THE RIGHT TO AN APPROPRIATE EDUCATION: A COMPARATIVE STUDY

*J.A. Clarence Smith**

I. INTRODUCTION

1979 was the International Year of the Child, and 1981 will be the International Year of the Disabled. It is a fitting time to examine the legal protection given to a child's needs and particularly (but not exclusively) the disabled child's needs. The greatest need of every child, and the need least legally protected, is his need for education. It is true that education is available to all children, or nearly all children, but if in any individual case it is denied there is little in the way of legal right to education, and still less to appropriate education. The handicapped child has even less right than his normal brothers and sisters. Much needs to be changed in our laws if Canada is to be true to the ideals to which she has put her name in several international undertakings.

Canada's instrument of accession to the International Covenant on Economic, Social and Cultural Rights (proposed by the General Assembly of the United Nations to its members on December 16, 1966) was filed on May 19, 1976. Since these are, at least in part, matters of provincial jurisdiction, care had been taken to obtain the unanimous consent of the provincial governments at a conference held in December, 1975. Article 13 of this Covenant provides that:

> 1. The States Parties . . . recognise the right of *everyone* to education.
> 2. . . . (a) Primary education shall be compulsory and free to *all* [Emphasis added.]

"Education" is not defined, and its definition would have raised ideological controversy; but the bare essential must be learning resulting from teaching: teaching producing no learning is not education, and still less is mere attendance at school.

The International Covenant was the culmination of a series of United Nations Declarations, two of which — the Universal Declaration of Human Rights of December 10, 1948 and the Declaration of the Rights of the Child of November 20, 1959 — had proclaimed the same right to education in slightly different words.[1] Other provisions not superseded

---

* Of the Faculty of Law (Common Law Section), University of Ottawa, Vice-President of the Ontario Society for Autistic Children. Any comments are the individual responsibility of the writer, and do not engage that of the Society.

[1] Article 26 and Principle 7, respectively.

by the Covenant continue to exist independently. Thus the Declaration of the Rights of the Child has as Principle 5:

> The child who is physically, mentally or socially handicapped shall be given the special treatment, *education* and care required by his particular condition. [Emphasis added.]

And the Universal Declaration of Human Rights has two Articles the relevance of which will appear presently:

> Article 7. All are equal before the law, and are entitled without any discrimination to equal protection of the law. . . .
> Article 10. Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights. . . .

Declarations are not binding in the same way as a covenant, but they reflect international consensus, and it would be unseemly in a party to them to ignore their precepts.

II. CANADA

In Canada the child's right to education is not entrenched by any constitutional provision. No human rights code mentions it and the B.N.A. Act is concerned with protecting only language and religion — not the child — in relation to education. There is not even the equivalent of the "equal protection" amendment to the American Constitution (repeated in the U.N. Declaration just quoted) which has effectively ensured in the United States that public money cannot be spent on some children and denied to others. Equal protection is important in the educational context because most children need no legal right to be in school: the authorities will go out into the highways and byways and compel them to come in. Those who need a legal right are the children the authorities prefer to be free to turn away: the physically and the mentally handicapped.

To put the legal question in its factual setting, there are two broad classes of mental handicap: mental disorder and mental retardation. Mental retardates are generally classified for educational purposes as educable, trainable or profound. While there is now general agreement that mental disorder is not a species of retardation, there is little consensus as to the subdivisions of mental disorder. One may say roughly that childhood mental disorders are either of the behaviour (thought to be psychological) or of perception (neurological). The former include emotional disturbance, some juvenile delinquency, and an inability or refusal to conform, leading to behaviour that is labelled inappropriate. In its extreme form this becomes impermeability to any influence, including teaching. The latter, the neurological disorders, include cerebral palsy on the one hand, and on the other dyslexia and the other learning disabilities, of which the most severe is aphasia. Childhood aphasia

ranges from slight difficulty to complete inability in translating the conventional sounds of spoken language into ideas and vice versa. Autism might be described from an educational point of view as a combination of aphasia with impermeability to influence.

This list may serve to illustrate the educational authorities' general reluctance to admit such children. For if a common factor of all these handicaps, and of some physical handicaps too, is that the afflicted child can learn (except perhaps the most profoundly retarded), it is also true that he will learn little or nothing by the ordinary teaching methods. Nor will a child with one handicap learn much by the methods effective for another. To take some obvious examples, you will not teach a blind child with written materials, or a deaf child by speaking to him. Nor will you teach a severely aphasic child by speaking to him, though for a different reason: but you can teach both deaf and aphasic children by writing or by sign language. You will not teach an autistic child without breaking through his impermeability and then knowing what to do next. The specialized techniques necessary in all these cases require specialized teachers and much smaller classes. Smaller classes mean more teachers' salaries. Specialized teachers require training which few people are truly qualified to give, and this again is costly.

In the absence of any overriding constitutional provision, the right to education depends entirely on provincial legislation,[2] and can be taken away by the same hand that gave it. Let it not be naively supposed that conscience or the fear of public opinion would prevent it being taken away: where the authorities find a right inconvenient there are ways of dressing up its abrogation so that even the legislators who vote on it do not notice what they are doing. We shall see presently a probable example of this evasion of the separation of powers.

To take first the normal child, provincial legislation might seem to give him not one legal right to schooling but two: one that his parents or guardians send him to school, and the other that the school authorities receive him there.[3] Breach of the parents' duty attracts a criminal

---

[2] Across the country from east to west: NEWFOUNDLAND, The School Attendance Act, S.N. 1978, c. 78, The Schools Act, R.S.N. 1970, c. 346; NOVA SCOTIA, Education Act, R.S.N.S. 1967, c. 81, *as amended by* S.N.S. 1970-71, c. 37, repealing some of the provisions concerning the subject-matter of this article, and giving the power to provide by Regulation in lieu. These provisions were reproduced as additions to the General School Regulations, at R. & R., S.N.S. 1972, page 284 [hereinafter cited as R. & R., Rule (no.)]; PRINCE EDWARD ISLAND, School Act, R.S.P.E.I. 1974, c. S-2; NEW BRUNSWICK, Schools Act, R.S.N.B. 1973, c. S-5; QUEBEC, Loi sur l'instruction publique, L.R.Q. 1977, c. I-14; ONTARIO, The Education Act, 1974, S.O. 1974, c. 109; MANITOBA, The Public Schools Act, R.S.M. 1970, c. P-250, The School Attendance Act, R.S.M. 1970, c. S-20; SASKATCHEWAN, The Education Act, R.S.S. 1978, c. E-0.1; ALBERTA, The School Act, R.S.A. 1970, c. 329; NORTHWEST TERRITORIES, Education Ordinance, O.N.W.T. 1976 (3d Sess.), c. 2; YUKON, School Ordinance, O.Y.T. 1974 (2d Sess.), c. 14 (amending R.O.Y. 1971, c. S-3); BRITISH COLUMBIA, School Act, R.S.B.C. 1979, c. 375.

[3] NEWFOUNDLAND, The Schools (Amendment) Act, 1974, S.N. 1974, No. 28, s. 8: "[A] School Board shall make provision for the admission to school . . . of all

sanction;[4] breach of the school authorities' duty does not.[5] The difference is hardly surprising: the duty is imposed on the school authorities by other authorities with a natural fellow-feeling; for school legislation is the work of civil servants, the elected representatives of the people rarely raising any objection.

Attractive though this analysis into two rights for the child may appear superficially, yet when the predominant "legislative purpose" is

---

children . . . ," (amending The Schools Act, s. 61, which previously read, "[C]hildren . . . may be admitted"), and, The Schools Act, ss. 99(2), 100(5): "No school fees shall be charged . . . in any area . . . where school tax . . . is imposed . . . "; NOVA SCOTIA, Education Act, s. 2(1): "All schools established or conducted under this Act are free schools . . . ", and, s. 2(2): "[E]very person over the age of . . . has the right to attend a school . . . ": PRINCE EWARD ISLAND, School Act, s. 47(1): "The Minister shall provide free school privileges . . . for every child . . . "; NEW BRUNSWICK, Schools Act, s. 5(1): "The Minister shall provide free school privileges . . . " (the duty lying, before 1966, on the School Board: Schools Act, R.S.N.B. 1952, c. 204, s. 63(1)); QUEBEC, Loi sur l'instruction publique, s. 33: "[L]es commissionaires ou des syndics d'école . . . sont tenus d'admettre aux cours . . . tout enfant . . . ", and, s. 234, "[ils] ne peuvent exiger rétribution . . . "; ONTARIO, The Education Act, 1974, ss. 31(1), 32(1): "A person [who attains the specified age] has the right, without payment of a fee, to attend a school . . . " (the right "to attend some school" from ages 5 to 21 dating from S.O. 1885, c. 49, s. 6); MANITOBA, The Public Schools Act, s. 255(1): "[A]ll public schools shall be free schools . . . ", and, s. 255(2) (added by S.M. 1971, c. 51, s. 6): "Every person has the right to attend school from age . . . "; SASKATCHEWAN, The Education Act, ss. 144(1), (2): "[E]very person between the ages . . . shall have the right to attend school . . . at the cost of the school division, and no fees . . . shall be charged . . . "; ALBERTA, The School Act, s. 136(1) (*a*): "[A board shall] accept in its schools every pupil . . . ", and, s. 143(1): "No tuition fees shall be charged by a board . . . "; NORTHWEST TERRITORIES, Education Ordinance, s. 53(1): "Every Board . . . shall admit to its school without charge any child . . . "; YUKON, School Ordinance, s. 27: "Any child . . . may attend school . . . " (before 1974 it being provided by School Ordinance, R.O.Y. 1971, c. S-3, s. 6(*m*) that "pupils may be admitted . . . ") and, s. 283(1): "No school board shall charge tuition fees . . . "; BRITISH COLUMBIA, School Act, s. 155(1)(*a*)(*i*): "[The Board of each school district shall] provide sufficient school accommodation and tuition, free of charge, to all children of school age. . . . "

