

Canadian Legislative Processes

Special Education

What are the prospects in Canada for legislative action to ensure the right of children to an education devised according to individual needs, and especially of those with extreme needs? The authors trace the history of special education from its beginnings in the separation (and exclusion) of those children identified medically as different, through the educational testing movement that enabled the identification of further groups that could be segregated, to the civil rights movement that led finally through parental agitation and court cases in the United States to statutory regulation by the federal government. Canada has neither institutions at federal level nor the American tradition of corrective action through the courts to make sense or justice out of the present mixture of fragmentary and uncoordinated legislation; but the way ahead lies principally through strong parental action aimed at legislators. "The models for mandatory legislation are everywhere."

Education is best seen as a human enterprise which in the long term responds to major forces in the culture. In the short run, it often seems frustratingly static. The field of Special Education is currently receiving increased emphasis both in Canada and the United States, as evidenced by legislative trends. To a large degree, these have their recent roots in the human rights movement and the notion of equal rights to education for all.

The basis of special education as it presently exists derives largely from the previous century, when conditions which had been identified medically (notably blindness, deafness, and mental retardation) were seen as requiring special education provisions. To use an example, Montessori, a medical practitioner by training, was one of the first to recognize the importance of an educational component in the "treatment" of the mentally retarded. Her work and that of others took place primarily in a medical setting. Consequently, the first model for Special Education was medical in its orientation.

A major influence on special education in this century was the testing movement of the 1920s and 30s. This was a somewhat incomplete revolution in education which probably did more than anything else to delineate the meaning of individual differences in learning. Indeed, currently, in the "soft" areas of handicap (such as learning disabilities, borderline mental retardation, and language disorders) the selection of students requiring "special education" depends largely upon psycho-educational assessment techniques. The testing movement allowed educators to identify more precisely differences in cognitive functioning in children. Information thus derived can be used to assist in the development of more sensitive individual educational programs. Unfortunately, however, its use initially was very different and was limited largely to the exclusion from school of those students who did not appear able to profit from the existing school program. In retrospect, then, one can observe that Binet, acting for a school system after the turn of the century, had developed a test to answer what now must appear to be a most unfortunate question: "Who shall be excluded?"

From exclusion to civil rights

Bloom's 1964 summary of "Stability and Change in Human Characteristics" supported the psychometrists' common observation of the fact of human continua. It is a logical next step to identify exceptionality as simply attributable to those individuals who lie at the extremes of whatever continua one may be concerned about. Hence, the initial approach was measurement, which allowed labelling, and which in turn facilitated exclusion.

It is important to note the truth of the statement that "it is through legislation and the regulations to that legislation that society expresses its aspirations for children with special needs and crystallizes those aspirations into law." (Council for Exceptional Children, 1974) In effect, legislation regarding the education of the handicapped which was written prior to the last decade largely derives from an earlier era, and like all legislation, expresses the understandings and intentions of that era. Such legislation, in effect, provided for and approved the exclusion of handicapped children from "regular" education.

One of the earlier and more blatant historical examples of expression of a will to exclude based on a court decision was the 1919 case in which the Supreme Court of Wisconsin ruled in *Beattie vs. State Board of Education* that "the rights of a child of school age to attend the public schools of the state cannot be insisted upon, when this presence is harmful to the best interests of the school." The child in question was not a physical threat and could compete in the academic environment. The major argument presented by the school district was that his physical condition (cerebral palsy) produced a "depressing and nauseating effect on the teachers and school children."

To this day, remnants of the exclusionary intent expressed above, albeit less blatant, remain in legislation particularly in Canada.

Paralleling the technical developments described earlier were social-political changes across North America which were to influence the development of legislation for exceptional children. In the face of resistance from organized educational systems, parents of handicapped children banded together to form groups and associations. Historically, such parent groups have largely been responsible for the establishment of services for their children. In some cases, parent associations have simply acted on their own and set up special programs; in others, they have dealt directly with school systems in the first instance, and in others, they have directed their energies toward influencing political opinion. The continuing activity of such advocacy groups might well be interpreted to mean that professional leadership alone has been insufficient to cause the changes which they perceive as necessary. It is the opinion of the authors that parental advocacy to secure special educational services is, and will continue to be, an essential component in bringing about change in the educational system.

