THE UNIVERSITY OF MANITOBA

SPECIAL EDUCATION REFORM: PROVISION FOR SPECIAL EDUCATIONAL NEEDS OF STUDENTS IN MANITOBA IN ACCORD WITH THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

by

MARY JO QUARRY

A THESIS SUBMITTED TO THE FACULTY OF
GRADUATE STUDIES IN PARTIAL FULFILLMENT
OF THE REQUIREMENT FOR THE DEGREE OF
MASTER OF EDUCATION

DEPARTMENT OF EDUCATIONAL ADMINISTRATION AND FOUNDATIONS
WINNIPEG, MANITOBA

WINTER, 1990

ISBN 0-315-71806-4

SPECIAL EDUCATION REFORM: PROVISION FOR SPECIAL EDUCATIONAL NEEDS OF STUDENTS IN MANITOBA IN ACCORD WITH THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

BY

MARY JO QUARRY

A thesis submitted to the Faculty of Graduate Studies of the University of Manitoba in partial fulfillment of the requirements of the degree of

MASTER OF EDUCATION

Abstract

This study examined the vulnerability of Manitoba's Public Schools Act and 1989 Guidelines, Special Education in Manitoba, to a challenge under section 15 of the Canadian Charter of Rights and Freedoms regarding educational rights of children with exceptional learning needs..

Research was undertaken to determine the present legal status of exceptional children in Manitoba and the potential impact of section 15 on educational rights for children with exceptional learning needs.

The study concluded:a) Exceptional students in Manitoba have virtually no entitlements, as defined in statutes and regulations, although the 1989 Guidelines, if they have the force of law, extend procedural and substantive rights considerably; b) Entitlements provided by Divisional policy manuals vary substantially from relatively complete to relatively non-existent; c) Most legal and educational analysts, and trends established by early Charter case law, suggests that the Charter's guarantees to "equal benefit" may have substantial impact on establishing educational rights for exceptional children in Manitoba as elsewhere, by invalidating sections of Provincial statutes which conflict with Charter guarantees.

Appreciations

Thanks are due to many people who helped the author in the preparation of this study.

My thesis committee, Dr. Hal May, Dr. Jeff Hughes and John Wiens, read this lengthy work and made valuable comments.

My family, Andrew, Kate and Bronwen, assumed many household tasks to free my time for reading and writing, and Andrew provided irreplaceable expertise regarding the intricacies of Microsoft Word.

Glen McRuer, Research Analyst for the Manitoba Teachers' Society, read and commented on the study and provided invaluable research assistance and general inspiration.

The G. Allan Roeher Institute provided generous financial support.

My colleagues at work were reliably interested in my work in progress and tolerated both my absence for a year and my occasionally abstracted presence.

The Manitoba Association of School Trustees staff, director Jerry MacNeil and President Brenda Leslie, generously made Divisional Policy Manuals, and working space in their office, available to me when needed.

Table of Contents

Part I: Problem and Scope

A. Introduction

Providing the best possible education for all children, including those with special educational needs, is increasingly a focus of professional and parental concern and of expanding Provincial financial and practical investment in Manitoba as in other parts of Canada and North America.

This attention has been demonstrated at both theoretical and operational levels within Manitoba by release of discussion papers on related topics by Manitoba Education and by professional and advocacy groups, by increases in Provincial financial support for special needs students which greatly exceed the rate of increase for 'regular' students, and by the widespread accommodation of exceptional children within the public school system in the absence of mandatory legislation, even though this accommodation varies widely in design and extent.

Theoretical.

Within the last few years the topic has been addressed by the Manitoba Teachers' Society in several major studies (Manitoba Teachers' Society, 1981, 1985), in

a response to the 1983 Education Finance Review (1984) and in briefs to the Minister of Education (1987a, 1987b, 1987c).

In January 1987 the Public Policy Committee of the Manitoba section of the Council for Exceptional Children, an international advocacy organization, speaking on behalf of six similar local organizations, urged then Minister of Education Jerry Storie to re-activate the Ministerial Advisory Committee on Special Needs, which had previously reported to the Minister of Education in 1977, 1979 and 1981.

The CEC Memorandum also urged the Minister to require Manitoba Education to generate policy statements which "direct school boards to develop policies and practices which are in keeping with the equity sections of the Charter of Rights and Freedoms" and further, said: "We consider leadership and guidance by Manitoba Education in the creation of policy regarding the education of students with exceptional needs to be fundamental in ensuring that school divisions fulfill their responsibilities to this group of students. We suggest it is imperative that all concerned in this area (parents, educators and advocacy groups) become involved in the creation of policy." (Council for Exceptional Children, 1987).

In March 1987 the Minister invited representatives from twelve organizations representing major professional and administrative associations, advocacy organizations related to handicapped or gifted children, and the Educational Psychology Department of the University of Manitoba, to form an advisory committee to "identify priorities concerning special needs programs and services..." (Storie, 1987). The Committee was to conclude deliberations by the end of the 1987-1988 school year.

Funding for special education was among topics considered by Enhancing Equity: The Report of the Education Finance Review, a comprehensive study completed in 1983 by then Deputy Minister of Education Glenn Nicholls.

Manitoba Education also produced internal working documents titled The Charter of Rights and Education in Manitoba (Manitoba Education,1986) and Study of Mainstreaming in Select Manitoba School Divisions (1988) and a public discussion paper titled Appropriate Education, Student Placement and Parent Involvement: A Policy Direction and Consultation Paper (Manitoba Education,1988).

The present Minister of Education, the Honourable Leonard Derkach, was quoted as favoring an amendment to the

Public Schools Act to increase parental access to school records (Mitchell, C., 1988).

The Minister expanded on this pledge in introductory remarks in his 1988 presentation of departmental estimates, saying that he is considering "legislation dealing with the access of parents to information in the placement of Special Needs students, as well as parental participation in placement decisions regarding Special Needs students." (Hansard, Province of Manitoba, 1988, p. 2295).

Operational.

In operational terms, the public school system in Manitoba, as in other Canadian provinces and in other North American jurisdictions, has since the early decades of this century been in the process of confronting its responsibility to meet the educational needs of all children, including those with exceptional learning conditions. Many Canadian sources have noted that accommodation of children with a wide range of exceptionalities is more and more prevalent in Canada (Howarth, 1983; Csapo, 1984; Canadian Education Association, 1985).

Provinces such as Ontario and Saskatchewan have, since at least 1978, guaranteed specific rights for exceptional

children through educational statutes and/or regulations, as does Alberta in its new School Act (Bill 27,) just-re-introduced into the Alberta legislature in May and approved in July of 1988. Public outrage over the issue of the designation of some children as "ineducable," among other matters, prompted withdrawal of the initial version of the re-written Act (Bill 59) in the spring of 1987 (Brennan, 1988).

Other provinces, including Manitoba, specify few rights through statutes or regulations but provide varying levels of programming pursuant to Ministerial policy statements and to local divisional policies and practices.

In a 1987 telephone survey of all Unicity divisions by the author, Special Education Coordinators said that their placement of choice for all exceptional students is a regular classroom in the home school if appropriate supports can be provided, and that other models are used only as far as necessary. While some divisions maintain a broad network of self-contained placement options outside of the regular stream, other divisions are experimenting with integration of even moderately mentally handicapped children in regular classrooms.

Financial.

In Manitoba, Provincial support for special education in 1988 showed an average provincial increase of 12.3% over the previous year, (Manitoba Teachers' Society (MTS), 1988b) while overall provincial support for education rose by 5% for the same period (Public School Funding Levels are Announced, January 15, 1988).

For the same period, cumulative expenditures by school divisions and districts rose 5.5% for regular instruction, and 9.8% for exceptional instruction, according to data from Financial Reporting and Accounting in Manitoba Education (FRAME) Final Budget reports analysed by the MTS. Research Office (Manitoba Teachers' Society, 1988c).

Similar disparities in costs for provision of special education compared to regular education services have been documented in the United States. In the United States, one major study done for the Rand Corporation found that the average cost for special education and related services provided to a handicapped child in 1977 was 2.17 times the cost of a regular, non-handicapped child (Kakalik, 1981, p.5).

Funds devoted to special education under The Education for All Handicapped Children Act (EHA), the 1975 legislation, rose from $100 million in FY 1976 to $1.6

billion in FY 1985 (U.S. Department of Education, 1987, p. E-139).

B. Significance

This is a significant point in Manitoba's history at which to consider this topic for the following reasons:

1. Buttressed by the normative effect of experiences in American and other Canadian jurisdictions, and the potential impact of the Charter of Rights and Freedoms, the expectations of parental and advocacy organizations for improved services for exceptional children have expanded in Manitoba as elsewhere, while public demand for expansion of other publicly-funded services has also grown.

2. Although the impact of the Charter of Rights and Freedoms of the Constitution Act of Canada (1982) in the securing of educational rights for exceptional children has yet to be tested in court, many educational and legal commentators have predicted that its import will be substantial. Some have suggested that its potential effect is as great as the 1954 Brown v. Board of Education decision in the United States, and may result in the Supreme Court of Canada functioning as a "National School Board." (Sussel & Manley-Casimir, 1986). Wayne MacKay,

author of the major Canadian educational law text, unequivocably attributes his success in reaching an out-of-court settlement in a significant 1987 Nova Scotia case regarding mainstreaming of a handicapped child to his clients' willingness to go to court under the Charter (MacKay, 1987c).

3. Both of these factors occur at a time when the traditional and cyclical tensions between concerns for educational excellence and for educational equity have resulted in a general, although by no means unanimous, consensus in the professional literature that these concerns can best be addressed in an elementary/secondary school context by the merger of 'special' and 'regular' educational systems into a cohesive whole, with the advantages of each system more equally available to all students.

4. Finally, Manitoba is in a position to take advantage of the body of knowledge which has accumulated in U.S. and in Canadian educational settings over the past two decades as to the most effective and efficient ways to meet individual needs of exceptional children through a mass-education public school system.

Those responsible for managing the educational system within Manitoba have the opportunity to profit from both

the successes and failures of legislators and educators in other jurisdictions. Realization of this opportunity will depend on comprehensive understanding of the present environment for exceptional children, on accurate anticipation of the nature of changes in legislation and their impact on local procedures and practices, and on appropriate and timely planning.

The consequences of failing to profit from both the successes and the failures of educators in other jurisdictions are potentially great, in both human and financial terms, and are unnecessary.

C. Research Questions

This study will consider four questions:

1. What is the legal status of exceptional children, as defined by statutes and regulations, in Manitoba and in selected other Provinces?

2. What policies are in place to provide for special educational needs of students in Manitoba school Divisions?

3. To what extent and in what areas might section 15 of the Charter of Rights and Freedoms have potential impact on educational rights of exceptional children?

4. To what extent and in what areas might Manitoba's Public Schools Act and/or Divisional policies or the absence thereof, be vulnerable to a Charter challenge?

D. Definitions

The educational definition of exceptionality introduced by Samuel Kirk in 1962 has been generally accepted since by writers in the field, and was the working definition for the landmark 1970 Canadian study One Million Children (Roberts & Lazure, 1970). It will be the working definition for this study.

According to Kirk (1962, pp. 4-5) an exceptional child is one "who deviates from the normal child in mental, physical or social characteristics to such an extent that he requires a modification of school practices, or special educational services, in order to develop to his maximum capacity."

E. Limitations

1. Data on policies of school divisions will be obtained from published policy manuals and guidelines as they exist and are available to the author. Specific issues of implementation may be explored in greater depth through interviews and/or questionnaires in a few representative

divisions, probably including Winnipeg #1, two other urban divisions and two or three rural divisions of varying sizes, if time allows. Visits will not be made to northern Divisions. Interviews will be conducted in English and will relate to services delivered in languages other than English only if time allows.

2. The financing of special education will be addressed as it relates to issues raised in the thesis but no substantive attempt will be made to analyze or to recommend finance models.

3. At least one research visit will be made to Ontario. Visits to Saskatchewan, Minnesota and additional visits to Ontario will depend upon the securing of additional funding.

4. There will be no attempt to analyze or compare approaches such as differing resource models or methods of formulating Individual Education Plans. There will not be a "how-to" focus.

Part II. Review of the Literature

This brief literature review will consider special education reform from the perspectives of (a) historical development of school services for exceptional children in Canada, with emphasis on Manitoba, (b) legal status of exceptional children in Manitoba and in selected other Provinces, (c) potential impact in Canada for exceptional children of the Charter of Rights and Freedoms, (d) the context provided by the excellence vs. equity debate and the regular education initiative, and (e) aspects of the topic, in particular with relevance to Manitoba, which are not addressed in current literature.

A. Canada and the U.S.: Comparisons

The term 'special education reform' has a different focus in Canada than is the case in the United States and in American professional literature.

In the United States, the extensive federal role in regulating and financing education, and the civil rights to due process and to equal protection ensured by various constitutional amendments, have had the combined effect of guaranteeing educational services to exceptional children

on the same basis as their non-handicapped peers (Singer & Butler, 1987).

The battle for legal recognition of the entitlement of exceptional children to services through the public system was largely won, and on a national basis, with the 1975 passage of the Education for All Handicapped Children Act (EHA). Attention in many quarters has subsequently shifted to definition of the parameters of that entitlement and of legal guarantees of appropriate programming, as well as to accommodating concern for meeting individual educational needs with broader concerns for the 'regular education initiative," the merging of the two systems.

In Canada, regulation and financing of elementary and secondary education are solely Provincial responsibilities,as established by the Constitution Act of 1867. In this country special education advocates, whether individual parents or members of advocacy organizations, still must work school by school, division by division, province by province, with few exceptions, whether to acquire services for exceptional children on an ad hoc basis or to achieve statutory recognition of the existence of exceptional children, of their rights to public education, and of the specific parameters of those rights (Keeton, 1979-1980; Smith, 1980, 1981; Poirier, 1986).

The potential influence of the Charter of Rights and Freedoms on educational rights for exceptional children, while clearly influencing some Provincial legislation (Hodder, 1984) has not been directly tested to date in Canadian courts (Manley-Casimir & Sussel, 1986; MacKay, 1987b).

Special Education in the United States: Beginnings

There are, of course, many common elements in the approaches of American and Canadian systems to education of exceptional children, despite the differences in legal structure and political culture.

After enrollment increased dramatically in U.S. public schools following introduction and enforcement of compulsory attendance at the turn of this century, the presence of large numbers of under-achieving children became a management and an economic problem for educators and public policy-makers. One obvious solution, in addition to exclusion of the physically and mentally handicapped, the truant and the difficult-to- manage from schooling, was wide-spread development of specialized classes, either in separate facilities or within public school buildings. Lazerson has noted that "in the decades before 1930, special education went from virtually non-

existent to being a subsystem within most large city school systems." (Lazerson, 1983, p. 27). MacMillan wrote that enrollment in special classes in the U.S. increased over four-fold from 1948 to 1963, from 90,000 to 400,000 children (MacMillan, 1982, p. 27).

Criticism of 'special education' began almost as soon as the system developed, both from those who complained that there wasn't enough of it and that many American children were still un-served by the public school system, and from those who suggested that those special programs which existed were providing questionable benefits.

Lazerson quoted a 1930 report provided to the White House Conference on Child Health and Protection, which estimated that only one million of ten million "maladjusted" children were receiving special education.

He also quoted a 1931 report from Philadelphia's Superintendent of Schools, commenting on the slowdown in special education growth caused by economic restraint: "Perhaps it as well that we are compelled for economic reasons to move slowly, because any treatment which requires segregation, whether of the dull or the brilliant, may cause errors of judgment which a lifetime will not correct." (Lazerson, pp. 34-35).

A generation or two of educational researchers subsequently devoted itself to "efficacy studies" to determine whether the proliferation of these special, largely segregated classes for the exceptional was achieving its aim. The consensus of this research was that, in general, the evidence of gains in social and academic skills produced through special class placement was either inconclusive or was over-shadowed by the negative effects of segregation and the operation of dual education systems (Madden & Slavin, 1983), at least in relation to the mildly handicapped who comprise three-quarters of the clients of special educators (Reynolds,Wang & Walberg, 1987).

Canada: Beginnings

Educational developments in Canada during this period could not remain unaffected by developments in the United States.

National advocacy organizations such as the Council for Exceptional Children identified the need for national standards for educators of exceptional children, and enunciated some of the same concerns as their American colleagues regarding the separation of regular and special education systems. Its authors declared themselves to be

"unanimously and strongly" in sympathy with an integrated approach emphasizing the common ground for educators in regular and special education. (Committee on Teacher Education and Professional Standards, (SEECC Report) 1971, p.11.).

The CELDIC Report suggested in 1970 that the Canadian educational system was failing to meet learning and emotional needs of one million children (Roberts & Lazure, 1970).

Impetus for the CEC SEEEC Report and for the CELDIC Report had been provided by an 1969 study, Legislation and Services for Exceptional Children in Canada, which had reported that generally, special education was being delivered by teachers with no training in the field, and that Canadian provinces showed great diversity in minimum training requirements and opportunities for training (Kendall & Ballance, 1969).

Partially as an outgrowth of this advocacy by professionals and parent organizations, it is the case today that accommodation of a wide range of exceptional children, from the mildly to the severely handicapped, in self-contained and in regular placements within regular schools, is more and more prevalent in Canada (Howarth, 1983; Canadian Education Association, 1985) even in the

absence of both mandatory national legislation and of extensive judicial involvement in education.

This may have occurred partially because the Canadian educational system is responsive to American trends in both philosophy and implementation, (Koopman, 1977; Keeton, 1979-1980; Curtis, 1985;) as a consequence of Provincial legislation (Hodder, 1984; Posno, 1986) or in expectation of legislative reform precipitated by challenges brought under the Charter of Rights (Manley-Casimir & Sussel, 1986a,1986b; MacKay, 1986a, 1986b, 1987a, 1987b.)

Manitoba: Beginnings

As will be established, Manitoba, unlike some other provinces (Canadian Education Association, 1985; Manitoba Teachers' Society,1987a, 1987b) does not have legislation requiring school boards to deliver appropriate services to exceptional pupils, although the topic was under consideration at the Provincial level in the early 1960's and explicit legislation to this effect was actually passed in 1975, although it never came into legal effect.

Changing Realities: A Study of Education Finance in Manitoba, (Manitoba Teachers' Society, 1981) describes one of the first governmental initiatives regarding education of exceptional children, a Study of the Education of

Handicapped Children in Manitoba, commissioned in 1963. Changing Realities notes that, among the recommendations of the 1963 study were:

a) school divisions and the Provincial government cooperate to develop programs to provide educational opportunities for children with mental and physical handicaps;

b) pre-school educational services be developed for physically and mentally handicapped and culturally disadvantaged children;

c) the handicapped child be educated in regular schools;

d) a department of Special Education develop the educational supporting services to assist local school divisions in the operation of services for handicapped children. (Manitoba Teachers' Society, 1981, p. 145).

The MTS report also notes that, before 1966, Manitoba school divisions were specifically empowered to exclude mentally retarded children. In 1965 section **465(22)** of the Public Schools Act was amended to make provision for services and facilities including the engaging of teachers for the education of children resident within the division who were classified as mentally retarded.

The 1975 Public School Act amendment, commonly referred to as Bill 58, paralleled some of the key provisions of the American legislation passed in the same year. The relevant section read:

> 465 (22) Every school board shall provide or make provision for the education of all resident persons who have the right to attend school and who require special programs for their education.

Although the wording of the statute itself was very general, the Notice of Intent issued by the Government of Manitoba which accompanied the legislation, and a commentary produced by the Working Group on the Education of Children and Youth with Special Needs (1975) were explicit:

> Statement of Intent
>
> To the maximum extent practicable, handicapped children shall be educated along with children who do not have handicaps and shall attend regular classes. Physical, and mental impediments to normal functioning of handicapped children in the regular school environment shall be overcome by the provision of special aids and services rather than by separate schooling for the handicapped. Special classes, separate schooling, or other removal of handicapped children from the regular educational environment, shall occur only when, and to the extent that the nature or severity of the handicap is such that education in regular classes, even with the use of supplementary aids and services, cannot be accomplished satisfactorily.

The accompanying Working Group paper, as well as two subsequent Reports to the Minister of Education on Bill 58 by the Advisory Committees (1977,1979) indicated that the Bill's provisions were to be broadly inclusive of all learning conditions, that educational placement was to be in the least restrictive environment, and that services should be provided to exceptional children before they reached the 'legal' age of 6 or 7. Both Advisory Committee Reports identified the need for additional staff training.

Although Bill 58 was approved by the Manitoba legislative Assembly in 1975, it was not proclaimed, because it was intended to come into effect only after a five-year planning and implementation phase. Instead, it was quietly repealed with the 1980 Public Schools Act amendments. Following this, the Advisory Committee on Special Education to the Minister of Education (1981) made a series of recommendations reinforcing and enlarging upon its previous Reports in 1975 and 1977.

In 1983, then Minister of Education Maureen Hemphill sent a directive to all Chairpersons, Superintendents, Secretary Treasurers and Special Education Coordinators, clarifying "the stance of the Government of Manitoba with respect to children with special needs." The Minister indicated that it was the "responsibility of the provincial

Government and those who provide educational services in the public school system to ensure that the child with special needs has an equal opportunity to receive a meaningful and appropriate education," and that for a large proportion of special needs students, the above goal could best be met by placement "within the regular program stream." (Hemphill, 1983).

Similarities in wording to the Bill 58 Notice of Intent are apparent. Although this directive has no force in law, it has not been repudiated by the three subsequent Ministers of Education, and so appears to remain, at least in the general sense of establishing a climate of Provincial (and parental) expectations for school boards.

B. Legal Status

Manitoba

Special education in Canada has been described by Csapo as an "intricate patchwork quilt of political accident, professional ambition and pedagogical oversight, loosely held together with provincial red-tape and federal neglect." (Csapo, 1980, p. 216).

Since Federal responsibility for education in Canada is largely restricted to issues relating to post-secondary and language education and to education of native people

and the regulation and financing of elementary and secondary education are solely Provincial responsibilities, statutory entitlements in all areas of education vary greatly from one province to another (Bargen, 1961).

In Manitoba exceptional students have neither distinct legal status nor rights as defined in educational statutes or regulations. The Act is silent as to appropriate service entitlements or rights for any students. Neither the Public Schools Act, last revised in whole in 1980, nor the Education Administration Act make direct reference to exceptional children. Although various Regulations define related items such as special services, high incidence and low incidence student classifications, special class teacher and resource teacher (all in the context of eligibility for grants), and make frequent references to special education, the term is not defined (Manitoba Regulations 13/85, 1/86, 252/86).

Manitoba's Education statutes confer on public school Boards only the obligation to "provide adequate school accommodation for the resident persons who have the right to attend school..." (Public School Act, 1980, s. **41(1)**).

The only reference in the "duties of Boards" sections of the Act (**41(1),(4),(5)** and **259**) which appear to relate directly to specific learning needs of children is **41(1)** q,

which requires that all students shall be screened for physical, emotional or learning disabilities. This amendment was passed with the 1980 PSA amendments but not proclaimed for seven years after its approval by the Manitoba Legislature. It first appeared in the 1987 printing of the PSA.

Ontario/Saskatchewan

As Bill 58 was being repealed in Manitoba before ever coming into effect, the Ontario Legislature approved the Education Act (1980), known as Bill 82, also with a five-year implementation phase. Hodder describes Bill 82 as standing "between the absence of legislation on the one hand, and the highly prescriptive U.S. Public Law 94-142 on the other", and notes that in 1980 when Bill 82 was introduced, "even die-hard opponents of regulatory action had come to terms" following increased public expectations in the wake of the American legislation (Hodder, 1984, p. 44).

In brief, Ontario's Act provides many of the rights and requires many of the procedural guarantees of the American legislation, including the right to appropriate programs and services and to appeal processes for parents regarding special education placements and services

(Education Act, 1980; Keeton, 1982; Kimmins, Hunter & MacKay, 1985).

In Saskatchewan, both gifted and handicapped pupils, as they are defined in the Education Act (1983) and Regulations, are entitled to referral, evaluation and special programming, in their home division or in another division, or in a private setting, at public expense. Recognized high-cost disabled pupils (approximately the same as students with "low incidence" handicaps in Manitoba terms) are entitled to a special education program from the age of three years.

Parents/ guardians who disagree with either identification/ non-identification or placement/non-placement of a child are entitled to be heard by an Appeal Committee, whose decision is final (Education Act, 1983).

C. The Charter: Potential Impact

The issue of the unmet needs of exceptional children has received substantial attention in Canadian journals and other publications whose audience is 'special educators' and, to a lesser degree, by Canadian writers interested in the larger field of human rights and children's rights (Canadian Council on Children and Youth, 1978; McMurray, 1983). Only in post-Constitutional writing has attention

come to focus on educational rights and upon legislatures and courts, rather than upon individual principals, superintendents and school boards, as potential instruments for those rights.

Several Canadian commentators in the fields of law and education have noted that, unlike in the United States, education has never been a particularly litigious area in this country.

David Cruickshank wrote that, despite extensive provincial statutory involvement with education, the few cases of pre-Charter education litigation to date have been directed to issues of personnel and financial responsibility (Cruickshank, 1986). At this writing no cases relating to denial of educational equality rights on the bases of physical or mental disability under the Charter have been reported.

By contrast, one American writer notes that there were 729 federal court decisions between 1956 and 1966, a seven-fold increase over the number in the preceding decade, and that from 1966-1970 there were 1200 more.(Wise, 1986, p. 212). Ysseldyke and Algozzine wrote that in the United States, educators today are "as much concerned with litigation and with legislation as with education." (Ysseldyke & Algozzine,1982, p. 212).

The Activist Interpretation

Michael Manley-Casimir and Terri Sussel, co-authors of several articles and co-editors of Courts in the Classroom: Education and the Charter of Rights and Freedoms, and A. Wayne MacKay, professor of law at Dalhousie University and author of numerous articles as well as Education Law In Canada, are among writers who predicted an increasingly activist role both for provincial courts and for the Supreme Court in the field of education, including establishment of rights for the handicapped, as a consequence of the Charter of Rights and Freedoms.

Sussel and Manley-Casimir compared the 'equality rights' section of the Charter to the U.S. Supreme Court decision in Brown v. Board of Education.

> Just as the school desegregation decision of Brown v. Board of Education fundamentally revised the structure of public education in the U.S., judicial decisions of the Canadian Supreme Court may profoundly change the various structures of public education across Canada, when policy or practice fails to satisfy the constitutionally protected interests of individuals or groups (Sussel & Manley-Casimir, 1986, p. 226).

MacKay, writing in 1984 before the equality sections of the Charter came into effect, identified as some of the areas potentially impacted by "equality" guarantees Provincial statutes or regulations which are either silent

or contradictory as regards entitlements, and procedures for student assessment, classification and placement.

In a later article MacKay suggested, in the context of an analysis of the construction of the Constitution and the Charter, that "equality rights" is a broader heading than non-discrimination and that judges in cases involving educational rights might be mandated not only to assure non-discrimination but to require programs to produce either real equality of opportunity or equality of outcomes. He argues for the latter.

He suggested a two-step process for considering adjudication under Section 15 of the Charter: first, determination that a statute or a situation constitutes a violation; and second, determination that a violation does or does not meet the test of reasonable limits established in section 1. "One aspect of s. 1 which is quite clear," he writes, "is that the burden of justifying a Charter violation rests with the agents of the State. In the field of education, that means the departments of education, school boards, administrators and teachers." (MacKay, 1986b, p.304).

The Cautious Interpretation

Judith Anderson, Director of Legal Services for the Alberta School Trustees' Association, and David

Cruickshank, Research Director of British Columbia Continuing Legal Education Society, are among those writers who make fairly cautious predictions regarding the potential impact of the Charter of Rights and Freedoms on educational rights of exceptional children.

Anderson, in a 1986 article predicted that "the constitutional status of "individual rights" in Canada will probably not result in the same extent of litigation as the American experience, but it is possible that a balance between the European and the U.S. experiences will influence our judiciary over the next several decades." (Anderson,1986, p. 183).

Her discussion of possible areas of impact, such as religious instruction and patriotic exercises, minority languages, corporal punishment, and suspension and expulsion, did not even address the Charter's impact on legislation relative to exceptional children, except indirectly in relation to right to education or to schooling, terms which she used synonymously.

Regarding the 'right to schooling' issue, Anderson says:

1. Although the U.S. Supreme Court has not recognized a constitutional right to education, some U.S. lower courts have recognized a right to attend school.

2. The "right to an education" is specifically guaranteed by the European Convention on Human Rights to which Canada is a signatory.

3. Canadian provincial legislation, without exception, guarantees a right to attend school, within age limits which differ from Province to Province.

4. Saskatchewan and Quebec have also provided for the right to an education in their human rights legislation, in more extensive fashion than education legislation which provides for the right to attend school.

She predicted that the Charter's "liberty" guarantee in Section 7, coupled with "equal benefit" provisions in Section 15, provide the potential basic right to receive an education, that courts would not likely view the exclusion from public schools solely on the basis of age as a "reasonable limit", and that human rights statutes offer more potential for assertion of rights regarding the kind of education provided than does the Constitutional "liberty" right.

In an earlier paper presented to a Manitoba Association of School Trustees workshop, she identified Section 15 as the relevant Constitutional section when special education claims are to be made (Anderson, 1985). She suggested that Section 15 could be used to support

limits on a school jurisdiction's traditional right to choose the type of program which a child receives, and that Section 15 might be interpreted to require that an appropriate education be provided to all children.

Cruickshank in 1983 examined four major legal approaches to development of the legal right to education:

1. Case law interpretation of existing statements in provincial Education Acts;

2. An express legislative statement of the right to education in provincial Education Acts;

3 An expressly legislated right to education in a provincial Human Rights Act;

4. A right to education developed under the "equality rights" in the new Canadian Charter of Rights and Freedoms.

Regarding establishment of equality rights under the Charter, he said:

1. Provincial Education statutes will have to meet the Charter's requirements, and even though they may not discriminate in their wording they are vulnerable to challenge if they produce inequality in their application.

2. Courts are likely to focus on the requirement to provide equality of opportunity, rather than equality of results, and hence may allow Provincial legislatures to

treat different classes of children differently, as long as that classification is reasonable.

3. Special education programs, since they are designed to ameliorate the condition of disadvantaged groups, may be outside of the Provisions of Section 15 (1).

Cruickshank made a final point that the importance of equality rights is that they do not rely on a prior finding of a legal right to an education. If an education statute provides any "protection " or "benefit" to anyone, it must be delivered on an equal basis to disabled and non-disabled.

Like Anderson, Cruickshank favored use of human rights rather than education statutes as the place to declare a right to education. "...there is little justification," he said, "for splintering the fundamental right to education into a bundle of special interest rights. Compulsory education is touted as universal; the approach to rights should be the same." (Cruickshank, 1983, p. 212).

In a 1986 discussion of Charter equality rights, Cruickshank enumerated possible situations in which Section 15 might be the basis of an effective challenge:

1. A disabled child is excluded from education programs altogether.

2. Per capita funds are not allocated to a disabled child on an equal basis.

3. A building or a part of a building is not accessible to a physically handicapped child.

4. The Education statute provides no due process or fair procedures regarding assessment and placement decisions (Cruickshank, 1986, pp. 66-68).

Interestingly, Cruickshank identified Manitoba as the only province whose education statute provides a right to education. He wrote that Ontario and Saskatchewan provide for regular school instruction or alternative programs, but that the "right" is dependent on the will of the Minister, and that other provinces only provide for the right to attend school.

D. Excellence and/or Equity

Tension between dedication to educational excellence and concern for educational equity has been present from the establishment of free, public compulsory school systems in both the United States and Canada.

Proponents in both countries of the 'general education initiative', who are presently calling for the merger of special and regular education systems into one, are in effect representing a synthesis of both points of view.

Separate systems of largely segregated and homogeneous classes for 'regular' and 'special' students have been criticized since the 1930's for both ethical and empirical reasons - both for their failure to provide equitable treatment and for their failure to do the job.

In post-World War II United States, a buoyant economy and exploding baby-boom school enrollments allowed the education system to try to accommodate both sets of values, rather than seeing them in conflict or perceiving a necessity to choose between them.

Equity

Concerns for equity for racial minorities and the culturally/economically disadvantaged fueled efforts such as Project Head-Start and other war-on-poverty programs from the late 1950's to the early 1970's (Bogdan & Biklen, 1977).