[4] NEWFOUNDLAND, The School Attendance Act, ss. 4, 11 (fine and imprisonment); NOVA SCOTIA, Education Act, s. 96(1) (fine); PRINCE EDWARD ISLAND, School Act, s. 49(2): "[E]very child shall attend school . . . ", but no explicit duty or penalty is imposed on parents; NEW BRUNSWICK, Schools Act, s. 59(7) (fine and imprisonment); QUEBEC, Loi sur l'instruction publique, s. 274 (fine); ONTARIO, The Education Act, 1974, s. 29(1) (fine); MANITOBA, The School Attendance Act, s. 22 (fine and imprisonment); SASKATCHEWAN, The Education Act, s. 155(2) (fine); ALBERTA, The School Act, s. 171, *as amended by* S.A. 1971, c. 100, s. 20 (fine); NORTHWEST TERRITORIES, Education Ordinance, s. 96(4) (penalty prescribed by regulation); YUKON, School Ordinance, s. 29(3) (fine and imprisonment); BRITISH COLUMBIA, School Act, s. 113(1) (fine).

[5] Breach of the school authorities' duty formerly attracted a criminal sanction in SASKATCHEWAN. The Education Act, s. 143 now provides, under pain of disqualification, that "no teacher, director, superintendent or other school official shall in any way deprive or attempt to deprive a pupil of access to, or the advantage of, the educational services approved and provided by the board of education". Up to January 1, 1979, s. 246(6) of the old School Act, R.S.S. 1966, c. 184, provided a fine of $50 for any "trustee, teacher or other person who interferes . . . with the right of a pupil to attend school in violation of this Act. . . . "

considered, the correlatives of the two duties are not rights in the child. The parents' duty is not imposed on them primarily in the child's interest (though this would usually be claimed), but in the public interest, hence the criminal sanction. The public interest in question is a homogeneous society, and childhood is the age at which homogeneity is most easily injected. And the other duty, imposed on the authorities, though often explicitly phrased as a right in the child to education, corresponds more significantly to a right in the parents not to pay. But one must not go too far in this direction either: the right to be in school begins in most provinces a year earlier, usually at six, than compulsory attendance,[6] and goes on in most provinces several years longer than the age, usually sixteen, at which compulsion stops.[7] This extension before and after must be intended to be largely in the interests of the child.

It might seem self-evident that the child's interest is served not by being simply in school but by what he receives there: attending school is not in itself education. But the right given by provincial law does not

---

[6] NEWFOUNDLAND, The Schools (Amendment) Act, S.N. 1974, No. 28, s 8 (amending The Schools Act, s. 61, without changing the right to attend school at age five and up), The School Attendance Act, s. 3(*b*) (compulsion from age six and up), NOVA SCOTIA, Education Act, s. 2(2) (right at age five and up), R. & R., Rule 91 (compulsion from age six); PRINCE EDWARD ISLAND, School Act, s. 47(1) (right at age six), s. 1(*b*) (compulsion from age seven); NEW BRUNSWICK, Schools Act, s. 5(1) (right at age six), s. 59(1) (compulsion from age seven); QUEBEC, Loi sur l'instruction publique, ss. 33, 256 (right and compulsion at age six); ONTARIO, The Education Act, 1974, s. 32(1) (right at age five and up), s. 20(1)(*a*) (compulsion from age six); MANITOBA, The Public Schools Act, s. 255(2) (right at age six), The School Attendance Act, s. 2(1) (compulsion from age seven); SASKATCHEWAN, The Education Act, s. 144(1) (right at age six), ss. 2(*g*), 155(1) (compulsion from age seven); ALBERTA, The School Act, ss. 133, 136(1) (right and compulsion at age six); NORTHWEST TERRITORIES, Education Ordinance, s. 53(1) (no explicit age for right), s. 96(1) (compulsion from five and up); YUKON, School Ordinance, s. 27 (right at age five and up), s. 29(1) (compulsion from age six); BRITISH COLUMBIA, School Act, s. 2(2) (right at age five and up), s. 113(1) (compulsion from seven).

[7] NEWFOUNDLAND, The School Attendance Act, s. 3 (compulsion to 15, no later age for the right to attend); NOVA SCOTIA, R. & R., Rule 91 (compulsion to 16), Education Act, s. 2(2) (right to 21); PRINCE EDWARD ISLAND, School Act, s. 1(*b*) (compulsion to 15), s. 47(1) (right to 20); NEW BRUNSWICK, Schools Act, s. 59(1) (compulsion to 15), s. 5(1) (right to 20); QUEBEC, Loi sur l'instruction publique, s. 256 (compulsion to age 15), s. 33 (right to age 16, although 20 is envisioned in s. 250); ONTARIO, The Education Act, 1974, s. 20(1) (*a*) (compulsion to 16), s. 32(1) (right to 21); MANITOBA, The School Attendance Act, s. 2(1), (2) (compulsion to 16), The Public Schools Act, s. 255(2) (right to 21); SASKATCHEWAN, The Education Act, ss. 2(*g*), 155(1) (compulsion to 16), s. 144(1) (right to 21); ALBERTA, The School Act, s. 133(1) (compulsion to 16), s. 133(2) *as amended by* S.A. 1971, c. 1 (right to age 18. However, under s. 133(3), added by S.A. 1972, c. 84, s. 11, "A board in its discretion may admit . . . any person 18 years of age or over . . . "); NORTHWEST TERRITORIES, Education Ordinance, s. 96(1) (compulsion to 15, no later age for right); YUKON, School Ordinance, s. 29(1) (compulsion to 16, no later age for right); BRITISH COLUMBIA, School Act, s. 113(1) (compulsion to 15), s. 2(2) (right to 19).

include, except in Saskatchewan[8] and the Northwest Territories,[9] the right to receive in school anything worthwhile: what the child receives depends on the uncontrolled discretion of the school authorities. When it is a question however of excusing parents from their duty to send their child to school on the ground of his being instructed elsewhere, then indeed the alternative education has to be adequate; and the adequacy is judged by the same school authorities[10] who have no duty other than moral to be adequate themselves. The only exceptions are Quebec[11] and British Columbia.[12]

With a legal right to an adequate education, however defined, the school authorities would be exposed to judicial "interference" as they sometimes are effectively in the United States. The prospect of "horrendous lawsuits", as described by a recent Ontario Minister of Education,[13] might indeed be embarrassing to the school authorities who would be weighed in the balance by an impartial observer. But this is what is meant by the rule of law — and also by Article 10 of the Universal Declaration of Human Rights. There is no reason why the educational authorities should enjoy more immunity from judicial criticism than hospitals and doctors, for example. To the argument that the Ministry (or even the school board) knows better than the judges what constitutes proper educational standards, we may answer that judges are well accustomed to weighing expert evidence on matters beyond their own knowledge. There is the further point that a judge's horizon is at least potentially far wider: the educational authorities refuse to listen to

---

[8] The Education Act, s. 144(1), adds "and to receive instruction appropriate to his age and level of educational achievement . . . ". A correlative duty to provide an appropriate program of instruction is imposed on school boards by s. 178(1).

[9] Education Ordinance, s. 37(*p*): "[Every Board of Education shall] provide instruction appropriate to their learning levels for all students . . . ".

