1993

The Regular Education Initiative in Light of Selected State and Federal Court Decisions

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The Regular Education Initiative in Light of Selected State and Federal Court Decisions

(TITLE)

BY

Frederick C. Kubicek

THESIS

SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS
FOR THE DEGREE OF

Masters in Education

IN THE GRADUATE SCHOOL, EASTERN ILLINOIS UNIVERSITY
CHARLESTON, ILLINOIS

1993
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The Regular Education Initiative in Light of Selected State and Federal Court Decisions

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B.S., Illinois Institute of Technology, 1968

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ABSTRACT OF THESIS

Submitted in partial fulfillment of the requirements
for the degree of Masters in Education at the
Graduate School of Eastern Illinois University

CHARLESTON, ILLINOIS

1993

Abstract

This study begins with a general categorization of the various positions which comprise the 'Regular Education Initiative.' The first of these three categories, entitled the 'Little Change' model, calls for the least number of changes within the current delivery system of special education services. The second, the 'Extreme change' model, calls for the total dismantling of the present 'dual delivery' system. The third general heading is that of the 'Moderate change' model. This position calls for a substantial reduction in the number of students being served by 'pull out' programs. These three positions were then analyzed in light of twenty four (24) Federal and State Court decisions which have either established legal precedents in the field of special education law, or have raised issues which educators must consider when proposing changes within an educational setting which is itself subject to numerous legal constraints. This study concludes that the 'Little Change' model complies with more of these standards (eg. due process, limited funding, equal access, duplication of services, and quality of education) than do either of its counterparts Of the two remaining positions, the 'Extreme change' model appears to be the least compliant.

Acknowledgments

I would like to thank Judith Ivarie for her continued support during my initial quest for teacher certification in the field of special education as well as her openness to my desire to make use of my legal training while conducting research in the field of special education. I would like to thank Ken Sutton for his encouragement and support of my desire to undertake this type of project. I would also like to thank Mary Ann Dudzinski for her valued suggestions and editorial comments during the course of this project.

Most of all, I acknowledge and thank the Most High God whose guidance and strength have made it possible for me to endure and grow during this transition period in my life.

Table Of Contents

Introduction

Statement of the Problem

During the month of November, 1986, a report from Assistant Secretary of Special Education and Rehabilitative Services (OSERS), Madeline Will, to the Secretary of Education unleashed what can only be described as a fire storm within the education field. According to Will, "... special education and remedial programs have made substantial contributions to improving the quality of instructional practice..." for students having special needs (Will, 1986, p.3). However, while acknowledging progress, Will reported that, "(t)here is clearly some evidence that our system for educating these students is not completely succeeding" (Will, 1986, p.4). To correct the perceived deficiencies of the "pull out" programs which constitute a major part of this country's current "dual system" of special education, (Will, 1986, p.8) the Assistant Secretary suggested a delivery approach which became known as the "Regular Education Initiative" (REI).

The controversy which has arisen concerning REI is centered on two issues. First, most of the debate about REI has come from educators and researchers who are most often associated with the special education departments of the various colleges of education throughout the

country. Very little input has come from those professionals who are more closely related to the field of regular education (Davis 1989). Second, and of primary concern to the issue at hand, there is no consensus as to exactly what REI entails (Lieberman, 1990). This condition exists in no small part because the REI, as discussed in Will's report, was more of a response to the problems which exist in today's special education system then a detailed blueprint for changing the delivery system (Jenkins, Pious, & Jewell, 1990).

The problem to be investigated in this study stems from the lack of consensus among professionals in the field as to exactly what the REI entails. As such, various proposals have been offered concerning both what REI is, and how it should be implemented. After first categorizing these proposals, this study will examine each of them in light of the judicial decisions which serve as the legal foundation for PL 94-142 and subsequent pieces of Federal legislation. The primary issue to be addressed herein is: Do any of these proposals comply with the legal mandates set forth by both the State and Federal judiciary in the these cases?

Parameters for Research

Educational Literature

There is no single definition of the REI. In fact,

the number of positions on exactly what the REI comprises are almost as numerous as the number of articles which have been written on this topic. These interpretations run the spectrum from totally dismantling the current dual delivery system of special education services to making modest changes within the present structure.

For purposes of comparing "the" REI with Judicial precedent, three representative positions have been chosen from this spectrum. The first position which is presented is the most conservative in that it advocates the least number of changes with the present system of service delivery. The second one advocates the total dismantling of the dual system of service delivery. Proponents of this position call for the immediate and complete mainstreaming of all students with handicapping conditions regardless of the severity of their condition. A final position to be reviewed is more "middle of the road" in that it calls for the mainstreaming of a substantial number of those students currently being served in resource rooms within the regular education program.

The articles which have been included in the review portion of this paper were chosen because they are representative of both ends and the middle of the REI

spectrum.

Legal

The Court cases which have been chosen for inclusion were done so because they have either been recognized by legal scholars as containing legal principles which must be addressed by the education community, or were directly cited to by the judges who wrote the majority opinions for their respective courts. Furthermore, these are the same cases which have been cited to as precedent setting in such respected legal publications as Washington University Law Quarterly, Matthew Bender's Education Law, and West's Education Law Reporter.

The following methods of legal research were employed in this study. While the Courts of this country have not specifically mentioned the REI, they have addressed the issue of "Least Restrictive Environment" (Rapp, 1992, p. 10-160) which is at the center of the REI issue. As such, the topic "least restrictive environment" (LRE) was examined in legal encyclopedias such as Corpus Juris Secundrum (1991). The Bar Association Journals, Law School Review articles, and cases to which these encyclopedias referred were then examined.