Concerns for educational equity were primarily focused on the rights of racial minorities and led to the 1954 Brown decision, one of the first wide-scale judicial intrusions into the American educational system. The decision said, in part:

> In these days it is doubtful that any child may reasonably be expected to succeed in life if he is

> denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms. (Brown v. Board of Education, 1954, p. 691).

The import of the Brown decision, with its finding that separate but equal was inherently unequal and therefore unacceptable, and of the strategies of the civil rights movement which had led both to this Supreme Court pronouncement and to later civil rights legislation, were not lost on advocates of rights for the handicapped (Lazerson, 1983; Gartner & Lipsky, 1987).

In 1977 public schools in the United States began implementation of PL 94-142. The Education for All Handicapped Children Act (EHA), approved by Congress and signed by President Gerald Ford in 1975, marked the culmination of at least two decades of efforts by individual parents and by organized advocacy groups to plead, cajole, pressure, negotiate, maneuver, litigate and finally to legislate their way into assurance of access to educational services for children with educational, developmental, physical or mental handicaps.

All children, regardless of severity of handicap, were henceforth entitled to the same educational rights and privileges as their non-handicapped peers -- a free,

appropriate public education (Chambers & Hartman, 1983; Turnbull & Fiedler, 1984; Singer & Butler, 1987).

During the 1985-86 school year, 4.37 million children received services under the provisions of P.L. 94-142, over 650,000 more students than those served in the year of the law's enactment (U.S. Department of Education, 1987, p. 3).

The 1986 Congressional revision to P.L. 94-142, re-enacted as P.L. 99-457, includes provisions to extend services to children from ages 3-5 and provides incentives for States to make such services available to children from birth to the age of 2.

Further analysis of the historical development of special education services is provided by Csapo (1980, 1983) Chambers & Hartman (1983) Tweedie, (1983) McCarthy & Deignan (n.d.) and Stainback & Stainback, (1985).

Analyses of the specific issues litigated, before and after the 1975 legislation, can be found, among other sources, in Ysseldyke & Algozzine (1982), Prasse & Reschly (1986) and Taylor, Tucker & Galagan (1986).

Excellence

While some advocates and educational planners in organizations such as the Council for Exceptional Children and civil rights groups addressed issues of educational

equity for minority and handicapped students, others, in the context of post-Sputnik anxieties about competitiveness and of the release of the Conant Report in 1959, focussed on concerns for excellence, and the capacity of the American public school system to produce winners and achievers.

The early 1980's produced a group of "excellence" Reports critiquing the state of American education. These included, among others, Boyer's High School: A Report on Secondary Education in America, Goodlad's A Place Called School, the National Commission on Excellence in Education's A Nation at Risk, and Sizer's Horace's Compromise: The Dilemma of the American High School.

The 'excellence' Reports also generated discussion on the relationship, or lack thereof, between regular and special education systems. Pugach & Sapon-Shevin (1987) discussed four of the Reports with regard to their treatment, or non-treatment, of special education. The authors commented that Goodlad's and Boyer's Reports demonstrate sensitivity to tracking and grouping issues, and that all of the Reports discuss the meeting of individual needs, teacher training and the role of specialists, but that none explicitly relate these to the existence or interaction of two different systems

The authors observed:

> Failing to clarify the interface between general and special education means that any reform that does occur as a result of the excellence reports has the potential either to bypass entirely the special education system as it now operates or, worse yet, to destroy some of the tenuous progress that has been made in special education to date (Pugach & Sapon-Shevin, p. 299).

Similar concerns about the implications of non-inclusion of special education in the Reports were voiced by the Council for Exceptional Children (1984), Lilly (1987) and Shepard (1987) in reviews of the same major Reports, and by Sapon-Shevin (1987) in an examination of the implications for students of two less well known documents, the Heritage Foundation Report and Barriers to Excellence: Our Children at Risk, by the National Coalition of Advocates for Students. Pugach discussed the implications of the Reports for teacher preparation programs, and suggested that a likely explanation for the non-reference to special education is that it is "...perceived as a separate, parallel enterprise that is only distantly related to general education." (Pugach, 1987, p. 313).

Thus, the "merger' position isn't new, nor has it surfaced only in the wake of the landmark American

legislation. Rather, it has been a consistent thread through the professional literature. In an oft-quoted 1968 essay, Lloyd Dunn spoke for many writers who came before and after him:

> In my view, much of our past and present practices are morally and educationally wrong. We have been living at the mercy of general educators who referred their problem children to us. And we have been generally ill-prepared and ineffective in educating these children.(Dunn, 1968).

Nearly 20 years later Madeline Will, Assistant Secretary for the Office of Special Education and Rehabilitative Services, U.S. Department of Education, identified the continued existence of dual educational systems, each with its own pupils, teachers, administrators and funding systems, as a barrier to further progress (Will, 1984, 1986).

Among many others, proposals for restructuring have been made in relation to the issue of eligibility for services (Meyen & Moran, 1979; Gerber, 1984; Hagerty & Abramson, 1987); to the school effectiveness literature (Hobbs, 1979; Edgar & Hayden, 1984-1985; Goodman, 1985; Bickel & Bickel, 1986; Morsink, Soar, Soar & Thomas, 1986); to ethical appropriateness (Stainback & Stainback, 1984; Stainback, Stainback, Courtnage & Jaben, 1985; Martin,

1986); to empirical results (Kaufman, Agard & Semmel, 1985; Wang & Baker, 1984-1985; Wang, 1987); to implementation issues (Will, 1986; Reynolds, Wang & Walberg, 1986); and from the perspectives of the school administrator (Herda, 1980; Sage & Burrello, 1986).

E. Aspects Not Addressed in Current Literature

Thomas, writing about the importance of well-functioning interdisciplinary teams in offering supports to special education students, noted:

> Canadians indeed appear to have considered it their national heritage to apply models taken from other countries generally a number of years after the event but in exactly the same form that such models were originally applied, refusing to benefit from the changes which have subsequently been found to be necessary in the country of origin. Such a lack of discernment appears to be the case when models of educational practice are adopted from province to province, district to district, school to school or classroom to classroom (Thomas, 1982, pp.143-144).

This observation seems nowhere so relevant as in the issue of accommodation of exceptional children in public schools. Expectations of both parents and professionals have been strongly influenced by educational developments in the United States, a country whose written constitutional guarantees of certain rights for all citizens supports a strong national presence in the governance and financing of education at state and local

levels, and whose political culture ensures at least a general awareness of rights and the means for enforcing them on the part of the citizenry.

The model for the education of exceptional children which developed from this context is highly centralized, with explicit procedures for identification and assessment of student needs and for ensuring accountability on the part of those whose job it is to meet those needs.

Successful application of this model in a province such as Manitoba, with its strong tradition of decentralized educational governance and "local autonomy", will require more than mandatory legislation or steadily increasing Provincial financial support.

This review will conclude with brief consideration of two aspects of special education reform in which discussion with specific reference to Manitoba is sketchy or non-existent.

Charter Impact on Legislation in Manitoba

Two discussion papers directly address this issue, one an internal document by Manitoba Education titled The Charter of Rights and Education in Manitoba (1986), the other a submission by the Manitoba Teachers' Society to

then Minister of Education the Honourable Jerry Storie (Manitoba teachers' Society, 1987b).

The Manitoba Education document begins from the premise that the implications of The Charter will be significant, that present statute law already infringes on Charter rights, and that substantive legislative re-drafting is in order. The report devotes six of 44 pages to special needs education, speculating on the likelihood that segregated educational placements may infringe The Charter, and suggesting revisions to the Act to require a guarantee of "appropriate" education and procedures for student referral and assessment and parent appeals similar to those in place in Ontario (Manitoba Education, 1986, pp.16-21).

The Manitoba Teachers' Society submission also identifies statutory provisions and administrative practices which may infringe The Charter, provides side-by-side comparisons of various aspects of "right-to-education' provided by educational statutes in the provinces of Manitoba, Saskatchewan and Ontario, and suggests grounds on which parents and/or advocacy groups are likely to bring action on grounds of denial of equal benefit and protection under the law.

Neither study addresses questions of the changes required in the operation of Child Care and Development Branch, the section of Manitoba Education which provides clinical and consultative services to school divisions outside of the Winnipeg area, or to existing Divisional policies and practices, in order to implement suggested changes. There is to the author's knowledge no document which analyzes policies of Manitoba school divisions in key areas relating to exceptional children.

Least Restrictive Environment Placement

Placement of exceptional students in the least restrictive environment (LRE), that is, in a regular classroom placement with appropriate supports unless an appropriate education cannot be provided in that setting, is not mandated in Manitoba or in Ontario. Nevertheless, it is the placement of choice for many professionals and for many parents, especially for mildly handicapped children.

The pattern of placement practices in Manitoba school divisions is somewhat contradictory. One the one hand, as noted above, a 1983 Ministerial directive supporting LRE placements has not been rescinded by subsequent Ministers, and a telephone survey of urban special education

coordinators indicated it was the preferred model. Of 49 Divisions which reported exceptional program enrollment in 1983, 26 reported a decline from 1983 to 1987.(Manitoba teachers' Society, 1988a) (In the FRAME nomenclature, "exceptional" refers to students who are in special education classes for at least 50 per cent of their instructional time (Manitoba Education, 1982, pp. 5.7 and 16.2).

On the other hand, the other 22 of those 49 Divisions reporting indicated that their exceptional program enrollments had increased, and the overall provincial enrollment in segregated classes was 8.4% higher in 1987 than in 1983.

This appears consistent with finding reported in Ten Years Later, a study by the Manitoba Teachers' Society done for the tenth anniversary of Bill 58, comprising some 1600 pages of data provided via surveys of special education teachers detailing various aspects of special education program delivery. In Ten Years Later 72% of special education teachers reported that they taught completely self-contained classes, and 75% said that their students received instruction only with other special education students. Teachers identified as impediments to integration high pupil-teacher ratios, lack of

receptiveness from regular classroom teachers, and a shortage of teacher aides, administrative support and individualized programming (Manitoba Teachers' Society, 1985, p. 49).

A study titled Study of Mainstreaming in Select Manitoba School Divisions (Manitoba Education, 1988) studied the perceptions of teachers, resource teachers, principals and other personnel in five Manitoba divisions regarding effects of mainstreamed students in regular classes. Curiously, the study focused on Low Incidence students (those with very severe handicaps) although most existing data on mainstreaming deals with the mildly handicapped who are seen to comprise 75% of the clients of special education (Reynolds, Wang & Walberg, 1987).

To the writer's knowledge Manitoba Education maintains no regular monitoring of policies and practices regarding placement in various Divisions, and collects no data other than that reported in budget submissions by Divisions.

Because Divisions report information on exceptional children in the form of numbers of students approved for funding in various Low Incidence categories, and in numbers registered in self-contained classes, it is not possible presently to make accurate statements about the pattern of placements relative to kind of exceptionality, or about

changes in those patterns induced by parental demands, by changing enrollment patterns or by funding models.

F. Conclusion:

Developments currently underway in Manitoba in the meeting of special education needs of students reflect developments in the United States and in other Canadian provinces. Even in the absence of prescriptive Provincial legislation the focus has both narrowed, to concentrate on techniques to meet educational needs of a diverse base of exceptional students, and broadened to address issues of the merging of regular and special education systems.

Educators and planners in Manitoba have the opportunity to learn from both successes and failures in the United States and in other Canadian provinces, in identifying key elements of programming which should be delivered, with or without statutory mandate, in order to meet special education needs of Manitoba students in a period of potentially expanding legal expectations and of potentially contracting provincial financial resources.

As Wayne MacKay has suggested:

> The Courts should not be seen as the enemy but rather as a new partner in the educational enterprise. If there is danger of introducing too much legalism into education, the best way to avoid it is for educators

to attempt to put their own houses into order. If school boards, school administrators and teachers evoke a plan for implementing equality in the schools, the courts are less likely to interfere. The first step is for educators to become educated about the equality provisions of the Charter and their implications for school policy. It will be a long but interesting journey. (MacKay, 1986b, p. 293).

Part III. Procedures / Organization

A. Research Procedures & Timelines

August, 1988 - January 1989

Review of relevant research using sources available in Manitoba, including: (a) education statutes and regulations; .(b).professional journals and texts and publications by American and Canadian governmental and other official bodies; (c) implementation studies conducted in American and Canadian jurisdictions; (d) present policies in selected Manitoba school divisions;(e) interviews with key individuals.

February - March 1989. On-site research, interviews and visitations in selected areas of Manitoba, and Ontario, and possibly Saskatchewan and Minnesota. Minnesota provides a potentially useful comparison because its population distribution, like Manitoba's, is roughly half in one urban area and half widely distributed in rural areas.

April-June 1989. Completion of thesis.

B .Projected Organization of the Thesis

I. Historical Development of Special Education.

A. Brief survey of developments in the United States.

B. Detailed survey of developments in Canada.

II. Historical Development of Special Education

A. Detailed survey of developments in Manitoba, from 1916 to 1988.

III. Current legal status of exceptional children

A. In Manitoba.

B. In British Columbia, Alberta, Saskatchewan, Ontario.

IV. Current policies and practices.

A. Divisional Policy Manuals

V. Vulnerability of Manitoba educational legislation, policies and practices to Charter action.

A. Review of relevant Canadian pre-Charter case law.

B. Review of relevant Canadian post-Charter case law.

C. Review of opinions of Canadian legal and educational authorities on possible application of the Charter of Rights.

VI. Proposed amendments to Manitoba Public Schools Act, incorporating in part:

A. Recommendations of Ministerial Special Education Advisory Committee Report, 1988.

B. Recommendations of Manitoba Education Parent Participation discussion paper, 1988.

C. Elements of American and Ontario legislation most likely to be demanded by various professional and advocacy organizations or seen to be required for adherence to guarantees under the Charter of Rights and Freedoms.

IV. Historical Development of Special Education Services: United States and Canada

Introduction

The term 'special education reform' has a different focus in Canada than is the case in the United States, and this difference is partially reflected in the preoccupations of those writing in the professional literature of the two countries.

In the United States, civil rights to due process and to equal protection ensured by various Constitutional amendments, and the extensive federal role in regulating and financing education which has developed as a consequence of those guaranteed rights, have converged to ensure, in law, educational services to exceptional children on the same basis as their non-handicapped peers (Singer & Butler, 1987).

The battle for legal recognition of the entitlement of exceptional children to services through the public system was largely won, and on a national basis, with the 1975 approval by the U.S. Congress of The Education for All Handicapped Children Act (EHA). Attention in many quarters

has subsequently shifted to definition of the parameters of that entitlement and of legal guarantees of appropriate programming, as well as to accommodating concern for meeting individual educational needs with broader concerns for the 'regular education initiative," a model which visualizes a central educational system responsible for meeting differential needs of all children (Will, 1986).

In Canada, regulation and financing of elementary and secondary education are in general solely Provincial responsibilities, as established by the Constitution Act of 1867. There is no guaranteed right to education and prior to coming into force in 1985 of the Equality section of the Charter of Rights and Freedoms, no national standard against which to measure exercise of Provincial obligations regarding education for children with exceptional learning needs. In this country special education advocates, whether individual parents or members of advocacy organizations, still must work school by school, division by division, province by province, with few exceptions, whether to acquire services for exceptional children on an ad hoc basis or to achieve statutory recognition of the existence of exceptional children, of their rights to

public education, and of the specific parameters of those rights (Keeton, 1979-80; Poirier, Goguen & Leslie, 1988; Smith, 1980, 1981).

The potential influence of the Charter of Rights and Freedoms on educational rights for exceptional children, while clearly influencing some Provincial legislation (Hodder, 1984) has not been directly tested to date in Canadian courts (MacKay, 1987b; Manley-Casimir & Sussel, 1986b).

This chapter will trace the development in the United States and in Canada of educational services for children with exceptional needs.

A. Special Education in the United States

As noted, there are some significant differences and significant similarities in the approaches of American and Canadian educational systems to meeting the needs of exceptional children. The differences reflect the divergent attitudes toward education as a whole in the two jurisdictions.

Within Canada a traditional, European view rather than a revolutionar, democratic one prevailed during the 19th

century. Education was widely seen as a privilege made available to those persons who by virtue of class or station would be most deserving and likely to benefit. As well, Canada sustained a rural, agrarian base for longer than its southern neighbor, and hence sustained reliance on family and charitable organization to assume responsibility for "unfortunates" for longer than did U.S. citizens.

Within the U.S. education was considered a commonly-held entitlement for those considered properly enfranchised citizens. To a greater degree than was true in this country, an educated populace was seen in the 19th cenyury United States as required to sustain the revolutionary momentum of the new republic, although certainly considerations of class, gender, nationality and race were influential in granting admission to the first rung of the 'great equalizer.' .

Within Canada a more European view prevailed. Education was more widely seen as a privilege made available to those persons who by virtue of class or station would be most deserving and likely to benefit. As well, Canada sustained a rural, agrarian base for longer than its southern neighbor, and hence sustained reliance on

family and charitable organization to assume responsibility for "unfortunates" for longer than did U.S. citizens.

It has been argued (Richardson, 1979) that the gradual accommodation of atypical or exceptional children into the American public school system reflects an historical model of school change characterized by three stages: first, a policy of exclusion is applied to children who are deemed ineducable or who deviate significantly from school norms; second, when the initial exclusion is succesfully challenged, or prohibited by law, students are accepted into school but with reduced or "special" status indicating less than full participation; third, special status within the institutions is abolished or dies out naturally, and the 'exceptional' are no longer considered different from regular students.

This is a useful framework within which to consider the American public school system's adaptive responses to public expectations that it facilitate achievement at the highest possible levels for competent students (excellemce) while simultaneously meeting individual needs of low-achieving students,usually poor and minority children (equity).

Beginnings: 1890 - 1920.

Since the public school system enlarged its focus in the late 19th century to try to include all children, rather than a select few, it has had to accommodate the fact that both intelligence and achievement appear to be normally distributed constructs in any population The larger and more diverse the school population, the greater is the disparity between highest and lowest, between best and worst (Lazerson, 1983).

After enrollment increased dramatically in U.S. public schools following introduction and enforcement of compulsory attendance around the turn of this century, the presence of large numbers of under-achieving children posed both a management and an economic dilemma for educators and public policy-makers. One obvious solution, in addition to exclusion of the physically and mentally handicapped, the truant and the difficult-to-manage from schooling, was wide-spread development of specialized classes, either in separate facilities or within public school buildings.

Lazerson notes that "in the decades before 1930, special education went from virtually non-existent to being

a subsystem within most large city school systems." (Lazerson, 1983, p. 27).

Many writers have noted that, in the public schools as in the larger society, humanitarian concerns for the welfare of the "different" - the physically or mentally disabled, the poor, or immigrant or non-English speaking person - has coexisted with racist assumptions and fears, and the need to structure and control these populations so as to protect the larger society (Hendrick & MacMillan, 1989; Lazerson, 1983; Sarason & Doris, 1979).

Before the 1900's, in an America whose population was dispersed and largely rural, with little investment in central governance, handicapped children received little public attention, other than the provision of largely residential state institutions for the deaf or blind or severely retarded. As with able-bodied children, their upbringing was regarded as primarily the responsibility of their parents, assisted perhaps by church. Only when parents were incapable was the community or the government seen to have a responsibility.

As well, in the early part of the 19th century only a minority of children attended even elementary grades of

school, and they were those whose parents were financially secure enough to afford both the school fees and the loss of the children's labor Few occupations required much literacy, and schooling was not seen as directly related to either employment or a "better job." Bowles and Gintis noted that in 1870, fewer than half of children under 17 years attended school, and that a school year averaged about three months (Bowles & Gintis, 1976).

Early 19th century education was intended to inculcate enough Protestantism to assure high standards of public and private morality and produce a sufficient level of literacy to allow (male, white, property-owning) citizens to function in a democratic republic whose pillars were already being shaken by rumblings of Jacksonian democracy.

As the population increased and began to urbanize, familiar topics came to dominate educational debate: ought boys and girls, and those of different classes or different races, to attend school together, or should they be in separate institutions? ought schooling to be publicly or privately financed; ought control to be centralized or localized? were professionals or parents better suited to

make decisions regarding curricula; what was the ultimate purpose of schooling? (Bowles & Gintis, 1976).

By the latter 19th century, the advocates of a common school held the day. The idea of a common school was that it would accommodate heterogeneous clientele, from urban and rural areas, from different racial, class and religious stock, and by presenting all with a common curriculum produce a citizenry with common values and respect for common virtues. In the 1890's the National Education Association's "Committee of Ten" published a document suggesting that all secondary students, regardless of whether college-bound, should be liberally educated and study foreign languages, math, history and sciences (Ravitch, 1983).

Lazerson noted that even in the beginning there was no smooth sailing, as issues of school control - "who is teaching what to my kids' - preoccupied Protestant and Catholic groups and ethnic groupings within the Catholic immigrant community, and as a coalition of blacks and abolitionists in Boston in the 1840's demanded racially integrated schools, a demand which they lost before the Massachusetts Supreme Court and won when the State

Legislature outlawed legally segregated schools in Massachusetts in 1855 (Lazerson, McLaughlin, McPherson & Bailey, 1985).

As urbanization, greatly increased immigration from non-Western European, non-Protestant countries, the shift from agricultural/artisan to a factory wage economy and the enactment of compulsory education statutes changed the parameters of people's daily lives, enrollment in both elementary and secondary education surged. By the mid-1880's school attendance was compulsory in North Atlantic, North Central and Western parts of the country (Richardson, 1979) and between 1890-1915, public day school enrollment increased 55%, average daily attendance increased 84%, the length of the school year increased by 18%, and the average number of days attended increased 40% (Lazerson, McLaughlin, McPherson & Bailey, 1985).

Schools were expected to manage not only vastly increased numbers of children, for a greater number of years, but very different kinds of children as well, students who were there because they were compelled to be there by school or child labor laws (Csapo, 1984), and large numbers of students who lived in extreme poverty,

spoke many languages other than English and did not come to school furnished with an understanding of the "American way."

As well, humanitarian reformers by this time had begun to complain about the custodial and/or abusive nature of public residential institutions for the handicapped, and public assumptions about the responsibility of the state for the care of physically and mentally handicapped children had begun to chang (Funk, 1987). Hence the school population was swelled by children with visible physical or mental handicaps, as well as with those who simply did not fit school norms for learning or behavior.

James Van Sickle, Superintendent of Baltimore Public Schools, wrote in 1909:

> Before attendance laws were effectively enforced there were as many of these special cases in the community as there are now; few of them, however, remained long enough in school to attract serious attention or to hinder the instruction of the more tractable and capable (Cited in Lazerson, 1983, p. 17).

These altered demands required a different kind of school, and the system responded with institutions that were more hierarchical, orderly, predictable and efficient. Age-graded classrooms and standardized curricula made it

clear when a child was behind others. With a class required to complete a set amount of work in a year, attendance became important.

With standards for success and failure becoming clearer, 'retardation' studies began, to examine with more precision which kinds of children succeeded in school, and which failed. The most well known, Ayers' Laggards in the Schools, reported in 1909 that 33.7% of all elementary school children were retarded in respect to grades, i.e., were more than two grades older than expected. Most were in the first two or three grades. In the country as a whole, one-sixth of students were repeaters, a fact Ayers noted was expensive and wasteful. He suggested that these kind of children needed "a different kind of teaching and a different kind of treatment from other children" (Lazerson, 1983, p. 19).

J.E.W. Wallin, in his 1925 The Education of Handicapped Children. wrote:

> In the regular grades the feeble-minded and subnormal represent, as it were, an unassimilable accumulation of human clinkers, ballast, driftwood or derelicts which seriously retards the rate of progress of the entire class and which often constitutes a positive irritant to the teacher and the other pupils (Cited in Lazerson, 1983, p. 23).

Coincident with the retardation studies was the popularization of Binet's scales, which first became available in France in 1905. The premise of Binet's and Simon's work was that average children achieve certain developmental stages in language, cognition and other skills at the same ages, and hence that it is possible to identify a scale of 'normal' achievement (MacMillan, 1982).

The instrument was originally designed to select out those students who were predicted not to do well in traditional schooling with a standard curriculum. Binet wrote that the scale "properly speaking, does not permit the measure of the intelligence, because intellectual qualities are not superposable, and therefore cannot be measured as linear surfaces are measured" (Lazerson, McLaughlin, McPherson & Bailey, 1985, p. 8).

Despite Binet's intentions, the scale became, in the hands of Henry Goddard, Director of the Vineland (New Jersey) Training School for the Handicapped, and Lewis Terman of Stanford University, the 'scientifically valid' instrument to identify mental defectives among the general population, and to provide justification for segregation of

students in schools into separate classes, for the protection of subnormals and the welfare of regular students.

In his 1916 revision of the Binet-Simon test, Terman introduced the concept of IQ or intelligence quotient, which identified the individual's brightness relative to that of others, rather than to mental age, which was the level of his functioning.

As it became possible to test various populations, it became clear that between those obviously normal and those obviously retarded were a large group of borderline individuals who could be accurately included in neither of the previous either-or categories. In 1910 the American Association on Mental Deficiency altered its classification system of mental retardation to include this group, which it called "morons."

Before the existence of universal, compulsory schooling and the application of intelligence scales to identify those who did not succeed in that context, this marginal group, largely able-bodied, of normal appearance and reasonable social competence, had been difficult to identify and to consider as a distinct grouping. They

would subsequently be labelled educable mentally retarded (EMR) as the public school system refined its classifications into program delivery streams.

Both Goddard's and Terman's depiction of retardation as a hereditary characteristic and the retarded as carriers of social malignancy are well known. The feeble-minded, they said, were responsible for disproportionate numbers of commitments to penitentiaries and reform schools, for chronic pauperism, and for much prostitution and the spread of social disease.

According to Terman, intelligence also followed racial lines:

> The intelligence of the average negro is vastly inferior to that of the average white man. The available data indicate that the average mulatto occupies about a mid-position between pure negro and pure white. The intelligence of the American Indian has also been overrated, for mental tests indicate that it is not greatly superior to that of the average negro. Our Mexican population, which is largely of Indian extraction, makes little if any better showing. The immigrants who have come to us in such large numbers from Southern and Southeastern Europe are distinctly inferior mentally to the Nordic and Alpine strains we have received from Scandinavia, Germany, Great Britain and France (Cited in Lazerson, McLaughlin, McPherson & Bailey, 1985, p. 23).

In 1917 Dickson, a student of Terman, used the Stanford-Binet scales to test 15% of Oakland, California

public school students. He found fewer than half making normal progress, with poor achievement concentrated in immigrant districts. He reported that these students had 'inherent mental tendencies that make the ordinary course of study either impossible or impractical." Unless these students were placed in special classes they risked "loss of interest, loss of self-respect or a resort to subterfuge," and the attendant "social unrest, sham and the I.W.W. spirit" (Cited in Lazerson, 1983, p. 29.).

The IQ test, with its veneer of objectivity and scientific validity, was in the right place at the right time. Lazerson cites the words of Wallace Wallin:

> The widespread employment of these(IQ) tests...whatever their imperfections, had indubitably done more than anything else to promote the organization for special classes and the introduction of differentiated courses of instruction in the public schools (Lazerson, 1983, p. 30.).

By 1939, no fewer than 4,279 mental tests were in use. A survey of 150 school systems in 1931 indicated that 75% of them were using "intelligence" tests to assign students to curriculum tracks (Bowles & Gintis, 1976, p. 196).

Development of separate programs for 'human derelicts' was made easier by two other factors. Public high schools had begun to become mass institutions, enrolling more and

more students and extending the selection imperative by making a closer connection between schooling and vocational futures. The labor movement's opposition to federally supported vocational education was overcome, although it's opposition to housing vocational and academic students in separate buildings won the day (Bowles & Gintis, 1976).

The other factor was the gradual demise of the "common school" idea, allowing introduction of different curricula and 'tracks' into elementary schools under the guise of the 'children's interests.' Quotations from superintendents in Boston and Cleveland school systems will illustrate this approach.

> Until very recently (the schools) have offered equal opportunity for all to receive *one kind* of education, but what will make them democratic is to provide opportunity for all to receive such education as will fit them *equally well* for their particular life work.
>
> It is obvious that the educational needs of children in a district where the streets are well paved and clean, where the homes are spacious and surrounded by lawns and trees, where the language of the child's playfellows is pure, and where life in general is permeated with the spirit and ideals of America - it is obvious that the educational needs of such a child are radically different from those of the child who lives in a foreign and tenement section (Bowles & Gintis, 1976, pp. 191-192).

Consolidation: 1920 - 1945

Arguments for provision of special education thus represented a convergence of many ideas: humanitarian concerns for the welfare of the less fortunate, mistrust of those who were different, concern to facilitate school success for the 'able' children by removing the distractions provided by the less able, fear of the mentally subnormal as carriers of social disease and of the unassimilated immigrants as harbingers of political unrest. Special education was also appealing because it was a logical extension of the curricular and organizational reforms of the progressive era spearheaded by John Dewey and his adherents.

Richardson has written a fascinating analysis of changes over time in U.S. Bureau of Education reports and the California Education Code which demonstrate a historical shift from race to behavior to health as the ostensible basis for classification and management of exceptional children.

A report from the U.S. Bureau of Education in 1911 describes three classification of pupils who are placed in separate classes in various regions of the country: Morally

Exceptional - those pupils who are delinquent, incorrigible or refractory; Mentally Exceptional - those pupils who are backward, mentally deficient and epileptic; Environmentally Exceptional - those pupils who are non-English speakers, late enterers or come from subnormal homes

Subsequent surveys in 1939-40, 1947-8 and 1957-8 did not use the term 'Environmentally Exceptional' at all, and most states reported decreases in students labelled truant or behaviorally disturbed and corresponding increases in mentally handicapped categories.

Richardson's analysis of changes in the California Education Code from 1870-1963 provides an even more graphic example of the shift in basis for exclusion from issues of health to racial and behavioral criteria. Beginning in 1873 the California Legislature identified for exclusion from white public schools children of African descent (1870), Indian children and "children from very poor families" (1874), children of Mongolian or Chinese descent and "children of filthy or vicious habits" (1885), children found "smoking on school grounds" (1919), students joining other than the one approved sorority or fraternity (1921),

children of "migratory laborers" (1925), Japanese children and children with "physical or mental disability" (1929).

In 1947 the arbitrariness of racial classification was challenged, although not on the basis of the unconstitutionality of racial exclusion but on the basis that the specified categories did not apply to Mexican-American children and so they ought not to be excluded. The Legislature removed the separation of races clause from the Education Code in 1947. In the same year, the Legislature formally authorized creation of classes for "mentally exceptional" children, many of whom had formerly been separated in ungraded classes, and subsequently authorized classes for the "trainable retarded" and the "educationally handicapped." All references to race, class or 'filthy habits' are gone from the Code (Richardson, 1979).

Lazerson noted that, although data on exact enrollments is imprecise, by 1910 urban school superintendents were routinely reporting on their provisions for handicapped children. By the 1930's special education had developed from a few classes to a subsystem within most large systems. Nationally, between 1922-1932

the number of students enrolled in public school special education programs went from 26,000 to 162,000, from 0.1% to 0.6% of kindergarten-Grade 12 enrollment (Lazerson, 1983, pp. 27-28).

Although many states still excluded handicapped children from regular schools and classrooms, leaving their education and care to their parents or various philanthropic groups, many other states enacted permissive or mandatory legislation regarding children with various specific handicapping conditions and provided financial assistance.

Criticism of the special education system began almost as soon as the system itself began to establish itself, both from those who complained that there wasn't enough of it and that many American children remained unserved by their schools, and from those who questioned the value of those special programs which did exist.

The report of the 1930 White House Committee on Child Health and Protection, for instance, estimated that of 10 million maladjusted children, only one million were receiving special education, and called for extension of

special education to more children, greater emphasis on early diagnosis and training, more modified curricula, an increase in vocational orientation and job follow-up, among other things. The same Committee also noted that, where special education was available, physical conditions and attitudes among professionals were often deplorable (Lazerson, 1983).

Over the next decade, economic restrictions induced by the Depression and World War II had the effect of drying up funds required to extend educational services for regular and special education alike, and more older students remained in school as minimum leaving ages were increased to prevent competition of high school leavers for scarce jobs (Ravitch, 1983).

From that same time period, Lazerson quoted a 1931 report from Philadelphia's Superintendent of Schools, commenting on the slowdown in special education growth caused by economic restraint: "Perhaps it as well that we are compelled for economic reasons to move slowly, because any treatment which requires segregation, whether of the dull or the brilliant, may cause errors of judgment which a lifetime will not correct" (Lazerson, 1983, pp. 34-35).