[10] In NEWFOUNDLAND, approval by the Superintendent is required (School Attendance Act, s. 8(*d*); in NOVA SCOTIA, under R. & R., Rule 92(*f*), a certificate by an "inspector or supervisor of schools" is required. In PRINCE EDWARD ISLAND, The School Act, s. 49(3)(*a*) requires "the opinion of the Minister". The same requirement exists in NEW BRUNSWICK under the Schools Act, s. 59(3)(*a*). In ONTARIO, The Education Act, 1974, ss. 20(2)(*a*), 23(2), calls for a decision by the Provincial School Attendance Counsellor after inquiry by his nominee. The MANITOBA School Attendance Act, s. 5 (*as amended by* S.M. 1978, c. 49, s. 86), and s. 6, calls for a decision by the Minister or a school inspector. In SASKATCHEWAN, The Education Act, s. 156(*a*) requires approval by the director or superintendent. In ALBERTA, The School Act, s. 134(1)(*a*) requires a certificate by a Department of Education inspector or a superintendent of schools. The NORTHWEST TERRITORIES, Education Ordinance, s. 96(3)(*a*), requires the opinion of the superintendent for the education district. The opinion of the superintendent of education is required in the YUKON (School Ordinance, s. 29(2)(*c*)).

[11] This exception is implied by the absence of designation of any authority to decide whether a child receives effective instruction at home (Loi sur l'instruction publique, s. 257(2)).

[12] The exception is explicit. Proof that a child is being educated by means "satisfactory to the Justice or tribunal before whom the prosecution takes place" is required (School Act, s. 112(2) (*a*)).

[13] The Globe and Mail (Toronto), Dec. 12, 1977, at 7, col. 1.

anyone whose expertise has not been certified in the province; but the courts will listen to anyone who demonstrates his knowledge, and legislation which sought to limit them to experts locally certified would hardly be tolerated.

This then is the scene for normal children whose legal rights have so far founded no litigation other than the occasional decision of a board to close a particular school and transfer its pupils to another. Contentions arise over handicapped children whom the authorities would be glad to exclude because they give trouble both to teachers and to the other children unless they are taught in the expensive way which alone is effective.

The strategy for exclusion of handicapped children is generally two-pronged: the first is an exception in about half the provinces from the right to attend school in the case of those who are "unable by reason of physical or mental handicap to profit from instruction", or some variation on this theme. In itself, and assuming instruction adapted to the child's special needs, this would exclude very few children. The second prong is the power (but no duty) in the school authorities to set up special classes and to direct children into them from regular classes, whether or not these children are "unable" in the sense of the exception. Some provinces — only some — allow the school authorities to subsidize privately run classes for handicapped children. While the exception takes away from handicapped children such rights as are conferred upon their normal brothers and sisters, the provision for special classes, public or private, gives them nothing but a *spes* in its place.

Handicapped children then are rightless in Canada, so far as education goes. They have no right in any province to an appropriate education, and in half the country they have no right even to be in school. This does not mean that no provision is in fact made for them, or even that the provision, where made, is not good: its adequacy is not a question of law. It means that any such provision is made as a matter of grace and favour; and where no provision, or no adequate provision, is made, there is no independent and impartial tribunal (in the words of the Universal Declaration of Human Rights) to compel respect for these children's needs. Even in a case of disregard for their needs, depending not on a genuine if misguided difference of opinion, but on some indirect motive, such as that the parents have made a legitimate nuisance of themselves, it is difficult to see any legal remedy.

A. *Exception From the Right to Attend School*

To take first the exception from the right to attend school, there are two separate points: first, its defined extent; and secondly, jurisdiction to decide whether it applies to any particular child.

1. *The Defined Extent of the Exception*

Some provinces do not have an exception at all. To judge from the terms of the legislation, the school authorities in Quebec, Manitoba,

Saskatchewan[14] and Alberta are obliged to admit all children with no other distinction than residence: this is known graphically in the United States as zero-reject, and it does not mean that there is no exclusion in fact.[15] Nova Scotia and the two Territories have no exception in terms, and an action should therefore lie for exclusion. Nevertheless, one may suspect that exclusion in fact results if attendance is "impractical", this being the ground for exemption from compulsion to attend[16] and for the provision of special classes.

The other Atlantic provinces, Ontario and British Columbia explicitly enable exclusion, but on different criteria. Newfoundland permits the exclusion of any pupil "so mentally deficient as to be incapable of responding to class instruction by a qualified teacher".[17] There is nothing to show that "qualified" means more than qualified to teach normal children. Prince Edward Island excepts from the right to "free school privileges . . . students for whom the Minister has provided special services such as deaf, blind and cerebral palsy [sic]"[18] so that at least they must have one provision or the other. New Brunswick provides[19] that the board may[20] exclude "a person . . . mentally defective to the extent that he is unlikely to benefit from attendance at school". British Columbia[21] takes a different approach by excusing school boards from admitting to Grade I a child who has not "attained a standard of education equivalent to that of pupils attending Grade I".

---

[14] This was not so in SASKATCHEWAN until 1979. Before then, The School Act, R.S.S. 1965, c. 184, s. 118 provided that:

> It shall be the duty of the board of every district, and it shall have power . . .
> (44.) if deemed advisable, to exclude from attendance at a school any pupil who . . . is so mentally deficient as to be incapable of responding to class instruction by a skilful teacher. . . .

The same criterion is still in force in NEWFOUNDLAND. *See* note 17, *infra* and accompanying text.

[15] It needed an order of the Supreme Court of Alberta to compel a board in that province to admit a child with cerebral palsy — Carriere v. Lamont Bd. of Educ. (15 Aug. 1978, unreported) — and that did not secure her *appropriate* instruction: The Globe and Mail (Toronto), Mar. 27, 1979, at 14, col. 7.

[16] NOVA SCOTIA, R. & R., Rule 92, exempts any child whose "mental condition . . . is such as to render his attendance at or instruction in school inexpedient or impractical". This replaced s. 81(1)(*d*) of the Act. The first appearance of this provision is apparently in An Act to Amend and Consolidate the Acts relating to Public Instruction, S.N.S. 1895, c. 1, s. 84(10). The NORTHWEST TERRITORIES enables the provision of special classes for "students who, for any physical or mental cause, are unable to take proper advantage of the regular school courses of study" (Education Ordinance, s. 38(1)(*d*)); and the YUKON does likewise for "children suffering physical or mental disability" (School Ordinance, s. 117(2)(*h*)(*ii*)).

[17] The Schools Act, s. 13(*e*). The exception was introduced by The Schools Act, 1969, S.N. 1969, No. 68, s. 13(*e*), before there was any right to attend.

[18] Regulations of Prince Edward Island, c. S-2, School Act Regulations, Part V, s. 5.28(*d*).

[19] Schools Act, s. 45(3).

[20] The word "may" first appeared in An Act to Amend the Schools Act, S.N.B. 1973, c. 75, s. 9, amending S.N.B. 1966, c. 24, which used "shall".

[21] School Act, s. 155(2)(*b*).

The situation in Ontario is more complicated. Not a ripple of attention greeted the insertion in 1927[22] in the Public Schools Act of an exception against children "who by reason of mental or physical defect are unable to profit by instruction in the public schools" (plural); but when in 1957[23] children were first given explicitly a right against Separate School Boards, the corresponding exception referred to "instruction in the separate school" (singular). The difference seems to be between the public school *system* and the particular separate school to which the child might be entitled. In 1960[24] this provision of the Public Schools Act was redrafted, omitting "in the public schools"; but the subsection conferring power to decide the question of inability (below) referred to "instruction in a public school" — singular but indefinite — so that the system seems still to be intended. But if the system is the point, the system was not confined to classes for normal children: inability to profit from "a special class for educable retarded children" was part of the definition of a trainable retarded child when schools for the latter were taken over by the *secondary* school system (operated by "divisional" boards) in 1968;[25] and such "special classes" were operated by the same boards as were charged with the elementary schools, usually if not always in the same buildings. Instruction in these classes was "instruction in a public school"; and it would not have been unreasonable to interpret "unable to profit by instruction in a public school" as "suitable for a trainable retarded school"; the question, however, was never tested.

In 1974[26] all this (and other) legislation was consolidated in the Education Act. The Bill as published after the first reading was prefaced by a general note that no change was made in the existing law except where noted, the note to each altered provision taking the form of the word "amended" after the reference to the sections reproduced or the word "new" if there was no earlier provision. A single section in the new Act consolidates exclusion from both public and separate schools, and in it the change from "defect" to "handicap" is purely verbal; but simple inability "to profit by instruction" became "to profit by

---

[22] The School Law Amendment Act, 1927, S.O. 1927, c. 88, s. 3. Up to 1944 the only record of debates in the Ontario Assembly is in The Globe and Mail, and there is no mention there of this Bill.