As it is not unusual for a case to present several

issues to the reviewing Court, only that portion of the court's opinion which was germane to the issue of LRE, and hence the REI, was pursued further. The progress of each lower court case was then followed to determine the outcome of any appeal to a higher court. This was accomplished by checking a series of legal reference books called Sheppard's Citators. These books list the case being researched by its official legal citation (Volume & page number). They then list all the courts which have heard the case on appeal. In addition to this information, a list of every State and Federal appellate court case throughout the country which has subsequently referred to that case is provided. These references were then examined to determine if the original opinion was either modified or expanded upon during the appeal process.

While reading this paper, it is important for the reader to remember that our system of justice includes several different levels of courts. The highest is of course the United States Supreme Court. Any decision rendered by this body is binding upon every branch of both the Federal government and all the State governments (see citations in which the initials "U.S." appear). Decisions rendered by the Federal Circuit Courts of Appeal are binding only upon those Federal and

State Districts which comprise that Federal Circuit (see citations in which the initials "F.2d" appear). Federal trial court decisions are only binding upon that portion of a particular state in which the court is located (see citations in which the initials "F. Supp." appear).

At the state level there are also three types of Courts: Supreme, Appellate, and Trial. The only State level decisions which are cited in this paper are from State Supreme Courts. As these decisions effect only the state in which they were decided, they have been referred to not because of the scope of their influence, but because of the potential importance of the issue which they raise.

Review of Related Literature

Background of REI

The principle document which must be examined whenever the topic of the REI is discussed is the report to the Secretary of Education filed by Assistant Secretary Madeleine Will (Will, 1986). While carefully noting the accomplishments which the field of Special Education had made in the 10 years since the passage of Public Law 94-142, the Assistant Secretary concentrated on those areas in which relatively little success has been measured. These "second generation issues" deal with concepts other than basic rights of entitlement to

an education (Will, 1986, p.5). It is the contention of the OSERS task force that in the process of successfully addressing basic entitlement issues, the dual delivery education system which arose after the passage of PL 94-142, inadvertently created certain obstacles which have had an adverse effect upon the quality and effectiveness of numerous education programs for students with special needs.

Will (1986) then identifies these major obstacles as follows:

1) Eligibility requirements lead to fragmentation, and in some cases a total lack of service delivery.

2) Less than ideal administrative practices lead to lowered accountability and expectation standards.

3) Stigmatization of students results from the eligibility/indentification process.

4) The placement process has been turned into a battleground rather than a cooperative process between all interested parties.

It is the report's further contention that there is a fundamental flaw in the philosophy of the "pull out" programs which currently serve as the cornerstone of special education today. Rather than view a student's poor performance as a deficiency in the student, educators should seriously consider the possibility that

the deficiency is in the environment of the regular classroom as it presently exists. Therefore, the overall thrust of the Secretary's Report (Will, 1986) is that the solution to the second generation problems mentioned earlier lies not in any expansion of the current dual delivery system of services, but within a modification of the regular education classroom.

While the following guidelines are, by the authors' own admission somewhat vague, Jenkins, Pious, & Jewell (1990) provide an overview of the REI in its broadest terms:

1) Administrative control of service delivery should be left entirely with the local school.
2) Instructional time should be increased drastically.
3) The classroom teacher must have an increased support base.
4) Instruction must be more personalized, assessment must be curriculum - based, and cooperative learning should become an intricate part of the instruction process.

According to Liberman (1990), there is every possibility that much of the controversy surrounding the REI is in fact due to the imprecise, and in some cases ill-defined terms used in the Will (1986) report. He

points out that terms such as "children with learning problems," "children with specific learning problems," as well as the term "learning disabilities" do not in and of themselves account for varying degrees of severity of handicapping conditions (p. 562). In supporting his position that the entire discussion of the REI is hampered by the issue of vagueness, Liberman points out that there are at least three separate interpretations of exactly what is implied by the term 'REI.' When asked for an opinion about REI, he states that he must first ask, "...which of the different perspectives ...[do you] want an opinion on." (p. 561)

Position # 1 - "Little change" in Existing Service Delivery

Kauffman, Gerber, and Semmel (1988) do not raise the issue of ill-defined terms. Rather, they question four of the assumptions upon which they believe the REI must rest. Among others, these include: Over identification of students needing special services and regular education teacher's ability/willingness to work with said students.

Rather than increasing, they contend that based upon data released from the U.S. Department of Education in 1987, the number of children identified with handicapping conditions has in fact begun to level off

in some areas, and even decline in others. They also maintain that staunch advocates of the environment deficit model are merely replacing the student deficit model with one that is equally incapable of accounting for individual variances within people.

Furthermore, Kauffman et.al. (1988) hold to a position which they liken to Lincoln's comment about fooling the people. Namely, "Good teachers can teach all their students effectively some of the time, and they can teach some of their students effectively all of the time, but they cannot teach all their students effectively all of the time." (Kauffman, Gerber, and Semmel, 1988, p. 16). As such, they conclude that any program which increases the diversity of performance ability among a given number of students, also decreases the number of students which a teacher, regardless of his/her training, can effectively teach all of the time.

