and British Columbia courts in Yarmoloy and Bales both were handed down before those Provinces revised their legislation with respect to special education. Nevertheless, they demonstrate the reluctance of Canadian courts to infringe on the decision-making powers of school boards once it is clear that appropriate procedures in the decision-making process were followed and that no harm comes to the child concerned.

Canadian courts can be swift to act and to provide direction if they feel that a child's rights have been infringed or if harm will come to the child. In a recent unreported case in the Province of New Brunswick, parents of a child placed in a segregated class asked the court for an injunction. Recent education legislation in the Province, based on the principles of the Canadian Charter of Rights and Freedoms, required placement in as normal a situation as possible. The court directed the educational authorities to follow the procedures established in the provincial legislation (Robichaud et al. v. School Board No. 39, Jan. 20, 1989, unreported (N.B. Q.B.). In particular, the court

declared that the child would suffer irreparable damage if she were not sent to the same regular school that she had attended in the past. Moreoever, the court issued the following orders: a) the child is to be educated in a regular grade eight class; b) a committee shall be created to oversee the program; c) funds for the student's program are to be immediately requisitioned from the Province; d) the committee shall develop a preliminary plan for the integration of the child within ten days; e) the principal of the school shall ensure that the students and the teachers are prepared for the experiment that is to be attempted; and f) the parents shall be involved at all stages, though they shall not be allowed to make unilateral decisions.

Legislation tends to accord rights to children to "attend school" without specifying in great detail what must occur in a school. The school curriculum is usually described in Regulations under the Act; local authorities usually have a great deal of discretion in adapting the curriculum and in determining how it will be implemented. One Canadian example which dealt with an exceptional child's right to schooling is the Alberta case of Carriere v. Lamont Board of Education, Supreme Court of Alberta, 15 August, 1978 (unreported). The court was quite emphatic that Alberta school law required the local school board to provide schooling for exceptional pupils. However, the education to be provided was not addressed by the court. (O'Reilly, 1985). At least one commentator found that the services provided were not at all suitable (Just Cause, 1985).

One case moving through the courts in which the courts may be forced to pronounce itself on matters of educational process is an Ontario case. Jaclyn Rowett has Down's Syndrome. For several years she attended school in her community. Then, according to procedures set down by Ontario law, she was assessed and placed in a self-contained classroom. Her parents appealed unsuccessfully first to a local special education appeal board and then to a Provincial Special Education Tribunal. According to Ontario legislaion the decision of a Tribunal is final. The parents appealed to the Provincial Court, stating the procedures violated Jaclyn's rights under the Charter of Rights and Freedoms. The court ruled that a competent administrative body (the Special Education Tribunal) had made a decision within its realm of competence. Such a body however could not grant remedies under the Charter. Only a court could determine whether such a placement infringed on her rights (Rowett v. Board of Education for the Region of York (1988) 63 O.R. (2d) 767 (S.C.)). It is expected that an appeal court will be petitioned to deal with this matter shortly.

III. Implications

The following remarks pertain to the Canadian situation, although they may have relevance for other common law nations.

First the courts tend not to interfere in the decision-making of agencies which are acting in accordance with clear legislation and within their sphere of expertise. This is especially true of the Canadian courts. Thus, the provision of clear guidelines which do not conflict with the basic rights of individuals are a first requirement.

Second, mainstreaming is clearly a desirable state of affairs. However, in order to successfully meet the needs of all exceptional children, it is necessary to have a range of services and options available to meet the needs of exceptional pupils. In other words, mainstreaming in the regular classroom is not a suitable educational solution for all pupils.

Third, no one is entitled to the "best possible service" or "maximum benefit". A service which ensures some educational progress towards acceptable objectives appears to be sufficient.

Fourth, predictions for the unfolding of case law in this domain can be perilous as all decisions are very context- and issue-specific. For example, the source of much of the American jurisprudence is Rowley, which decided on the needs of a gifted but auditorially handicapped child. Conceivably, if she had been a deaf and severely retarded child, the case could have been decided on other premises and we would today be dealing with a different interpretation of legal principles.

Fifth, Canadian courts are not inclined to assume a mantle of educational expertise to make educational decisions. Decisions rendered to date by and large respect the decision-making processes of duly consituted educational bodies and the results of those processes providing the basic rights of a child, including a right to an education, are not violated. The courts seem to be reluctant to examine either the content or the quality of educational decision-making.