[23] The Separate Schools Amendment Act, 1957, S.O. 1957, c. 112, s. 1, which became s. 25(1) of The Separate Schools Act, R.S.O. 1970, c. 430. Separate School Boards had been, from the beginning, under the same duty as the Public School Boards to provide for "all children" of their supporters, but this was the first mention of a correlative right in the child.

[24] The Public Schools Amendment Act, 1960, S.O. 1960, c. 96, s. 1. This became s. 4(1)(*b*) of The Public Schools Act, R.S.O. 1970, c. 385.

[25] The Secondary Schools and Boards of Education Amendment Act, S.O. 1968, c. 122, s. 9, adding s. 101(1)(*f*) to the principal Act. In The Secondary Schools and Boards of Education Act, R.S.O. 1970, c. 425, this became s. 69(1)(*f*). This is now s. 1(1)66 of The Education Act, 1974.

[26] The Education Act, 1974, S.O. 1974, c. 109.

instruction in an elementary school",[27] without any indication of amendment to the old sections cited as reproduced.

In the absence of any note there was no debate on this subsection: it occurred to no member to ask whether and why some children were no longer to have rights which the old law gave them.[28] It is unnecessary to go into the details of the subsequent protests and the ensuing series of private members' bills (consigned to the usual destination of such bills), since after a long period of confidential gestation a government bill received first reading in May 1980,[29] and, if passed, will remove the four offending words nearly six years after their insertion. It also removes all reference to physical handicap, so that in respect of those children Ontario will be zero-reject.

2. *Jurisdiction to Decide Whether the Exception Applies to a Particular Child*

Although the provisions cited from the excluding provinces appear to provide criteria for the exclusion of described children and no others, the protection of the others who claim to be able to profit from instruction is not judicially controlled: their right to be in school can hardly in these circumstances be called a legal right. In Newfoundland exclusion depends on a teacher's suspicion of a handicap, confirmed by the certificate of a "duly qualified medical practitioner".[30] One may confidently predict that the legislator had in mind a psychiatrist, not a neurologist, still less a psychologist, since a psychologist is not a medical practitioner. These, however, are the two disciplines relevant to mental handicaps, not psychiatry. There is no requirement that the parents even be informed of the teacher's suspicion before exclusion is decided.[31] In New Brunswick the decision has, since 1973, been made by certificate in writing from "a director of a mental health clinic",[32] who would again be a psychiatrist. There is no provision for investigation, still less for challenge. In the zero-reject provinces, Nova Scotia, Quebec and the Prairies, the question does not arise.[33] In the North-West Territories and

---

[27] The Education Act, 1974, s. 34(1).

[28] Though there was a protest against their having no rights: *see* LEG. ONT. DEB., 29th Leg., 4th Sess. No. 161, at 6763-64 (1974).

[29] Bill 82, 31st Leg. Ont., 4th Sess., 1980, s. 6, which will replace s. 34. As we go to press, Bill 82 is the subject of amendments and counter-amendments.

[30] The Schools Act, s. 13(*e*).

[31] *See* The School Attendance Act, s. 8. Under the prior legislation, parents were to have reasonable opportunity to make representations before a child was excused: The School Attendance Act, R.S.N. 1970, c. 345, s. 9(1), (2).

[32] Schools Act, s. 45(3). Between 1966 and 1973, it was "district medical health officer" (Schools Act, S.N.B. 1966, c. 24, s. 34(2)); and before 1966, a "physician designated by the Minister" (Schools Act, R.S.N.B. 1952, c. 204, s. 63(14)).

[33] Exclusion in Saskatchewan before 1979 depended on the judgment of the Superintendent, subject to appeal by the parent or legal guardian of the pupil to the Minister of Public Health, whose decision was final: The School Act, R.S.S. 1965, c. 184, s. 118(44).

in the Yukon no provision is made for such a decision, exclusion being apparently a matter of discretion. In British Columbia no provision is necessary since the basis for exclusion is different.

In Ontario, before the 1974 Education Act, exclusion from the ordinary schools was open to challenge, the challenge being decided by a committee appointed by the Minister with no prescribed membership, "and the decision of the committee is final".[34] The Act of 1974[35] provides for exclusion after investigation by a committee of three appointed by the board and to consist of a psychiatrist (in the area of mental handicap) and "a supervisory officer or principal neither of whom is the supervisory officer or principal to whom the matter has been previously referred" — but still comfortably within the same bureaucracy. The proposed amendment[36] spells out that on a decision of inability to profit the board *shall* exclude the child. Since 1974 it is not provided that the decision of the committee is final, but the effect is hardly different: the board cannot be sued for doing what the law says it *shall* do; and nothing can be done to alter the decision of the committee except a proceeding in the nature of a prerogative writ[37] in respect of errors of procedure or of law, but not of fact or discretion. The Minister has indeed to be notified of a decision to exclude, but he is given neither power nor duty to do anything about it.[38]

B. *Power of School Authority to Set Up Special Classes*

In former times children who could not profit by conventional instruction were either specially helped by devoted teachers relying on their usually accurate instinct, or, if quiet, allowed to sit at the back of the class and do nothing. Many teachers today would still be willing and able to help children in these circumstances, and sometimes still do in practice; but in modern psychological and administrative theory, by which local bureaucracies are spellbound, these children are supposed to be taken out of the normal class and taught specially.

---

[34] The Public Schools Act, R.S.O. 1970, c. 385, s. 4(2); The Separate Schools Act, R.S.O. 1970, c. 430, s. 25(2).

[35] S. 34(2) and (3), to be verbally remodelled by Bill 82, 31st Leg. Ont., 4th Sess. 1980, s. 6.

[36] Bill 82, s. 6 (adding new s. 34(7) to the principal Act).

[37] The Judicial Review Procedure Act, 1971, S.O. 1971, Vol. 2, c. 48

[38] The Education Act, 1974, s. 34(6), or s. 34(7)(*b*) under Bill 82. This is in accordance with a conscious policy to respect the independence of the locally elected school boards. Liberty of decision is a pearl of great price so long as the decision governs one's own affairs; but it is a fatal confusion of thought to admire liberty to decide other people's affairs without threat of interference. In the public, as opposed to the bureaucratic, interest such "liberty" requires to be closely defined legislatively and closely controlled judicially. A fashionable word for this is "accountability", and boards are generally quite willing to be accountable to parents, one family at a time. No one who has seen a board's heavy artillery trained on an already flattened parent will take this quite seriously.

Separate mention must be made first of facilities for the blind and the deaf; secondly, of those for the trainable retarded; and, thirdly, of those for the handicapped in general. Provision for the blind and the deaf is often separate, while the trainable retarded are sometimes provided for separately, sometimes included in the handicapped in general; and in some provinces there is no provision for any but the specific handicaps in the first two classes: those who were once allowed to sit at the back and do nothing often still are, whether in the normal schools or in the retarded schools. This is the particular complaint of the learning disabled, conveniently regarded as merely stupid or lazy.

1. *The Blind and the Deaf*

For the blind and the deaf — otherwise "aurally or visually handicapped persons" — an agreement was made between the four Atlantic provinces in January 1975 to set up an "Atlantic Provinces Special Education Authority", which operates a school for the blind at Halifax, and another for the deaf at Amherst. The agreement has reached the statute book only in Nova Scotia,[39] where it originated, and in New Brunswick.[40] The Nova Scotia statute envisages placement locally if the superintendent of schools finds that "suitable", and if not and if the child's school board so recommends (in its discretion), only then is the Authority obliged to take charge of him.[41] In New Brunswick the Minister of Education is obliged to "issue an order approving the admission of the handicapped person" on application and proof of residence.[42] In Newfoundland and in Prince Edward Island there is no special legislative provision for the blind or for the deaf, whose education therefore depends, as in the case of handicaps generally (below), on the discretion of the Board in Newfoundland, and of the Minister in Prince Edward Island. In the latter province, the Minister operates provincial schools for the deaf and for the cerebral palsied as well as making use of the facilities of the Atlantic Provinces Authority.[43] In Quebec too there is no special legislative provision; but Ontario has special schools, run by the Minister of Education, for the deaf and for the blind. Regulation prescribes "the terms and conditions upon which pupils may be admitted"[44] but "any question concerning the eligibility for admission of an applicant" is determined by a committee appointed by the Minister.[45] In Manitoba the government *may* pay for the education

---

[39] The Handicapped Persons' Education Act, S.N.S. 1974, c. 5, in force from Mar. 1, 1975.

[40] Education of Aurally or Visually Handicapped Persons Act, S.N.B. 1975, c. E-1.2.

[41] Ss. 11, 12.

[42] S. 8.

[43] Information from the Director of Education Planning.

[44] The Education Act, 1974, s. 12(4) (*a*).