Proponents of conflicting views on the REI have each attempted to justify their positions by reexamining the history of special education. In so doing, Kauffman and Pullen (1989) arrive at the conclusion that, "[r]esearch to date neither unequivocally supports nor clearly rejects any service delivery system..." (p. 13). They cite various failures dating back to the early 19th-century as evidence that concepts which were once

thought to be "cure-alls" for the problems of special education were found to be harmful when instituted without a sound research basis to support them. As such, they point to the history of special education as further support for their position that repair of the dual delivery system, not abandonment in whole or in part, is the best course to follow.

While acknowledging the existence of a real problem within the field of special education, other authors have also been generally critical of the REI. A case in point is the article by Carnine and Kameenui (1990). The concerns which they raise center on the ability of the regular education system to effectively implement the types of reforms which would be required if, in fact, a substantial degree of reintegration were to occur. In particular, they cite what they consider to be the dismal record of the general education system when it comes to benefiting students identified as having special needs. In part, they place the blame for this state of affairs upon the failure of institutions of higher education to adequately train general education teachers to serve such students. In short, while acknowledging that a problem exists, they question the assumption that the needs of students identified as disabled can best be served by the general education

system.

The very process of identification itself also serves as a source of controversy in the REI debate. Given the impressive body of data which exists on the issue of exactly what is a learning disability, Trent (1989) noted that one's view on the topic can be shaped simply by which researcher's perspective one choses. After this issue is finally resolved by a group of impartial professionals, the issue of how best to serve students exhibiting mild disabilities, as opposed to severe disabilities, can then be tackled.

In any event, Trent (1989) takes the position that proponents of any given position on the REI issue must be aware of the fact that they have more in common with each other than they have differences. Only then can actual advances be made in serving students with special needs, first at the elementary level and then at the secondary level.

Two distinctly different articles point out still another area within the REI debate which lends itself to controversy; namely, that of impugning the very motive behind Will's (1986) report. Even though Kauffman (1989) acknowledges the fact that many advocates of the REI have no particular political agenda to advance, he puts forth the argument that the REI was nothing more

than an attempt by the Reagan/Bush administration to cut both Federal involvement and expenditures in America's educational system. According to Kauffman (1989), the REI is, in effect, little more than a political philosophy disguising itself as educational reform. By "...fostering an image of achieving excellence," the Reagan/Bush administration was doing nothing more than continuing to advance its policy of blocking federal funding to education and disengaging itself from programs which it considers to be the responsibility of local political bodies (Kauffman, 1989, p. 260).

Furthermore, by equating the dual delivery system of today's special education program with the separate but inherently unequal racial discrimination system banned by the Supreme Court in Brown vs. The Board of Education of Topeka. Kauffman (1989) contends that the proponents of REI are playing upon emotion rather than advancing a position which is supported by research. He makes a similar charge when referring to the use of the term "academic excellence" by proponents of REI who infer that those opposed to the REI are settling for something less than the best for all students (p. 267).

In the second article, Sleeter (1986, as cited in Kavale and Forness, 1987), approaching the issue from a totally different perspective nevertheless, calls the

motive behind the REI into question. According Sleeter (1986), the basic motive behind the REI and the classification known as LD, was to provide an excuse for the failure of white middle class students. He further maintains that the education system in place within the United States is the by-product of a political and socio-economic struggle which has been dominated by the white middle class. As such, an excuse for the failure of many of their own students had to be devised. The category of LD was the initial excuse, and the REI is merely an additional attempt to explain the continued failure of these students within a system which is dominated by white middle class values.

Position #2 - "Extreme Change" in Existing Delivery System

In their article staunchly supporting the total integration of all students into the regular education setting, Stainback and Stainback (1984) begin with the proposition that there are in reality not two separate types of students; rather, all students are both special and different from one another. However, this difference is along a continuum, as opposed to merely being at opposite ends of a spectrum with all "regular" students grouped somewhere in the middle of this imaginary line (p. 102-103). As such, all students are

entitled to whatever services they need in order to accommodate their individual characteristics. This being the case, the need for classification and eligibility requirements is eliminated. With this portion of the special education bureaucracy eliminated, much of the money wasted in the administration of the dual delivery system can now be channeled into a single system.

Stainback and Stainback (1984) also maintain that the savings generated by a unified system would be more than monetary. Professionals whose energies are now being directed toward classification could spend more time actually working with, and therefore being of direct help to students. In addition, expectations for all students would rise perceptibly, and the stigmatization which follows on the heels of the labeling process would be eliminated.

While agreeing with many of these tenets, Greer (1988) unequivocally states that "Special education should be carried on as an integral part of the total educational enterprise, not separately" (p. 294). Putting it another way, the Council for Exceptional Children held as early as 1924 that "...education cannot be divided because the child cannot be divided" (p. 296). Geer (1988) views the "dual" system as being

founded upon flawed social policy in that such a system departs from the partnership concept which special educators have historically formed with the community at large. He also maintains that by separating the two systems, students in the regular education program are being deprived of advances in methods and skills which professionals in the field of special education develop. Finally, Geer (1988) advances the position that by operating two distinct systems, the American educational establishment is being fiscally irresponsible.

Position # 3 - "Moderate Change" in Existing Delivery System

While the Stainbacks (1983) call for the eventual dismantling of the dual delivery system, not all supporters of the REI call for that drastic of an approach. Wang, Reynolds, and Walberg (1985) exemplify the middle of the road approach which would greatly curtail the number of students who are served in "pull out programs" but acknowledge that in some instances such methods are justified.