More recently, the rise of the civil rights movement in the United States, and the subsequent human rights issues which arise from it, have had a major influence on the history of legislation for special education. Coupled with this trend has been a growing recognition that as families have lost their economic production activities through industrialization, they have also begun to lose their welfare functions. Thus, the training which a child receives has become of interest to all in the community, either as his potential employers or as his potential economic supports if he should become dependent.

The influence of American legislation and litigation

As early as 1911 in New Jersey, 1917 in New York, and 1920 in Massachusetts, legislation made it mandatory for local boards of education to determine the number of handicapped children within their school districts. By 1969, the Council for Exceptional Children State Federal Information Clearing House for Exceptional Children estimated that about 40% of handicapped children of school age were receiving special education services. While over half of the states at that point had statutes mandating education for the handicapped, Abeson and Weintraub (1971) reported that no state was meeting that obligation, and that approximately one million children were languishing in homes and institutions where they were excluded from publicly supported education, or were receiving private education paid for by their parents or charity.

Parents in the U.S.A., beginning in the late 1960s, have been supported by a court system which, following the trend of the civil rights movement, has demanded that appropriate educational services be available to handicapped

children. In 1969, Judge Wilkens, Third Judicial District Court of Utah, required that two mentally retarded children excluded from education and placed under the Department of Welfare be provided with the opportunity to attend school. He observed: "To-day it is doubtful that any child may reasonably be expected to succeed in life if he is denied the right and opportunity of education. In this case the segregation of the plaintiff children from the public school system has a detrimental effect upon the children as well as their parents. The impact is greater when it has the apparent sanction of the law."

In January 1971, the Pennsylvania Association for Retarded Children brought suit on behalf of the parents of thirteen retarded children against the state of Pennsylvania, its agencies and school districts, for failure to provide their children a publicly supported education. Simply put, they argued that if education is provided by government to some, it must be available to all. In October 1971, agreement was reached between the parties, and the court ordered compliance by the state within one year, in providing education to all mentally retarded children including those living in institutions.

In the same year, in the District of Columbia, the court ruled in the case of *Mills vs. Board of Education* that failure to provide exceptional children a free and suitable publicly supported education cannot be excused by the claim that there are insufficient funds.

By 1973 Thomas Gilhool of the U.S.C. Law Centre was noting, in a review of court cases having to do with the right of handicapped children to appropriate educational services, that "Litigation is busting out all over." He suggested that we have entered the era of a new conception of the handicapped citizen's place in society, a conception that the handicapped "no longer have what they may have by the grace or good will of any other person, but that they have what they must have by right."

With nowhere to hide, school systems in the U.S. got behind the movement to force the federal government to become a partner with the states in the education of handicapped children. This process culminated in 1975 in the passage in the U.S. of Public Law 94 - 142, the Education of All Handicapped Children's Act. This Act, at the same time as it reflected changing practice in special education, demanded change from school systems both local and state. It has without doubt become the major focal point in special education in that country. Conferences on special education are now dominated by consideration of how best to comply with what is now federal law.

P. L. 94 - 142 is remarkably comprehensive and demanding. It leaves no doubt that

— *all* handicapped children must be served by suitable educational programs

- school systems *must* develop individualized education program plans (I.E.P.s) for all such children
- these I.E.P.s *must* involve the parent as well as the teacher and other educational specialists
- parents have clear *rights of due process* throughout the processes of assessment, program planning, and review
- children will be served from age 3 through to their adulthood at age 21
- all these conditions having been met the federal government *will pay* a portion of the costs of such education (up to 40% when the Act is in full operation — expected initially in 1982, five years after the Act was ratified)

When one reviews the history of American legislation regarding the educational rights of the handicapped, it becomes obvious that the earlier issues had to do simply with whether one was “in” or “out” of the system. More recent litigation focuses on qualitative concerns regarding the adequacy of assessment procedures and on the system for delivering special educational services. American schools initially opted for segregated special classes to provide services. Dunn’s 1968 classic article questioning the efficacy of special class placement has led to new concerns regarding the placement of students in segregated classes, and these concerns are reflected in P.L. 94 - 142.