Post-War Reassessment: 1945 - 1970

While throughout this period access to public school education remained a goal for parents of children with a great range of handicaps, in the political climate of the 1960's and 1970's the question of overrepresentation of minority children in special education classes was to assume a high public and legal profile. The groundwork for that process was laid in the immediate post-war period, when several factors converged.

First was the passage of the Veteran's Readjustment Bill of 1944, known as the GI Bill of Rights. It was supported by veterans' organizations which lobbied for a good package of benefits, and planners who wanted to cushion economic distress and joblessness following demobilization, and opposed by distinguished educators of the status of Robert Hutchins and James Conant, who feared that the subsidized participation of so many in higher education would inevitably lead to deterioration of academic standards.

During the seven years benefits were available, 7.8 million used them to attend universities, colleges, high schools, trade schools and training programs, demonstrating

to educators that higher education should not be reserved for the children of the well-to-do and well-connected and beginning to create public acceptance of an expanded federal role in education (Ravitch, 1983).

The second factor was demographic, as the baby boom and post-war immigration boosted enrollment in a school system already under-developed and under-maintained as a result of Depression-related financial strictures. Special education expanded accordingly.

Between 1948 and 1968, the number of children in public school special education went from 357,000 to 2,252,000, from 1.2% to 4.5% of Kindergarten-Grade 12 enrollment. By 1976 the figure was 3,837,000, or 7.7% of the total (Lazerson, 1983, p. 38).

Additional demographic pressures contributed to generating clients for special education, including improved medical technology which kept more handicapped children alive, the effects of thalidomide use and the epidemics of polio in the 1950's and rubella in the 1960's and the "discovery" of learning disabilities. All of these had the effect not only of straining the system but of highlighting discrepancies between available spaces and

expectation of parents that their children should be appropriately served within the public schools

Third, activists began to target the beginning of the end for institutionalized racism, as the experiences of a war fought against racism and the persecution of an underclass abroad highlighted for blacks and whites the necessity for changes at home.

A Presidential Committee on Higher Education, appointed by President Truman and reporting in 1947 and 1948, condemned the effects of racism on educational opportunity of black students in both segregated and non-segregated states and denounced the quota system which worked to restrict entry of blacks and Jews to higher education.

Truman's Committee on Civil Rights, reporting in 1947, detailed the severity of racism in the United States. It's findings on education noted that school segregation, enforced by law in 17 states and the District of Columbia, was unjust.

> Whatever test is used - expenditure per pupil, teacher salaries, the number of pupils per teacher, transportation of students, adequacy of school buildings and educational equipment, length of school terms, extent of curriculum - Negro students are

invariably at a disadvantage (Ravitch, 1983, pp. 20-22).

The U.S. Supreme Court's Plessy v. Ferguson decision in 1896 had sanctioned racial segregation as long as facilities available to the two races were equal. Diane Ravitch, in her 1983 work on the 1945-1980 period in American education, described the coordinated campaign against school segregation masterminded by the NAACP, beginning in the 1930's. It was designed to create a body of legal precedents which would undermine the validity of the "separate but equal" doctrine, and began with suits seeking admission of qualified blacks to public graduate and professional schools.

In a pre-war decision Missouri was ordered to admit a white student to the University of Missouri Law School, although the student did not subsequently enroll. In 1948 Oklahoma responded to a Supreme Court order to provide equivalent legal education for Negro applicants by setting up a makeshift school for Negroes rather than admit them to the all-white University of Oklahoma. In 1950 The University of Texas, to comply with the "separate but equal" mandate, opened a 'law school' with three part-time faculty, three classrooms and one black student. Also in

1950, a federal court ordered the University of Oklahoma to admit a black applicant to its graduate school of education. He was admitted but was segregated from other students, whether in the classroom, library or cafeteria.

With these precedents, lines were drawn. After several more years of similar litigation, the Supreme Court ruled unanimously in 1954, in the famous Brown v. Board of Topeka case, that state-imposed racial segregation in the public schools was unconstitutional. Chief Justice Warren said that education had become so important that "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, must be made available to all on equal terms." Even when physical facilities are equal, the Court said, minority children are deprived of equal educational opportunity if schools are segregated on purely racial lines. "In the field of education" the judgment said, "the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." (Ravitch, 1983, p. 127).

On another advocacy front, parents and organized groups, still confronted with the reality of public schools which continued to exclude many handicapped children, and provided poorly for many of those they professed to serve, were engaged in school by school, district by district, state by state battles to legitimize the presence of their children in the public schools, and their rights to appropriate programs once there.

The effect of the Brown decision and the obvious success of the civil rights strategy was not lost on advocates for rights of the handicapped. There was a growing realization that many of the issues raised through the civil rights movement identifying the ethical and legal "wrongfulness" of racial segregation were equally applicable to the handicapped. The importance of civil rights strategies to the subsequent legal and legislative victories for handicapped children has been widely noted (Gartner & Lipsky, 1987; Lazerson, 1983; Singer & Butler, 1987; Weintraub, Abeson, Ballard & LaVor, 1976).

Lazerson noted that "the issues of race raised more serious questions than simply the right of access to, and the quality of, special education programs: the ways in

which special education and race intersected raised doubts about the more general workings of the educational system and about the benificence of special education in the first place" (Lazerson, 1983, p. 40).

By this same time as well, the "efficacy" studies which preoccupied a generation of educational researchers during the 1950's and 1960's had accumulated a critical mass of findings which concluded that, in general, the benefits of special education placement were inconclusive at best regarding both academic and social outcomes for most of the mildly handicapped, who are estimated to comprise from 75% (Reynolds, Wang & Walberg, 1987) to 90% (Shepard, 1987) of the clients of special education. At worst,the benefits were arguably overshadowed by the negative effects of segregation and the necessity of operating dual educational systems (Carlberg & Kavale, 1980; Madden & Slavin, 1983).

Lloyd Dunn, in his oft-quoted 1968 speech, spoke for many of his colleagues, past and future, when he observed that 60-80% of the children then placed in the 32,000 classes for the mildly retarded were from 'low status' backgrounds and that this practice raised "serious

educational and civil rights issues which must be squarely faced. It is my thesis that we must stop labeling these deprived children as mentally retarded. Furthermore we must stop segregating them by placing them into our allegedly special programs." (Dunn, 1968).

Litigation and Legislation: The 1970's

By the early 1970s, a coalition of parents and professionals was challenging many of the assumptions, policies and practices of the special education system. For some the issue was exclusion from school altogether, or the poor quality of program provided within schools. To others, it appeared that the organizational structure which had excluded their children by race or class background from the public schools now worked to segregate them as effectively within their supposedly integrated schools. The stage was set to move beyond negotiation to litigation and legislation.

Litigation

As Reschly has noted, two types of litigation have exerted significant influence on the educational system's

development of services for handicapped children: the 'right to education' cases, generally initiated by parents of moderately and severely handicapped children who rejected their children's exclusion from schooling, and the overrepresentation cases, brought by parents who wanted less, not more special education for students whom the system also classified as retarded (Reschly, 1988b).

The first two substantive cases regarding exclusion of handicapped children from public schooling, generally referred to as PARC (Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania) and Mills (Mills v. Board of Education) were launched in 1971 and settled in 1972.

In PARC, the plaintiffs said that Pennsylvania's policy of "excusing" from school attendance any child judged by a school psychologist to be unable or profit from school attendance, or "ineducable," represented denial of equal protection, a 14th Amendment right, and that assignment of children to programs for the retarded, unless preceded by a notice and opportunity for a hearing, denied them due process of law.

PARC was settled by a consent decree, an agreement negotiated between plaintiffs and defendants and approved by the courts, rather than by a judicial ruling on the merits of the case.

The PARC decree mandated far-reaching changes in state and local district educational policy. It required that the state locate and identify all excluded children; that thorough medical and psychological evaluations be provided for previously excluded children and for children presently in classes for the retarded or recommended for such classes; that all children in special classes be re-evaluated every two years or whenever a change in program was planned; that all retarded children be placed in a "free public program of education and training appropriate to the child's capacity"; and that regular class placement was "preferable" to any other kind of program (Kirp, Buss & Kuriloff, 1974, pp. 58-60).

Mills was similar to PARC in that both sought to establish the principle that all children were entitled to publicly supported education and to procedural protections before placement in special programs. The plaintiffs in Mills, however, represented not just retarded children but

a much broader range, including children barred from school as "incorrigible" and students denied access to education because of physical, mental or emotional problems.

The court found in Mills that the constitutional right of equal access to publicly supported schooling had been established in earlier decisions, specifically Brown v Board of Education and Hobson v. Hansen, a 1967 case, dealing with educational tracking which took place, like Mills, in Washington, D.C., and that due process of law was required before children were excluded or terminated from school attendance or classified into a special program (Kirp, Buss & Kuriloff, 1974, pp. 82-84).

The two major court cases which related to minority overrepresentation in classes for the mentally retarded both occurred in California, and involved black (Larry P. v Riles) and Mexican-American (Diana v. State Board of Education) students.

Because the plaintiffs in Larry P. were able to demonstrate that practices, policies and procedures involved in assignment to special education classes contributed to the establishment of programs segregated

along racial lines, the precedents of Brown regarding "separate but equal" were relevant.

The first phase of Larry P. began in 1971, although the actual trial did not commence until October, 1977, and the judgment was not rendered until October, 1979. Plaintiffs (five black children) argued that they had been wrongfully placed in classes for the educable mentally retarded (EMR) in the San Francisco Unified School District on the basis of intelligence tests which were racially discriminatory and which thus violated plaintiffs' constitutional guarantees of equal protection.

Plaintiffs demonstrated that at that time blacks constituted 28.5% of all children in the school system, but 66% of the membership of EMR classes. Within the state of California, blacks represented 10% of the state's school population, but 25% of those children in the state's EMR classes.

Plaintiffs requested various forms of injunctive relief, including elimination culturally biased tests, mandated re-evaluation of all children then placed in EMR classes, and institution of a quota system based on the

percentage of blacks in the population. The injunction was granted in 1972 and upheld in 1974.

When the trial began, it lasted eight months and heard over 50 witnesses. The trial transcript eventually exceeded 10,000 pages. The Court ruled for the plaintiffs on both statutory and constitutional grounds, finding that the state had been engaged in purposeful discrimination demonstrating intent to segregate minority students into special education classes, which the Court described as 'dead end, isolated, sub-standard and stigmatizing." The Court also referred to "obvious and well documented irreparable harm that comes from misplacement into EMR classes..." (Prasse & Reschly, 1986).

The 1979 judgment in Larry P. was upheld on appeal in 1984 and an expanded order was issued in 1986, establishing a comprehensive ban on use of IQ tests on black students for any purpose and prohibiting school districts from even requesting permission to use IQ tests with black students (Reschly, 1988b, p. 268).

The Diana case was heard just before Larry P was filed, and by the same judge. Plaintiffs were nine Mexican-American children who alleged they were mistakenly

placed in EMR classes on the basis of intelligence tests which were invalid for Spanish-speaking children; that the quality of education in EMR classes is poor; and that children suffer irreparable harm from inadequate education and the stigma of the mentally retarded label. Diana was settled by a consent decree, in which the state of California undertook, among other things, to test children in their primary language, and to re-evaluate all Chinese-American and Mexican-American children then placed in EMR classes (MacMillan, 1982).

These cases, together with other less-publicized ones (Gilhool, 1976), constituted one important part of the reform movement's overall strategy. As Tweedie described it,

> Widespread right to education legislation, and the threat of even more, generated a "quiet revolution" in school boards, state legislatures, and the Congress. Litigation supplied the political leverage to gain comprehensive special education reform. Faced with expensive litigation and court-ordered programs drawing from already limited budgets, local and state school officials changed their own policies and supported state and federal reform legislation (Tweedie, 1983, p. 51).

Through favorable legal judgments or consent decrees the handicapped had acquired expanded rights, both

substantive and procedural. A study commissioned by the Bureau of Education for the Handicapped and conducted by the Council for Exceptional Children (CEC) indicated that by 1975 all but two states had adopted some form of mandatory legislation relative to handicapped children, and that 37 of the 48 states with mandatory legislation had adopted their legislation since 1970 (Abeson & Ballard, 1976, pp. 84-87). Federally, Congress passed 160 pieces of legislation dealing with the handicapped between 1970 and the 1975 passage of EHA (LaVor, 1976, pp. 109-111).

Strategists recognized, however, the limitations of the litigation tactic. They did not want to base reforms solely on the right to an education, since they were concerned about appellate and Supreme Court rejection of education for the handicapped as a constitutional right. Litigation consumed enormous resources of time, energy and money. Experience with the implementation of orders under PARC and Mills had proven that favorable court decision did not automatically improve the ability or willingness of school systems to change their previous practices. Finally, only substantial infusions of new funds could support improved programming, and for this, legislative

and, more importantly Congressional involvement was required (Tweedie, 1983).

Legislation

As noted above, traditional antipathy at the Congressional and state level to federal involvement in education had been eroded by several factors, including the successful implementation of the G.I. Bill of Rights following World War II, the failure of local and state revenue-generating capacities to keep pace with expanding demographic pressures on schools, and the massive re-adjustment in the school system necessitated by the 1954 Brown decision. Nonetheless, resistance remained, and the evolution of federal involvement was gradual.

Martin LaVor has traced the process by which initial assumption of public responsibility began at the state rather than federal level. In the 1820's and 1830's a few states established, and appropriated funds for, state residential schools for the deaf or the blind, and in the 1850's and 1860's, a few provided support for institutions or training programs for the retarded. In the 1860's and

1870's, the first day classes for children with various exceptionalities were begun in Boston and New York.

Federal funds were first provided in 1858 for the support of the institution which a century later became Gallaudet College in Washington. With few similar exceptions there was little more direct federal involvement until 1954, when the Cooperative Research Act, relating to education of the mentally retarded, was passed, representing initial Congressional awareness of the need for categorical aid for the handicapped. Two subsequent bills in 1958 established categorical aid relative to provision of materials for the deaf and training of personnel (Barbacovi & Clelland, n.d.).

In 1960 Congress passed the Elementary and Secondary Education Act (ESEA), the most substantial effort to date to provide federal support for K-12 education. ESEA, with its subsequent amendments, authorized support to states for the provision of educational services for the "educationally deprived" and the handicapped; established the National Advisory Committee on Handicapped Children; established the Bureau of Education for the Handicapped in the Office of Education with a mandate to administer all

Office of Education programs for the handicapped; supported development of preschool and early education programs for the handicapped; and accelerated recruitment of special education personnel.

In September 1973, following presidential veto of two previous versions of the bill, Congress passed P.L. 93-112, the Vocational Rehabilitation Amendments of 1973, authorizing the U.S. Secretary of Health, Education and Welfare to cut off all HEW funds going to a state or locality which was judged to be in non-compliance with Section 504, which said:

> No otherwise qualified handicapped individual in the United States shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance (Ballard, n.d.).

Subsequently, the Education Amendments of 1974, P.L. 93-380, greatly increased the federal funding commitment; extended procedural guarantees for due process, parental involvement and Least Restrictive Environment (LRE) placement; and required states to file detailed plans and timelines for achieving the goal of full educational opportunities for all handicapped children.

Finally, after many decades of negotiation and public relations, nearly a decade of litigation, enactment of mandatory legislation by most state legislatures and provision of capacity-building financial and programming mandates at the federal level, and three years of hearings conducted by both Chambers of the Congress, on November 29, 1975, President Gerald Ford signed into law P.L. 94-142, the Education for All Handicapped Children Act.

EHA is described by one of its authors as "the clearest expression by government of the rights and expectations of persons with disabilities in law." (Walker, 1987, p. 97). The Act said its purpose was to "assure that all handicapped children have available to them...a free, appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist states and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children."

States were required under EHA to provide special education services to all children ages 5 to 18, and they

were permitted to extend services with full federal support to the 3-to-5 year and 18-to-21 year group. P.L. 99-457, the EHA amendments passed in 1986, makes services mandatory for all children from 3 to 21 by 1990-1991, and provides incentive grants for provision of services for handicapped children from birth to three years of age.

Canada: Beginnings

It has been widely noted that the social and legal structures which Canadians employ to provide for children's needs, and the approaches of those who advocate changes in those structures, are reflective of the differences in social and political culture between the two countries. One difference springs directly from the revolutionary beginnings of the United States, whose founding fathers wished a distinct break with previous forms of social order and of government. The American dedication to "life, liberty and the pursuit of happiness" is expressed as a Canadian commitment to "peace, order and good government," reflecting the concerns of Canadian 'founding fathers.' Written Constitutional guarantees of rights and the procedures for securing those rights gave to Americans both

a set of abstract assumptions about their relationship to the social system and a tangible set of tools to impact the system, while the Canadian tradition has been one of deference to authority and the preservation of existing institutions and traditions (Gaffield & West, 1978; MacKay, 1987b).

A second relevant difference in national development with relevance to education is that Canada has not the same experience of legal racism. For instance, although this country's historical and current maltreatment of its aboriginal people is well documented, as are present-day difficulties in assimilating racial minorities into the Canadian mosaic, Canadians have less history of de jure exclusion on the basis of race from public schools or public facilities, than was the case in the United States. Thus Canada has at the same time been spared some of the more blatant examples of legal and political discrimination and the strong tradition of civil rights activity which grew up in response to that discrimination and which contributed so significantly to the inspiration and to the strategies of the movement which advocated for legal affirmation of the rights of exceptional children.

Arguably, it is even more insidious that the de facto segregation along lines of class and race which has existed and exists today in Canadian public schools has developed and been maintained without the legal sanctions required in the United States.

It is clear from reading the words of influential early Canadian figures that many held views toward the educational process similar to their American colleagues, viewing it as, if not the great equalizer, at the least as the great civilizer. Definitions as to what constituted 'civilization' tended to be highly circumscribed.

Admittance Restricted, the 1978 report of the Canadian Council on Children and Youth quotes Egerton Ryerson, the architect of public education in the Province of Ontario, writing in the 1840's:

> The physical disease and death which has accompanied their (the poor) influx among us may be a precursor to the worst pestilence of social insubordination and disorder. It is therefore of the last importance that every possible effort be employed to bring the facilities of education within the reach of the families of these unfortunate people, that they may grow up in the industry and intelligence of the country, and not in the idleness and pauperism, not to say mendacity and vice, of their forefathers (Canadian Council on Children and Youth, 1978, p. 105).

The same publication quotes then Superintendent of Indian Affairs Hayter Reed, writing in the Department's 1893 Annual Report:

> Experience has proved that industrial and boarding schools are productive of the best results in Indian education. At the ordinary day school the children are under the influence of their teacher for only a short time each day and after school hours they merge again with the life of the reserve...But in the boarding or industrial schools the pupils are removed for a long period from the leading of this uncivilized life and receive constant care and attention. It is therefore in the interest of the Indians that these institutions should be kept in an efficient state as it is in their success that the solution of the Indian problem lies (Canadian Council on Children and Youth, 1978, p. 137).

Twentieth century educational developments in Canada during this century could not remain unaffected by developments in the United States. American influence is exerted through print and electronic media, collaboration between similar advocacy organizations which focus on specific disabilities such as retardation or learning disabilities, and professional membership in international organizations and attendance at conferences. As well, it has been estimated that 85% of holdings in University Education library holdings are journals and books which originate in the U.S., and that a significant proportion of

people holding graduate degrees hold at least one degree from an American university (Richert, 1982).

Studies and Surveys: The 1960's & 1970"s

There is little commentary available on the provision of educational services for children with special needs in the context of Canadian social or political history, perhaps because the field has been examined primarily by educators rather than by historians or political scientists. One of the first published overviews of special education across the country was provided by Dr.Samuel Laycock, Professor Emeritus of the University of Saskatchewan, in the 1963 Quance Lectures. Laycock praised various individual efforts at the local district level and by voluntary organizations to initiate services in response to exceptional learning needs, described the embryonic and variable nature of programming across the Provinces, especially as it related to early identification, and noted that a supply of appropriately trained teachers was central to extending services in a consistent way to all Canadian children (Laycock, 1963).

During the 1965-1975 period, as "capacity-building" legislation began to be approved at the federal level in the United States and parents and advocacy organizations such as the Council for Exceptional Children began to expand their "friendly persuasion" approach to include litigation and demands for national legislation, at least five major national studies or publications regarding needs of children - the regular and the exceptional - were released by coalitions of professional and voluntary organizations in this country.

In September, 1964 representatives of several organizations met in Montreal to discuss their conviction that existing educational, medical and social services for children with emotional and learning disabilities were critically inadequate in both quantity and quality, at least partially because of disarticulation between service providers in those fields.

From this initial meeting, the Commission on Learning and Emotional Disorders in Children was formed, under sponsorship of The Canadian Association for Retarded Children, The Canadian Council on Children and Youth, The Canadian Education Association, The Canadian Mental Health

Association, The Canadian Rehabilitation Council for the Disabled, and The Canadian Welfare Council.

Supported financially by a combination of federal, provincial and private sources, with multidisciplinary membership from all provinces, the Commission spent three years in study and travel and in 1970 published One Million Children. It's opening words were: "Twelve percent of the population up to nineteen years of age, or no less than a million children and youth in Canada today, require attention, treatment and care because of emotional and learning disorders" (Roberts & Lazure, 1970, p. 9). The Report acknowledged the difficulty of accurate estimation because of wide divergence in working definitions of exceptionalities and difficulties in collecting accurate data on prevalence, but settled on an estimate of 12-16% as an average of figures collected in Canada, Britain and the U.S.

Consistent with its stated value for viewing the child holistically, the Report considered the needs of the child in his various roles, including as student, as patient, as ward and as offender, and made 141 recommendations related to these classifications, to the responsibilities of those

providing care to children in their various roles, and to proposals for change.

The Report identified schools as "the pivot, the core service" in the implementations of most of its recommendations. Education, it said, once the privilege of a few, had come to be regarded as the right of all, and this right had long been generally recognized in provincial statutes by making free public education available for all within certain ages and making school attendance compulsory for at least part of this period.

The Report continued:

> What is less clear is whether this right exists regardless of physical or mental disability in the child, and whether education is to be defined only in terms of a single one-track school system that, in theory at least, admits all children. It is not clear whether this definition can somehow be stretched to cover individual differences, and to include the provision of compensatory, remedial and special educational services for children who have special needs (Roberts & Lazure, 1970, p. 70).

The Report said that, because of great variation between provinces and between districts within provinces, lack of clarity regarding responsibility for financing, initiation and management of programs for exceptional children created a "chaotic spectrum of services." The

Report criticized "gaps in service which are a consequence of inadequate and uncoordinated planning. For very many children with emotional and learning disorders there are no appropriate educational services in the local or provincial school system" (Roberts & Lazure, 1970, p. 79).

Among the recommendations which related directly to exceptional learning needs were the following:

1. that educational authorities be financially responsible for the education of all children in their community.

2. that educational authorities make nursery and kindergarten programs available to all children who are likely to benefit from these preschool experiences and that in the development of these services priority be given to children who are physically, educationally or socially handicapped.

11. that because of the negative effects of separate special education facilities, educational authorities minimize the isolation of children with emotional and learning disorders and plan programs for them that as far as possible retain children within the regular school curricula and activities.

12. that educational authorities avoid setting up or maintaining terminal special education classes except for very small numbers of multiply handicapped or severely retarded children.

16. that in order to prepare adolescents with emotional and learning disorders for adult life it be mandatory for education authorities to provide appropriate educational and training opportunities until the student is twenty-one years of age (Roberts & Lazure, 1970, pp. 145-147).

In 1966 the Canadian Committee of the Council for Exceptional Children(CEC), an international organization founded in the United States in 1922, asked its membership in all Provinces to report on such factors as legislation, number and types of special classes, curriculum and guides, organization and direction of special education programs; local policies; teacher training; special schools outside the public system; and urgent needs.

The 1969 Report on Legislation and Services for Exceptional Children in Canada (Ballance & Kendall, 1969) which was generally referred to as the Kendall Report, and its 1972 supplement (Ballance, Kendall & Saywell, 1972) noted in general that legislation relating to exceptional

children tended to be found in School Acts which dealt with structure and administration of an educational system, rather than details of curriculum, school organization or educational philosophy, and that nowhere in Canadian educational statutes was there the broad requirement found in some English and American statutes that school systems identify those children in need of special educational programming, despite the importance of this element for the orderly development of services.

Among the Report's other findings:

1. There was no necessary connection between the amount or kind of legislation and the amount or quality of educational services provided.

2. Most Provincial statutes were permissive rather than mandatory relative to provision of programs for exceptional children. Most early enabling legislation relates to handicaps of vision or sight, with Manitoba and two other provinces requiring attendance for deaf and blind children.

The Report said: "...we find in all provinces universally a provision allowing a school to exclude or not to require the attendance of sick or mentally defective children, yet there are very few examples of legislation that forces or

encourages school districts to make appropriate specific provisions for exceptional youngsters (Ballance, et al., 1972, p. 1). (Manitoba had, at that writing, passed legislation, to become effective in July, 1967, to require school boards to provide classes for the education of all mentally retarded children in minimum class sizes of 10.)

3. In most cases, the initiative for development of services came largely from local school boards, with important contributions from universities, teachers' federations, and voluntary associations.

The trend was for coordination and leadership at the Provincial level to be provided only after services had first developed in large urban districts and then spread to rural areas. The position of provincial special education coordinator, if it existed, was paid at a lower rate than a similar position at the district level.

In some cases this piecemeal pattern of development provided the advantages of flexibility and responsiveness to local needs, but in others it made more likely gaps and overlaps in services and risked catering to those children who had strong advocates while ignoring the needs of others.

The Report said: "Often the voluntary agencies have been largely instrumental in forcing governments and school districts to an awareness of the meaning of public responsibilty for education of all children" (Ballance, Kendall & Saywell, 1972, p. 27).

4. Data were potentially misleading due to variations in definition, but it appeared that nationally, some 126,000 children, 2.41% of the total school population, were receiving special education services, a "significant proportion" not provided by public school boards. This figure was almost exactly the 120,720 children reported to be receiving special education services in a Dominion Bureau of Statistics 1966 survey. At this time, estimates of exceptional children from American prevalence rates ranged from 8 % to 15% (Ballance, Kendall & Saywell, 1972, p. 36).

5. Provinces reported great variations in requirements for teacher training.and availability of training opportunities. Most provinces did not require any particular training, even for teachers of the deaf.

The Report said:

> Although some Provinces require teachers of special classes to have completed minimal training requirements, the general situation is that special education is carried out by teachers untrained in this field. At the same time there are serious limitations in almost all provinces, although the situation is improving...A review of the problems expressed by our correspondents suggests that not only do we need to train teachers in special education more rapidly; we must also ensure that such training really improves their competence to teach children with special needs" (Ballance, Kendall & Saywell, 1972, pp. 58-59).

A 1971 publication of the Canadian CEC known as the SEECC Report produced 158 recommendations on every aspect of the preparation of teachers for exceptional children. Its authors identified the need for national standards for educators of exceptional children, and enunciated some of the same concerns as their American colleagues regarding the separation of regular and special education systems. They declared themselves to be "unanimously and strongly" in sympathy with a non-categorical approach both to the provision of student program models and the preparation of teachers, emphasizing similarities rather than differences between the learning needs of various children and the skills required in their teachers (Committee on Teacher Education and Professional Standards, 1971, p. 11).

In 1974 the Committee on Legislation of the CEC Canadian Committee published A Matter of Principle, which proposed a set of 33 principles to govern legislation for services for children with special needs. In harmony with previous publications from the CEC and other organizations, this report's focus was not restricted to school-related issues, but addressed as well the scope of Provincial legislation and regulations and the process of their formulation, interrelationship between Provincial Departments of Education and other agencies with impact on children, the need for appropriate funding and the role of funding models, and the role of the family

In 1975 the Canadian Council on Children and Youth formed a task force of professionals from various fields related to child development to address the broader subject of "The Child as a Citizen in Canada." The task force report, titled Admittance Restricted, acknowledged the central role of the school in children's lives, and regretted that, over its 120 years of history and despite many changes in form, the basic function of schooling had remained to "provide a systematic way of instilling appropriate attitudes and beliefs" (Canadian Council on

Children and Youth, 1978, p. 105). The report criticized practices in evaluation, curriculum and student placement which it said contributed to the reproductionist effects of the Canadian school system.

Regarding children with exceptional needs, it said:

> The provision of appropriate programmes for children with such handicaps have been at best sporadic and at worst, non-existent. Too often, children with special needs are deprived of access to the school system and, where access is achieved, are provided with inadequate support services. The list of unmet demands from parents of children with special needs is long: special aids and programmes; effective support staff; special equipment and supplies; adequate transportation; architectural accessibility (Canadian Council on Children and Youth, 1978, p. 112).

Finally, like many reports and articles before and after it, Admittance Restricted called for increased federal involvement in the enunciation of a national educational policy and and its expression in legislation.

In 1976 the Organisation for Economic Cooperation and Development published a review of Canadian national policies for education. The OECD Review reprised the by-then-familiar concerns: too little concern for early diagnosis; inadequate provisions at the Provincial level, whether in public or separate schools; deficits in teacher training; lack of regional and trans-regional coordination;

and the lack of acceptance of the education of handicapped children as a public responsibility.

The Review said:

> The Examiners drew the conclusion that only after voluminous (and usually private) investigations and revelations, and sometimes even vigorous attacks in public, did the responsible public authorities undertake the necessary planning and take some measures commensurate with the problem (Organisation for Economic Cooperation and Development, 1976, p. 54).

Policy-oriented articles in the Canadian professional literature over this time period covered similar ground. Pre-dating current discussion of the Regular Education Initiative, David Kendall of the University of British Columbia identified the need to improve the mainstream educational system rather than merely tampering with improvements to special classes or returning children from special to regular classes (Kendall, 1971).

Other authors addressed the lack of provincial legislation or the fragmentation of responsibility between government departments (Rawlyk, 1979; Treherne & Rawlyk, 1979); called for expanded federal involvement through such means as the formulation of national policy statements, collection of data, funding of research and dissemination of research results, in order to provide an elevated

national profile for the rights of exceptional children (Csapo, 1980, 1984; Goguen, 1980a; Richert, 1982); and discussed the implications for Canada of the 1978 Warnock Report in Britain (Nesbit & Karagianis, 1980).

Discussion:

Richardson proposed that school systems, presented with expecttaions to accept more and different students,proceed through three stages of change: rejection, acceptance but with reduced status, and finally full acceptance.

From the perspective of Richardson's model of exclusion/inclusion, public educational systems in both the United States and Canada are functioning largely at the second stage - inclusion of all children but with reduced or special status for some - with some progress toward his third stage, acceptance without distinctions.

Throughout the 1960's, 1970s and 1980's, there has been no shortage of advice available to Candian public policymakers and legislators regarding identified unmet needs of exceptional children and suggested remedies in the form of statutory guarantees of substantial rights to

appropriate education and procedures for their implementation. Common to most of these sources, whether of provincial or national focus, is the general consensus that many Canadian children with exceptional learning needs are ill-served by the status quo and that they deserve a free appropriate public education which 1) is in as normalized a setting as possible; 2) includes pre-school and vocational components where necessary; 3) is delivered by appropriately trained personnel; and 4) is supported by adequate statutory and financial mandates and assurance of necessary related services by provincial authorities.

Partially as a consequence of the normative effect of the American experience on Canadian expectations and partially as an outgrowth of advocacy by professionals and parent organizations as well as many other factors, it is the case today that accommodation of a wide range of exceptional children, from the mildly to the severely handicapped, in self-contained and in regular placements within regular schools, is more prevalent in Canada than in the past (Canadian Education Association, 1985; Canadian Institute for Research, 1978; Howarth, 1983; Loken, 1978)

even in the absence of both mandatory national legislation and of extensive judicial involvement in education.

It is also the case that education systems as a whole remain remarkably impervious to reform attempts, as many writers over the last century have noted. Several evaluation studies of the impact of the American legislation have concluded that, while many children previously excluded are now being served by the public schools and some of the barriers between regular and special education have been eroded, (Singer & Butler, 1987; Walker, Singer, Palfrey, Orza, Wenger & Butler, 1988), nearly 30 % of elementary and secondary students receive their education in separate classes, segregated day or residential schools, and that this figure has remained fairly constant over the 10 years in which the U.S. Department of Education has collected data on educational placements (Danielson & Bellamy, 1989).

On a slightly different front, in 1954 the Topeka, Kansas school district became the first to have its separate but equal educational policies declared unconstitutional. In an action brought by the original plaintiff in the 1954 Brown v. Board of Education of

Topeka, a divided federal appeals panel ruled on June 2, 1989 that the Topeka, Kansas school district still has not completed the task of dismantling its segregated system (Snider, 1989).