[45] The Education Act, 1974, s. 12(4) (*b*).

and maintenance of blind children and deaf children inside or outside the province;[46] in Saskatchewan[47] and British Columbia[48] provincial schools *may* be established; and in Alberta, the Northwest Territories and the Yukon there is no special provision. There is therefore no right anywhere (with the possible exception of New Brunswick and soon Ontario) for blind or for deaf children to be specially educated.

2. *The Trainable Retarded*

For the retarded, separate provision is made in Nova Scotia, Ontario, Manitoba and British Columbia. In Nova Scotia, "training centres" (but dispensing also "education") *may* be provided by the Minister of Social Services;[49] and in British Columbia "the School Board *may* . . . with the approval of the Minister [of Education] establish and operate special classes . . . ".[50] Only in Ontario[51] and Manitoba[52] is provision (unspecified in Manitoba, but "a school or class" in Ontario) compulsory on divisional boards,[53] but there is no correlative right in the child to be admitted. In Manitoba admission depends on being "classified . . . by an official designated for the purpose by the Minister of Health": but since Manitoba is zero-reject refusal to classify would involve admission to a normal class. In Ontario[54] admission depends on the uncontrolled discretion of an admissions board presided over by the principal, and rejection gives no right to admission to a normal, or any class. The proposed amendment, however, will entrust admission and rejection to a placement committee under the board. The decision to expel on a subsequent finding of "inability to profit from instruction" is to be entrusted to the committee of three, mentioned in connection with exclusion generally.

---

[46] The Blind Persons' and Deaf Persons' Maintenance and Education Act, R.S.M. 1970, c. B-60, ss. 3, 4.

[47] The Education Act, s. 10(1)(*d*)(iii).

[48] School Act, s. 16(*e*).

[49] Children's Services Act, S.N.S. 1976, c. 8, s. 6(*a*). This is the first time that *education* of the retarded has appeared in Nova Scotian legislation.

[50] School Act, s. 160(*h*).

[51] The Education Act, 1974, s. 70(1).

[52] The Public Schools Act, s. 465(22) (*as amended by* S.M. 1975, c. 39, s. 92 (not yet proclaimed in force)).

[53] These boards are responsible for secondary education in both provinces. In MANITOBA, a board of trustees *may* deal with the retarded where there is no divisional board: The Public Schools Act, s. 147(1)(*b*). In ONTARIO, separate school boards are concerned only with elementary education and have therefore no involvement with the trainable retarded: Public School Boards coincide with divisional boards.

[54] The Education Act, 1974, s. 75, first introduced in 1968 by The Secondary Schools and Boards of Education Amendment Act, S.O. 1968, c. 122, s. 9 (adding s. 109 to the principal Act). This became The Secondary Schools and Boards of Education Act, R.S.O. 1970, c. 425, ss. 77(1), (6) and (7), now replaced by s. 75. S. 75 of the 1974 Act will be repealed by Bill 82, 31st Leg. Ont., 4th Sess., 1980. The placement committee is provided for by s. 3, replacing s. 10(1)5, and exclusion from all programs is dealt with in the new s. 34.

3. *The Handicapped in General*

British Columbia has no legislative provision for the education of children with mental handicaps other than retardation, and this is also the position in Manitoba pending proclamation of legislation passed in 1975 and to be discussed below. Ontario alone distinguishes specifically the trainable retarded (above) from children with other handicaps including the educable retarded. Provision of "special education programs" is still optional,[55] but the proposed amendment will make it compulsory by 1985.[56] A special education program is, however, defined in the Bill as "an instructional program that meets *or is designed to meet* the needs of an exceptional pupil. [Emphasis added.]" It is true that one interpretation of "designed" might allow judicial intervention where the program offered to a pupil was inappropriate, but that is the nearest approach to the heralded guarantee of "appropriate" education for every child. Admission to any such program depends on the unfettered discretion of a placement committee.[57]

The other provinces, except Nova Scotia, give power (but impose no duty)[58] to provide "special classes of instruction for children who are from any physical or mental cause unable to take proper advantage of the regular school courses of study",[59] without restriction (in the case of mental causes) to retardation and without any special mention of it. Provision being optional, it is hardly necessary to add that admission is

---

[55] The Education Act, 1974, s. 147(1) 40.

[56] Bill 82, s. 14, introducing a new paragraph 6 *a* into s. 146. The definition of "special education program" is contained in Bill 82, s. 1(1), adding new paragraph 62 *a* to s. 1(1) of the principal Act.

[57] The Minister will be authorized by the new s. 10(1) 5, added by Bill 82, s. 3(1), to regulate the establishment, etc. of "committees to identify exceptional pupils and to make and review placements of exceptional pupils". It has already been provided, by O. Reg. 704/78, s. 30(2)(*b*), that a board electing to establish special education programs or services must also establish, and by s. 31(1) appoint all the members of, a Special Education Program Placement and Review Committee. The board is also to "establish procedures and criteria governing the placement of an exceptional pupil and the review of such placement" (s. 30(2)(*a*)), and "print and make available copies of" these (s. 30(2)(*i*)). Pupils cannot be placed against their written objection (s. 30(2)(*d*)), but they have no power to insist on placement against the Committee's view of what is proper.

[58] In SASKATCHEWAN, since Jan., 1979, provision is at first sight compulsory: The Education Act, s. 184(2). But the subsection continues (s. 184(2)(*b*)): "[W]here . . . a pupil is so seriously handicapped as to be unable to benefit from any of the instructional services provided by the board, the board shall . . . make available any of its consultant services . . . ". In other words, the board chooses, as before, what "instructional services" to provide; if any child does not fit, he is out.

[59] NEWFOUNDLAND, The Schools Act, s. 13(*p*). Similar words occur in PRINCE EDWARD ISLAND, School Act, s. 5(*f*), and almost identical words in NEW BRUNSWICK, Auxiliary Classes Act, R.S.N.B. 1973, c. A-19, s. 4; as to the other provinces and territories, *see* QUEBEC, Loi sur l'instruction publique, s. 480, s. 504 for the island of Montreal; SASKATCHEWAN, The Education Act, s. 184(2); NORTHWEST TERRITORIES, Education Ordinance, s. 38(1)(*d*), *cf.* ss. 3(4)(*d*) and 72(1). ALBERTA mentions only "special education" without saying for whom: The School Act, s. 138(*b*). The YUKON

discretionary.[60] There is no legislative requirement of effectiveness, if one ignores the occasional outburst of non-justiciable idealism:[61] there is in sum no way of compelling the authorities to act otherwise than in accordance with their inclinations and internal advice. This is not accountability.

Provision is a function of the Minister of Education in Prince Edward Island,[62] of the Commissioner in the Yukon,[63] and of the executive member alternatively to the board of education in the Northwest Territories;[64] of a "society", which includes a school board,

---

refers to "children suffering physical or mental disability". School Ordinance, s. 117(2)(*h*)(ii).

[60] NEWFOUNDLAND, no explicit provision; NOVA SCOTIA, Children's Services Act, S.N.S. 1976, c. 8, ss. 29(2), (3): "A mentally retarded child . . . may be admitted . . . in accordance with the regulations . . . . [W]here a committee is appointed no admission . . . shall be made . . . unless the committee approves . . .", PRINCE EDWARD ISLAND, School Act, s. 33(2): 'Each regional school board shall determine the placement of pupils in the various classes and schools according to the needs of the pupils and the facilities of the unit . . . ": NEW BRUNSWICK, Auxiliary Classes Act, R.S.N.B. 1973, c. A-19, s. 5:

> No child shall receive instruction or training under this Act unless such instruction or training is recommended for the child
> (a) by the director of a mental health clinic in New Brunswick, or
> (b) by a medical practitioner . . . in the public service of the Province and designated for the purpose by the Minister of Health.

QUEBEC, Loi sur l'instruction publique, s. 482: "Ces enfants sont admis à ces classes spéciales par le principal de l'école vers laquelle ils sont dirigés, sur avis des instituteurs attachés à ces classes spéciales . . . ": ONTARIO, O. Reg. 704-78, s. 31(1) "A committee shall consist of . . . members . . . all of whom shall be appointed by the Board . . . ": s. 32(2), "and the committee . . . shall determine the placement of the pupil . . . ": MANITOBA, The Public Schools Act, s. 465(22): "children . . . who are classified as mentally retarded by an official designated for the purpose by the Minister of Health . . . ". An amendment in the Public Schools Amendment Act, S.M. 1975, c. 39, s. 92, replaces s. 465(22) on a day yet to be proclaimed. This new section does not mention classification. SASKATCHEWAN, The Education Act, s. 178(1)(*a*) gives the initiative to the principal and ss. 178(2) and 184(2) give the decision to the director or superintendent after consultation with "the principal, teacher, parent or guardian, pupil, or any of them . . . ": ALBERTA, The School Act, s. 134(2): "the opinion of an inspector or superintendent" will permit a board to excuse the child from attendance, until "the board with the approval of the parent" can arrange the needed special education. If the parent persists in disagreeing, there is presumably no placement NORTHWEST TERRITORIES, Education Ordinance, s. 73(2): "authorization by the Executive Member" is required for attendance at a special school, but nothing is said about placement in special classes. In the YUKON, the 1974 Ordinance is not explicit, the Commissioner may prescribe fees as a condition of entry to such a class (s. 117(2)(*r*)), and otherwise prescribe generally (s. 117(1)). BRITISH COLUMBIA, School Act, s. 160(*h*), refers to the approval, establishment and operation of special classes to train and educate mentally retarded children "under the regulations"

[61] *E.g.*, in NEW BRUNSWICK, Auxiliary Classes Act, R.S.N.B. 1973, c. A-19, s. 4(*a*): "Such courses of instruction and training as are best adapted to secure the mental and physical development. . . . "

[62] School Act, s. 5(*f*).