Like Kaufman and Pullen (1989) before him, Reynolds (1989) also has relied upon the history of the special education movement in the United States to give credence to his position. According to him, a detailed analysis of this history reveals a pattern of "progressive

inclusion" (p. 7) into the mainstream of the general education setting. Therefore, at the very least, residential and special schools should eventually be eliminated from the spectrum of offered services.

Wang, et al. (1989) hold to the position that much of the problem stems from the fact that the vast majority of those being served in "pull out" programs have little more than mild disabilities at worst. As such, they would best be served in a modified regular education classroom. The "pull out" program would then be reserved for those exhibiting more severe conditions. In effect, they are suggesting that the burden of proof shift so that those who advocate labeling and "pull out" programs must demonstrate that what they are proposing is superior to that which can be offered in a modified regular education setting.

Along a similar vein, Algozzine, Maheady, Sacca, O'Shea, & O'Shea (1990) emphasize the fact that the REI does not in and of itself constitute a call to totally dismember the dual delivery system of special education services. They hold to the position that by merely shifting dependency away from the "pull out" programs currently used, more innovative concepts will be given a chance. By stating that, "We think it is time to subject all prescriptions for improvement of special

education to ongoing trials," the authors are agreeing with Will (1986) that significant problems exist within the delivery system (Algozzine, et al. 1990, p.556). Furthermore, they are also acknowledging that in many instances there is comparatively little in the way of valid research data to justify either the dismantling or continuance of the present system.

Wang and Reynolds (1985) displayed an understanding of the problems which could be encountered if new programs are instituted in the field of special education without prior corresponding changes being made in the funding requirements. The authors cite to an actual example of the kind of educational nightmare which could await honest attempts to revamp the dual delivery system, to wit:

> Given: Special education funding should be used to provide the best possible education for handicapped students in the "least restrictive environment."
>
> Finding: Provision of effective instruction for handicapped students in regular classes is feasible.
>
> The 'Catch': Provision of educational services that are tailored to the learning needs of handicapped students in regular classes

> cannot be supported by special education funds under current policy guidelines. Consequence: In order to maintain levels of special education funding support provided by state departments of education to local education agencies for meeting the instructional and related special needs of handicapped students, mainstreamed handicapped students have been returned to self-contained, special education classes and special education resource room programs where they are being educated in more restrictive environments. (p. 501)

As opposed to merely pointing out the problem, in a subsequent article the authors offered a solution to the predicament which they earlier called to our attention (Wang, & Reynolds, 1986). Recognizing that the reforms which are called for by the REI are "fundamental" and complicated enough that the authors "doubt that anyone really knows how to design them" (p. 77), they call for a 5 year period of flexibility in funding and regulations in order to allow innovative concepts to be tested and analyzed.

While Reynolds (1989) acknowledges that major changes would have to be made within the regular

education classroom, he generally limits his discussion in this article to two concepts. First, special education teachers will have to begin assuming the role as "co-teachers" (p. 10) within the regular classroom setting without at the same time abandoning their position as consultants. Secondly, in order to avoid the "Catch-22" referred to earlier, numerous types of waivers will have to be granted to teachers certified in other areas in order to maintain funding levels.

Slavin (1990) predicts even more drastic changes within the regular education setting. It is his position that an entire transformation of attitude must take place within the realm of both regular and special education. If ideas such as the 'Success for All' reading program (Slavin, 1990) prove successful on a national scale, the major emphasis in problem resolution will shift from cure to prevention. However, he acknowledges that before making the transition to thinking in terms of intervention and prevention, major shifts in legal and governmental policies would have to take place.

Other considerations

The fact that there is indeed a strong possibility that no one really knows how to design, much less implement the types of reforms being suggested, prompted

Braaten, Kauffman, Braaten, Polsgrove, & Nelson, (1988) to refer to suggestions of change within the system as "patent medicine" (p. 26). They believe that this is especially true in the case of students who have been identified as being behavior disordered. The authors contend that to make the type of substantive changes called for by the Stainbacks without first obtaining verifiable data to substantiate their claims that these proposed changes will provide better results, is irresponsible at best.

Braaten, et al (1988) maintain that to make such changes first would only compound the ills of the current system. This is especially so in light of research which they cite that indicates that "... teachers who use more effective instructional procedures [something which is inherent in the 'excellence for education' movement] were less tolerant of students' behavioral excesses and ... expressed less willingness to accept [such] ... students in their classroom" (p.24).

Mesinger's (1985) criticism of a wholesale merger of special and regular education also centers on the lack of positive data. However, the data he is referring to has to do with the willingness/ability of the regular education field to deal with the extra work load,

responsibility, and demands which students having special needs can sometimes require.

This is not to say that Mesinger (1985) believes that no data exists. Quite the contrary is true. The data to which he cites, however, is rather critical of the regular education field. In particular, he refers to the "Nation at Risk" report which indicated that not enough qualified candidates were entering the teaching profession.

Mesinger also cites a study which claimed that some colleges "are responding to the declines in high talent teacher trainees by enrolling more low scoring students" (p. 511). As far as he is concerned, the mixture of increased demands upon the regular education teacher which are inherent in the REI, and a less qualified teacher pool do not add up to better services being offered to students with exceptionalities.

Vergason & Anderegg (1989) have reacted to the relative lack of data which would support a wholesale dismantling of the current dual delivery system with equal consternation. They appear to be in complete agreement with critics of the REI that refer to numerous articles written in favor of it as more "public relations campaigns than research effort" (p. 61).