In this country progress has been halting as well After decades of professional debate, reports by national and provincial commissions and successive efforts at statutory reform, Poirier, Goguen and Leslie write, in the most current national assessment of the educational rights of exceptional children, that seven of 10 provinces have mandatory legislation requiring school boards to accommodate all children; only three provinces stipulate that education must be suited to the needs of the child; and only two provinces require placement in the least restrictive environment (Poirier, et al., 1988).

V. Special Education in Manitoba

Introduction

Under the Constitutional framework established in Canada since 1867, each province has full responsibility for provision of education. From the time of its entry into confederation in 1870 until the late 1950's, the province of Manitoba vested virtually exclusive authority for the operation of Manitoba's schools in several hundred boards of trustees.

Gregor and Wilson noted that most of the fundamental educational problems of 1916 had not been solved by 1959. Even at the end of the 1950's diseconomies of scale induced by a thinly distributed population, distance and geography, as well as philosophical preference by rural politicians for local control, conspired to prevent formation of the consolidated administrative units required to address issues of differentiated curriculum and retention of qualified teachers. Changing models of educational finance and formation of unitary divisions, proposed by the MacFarlane Commission in 1959 and the Michener Commission in 1967, were the first steps toward increased reliance on provincial rather than strictly local resources and governance (Gregor & Wilson, 1984).

Manitoba, unlike most other Provinces, does not have legislation requiring school boards to deliver appropriate services to exceptional pupils. The topic was under consideration at the provincial level in the mid-1960's and mandatory legislation to this effect was actually passed in 1975, although it never came into legal effect.

Development of special education services in Manitoba paralleled in many ways the process in this country and in the United States. Children who were deaf or blind were the first for whom the state assumed responsibility. Humanitarian concerns for protection of the handicapped and accommodation to the needs of immigrants coexisted with assumptions about the superiority of the prevailing Anglo-Saxon culture and the need to protect it by requiring assimilation of immigrants. An influx into the province of immigrants from other provinces as well as other countries, who brought with them cultures and languages different from the mainstream, the increasingly industrialized nature of the province's population center, and pressure from reformers for institution of compulsory schooling, all played their role, as they did in the United States and in other Canadian Provinces, to influence the development of the public education system in Manitoba (Artibise, 1975; Maciejko, 1985).

The impetus for provision of services to address unmet needs of children, whether health, educational or social, began with coalitions of parents and organized reformist or advocacy groups who lobbied for funding from local government. Local authorities responded with partial support through grants, and petitioned senior government for reimbursement and for provincial assumption of responsibility Regarding special education, successive Provincial governments have responded with increasing levels of financial support, with unofficial statements of moral support, with a number of studies commissioned or produced throughout the 1950's, 1960's, 1970's and 1980's, with 1975 legislation which was highly progressive for its time but was never implemented, with current legislation which is nearly silent as to rights or entitlements for any children, and, most recently, with promises of policy statements and statutory reforms to come during the 1989-1990 legislative session and, most recently, with Special Education Guidelines which while not statutory, are described as mandatory.

This chapter will a) briefly examine developments from 1870, when Manitoba became a province, to 1916, when it became the last English-speaking province to make school attendance compulsory; b) examine development of services for exceptional children in Manitoba's educational system

for two time periods, 1916-1966, and 1966 to 1989, through consideration of Departmental Annual Reports, Provincial Studies, Divisional Activities and Legal Action.

Beginnings: 1871 - 1916

In the two decades following 1871, when the newly established Manitoba Legislature passed the Act to Establish a System of Public Education, the school population grew from 33 schools, equally divided between Protestant and Catholic, with 1,454 students, to 719 schools, all but 90 of them Protestant, with a total of 23,214 pupils (Gregor, & Wilson, 1984).

Many factors accounted for this growth during the first 20 years of the Province's existence, including the extension of public schooling to more parts of the province, the geographical extension of Provincial boundaries and the emergence of secondary school as part of the system. The most substantial factor was the influx of immigrants from eastern Canada and from outside of the country, for the first time coming largely from groups outside the traditional ethnic patterns in Manitoba. In addition to contributing to French-English and Catholic-Protestant tensions. the increase in immigration brought into focus the importance of schooling as a socializing

institution and the desirability that all attend. One of the District Superintendents wrote in 1906:

> The above facts are almost platitudes, they are so generally recognized, but if the children do not attend the schools, how can the schools bring about this assimilation? The recent regulation about the Flag, taking effect with the New year, is a step in the right direction, but how can the teacher inculcate a reverence for the Flag, and all that it stands for, unless the children are there to be instructed and inspired?...In the town of Portage la Prairie there is a considerable foreign element. these people are industrious and frugal, and from a material standpoint, most of them are doing well; but I question if any of their children will be found in the schools above grade three. They are in the Primary classes, unable to speak a word of English. As soon as they get a smattering of the language and can help at home or earn a little money, they are taken from school. This means that these children are growing up uneducated, unassimilated. (Superintendent Maguire, Report of the Department of Education, 1906, cited by (Gregor & Wilson, 1984, p. 93).

As well, while the time of compulsory schooling was still some years ahead, other District Superintendents during this period, as quoted by Gregor and Wilson, frequently commented in their annual reports on problems of sparse attendance, even when children were enrolled, and the necessity of requiring attendance for all at tax-supported schools, as well as the need to improve the quality of teacher preparation and the salaries paid to teachers, and to provide healthful and safe conditions for children in schools. All of these concerns echoed statements being made in the United States at about the

same time, and presaged the early 20th century reformist concerns to come.

As early as 1905, the Winnipeg School Division Management Committee requested its solicitor to prepare draft legislation for compulsory school attendance, as a model for Provincial inspection (Baker, 1967). In addition to experiencing pressure from professional educators to enact compulsory education, the Provincial government was lobbied for over a decade by a broad spectrum of political actors, from Winnipeg's Mayor and members of the Canadian Club and the Orange Order, who demanded that schools be not only compulsory but unilingual English, to representatives of organized labour and J.S. Woodsworth from the All People's Mission (Artibise, 1975, p. 204; Maciejko, 1985).

As early as 1876, cities and towns had been empowered to enact their own by-laws regarding compulsory attendance for children from 7 to 12 years of age. In 1912 legislation made it compulsory for deaf children to attend, for at least four months per year, the Manitoba School for the Deaf, which had been opened by the Province in 1889 after lobbying by the Ministerial Association of Winnipeg. In 1916, with the passage of the School Attendance Act by the newly elected Liberal Government of T.C. Norris, Manitoba became the last English-speaking Province to require attendance of children from 7 to 14 years, and of

14 to 16 year olds who were not actively employed. Local by-laws could require attendance through age 15.

The 1916 Act laid the foundation for development of special education facilities, since appointment of Attendance Officers and the taking of a census of children drew attention to those children not attending because of mental or physical defects, and also to age-grade disparities of children already enrolled in public schools. (Baker, 1967; Gregor & Wilson, 1984).

Departmental Annual Reports: 1916-1966

Discussion of exceptional children is virtually non-existent in annual Reports of the Department of Education from the beginning of compulsory attendance to the late 1950's. The first reference to exceptional children appears in 1915, when concern is expressed about the financial and educational implications of having substantial numbers of children, as high as 20% even in Winnipeg city schools, who were over-age for their grade placement. The Report said: "One of the pressing problems of the day is to determine the extent to which this retardation is due to irregular attendance, incapacity on the part of the pupil, or defects in the course of study." (Manitoba, 1915, p. 12).

The 1938-1939 Report said:

> There is repeated reference in the reports to the very disturbing incidence of backwardness. Here is a problem promoted and exaggerated by the inability of many pupils to read or speak English. At the same time there are many pupils whose difficulty in learning the rudimentary subjects are beyond the comprehension of their teachers. There is need here for specific help in diagnostic and remedial work. (Manitoba, 1938-1939, p. 24).

Subsequent Reports during the 1940's referred to efforts to provide correspondence courses or some other form of education to handicapped children not attending school, as identified by an annual census taken by the Attendance Branch (Manitoba, 1944-1945, p. 12; Manitoba, 1945-1946, pp. 13-14).

The first references to children with handicaps other than deafness or blindness, provided for outside of the Winnipeg Division, occurred in 1955-1956, when classes for the mentally retarded in three other Divisions were identified (Manitoba, 1955-1956, p. 21).. In 1959 the Report noted that grants were paid to districts in respect to classes for the mentally retarded, physically handicapped, emotionally disturbed and visually handicapped (Manitoba, 1959, p. 14).

The 1963 Report said:

> The education of exceptional children is of growing concern to the Department. The number of classes for the mentally handicapped continues to increase, raising problems of curriculum, supervision and

> teacher training that are quite new to the department. (emphasis added) (Manitoba, 1963, p. 14).

The 1964 Report said that the Legislature had allocated funds for construction of a residential school for the deaf, necessitated by growing enrollment in the Day School, that there were then 119 classes for the mentally retarded in operation, 47 in Winnipeg, 28 in suburban divisions, and 44 in other parts of the province, and that Winnipeg operated 15 classes for children with other handicaps.

In 1965 a Directorate of Special Services was created, with responsibility for Special Classes, Special Schools (mostly in Hutterite Colonies) Home Economics and Physical Education. The 1965 Report echoed concerns expressed in 1938-1939:

> The extension and further development of special classes for various types of handicapped children appears inevitable, and as it happens the auxiliary services required to implement and strengthen special programs need to be strengthened and coordinated. The "ungraded" class was initially and specifically intended for the "educable retarded" child, but pressures are now being exerted to broaden this intent so that under-achievers or slow learners may also be admitted into such classes, because there they can receive a greater degree of individual attention and types of remedial teaching that are not so readily available in the regular classroom.
>
> Authorities claim that the "educationally sub-normal" who require some type of special attention or placement in a public school system comprise at least 15 % of the school population. If this is so it is apparent that, because of the wide divergence of abilities and disabilities within this group, there are special needs in diagnosis and assessment, in

> curriculum and program adaptation, and in the training of teachers who will handle the children concerned. The Department of Education has these items under advisement. (Manitoba, 1965, p. 74).

In 1966 the Office of Child Development Services was established, to "extend and coordinate diagnostic, assessment and registry services for all school-aged children who are handicapped physically or mentally or by learning disability," and the Curriculum Branch began work on creating a curriculum for the "educably mentally retarded" child (Manitoba, 1966, p. 77).

Provincial Studies: 1916-1966

Two major studies done during this period provided recommendations to the Manitoba Government on exceptional children, among many other topics.

A Royal Commission on Education, headed by R. O. MacFarlane, was established in 1957 with a mandate to study and report on all aspects of education in Manitoba, and reported in 1959. Relative to exceptional children, the MacFarlane Commission summarized the existing range of services, some provided through the public system directly, some supported by Provincial grant in institutional settings, and some partially supported by grants from many sources and provided in non-school settings by private

organizations such as the Association for Retarded Children.

In addition to generally increased levels of Provincial support for supplies and physical conversion of facilities for children with sensory and physical handicaps, and expanded efforts to identify and provide enrichment for gifted children, the Commission recommended that local school boards be required to provide classroom space for severely retarded (trainable, I.Q. 25-50) children where numbers warranted, and that boards in whose jurisdictions ten or more retarded children (educable, I.Q. 50-75) were identified be required to provide special classes (MacFarlane, 1959,pp. 231-257).

In 1963 John Christianson was commissioned by Premier Duff Roblin to determine a) the numbers, kinds and geographical distribution of handicapped children in Manitoba, b) the facilities and programs then available for them,including those programs provided by voluntary and charitable organizations and c) the applicability of programs employed in other jurisdictions, and to make recommendations.

Christianson's definition of handicapped was: "any child who deviates intellectually, physically, socially or emotionally so markedly from what is considered to be normal growth and development that he cannot receive

maximum benefit from a regular school program and requires a special class or supplementary instruction and services."(Christianson, 1965, p. 7).

A Study of the Education of Handicapped Children was completed in 1965.

Among the recommendation of the Christianson Report:

1. increased cooperation was needed between the provincial Government and school divisions to provide services for the mentally and physically handicapped, and the economically/culturally disadvantaged.

2. the more severe the handicap, the more important is early identification and intervention, including access to pre-school services.

3. whenever possible, the exceptional child should be educated in a regular learning environment and remain living in his own home.

.4. The school system should be reorganized to allow for continuous, non-graded progress and move away from traditional grades, examinations and teaching methods.

5. Education of all retarded children should be the responsibility of local boards, and the Public Schools Act should be amended accordingly.

Divisional Services: 1916-1966

Both the MacFarlane Report (1959) and the Christianson Report (1965) observed that in Manitoba development of special education programs had taken place mainly within the city of Winnipeg, although it is certainly the case that other divisions have developed their own programs since that time. Even in 1987 the Winnipeg School Division, with nearly 16% of total Provincial N-12 enrollment, reported 1,801 exceptional students, or nearly 35% of total Provincial 'exceptional' enrollment (Manitoba, 1988, pp.45-46). For these reasons and for the sake of brevity, discussion of "Divisional Activities" in this chapter, particularly for this time period, will center on those of the Winnipeg Division #1. This should in no way be interpreted as failing to acknowledge developments in other jurisdictions within the last 20 years.

The following information is taken primarily from Doris Baker's 1967 dissertation, The Development of Special Educational Provisions for Exceptional Children in the City of Winnipeg, the most complete source of information on this topic for the period 1900-1965.

Early in this century the Winnipeg School Board demonstrated a pro-active stance toward needs of children within its boundaries. In 1907 the Winnipeg Board directed its Management Committee to consider hiring trained nurses

to inspect children for infectious diseases, and by 1918 the Board employed a full-time director of medical services, two assistant medical directors, ten nurses and two clerks. Among their duties was the identification and referral of "backward and mentally deficient children."

Medical directors assessed those children referred to them, using the newly developed Binet-Simon test, and by 1916 the Chief Medical Director reported to the Board that "We have in Winnipeg...three special classes but there remain too many sub-normal children still suffering from lack of special attention and who are constantly a menace to themselves and society for this reason."(Baker, 1967, p. 56).

In 1912 two technical schools were opened and Superintendent Daniel MacIntyre discussed in an annual report the goal of providing instruction to backward boys to forestall their dropping out.

In 1920 a specialist was hired in intelligence testing and measurement, and by 1934 there were reports that 200 children were placed in or awaiting placement in special classes, or were awaiting assessment. By 1939 there were two classes for visually impaired, fifty opportunity/remedial classes for "slow learners", 38 ungraded classrooms for children with identifiable mental handicaps, probably in what would today be termed the

"educable" range,and two occupational centres for children with IQ's below 50.

In 1919 the Winnipeg Board had opened its first junior high school and by 1930 the Winnipeg system had been converted from the traditional "8-4" to the "6-3-3" pattern, with almost all students of Grades 7, 8 or 9 were placed in separate junior high buildings or in separate departments housed in elementary schools (Baker, 1967, pp. 71-72). This model, while not designed as a special education initiative, facilitated offering of courses with different degrees of difficulty to accommodate different student interests and abilities.

The Child Guidance Clinic, jointly sponsored by the Winnipeg School Board and the City Health Department, was organized in 1941, and by 1951 provided services, mostly in the metropolitan area, in social work, psychology, psychiatry, reading and speech therapy.

During the 1940-1965 period, occupational centres for the trainable retarded were disbanded as the Provincial residential institution was developed in Portage la Prairie, 60 miles from Winnipeg. Classroom settings for exceptional students varied as differing educational theories waxed and waned. The number of separate classes for mentally retarded and some of the remedial and opportunity classes declined and were replaced by an

adjustment teacher model, similar to present-day resource teachers but expected to provide more direct service. After a few years, the number of adjustment teachers declined and more children were placed in separate classes, termed "modified" and identified as such on grade reports. In the post-Sputnik enthusiasm of the mid-1950's, more attention was paid to accelerated programming. In 1956 the Winnipeg Division appointed its first Director of Special Services.

In 1958 the grant structure was amended to allow Provincial grants to be paid for classes for the (educable) mentally retarded (to age 16) and for some other classifications. Private agencies such as the Cerebral Palsy Association, which became the Society for Crippled Children and Adults (now the Society for Manitobans with Disabilities) and the Association for Retarded Children (now the Association for Community Living) organized school programs for those children whom the public system wouldn't serve.

Legal Activity: 1916-1966

Before 1966 the Public Schools Act had specifically empowered Boards, if they chose, to prohibit mentally retarded children from attending school (Public Schools Act, 1954, s.291). In 1966 the PSA was amended to allow

all Boards, effective September 1, 1966, to provide "services and facilities" and to engage teachers for resident children classified as mentally retarded by the Minister of Health, and to require Boards to provide these services from July, 1967. Boards were also allowed to discharge this responsibility by purchasing service from another Division.(Public Schools Act, 453(18A,B). In the 1970 revision of the Act, these sections became 465(22) and 465 (23) (Public Schools Act, 1970).

Departmental Reports: 1967-1989

The 1967 *Report* noted that Departmental staff spent considerable planning time with Boards in "expanding programs for the "educable" mentally handicapped and in preparing for admittance into the public school system for the first time the "trainable" mentally handicapped who had formerly been attending classes operated by the Association for Retarded Children" (Manitoba, 1967, p. 44).

The 1968 Report reported a 51% increase in the number of mentally handicapped enrolled in public school classes from 1966-67 to 1967-68 as one indicator of the impact of the revised legislation. The Report that year also said that the Department's Special Services branch was then "able more effectively to concentrate" on special education issues since being relived of its former responsibilities

to supervise Physical Education and Home Economics (Manitoba, 1968).

The Office of Child Development Services (CDS) which had been opened in 1966 as a branch of the Department of Health and Social Development, was transferred to Education in 1972. This accorded with one of the recommendations of the Christianson Report.

Seven service regions covering the Province were designated, within which CDS was to introduce clinician services. It was agreed that after the service regions model was established on a pilot basis, school divisions would jointly, regionally or individually assume responsibility for delivery of the services In 1975 these were consolidated into three regions (Manitoba Teachers' Society, 1981, pp. 146-148).

In the early 1970's revisions in grant structures provided support for Divisions to hire resource teachers and special education coordinators.

In 1975 the Special Education Branch, Child Development Services and other groupings were amalgamated to form Child Development and Support Services (CDSS). Annual Reports from that time on contain only very general information about CDSS goals and activities in various geographic regions of the Province.

In 1981 a provincially-funded Diagnostic Support Centre was initiated. Staffed by a coordinator, a psychologist, three learning specialists and a residence counsellor, the DSC provides diagnostic and teacher support services for students, generally from rural and northern divisions, with severe learning problems.

In 1982 CDSS became Child Care and Development Branch (CCDB), with additional responsibility for the Manitoba School for the Deaf and disadvantaged and "at risk" children.

Reports for 1984 and 1985 listed as three of the Branch's objectives:

1. to ensure that each child with special needs receives a meaningful and appropriate education commensurate with his/her needs and abilities;

2. to promote the recognition that parents are equal partners in the education of their child and that their involvement is particularly crucial where the child has special needs;

3. to promote leadership in the development and expansion of early preventative and compensatory programs with a particular emphasis on disadvantaged and "at risk" children.

Those objectives are absent from subsequent Reports and have been replaced by general references, very similar

from year to year, to the Branch's role in provision of consultative services regarding specific handicapping conditions and Early Identification programming, among other activities.

Provincial Studies: 1967-1989

In 1974 a Departmental 'Working Group on the Education of Children and Youth with Special Needs' was formed, with an 18-month mandate to make recommendations for structural, funding and legislative changes necessary "to enable school-age children to receive where necessary and possible those special services which will allow them to be educated in and/or through their local school divisions." (Manitoba, 1974-1975, p. 15). Its recommendations contributed to passage in 1975 of an amendment to the PSA known as Bill 58, which was revoked in 1980 before coming into effect. Bill 58 is discussed more fully below under Legal Action.

During the five year enabling period before the expected proclamation of Bill 58, a discussion paper and two substantial surveys were published by the Department of Education and the interdepartmental Working Group.

The discussion paper reviewed the American research, surveyed the legal status of exceptional children in some other Canadian Provinces, identified possible implementation difficulties of the new legislation,

outlined strategic approaches and specified essential elements to be included in Regulations or subsequent legislation. These provisions would give parents/guardians the right to appeal a) designation of a child as exceptional; b) placement of a child in a setting not appropriate to his needs or one not providing a sufficient program; c) failure to place a child in an appropriate setting; d) failure to maintain or offer suitable programs and related services; e) failure to provide appropriate services by the unit of government having primary responsibility to do so.

The recommended provisions also specified elements of due process to be available to parents, including independent review of a child's diagnosis or evaluation when a placement or a change in placement was made by provincial or local authorities. Finally, the Working Group's paper outlined mechanisms for compliance monitoring, including withholding of Provincial funds from Divisions found to be derelict in their responsibilities and provision of required support by the Province, in the form of teachers, supplies and transportation costs, with Divisions required to pay costs themselves (Working Group on the Education of Children and Youth with Special Needs, 1975).

The 1975 Survey of Special Services Associated with the Manitoba School System collected data on provision of screening approaches for vision or hearing disabilities, availability of resource teachers and clinicians and placement of students in classes identified by exceptionality (Educable Mentally Handicapped, Trainable Mentally Handicapped, Occupational Entrance, Modified, Vocational, Physically Handicapped, Hearing Impaired and Visually Impaired).

Among the study's findings were: classroom and resource teachers both required additional pre-service and in-service training in 'special education'; additional alternatives and coordination of alternative settings for emotionally disturbed children were badly needed; inter-Divisional and Divisional-agency coordination was inadequate; procedures for identification of children with special needs were not "efficient or consistent" within schools, and were non-existent at the pre-school level; rural/urban inequities were "disturbingly obvious" (Kristjanson & Starec, 1975).

The 1978 Special Education Review collected and analyzed data in more detail, and grouped exceptional children in High Incidence/Low Cost or Low/Incidence/High Cost categories. In its General Introduction the Review noted that "special education has become an important

growth industry within a relatively short time" and that the "scope and nature of special education has broadened over the last two decades to the point of involving schools in delivering programs and services to children who formerly had been either programmatically ignored or, in many cases, physically excluded from public schools." (Manitoba Department of Education, 1978, p. 1).

The 1978 Review cautioned that the data provided reflected only the special education population presently identified and receiving programming, rather than all children with identifiable exceptional needs and that, while raw data appeared to be relatively complete in identification of populations such as blind and severely hearing impaired, it was incomplete in others.

The High Incidence category included the sub-groups of Slow Learners, Educable Mentally Handicapped, Learning Disabilities, Emotionally Disturbed and Gifted. The Review examined the Divisional reporting of numbers enrolled and programming provided for each category, and compared the enrollment to generally accepted prevalence rates. In every category except Learning Disability, for which no information was sought because of lack of consensus as to definitions, the Review concluded that the numbers of students identified as served were substantially lower than should be expected, based on enrollment totals.

This shortfall in programming was attributed to lack of professional expertise and concern regarding expense of programs in some Divisions (for emotionally disturbed), low priority in Divisional planning (for gifted, slow learner and EMH), and a general tendency to limit provision of classes or services targeted to this population in order to spread the use of resource teacher services over the entire school population.

The Review acknowledged that many students within these population were undoubtedly placed within the regular program stream and not identified or counted as having special needs (Manitoba Department of Education, 1978, pp. 5-14).

The Low Incidence population included Trainable Mentally Handicapped, Severely Multiply Handicapped, Orthopedically Handicapped, Blind/Visually Impaired and Deaf/Hearing Impaired. The *Review* concluded that the Low Incidence population appeared to be completely identified.

The Review's findings regarding use of special education personnel were as follows:

Coordinators. Forty-seven of 62 districts/divisions reported employment of coordinators and claimed grants for them. Only 33 reported that coordinators were assigned full-time duties in that capacity and of those, it was

"commonly known" that several had additional job descriptions.

Resource Teachers. The original objectives of the resource teacher program, as outlined in Manitoba Regulation 170/77, were not met in a significant number of Divisions. Ranked role-function statements demonstrated that resource teachers spent the greatest portion of their time tutoring individual students, and that less than 25% of resource teacher role-function time was spent in consultation or collaboration with classroom teachers. This meant that "a significant number of students with learning problems are not receiving the kind of classroom support which the resource teacher program was expected to provide."(Manitoba Department of Education, 1978, pp. 41-42). As well, a number of Divisions which claimed resource teacher grants were using those teachers as regular classroom teachers or for other duties not related to special education. As with coordinators, the Review said, this inappropriate use of Provincial grant funding was possible because in practice grants in both cases were unconditional. On the basis of the information on resource teacher assignment and on the proportion of special education teachers assigned to the Low Incidence population, the Review suggested, "...indications are that E.M.H. students in particular, as well as children with

language disorders, emotional problems, adjustment problems and severe learning disabilities, may not be receiving appropriate supports within regular classrooms." (Manitoba Department of Education, 1978, p. 47).

The Review recommended, among other things; a) that the Department of Education ensure that its policies regarding special education programs, including guidelines for use of grants and accountability expectations, be communicated clearly to Divisions; b) that compliance monitoring be instituted; c) that the Department make special education grants conditional on actual provision of educational services consistent with guidelines and Regulations; and that d) the Department, with the Universities, evaluate existing requirements for teacher certification to assess their adequacy for preparing regular classroom teachers to teach children with handicapping conditions.

In the absence of Provincial involvement through statutory enactment, in 1983 then Minister of Education Maureen Hemphill sent a three-page directive to all Chairpersons, Superintendents, Secretary Treasurers and Special Education Coordinators, to clarify provincial expectations with respect to the application of special needs support." The Minister said:

> Since each child in the province has the right to develop to the fullest extent possible as a confident and valued member of our society, there is a responsibility for the provincial government and those who provide educational services in the public school system to ensure that the child with special needs has an equal opportunity to receive a meaningful and appropriate educational program.

The Minister continued: "For a large proportion of children with special needs, this goal is best accomplished by placement within the regular program stream." The Minister acknowledged that most students with special needs are mildly to moderately handicapped, and should be accommodated through use of resource teachers and other specialist personnel and that even "that small proportion of the student population with more extensive needs" should not be "locked into" segregated placement for their entire timetables. The Minister concluded by urging School Divisions/Districts to make information describing special education programs and related services available to the community (Hemphill, 1983).

Although this directive has no force in law, it has not been repudiated by the three subsequent Ministers of Education, and so appears to remain in effect, at least in the general sense of establishing a climate of Provincial (and parental) expectations for school boards.

Also in 1983, the Education Finance Review completed 18 months of public hearings and published Enhancing Equity in Manitoba Schools, also called the Nicholls' Report. The

Nicholls' Report acknowledged that funding mechanisms could not be considered in isolation from philosophical issues such as mainstreaming and labelling. Its recommendations included discontinuing the practice of permitting Divisions to use the same grant entitlement to hire two teacher aides instead of one special education or resource teacher; introduction of an additional category of support for students whose programs were "viewed as highly costly"; and initiation of studies by Child Care and Development and Finance branches to determine full costs of providing various kinds of special needs services (Nicholls, 1983, pp. 67-74).

In 1985 Section 15, the "equality" section of the Canadian Charter of Rights and Freedoms came into legal effect. This provision guarantees to all individuals equality before and under the law, and the right to equal treatment and equal benefit of the law, and particularly forbids discrimination in a number of enumerated areas. Manitoba Education, as the Department was by then titled, took two initiatives to recognize the possible implications of the Charter for education.

The Minister announced that Assistant Deputy Ministers Glenn Nicholls and Guy Roy would conduct a Review of Relationship between the Charter of Rights and Freedoms and Manitoba Education Legislation. In a letter to presidents

of the Manitoba Association of School Trustees, the Manitoba Association of School Superintendents and the Manitoba Teachers' Society, the Minister referred to recent enquiries from trustees, superintendents and teachers regarding the issue of governance of French language schools, and said that her department, in cooperation with the Attorney-General's Department, had been examining the potential impact of the Charter on provincial legislation, particularly in relation to "the rights of children, of pupils and of parents - rights as they relate to special needs, to language and to decision-making." The letter concluded, "Once the full terms of reference have been finalized, the co-chairpersons will be contacting organizations within the educational community to solicit input for the review." (Hemphill, 1985).

In July, 1986, Jerry Storie, who had replaced Maureen Hemphill as Minister of Education, responding to questions during review of his departmental Estimates, described the Nicholls-Roy Review as "internal" and said that a decision as to public input had yet to be made (Hansard, Province of Manitoba, 1986, pp. 2064-2066). None has been sought to date.

An internal discussion paper titled The Charter of Rights and Education in Manitoba was produced in 1986, examining potential vulnerability to Charter action of all

aspects of the Public Schools Act. The paper, whose author is not identified, examines vulnerability of the Public Schools Act to a Charter challenge in the areas of rights of students and parents, rights and duties of teachers, operation of Boards, Indian education, special needs education and religious exercises, among others.

The paper made a number of recommendations relative to special needs students, including, among many others, amendment of the PSA to recognize the right to "appropriate" education and establishment in Regulations of procedures for identification, assessment, placement and periodic evaluation of students, and for parental involvement and appeal. (Manitoba Education, 1986, pp.16-21).

Issues regarding the paper's discussion of the vulnerability of the *Public Schools Act* to Charter action will be discussed more completely in Chapter 5.

In March 1987, Manitoba Education circulated a public discussion paper titled Appropriate Education, Student Placement and Parental Involvement: A Policy Direction and Consultation Paper (Manitoba Education, 1987a). A final draft, reflecting public input, was released in August, 1987. In brief, the paper recommended that all Divisions and Districts develop policies reflecting concerns for procedures to specify and deliver education appropriate to

individual student needs and to facilitate parental involvement at all stages. The paper proposed a three-stage mediation process by which parents/guardians would negotiate first with divisional personnel and next with representatives of CCDB, and finally might appeal to a committee appointed by the Minister, whose decision would be final (Manitoba Education, 1987b).

In 1988 the Planning and Research Branch of Manitoba Education published a study called Mainstreaming in Manitoba. Despite the comprehensive focus implied by its title, the study concentrated on integration of Low Incidence students in five divisions. The term "low incidence" in Manitoba is used for funding purposes and refers to students with severe physical and/or mental handicaps requiring extensive educational modifications, and is described in more detail in Chapter 3.

Mainstreaming in Manitoba identifies as its focus "student outcomes, teacher preparation and funding" with respect to identification of "those factors and conditions which facilitate mainstreaming" through "a review of the literature, field visitations and a survey of perceptions held by parents, students, educators and administrators." (Manitoba Education, 1988, p. 1).

The study drew three major conclusions: a) there is a general belief in Manitoba that mainstreaming has a

positive effect on learning outcomes of students, particularly in the affective domain; b) there are several important conditions which facilitate successful mainstreaming, including availability of paraprofessional assistance, consultation services, colleague support, and classroom learning materials, provision of adequate preparation time and in-service training, and reasonable class size; c) several areas of concern need to be addressed, including the need for additional resources, the need for more effective professional development programs, and the need to develop a team approach to mainstreaming (Manitoba Education, 1988,pp. 1-3).

The Study warned that, because of low return rates for some parts of the sample, the subjective nature of the survey structure and its limitation to five Divisions, its conclusions could only be applied to the Province as a whole with caution. Among the more interesting findings of the Mainstreaming Study:

1. "There appears to be strong agreement amongst most divisions that most universities do not adequately prepare graduates for special education."

2. "None of the divisions were able to provide a detailed analysis of the actual costs of mainstreaming. Perhaps this can be explained by the fact that record-keeping is difficult at the program level and that special

needs students are in the same class as regular students."(Manitoba Education, 1988,p. 16).

3. Both classroom and resource teachers expressed concern that regular students do not always receive the amount of attention they require in a mainstreamed classroom, or that they would receive in a classroom which did not include identified special needs students (Manitoba Education, 1988, pp. 18-20)

Advisory Committee Reports: 1967-1989

Early in 1977 Education Minister Ian Turnbull established an Advisory Committee on Bill 58. Among the groups represented on the Committee were the Manitoba Association of School Trustees (MAST), the Manitoba Teachers' Society (MTS), the faculty of Education of the University of Manitoba, the Manitoba Association of School Superintendents (MASS), the Department of Education, and representatives of various social service agencies and advocacy organizations.