[63] School Ordinance, ss. 117(2)(*h*)(*t*): "[The commissioner may make regulations] to establish schools or courses . . . [and] respecting the tuition fees to be charged . . . ".

[64] Education Ordinance, ss. 3(4)(*d*) and 72(1).

in New Brunswick;[65] of the school board in Newfoundland, Quebec, Saskatchewan and Alberta. The class is usually located physically in an ordinary school.[66]

In four of these provinces, Prince Edward Island,[67] New Brunswick,[68] Saskatchewan[69] and Alberta,[70] and in the Northwest Territories[71] (as well as in British Columbia[72] for the retarded), special education may be purchased from private bodies as well as from other boards; but in the other provinces purchase is authorized only from other boards.[73] In Ontario a board may on request send its own teachers without charge into charitable organizations and facilities of various kinds,[74] but that is not at all the same as paying fees to an outside organization on the ground that it is better able to deal with the problem than the board is. For this is the basis of the permission given in the

---

[65] Auxiliary Classes Act, R.S.N.B. 1973, c. A-19, s. 1 (*as amended by* S.N.B. 1975, c. 9, s. 1).

[66] QUEBEC, "dans leurs écoles" (Loi sur l'instruction publique, s. 480); SASKATCHEWAN, "within the school or in other facilities within its control" (The Education Act, s. 184(3)); ALBERTA, "special schools or classrooms" (The School Act, s. 138(*b*)); NORTHWEST TERRITORIES, "in the school he normally would attend wherever such arrangement is practical" (Education Ordinance, s. 73(1)).

[67] School Act, s. 5(*f*): "[The Minister] may . . . provide for the education of those persons [unable to attend the regularly established school] in such institutions as he deems advisable". This provision is apparently free of charge.

[68] Auxiliary Classes Act, R.S.N.B. 1973, c. A-19, ss. 10, 11, envisage mainly government funding to a "society . . . approved by the Lieutenant Governor in Council as a society for the purposes of this Act . . . ". A society may be an incorporated association, a person, or a district school board (s. 1, *as amended by* S.N.B. 1975, c. 9, s. 1).

[69] The Education Act, s. 184(3): "A board of education may discharge its responsibilities [to provide educational services to handicapped pupils] by providing such services . . . or by entering into agreements with another board of education, agency, institution or person to make these services available."

[70] The School Act, s. 138(*b*): "[A board may] provide special education by operating . . . or by making a grant and sending pupils to an organization or agency approved by the Minister which provides special education".

[71] Education Ordinance, s. 74:

> Where it is not practical or educationally effective to provide, in a regular school or in a special school within the Territories, a special education program for a student requiring such services, the Executive Member acting on the advice of the Superintendent for the district where the student resides and at the request of the parent or guardian, may arrange for a student to attend, at no cost to the student, a special school or institution outside the Territories where the type of special education program required is available.

[72] School Act, ss. 157(1) (*m*), (*n*): "[The Board may] pay the British Columbia Association for the Mentally Retarded an amount towards the cost of education and training of a mentally retarded child . . . ", and also provide the Association with school accommodation.

[73] In ONTARIO, this prohibition on public money for private educators is said to be connected with the permission to separate school boards to exist; but separate school boards exist equally in SASKATCHEWAN and ALBERTA.

[74] The Education Act, 1974, ss. 147(1) 37 and 38.

provinces named above and also in England and in many states of the United States.[75]

Today Nova Scotia alone imposes a duty on all boards not only to set up classes but also to provide instruction there for "physically or mentally handicapped children".[76] A similar duty will be imposed by Ontario in 1985 and more generally in Manitoba when (if ever) the 1975 legislation is proclaimed for "all . . . persons who . . . require special programs for their education".[77] The Manitoba provision will replace the arrangements for the retarded, who are therefore included; but the Nova Scotia rule continues side by side with the "training centre". Decision on admission to such classes, or on whether a child requires (or does not require) a special program is not specifically mentioned[78] except in Ontario, so that recourse to the courts for a decision is not barred; and the court approached might be trusted to interpret "provision" as "effective provision". But these are uncharted waters here.

III. UNITED STATES

The same might have been said of the United States a mere ten years ago; but charting is well under way now, based on legislation which differs significantly from ours, though many state laws are of the same import as the Canadian statutes we have seen. In Pennsylvania, for example, the following provisions figured in the School Code in 1971:

> S. 1304: The board . . . may refuse to accept or retain beginners who have not attained a mental age of five years, as determined by the supervisor of special education or a properly certificated public school psychologist. . . .
>
> S. 1330(2): . . . [A]ny child who . . . [h]as been examined by an approved mental clinic or by a person certified as a public school psychologist or pyschological examiner, and has been found to be unable to profit from further public school attendance . . . [is excused from compulsion to attend school].

---

[75] One such state is New York. Stick, *The Handicapped Child Has a Right to an Appropriate Education*, 55 NEB. L. REV. 637, at 681 (1976), records a proposed exception in respect of schools for the handicapped to the Nebraska interdiction of state funding for private schools. In England, which is "zero-reject", there was a tendency some years ago for local education authorities to take over these services instead of farming them out, but they soon realised that the trouble was not interesting and are now getting out of the field again. It is no particular trouble unless one is conscientiously concerned to make the services effective.

[76] R. & R., Rule 7(c) of the General School Regulations, added on 18 Apr 1972 with effect from 1 Jan. 1973.

[77] In ONTARIO, by Bill 82, s. 14 (adding para. 6*a* to s. 146); in MANITOBA, by the Public Schools Amendment Act, S.M. 1975, c. 39, s. 9(2) (replacing The Public Schools Act, s. 465(22)). The Manitoba subsection comes into force on proclamation, and it has not been proclaimed. Constitutional reformers might consider bringing into force automatically legislation made dependent on proclamation and which two years after being assented to has been neither proclaimed nor repealed.

[78] By Rule 3(4) of the Nova Scotia General School Regulations (consolidation in pamphlet form available from Department of Education, Halifax), "a child . . . shall be admitted to the appropriate grade as determined by the school board . . . ", but special classes are ungraded.

> S. 1375: . . . Any child who is reported by a person who is certified as a public school psychologist as being uneducable and untrainable in the public schools . . . [has no right to be in school and is turned over to Public Welfare].[79]

In that year (1971) certain named children excluded from schooling as being mentally retarded brought an action against the Commonwealth of Pennsylvania and certain named school boards, demanding admission to school:[80] it was a class action on both sides, on behalf of all retarded children in the state and against all school boards. The plaintiffs had evidently no right to admission under the state law set out above; but this was all overborne by the "equal protection" clause of the United States Constitution, in its more precise application as "equal educational opportunity",[81] combined with expert evidence to the effect that "all mentally retarded persons are capable of benefiting from a program of education and training". Faced with this evidence the Attorney-General gave up,[82] and avoided a judgment of unconstitutionality by consenting to a decree containing undertakings by him to issue a formal opinion that the provisions in question did not have the effect of excluding mentally retarded children. The consent order contained an injunction to "accord [each child] access to a free public program of education and training appropriate to his learning abilities". "Appropriate" was specified on the basis of the "equal protection" clause, which would come into play only if the education provided for normal children was appropriate to them; but the defendants would have looked a little silly if they had denied this.

The laws and regulations of the District of Columbia in the same year were more propitious than those of Pennsylvania. They commanded education for all, and added that a child "found to be unable mentally or physically to profit from attendance at school" was to have from the board "specialised instruction adapted to his needs". To a class action then by seven named plaintiffs[83] excluded as having "behavioral problems" or as "mentally retarded, emotionally disturbed or hyperactive" the board had simply to admit that it was in default of its

---

[79] 24 PA. STAT. ANN. Public School Code of 1949, s. 13 (Purdon).