Sixth, educators cannot rely on the courts to abstain from making educational decisions. When the rights of children are at stake, the courts will first enquire about the decision-making processes, then about IN-PUTS and OUT-PUTS. However, if educators cannot assure the courts that children are receiving programs which are designed to achieve reasonable educational objectives, then the courts will begin to question the educational processes themselves.

REFERENCES

Biaggi, M. (1983). Changing plans for handicapped students: what does the future hold? Children's Legal Rights Journal, 4(2), 6-10.

Brady, M., McDougall, D. & Dennis, H. F. (1989). The schools, the courts, and the integration of students with severe handicaps. Journal of Special Education, 23, 43-58.

Cambron-McCabe, N.H. (1986). Handicapped. The Yearbook of School Law. Pp. 122-145.

Cambron-McCabe, N.H. (1987). Handicapped. The Yearbook of School Law. Pp. 118-141.

Cambron-McCabe, N.H. (1988). Handicapped. The Yearbook of School Law. Pp. 108-138.

Cruickshank, D. (1983). Human rights and Charter rights in special education, B.C. Journal of Special Education, 7, 205-220.

Crux, S. C. (1989). Special education legislation: humanitarianism or legalized deviance and control? Education Canada, 29, 24-31.

Giles W.H. (1988). Schools and Students: Legal Aspects of Administration. Toronto: Carswell Co. Ltd.

Gresham, F.M. (1982). Misguided mainstreaming: the case for social skills training with handicapped children. Exceptional Children, 48, 422-433.

Heaney, J.P. (1984). A free appropriate public education: has the supreme court misinterpreted congressional intent? Exceptional Children, 50, 456-462.

Hill, K.D. (1986). Legal conflicts in special education: how competing paradigms in the Education for all Handicapped Children Act create litigation. University of Detroit Law Review, 64, 129-170.

Hurlbert, E. L. & Hurlbert, M.A. (1989). School Law Under the Charter of Rights and Freedoms. Calgary: University of Calgary Press.

Lehr, D. & Haubrich, P. (1986). Legal precedents for students with severe handicaps. Exceptional Children, 52, 358-365.

American and Canadian Case Law

Lowell, H.D. & Schiavoni, T.F. (1980). The fragmentation of services--can the handicapped child survive another fall through the cracks? Children's Legal Rights Journal, 1(5), 20-26.

Lufler, H. S. (1984). Pupils. The Yearbook of School Law. Pp. 115-134.

Lufler, H. S. (1985). Pupils. The Yearbook of School Law. Pp. 115-134.

MacKay, A.W. (1987a). The Charter of Rights and special education: blessing or curse? Canadian Journal for Exceptional Children, 3, 118-127.

MacKay, A.W. (1987b). The Elwood case: vindicating the educational rights of the disabled. Canadian Journal of Special Education, 3, 103-116.

Mainstreaming--What is appropriate? (1983). Children's Legal Rights Journal, 5:1, 17-19.

McCarthy, M. (1983). The Pennhurst and Rowley decisions: issues and implications. Exceptional Children, 49, 517-522.

Myers, J.E. & Jenson, W.R. (1984). The meaning of "appropriate" educational programming under the Education for All Handicapped Children Act. Southern Illinois University Law Journal, 1984 (3), 401-441.

O'Reilly, R.R. (1984). Educational Rights for disabled Children. Just Cause, 2(3), 4-6.

O'Reilly, R.R. (1985). Still no malpractice suits in special education in Canada or the United States. Canadian Journal for Exceptional Children, 2(1), 22-24.

O'Reilly, R.R., Levesque, D., Cousineau, M. & Duquette, C. (1990). A Review and Analysis of Case Law on the Integration of Exceptional Pupils into Regular Classrooms. Toronto: Ontario Ministry of Education and OISE Publication Sales.

Osborne, A.G. (1984). How the courts have interpreted the related services mandate. Exceptional Children, 51, 249-252.

Osborne, A.G. (1988). The supreme court's interpretation of the Education for All handicaped Children Act. Remedial and Special Education, 9, 21-25.