Turnbull, on succeeding Ben Hanuschak as Minister, had discovered a high level of uncertainty among various sectors of the educational community concerning the precise implications of Bill 58, and the funding commitment to be expected of the Province. The Advisory Committee was to generate public feedback and to provide an opportunity for

all interested parties to air their concerns and achieve some consensus before the Committee advised the Minister on the implementation process for Bill 58. Tim Sale, recently appointed Director of the Social Planning Council of Winnipeg, was asked to chair the Committee. Sale has described the process as "like trying to chair a cactus."

Committee members represented the entire spectrum of opinion. Many of those active with organizations such as the Canadian Association for the Mentally Retarded, or employed in senior or middle management positions in various human service agencies, had been strongly influenced by the work of Wolf Wolfensberger. Wolfensberger was the most visible advocate in the United States and Canada for the principle of 'normalization' developed in Scandinavia by Nirje, which argues for the 'normal' treatment of handicapped persons in everyday environments to the greatest degree possible. Many people involved in advocacy or employed in senior or middle management positions in various human service agencies had received training by Wolfensberger in Winnipeg during the 1973-1979 period in Program Analysis of Social Systems (PASS), the evaluation instrument developed by Wolfensberger.

Sale described the philosophy of normalization as a moral/ethical imperative with strong intellectual grounding

Its adherents, he said, approached questions such as institutionalization of the retarded or segregation of handicapped children within schools as ethical rather than empirical issues, and as such not conducive to compromise or negotiation. Hence advocates of normalization tended to be perceived by others as "wild-eyed fanatics who believed that there wasn't a child born who couldn't be completely mainstreamed." They in turn tended to perceive Departmental civil servants as defenders of the status quo, and other representatives of the Department of Health and Social Development as actively in opposition to the deinstitutionalization movement then on the ascendance in this country and in the United States (E.T. Sale, personal communication, August 25, 1989).

The first Advisory Committee Report noted that it was indicative of the group's progress that the report contained no minority opinions. The Report a) recommended that an appeal process should be established to address those differences of opinion which could not be handled by negotiation, and that the process should avoid the civil court system, b) emphasized the importance of early detection and suggested programs be available to pre-school age children, and c) urged inter-Departmental cooperation. It concluded by underlining its support for Bill 58 and its accompanying Statement of Intent, and noting that current

levels of government funding were inadequate to support the developing mainstreamed model (Minister of Education's Advisory Committee on Bill 58, 1977).

The Advisory Committee's second report was delivered in 1979 to a Progressive-Conservative provincial government and a new Minister, Keith Cosens, 18 months into his term of responsibility. The Committee re-iterated its support for Bill 58 (Section 465(22)), saying:

> The committee recommends that the specific intent of 465(22) be included explicitly in the new school act, to have effect concurrently with the implementation of the two-tiered grant system. We believe that the inclusion of this intent is both necessary as well as humane. It does no more than bring Manitoba in line with progressive authorities in North America and elsewhere. (Minister of Education's Advisory Committee on Bill 58, 1979, p. 7).

It further indicated that the Bill's provisions should be broadly inclusive of all learning conditions, that educational placement was to be in the least restrictive environment, and that the issue of services required by exceptional children before they reached the 'legal' age of 6 or 7 needed to be addressed by the combined forces of Education and Health and Social Development Finally, the *Report* endorsed the recommendations of the 1978 Special Education Review regarding a two tiered granting system, monitored by the Department of Education, to provide adequate programming for both high and low-incidence

students, and again elaborated on the need for additional staff training

Following the passage of the revised Public Schools Act, the Advisory Committee made a series of recommendations reinforcing and enlarging upon its earlier Reports, urging that primary prevention be a Provincial trans-Departmental priority, that Divisions be responsible for providing for exceptional children regardless of age, and that a practicum in special needs education be required for all teachers before certification (Advisory Committee on Special Education, 1981).

Divisional Activities: 1967-1989

As in other Provinces, school divisions in Manitoba differ greatly along many dimensions, including enrollment, geographic size and capacity to generate revenue. Approaches to providing for special needs children also vary. Some Divisions maintain a broad network of self-contained placement options outside of the regular stream while others are attempting to integrate even moderately mentally handicapped students into regular classes, and some, who have historically relied on the resources of neighboring school divisions, have just begun to develop specialized services.

As has historically been the case, Divisional policies, and services provided sometimes exceed Provincial statutory requirements. A survey of the policies of most Divisions and Districts in Manitoba on a range of issues relative to special education was conducted by the author, and is described in detail in Chapter 4

In general terms, special education policies range from the very complete and prescriptive to the virtually non-existent, with urban and rural jurisdictions represented about equally across the spectrum. About a quarter of the 44 Boards have approved statements specifying, although often in general terms, an intention to provide education appropriate to individual needs, and outlining some aspects of this process such as steps in identification, referral, and assessment, placement in the least restrictive environment under some circumstances, provision of written individual education plans, and job descriptions for specialist personnel. Some urban Divisions have published additional policy books or handouts with detailed descriptions of available programs and procedures,

Some Board Policy Manuals make no reference to parental access to school records, while some make clear distinctions between educational and clinical materials and specify procedures by which parents/guardians can attach

written objections to anything in a child's files, or can appeal to have the information in question removed. Only one Board refers in its statement regarding special education philosophy to the climate or the standards established by the Canadian Charter of Rights and Freedoms and the Canadian Human Rights Act.

Legal Activity: 1967-1989

The 1975 Public School Act amendment, commonly referred to as Bill 58, paralleled some of the key provisions of P.L. 94-142, the American legislation passed in the same year. The relevant section of Bill 58 read:

> 465 (22) Every school board shall provide or make provision for the education of all resident persons who have the right to attend school and who require special programs for their education.

Although the wording of the statute itself is very general, the Notice of Intent issued by the Government of Manitoba which accompanied the legislation, and a commentary produced by the Working Group on the Education of Children and Youth with Special Needs (1975) are explicit:

> Statement of Intent
>
> To the maximum extent practicable, handicapped children shall be educated along with children who do not have handicaps and shall attend regular classes.

> Physical and mental impediments to normal functioning of handicapped children in the regular school environment shall be overcome by the provision of special aids and services rather than by separate schooling for the handicapped. Special classes, separate schooling, or other removal of handicapped children from the regular educational environment, shall occur only when, and to the extent that the nature or severity of the handicap is such that education in regular classes, even with the use of supplementary aids and services, cannot be accomplished satisfactorily.(Working Group on the Education of Children and Youth with Special Needs, 1975).

The wording of the Declaration of Intent is almost identical to the wording of the 1975 American legislation.

The Working Group had advised the Provincial government that new special education legislation should be introduced in two phases. In the enabling period school Divisions would identify the provincial population in need of special education, assess needs and plan programming. In the later mandatory phase Divisions would be expected to comply with legislative mandates to provide education for all children.

Bill 58 was to be proclaimed, signifying its enactment as law, only when the provincial and divisional infrastructure was in place and costs identified. New Democratic Party Education Minister Ben Hanuschak made this point repeatedly in the limited discussion which took place in the Legislature and at deliberations of the Law Amendments Committee before the Bill was introduced for

third reading, the final stage before passage (Hansard, Province of Manitoba, 1975, p. 4250).

In 1977, the Progressive Conservatives replaced the New Democrats in government. Instead of proclamation of Bill 58, Education Minister Keith Cosens introduced completely revised versions of the Public Schools Act and the School Administration Act in March, 1979. The guarantees of Bill 58 were replaced by section 41(5) of the proposed Bill 22, which said:

> 41(5) Every school board shall, as far as is possible and practicable in the circumstances, provide for, or make provision for, resident persons who have the right to attend school and who require special programs for their education.

Introducing Bill 22 for second reading, the Minister said that the new section would "make statutory what school boards are to all intents and purposes doing today, that is, providing programs for children with special needs." (Hansard, Province of Manitoba, 1979, p. 3959). When New Democrat Bud Boyce said in the House the following day that advocacy organizations were unclear as to whether the provisions of the new Bill were to replace, or to augment, the not-yet-proclaimed Bill 58, and asked the Minister to clarify his government's intentions, the Minister took the question as notice, a parliamentary procedure sometimes employed to delay a response pending additional information. (Hansard, Province of Manitoba, 1979, p.3985).

The proposed Bills were withdrawn, and public hearings were held in October, 1979 by the Standing Committee on Privileges and Elections of the Manitoba Legislature. Some of the more than 60 submissions, of course, addressed many topics in addition to special needs, including expanded funding for private schools and French language instruction.

Spokespersons for Winnipeg School Division #1, for the Manitoba Teachers' Society, and for advocacy organizations such as the Social Planning Council and the Canadian Association for the Mentally Retarded.criticized the proposed "special needs" clause. They described it as a weak and regressive retreat from the Provincial government's former stance of leadership, one which was likely to maintain wide disparities in service for children in different parts of the Province and which failed to provide parents with a mechanism of appeal.

A revised Public Schools Act, Bill 31 was reintroduced in May. The new Act was silent as to educational rights or entitlements for any student. Relevant sections of the Act specifying duties and responsibilities of school boards are re-printed in full in Chapter 3. In general terms, Boards were required to provide or to arrange for other Boards to provide school accommodation in Grades I to XII inclusive for all resident children between the ages of 6 and 21

The only reference to "duties of boards" which appears to have direct reference to specific learning needs of children is Section 41(1) q, which requires that Divisions screen all pupils for physical, emotional, mental or learning disabilities. The section was passed as part of the 1980 Act but, nine years after receiving approval by the Legislature, has not been proclaimed.

When he introduced the revised Bill on May 30, 1980, the Minister said that the revised statute was intended to provide a common direction to all jurisdictions, recognizing local authority and keeping "only those controls which are needed to ensure that every pupil receives a level of education commensurate with his or her ability." Referring to the public briefs presented the previous October relative to special needs, he said that in Bill 31, "the duty of school boards to provide or make provision for the education of all persons for whom they are responsible is clearly enunciated." (Hansard, Province of Manitoba, 1980, p. 4198).

The Committee on Privileges and Elections, meeting in June 1980, heard 29 public briefs Special needs advocacy groups generally welcomed removal of the "practical and possible" clause, but submissions warned that the revised legislation was still ineffective because it required school Divisions to provide children only with a place in a

classroom rather than an education appropriate to individual needs, and that some Divisions would never develop their own resources to provide for special needs children if allowed to continue to purchase services from neighboring jurisdictions

Members of the New Democrat opposition who addressed the special needs aspect of the Bill in legislative debate generally echoed the criticisms of parent and advocacy groups about the Bill's shortcomings and its lack of assertion of children's rights. Several members commented on the contrast between Manitoba and the neighboring jurisdiction of Ontario, whose Progressive Conservative government had at that time introduced legislation to guarantee the sort of educational rights which Manitoba's government was in the process of discarding. One legislator noted that virtually no government members except the Minister had entered the debate and suggested that the government had chosen to introduce the Bill near the end of the legislative session and had ordered its Members not to speak to the Bill in order to avoid full discussion.

By contrast, one New Democrat, Russell Doern, warned the Minister that embarking on a course of meeting special education needs in even a limited fashion would be extremely expensive, and suggested that discussion about

the school system's responsibility to exceptional children was motivated by professionals' concern over declining public school enrollment (Hansard, Province of Manitoba, 1980, pp. 5148-5149).

The sole Liberal member, June Westbury, expressed outrage that the intersessional Legislative Committee had condensed the concerns of 50 to 60 organizations into a one-and-one-half page report. The Liberal Party, she said, believed that the right to education should be enshrined in legislation as were other fundamental rights in a democracy, and should include a process for guaranteeing appropriateness, should assume placement of children in the least restrictive environment, and should assure early screening for learning disabilities (Hansard, Province of Manitoba, 1980, pp. 5155-5157).

The revised Public Schools Act received legislative approval in July,1980, with all New Democrat and Liberal members voting in opposition, and became law the following December.

Commenting on his government's approach in 1979-1980 after the passage of 10 years, the former Education Minister identified a sense of financial jeopardy rather than an ideological position regarding exceptional children as the motivation behind the decision to repeal rather than to proclaim Bill 58. Cosens said that there seemed to be

no way to get a reliable estimate of the potential costs of Bill 58, both to begin implementation and to continue to meet demands which could potentially expand indefinitely, and that it was felt that no government of that period could afford to issue what amounted to a blank cheque.

Cosens also said that there had been no consultation between his Ministry and the Education Ministry in Ontario, where the Progressive Conservative government introduced Bill 82 in Ontario at the same time as Bill 58 was repealed in Manitoba. Ontario, with more industrialization and a larger population base, might be able to afford legislation which guaranteed more services, he said, but that wasn't relevant to what could be afforded in Manitoba.

Cosens reiterated earlier statements that his government had incorporated the basic ideas of Bill 58 into the revised Public Schools Act. His government had also sought to eliminate any reluctance on the part of School Divisions to provide resources, he said, by greatly increasing Provincial funding. "We found that autonomy didn't become an issue if the money was there," he said (Keith Cosens, personal communication, August 11, 1989.)

The funding increase to which Cosens referred was indeed substantial. Special education operating support for 1981 increased 356%, from $6,218,00 to $22,173,700 (Manitoba Teachers Society, 1983, p. 15).

As Cosens indicated, and as has been noted in several studies produced by the Manitoba Teachers' Society over the past 10 years, the statutory mandate for Bill 58 had not been paralleled by a financial mandate for the 1975-1980 "enabling" phase. A 1976 Department of Education review paper observed:

> The Department of Education has to date not screened or identified the special needs population in order to establish the number of children requiring special education programming and support services.
>
> ...Basic information needed to project accurate estimates for the implementation of Section 465(22) of Bill 58 is not available at this time. A need exists, therefore, to develop an interim funding strategy until necessary data is available on which a rational funding policy can be developed.(Cited in Manitoba Teachers Society, 1983, pp. 7-8).

The Department of Education published guidelines describing the establishment and functioning of Local Advisory Committees. These LAC's were to include teachers, administrators, parents and others involved with special needs children. They were to operate, as Standing Board Committees, to gather data and provide recommendations (Manitoba Department of Education, 1977-1978).

In the two budget years following passage of Bill 58, School Districts/ Divisions were eligible to apply for grants to support costs of Initiation, Planning and Professional Development. In the 1977-1978 year these grants were available to a maximum of $12,000 per Division.

Beginning with the 1978-1979 fiscal year the implementation grants were replaced with an allocation for fund requests initiated by Divisions for support of specific projects (Manitoba Teachers Society, 1983).

An Advisory Committee on Special Needs had last reported to the Minister of Education in Manitoba in 1981. The Committee was reconvened in early 1987 and asked to address a wide range of issues including mainstreaming, parental involvement and funding. It reported to the Minister in October, 1988, identifying basic principles of equity which include the rights to receive an appropriate education, culture-fair assessment and least restrictive environment placement, and an appeal process for resolution of disputes. The Committee recommended, among many things, that the provincial Government enact statutes and regulations which recognize both substantive and procedural rights for parents and children; that Manitoba Education assume a higher profile in assuring adequate training for all teachers and demonstrate leadership vis-a-vis School Boards by articulating a "mission statement" and providing a Provincial policy manual; and that inter-departmental and inter-agency coordination be facilitated (Advisory Committee on Special Needs, 1988).

Discussion

Educational services for special needs children developed in Manitoba in a sequence similar to the general Canadian pattern. and to some extent to the U.S. model. Parents and organized groups petitioned local School Boards for services. Services were gradually provided, while Boards lobbied the senior level of government for both statutory regulation and financial support.

The stance of the senior level of government, in this case the provincial Department of Education, has been consistently a reactive rather than an initiatory one. Services provided to children by local jurisdictions have often exceeded statutory requirements, and supports provided by the Provincial Ministry of Education to local jurisdictions have in many cases followed enactment of Provincial statutes rather than anticipating needs and supporting local Boards in capacity-building.

The tone of Departmental Reports from the 1930's throughout the 1960's is consistently that of a marginally involved observer. The 1963 Report, for example, commented that development of classes for exceptional children continued to expand throughout the province, resulting in increased workload for the Department, requiring it to confront issues of "curriculum, supervision and teacher training which are quite new to the department." This

observation was made in 1963, the year in which the Christianson Report was commissioned, and only three years before statutory revisions, in response to recommendations made by the 1959 MacFarlane Commission, required all Boards to open their schools to the mentally retarded, and at a time when, as shown by the Department's own statistics, there were at least 119 classes for the retarded already operating throughout the Province.

In a similar vein, the Department reiterated in 1965 that it had these issues "under advisement," where presumably they had rested since the 1930's when they were first raised in Departmental Reports. In 1967 the Department reported that the Curriculum Branch had begun work on a curriculum for the mentally retarded (Manitoba, 1965; Manitoba, 1967). This work was beginning in the year in which the enrollment of retarded children in Divisional programs increased by 50%.

Many of the recommendations of the 1988 Advisory Committee in Manitoba repeat, in more contemporary terminology, recommendations reiterated by individual professionals, advocacy organizations, provincial and national commissions and previous Provincial Advisory Commissions over the last three decades. There has been nearly complete unanimity on such issues as the need for improvements in both the quantity and the quality of

training for teachers, for instance, and for expansion of Provincial Government involvement to guarantee that needs of all children are met by the public school system, in every public document relating to exceptional children published in this country since 1963.

Until 1989, the Manitoba government had consistently elected not to act on advice offered by the national educational community or by the Minister's Special Needs Advisory Committee, which had four times since since 1977 recommended statutory enactment of rights for exceptional children, expanded provincial responsibility in monitoring delivery of services by Divisions, and inter-Departmental initiatives to address needs of pre-school exceptional children, among many other issues.

The 1989 Guidelines, released by Minister Len Derkach in September, represent the first substantive response of the government of Manitoba to the representations made to it in this regard by parents and professionals since the mid-1970's. Whether the Guidelines will have the effect of finally facilitating the development of services in Manitoba and the heightened Provincial profile recommended by parents and professionals since the 1960's and 1970's will be seen in the months to come.

VI. Legal Status

Introduction

During the late 1970's and 1980's, most Provinces took some action to expand substantive and procedural provisions for the education of exceptional children. Some, such as Manitoba, Newfoundland and Prince Edward Island, provide a network of services largely prescribed through Ministry policy statements and manuals, without a statutory mandate (Conn-Blowers, & McLeod, 1989; Manitoba Teachers' Society, 1987b; McBride, 1989; Wilson, Cleal, Godsell, & Sheppard, 1989). Others, including Saskatchewan, New Brunswick, Nova Scotia, Ontario, Quebec and Saskatchewan, introduced mandatory and prescriptive legislation and regulations.(Beuree, 1989; Carlson, 1989; Champoux-Lesage, 1989; Wilson, 1983a; Wilson, 1983b).

This chapter will review definitions and indications of status as to rights and responsibilities of the exceptional child, as prescribed in educational statutes and regulations in Manitoba and, for purposes of context, in the Provinces of Alberta, Saskatchewan and Ontario and in the United States.

Manitoba: Definitions

Neither the *Public Schools Act* nor the Education Administration Act, both last revised substantively in 1980, make direct reference to exceptional children or to special education. Although there are frequent references to 'special education' in the Regulations, nowhere in the Regulations is there a definition of the term.

Regulations presently in force under the Public Schools Act with sections pertaining to exceptional children are: 138/89, 464/88, 179/88, 252/86, 1/86, 146/83, 166/81 and 6/81. The following sections include relevant definitions in effect at this writing.

Section 1:

> "coordinator of special education services" means a teacher with special education certification whose full-time duty is to administer special education services, to provide consultation and support for special education, resource and regular classroom teachers and coordinate clinician and special education services; (Manitoba Regulation 1/86,amended by 179/88).
>
> "resource teacher" means a teacher with special education certification employed by a school division and whose principal duties are to diagnose individual educational problems, prescribe special remedial measures for use by teaching staff, give direct assistance to students in need of special help and provide consultative services to school personnel and parents; (Manitoba Regulation 1/86, amended by 179/88).
>
> "special class teacher" means a teacher with special education certification employed by a school division and whose full time duty is to teach children who

require special education programs; (Manitoba Regulation 1/86, amended by 179/88).

"special services" means:

(a) provided under Level I support, and for Level II and Level III pupils as defined in section 7, and (b) provided by the coordinator of special education services and clinicians; (Manitoba Regulation 138/89).

"teacher of the gifted" means a qualified teacher employed by a school division whose principal duty is to teach a program for gifted students approved by the minister as a program for gifted students; (Manitoba Regulation 1/86, amended by 179/88).

'High incidence' is a term usually applied to relatively mildly handicapping conditions which are more frequent in the population as a whole and require relatively less intensive educational modification. The term 'low incidence" is usually applied to more severe handicapping conditions which are of low prevalence in any population but which require more significant educational modifications and supports.

Manitoba originally recognized two categories of Low Incidence conditions for funding purposes (Regulation 166/81) and added a third category in Regulation 252/86. High Incidence was defined in 166/81 only in relation to eligible units for Provincial financial support. The terms were used until the passage of Regulation 138/89, when the High Incidence category was combined with the existing Low Incidence One service level to become the new Level One

service level. Regulation 138/89 provides these definitions:

> 4. Section 7 is repealed and the following is substituted:
>
> In this section and in sections 8, 9, 10, 11,.13,.13.1 and 14.,
> (a) "level I" means a program of support for the provision of resource teachers, occupational entrance teachers, special class teachers, teachers of the gifted, teacher aides and related costs as set out under section 20;
> (b) "level II" pupil means a pupil who is severely multi-handicapped, severely psychotic or autistic, or profoundly deaf;
> (c) "level III" means a pupil who is profoundly multi-handicapped.

Manitoba Regulation 464/88 refers to duties which are not to be performed by paraprofessionals unless "a certified teacher is not available for direction and guidance." These duties include classroom organization and management, planning of teaching strategies, assessment of students, selection of educational materials and evaluation of student progress. The Regulation provides no definition of the terms "available," "direction" or "guidance." (Manitoba Regulation 464/88, S.3(1) and (2)).

A Regulation under the Education Administration Act, outlines certification requirements, in terms of coursework and of teaching experience, to qualify for Special Education and Special Education Coordinator certificates,

but provides no additional definitions (Manitoba Regulation 13/85).

The other definition in Manitoba educational documentation relating to exceptional students is found in the Manual for Financial Reporting and Accounting in Manitoba Education (FRAME). This Manual governs the uniform reporting procedures required of all Divisions and Districts in Manitoba since 1983. "Exceptional Program" is defined as follows:

> "Consists of activities related directly with the teaching of exceptional students in special classes. Special classes included in this program must involve students who take the majority of their instruction in special classes (Manitoba, 1982, p.5.7).
>
> Students are to be reported in this program category if the instruction they receive is given in special education classes for 50% or more of the instructional training." (Manitoba, 1982, p.16.2).

It should be noted that Provincial regulations governing education in the Province of Manitoba have an almost exclusively fiscal orientation. On the whole they serve to specify eligibility criteria for various levels of Provincial financial support by School Boards, rather than also defining for School Boards and for all citizens the standards or expectations of the Province for provision to children of educational programs and related services.

Manitoba: Legal Status

Manitoba's Public Schools Act is silent as to educational rights or entitlements for any student. The duties of school boards are defined as follows.

> Certain duties of school boards
> **41**(1) Every school boards shall
> (a)Provide adequate school accommodation for the resident persons who have the right to attend school as provided in section 259.
> Instructional responsibilities of school boards
> **41**(4) Every school board shall provide or make provision for education in Grades I to XII inclusive for all resident persons who have the right to attend school.
>
> Programs not offered locally
> **41**(5) Subject to any regulations made under the Education Administration Act every school board shall make provision for a pupil to attend a school in another school division or school district for a program not provided by the pupil's home school division or school district and the pupil's home school division or school district is responsible for paying the residual costs of the education.
>
> Right to attend school
> **259** Subject to the provisions of this Act any person who has attained the age of 6 years at the beginning of the fall term or will attain the age of 6 years within 12 weeks after that time or within 12 weeks after any date fixed by the school board for admission to enrollment, has the right to attend school to an age 3 years beyond the age of majority.(Public Schools Act, 1980).

The only reference to "duties of boards" which appears to have direct reference to specific learning needs of children is 41(1) q, passed with the 1980 PSA amendments

but not proclaimed until the 1987 printing of the PSA. It requires that every school board shall

> (q) screen every pupil who has not previously been screened entering the school system in that division or district, for physical, emotional, mental or learning disability.

The section of Manitoba Regulation 1/86 dealing with transportation makes further reference to 'special class'.

> **3.** Notwithstanding clause 2(b), a pupil who is enrolled in a school division shall also be considered a transported pupil:
>
> (c) if the pupil attends a special class of children who are mentally retarded, physically handicapped, emotionally disturbed or hard-of-hearing, or if the pupil does not attend a special class of children, but is certified by a duly qualified medical practitioner as being physically handicapped;

Manitoba Regulations 1/86, as amended by 252/86, 138/89 and 179/88, outline procedures under which school divisions receive Provincial support grants for employment of special education teachers, special education coordinators and clinicians, or under which divisions may apply for additional Provincial funding on a per-student basis for students classified in one of two low incidence categories through an annual negotiation process with representatives of the Child Care and Development Branch of Manitoba Education. Complete diagnostic descriptions of the exceptionalities within each category are found in 'Guidelines for Application for Low Incidence Support for

School Divisions/Districts,' issued by Manitoba Education in April, 1986.

Manitoba Regulation 13/85 outlines requirements for acquisition of the Special Education Certificate. Presently teachers are not required by Provincial statute to hold the certificate in order to be employed in a special education or a resource capacity. Provincial support commitments, as specified in Manitoba Regulations 1/86 and 252/86, provide financial incentives, in the form of eligibility for grants based on enrollment, for Divisions or Districts to employ teachers who hold the Special Education certificate. The Winnipeg School Division No.1, among others, is encouraging teachers to apply for special education and resource positions within the Division only if they hold the certificate or are near completion of requirements for it (Winnipeg School Division No. 1, 1987).

Both Manitoba's Act and Regulations are silent on the issues of parental involvement in identification of exceptional learning needs or provision of programs, and of due process or an appeal procedure, except to specify, in Regulation 138/89:

14. The decision of the minister or designate as to the classification of a pupil Level II pupil or a level III pupil is final for the purposes of this regulation.

In March 1987 Manitoba Education issued a 'Policy Direction and Consultation paper' titled Appropriate Education, Student Placement and Parent Involvement. It was widely circulated to parental, professional and other advocacy groups for comment. The paper reviewed procedures which presently govern the involvement of parents, and suggested very general principles which ought to underlie a more formalized process for promoting cooperation between parents and professionals and for resolving disagreements. The paper closed with an indication that guidelines were to be finalized by June 30, 1987, and that the issues addressed in the paper "need to be resolved for the 1987-88 school year."(Manitoba Education, 1987a, p.3). A revised paper, incorporating public responses to the June paper, was issued in August 1987 (Manitoba Education, 1987b).

Bill 59, the Public Schools Amendment Act. was introduced into the Legislature by the Minister of Education on November 8, 1989. The Bill's provisions reflect none of the Departmental paper's recommendations regarding parental involvement, other than a reference to access to records which does not specify whether the access

includes the right to copy, appeal, provide an attachment to or remove items from the student's school records..

> **41**(1) Every school board shall
>
> (r) determine the times when and the manner in which reports and other information respecting pupils shall be delivered or provided or made available by teachers under section 96;
>
> (s) make available to the parent or guardian of any pupil attending a school within the jurisdiction of the school board, or to both the parent or guardian and the pupil where the pupil has reached the age of majority, such information as may be contained in any file or record kept at the office of the school or school board respecting the pupil;
>
> (i) in the case of a file or record kept at the office of the school, during normal school hours, and
>
> (ii) in the case of a file or record kept at the office of the school board, during normal office hours,
>
> or at such other time as may be agreed between the school board and the parent or guardian or between the school board and both the parent or guardian and the pupil, as the case may be; (Bill 59, 1989).

Saskatchewan: Definitions

Saskatchewan's Education Act (1983) provides the following definition of 'handicapped' pupils:

> **184.**-(1) "...handicapped pupil" includes a pupil who, under criteria prescribed in the regulations, is deemed to be unable to participate at an optimal level in the benefits of the ordinary program of the school by reason of personal limitations attributable to sensory defects, mental retardation, communications disorders, neurological, orthopedic or physical impairment or behavioral disorders.

Gifted pupils are addressed as well:

> **185.** Where the ordinary programs of instruction of the school are considered by the board of education to be insufficient to meet the educational needs of certain pupils of superior natural ability or exceptional talent, the board may make provision for such special programs as it considers feasible and appropriate.(Education Act, 1983).

Saskatchewan's Education Regulation defines a "low-cost disabled pupil" as one with "a mild to moderate disabling condition who requires appropriate special educational services but who does not meet the criteria" for a "high-cost disabled pupil (Saskatchewan Regulation 1986, Part IX, S.48). Section 49 of the Regulation delineates specific diagnostic descriptors for the categories of high-cost disability listed in Section 184 above.

Saskatchewan: Legal Status

The Education Act says:

> **178.**-(1) Every pupil shall be provided, insofar as is practicable within the policies and programs authorized by the board of education, with a program of instruction consistent with his educational needs and abilities, but...

Clauses (a) through (d) of Section 178 follow, outlining procedures by which a principal or a parent/guardian who feels that a pupil, by reason of disability, handicap or other personal attributes,

including giftedness, is unable to profit from the instruction normally provided, can initiate the process of referral, leading to assessment of the pupil and modifications of the educational program.

Boards are allowed to exclude handicapped pupils from certain placements or any placement provided by the board under the following conditions:

> **184.**-(2) Subject to the regulations, a board of education shall provide educational services on behalf of handicapped pupils, but:
>
> (a) where it is considered advisable, the board may exclude from attendance in a specific curricular program any pupil who, in the opinion of the director or superintendent, is incapable of responding to instruction in that program or whose presence is detrimental to the education and welfare of other pupils in attendance in that program, but no such exclusion shall deprive a pupil of access to alternative educational services provided by boards of education to handicapped pupils in this section; and
>
> (b) where, upon investigation of and in the opinion of the director or superintendent, 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 consult with the pupil's parents or guardians and make available any of its consultant services that may be of assistance in identifying and arranging other services appropriate to the needs and circumstances of the pupil. (Education Act, 1978).

Regulation E-O.1 provides that handicapped or gifted pupils are entitled to referral, evaluation and special programming, in their home division or in another division, or in a private setting, at public expense. The

superintendent or director of education for the division in which the student resides is responsible for identification and placement. Recognized high-cost disabled pupils are entitled to a special education program from the age of three years, on the request of the parent or guardian. Both the designation as 'high-cost disabled' and the program provided for the child are to be reviewed annually (Saskatchewan Regulation 1986,(S.50.(1)-(5), S.52(2)-(7)).

Parents or guardians are entitled to be "consulted with" before a child is designated as "high-cost disabled" and placed in a special education program. Parents or guardians who disagree with either identification/non-identification or placement/non-placement of a child are entitled to be heard by an Appeal Committee, whose decision is final (Saskatchewan Regulation 1986, S.51(1)-(6)).

Regarding the services to be provided by Boards to all exceptional children, the Regulation says:

> **52**(1) A board of education shall
>
> (a) make available at no cost to their parents or guardians, special education services for disabled pupils that are, in the opinion of the minister, appropriate, including special schools, special classrooms, resource rooms and itinerant and tutorial programs, and may provide those services for pre-school age disabled children identified pursuant to section 50(2), in order that disabled pupils can benefit from the most appropriate and least restrictive program;

(b) ensure that the services described in clause (a) are provided by staff with special training acceptable to the minister;

(c) provide special instructional materials and any modified facilities and reduced teacher-pupil ratio that, in the opinion of the board of education, is appropriate;

(d) ensure that the costs of the services described in clause (a) generally reflect the expenditures which are prescribed in these regulations.

Alberta: Definitions

A new School Act, to replace the current statute which dates from 1970, was introduced into the Alberta Legislature for first reading in June, 1987. It was described as the product of "over two years of extensive review including three province-wide tours by a policy advisory committee, 29 public forums, more than 150 presentations by interested groups and over 1,100 written submissions." (Brennan, 1987, p. 1).

In the face of public opposition, Education Minister Nancy Betkowski withdrew Bill 59. One of the sections which drew the fire of numerous groups, including the Canadian Association of Community Living and Integration Action Alberta, would have relieved Boards of responsibility to provide for students who were deemed 'non-educable.'(Barnsley, 1988; Brennan, 1987). A non-

educable student was one who was "unable to benefit educationally from a regular education program or a special education program on account of that person's (i) severe lack in intellectual functioning, or (ii) severe medical fragility."(Bill 59, 1987, Alberta). The Board's designation of non-educability was appealable to a Special Education Tribunal to be established by the Minister. The tribunal's decision was final.