As opposed to being a totally separate system,

Vergason and Anderegg (1989) hold to the position that programs such as the resource room are in reality "adaptive support systems" which are complementary to and not separate from the regular education program (p. 61). Furthermore, they respond to criticism of the placement process by noting that if more effort were given to improving assessment instruments many of the problems associated with the identification/eligibility processs would be solved.

In an attempt to further clarify some of the issues surrounding the REI controversy, Davis (1989) identifies a problem which he believes must be overcome if the debate is ever going to result in meaningful change. To begin with, he stated that at the present time the discussion of the issues involved is restricted solely to special education university scholars. He then poses the question as to how worthwhile adjustments in delivery of services can be accomplished if both the recipients of those services (the student), and the provider of those services (the local education agency) do not have input into the discussion? Of 48 articles researched for this study, Davis is one of the few commentators to even bring up the issue that other disciplines need to be involved in the debate if the REI is to produce positive results.

According to Gersten and Woodward (1990), it is absolutely necessary for a viable educational model to be developed, regardless of which version of the REI is eventually adopted. They maintain that this is necessary because research has shown that teachers need more then information alone if they are going to be expected to successively implement far reaching changes. Furthermore, it is their contention that the burden for instituting these changes cannot be placed upon the shoulders of merely one individual within the school system. Rather, changes of the magnitude suggested by several interpretations of the REI can only be successfully implemented by a team of administrators, teachers, transition specialists, and support personal. Even then, a period of time will be required in order to iron out both conceptual and practical deficiencies in the application model.

The importance of the team approach to implementation is also stressed by Habel (1989). Her observations are not based upon research but from experience in the field. Concerning one of her students she writes, his "...learning disabilities are life long. They have not been cured nor will they be... (I)t takes time to map out plans for each unique student in each unique situation." (Habel, 1989, p. 6)

The success which Habel (1989) described with this student came about only after extensive collaboration with both the student's mother and his regular education teacher. Without commenting as to which variation of the REI she was referring to, the author indicated that improved success under the REI would require even greater expenditures of money and time.

The final article to be reviewed in this section draws attention to the issue that the burden of proof is on the REI to establish a greater rate of success than the system it proposes to replace. According to Byrnes (1990):

> We have spent the last 20 years developing a system that celebrates the special nature of children with disabilities and proclaims our commitment to their success... To ensure commitment to children with disabilities, intricate laws have been enacted. Entitlement have been established. Legal routes and remedies have flourished for this unique branch of education. (p. 346)

Byrnes (1990) then points out that parents have correctly been assured appeals procedures within the current system of laws. Such safeguards were put in place because schools are far from infallible when it comes to making decisions which effect other people's

children. Without first providing convincing proof that any interpretation of REI will offer their child a more effective education, how can these same parents now be expected to forego all the protections afforded them under this system of laws, and embrace REI? If they do not forego these appeal procedures, and are indeed successful in challenging the REI in whole or in part, the resultant chaos within the system could be disasterous. As such, according to Byrnes, this issue must be clearly and forthrightly addressed at every stage in the reform debate.

Discussion

For purposes of organization, the discussion portion of this paper will be divided into two main groupings. The first will address those four precedent setting cases which were decided prior to the passage of the Education For All Handicapped Children Act, P.L. 94-142. The second section will review the implications of eighteen (18) subsequent Federal and State court cases upon the REI debate.

Henceforth, the following terms will be used to refer to the three (3) representative interpretations of the REI. Kauffman's (1989) position which advocates extreme caution in making changes within the present dual delivery system will be noted as the "Little Change

Model." Stainback's (1984) advocacy of the total dissolution of the dual delivery system will be noted as the "Extreme Change Model", and Wang et al's (1985) position calling for a substantial reduction in the number of students currently being served in pull out programs will be noted as the "Moderate Change Model."

Cases Decided Prior to P.L. 94-142

Perhaps the premier case in the field of education law was Brown v. Board of Education of Topeka (1954) (Weiner & Hume, 1987). It's importance lies in the fact that for the first time the "equal protection clause" of the 14th amendment was applied to the area of public education (Brown v. Board of Education of Topeka, 1954, p.493). In writing the Court's majority opinion, Mr. Chief Justice Warren noted that once the state has undertaken the task of providing a service (in this case education), it becomes a "... right which must be made available to all on equal terms" (p. 493).

While it could well be argued that the Court's position that "(s)eparate educational facilities are inherently unequal" (p. 495), provides support for the Extreme Change Model, it must be remembered that the segregation in this case was based solely upon race. Furthermore, the District Court's approval of a consent decree in the case of Pennsylvania Association For

Retarded Children v. Commonwealth of Pennsylvania, (1971) clearly indicates that the Federal Judiciary has not interpreted the Brown decision that broadly. In fact this order, while recognizing the preference to be given the regular education setting, specifically acknowledges the need for not only what has become known as the resource room, but the very real possibility of alternative special educational settings (p. 1260).

As such it could well be argued that this District Court's recognition of the possible need for educational settings other than the regular classroom appears to actually work against the Extreme Change Model. Neither of these two cases provide solid support for this position. On the other hand, neither of them offer much in the way of support for either the Little Change Model or the Moderate Change Model. Considering the fact that these cases were decided before the dual delivery system of special education services had been fully installed within the regular education setting, the fact that this issue is not directly addressed is understandable.