[80] Pennsylvania Assoc. for Retarded Children v. Commonwealth of Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971); 343 F. Supp. 279 (E.D. Pa. 1972).

An official of the Ontario Ministry of Education once remarked to the writer that suing a school board was not a Canadian way to behave. How envious their American counter parts must be, on the assumption that they know what goes on here.

[81] Brown v. Board of Educ. of Topeka, 347 U.S. 483, 98 L. Ed. 873 (1954), the epoch-making desegregation decision.

[82] This was how the plaintiffs saw it: Gilhool, *Education an Inalienable Right*, 39 EXCEPTIONAL CHILDREN 597, at 604 (1973). Professor Gilhool was then a Philadelphia attorney, counsel to the plaintiffs and principal architect of the consent decree. Another interpretation was collusion for political advertisement at the expense of the taxpayer: *see* Kirp, Buss & Kuriloff, *Legal Reform of Special Education: Empirical Studies and Procedural Proposals*, 62 CALIF. L. REV. 40, at 60-61 (1974).

[83] Mills v. Board of Educ. of the District of Columbia, 348 F. Supp. 866 (D.D.C. 1972).

obligations. Its only defence was that its legal duty was impossible without "millions of dollars" either granted from the United States Congress or to be found by cutting back the money allocated to normal children. The only finding not based on admission was the rejection of this defence: "[T]he inadequacies of the District of Columbia public school system, whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the 'exceptional' or handicapped child."[84] The board had therefore to provide each child with "a free *and suitable* publicly supported education regardless of the degree of the child's mental, physical or emotional disability or impairment",[85] and regardless of the comparative cost. "Equal educational opportunity" in other words refers to equality of opportunity, not to equality of expense.[86]

In 1976 another class action in Pennsylvania[87] confirmed that lack of funding was no answer to a charge of inequality, and the right of the mentally retarded to appropriate education was recognized (without contest) as belonging also to the learning disabled. The court was guided to a finding that existing arrangements were inadequate by expert evidence that such children can profit by instruction of the right kind, but that education with normal children and by normal methods was ineffective for them. It was guided also by the board's own plan, approved by one branch of the Education Department but unfulfilled because it was denied funding by another branch.

These three class actions, all in the federal courts, have given rise to inordinate difficulties of enforcement. Simply because they were class actions the court could not deal with the proper solution for one child, but had to order either a reform of the educational system or compliance in an indeterminate number of cases with the rules as they stood. And a court cannot order any state government to appropriate funds: it can only order particular boards to distribute their available resources so that opportunity for all may be equal. The two Pennsylvania decisions ordered submission of plans for approval by special masters, initially a census by evaluation, and many retarded children were in fact brought out into the light of day under the first order. The execution order in the second case led to an appeal which was dismissed.[88] In Washington, D.C., the board was ordered to submit a plan to the court, including the identification of

---

[84] *Id.* at 876.

[85] *Id.* at 878 (emphasis added).

[86] The Supreme Court of the United States decided in San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 36 L. Ed. 2d 16 (1973), that there is no right to equality of expenditure, the plaintiffs there complaining that less was spent on them than on others. The converse proposition follows that plaintiffs are not disqualified from asking for *more* money to be spent on them if their need is greater: McClung, *Do Handicapped Children have a Legal Right to a Minimum Adequate Education?*, 3 J L & EDUC. 153, at 160 (1974).

[87] Frederick L. v. Thomas, 408 F. Supp. 832; 419 F. Supp 960 (E.D Pa 1976)

[88] 557 F. 2d 373 (3rd Cir. 1977).

all children suffering from any handicap: there was a threat of a special master and also of contempt proceedings. By 1973 it did not appear that much had been done except for the identification of retarded children in Pennsylvania.[89] In particular the question of what would concretely be "appropriate" or "suitable" had not even been touched. Nor does it seem that much has been done since then.[90] It is not an unfair generalization to say that the school authorities have dragged their feet as much as they dared; that the threshold of their daring is very high; and that no way has been found of coercing them. Contempt proceedings have not yet been tried; and if they were it would not be easy to decide which individual in the chain of command to commit.

But there is no compelling reason why an action should be a class action; there is a line of cases in the New York state courts of individual actions where relief has apparently been effective. The state constitution prescribes that the "legislature shall provide for the maintenance and support of a system of free common schools wherein all the children of this State may be educated".[91] There is no exception; and the legislature has so provided by the Education Law, imposing the duty on boards of education and specifying *inter alia* that "the board of education . . . shall be required to furnish suitable education facilities for handicapped children. . . . The need of the individual child shall determine which of such services shall be rendered."[92] Finally, the family court has specific jurisdiction to order the placement of a handicapped child at the board's expense in a private school or institution[93] without restriction to institutions in the state of New York.[94]

---

[89] Kirp, Buss & Kuriloff, *supra* note 82. This is a curious article, not only for its great length (115 pages), which is not uncommon in the United States; not only for its demonstrative disillusionment with the effectiveness of legal process; but most of all for its ambivalence in respect of the school authorities. We are twice assured of their blamelessness (pp. 45 and 113-14), but the details continually condemn their deliberate evasion of compliance. When the article was written in 1973, it was perhaps too early to assess the effect of the first two judgments, and it was three years before the third was handed down.

[90] Levinson, *The Right to a Minimally Adequate Education for Learning Disabled Children*, 12 VAL. U.L. REV. 253 (1978), is a very useful introduction to the United States scene.

[91] N.Y. CONST. art XI, s. 1.

[92] N.Y. EDUCATION LAW (Consol.), s. 4404(2).

[93] The law prescribes parental contribution to the cost if they can afford it, and an order for contribution was made in L. v. State, 335 N.Y.S. 2d 3 (1972). Later decisions are to the effect that it is unconstitutional to place on the parents of handicapped children a burden not borne by those of normal children: *In re* Downey, 71 Misc. 2d 772, 340 N.Y.S. 2d 687 (Fam. Ct. 1973); *In re* Kirschner, 74 Misc. 2d 20, 344 N.Y.S. 2d 164 (Fam. Ct. 1973).

[94] But notice must be given to all appropriate authorities before ordering out-of-state placement to enable them to argue suitable placement in the state: Leitner v. County of Westchester, 38 A.D. 2d 554, 328 N.Y.S. 2d 237 (App. Div. 1971). With this formality, placements have been ordered in Rhode Island (*In re* Leitner, 40 A.D. 2d 38, 337 N.Y.S. 2d 267 (App. Div. 1972)), in Florida (*In re* Downey, *supra* note 93), and in Massachusetts (*In re* Kirschner, *supra* note 93).

Against this legislative background the case-law is merely illustrative of the judicial attitude to be expected in any jurisdiction where such legislation might exist. In the earliest case, also in 1971,[95] a child suffering from a so-called organic brain syndrome had been five years in school, including three and a half of special education, in the same class with retarded and emotionally disturbed children, and perhaps surprisingly had made no progress. He was then sent to a private school, and in one year made two years' progress. The public system now wanted him back on the ground that they were setting up a class which they considered to be suitable. The judge did not accept their view: he told them to set up the class and demonstrate to him its suitability, and he might reconsider next year. Meanwhile the private placement continued at board expense. A year later, in another case[96] where the school authorities wanted a child back on the same ground, the judge weighed the expert evidence on the relative advantages of a private placement and the public system, and did not accept the official experts' view that the public facility would be beneficial.

There was another surprise in 1972, in a case[97] of a child said to be suffering from cerebral palsy (but the described symptoms are transparently autistic[98]) in which "psychiatric therapy, involving both the child and her mother, was implemented . . . for approximately two and a half to three years without any noticeable benefit" — benefit, that is, to the child or her mother. Only the publicity of the judicial process can bring such a finding out from behind the sheltering walls of professional discussion: in reputable professional circles it has been known for a long time that psychiatry has little to say about developmental handicaps, especially from the educational angle. The court order here was a private residential facility.

In 1973[99] the court had to deal with the excuse that no funds were left, the application having been made after the closing of the accounts for the year in which private schooling had been received. The defence was no more successful than it had been in the federal courts in Pennsylvania and Washington, D.C.

Orders to pay private organizations have been made for children suffering from autism,[100] childhood schizophrenia,[101] "minimal brain

---

[95] *In re* H., 66 Misc. 2d 1097, 323 N.Y.S. 2d 302 (Fam. Ct. 1971).

[96] *In re* M., 73 Misc. 2d 513, 342 N.Y.S. 2d 12 (Fam. Ct. 1972)

[97] L. v. State, *supra* note 93.