A revised School Act was introduced on May 5, 1988 and received legislative approval on July 6. Education Minister Nancy Betkowski is quoted as telling the Alberta legislature that, "for the first time in Alberta's history" the School Act, "focused on the student, as well as the right of students to educational programs that meet their particular needs." (Brennan, 1988, p. 1).

The 1988 Act provides no definition of special education program, except as that to be provided for a student who, is because of "behavioral, communicational, intellectual, learning or physical characteristics, or a combination of those characteristics, a student in need of a special education program." (School Act, 1988, S.29(1)).

Alberta: Legal Status

In Alberta children between the ages of 6 and 18 who meet citizenship and residence requirements is entitled to

"access to an education program." A Board at its discretion may provide an education program to a child who is younger than 6 or older than 19 (School Act, 1988, (Part 1, S.3(1)-3(2)). Boards are required to provide resident students with an education program by enrolling the student in a school operated by the Board, by another Board, or by the Government, or a private school (S.28(1)). A child who is determined to be in need of a special education program is entitled have access to a special education program.as described in Section 28. Parents, and the student where feasible, are entitled to be "consulted with" before placement of a child in a special education program (S.29(3)).

If a Board determines that a child's special needs cannot be met by an education program provided by a Board under section 28, the Board may refer the matter to a Special Education Tribunal, established by the Minister which can refer the child back to the Board for provision of a program, or concur with the Board's judgment. If the Tribunal upholds the Board's referral, it "shall develop or approve a special needs plan that is in accordance with the needs of the student," including related services which may be required from outside agencies, and the apportionment of costs between the Board and the provincial government. The

Tribunal's decision must be reviewed at least every three years (S.30(1)-(6)).

Tribunal decisions are binding on both the parent and the Board, but under S.104(3) either a parent or a Board may request that the Minister review a decision made by a Special Education Tribunal. The Minister may mediate with both parties to attempt to resolve the dispute but failing resolution, may make a final decision.

S.103 outlines broader conditions under which students or parents may appeal a decision by an employee of the Board (or the failure to make a decision) which "significantly affects the education of a student." Placement of a student in a special education program (but not, apparently, the content of the program) is a specified ground for appeal. Appeal is to a Board Committee, with provision for Ministerial review as specified in S.104.

The statute outlines the responsibility of Boards to provide transportation for students residing more than 4.8 kilometers from school, but makes no reference to students with special needs (S.34(1)).

Ontario: Definitions

Ontario's Education Amendment Act, also known as Bill 82, received royal assent in 1980, with a phase-in period of five years before full implementation in September,

1985. Bill 82 has been described in positive terms as standing "between the absence of legislation, on the one hand, and the highly prescriptive U.S. Public Law 94-142, on the other" (Hodder, 1984, p. 44) and in negative terms as a law which "permits hardly anything which was not permitted already, gives no enforceable rights, and compels no one to obey it."(Smith, 1981, p. 208). References throughout this chapter are to the 1983 printing of the Act.

The Ontario Education Act provides these definitions.

> **1.**--(1) In this Act and the regulations, except where otherwise provided in the Act or regulations,
>
> 21. "exceptional pupil" means a pupil whose behavioural,communicational, intellectual, physical or multiple exceptionalities are such that he is considered to need placement in a special education program...
>
> 63.'special education program" means, in respect of an exceptional pupil, an educational program that is based on and modified by the results of continuous assessment and evaluation and that includes a plan containing special objectives and an outline of educational services that meets the needs of the exceptional pupil.
>
> 68."trainable retarded child" or "trainable retarded pupil" means an exceptional pupil whose intellectual functioning is below the level at which he could profit from a special education program for educable retarded pupils.
>
> **34.**(1)In this section
>
> (b)"hard-to serve" pupil means a pupil who, under this section, is determined to be unable to profit by instruction offered by a board due to a mental

> handicap or a mental and one or more additional handicaps.(Education Act, 1980).

Legal Status: Ontario

Ontario's 1980 Education Act offers the most comprehensive and detailed provisions on educational services for exceptional students in effect in any Canadian jurisdiction.

Wilson (1983a) describes the five principles of the Ontario legislation which have their equivalent in the 1975 American legislation.

Universal Access. The right of all exceptional pupils to have access to appropriate education programs.

Education at Public Expense. Education is provided without additional fees charged to the pupil and family.

These rights are conferred in the definitions contained in S.1, cited above, and in the following sections.

> **8.**(2)The Minister shall ensure that all exceptional children in Ontario have available to them, in accordance with this Act and the regulations, appropriate special education programs and special education services without payment of fees by parents or guardians resident in Ontario, and shall provide for the parents and guardians to appeal the appropriateness of the special education placement, and for these purposes the Minister shall
>
> (a)Require school boards to implement procedures for early and ongoing identification of the learning abilities and needs of pupils, and shall prescribe

standards in accordance with which such procedures be implemented; and

(b) in respect of special education programs and services, define exceptionalities of pupils, and prescribe classes, groups or categories of exceptional pupils, and require boards to employ such definitions or use such prescriptions as established under this clause.

149. Every board shall

7. before the 1st day of September, 1985, provide or enter into an agreement with another board to provide in accordance with the regulations special education programs and special education services for its exceptional pupils in the English language or, where the pupil is enrolled in a school or class established under Part XI, the French language, as the case may be;

Trainable retarded pupils are defined (S.1(68)) as exceptional and therefore eligible to the same provisions and processes as other exceptional students, including instruction in either language and in a separate school if applicable, to the age of 21.

Appeal Process. The right of all exceptional pupils to have their interests represented, including the rights of parents to appeal the identification and placement or to request a review on behalf of their child.

In addition to S.8(2) above, this right is described in Ss.34,35 and 36, and in Ontario Regulation 554/81. Ontario Regulation 554/81 describes the Identification, Placement and Review Committees (I.P.R.C.'s) to be established by boards for the designation of children as

exceptional, and hence eligible for placement in a special education program.

An I.P.R.C., after reviewing educational assessments, and health and psychological assessments with parental permission, may designate a child exceptional within one of the categories specified in S1(21) of the Act, and recommend a placement. A parent who disagrees with the designation or the placement may appeal to an Appeal Board, established by the school board. The Appeal Board, within three days of the hearing, may agree with the I.P.R.C., disagree and refer the case back to the I.P.R.C., or determine that the pupil is not exceptional. A parent who disagrees with the finding of an Appeal Board may appeal to a Special Education Tribunal and, under some conditions, to a Regional Tribunal. A parent may also activate the appeals process if he disagrees with the conclusions of an I.P.R.C review three months after the initial special education placement.

Sections 34, 35 and 36 of the statute outline the procedures whereby a child is a) identified, by a principal or a parent, as unable to profit from instruction offered by the board and referred to a committee appointed by the board; b) determined to be in need of a special education program, which will be provided by the board, or 3) determined to be a hard to serve pupil, in which case,

with parental agreement, the board will assist the parent to locate a placement in Ontario, where available, or outside of Ontario if necessary. Costs of finding and supporting such a placement are to be paid by Ontario.

A parent who disagrees with the placement offered by the board, or with the designation of the pupil as hard to serve, may appeal to a Special Education Tribunal and, in some circumstances, to a Regional Tribunal. S.36(5) says:

> The decision of a Special Education Tribunal or of a regional tribunal under this section is final and binding upon the parties to any such decision.

Appropriate Program. The right of exceptional pupils to a program that includes a plan containing specific objectives and an outline of services that meets the needs of exceptional pupils.

> **1.**-(1)63.'special education program" means, in respect of an exceptional pupil, an educational program that is based on and modified by the results of continuous assessment and evaluation and that includes a plan containing special objectives and an outline of educational services that meets the needs of the exceptional pupil.

Section 1(1)64 ensures that the special education service described in S.1(1)63 includes facilities, equipment and support personnel.

Ongoing Identification and Continuous Assessment and Review of each pupil's progress, including an annual review of the suitability of the placement.

The educational plan must be modified by continuous assessment and evaluation and must meet the student's needs (S.1(1)63). A parent who believes a child designated hard to serve has improved so as to be able to "profit from instruction" may apply for a review of the designation (S.34(1)6).

More detailed analysis of the operation of the Act and relevant Regulations (62/82, 554/81, and 274 as amended by 553/81) can be found in Chalmers, 1982; Crealock, & Nediger, 1983; Crux, 1983; Humphreys, Davidson, & Feeney, 1986; Ontario Ministry of Education, 1984; Wilson, 1983a; Wilson, 1983b; Wilson, 1984.

Two principles in the United States legislation are not included in the Ontario legislation. There is no requirement for mainstreaming or Least Restrictive Environment placement, as provided for in EHA, in Section 504 of the Rehabilitation Act of 1973, and in about half of the state statutes (Citron, 1982, p. 23). As well, there is no provision for non-discriminatory or culturally appropriate testing in the child's first language, as is required by EHA and by approximately one fourth of all states (Citron, 1982, p. 30).

United States: Definitions

The 1975 Education for All Handicapped Children Act provides these pertinent definitions:

> 602(4)(16) The term "special education" means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.
>
> 602(4)(17) The term "related services" means transportation, and such developmental, corrective and other supportive services (including speech pathology, audiology, psychological services, physical and occupational therapy, recreation and medical and counselling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.
>
> 602(4)(18) The term "free appropriate public education" means special education and related services.which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the state educational agency, (C) include an appropriate preschool, elementary or secondary education in the state involved, and (D) are provided in conformity with the individualized education program."
>
> 602(4)(19) The term "individualized education program" means a written statement for each handicapped child developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child and, whenever appropriate, such child, which statement shall include (A) a statement of present levels of educational performance of such chid, (B) a statement of annual goals, including short-term educational objectives, (C) a statement of the specific educational services to be provided to such

> child and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, (E) appropriate objective criteria and evaluation procedures and schedules for determining on at least an annual basis, whether instructional objectives are being achieved (Education for All Handicapped Children Act of 1975 (P.L. 94-142), 1976).

United States: Legal Status

In Canada education is largely a responsibility of Provincial legislatures, and there has been little judicial involvement at either federal or provincial levels. In the United States students derive educational status from legislative, executive and judicial involvement at both federal and state levels. Although the U.S. Supreme Court has ruled that education is not a fundamental right under the federal Constitution, all state constitutions guarantee its citizens a system of public education (Turnbull, & Fiedler, 1984), and all states have a special education statute (Citron, 1982, pp. 120-124). A succession of court decisions at all levels has established that the federal Constitution, and some state Constitutions, ensure protection for exceptional children's educational rights through equal protection and civil rights provisions (Goldberg, 1982; Kirp, Buss, & Kuriloff, 1974; McCarthy, & Deignan, 1982).

The historical and socio-political roots of special education reform in the United States have been described. The heightened level of expectations on the part of Canadian parents and advocacy organization regarding the educational rights of their exceptional children, and perceptions of responsibility on the part of Canadian legislators and educational policy makers, must be in part attributed to familiarity with the American experience and its culmination in the passage of the Education for All Handicapped Children Act in 1975.

It is useful at this point to consider, in brief overview, the major components of EHA, since many of the concerns now being addressed by updated Provincial statutory provisions for exceptional children or, as in the case of Manitoba, by policy statements to that effect, have their inspiration, if not their origin, in the American legislation.

The following identification of the six principles of the Education for All Handicapped Children Act is taken from Turnbull and Fiedler (1984).

Zero Reject

The Fourteenth Amendment to the U.S. Constitution provides that no state may deny to any person equal protection of law. In practical terms,this has been

interpreted both legislatively and judicially to mean that all age-eligible children, no matter how severe their handicapping condition, must be allowed to attend public schools.

Non-Discriminatory Evaluation

The Fifth and Fourteenth Amendments guarantee that a person shall not be denied life, liberty or property without due process of law. This has been applied to mean that denial of an education is tantamount to denial of right to acquire property, and that erroneous school classification resulting in disproportionate placement of some pupils in special education classes because of race or ethnicity violates the equal protection clause.

Individualized Appropriate Education

Due process clauses of the Fifth and Fourteenth Amendments and the equal protection clause of the Fourteenth have been interpreted to protect students from an education which lacks meaning or utility (appropriateness) and hence would be the same as functional exclusion.

The definition of "appropriate" has been cited above in the 'Definitions' section.

Least Restrictive Educational Placement

Provision for due process under the Fifth and Fourteenth Amendments underlie the requirement that children be separated from the educational mainstream only for reasons of individual need, determined on a case-by-case basis, rather than on the application of a disability classification, or for reasons of economy or administrative convenience. Regarding placement, EHA says:

> "(1) that to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and
>
> (2) that special classes, separate schooling or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."(Education for All Handicapped Children Act of 1975 (P.L. 94-142), 1976,(612(5)).

Procedural Due Process

This principle recognizes that citizens should have the right to protest before their government takes action with respect to them.

The due process safeguards allow schools or parents the right to challenge each other about any aspect of the child's program, including the designation of exceptional, whether an evaluation should be performed, how the child

should be classified, and the particular programs or services to be received, and their location.

Generally, but not inflexibly, parents are required to exhaust all administrative remedies before commencing litigation, and to maintain their child in the disputed placement during the period in which they are engaged in due process actions.

Parent Participation

This principle, representing a logical extension of parental responsibility but a significant departure from previous statutory construction, is a primary mechanism for ensuring the other rights guaranteed by the statute.

According to Turnbull & Fiedler:

> Parents are involved in the principle of zero reject by their act of identifying the child to school officials and by seeking enrollment of the child into the public schools. Parents must give consent prior to any formal evaluation of their child. Parents help assure an "appropriate education" for their child by participating as a member of the educational planning team.
>
> As an educational planning member, parents can assure that their child will be educated in the least restrictive environment which is appropriate. Finally, parents may invoke the due process procedures by requesting a hearing to protest school actions. (Turnbull & Fiedler, 1984, p. 17).

Discussion

Manitoba is among those provinces which support provision of some educational services to exceptional children, in the form of Provincial financial support and a measure of centralized services, without an accompanying statutory or regulatory mandate.

The Public Schools Act does not distinguish between exceptional and other students. The Act specifies duties of Boards, but is silent as to rights of students or parents. While other Provinces have taken steps to update their educational statutes in order to clarify to elected oficials, parents, students and the citizenry as a whole will know how the Province intends to provide for its citizens the rights guaranteed by the Charter of Rights and Freedoms, Manitoba has chosen to retain the format with which it operated throughout the last three-quarters of a century.

The circular nature of the definitions employed in the Manitoba statute and accompanying regulations and other documentation should be noted: special services are those provided by special class teachers; special class teachers are those who provide special services; exceptional pupils are those enrolled in special education programs.

A publication titled Special Education In Manitoba: Policy and Procedural Guidelines for the Education of

Students with Special Needs in the Public School System was released by Education Minister Len Derkach on September 21, 1989. Its language is mandatory, and it outlines procedures which Divisions/Districts are to follow regarding identification, assessment and placement, provisions for parental involvement, an appeal process, and the filing of detailed annual Divisional planning documents. The procedures are generally similar to those required by statutes in Alberta, Saskatchewan and Ontario and by the American legislation.

The document provides no "definitions" section, and at no point defines "special needs students", although the term is used throughout. There is no indication that the Provincial government intends to include the document's principles as amendments to the Act, now or in the future.(Manitoba Education and Training, 1989).

Hence the only definitions in effect related to the exceptional learning needs of students in Manitoba are those very circular ones to be found in existing regulations. Special services are those provided by special class teachers; special class teachers are those who provide special services; exceptional pupils are those enrolled in special education programs.

VII. Provincial/Divisional Policies

Introduction

In Manitoba the statutory and regulatory mandate for the education of exceptional children is very limited. Rather than update its education statute, as some other Provinces have done, this Province has elected to address the issue by publishing a document outlining Provincial guidelines for the education of exceptional children (Manitoba Education and Training, 1989). Special Education In Manitoba reiterates, in much more structured detail, the "Provincial expectations" described by a previous Minister (Hemphill, 1983), and reflects many recommendations of previous Advisory Committees.

As well, some "quasi-legal" rights for exceptional children, both procedural and substantive, are outlined in Divisional Policy Manuals and Special Education policy statements. Many School Divisions presently offer programs and services far in excess of those required by the Province, and indeed, in excess of those specified in their own Policy Manuals.

This chapter will provide a) an overview of the issues addressed in Special Education in Manitoba: Policy and Procedural Guidelines for the Education of Students with Special Needs in the Public System; b) a comparison of

the recommendations of the Guidelines with the recommendations of the four Ministerial Special Needs Advisory Committees; and c) a survey and discussion of policies relative to exceptional children contained in Policy Manuals and/or Special Education handbooks from Manitoba School Divisions as of 1989.

Special Education in Manitoba: Summary

Special Education in Manitoba was published in August, 1989 and released for public distribution in September, one year after the 1988 report of the Special Needs Advisory Committee. This was the first time since 1981 that a Special Needs Advisory Committee had been requested to report to the Minister of Education. Special Education in Manitoba is the only policy statement regarding the education of exceptional children, other than the 1983 Ministerial letter (Hemphill, 1985) and references in annual Ministerial grant announcements and in miscellaneous directives sent to Divisions, to be issued by the Government of Manitoba since the Notice of Intent which accompanied Bill 58 in 1975. The content of its six sections will be summarized and its overall significance discussed.

1.0 Introduction. The Government of Manitoba recognizes that the goal of education is the same for regular and special students: all are to be supported in developing knowledge and skills required to live "meaningful, self-fulfilling lives with as much independence as possible in their communities."

This document is designed to consolidate policies and guidelines for provision of special education programs and services. These include:

* an education programming and placement process for students who require modification of their education program.

* a division/district-wide planning process for the education of students with special needs.

* increased involvement of parents of students with special needs in program and placement decisions.

* an appeal process for disputes involving students with special needs (Manitoba Education and Training, 1989, p. 1).

It is noted that the guidelines are developmental and will require periodic updating and refining in the future.

2.0 Mandate. The Public Schools Act provision (Section 41(4)) which requires School Boards to provide education for all resident pupils constitutes mandatory legislation regarding all children, including those with special learning needs. This is consistent with rights

specified in Section 15 of the Canadian Charter of Rights and Freedoms, which guarantees equal protection and equal benefit under the law without discrimination on the basis of mental or physical handicap, among other specified categories.

All children in Manitoba are entitled to access to learning opportunities commensurate with their needs and abilities. For students with special needs, this means programs which are appropriate, individualized when indicated, accompanied by support services required for students to benefit, and delivered in the most enabling environment, which for most students is the regular classroom with special supports. The planning process will be carried out by a team consisting of "all those who have information that is relevant to the student..."

3.0 Goals and Principles. The goals of the educational system are consistent for special education and for regular education. A continuum of resources and supports, across a choice of program alternatives ranging from enrollment in a regular classroom with minor modifications to instruction in a hospital setting, should be employed to accommodate children's differing developmental patterns, abilities and learning styles.

Systematic assessment of educational needs should precede programming and placement decisions, which should be based on a comprehensive plan, developed and reviewed periodically by the educational team. Students who require extensive program modifications should have a written Individual Education Plan (IEP). Education personnel, with parental authorization, should be responsible for coordinating support services from health, mental health or community service personnel when indicated.

Finally, school divisions/districts are directed to provide early identification and intervention programming. The document notes: "Such special education programming, provided at the earliest possible stages of development, is critical for children with special learning needs and may lessen the deleterious effects of disabilities on their learning."(Manitoba Education and Training, 1989, p. 6).

4.0 Programs and Services. This section underlines the responsibility of the Minister of Education and Training to establish overall policy directions, approve programs and support authorized activities, and the responsibility of School Boards to "implement education policies and deliver education programs in an effective and efficient manner."

Boards are directed, within the parameters of provincial directions and policies, to develop and keep current a Board-approved Annual Divisional Special Education Action Plan (ADAP), to be submitted annually to Manitoba Education for review and to be made available to the public upon request. The ADAP is to include a statement of special education philosophy, policy, procedures, practices and professional development activities of the Division/District, and is to provide a detailed description of the special education population served, the specialist personnel serving this population and the programs and services provided. Boards are required to provide appropriate transportation for special needs students requiring such services, and the ADAP is to include the transportation plan.

A planning guide to facilitate this planning process is appended to the document. Boards are required to complete the first phase by December 15, 1989, the second phase by May 30, 1990, and the third by May 30, 1991.

Boards are also directed to submit to the Public Schools Finance Board a five-year plan, updated annually, outlining and priorizing Divisional requirements for capital construction and/or modifications to existing structures to accommodate students with special needs.

The section concludes with a list of twelve aspects of specialist consultative support and direct services provided by Manitoba Education and Training to assist Divisions/Districts to develop and deliver comprehensive services.

5.0 Parent Involvement. This section emphasizes that parent/professional collaboration is even more critical to the success of the educational process for special needs children than it is for the non-exceptional student. Parents are to be involved early in the process, "as soon as a significant difficulty has been observed, well before program decisions are made and alternatives are being considered and developed."

Parental involvement is to include access to information about program alternatives and to the contents of children's files, appropriate ways to interpret file information, and the opportunity to add to the contents of files or to amend factually incorrect information. Parents may inquire about any aspect of the program at any stage of the process.

The responsibility for identification of students with special learning needs, and development of a comprehensive educational plan, rests with local school authorities.

6.0 Appeal Process This section outlines a process, with timelines, for handling disputes which cannot be resolved at the school level. On receipt of a written request from a parent/guardian, the Board will establish a review meeting within 15 working days. Disputes not resolved at such a meeting can be referred to the Child Care and Development Branch (CCDB) of the Manitoba Education and Training for conciliation. Solutions suggested by CCDB representatives are not binding on either party. The final arbitration stage will be.provided by a Special Needs Arbitration Panel, one of which will be established for each region of the province. The three-member Panel, appointed by the Minister, will review both the placement decision and the procedures followed, generally within 20 working days of the request for a hearing. Panel decisions will be final. The student whose educational placement is in dispute will remain in his placement during this process.

Special Education in Manitoba: Discussion

Although in general very precise and detailed, Special Education in Manitoba begins with an inaccuracy. The opening sentence of the Ministerial letter which accompanies the document says:

> For more than two decades, students with special learning needs have had access to educational programming through Manitoba's public school system.

The opening sentence of Special Education in Manitoba reads:

> In 1967, the Manitoba government first enacted legislation requiring school divisions/districts to provide educational programs for children with special needs (Manitoba Education and Training, 1989, p. 1).

Neither statement is accurate. Students with special learning needs have had access to educational programming through Manitoba's public school system since the second decade of this century, before Divisions were required to provide any such services and before school attendance was compulsory (Baker, 1967). Provincial grants were paid to Divisions by 1959 in respect to classes for the mentally retarded, physically handicapped, emotionally disturbed and visually handicapped (Manitoba, 1959, p. 14). The Ministerial statement under-represents the history of some Boards in Manitoba in attempting to meet exceptional learning needs.

On the other hand, the legislation enacted by the Manitoba government in 1967 did not require Divisions/Districts to "provide educational programs for children with special needs." The 1966 amendment, which became mandatory in July, 1967, required Boards to provide

"services and facilities" and to engage teachers for resident children classified as mentally retarded. The 1975 PSA amendment, Bill 58, was welcomed by advocacy groups because it would have extended this right to all students, and the 1980 amendment to the Act was described by Education Minister Keith Cosens as enunciating "the duty of school boards to provide or make provision for the education of all persons for whom they are responsible..."(Hansard, Province of Manitoba, 1980, p. 4198).

This confusion between provision of services through Divisional initiative and as a consequence of provincial legislation is perhaps reflective of the divergence of opinion which seems to exist between the educational community in Manitoba on the one hand and successive Ministers of Education and their Departmental spokespersons on the other hand.

Special Education in Manitoba clearly reflects the very comprehensive and broadly inclusive recommendations of the 1988 Advisory Committee Report. Its language is mandatory. It acknowledges the school system's obligation to provide appropriate education for all children, and specifies procedures which Divisions will use to address that objective. Most of its recommendations are in the

mainstream of proposals made by Provincial and national surveys, commissions and task forces in this country throughout the 1960's, 1970's and 1980's.

A revised Public Schools Act which incorporated all of the Advisory Committee's recommendations would have included all of the principles of the 1975 American legislation which Anne Wilson lists as included in the 1980 Ontario legislation: rights to universal access, education at public expense, an appeal process, an appropriate program described by an individual plan, and continuing assessment and review. Such an amendment would also have incorporated the two principles which Wilson notes are not covered by Ontario's Bill 82: Least Restrictive Environment Placement, and culture-fair assessment (Wilson, 1983a).

B. The Guidelines in Context

A comparison of the areas addressed by the 1989 Guidelines, Reports of Ministerial Advisory Committees in 1988, 1981, 1979 and 1977, and the the 1983 Ministerial Special Education Directive, is presented in Table 1. The checklist of policy areas was adapted by the author from a list developed in the U.S. Special Education Administration Project and used in similar research by the government of

British Columbia in the late 1970's (Goguen & Leslie, 1980b).

Policy areas were selected to reflect those items generally covered in Provincial education statutes revised during the 1970's and 1980's, as well as issues current in the literature.

For all policy tables, definitions of policy areas whose meaning may be open to interpretation are as follows:

Statement of rights: an affirmation that all children have equal rights to education appropriate to individual needs and abilities, or a specific commitment to 'appropriate' education for exceptional children;

Parent consultation: a reference to the necessity of parental involvement in assessment, referral and placement processes, whether through "consultation" or through formal granting of permission;

Appeal: designation of a specified process whereby parents/guardians may appeal school or Board decisions regarding a child's identification, placement or program.

Definitions: generic definitions define exceptional children as those whose learning needs or styles require modifications of program or setting; categorical definitions define exceptional children as those exhibiting specific handicapping conditions or as those who are placed

or require placement in particular school classes or groupings;

Screening process: As discussed in the Report of the Manitoba Early Identification and Education Programming Pilot Project, screening is observation of kindergarten children, using standardized screening instruments, for the purpose of providing early identification of individual children requiring further observation and evaluation, and possibly differential educational programming (Manitoba Department of Education (Child Care and Development Branch), 1981-82).

LRE placement: 'Optional' implies a statement that placement in the least restrictive environment is an option open to schools as far as practical or possible; 'mandatory' implies a stronger position, that the onus is on Boards to place most children in LRE placements and to justify other decisions; mandatory does not imply a statement that all children are to be 'mainstreamed' and does not imply a statement that there are no children for whom partially or completely self-contained settings for all or part of the day are the most appropriate or the least restrictive;

Individual educational plan: an individualized program plan specifying short and long term goals, strategies and a process for goal evaluation, whether written or not;

Special education professional development: a statement recognizing the obligation of Boards to address professional development needs of regular and specialist personnel regarding exceptional children.

Table 1: POLICY AREAS IN MANITOBA POLICY STATEMENTS

POLICY AREAS	1989 Guidelines	1988 Advisory Cttee	1983 Directive	1981 Advisory Cttee	1979 Advisory Cttee	1977 Advisory Cttee
Statement of Rights	X	X	X	X	X	X
Parent Consultation	X	X	X		X	X
Appeal Process	X	X			X	X
Definitions						
• Generic	X	X	X			
• Categorical						
Screening Process						
•Optional						
•Mandatory	X	X				
Referral Processes						
Assessm. Processes		X				
First Lang. Assessm.		X				
LRE Placement						
•Optional						
•Mandatory	X	X	X	X	X	X
Indiv.Ed. Plan(IEP)						
•Optional	X					
•Mandatory	X	X				
Program Evaluation	X	X		X	X	X
Grad. requirements						
Susp./Expulsion						
Accessibility	X	X				
Spec. Ed. Prof.Dev.		X		X	X	X
Spec. Ed. Cert. Req'd						
Job descriptions						
•Coordinators						
•Resource Teachers		X				
•Teachers (Reg/Spec)		X				
•Educ. Assistants		X				
Transportation	X				X	X
Access to Records	X	X				

As indicated in Table 1, the Advisory Committees which reported in 1977 and 1979, both in the context of anticipated proclamation of Bill 58, were in substantial agreement. Both Reports repeated the Committees' commitment to legislative recognition of the right to appropriate education for all children, with significant parental involvement and a specified appeal process for the reconciliation of disagreements. Both Reports assumed that Least Restrictive Environment placements should be the norm for most children, and emphasized the importance of pre- and in-service professional development for staff and of on-going evaluation of program and placement for students. Additionally, both emphasized the critical role of early (pre-school) intervention and the necessity of assuring linkages and cooperation between Provincial departments of Health, Community Services and Education.

The 1981 Report did not repudiate any of its previous positions and repeated earlier calls for early intervention and for the integration of education and related services. The 1981 Committee reported to the Minister after the passage of the 1980 Public Schools Act, which the Minister had described as mandatory legislation and which the Report described as "a simplified and improved version" of Bill 58 " (Advisory Committee on Special Education, 1981, p. 1).

The 1981 Report stressed the need of Boards for access to Provincially-funded research and the importance of Provincial responsibility for monitoring of Board compliance with Provincial mandates, and it devoted substantial space to discussion of needed upgrading in preparation of professional personnel .

The 1983 Ministerial letter, written by a new Minister of Education after a change of government in 1981, clearly affirmed the rights of exceptional students to an appropriate education, and the rights of parents to meaningful involvement in the process. The bulk of the letter discussed Ministerial expectation regarding LRE placement.

The 1988 Report was the most comprehensive and prescriptive. In more contemporary language and more detailed structure, it explicitly endorsed nearly every position taken by earlier Reports in the areas of right to appropriate education, parental involvement, due process, LRE placement and professional development, among others. Additionally, the 1988 Report specified that assessment processes should be "comprehensive, continuous, culture-fair, prescriptive and appropriate..." (Advisory Committee on Special Needs, 1988, p. 5). This is the first time a Special Needs Advisory Committee in Manitoba has addressed

the issue of culture-fair assessment which, in the context of first language assessment, has long received substantial discussion in the American educational literature (Brantlinger, & Guskin, 1985, 1987; Chinn & Hughes, 1987; Collier & Hoover, 1987; Heller, Holtzman, & Messick, 1982; Tucker, 1980) and recently has been discussed by Canadian authors as well.(Common & Frost, 1988; Cummins, 1984, 1987; Myles & Ratzlaff, 1988; Persi & Brunatti, 1987; Samuda, 1982).

C: Divisional Policies

Special education services, in Manitoba as elsewhere, have most frequently developed in response to demands from parents, teachers and advocacy organizations. Historically some School Boards in Manitoba have authorized provision of special education services greatly in excess of those statutorily required, and it is the author's experience that frequently services have been provided at the individual classroom and school level in excess of specific policy mandates from Boards.

It has been frequently noted that, while delivery of services in response to situation-specific needs or demands on an ad hoc basis allows flexibility, such a practise also encourages piecemeal development of services, often in

response to the most articulate or organized advocates, rather than systematic planning based on acknowledged rights and identified needs of children Ad hoc services, not protected by formal policy provisions, also tend to be perceived as add-ons, and as such vulnerable to shifting currents of political priorization or fiscal restraint (Ballance & Kendall, 1969; Goguen & Leslie, 1980b; Treherne & Rawlyk, 1979).

Since Manitoba's statutes and regulations contain little policy, it is useful to examine Policy Manuals of Manitoba School Divisions to determine alternate sources of educational 'entitlements' for exceptional children.

The 39 School Division Manuals examined were those available in the office of the Manitoba Association of School Trustees during the month of July, 1989. As well, Special Education Coordinators for Divisions #1 through #10 were contacted in September, 1989 about availability of additional policy statements or handbooks regarding exceptional children. Policies contained in either Board Manuals or handbooks are described in Table 2 and Table 3, by Divisional number. Table 4 provides a list of Divisional names and numbers.

This survey of policies is designed to provide a general overview of the degree to which Manitoba School

Divisions have addressed a range of issues relative to the education of exceptional children through the vehicle of policy formulation. The survey is in no way intended to imply a criticism of particular Divisions or a ranking of Divisions. As well, there is no intention to suggest any necessary relationship between the existence or content of formal policy and the existence or content of programming within a given Division.

It was necessary for the author to make frequent judgment calls in determining whether an item in a Manual qualified as a statement of policy, because direct comparison from one manual to another was not a straightforward process.