The third foundational case in the area of special education law is Mills v. Board of Education of District of Columbia, (1972). The primary focus of this case was the District Court's decision that school districts could not rely solely upon the argument that lack of

funds made it difficult for them to provide equitable educational opportunities for students with exceptionalities (p. 876). (Note: The issue of finances will be addressed in more detail later on in the second part of this discussion)

While the following point was secondary to the case at bar, it was to become of primary importance to the field of special education (Hendrick Hudson Dist. Bd. of Ed. v. Rowley, 1981, p. 194). The Court decided that:

> ... no child eligible for a publicly supported education ... shall be excluded from a regular public school assignment ... unless such child is provided (a) adequate alternative educational services suited to the child's needs, which may include special education and (b) a constitutionally adequate prior hearing ... [emphasis added] (p. 878).

For purposes of this discussion, the infusion of the due process prior notice requirement of the fourteenth amendment into the educational setting is notable because it specifically allowed for the possibility of delivery of services in a setting other than the regular education classroom.

While the due process clause argument was first successfully advanced in the area of general education

law in the case of Dixon v. Alabama State Board of Education, (1961), the last of the pre P.L. 94-142 cases which will be presented here, Goss v. Lopez (1975) reaffirmed the position that the right to an education falls under the auspices of the due process clause (p. 582). The Court reasoned that since the right to an education is a property right, it cannot be abridged (in this case by suspension for 10 days) without prior hearing (p. 579). Just as importantly though, it marked a departure from the Court's previously held firm position that "... public education in our Nation is committed to the control of state and local authorities (p. 587).

This case has served as the foundation for later cases involving discipline within the area of special education (Weiner & Hume, 1987). As will be noted in the next section of this discussion, Justice White's opinion was influential in those subsequent decisions which have held that disciplinary procedures can amount to a change of placement within a special education setting and as such, require a prior hearing before they can be implemented. The key here is the concept of change of placement and the prior notification and hearing which that entails.

While none of the three REI positions reviewed call

for changes of placement without notice and hearing, it is important at this point to recall Wang & Reynold's (1986) warning about the dire consequences which await any attempts to institute wholesale changes in the dual delivery system without first instituting substantial administrative/legal/fiscal changes. This is especially so in light of Algozzine's (1990) warning that there is comparatively little in the way of valid research to justify either the dismantling or continuance of the present dual delivery system. Without such data, it would be difficult to justify any change in placement during a due process hearing merely because of a desire to modify the service delivery system.

Post P.L. 94-142 Cases

An interesting case with which to begin this portion of the discussion is Stemple v. Board of Ed. of Prince George's Cty., (1981). In this case, the parents of a child felt that the School Board's decision to partially mainstream their child so as to "assist her in developing socialization skills with her peers" (p. 894) was not working out. Therefore, they removed her from the public school and placed her in a private non - residential school. They then sought tuition reimbursement under the appropriate section of Maryland's school code. Their request was denied

pursuant to Section 615 (e)(3) of P.L. 94-142 because they changed placement prior to the outcome of a final hearing on the issue of placement. This case provides still further indications that the Federal Courts are not going to look favorably upon changes in placement unless and until all administrative and procedural regulations have been followed. It also serves as a reminder that not all parents of children with handicapping conditions feel that mainstreaming of the type called for in the Extreme Change Model is beneficial to their child.

Two additional cases, S-1 v. Turlington, (1981) and Kalen v. Grubbs, (1982) also addressed the issue of changes of placement. In these instances two separate Federal appellate circuits used the same rationale to decide different cases. Namely, change of placement (in these instances through disciplinary expulsion) cannot take place without prior notice and hearing. As each of these steps is guaranteed not only under the terms of the P.L. 94-142, but each successive piece of Federal special education legislation, it would appear that advocates of the Moderate Change Model (Wang & Reynolds, 1986) are faced with a problem. In addition to calling for parents of children with handicapping conditions to voluntarily refrain from enforcing their rights, any

type of 5 year moratorium on regulation enforcement (Wang & Reynolds, 1986) would literally require an act of Congress.

The first United States Supreme Court case specifically dealing with P.L. 94-142 was Hendrick Hudson Dist. Bd. of Ed. v. Rowley, (1981). In this case, a student who was hearing impaired was receiving some special services in regard to her education. These services (which were all provided within the framework of the regular classroom) included the use of a special hearing aid and additional tutorial instruction. The local school board refused the parent's request for a sign language interpreter in each class. The appellate court held that the Board's decision amounted to a refusal to provide the student with a free appropriate public education (p. 176).

The Supreme Court reversed the lower court and held that the school board's actions were correct. In delivering the majority opinion for the Court, Mr. Justice Rehnquist examined a portion of the Congressional intent underlying the passage of P.L. 94-142. He wrote:

> Congress sought to provide assistance to the States in carrying out their responsibilities under ... the Constitution of the United States to provide

> equal protection of the laws. But we do not think that such statements imply a congressional intent to achieve strict equality of opportunity or services. (p. 198)

In making this statement, the Court was taking the position that while "... available funds must be expanded equitably" (p. 193n), a disproportionate amount of funds need not be spent on special programs in an attempt to achieve perfect equality.

The Circuit Court of Appeals for the 6th Circuit in the case of Clevenger v. Oak Ridge School Bd., (1984) held that when given a choice between comparatively equal placements, the local board is free to adopt that program which costs less. In fact, the District Court for the Southern District of Ohio went so far as to state in Matta v. Board of Educ., (1990) that "(w)hen devising an appropriate program for individual students, cost concerns are legitimate" (p. 255).

This would indicate that there are some limits to the amount of money which a school district must spend in order to provide a free appropriate public education. As such, it would appear that one additional legal hurdle which may have to be overcome by advocates of the Extreme Change Model (Stainback, 1984) is to establish apriori that the costs of their programs would not

exceed the current level of appropriate expenditures incurred by local districts in providing special education services.