[98] *Id.* at 6:

> She has been observed to behave inappropriately with her peers and evidently has no real understanding of how to play with them. Her speech is oddly inflected, her bizarre head movements with hand flapping serve to set her apart from her classmates. Although she ambulates independently her gait is noticeably awkward. She has become increasingly withdrawn from the other children, evidencing a rather severe emotional problem in addition to her physical handicap. If left to her own devices at school, she would prefer to play endlessly with pieces of string.

[99] *In re* K., 74 Misc. 2d 872, 347 N.Y.S. 2d 271 (Fam. Ct. 1973)

[100] Leitner v. County of Westchester, *supra* note 94; *In re* Leitner, *supra* note 94

[101] *In re* H., 72 Misc. 2d 59, 337 N.Y.S. 2d 969 (Fam. Ct. 1972)

dysfunction",[102] and "neurological dysfunction"[103] in the absence of adequate public facilities. In the last case the court noted that the child had been shuttled uselessly from school to school and finally abandoned "not because [she] cannot be educated, but because the type of program she needs is not available locally". The various authorities were ordered to put their heads together and "locate or develop a program which will protect [her] from further violation of her rights".[104]

To the occasional stick wielded by private-enterprise litigation — the cases cited above are only a selection from a far larger number, in none of which was a remedy denied[105] — has been added a formidable carrot by the United States federal government. The Education for All Handicapped Children Act of 1975 (the culmination of a line of legislation beginning in 1965) invited state governments to claim forty per cent of the additional cost of providing every handicapped child between the ages of three and eighteen (twenty-one by September 1980), with a "free appropriate public education".[106] The definition of "appropriate" includes "individualised education programs" for each child, and integration into the normal school setting so far as practicable. To qualify for this subsidy the state has to submit a plan to provide genuine and imaginative testing (the child's regular teacher being in the testing team), a detailed report on each child, and opportunity for parents to challenge the result. The plan may include up to twelve per cent of the student population, and the original limit to two per cent for learning disabled children has been removed. Plans were to be in by September 1978, and by February 1978 every state but one had submitted its plan; but at the operational level less than half the school districts across the country have established programs for learning-disabled children.[107] The tide is flowing strongly, however; and it is particularly noteworthy that school boards in the now numerous zero-reject states are not in general passively accepting difficult children, but actively seeking and paying for instruction on how to deal with them.

The requirements of *appropriate* education and realistic testing become a legal duty when a state accepts them by filing a plan in compliance with the Act. There is a correlative legal right in any child, enforceable like any other legal right in court. The first reported case on this comes from Texas, where the school had made itself impossible for a learning-disabled adolescent, and then "dropped" him. The board's defence was that their program was "appropriate" to the victim, but he had refused to participate in it, for which they blamed the "home

---

[102] *In re* Kirschner, *supra* note 93.

[103] *In re* Lofft, 383 N.Y.S. 2d 142 (Fam. Ct. 1976).

[104] *Id.* at 147.

[105] Stick, *supra* note 75, at 639.

[106] 20 U.S.C. ss. 1401-1461 (1976). Parents may dispute the school authorities' views of appropriateness. For a preview of the practical difficulties, *see* Note, 92 HARV. L. REV. 1103 (1979).

[107] Levinson, *supra* note 90, at 259.

situation". They further said that the parents had "voluntarily" withdrawn their son and placed him privately, and must therefore bear the cost.[108] This all-too-familiar trilogy met with an order against the board (in June 1978) from the federal court sitting at Galveston[109] to reimburse the whole cost incurred at the private institution and to go on paying for it, and meanwhile to "develop an individual education plan which specifies Douglas S.'s needs and all services required to meet those needs". The reasons for the order also considered the personal liability of the trustees for denial of the boy's constitutional rights — non-existent in Canada. He is now back in school.

Aside from the special field of handicapped children, school authorities may take comfort from the failure of plaintiffs in the penultimate courts of California[110] and New York[111] to obtain damages for leaving school with ornate diplomas but still illiterate. It was held that to admit such actions might release a flood of claims, many false — hospitals would have liked to avail themselves of this argument when they began to be held liable. Other equally weak reasons were given,[112] but there are two valid ones. The first, not given, is that damages against impersonal boards do not fulfill the secondary purpose of damages, which is to deter: no one suffers but the more or less innocent local taxpayer. What is wanted from this point of view is damages against the individuals responsible — not of course the unfortunate, unhelped teachers, but the administrators and "counsellors". And better still, injunctions should be issued before the damage is done. The second reason which can be defended (if with difficulty) is that the common law does not give an action in negligence where there is no duty owed by the defendant to the plaintiff, and that statute-created schools have no statute-created duty to teach properly.

This leads to the most recent illustration of developments in the United States, described in the words of the Ontario Minister of Education as "horrendous lawsuits". A suit was filed last year for an injunction (and the conventional million-dollar damages) against a school board in Illinois.[113] The board refused to put a bright ten-year-old in high school classes to save him from being "bored to death" by the constant repetition of what he had already learned in his age group. How

---

[108] These arguments are not in the report: they (and the present situation) are information from Mr. Reed Martin of the Texas bar.

[109] Howard S. v. Friendswood Independent School Dist., 454 F. Supp. 634 (D. Tex. 1978). One would like to be able to describe as "unexampled" the cynical effrontery with which the board blocked every effort by the boy's parents to challenge their "diktat".

[110] Peter W. v. San Francisco Unified School Dist., 60 Cal App. 3d 814, 131 Cal. Rptr. 854 (Ct. App. 1976).

[111] Donahue v. Copiague Union Free School Dist., 64 A.D. 2d 29, 407 N.Y.S. 2d 874 (App. Div. 1978).

[112] They are examined in Cohen, *The ABCs of Duty: Educational Malpractice and the Functionally Illiterate Student*, 8 GOLDEN GATE U.L. REV. 293 (1978).

[113] The Ottawa Journal, April 7, 1979, at 24, col. 6.

many Canadian children have had the same experience, and no remedy but resignation to their fate or transfer to a private school. The reason one need not be resigned in Illinois is that the state constitution has imposed since 1970 a duty unknown in any Canadian province, or in California or New York, to educate "all persons to the limits of their capacities".[114]

IV. CONCLUSION

If Canada desires to be true to her internationally proclaimed undertakings and aspirations, it is idle to suppose that local educational authorities will conform willingly any more than they do in any other country. They will need to be compelled by an "independent and impartial tribunal", which realistically can only be the courts. But the courts can do no more than enforce the law they find: the first requirement is therefore to change our laws.

The most elementary need is that all provinces should follow the lead of Quebec, Nova Scotia and the Prairies and "go zero-reject", that is give every child without distinction the right to education.

Secondly, the education dispensed must be obligatorily worthwhile: the provisions already in force in Saskatchewan and the Northwest Territories might be less frightening than the Illinois model.

Thirdly, school boards should have the duty — not merely the discretion — to make available special education to any child needing it: this on the model of Nova Scotia and (one day) Manitoba and Ontario. Again the duty should be to make special education effective, which means first that it should be the kind of special education appropriate to each child — special classes or special support to "mainstream" education, but in either case of an appropriate content — and, secondly, the provision of teachers really (and not *pro forma*) qualified, and the subsidizing of their training: at present only Manitoba provides for this, and only in respect of the Winnipeg school division.[115] There should also be a subsidiary duty of ongoing monitoring, so that if the special education provided has no particular effect on the children receiving it the board cannot plead ignorance of this.

Fourthly, if a board prefers not to provide any particular kind of special education within its own establishment, or if it is not doing so effectively, there must be a duty and not merely a discretion to purchase it either from another board or from a private enterprise. Discretion already exists in varying degrees in Prince Edward Island, New Brunswick, Saskatchewan, Alberta, the Northwest Territories and British Columbia.

Fifthly, principals and other school board administrators who exclude children from school should be subject to the same criminal

---

[114] ILL. CONST. art. X, s. 1.

[115] The Public Schools Act, s. 80(1), up to $8,000 a year.

penalties as parents who fail to send them — that is, in either case in the absence of lawful excuse.

Sixthly, disputes as to whether a board is performing any of its duties should not be committed to the final decision of any official: as with other disputes the ordinary courts should be the arbiters. All these points are necessary if we are to live up to what we have said internationally.

Lastly, an alteration which would change nothing of substance but which would indicate an indispensable change of attitude: school legislation should begin with the rights of the child (and his duties in school) together with the duties of boards to satisfy those rights; move on to the constitution and powers of boards and the relations between board and teachers; and wind up with the duties and powers of the Minister of Education. In the existing legislation the Minister usually comes first, presumably because of his superior dignity. But the Minister is made for the child, not the child for the Ministry.

It would be a valuable inducement to provincial legislatures to bring their laws into line with their duty if the federal government subsidized special education, but in the same exacting way as is in force south of the border.