The background of current federal legislation in the U.S.A. is interesting. On the face of it, it appears to have been passed as a result of the efforts of a number of prominent members of both Houses, most notably Senator Edward Kennedy. Prominent sponsorship is certainly an important element. Viewed historically, however, it becomes apparent that the process has taken nearly a decade, and involves hundreds of separate pieces of legislation across the nation which collectively resulted in the kind of social-political climate which would enable the passage of such a bill. Not to be overlooked in the process is the active involvement of the Council for Exceptional Children and the united efforts of a number of advocacy groups.

Canadian legislation and legislative and judicial processes

Those involved with special education in Canada have watched the course of legislation in the United States unfold both with interest and, on occasion, with envy. However, those who are students in the field are quick to recognize historical, philosophical, cultural, and constitutional differences which change the nature of the developments here and the processes through which these developments do (or do not) occur, despite similarities in the basic principles which special educators on both sides of the 49th Parallel espouse.

The writers enter this discussion in humble recognition that they are not constitutional experts, but professional educators trying to come to grips in their

own way with some very large and overriding realities within which we in Canada must operate, if we are to be effective in promoting change for children with special educational needs.

At the outset it is interesting to recognize that our two constitutions both allocate responsibility for education to the provincial/state levels of government. But the overriding understanding which emerges about the Canadian governing process is the supremacy of parliament. In a sense the monarch is still supreme. Our present-day parliament is simply the end product of an evolutionary growth of parliament, which now acts in the place of the monarch. Not so in the U.S. There, the interaction between the executive, the administrative, and the judicial arms constitutes the operation of government. The courts, an integral and equally powerful part of the system, maintain vigorous scrutiny of this interaction to ensure that the constitution which lays down these power relationships is not violated.

Thus it is that non-provision of suitable special education programs and services has been judged by the U.S. courts to be in violation of civil rights — rights to a free and appropriate education and the right to equal opportunity. The courts thus have the power to order the governing process into line with its constitutional provisions. Canadians have no similar basis for judicial intervention under the B.N.A. Act. Some legal advisors with whom the authors have spoken observed that the intent is present in the Canadian Bill of Rights, but that for the purposes outlined in this discussion this bill is of little value since it has not been entrenched in our constitution. At any time, the Bill could be revoked by an act of Parliament.

With little in the way of a constitutional base from which to operate, it is not surprising that parents of handicapped children and advocacy groups have been reluctant to take their cases into the judicial arena. Consequently the milestone court cases in Canada are few and far between. A further little-mentioned barrier to carrying cases to the courts in Canada has been the lack of potential for class action suits in the Canadian system, and the burden which such a limitation places on individuals who would act as advocates.

The first review of existing special education legislation in Canada was published in 1969. At that time, only one province (Nova Scotia) had mandatory legislation in place. In 1971 Saskatchewan introduced mandatory provisions in the School Act. Saskatchewan's law bears many similarities to U.S. P.L. 94 - 142, although it is provincial in scope. It is interesting to note that it predated 94 - 142 by some six years. Manitoba has mandatory provisions for some handicapping conditions. The Ministry of Education in Ontario has recently announced the intent to move toward mandatory legislation in that province. Thus, at the present time, for most parents of the handicapped in Canada, there appears to be little in the way of a legislative base from which to act.

Despite the lack of a solid legislative base, isolated examples of legal action taken by parents on behalf of their children are beginning to spring up in Canada. In one of the few cases in Canada in which a school system has been charged with non-provision of educational service, the Honorable Mr. Justice M. B. O'Byrne ordered the Lamont Board of Education in Alberta to allow the handicapped child in question into its school, or to arrange for her enrolment elsewhere and to pay whatever fees this might entail. The case here had simply to do with non-attendance (the "in-or-out" issue) rather than with the more complex question of "suitable" educational provisions which is presently the focus of American cases. The judge specifically recognized the limitation on his power with regard to the qualitative issue, stating in his reasons for judgement, "I do not have the authority to direct the Board of Education as to what must be done or the manner in which this order is to be complied with. That is a matter for the Board to resolve."

One of the consistent observations which can be made when surveying Canadian legislation in the field is the fragmentation of legislation, both within each province and between provinces. In any given province, it is possible to find separate pieces of legislation dealing with the educational or educational support needs of handicapped students under the departments (or ministries) of Education, of Health, or of Welfare. Without a clear identification of responsibility for the various services, such inconsistency is predictable. Sometimes services are provided inappropriately because of available sources of funding, in the absence of mandated responsibility. An example in some provinces is the employment of educational psychologists through provincial health services, largely because of the historical federal-provincial cost-sharing arrangements which had been available to Health, but not to Education.