This does not mean that local boards are not required to expend what could be considered by some to be substantial sums of money in order to meet their obligation to provide a free appropriate public education for students having special needs. The Supreme Court held in the case of Irving Independent School District v. Tatro (1984)) that the board's refusal to provide catheterization services for one of its students amounted to a refusal on their part to provide her access to school. However, the case of Hendrick v. Rowley (1981) makes it clear that there are limits to the financial expenditures which districts are going to be required to make. Furthermore, as noted by Justice Rehnquist the term "free and appropriate" public education does not mean a completely equal spectrum of services being provided to all students.

The Circuit Court of Appeals for the Fifth Circuit has taken the position that since special education services provided under P.L. 92-142 are provided within the framework of public education, every student, regardless of the presence of any handicapping condition, is entitled to a proportionate share of the

"schools limited resources" (Daniel, R.R. v. State Bd. of Educ., 1989, p. 1052). As such, while local school districts are under the obligation to provide students requiring special education services a "basic floor of opportunity" (Hendrick Hudson Dist. Bd. of Ed. v. Rowley 1981, p.200), there is no requirement to provide these services in such a way as to "...unduly take away from the education of nonhandicapped children" (Rapp, 1990, p. 10-164.7). As has been noted by the Court in Daniel, R.R. v. State Bd. of Educ. (1989), while P.L.94-142 does require that students with handicapping conditions be educated in the regular classroom to the maximum extent possible, it does not require all special education services be provided in the regular education classroom.

Furthermore, other Courts have held that the monies spent on one child with a handicapping condition should not be so great so as to deprive other such students of the services they need (A.W. By & Through N.W. v. Northwest R-1 Sch. Dist. 1987). The concept of giving credence to some level of financial limitations has been adopted by numerous local jurisdictions. In writing for the Supreme Court of the State of West Virginia, Justice McHugh stated that "Ours is a world of finite resources - a consideration of which courts as well as legislatures and executives should be constantly

mindful" (Board of Educ. v. Human Rights Com'n, 1989, p. 645). The Federal District Court for the Eastern District of Virginia expressed a similar sentiment when it said "...a school system is not required to duplicate a small, resource-intensive program at each neighborhood school. (Barnett v. Fairfax County School Bd., 1989, p. 761).

While referring to the requirement of educating children in the least restrictive environment, Judge Hilton specifically stated that this requirement does not create an "absolute duty to place a child in his base school" (p. 761). Justice McHugh even went so far as to refer to the requirement that all school districts must provide local schooling for all of its students with handicapping conditions regardless of costs as "... an unhealthy fetish" (Board of Educ. v. Human Rights Com'n., 1989, p. 645).

These cases specifically held that the term "least restrictive environment" does not necessarily mean that all students with handicapping conditions must be educated either within the regular education classroom or for that matter even their home school. Additionally, they have specifically recognized that there are instances in which the amount of funds available can limit the types of services which must be

provided by the local school board at any given home school. It would, therefore, appear that proponents of the Extreme Change Model would not find legal support for their position in any of the aforementioned jurisdictions until they were able to first establish that their proposal would not require a disproportionate amount of the school board's special education budget be spent on a comparatively small number of students. Based upon these same cases, the level of success which advocates of the Moderate Change Model would achieve in pursuing their program would likewise depend to a great extent upon the increased cost factors involved in it's implementation.

At this point, an examination of the educational considerations which Courts have deemed essential in determining the mainstreaming component of the "least restrictive environment" concept would be appropriate. While recognizing the validity of the cost effectiveness aspect of the placement decision making process, the Court in Tokarick v. Forest Hills School Dist. (1981) clearly stated the prevailing opinion of the legal system when it said, "Because special education specifically contemplates instruction in a regular classroom, related services necessarily include what is required within reason to make such a setting possible

for a child who can benefit from it" (p.455). On the surface, this would appear to lend strong suppor to both the Extreme Change Model and the Modified Change Model. However, the key to understanding the Court's decision lies in knowing what is meant by the term "within reason."

In an attempt to gain insight into the legal definition of the term "within reason," it would be helpful to examine the wording used by other courts when they dealt with the same issue. While referring to the preference which is to be given to mainstreaming, Federal Circuit Judge John R. Gibson wrote that it would be "... inapplicable where education in a mainstream environment cannot be achieved satisfactorily" (A.W. By & Through N.W. v. Northwest R-1 Sch. Dist., 1987, p. 163). The language of the decision in Lachman v. Illinois State Bd. of Educ. (1988) qualifies the preference to be given mainstreaming still further when it noted that a student with handicapping conditions is to be mainstreamed if and only if that child's education can be carried out "... satisfactorily in the type of mainstream environment sought by the challengers to the IEP proposed for that child" (p. 295).

At this point, it must be remembered that the Courts have not decreased any requirements concerning

the quality of the education which students are to receive under the auspices of P.L. 94-142. Students with handicapping conditions are expected to acquire a certain level of skills normally taught in the regular classroom (Daniel, R.R. v. State Bd. of Educ., 1989). The 7th Circuit Court of Appeals noted in the case of Brookhart v. Illinois State Bd. of Educ. (1983) that "A student who is unable to learn because of his handicap is surely not an individual who is qualified in spite of his handicap" (p. 184). In using the same line of reasoning expressed in the regular education case of Debra P. v. Turlington, (1981), the Brookhart Court went on to hold that it is not a violation of either the spirit or letter of P.L 94-142 to deny students who received special education services a diploma because of their failure to pass a minimal competency exam.