Many Board Manuals were organized according to a classification system developed by the Educational Policies Service of the U.S.National School Boards Association (NSBA). The system provides twelve subject classifications for policies or administrative rules, each bearing an alphabetical code, with alphabetical subcoding for subclassifications under each heading. Location of specific policy statement was greatly facilitated for those manuals which used this system. Other manuals used a variety of other classification systems rather than the NSBA model, but did provide subject indexes with some

variety of coding system. Still others used no coding systems or indexes. For the latter two groups the survey process was more difficult, and may have resulted in policies not being located, or in non-interpretation of.a particular reference as 'policy.,' even though all manuals were examined page-by-page. In all cases the most liberal interpretation was given. For instance, a reference to the necessity for development of appropriate assessment or referral processes was recorded as policy in those areas even in the absence of specification of the content of these processes.

Definitions provided for Table 1 apply to Table 2 and Table 3 as well.

Table 2: POLICY AREAS BY DIVISION IN MANITOBA

DIVISIONS

POLICY AREAS	1	2	3	4	5	6	8	9	10	11	12	13	14	15	17	19	20	21	22	24	25	26	28	29	30	33	34	35	37	38	39	40	42	43	44	45	46	47	48
Statement of Rights			x	x		x			x			x		x	x				x	x																x	x		
Parent Consultation	x	x				x		x		x			x	x	x		x			x		x			x	x	x	x					x		x	x	x		
Appeal Process						x						x																											
Definitions																																							
• Generic	x					x		x				x		x	x		x						x													x	x		
• Categorical	x	x							x			x	x		x	x	x					x						x								x	x		
Screening Process																																							
•Optional																																							
•Mandatory	x								x																														
Referral Processes	x	x				x		x	x	x			x	x			x		x	x		x			x	x		x							x	x	x		
Assessm. Processes		x				x		x	x				x	x						x		x			x											x	x		
First Lang. Assessm.																																							
LRE Placement																																							
•Optional	x	x			x	x		x	x	x		x		x	x					x			x													x			
•Mandatory												x	x				x	x		x					x	x											x		
Indiv.Ed. Plan(IEP)																																							
•Optional		x																																					
•Mandatory	x					x		x	x	x							x									x											x		
Program Evaluation	x	x				x		x	x								x																			x			
Grad. requirements																				x																			
Susp./Expulsion																																							
Accessibility																																							
Spec. Ed. Prof.Dev.	x								x																											x			
Spec. Ed. Cert. Req'd									x																														
Job descriptions																																							
•Coordinators	x	x				x		x					x	x	x	x	x						x	x		x	x		x				x		x		x	x	
•Resource Teachers	x	x						x				x		x	x	x	x						x														x		
•Teachers (Reg/Spec)	x					x								x	x								x														x		
•Educ. Assistants	x							x	x		x	x			x		x	x		x		x	x	x	x			x				x							
Transportation	x	x	x				x	x	x		x	x							x	x		x				x										x		x	
Access to Records	x	x	x	x	x	x	x		x	x							x	x	x	x						x		x				x				x	x	x	x

Table 3: DIVISIONAL POLICIES—TRANSPORTATION AND RECORDS

DIVISIONS

POLICY AREAS	1	2	3	4	5	6	8	9	10	11	12	13	14	15	17	19	20	21	22	24	25	26	28	29	30	33	34	35	37	38	39	40	42	43	44	45	46	47	48
Transportation—																																							
•Special Ed. Class	x	x	x		x		x	x	x		x	x							x											x									
•Special Needs OK	x	x	x				x	x	x		x	x						x	x	x						x		x	x	x						x			
•Others OK	x	x					x	x	x		x															x		x	x	x									
Records - School—																																							
•Parents can see	x	x	x	x	x		x		x	x							x	x	x	x						x		x	x				x					x	x
•Parents can copy		x	x	x													x									x													
•Parents can protest—																																							
•Attachment	x			x		x											x									x		x											
•Appeal/Remove		x	x		x				x	x																													
Records - Clinical—																																							
•Parents can see	x	x	x				x		x	x								x	x							x		x	x				x					x	
•Parents can copy	x	x																								x													
•Parents can protest—																																							
•Attachment																										x		x											
•Appeal/Remove		x	x																x							x													
Interpretation—																																							
•Allowed		x																																					
•Required	x		x				x		x	x									x									x	x				x						

Table 4: MANITOBA SCHOOL DIVISIONS

Winnipeg #1
St. James-Assiniboia #2
Assiniboine-South #3
St. Boniface #4
Fort Garry #5
St Vital #6
Norwood #8
River East #9
Seven Oaks #10
Lord Selkirk #11
Transcona-Springfield #12
Agassiz #13
Seine River #14
Hanover #15
Boundary #16
Red River #17
Rhineland #18
Morris-Macdonald #19
White Horse Plain #20
Interlake #21
Evergreen #22
Lakeshore #23
Portage la Prairie #24
Midland #25
Garden Valley #26
Pembina Valley #27
Mountain #28
Tiger Hills #29
Pine Creek #30
Beautiful Plains #31
Turtle River #32
Dauphin-Ochre #33
Duck Mountain #34
Swan Valley #35
Intermountain #36
Pelly Trail #37
Birdtail River #38
Rolling River #39
Brandon #40
Fort la Bosse #41
Souris Valley #42
Antler River #43
Turtle Mountain #44
Kelsey #45
Flin Flon #46
Western #47
Frontier #48

Explanatory Notes:

The following notes refer to information presented in Tables 2 and 3. Notes are identified by the relevant Division number.

Divisions # 4, #6: No distinction made between school and clinical records.

Division # 17: This manual was available only in French.

Division #20: Policies regarding parent consultation, referral processes, LRE placement and Individual Education Plans refer to students involved with the resource program rather than to children enrolled in special education classes.

Division # 30: Policies regarding Referral and Assessment Procedures and LRE placement refer to students involved with the resource program rather than to children enrolled in special education classes.

Discussion:

School Boards in Manitoba have varied widely in the extent to which they have addressed policy formation regarding educational needs of exceptional children Several urban Divisions have established detailed positions on many of the identified policy areas, while other urban

Divisions operate largely in absence of formal policy statements. The same variation can be seen across rural and northern Divisions.

Twenty of 39 Divisions surveyed specify a process for parental access to school records. This specification can range from a simple statement that parents/guardians may have "access" to records, with no definition of "access" or specification of procedures, to detailed provision for parents/guardians and students of majority age to see, copy, add to or appeal inclusion of anything in school or clinical records. Many Manuals do not differentiate between school and clinical records.

Fewer than one half require parent consultation for the identification, assessment and placement process, or specify that referral processes must be established and followed by Divisional personnel, or provide job descriptions for special education coordinators, resource teachers or paraprofessionals, despite the central role played by these three groups in the education of children with special needs.

There is great variation in the definitions which are provided. Most Divisions whose Manuals describe the job of Special Education Coordinator specify a broad range of duties including, in one case, the counselling of parents

of children with emotional or severe learning disabilities. By contrast, one Division stipulates that all decisions regarding referral, assessment and placement are to be made at the school level and that the Special Education Coordinator is to be consulted only in the event of an insoluble difference of opinion.

Fewer than half of the Boards Manuals mention Least Restrictive Environment placement, and only nine Boards have taken the position that LRE placement shall be the norm where possible, rather than a possible option.

Fewer than one quarter of the Divisions surveyed acknowledge the right of the exceptional child to an appropriate education, or define this population of children in a generic sense, as children whose abilities and disabilities require modifications of the educational process and setting, rather than categorically, as children who are enrolled in various categories of separate class groupings.

Some urban Divisions guarantee transportation for any students who require it because of special needs, rather than restricting transportation to those students enrolled in separate classes. Some identify their policy as that required by the Public Schools Act, which itself refers to children enrolled in separate classes. Others indicate

that transportation is available to those children covered by PSA provisions and to others on presentation of a doctor's certificate. Policy Manuals of most other divisions either identify their transportation policy for exceptional children as specified by the PSA or make no reference to transportation.

Only two of 39 Divisions surveyed require a process for parental appeal. Only one referred to differential diplomas for students enrolled in different class groupings.

No Boards have policy statement on any of the following issues: culture-fair or first language assessment; graduation requirements or diploma-granting procedures for students with special needs not enrolled in separate classes; policies regarding suspension or expulsion; accessibility.

Summary

The provincial Ministry of Education is nothing if not consistent. Advisory Committees on Special Education have reported to the Minister of Education four times in the past twelve years. The Reports have covered substantially common ground. The Government of Manitoba has acted at various times to implement, through the establishment of

funding mechanisms or the issuance of policy statements, a few of the recommendations of its Advisory Committees. The Government has ignored other recommendations common to all of the Reports, such as the importance of early intervention services delivered to pre-school children .

By choosing to implement the 1988 Advisory Committee's recommendations in the form of 'Guidelines' however, rather than including them in the Public Schools Act and accompanying Regulations, the Government of Manitoba has ignored a key recommendation, expressed by the 1988 Advisory Committee, by every Advisory Committee since 1977, and by nearly every other public presentation on this subject for the last two decades: that the position of a Provincial Government vis-a-vis the rights of children with special needs, and the duties of school systems toward them, should be expressed through legislation.

The 1988 Advisory Committee considered this to be such a pivotal issue that it specified government action in the form of amendments to the Public Schools Act and its Regulations in its recommendations dealing with rights of students, LRE placement, agreement of Divisional policies with Provincial policies, pre-certification training in special education for all teachers, parental involvement, procedural due process, mandatory provision of an

Individualized Education Plan, and the availability of fair and impartial hearings. In all these matters the Committee, composed of representatives from major professional and advocacy groups in Manitoba, asserted that meaningful reform required legislative action by the Minister rather than a continued reliance on the issuance of statements of Ministerial opinion or the adoption of a more vigorous leadership stance on the part of the Minister's Departmental employees.

The Minister's 1989 Guidelines require Boards to comply by December 15, 1989 with the first phase of the Annual Divisional Action Plan by submitting the following information:

4. Comprehensive Service Delivery System

Provide a comprehensive listing of program options available in the division, and of the special education staff utilized to provide a comprehensive delivery system. The data reported should include:

a) a description of all special education program options and of all students served.

b) the total number of personnel employed in each program option expressed in full-time equivalents.

3) the total number of personnel assigned to positions requiring special education certification and the number of these who are fully qualified.

4) the total number of clinician support staff available to the division by specialty, expressed in full-time equivalents.

5. Outline of Other Divisional Resources

Identify and describe other division resources which are important components of the school division's comprehensive service delivery system. These would include special equipment, special materials, building modifications, individualized transportation plans, and other specific resources of importance to the division service delivery system (Manitoba Education and Training, 1989, pp. 16-18).

By May 30, 1990, Divisions are to submit a complete ADAP which will include, in addition to the above, a description of planning procedures and personnel involved in producing the ADAP and a statement of divisional philosophy governing the delivery of special education systems, including identification of student needs, development of IEPs and curriculum modifications, placement processes and procedures for involving students, parents and professional staff in the above procedures. As well,

Divisions are directed to survey their student population to determine the number of students with special needs and to report the survey results in a manner which identifies the types of program supports and modifications which these students require.

Given the uneven degree of importance accorded to the establishment of formal policy in these matters by many Divisions to date, and the failure of the Guidelines to include definitions, it is reasonable to predict that personnel in many Board offices will be very occupied in meeting the December 1989 and subsequent deadlines, and conceivably, that the quality of data obtained over the first few years of the ADAP process may be uneven at best.

The impact of Special Education in Manitoba on the lives of students, parents and professionals in this Province will depend on more than the Province's capacity to establish a quantitative Provincial data base, welcome and long overdue as that may be. It will depend on several other factors, including:

1. the degree to which Divisions comply with Guidelines which are non-statutory and which do not suggest a consequence for non-compliance;

2. the response of the Government of Manitoba toward Divisions which fail to comply, fully or in part, with the Guidelines;

3. legal precedents, in pre-and post-Charter of Rights cases, regarding the degree to which School Boards are legally bound to abide a) by their own written policies and b) by non-statutory expressions of Provincial Government preference;

4. precedents in other Provinces regarding application of the Charter of Rights to educational rights of exceptional students.

VIII. The Charter of Rights: Potential Impact

Introduction

The issue of unmet educational needs of exceptional children has for several decades received substantial attention in Canadian journals and other publications read and contributed to by "special educators," and to a lesser degree, by Canadian writers interested in the larger field of human rights and children's rights (Canadian Council on Children and Youth, 1978; McMurray, 1983). Public consideration of the issue of educational rights for these same children is more recent.

In 1961 Bargen surveyed the legal status of Canadian pupils across the country (Bargen, 1961) and various Royal Commission and task force reports through the 1960's and 1970's identified massive inadequacies in public services for exceptional children and called for the rights of all children to appropriate education both to be defined in Provincial legislation and buttressed by increased federal involvement (Ballance & Kendall, 1969; British Columbia Royal Commission on Family and Children's Law, 1975a, 1975 b; Organisation for Economic Cooperation and Development, 1976; Roberts & Lazure, 1970).

It is largely in post-Constitutional publications that attention has begun to focus on the establishment of rights as an essential tool to meet the educational needs of exceptional children, and on legislatures and courts, rather than on individual teachers, administrators,and school board trustees, as instruments for the realization of those rights.

Since 1982 there has developed an expanding body of legal and educational literature which examines the potential impact of the Charter of Rights and Freedoms, particularly of ss.7 and 15, and of United States educational case law, on the Canadian educational system.

Canadian court cases relative to educational rights or entitlements, however, are few and far between. As Cruickshank (1986) noted, "The courts have not been a popular forum for dispute settlement over educational issues. Despite extensive provincial statutory regimes over education, litigation has been preserved primarily for personnel matters and the occasional battle over financial responsibility." (Cruickshank, 1986, p. 51).

This chapter will provide a) a brief introduction to the major provisions of the Charter of Right and Freedoms with potential impact on education law; b) a summary of pre- and post-Charter cases dealing with the education of

exceptional children; and c) an overview of post-1982 writings by educational and legal analysts on the import of the Charter for the education of exceptional children.

A. Introduction: Key Charter Sections

For over a century, from 1867 to 1982, Canada's written Constitution was the British North America Act, enacted by the Parliament of Great Britain. The BNA Act assigned certain specified powers to the Federal government and certain others, including education, to the jurisdiction of the Provinces. Elected representative bodies acting in their legitimate sphere were supreme. The judiciary was limited to interpreting and applying the law as written by Parliament or provincial lawmakers, and had no role in making social policy.

As Tarnopolsky has noted, courts did not overrule legislation that, for example,

> denied the franchise to our Aboriginal peoples or those of Asiatic origin, or discriminated in land ownership or admission to professions on a racial basis, or threatened the expulsion (after World War II) of Japanese-Canadians or, for that matter, prevented White women from working in restaurants owned by Chinese-Canadians (Tarnopolsky, 1983, p. 12).

The first provincial government to act on a growing concern in post-war Canada for the enunciation of individual rights was the Cooperative Commonwealth

Federation (CCF) government in Saskatchewan, which enacted a Bill of Rights in 1947. By the end of the 1950's all the provinces had enacted anti-discrimination statutes regarding racial and ethnic minorities (Sussel & Manley-Casimir, 1987, p. 46).

A federal CCF member proposed the first federal Bill of Rights in parliament in 1945. The concept was supported by John Diefenbaker and the Canadian Bill of Rights came into force on August 10, 1960 (Zuker, 1988, p. 144).

The Bill of Rights was only an Act of Parliament, however, and not constitutionally entrenched. It could be amended by a simple majority, and was not binding on any of the provinces. Therefore it could not protect citizens from abuses by all levels of government in Canada. The Supreme Court of Canada held that unequal treatment of Indian women compared to Indian men did not violate the Bill of Rights prohibitions against discrimination in the 1974 Lavell case and that discrimination on the basis of pregnancy did not constitute discrimination on the basis of sex in the 1979 Bliss case (Bliss v. Attorney General of Canada, 1979; Lavell v. Attorney General of Canada, 1974). In MacKay's words, the Bill of Rights provisions for equality "did not guarantee equal content of the law but,

whatever the law's content, equal application before all Canadian courts." (MacKay, 1986b, p. 298).

From 1968 to 1982 Prime Minister Pierre Elliot Trudeau steered the Canadian Constitution and the Charter of Rights and Freedoms through a labyrinth of Federal-provincial conferences and Parliamentary debates. In April 1982 the Constitution Act became the written Constitution of Canada. It was agreed that Section 15 of the Charter of Rights, the "equality" section, would come into effect only after a three-year implementation period, since it was anticipated that Provincial legislatures might need to amend various statutes to avoid conflict with Charter provisions.

The Charter sections with potential impact on education law cases are the following:

1. **Rights and Freedoms in Canada.-** The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

2. **Fundamental Freedoms.-** Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communications;

(c) freedom of peaceful assembly;

(d) freedom of association.

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

15. Equality before and under the law and equal protection and benefit of law.- (1) Every individual is equal before and under the law and has the right to the equal protection and benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Affirmative Action Programs. - (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin,

colour, religion, sex, age or mental or physical disability.

24.Enforcement of guaranteed right and freedoms. - (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

32. Application of the Charter. - (1) This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in all matters within the authority of the legislature of each province.

Primacy of Constitution of Canada

52. (1) The Constitution of Canada is the supreme law of Canada and any law that is inconsistent with the Provisions

of the Constitution is, to the extent of the inconsistency, of no force or effect.

B. Special Education Case Law: Pre-1982

Bouchard v. St Mathieu-de-Dixville (1950)

Two students with learning difficulties were expelled because they could not follow the curriculum and because they were distracting other students. The Supreme Court of Canada refused to order their Board to re-instate them. (Bouchard v. St. Mathieu-de-Dixville, 1950).

McLeod v. Salmon Arm School Trustees (1952)

A school board closed a school because a municipality did not contribute adequately to its funding, leaving students without a school for the rest of the year. The British Columbia Court of Appeal ruled that the school board had the duty to provide students with accommodation regardless of its financial problems (McLeod v. Salmon Arm Board of Trustees, 1952).

Carrière v. County of Lamont No. 30 (1978)

A nine year old Alberta girl suffering from cerebral palsy had been attending a hospital school. In June, 1977, the hospital staff decided that she was mentally retarded and thus ineligible to attend the school which served only the physically handicapped. Psychological tests subsequently administered indicated that she required assistance in school but was not mentally retarded. A court directed her local school board to accept her in one if its schools or to arrange a program in another district, and to assume, in whichever case, costs for her education, but decided it could not make an order regarding the content of her educational program (Carrière v. Lamont County, 1978).

MacMillan v. Commission Scolaire de Ste Foy (1981)

An autistic child had been placed in a kindergarten classroom in an anglophone school for one year, with the assistance of a subsidy of $3000 from the Quebec government. The following year the Board decided that the subsidy was inadequate and gave the child's parents the option of a local special class for francophones or an anglophone class in Montreal. The Court ruled that since the Quebec statute required that school boards integrate

handicapped children under 16 years of age into their local schools, his local Board had an obligation to accommodate him.

The judge also stated that although he recognized that his decision imposed a financial and administrative burden on the Board in question and potentially on all Boards in the province, he would not be guided by this consideration in considering rights and obligations (MacMillan v. Commission Scolaire de Ste-Foy, 1981).

Special Education Case Law, Post-1982

Antonsen v. Board of School Trustees District No. 39 (Vancouver) et al.

Parents of a child with learning disabilities asked for a judgment of mandamus compelling the Vancouver School Board to fulfill its statutory duty to provide "sufficient tuition and accommodation." The court upheld the School Board and dismissed the application.

The evidence indicated that Deirdre Antonsen demonstrated behavioral and learning difficulties in Grade 1. Extensive assistance was provided through school and hospital-based systems. Deirdre's parents removed her from public school in Grade 3 and enrolled her in a private

school. Initially the parents asked for reimbursement of private school fees but did not proceed with their claim (Antonsen v. Board of School Trustees No. 39, 1989).

The issues in the case, as described by Judith Clark, Legal Counsel to the British Columbia School Trustees Association, were:

1. Can the parents compel the Board to live up to the obligations imposed by the School Act?

2. If so, has the Board lived up to its responsibility?

The court answered both questions affirmatively. The Board can be compelled to fulfill its statutory duty. The term "sufficient" in the statute applies to both tuition and accommodation. Tuition is not limited to levels of service defined by the Act, its regulations or other Ministerial guidelines but must be sufficient to provide an appropriate education. The Act gives a Board discretion over the manner in which it fulfills its duty, and a court cannot compel a Board to use its discretion in a particular way. The Board's services had been those described in the mainstream literature as appropriate for a child such as the plaintiff.

Clark concluded:

> In my opinion, this case would have the same outcome under the new School Act. Parents may compel a board through the courts to provide an educational program;

> but the courts will not interfere in a board's efforts in good faith to provide such a program on the basis of differences in educational philosophy between the board and the parents (Clark, 1989, p. 4).

Bales, Bales and Bales v. School District 23 (Central Okanagan) Board of Trustees (1984)

An eight year old child, with a mental age of about 4, was removed against his parents wishes from a special class in a public school which he had been attending and placed in a segregated school. His parents applied for an order returning him to the public school on grounds that the Statute gave the Board the right to operate special classes but not separate schools, and on the grounds that his Charter rights to life, liberty and security of person had been violated.

The Court ruled that the Board was not in breach of its obligation under the statute to provide sufficient school accommodation, was exercising legitimate rights under the statute in its operation of a separate school and had not discriminated or acted unfairly against the child (Bales Bales and Bales v. School District No. 23 Board of School Trustees, 1984).

André Dore et Rita Lapointe v. La Commission Scolaire de Drummondville (1983)

The Quebec Court of Appeal upheld the judgment of the Quebec Superior Court which refused to grant an injunction forcing the School Board of Drummondville to accept André Dore, a ten year old autistic boy, in their school system. The Court ruled that even though Quebec law requires Boards to provide school services for children with disabilities, this requirement is not absolute. The Court accepted evidence that the child was disturbing to other children and could not be instructed (Dore v. la Commission de Drummondville et. al., 1983).

Deyell v. Her Majesty the Queen in Right of Alberta and Calgary Board of Education (1984)

When a child with physical handicaps and a learning disability attended a private school in the United States, his parents were reimbursed for the full cost of his tuition fees. When he transferred to a private school in Alberta the parents were only reimbursed for half of the amount of his school fees. His parents alleged to the Provincial Human Rights Commission that their son was discriminated against with respect to a public service by the Government of Alberta and the Calgary School Board, on the basis of his physical handicap. The Commission agreed and referred the matter to a Board of Inquiry for

determination. The Government of Alberta and the Calgary Board of Education asked for a prohibition from the Court of Queen's Bench on grounds that the Board of Inquiry had no jurisdiction (Calgary Board of Education v. Deyell, 1987).

Both the Court of Queen's Bench and in 1987, the Court of Appeal agreed, stating that, while the schools are a service provided to the public, discretionary grants provided to assist children with disabilities are not such a service (Re Alberta Human Rights Commission and the Queen et al., 1986).

Elwood v. The Halifax County Bedford School District School Board (1986)

In September, 1986 the parents of Luke Elwood, then an eight year old variably labelled trainable mentally handicapped, developmentally disabled or language disordered, enrolled their son in a Grade 3 classroom in their local elementary school. Luke had previously attended segregated classes for the trainable mentally handicapped in another school, but his parents now wished him to have exposure to children in regular classes.

After discussions at a series of Board meetings, Luke was ordered removed from his local school and returned to

his previous segregated placement. The Elwoods obtained an immediate ex parte injunction to prevent Luke's removal from his present school placement pending a court hearing. Subsequently Justice Glube of the Nova Scotia Supreme Court refused to grant the Board's request to lift the injunction. A trial date was set for June, 1987.

Just before the case was to come to trial, the Board, in a judicially approved settlement, agreed to continue Luke's integrated placement for the next three years, and agreed as well to a detailed set of conditions as to the process of formulating and monitoring his specialized educational program and the provision of additional resources (MacKay, 1987c).

Hickling, Horbay and Legris v. The Lanark Catholic School Board (1986)

A Board of Inquiry under the Ontario Human Rights Code found that the Lanark Catholic School Board discriminated against two children because of their mental handicap by refusing to register them in the separate school system and requiring them to attend public schools for all or part of the day. The Code guarantees rights to equal treatment with respect to services, goods and facilities without discrimination with regard to various categories including

mental handicap. All non-handicapped children of separate school supporters who lived in the respondent Board's area were allowed to attend Board schools full time if they elected to do so. The School Board had not registered or assessed the three complainant children. The School Board was ordered to provide full-time schooling for one child and half-day schooling for a second. No ruling was made regarding the third complainant because she had progressed to high school age, which was not available from the separate school system (Hickling Horbay and Legris v. The Lanark Catholic School Board, 1986).

On June 22, 1987 the Supreme Court of Ontario reversed the Board of Inquiry decision. The Court ruled that Section 16(1) of the Ontario Human Rights Code provided the Board with a defense to the charge of discrimination, by providing that a right is not infringed for the reason only that services or facilities lack the amenities that are appropriate because of handicap. The Court found that the fact that the Separate School Board did not presently employ the necessary aides and trained teachers to integrate mentally disabled children meant that it lacked the amenities appropriate because of handicap (Lanark Leeds and Grenville County Roman Catholic Separate School Board v. Ontario, 1987).

Re Dolmage et al. and Muskoka Board of Trustees et al (1985)

Parents wanting a special program for their son in the 1982-1983 school year sought to have the Court quash the Board's placement, which they did not consider appropriate. Ontario at that point was in the implementation phase of 1980 legislation which was to be fully in effect in September, 1985.

The Court ruled that the Board was not obligated under the Education Act of 1980 to have special education programs, guaranteeing appropriate education and services, completely in place until September 1, 1985 (Re Dolmage et al. and Muskoka Board of Education, 1985).

Re Maw et al. and Board of Education for the Borough of Scarborough and two other applications (1983)

Parents of three children asked a Court in Ontario to quash three decisions by the Boards of Education in Ontario that in each case determined that the applicants were not entitled to "hard to serve pupil" hearings under the Ontario Education Act. A designation of "hard to serve" would have entitled the students in question to placement in a private school at public expense, under s.34(2) of the

Act. The Court ruled that none of the students qualified for the hearing because, not being enrolled in schools in either of the Boroughs in question, they failed to qualify as "resident pupils' who had right to the hearing in question (Re Maw et al. and Board of Education for the City of Scarborough and two other applications, 1983).

Re Thompson et al. and the Queen in Right of Ontario (1988)

The East York Board of Education rejected the conclusion of a "hard-to-serve" committee which, operating under s.34 of the Ontario Education Act, found that a student was not a hard-to-serve pupil. The Board determined that he was such a pupil and an application was brought to compel the Ministry to pay for his schooling in an appropriate placement.

The Court held that, although s.34 was not completely clear, that the Board had jurisdiction to reverse the committee's decision. Accordingly the child was declared to be a "hard-to-serve" pupil (Re Thompson et al. and the Queen in right of Ontario, 1988).

Re Townsend et al. and Board of Etobicoke for the Borough of Etobicoke (1986)

A Board of Education decided that parents were not entitled to an Identification, Placement and Review Committee (I.P.R.C.) hearing or a "hard-to-serve" hearing under the Ontario Education Act, leading either to a designation as exceptional and entitled to a special education program, or to the right for private placement at public expense, because the child in question was not enrolled in a Board school at the time of application. The parents' application for a judicial review of the decision was dismissed by the Divisional Court in 1983, and the dismissal was upheld by the Court of Appeal in 1986 (Re Townsend et al. and Board of Education for the Borough of Etobicoke, 1986).

Robichaud v. Commission Scolaire No. 39 (1989)

In January 1989 the New Brunswick Court of Queen's Bench granted an injunction, pending the outcome of legal action brought by parents, requiring a New Brunswick school board to place 15 year old Nathalie Robichaud into a regular grade 8 class while it prepared an individual education plan as required by the New Brunswick Act, in consultation with the parents. The injunction was sought pending the outcome of legal action brought by parents

against the Board (Robichaud v. Commission Scolaire No. 39, 1989).

In April 1989 the New Brunswick Court of Appeal set aside the injunction, effective June 30, 1989. The Appeal Court ruled that the objective of an injunction was to preserve the status quo pending outcome of a trial and should not be used, as the Lower Court had done, to provide the child an opportunity to prove that her integration could be successful (Le Conseil Scolaire No. 39 v. Robichaud, 1989).

Rowett v.Board of Education for the Region of York (1988)

Under Ontario's Education Act, a School Board established an Identification, Placement and Review Committee (IPRC) charged with identifying exceptional children and identifying and reviewing their placements. In May, 1985 an IPRC identified 7 year old Jaclyn Rowett, a child born with Down's Syndrome, as exceptional and recommended that she be placed in a self-contained classroom for the educable retarded in a school 12 miles from her home and from the neighborhood elementary school in which she had been attending regular classes. Her parents agreed with the designation of exceptional and that

Jaclyn fell within the Ministry's definition of "educable retarded," but disagreed with the proposed placement.

As provided by Regulation 554/81, the Rowetts appealed to an Appeal Board, which upheld the IPRC recommendation. The Rowetts then applied for and were granted leave to appeal to a Special Education Tribunal. The plaintiffs asked for an order requiring that their daughter be placed in an age-appropriate class at Woodbridge Public School with supports as necessary to met Jaclyn's needs according to an individual lan as defined in s.1 (63) and (64) of the Act.

In August 1986 the Tribunal unanimously dismissed the appeal and ruled that Jaclyn Rowett be placed according to the IPRC recommendation, with fullest possible integration within the school.

In June 1985 Jaclyn had been withdrawn from public school and enrolled in a private program. In June 1987, the Rowetts began legal action against the York region Board of Education and the Minister of Ontario. The action declared that the Board and the Ministry of Education had breached Jaclyn Rowett's Charter rights under s. 15, denial of discrimination by reason of mental handicap, and under s. 2, freedom of association, by refusing to provide her with special education appropriate to her needs without

payment of fees, and that the program offered to Jaclyn by the York Board was both detrimental to her and not developed pursuant to an individual education plan as required by the Ontario Act.

The plaintiffs subsequently amended their claim to make it clear that they were not seeking to re-litigate the decision of the Special Education Tribunal, but rather to address the issue of denial of Charter rights.

When the issue of Charter rights had been raised before the Tribunal, the Tribunal had stated that it was not a court of "competent jurisdiction" as defined by s. 24 of the Charter, and that even if it were, it would not find that the case demonstrated discrimination under s. 15.

The York Board applied for a Court order striking out the parents' contention that the placement offered was inappropriate or detrimental to Jaclyn, on grounds that to re-litigate an issue that had been settled constituted abuse of process. In February 1988 the Ontario Supreme Court upheld the Board's contention that the Ontario Act specified that the Tribunal's decision as to an appropriate placement was final and not open to appeal. The Court found that the parents had the right to pursue in litigation the issue of violation of Charter rights (Rowett v. York Region Board of Education, 1988).

The Rowetts appealed the judgment, arguing that the facts brought before the Tribunal and the judgment of the Tribunal were relevant to their case. In June 1989 the Ontario Court of Appeal agreed that the factual and legal evidence were inextricably bound and should be dealt with at trial. The appeal of the parents was allowed and is pending (Rowett v. York Region Board of Education, 1989).

Yarmoloy v. Banff School District No .102 (1985)

A 14 year old developmentally delayed child was educated for six years in a special program at the Banff Elementary School. A report commissioned by the school district recommended placement outside of the Banff school district, to allow the child to attend a special program not available in Banff. The Board of Trustees, without notifying the child's parents or affording them an opportunity to be heard, directed that the child be placed in the Calgary school district even though this would have required that she reside in an institution five days per week.

The appeal process involved an appeal to a local appeal board, then to the provincial appeal committee. The Board decided that a local appeal would be redundant and ordered that the appeal go directly to the provincial

appeal committee. Before the appeal was heard, the child's parents applied for mandamus to compel the Board to accept her in the Banff school district and, alternatively, for an order requiring the Board to arrange special education for the child, to be approved by her mother.

The Alberta Court of Queen's Bench allowed the application. The Court held that it had no jurisdiction to direct where the Board was to place students, but that the Board had an obligation to abide by its own stated appeal procedures, which it had not done. The Court ordered the Board to re-hear the matter, giving the parents notice and an opportunity to be heard (Yarmoloy v. Banff School District No. 102, 1985).

C. The Charter's Impact: Major or Minor

As previously noted, post-1982 educational writing has begun to reflect an interest in the potential effect of the Constitution and the Charter of Rights and Freedoms on educational rights, whether on professional practice in the field of education (Crux, 1983; MacKay, 1987a; Nicholls, & Wuester, 1986, 1989); of psychology (Kimmins, Hunter, & MacKay, 1985; Richert, 1982; Wilson & Humphries, 1986) or of law (Foster & Pinheiro, 1988), or from an advocacy perspective (Endicott, 1986a; McCallum, 1987).