In virtually every province, examples may be found of educational services which have been developed through some agency or department of government, to attempt to fulfill educational needs not being provided through the educational system. Since such arrangements are frequently *ad hoc*, it is not unusual to find that in times of fiscal constraint these programs are cut back, since the sponsoring authority has no mandate to offer educational services. The children and their parents are then caught in the middle. At such times, they frequently turn to the educational system, which is poorly equipped to provide the service, and indeed has probably not concerned itself with it at all, since the needs had been met previously outside the system. Education authorities are frequently surprised to learn that the sponsoring agencies have no clear mandate either! Needless to say, in time of economic restraint and in the face of public concern about increasing costs of education, the educational system is not usually receptive to accepting added responsibilities. Thus, though well-meaning in their intent, services established outside education may well have the effect of reducing the scale of educational opportunities for the handicapped within the system, since it has the effect of "taking off the pressure" and reducing the demand by parents of the handicapped for educational services for their children.

No doubt the existence of a national Office of Education, and of the Bureau for the Education of the Handicapped (B.E.H.), has been a major force in the development of a national direction for the education of exceptional children in the United States. In Canada, while there are federal departments in the area of Health and Welfare, there is no counterpart in Education. Coupled with the effect of medical care programs across the country, there has been a greater incentive to develop services to the handicapped under the auspices of those departments and/or their provincial counterparts. As noted above, one of the effects of this has been a dependency on the part of educational systems on services which are not system-accountable, provided by sources whose changing priorities do not necessarily parallel priority changes in education. A second effect is the continued reliance on a medical model to solve educational problems — a situation which many respected special educators see as inappropriate. A third is the lack of formal structures at the national level to coordinate the efforts of education, health, and welfare in the interests of handicapped children, their families and teachers.

Future directions

The Council for Exceptional Children in Canada published in 1974 a policy statement which set out 33 principles which could be used in the development and review of legislation and policies for special education. Most notable among these were consistency and co-operative planning between the different levels of government and between the different departments and agencies, to assure legislation which was clear, concise, and comprehensive, and to assure that the rights of exceptional children and their families be established and protected through due process. On reviewing these principles it would seem to the authors that they have remained valid and still constitute a worthwhile statement of principle which Canadian legislators and advocates on behalf of exceptional children could use to advantage.

One of the relatively new factors which may well influence the effectiveness of advocacy groups in Canada is the increasing sophistication of their advocacy techniques. Parents of the handicapped are no longer prepared to regard education for their children as anything other than a right, and they have learned much from the human rights movement. They are more prepared than ever to take their case into the political arena.

As the writers see it, Canada almost certainly will move towards mandatory special education legislation in all provinces in the 1980s. This will not come about if it is left to the legislators and civil servants alone, but will require the expressed concern of the public to make it happen. We believe that the various advocacy groups have a central role to play in expressing public concern. The rapidity of change will be to a large extent in their hands, since the models for mandatory legislation are everywhere. Their role now will lie in getting to legislators effectively, to demonstrate public support and give clear direction.

The courts in Canada may play a part in the 1980's, but they are not essential and indeed could become a block to the whole process if advocacy groups put too much of their energy into attempting to get them involved. Clearly energy must first and foremost be directed at influencing the legislators of the country.

In a keynote address to the Canadian Association for Children with Learning Disabilities in October of 1977, Mr. Justice Thomas Berger advocated not pressing for special legislation for the handicapped, but rather for rights for all children, which would then include the handicapped. He also recognized the primacy of the legislative rather than the judicial process in Canadian government. While it is obvious to everyone that those children whose characteristics differ in the extreme need "special" education, it is somewhat less obvious but nonetheless important that recognition be made that all children differ, and that a variety of educational provisions is needed for all children. Taken to its logical conclusion, such an approach would necessitate that the education system put into practice what it already claims to recognize philosophically — the existence of individual differences among children. Suitable legislation is needed in all provinces and hopefully at the national level to guarantee such educational practice.

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