American and Canadian Case Law

Poirier, D. & Goguen, L. (1986). The Canadian Charter of rights and the right to education for exceptional children. Children Journal of Education, 11, 231-244.

Tillery, W. & Carfioli, J. (1986). Frederick L.: a review of the litigation in context. Exceptional Children, 52, 367-375.

Treherne, D. & Rawlyk, S. (1979). Canadian legislative processes. McGill Journal of Education, 14, 265-273.

Turnbull, H.R. III (1986). Appropriate education and Rowley. Exceptional Children, 52, 347-352.

Vickers, J.M. (1983). Major equality issues of the eighties. In Canadian Human Rights Yearbook 1983. Toronto: Carswell.

Yanok, J. (1986). Free appropriate public education for handicapped children: congressicnal intent and judicial interpretation. Remedial and Special Education, 7(2), 49-53.

Zucker, M.A. (1988). The Legal Context of Education. Toronto: OISE Press - Guidance Centre.

Canadian Legal References

Bales v. Board of School Trustees, School District 23 (1984), 54 B.C.L.R. 203, 8 Admin. L.R. 202 (B.C. S.C.).

Canadian Charter of Rights and Freedoms: Constitution Act, 1982 Schedule B of Canada Act, 1982 (U.K.) c. 11 (1982)

Carriere v. Lamont Board of Education (unreported AB, PQ) August 15, 1978.

Elwood v. Halifax County - Bedford District Nova Scotia (1988) Not a court decision, but a negotiated settlement registered with the Court.

Law Society of British Columbia v. Andrews, (S.C.C., Feb. 2, 1989, decision not yet reported).

Mark Antonsen and Barbara Antonsen in their own capacity and as guardians ad litem of their infant daughter Deidre Antonsen v. Board of School Trustees District No. 39 (Vancouver) and Her Majesty the Queen in right of the Province of British Columbia and the Bristish Columbia Ministry of Education and the Attorney General of British Columbia, July 1989, British Columbia Supreme Court, unreported.

American and Canadian Case Law

R. v. Big M Drug Mart [1985] 1 SCR 295.

Robichaud et al. v. School Board No. 39, (Jan. 20, 1989) unreported (N.B. Q.B.).

Rowett v. Board of Education for the Region of York, (1988) 63 O.R. (2d) 767 (S.C.).

Yarmoloy v. Banff School District No. 102 (1985), 16 Admin. L.R. 147 (Alta. Q.B.)

American Legal References

A. W. v. Northwest R-1 School District, 813 F.2d 158 (8th Cir. 1987) Application of leave to appeal to the U.S. Supreme court denied.

Board of Education v. Diamond, 808 F. 2d 987 (3rd Cir. 1986)

Board of Education v. Rowley (1982) 458 U.S. 175

Bonadonna v.Cooperman, 619 F. Supp. 401 (D.N.J. 1985)

Daniel R. v. El Paso Independent School District 1987-88 EHLR Dec. 559: 418 (Dist. Ct. Western Dist. of Texas).

Education for All Handicapped Children Act, Public Law 94-142, 20 U.S.C. 1400

Honig, California Superintendent of Public Instruction v. Doe 1987-88 EHLR Dec. 559: 231 (U.S. Supreme Court).

Kerkam v. District of Columbia Board of Education 1987-88 EHLR Dec. 559:210 (District of Columbia District Ct.).

Roncker v. Walter 1983 EHLR Dec. 554: 381 (U.S. Court of Appeals).

Rouse v. Wilson, 675 F. Supp. 1012 (W.D. Va. 1987)

Taylor v. Board of Education, 649 F. Supp. 1253 (N.D.N.Y. 1986)

Wilson v. Marana Unified School District of Pima County, 735 F. 2d 1178 (9th Cir. 1984)

ABSTRACT

Case law in Canada and the United States is examined with respect to the integration of exceptional pupils into regular classrooms. Emphasis is given to three concepts: mainstreaming, least restrictive environment and maximum benefit.

American jurisprudence is based on interpretations of the American Constitution and extensive federal legislation in the fields of rights for the handicapped and of special education. Canadian cases have been interpreted in light of the Canadian Charter of Rights, limited provincial legislation and an absence of federal legislation in the field of education.

The jurisprudence emanating from these two common law countries results in similar decisions.