This indicates that the environment of the regular education classroom must itself be examined to determine if it can be adequately modified so as to accommodate the needs of the students with special needs. This concept is critical to the discussion at hand when it is remembered that by definition, the Extreme Change Model assumes that every regular education classroom can be so modified.

Concerning the modification of the regular

education classroom, the Daniel court noted that regular education teachers are not required to "...devote all or most of their time to one handicapped child, or to modify the regular education program beyond recognition" (p. 1048). The Court even went to far as to state that it is not the job of regular education teachers to become special education teachers within the regular classroom (p. 1049). As if this language were not strong enough, Judge Gibson in the A.W. By & Through N.W. case emphatically stated that "...some handicapped children simply must be educated in segregated facilities" (p. 163). Needless to say, not only do these positions run totally contrary to the Extreme Change Model, but they represent a stance which proponents of the Moderate Change Model such as Reynolds (1989), who call for the eventual elimination of residential and special schools would likewise have to overcome.

An examination of the Eight Circuit Court of Appeals decision in the case of Mark A. v. Grant Wood Area Educ. Agency (1986) reveals that at this point some jurisdictions have come full circle in their positions. While writing the majority opinion in this case, Senior Circuit Judge Swygert held that while P.L. 94-142 does indeed mandate as much mainstreaming as possible, "...

it does not compel the state to establish entire new levels of public education services to satisfy" this requirement (p. 54). In other words, once it has been established that a local school board has properly addressed the issue of whether or not education in the regular classroom can be reasonably achieved with the use of supplemental aids and services (Daniel, R.R. v. State Bd. of Educ., 1989), the board is free to choose the least costly alternative form of education.

One additional factor concerning modification of the regular education classroom needs to be addressed. As can be seen from the aforementioned cases, various Federal and State courts have examined the effect which the regular education classroom will have upon the education of students requiring special education services. This does not mean however that the flip side of this issue has been ignored. The Federal Appeals Court for the 3rd Circuit acknowledged the fundamental importance of addressing the issue of what effect a given student's inability to function in the regular education classroom will have upon that environment (Kruelle v. New Castle Cty. School Dist, 1983).

The Court in Daniel, R.R. v. State Bd. of Educ. (1989) specifically held that while local districts must accept the responsibility for providing children with

handicapping conditions as much mainstreaming as appropriate, the school must also balance the benefits of such an education for each individual child. The majority felt that it is perfectly legitimate for the school board to examine the effect "the handicapped child's presence has on the regular classroom environment and thus, on the education that the other students are receiving" (p. 1049). For example, the Court reasoned that "(w)here a handicapped child is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment" (p. 1049). (For another case directly on point see the opinion rendered in Petition of Tobias, 386 N.Y.S.2d 735 (1976)). As this is precisely the scenario envisioned by Kauffman et al (1988), this avenue of legal argument would seem to provide more support for the Little Change Model than either of the two alternatives.

In order to prevail under these cases, it would appear that proponents of the Extreme Change Model will need to establish several factors. First, inspite of Algozzine, et al's (1990) finding that there is comparatively little valid research to justify the dismantling of the dual delivery system, Extreme Change Model advocates will have to produce proof that indeed

this is the best step to take. Second, more than Messinger's (1985) assertions, alone will be needed to verify the fact that there will be sufficient qualified personnel in the regular education setting so as not to decrease the quality of education currently being provided students with handicapping conditions under the present system. Finally, as discussed earlier in this section, proponents of Extreme Change will need to establish the cost effectiveness of their proposal with hard data prior to any court ordered implementation. To a lesser extent, proponents of the Moderate Change Model would also have to address each of these issues.

Summary

Based upon all of the foregoing, it would appear that the Little Change Model has the highest probability meeting each of the precedents and legal principles discussed in this section. Given that this position advocates substantially fewer changes than either of its counterparts, it stands a greater chance of being implemented without violating existing regulations. Furthermore, due to the fact that fewer changes are called for, there is a greater chance that they can be put into effect without the need of resorting to any moratorium on parental rights. Also, cost figures for a less complicated program modification tend to be easier

to estimate. Finally, for purposes of analysis, it is often difficult to pinpoint the effectiveness of any given component in a program which entails sweeping change. As such, the data needed to justify sweeping changes may in fact only come about after the gradual implementation of change. Even then it will take the cooperation of all interested parties - client, parental, legislative, judicial, and educational, to see to it that beneficial changes are instituted in such a way so as to not create the type of administrative / legal quagmire as exists today.

Given the ever increasing amount of litigation in the field of special education and the changing philosophical complexion of the U.S. Supreme Court, the reader is cautioned against thinking that (s)he now knows "the law" in regard to this issue. While this study has been through in regard to the points it has examined, the applicability of any given legal opinion will depend first of all upon the facts of the current case facing the local administrator. As has been previously noted, consideration must be given to the jurisdiction which rendered the opinion in question and how that compares to the philosophical persuasion of the Justices of the reviewing court.

Even so, the truth of a proposition is not

dependent upon either the number of times it is repeated or the volume with which it is advocated. Regardless of the vehemence with which proponents of any given Change Model advance their position, they must be prepared to face the legal questions which have been presented in this study. Parents and local educators should demand that those who occupy positions of power within the education and political field address the issues which have been discussed herein before instituting substantive and costly changes.

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