A number of analysts have addressed the broad topic of the Charter's implications for students in areas such as freedom of speech or search and seizure. The following section will provide a representative overview of publications, written from legal, educational and joint legal-educational perspectives, between 1982 and 1989, dealing with the potential impact of the Charter on the education of exceptional children. Most writers have predicted that the Charter stands to exert considerable impact, although there is division of opinion on, among other areas, the degree of activism to be expected from a Canadian judiciary with a history of deference to the actions of legally constituted school boards, and the degree of influence likely to be exerted by American precedents.

This organizational structure is intended only to facilitate comparisons, and should not be seen as implying antithetical positions. Many of the writings pre-date the 1985 effective date of Section 15 and are able to cite only early Charter cases, decided on the basis of other sections. Even post-1985 writing must be predictive, since to date no cases alleging denial of equal protection and equal benefit or discrimination in education on the basis of physical or mental handicap have been heard by trial

courts. Although there are lower court judgments on the subject of section 15 rights, only one has proceeded to the Canadian Supreme Court (Andrews v. Law Society of B.C., 1986; Andrews v. Law Society of B.C., 1989).

Legal Perspectives

Judith Anderson is Director of Legal Services for the Alberta School Trustees' Association, a regular contributor on legal issues to the Canadian School Executive, and publisher of School Law Commentary, a monthly newsletter on educational case law.

In a presentation to a Manitoba Association of School Trustees' workshop just before Section 15 came into effect, Anderson identified the 'equality' clause as the relevant Constitutional section when special education claims are to be made. She noted that these protected categories were added near the end of the debates which produced the Charter of Rights at the insistence of many groups representing the handicapped and suggested that courts would be likely to adopt either strict or intermediate scrutiny tests for cases with specific reference to physical or mental disability.

Anderson predicted that Section 15(1) could be used to support limits on a school jurisdiction's traditional right

to choose the type of program which a child receives, and that Section 15 might be interpreted to require that school systems provide an appropriate education to all children, or equal access for all children to local schools regardless of handicap (Anderson, 1985).

In a later article Anderson said that the Charter of Rights "confirms the pre-eminence of citizens over institutions," and marked the end of provincial sovereignty over education which, she wrote, "must now give way to federal priority-setting and judicial intervention." (Anderson, 1986, p. 183).

Anderson suggested that the Canadian judiciary was likely to be influenced by a balance between U.S. and European experiences, because of similarities between the Charter, the American Bill of Rights and the European Convention on Human Rights. She reviewed US and European precedents and compared them to provisions in Canadian provincial legislation and decisions in past litigation.

Regarding the 'right to schooling issue, Anderson wrote:

1. Although the U.S. Supreme Court has not recognized a constitutional right to education, some U.S. lower courts have recognized a constitutional right to attend school.

2. The "right to an education" is specifically guaranteed by the European Convention on Human Rights of which Canada is a signatory.

3. Canadian Provincial legislation, without exception, guarantees a right to attend school, within age limits which differ from Province to Province. Canadian courts will not likely view the exclusion from public schools solely on the basis of age as a "reasonable limit"

4. Saskatchewan and Quebec have also provided for the right to an education in their human rights legislation, in more extensive fashion than education legislation which provides for the right to attend school.

5. Although Canadian courts have consistently ruled that any right to attend school does not include the right to choose which school one attends, they have interpreted provincial legislation as conferring the right to attend school (Carrière, reviewed above) and identified that right as belonging to the child rather than being left to the discretion of board or parents (Wilkinson v. Thomas et al., 1928).

6. The Charter's "liberty" guarantee in Section 7, coupled with "equal benefit" provisions in Section 15, may be interpreted as providing the potential basic right to

receive an education but is not likely to be useful for guaranteeing any specifics arising from the right.

7. Human rights statutes offer more potential for assertion of rights regarding the kind of education provided than does the Constitutional "liberty right."

David Cruickshank is Research Director of the British Columbia Continuing Legal Education Society, and formerly taught on the Faculties of Law at the Universities of British Columbia and Calgary. He was Research Director for the B.C. Royal Commission on Family and Children's Law.

Writing in 1983, Cruickshank examined four major legal approaches to development of a legal right to education:

1 Case law interpretation of existing statements in provincial Education Acts;

2 An express legislative statement of the right to education in provincial Education Acts;

3 An expressly legislated right to education in a provincial Human Rights Act;

4 A right to education developed under the "equality rights" in the new Canadian Charter of Rights and Freedoms.

Regarding case law interpretations of existing statutes, Cruickshank wrote:

1. Most education statutes establish a duty to attend school rather than a right to be educated. It is this legal gap - schools may enforce attendance, but if a school denies attendance, there is usually no enforceable right for parent or child - that has animated advocates of the establishment of legal rights to education.

2. There are three Canadian cases which appear to establish the right to attend school, with potential utility for advocates for exceptional children. The court in Henchel said: "Children have a right to be educated, and school districts and school divisions have no other reason for existence." Courts in McLeod and Carrière also affirmed a "right to schooling" (Carrière v. Lamont County, 1978; Henchel v. Board of Education School Division No. 4, 1950; McLeod v. Salmon Arm Board of Trustees, 1952).

Regarding statements in Provincial statutes, Cruickshank said:

1. Some Provinces, such as Ontario, have opted for "special interest" rights to education. Under the 1980 legislation, the Minister is required to ensure that all exceptional children have available to them appropriate special education programs and services (Education Act, 1980, 8(2)). The word "right" is never mentioned, and the Minister or his designates can limit the number and kind of

students designated exceptional. Manitoba, according to Cruickshank, provides stronger statutory guarantees by requiring boards to "provide or make provision for education" for all eligible students (Public Schools Act, 1980, 41(4)).

Like Anderson, Cruickshank favored use of human rights rather than education statutes as "the place to declare a right to education." "...there is little justification," he said, "for splintering the fundamental right to education into a bundle of special interest rights. Compulsory education is touted as universal; the approach to rights should be the same." (Cruickshank, 1983, pp. 212-215).

Regarding establishment of equality rights under the Charter, he said:

1. Provincial Education statutes will have to meet the Charter's requirements, and even though they may not discriminate in their wording, they are vulnerable to challenge if they produce inequality in their application.

2. Courts are likely to focus on the requirement to provide equality of opportunity, rather than equality of results, and hence may allow Provincial legislatures to treat different classes of children differently, as long as that classification is reasonable.

3. Special education programs, since they are designed to ameliorate the condition of disadvantaged groups, may be outside of the Provisions of Section 15(1).

Cruickshank emphasized that the importance of equality rights is that they do not rely on a prior finding of a legal right to an education. If an education statute provides any "protection " or "benefit" to anyone, it must be delivered on an equal basis to disabled and non-disabled.

In a 1986 discussion of Charter equality rights, Cruickshank enumerated possible situations in which section 15 might be the basis of an effective challenge: total exclusion of a disabled child from education programs; unequal allocation of per capita funding; inaccessibility of a building or part of a building to a handicapped child; failure of an education statute to provide due process or fair procedures regarding assessment and placement decisions (Cruickshank, 1986, pp. 66-68).

Orville Endicott, Legal Counsel to the Canadian Association for Community Living, suggested in 1986 that most people's understanding of the meaning of the "benefit" conferred by education would include at least "a)the development of a body of knowledge and a basic repertoire of skills with which to meet the demands of one's actual

and potential living and working environment, and b) the opportunity to begin to participate in a social milieu that is representative of one's larger society." These two kinds of benefits are not obtained separately, he said, but "in large measure concurrently, as pupils interact with one another and their teachers."(Endicott, 1986b, p. 35).

Endicott listed basic expectations for the Charter's application to a case involving the right to education:

1. No one is to be deprived of education because of mental disability.

2. Some differentiation in the kind of learning opportunities provided through schools is probably a "reasonable limit" on equality rights which section 1 says may be "prescribed by law," but such special programs do not relieve Provinces or School Boards of the responsibility to treat such students as equally as possible to other students.

3. Students with any degree of mental disability ought ordinarily to attend regular schools and regular classes and receive the special assistance they require in an integrated setting.

William Foster and Gayle Pinheiro, respectively a member of the Faculty of Law at McGill University and a recent McGill graduate in law, published a lengthy paper in

1988 on the issue of whether a right to education can be constitutionally based. The authors' thesis is that an optimal protective framework can be constructed on the basis of the equal protection and equal benefit provisions of the Charter which will legitimate increased judicial intervention in areas most likely to be litigated, and will permit "greater protection of the individual's interest without embroiling the courts in educational policy measures." (Foster, et al., 1988, p. 763).

The article a) examines arguments maintaining that education deserves constitutional protection by virtue of its central role in individual development and the betterment of society and b) suggests that the judgment in San Antonio Independent School District v. Lopez, which held that education was not constitutionally protected in the United States, can be utilized to construct a constitutional right to an education under the due process and equal protection provisions of the American constitution and the equal protection and equal benefit provisions of the Canadian Charter.

A thorough examination of the arguments advanced in Foster and Pinheiro's 72-page article is beyond the scope of this chapter. Some of the key arguments with

applicability to educational rights for exceptional children are as follows, summarized in point form by topic.

Education as a Fundamental Right. The right to an education is not one explicitly granted by the American Constitution or the Canadian Charter. Moreover, the right to an education differs substantially from more traditional civil rights such as freedom of speech which do not require government to confer a benefit.

Under the Charter, legislation which impinges on a person's protected rights is valid only if passed under the override clause in s 33, or if demonstrably a reasonable limit prescribed by law and justified in a free and democratic society, according to s.1. In the United States a standard of strict judicial scrutiny, requiring the state to demonstrate "compelling state interests," is applied to cases involving "laws that operate to the disadvantage of suspect classes or interfere with the exercise of fundamental rights and liberties explicitly or implicitly protected by the constitution." (Foster & Pinheiro, 1988, p. 765).

If it could be established that an individual's interest in education were a fundamental right, courts might be less likely to defer to opinions of pedagogical authorities and more likely to impose a higher standard of

care both on educators in the performance of their duties and on legislators in allocating resources to the educational system. In areas such as education of children with mental or physical handicaps, identification of education as a fundamental right could "counter government arguments that it is providing maximum amount of services within its budget." (Foster & Pinheiro, 1988, p. 765)

Theoretical justification for the existence of a right to an education can be found in international human rights documents to which Canada is a signatory, and in classic political pronouncements and philosophical theories of justice. Consequently, the authors say

> ...education should be accorded a preferred status because it is intimately tied to the development of individual dignity and administered by a monopolistic structure which, in many ways, denies the individual any opportunity or choice of alternative educational opportunities. If constitutional guarantees restraining government and majoritarian discrimination are to remain fundamental constructs of social ordering, the scope of their protection must expand to non-traditional interests, such as an education, which have come to assume a dominant influence on individual development. (Foster& Pinheiro, 1988, p. 772).

Principles of Fundamental Justice. Section 7 of the Charter prohibits government interference with private rights of life, liberty and security of the person "except in accordance with principles of fundamental justice." Tradition under common law has restricted this protection

to requirements of procedural fairness, a much narrower model than the American due process one.

Recent Supreme Court judgments have moved general administrative law principles closer to the American model by affording more than procedural protection to an aggrieved individual (Reference Re Section 94(2) of the B.C. Motor Vehicles Act, 1986) and extending the availability of court review from bodies performing judicial or quasi-judicial functions to include bodies exercising solely administrative functions, when such bodies acted arbitrarily or unfairly (Nicholson. v. Haldimand-Norfolk Police Commissioners Board, 1979).

"To determine the requirements of fundamental justice," the authors said "where the issue to be decided is entitlement to government benefits, a similarly broad focus which addresses the wording. character and larger objects of the Charter should also be employed." (Foster & Pinheiro, 1988, p. 795).

A. Wayne MacKay, of the Dalhousie Faculty of Law, is perhaps the most widely published author on the topic of the Charter's significance for exceptional children in both the educational and legal literature, but virtually the only source of analysis. MacKay is the author of Education Law in Canada, the major Canadian textbook in the field,

and co-editor of Rights, Freedoms and the Education System in Canada, a 1989 resource book of cases and materials.

Writing in 1984, before Section 15 came into effect, MacKay said that Provincial statutes and regulations which are either silent or contradictory as regards entitlements and procedures for student assessment, classification and placement are potentially vulnerable to action under the Charter's equality section. Whether additional rights were established through education or human rights statutes, he said, the doors were opening, and the point had been established that "a child cannot be denied an education merely because he or she does not fit the profile of the average public school student (MacKay, 1984a, p. 57).

In later articles MacKay speculated on the Charter's implications for a broad range of student-related concerns such as conduct and freedom of speech (MacKay, 1986a) and provided a structural analysis of the relationship between education and the equality provisions (MacKay, 1986b).

In the former article MacKay described the Charter as the potential vehicle for a shift in educational philosophy, granting to students many of the same rights as adults but inviting courts to determine reasonable limits in cases of conflict. He warned that the "notwithstanding" clause will allow legislators to "second guess the courts

on matters of fundamental rights," and that Quebec's early use of the clause to remove all of its legislation from the Charter's application should give pause to those who have warned that use of the clause to preserve majoritarian interests would be political suicide.

He also invited readers to speculate on what would have been the impact of the U.S. Supreme Court's desegregation decision in Brown if southern American states had been able to opt out of its application to their schools.

In his structural analysis of s. 15 of the Charter, MacKay described equality as a broader concept than non-discrimination, and said that judges in cases regarding educational equality rights might be mandated not only to assure non-discrimination but to require programs to produce either real equality of opportunity or equality of outcomes. "True equality of opportunity," he said, "cannot be achieved simply because the state does not discriminate. While the Charter does act in a negative sense by limiting what the state can do, it may also impose positive duties on the state to promote equal opportunity." (MacKay, 1986b, p. 296).

He noted that at an earlier stage in its genesis, the original title for the "Equality Rights" section had been

"Non-discrimination," that this had been dropped in favor of the equality label, and that Justice Estey, speaking for the Supreme Court of Canada in Law Society of Upper Canada v. Skapinker, had said that Charter headings should be used in interpreting sections which come under them (Law Society of Upper Canada v. Skapinker, 1984).

MacKay provided these definitions for the four 'equality' phrases in s. 15: 1) 'equality before the law' is simply the 1960 Bill of Rights language, which did not guarantee equal content of the law but only equal application before all Canadian courts; 2) 'equality under the law' was intended to permit challenges not just to the application but to the content of laws as well; 3) 'equal protection of the law' is exactly the wording used in the American 14th Amendment, and the parallel will be used to bring in some American case law on equality; 4) 'equal benefit of the law' may be the most far-reaching of the four phrases, because it requires laws not only to avoid discrimination but to require benefits to be distributed equally.

Regarding listed grounds of discrimination, MacKay emphasized that the fact that s.15 says that there shall be no discrimination, and "in particular" no discrimination on listed grounds, indicates that there must be other unlisted

grounds. This may indicate, he said, that Canadian courts will not import the American approach of relating the grounds for discrimination to the ease with which the state can justify discrimination as necessary.

He suggested that s. 15 will influence most levels of educational decision-making, possibly including disproportionate placement of low-income students in vocational classes, or unequal distribution of funds for special education services between regions of a Province.

MacKay recommended a two-step process for considering adjudication under Section 15 of the Charter: first, determination that a statute or a situation constitutes a violation; second, determination as to whether the violation meets the test of reasonable limits established in s. 1. "One aspect of s. 1 which is quite clear," he said,"is that the burden of justifying a Charter violation rests with the agents of the State. In the field of education, that means the departments of education, school boards, administrators and teachers." (MacKay, 1986b, p. 304).

Writing with Gordon Krinke, also of the Dalhousie Faculty of Law, MacKay in 1987 advanced six philosophical or logical arguments to support the idea of 'education as a basic human right' rather than a right which derives from

statutes as a privilege, "bestowed by the legislature, to be determined by administrators, and to be overseen only as a last resort by the courts." (MacKay & Krinke, 1987b, p. 73).

MacKay and Krinke outlined the following arguments for judicial recognition that the Charter includes a right to education:

1. There is ample pre-Charter judicial recognition of the judicial role in making law, and there are post-Charter pronouncements which indicate an interventionist path. Mr. Justice Lamer wrote that the Charter had extended the scope of judicial review in constitutional matters to "the rights of individuals as well as the distribution of powers," and observed that the Charter was entrenched by elected representatives, indicating a willingness on the part of legislatures to relinquish some of their powers and vest them in the judiciary.

2. On rights issues, the courts are the logical forum. The entire question of human rights is somewhat anti-majoritarian, and legislatures are by nature more subject to pressure from majorities than minorities.

3. Legislatures have not shown willingness to extend the statutory right to appropriate education to the mentally retarded, even with ample warning to legislators and

educators during the 1982-1985 preparatory period before the Charter was completely in.force, and with regard to Canada's position as a signatory to various international conventions which recognize a right to education. These include United Nations Declarations proclaiming the rights of the Handicapped, including the International Covenant on Economic, Social and Cultural Rights, which asserts that a child has a right to an appropriate education tailored to his or her individual needs.

"Having failed to meet this standard, and having refused to fulfill their international commitments, educators should not be surprised when the courts intervene." (MacKay, et al., 1987b, p. 79).

4. The constitutional right to education is found most logically in s.7. In R. v. Jones, (1986) both the majority and minority Supreme Court opinions, seeking to establish a definition of liberty in the context of education, quoted a 1923 U.S. decision which included the right 'to acquire useful knowledge" as one of the rights denoted by the word "liberty." .(MacKay & Krinke, 1987b, p.83)

Judicial recognition of this would assure that provisions in statutes and regulations which were inconsistent would be of no force or effect. The onus of proving the violation as a reasonable limit would be placed on the

offending School Board, which could not deprive an individual of his rights except in accordance with fundamental justice, a standard which denotes both substantive and procedural review..

5. Rejection by the United States Supreme Court of the constitutional right to an education should not be seen as the definitive judgment on the subject. Section 7 of the Charter is positive- "everyone has the right to life, liberty and security of the person - while the 14th Amendment is negative - "...nor shall any State deprive any person of life, liberty or property..." "A positive right," the authors said, "invites state action." (MacKay & Krinke., 1987b, p. 81).

6. As well, the structure of the Charter and the American 14th Amendment differ. Lamer J. in Reference Re Section 94(2) of the B.C. Motor Vehicles Act highlighted three differences: a) The American Constitution contains no equivalent of the supremacy clause, s. 52, and hence Canadian court have more authority to be active; b) The American Constitution has no equivalent of s. 33, the override provision, and hence, Canadian legislatures which wish to override anti-majoritarian court decisions may do so, unlike their American counterparts; c) The American Constitution has no equivalent to the Charter's s.1

reasonable limits clause, and hence, U.S. courts have been reluctant to expand the content of substantive rights. This reservation should be of less concern to Canadian courts.

7. The Charter is a more contemporary document than either the American Constitution or the Canadian Bill of rights, and should reflect contemporary social values about human rights. It was crafted in full knowledge of the history of human rights jurisprudence in both countries, and clearly meant to be remedial.

8. Two sections of the Charter, s.23 (minority language education) and s.29 (rights to denominational schools) give specific educational rights. To grant a right to a specific form of education to some students under some circumstances without recognizing the pre-existing right to education for all makes no sense.

Having advanced arguments to support the existence of a constitutional right to education, MacKay outlined the general content of that right as follows:

1. If the general goal of education is to impart technical, academic or vocational skills, then those who cannot "profit" from education are likely to be denied access. If the purpose of education is defined more broadly, the access is likely to be wider.

2. Generally accepted documents, from modern human rights statements to provincial education statutes, identify that the goal of education is much more than the imparting of technical information or the creation of scholars. Judicial pronouncements such as that in Brown v. Board of Education confirm this. A major justification for compulsory education in Canadian and American jurisdictions has been the socialization objective of the schooling experience.

3. If it is accepted that all children should have access to the educational system, who should decide each child's placement? If most children have access to age-appropriate classrooms in neighborhood schools, should the same access be available to the mentally handicapped child? "If the goals of education are defined in terms beyond the academic, and a segregated classroom denies mentally disabled students the means of obtaining these goals, segregation is a violation of the substantive s.7 right." (MacKay & Krinke., 1987b, p. 87).

In several publications MacKay has described his role as co-counsel in the Nova Scotia Elwood case, which he describes as "a once in a lifetime opportunity and as close as a Charter advocate is likely to get to a perfect set of facts." (MacKay, 1987c, No. 2, p. 3).

The facts of the Elwood case have been summarized above. MacKay has described the legal issues raised in the case:

A constitutional right to an education. The Elwoods argued that exercise of rights under section 7 of the Charter requires an education, and that since other sections of the Charter expressly recognize rights to denominational education and education in one's minority language, it would be inappropriate to see the Charter as not providing a more general educational right.

The Board argued that education was still a matter to be defined by statute and regulation and delivered by educational administrators.

Denial of natural justice and fair procedures at common law, and of procedural guarantees of section 7. The Elwoods argued that the components of this denial included lack of parental access to crucial documents and meetings, denial of the right to question school board members, brevity of notice for crucial meetings, restriction on the length of parental submissions to school board meetings, and failure of the Board and its agents to follow their own policies and procedures.

The Board did not address the claims about fundamental justice under section 7 since its position was that

education is not one of the "life, liberty and security interests" referred to in section 7. They argued that the Elwoods were treated fairly in regards to common law fairness, that the Board and its agents had acted in accordance with statutes and regulations, and that Board policies were not legally binding.

Equal benefit of the law. The Elwoods argued that integration was the only way in which Luke Elwood would receive equal benefit of the law as guaranteed by section 15, that integration rather than segregation was the norm and that the onus rested with the Board to justify special placement as a reasonable limit of rights.

The Board argued that Luke, as a member of a class of mentally handicapped students was not similarly situated to non-disabled students and hence there was no discrimination, and secondly, that his special placement was an affirmative action program allowed under section 15(2) (MacKay, 1987c).

In October, 1986 Chief Justice Constance Glube of the trial division of the Nova Scotia Supreme Court refused to lift the interim junction prohibiting the Board from removing Luke from his integrated placement until his case came to trial. In the months leading up to the June 1987 court date, MacKay and his co-counsels conducted what

amounted to a "royal commission on education in the Halifax County -Bedford School District." They held examinations for discovery of nineteen witnesses, including child psychologists, experts in special education from across Canada and the United States, and almost every school principal, teacher and official who ever came into contact with Luke..."(Batten, 1988, p. 194-5).

The Elwood case was settled out of court just before the trial was to begin. As the settlement required court approval, it has value as precedent. As well, the relative strengths of each side's case were reflected in the settlement agreement, which finally gave the Elwood's almost everything they were seeking, with the exception of costs (MacKay & Krinke, 1987b). Having conceded nearly every issue to the Elwoods, the Board made a two-point stipulation: each said would be responsible for its own costs, and the subject of costs was not to be mentioned in the settlement or in court (Batten, 1988, pp. 200-204).

Analyzing the significance of the Elwood case, MacKay has written:

> The Elwood agreement itself is an important precedent in practical terms and it is a classic illustration of the out-of-court uses of the Charter of Rights as an important negotiating tool for students and parents. There is no doubt in my mind that there would have been no agreement in the Elwood case had we not been

prepared to go to court under the Charter of Rights (MacKay, 1987c, No.3, p.4).

Educational Perspectives

There has been general discussion in Canadian educational publications regarding the Charter's impact on the broad topic of children's rights, (Magsino, 1982) and its more specific impact on students and the educational system in contexts such as freedom of speech and policies regarding search and seizure and drug and alcohol use (Magsino, 1988; Manley-Casimir, & Pitsula, 1988; Solomon, Hewitt, & Basso, 1988; Zuker, 1988) One of the few Canadian educators to have written about the implications of the Charter for exceptional students is Anne Keeton Wilson, presently head of the Special Education Department of the Ontario Institute of Studies in Education, has analyzed the possible effect of Canadian and Ontario special education legislation on the issue of legal liability for professionals (Wilson, & Usher, 1985) and more specifically for psychologists in post-Charter practice (Wilson & Humphries., 1986).

Wilson identified two areas in which the role of psychologists might be challenged:

1. A parent might argue that use of psychological tests results in discriminatory educational decisions if

used as the primary basis for students classification and placement, especially for students with minority backgrounds. Lawsuits on similar grounds, arising from provisions in American law which are similar to Charter guarantees of equal treatment under the law without discrimination, were successful in changing the ways in which psychological tests could be used in the United States.

Courts ordered that testing should be non-discriminatory, that no one test score be use as the primary basis for classsifying or placing students, and that designations of exceptionality include assessment of adaptive functioning.

Research on the implementation of Ontario's 1980 special education legislation suggests that "psychological tests scores are still used as the criteria, and frequently the sole basis, on which exceptional students are designated and placed in special classes (Wilson & Humphries, 1986, p. 3).

2. A parent might argue that the designation and assessment process in itself is biasing if it results in a placement which does not significantly increase the child's opportunities to learn and progress compared to those available to children in regular classrooms.

Ontario education law supports a categorical model of special education delivery, and influences Boards to allocate professional resources to the identification and placement functions required by the law. "The major purpose of psychoeducational assessment in a large proportion of Ontario school boards is to permit identification and placement of pupils in one of the categories of exceptionality defined by the Ontario Ministry of Education." (Wilson & Humphries, 1986, pp.3-4).

In a 1989 analysis of the workings of Ontario Bill 82, Wilson noted that cases have been filed in Ontario claiming that the Ontario statute is of no force or effect because it violates rights under s. 15 of the Charter guaranteeing placement in age-appropriate placements in neighborhood schools. Wilson suggested that Boards and parents are drawn inevitably into adversarial situations by the categorical nature of the 1980 Act and its Regulations, which requires students to be identified in a particular category of exceptionality which then substantially determines their placement (Wilson, 1989). Wilson, Cleal, Godsell and Sheppard made substantially the same point in a review of Newfoundland's 1987 revision of its Special Education policy manual (Wilson, Cleal, Godsell, & Sheppard, 1989).

Kimmins, Hunter and MacKay in 1985 reported on a survey of education statutes in 10 provinces and two territories. The existence of the position of school psychologist was mentioned in only six of twelve statutes examined. The role was defined or described in none, despite the central responsibility of the school psychologist in determining a student's eligibility for special education services or placement in a special education setting.

The authors suggested that an issue which should be of even greater concern to members of the psychologist profession than their legal status was "the extent to which provincial legislation concerning special education leaves open to question our nation's commitment to a universal right to free and appropriate education." (Kimmins Hunter & MacKay, 1985, p. 9).

Shared Legal/Educator Perspectives

Michael Manley-Casimir is on the Faculty of Education at Simon Fraser University, and the author of several books on education and of numerous articles on the intersection of law and education. Terri Sussel is a lawyer on the staff of Simon Fraser University's Education and Law Project. Manley-Casimir and Sussel are co-editors of

Courts in the Classroom: Education and the Charter of Rights and Freedoms and of numerous articles on the potential import of the Charter for education.

Sussel and Manley-Casimir, discussing the potential for the Canadian Supreme Court to operate as a "National School Board", have written that "recent constitutional development reveals a hesitant yet perceptible trend toward more judicial "activism," less judicial "modesty," and hence an expanded role for the judiciary in the Canadian political process." They suggested the possibility that the Supreme Court might render decisions which "set uniform national education standards in areas traditionally subject to diverse provincial and local policies and practices." (Sussel & Manley-Casimir, 1986, p. 314).

To support their argument Sussel and Manley-Casimir made these points:

1. Although Chief Justice Brian Dickson has argued for a cautious and incremental approach to the process of "judicial law-making,' he has also said:

> The legislative process should not be idealized all out of proportion. It is certainly not the solution to every trouble of the law. On the contrary, judicial law-making may be a spur to a lazy or indifferent legislature. The judiciary and the legislature do not exist in splendid isolation from each other." (Sussel & Manley-Casimir, 1986, p. 318).

2. In the first Charter case to come before the Supreme Court, The Law Society of Upper Canada v. Skapinker, the court cited the famous American case of Marbury v. Madison, seen as the source of the U.S. Court's activist tendencies. Justice Estey, writing the Court's unanimous opinion, drew attention to the significance of judicial review under the new system of constitutional government and asserted that the Charter would have a broad and generous interpretation.

3. The second Supreme Court Charter judgment invalidated a provincial statute limiting eligibility for attendance at English language schools (Bill 101).because it was incompatible with Constitutional guarantees in s. 23 (A.G. Quebec v. Quebec Association of Protestant School Boards et al.,1984).

4. Other nationalizing influences on educational policy include previous proposals for heightened federal profile, including the 1976 OECD proposal for a federal office of education, the operation of national professional and administrative organizations, the coordination mechanism provided by membership of Provincial minister in the Council of Ministers Of Education in Canada, and federal legislative initiatives in areas such as multiculturalism, supported by Charter guarantees regarding language rights and respect for multicultural heritage.

Sussel and Manley-Casimir concluded:

> Just as the school desegregation decision of Brown v Board of Education fundamentally revised the structure of public education in the U.S., judicial decisions of the Canadian Supreme Court may profoundly change or modify the various structures of public education across Canada when policy or practice fails to satisfy the constitutionally protected interests of individuals or groups. The overall effect of such decisions will certainly be to infuse a new judicially-based "nationalizing influence into Canadian education (Sussel & Manley-Casimir, 1986, p. 328)

In a later article Sussel and Manley-Casimir noted that, after two years of constitutional experience, "the question remains very much open whether this novel constitutional assertion will translate into viable legislation and programs that will ameliorate historical inequities in the treatment of handicapped children." (Sussel & Manley-Casimir, 1987, p. 45).

Even though all Provinces have confirmed a least tacit commitments to universal educational rights, Provincial legislation on the whole fails to reflect this commitment, leaving the issue of appropriate education for special needs children more of a privilege than a right, they wrote.

They suggested that the phrase "equal benefit of the law", conceptually linked to the 'equal protection of the law" drawn from the American Fourteenth Amendment, should

be interpreted to mean "equality of results" for these reasons:

1. American jurisprudence has considered two interpretations of equal protection: equality of opportunity and equality of results. Both concepts are concerned with the substance of equality and the results of legislation. Equality of opportunity means that legislation may classify, that the classification is a means to achieve some end, and that the classification must be related to that end. The notion of equality of results may require inequality of opportunity where unequal allocation of resources is required to overcome real disadvantages or systemic inequities.

2. The "equal benefit of the law" notion was intended to expand the narrow pre-Charter Bill of Rights concept by allowing individuals to enjoy equality of benefits as well as protection from discriminatory treatment.

3. Rather than "equal as same", the relevant notion of equality is "equal as fitting," which implies that to treat people equally requires a fit between relevant circumstances and needs and the treatment supplied. In educational terms, "the fittingness definition of equality places the issue explicitly in the context of acknowledging

these differences and developing an appropriate educational response."

4. A recent Canadian judgment consistent with this line of reasoning was the Huck case in Saskatchewan, under the Human Rights Code, in which an Appeal Court held that a theatre had discriminated against a wheelchair-bound patron by requiring him to sit between the first row of seats and the screen rather than offering him the range of choices available to other patrons. The court said: "It is no defence that the acts complained of were not intended to be discriminatory; the result of the respondent's action is discrimination." (Canadian Odeon Theatres v. Saskatchewan Human rights Commission and Huck, 1985).

If similar reasoning had been applied to the case of a school-age student seeking to attend school, a court might have found that the service offered to him differed substantially from that available to the general student population, that access to the facility without provisions for him to benefit from entry made no sense, and that discrimination was a matter of effect rather than intention. "Benefit" in this example would include not only access but quality of service and character of the experience."In constitutional terms it could plausibly be argued that the absence of any of these components would,

in effect, constitute discrimination and, by implication, unequal treatment open to constitutional challenge." (Sussel & Manley-Casimir, 1987, p. 63).

5. The framers of the Constitution must have intended that S. 15, the "equal benefit" clause, guarantee legislative efforts to reduce and eventually eradicate inequalities, rather than to perpetuate them.

Subsequent articles by Manley-Casimir and Pat Pitsula, a Research Associate in the Education and Law Project at Simon Fraser University, have struck a somewhat more cautious note. They warned against wholesale acceptance of U.S. case law as a primary source for Charter interpretation if such a course risked undervaluing the degree to which cultural, and legal traditions between the two countries differ (Manley-Casimir & Pitsula, 1988) and suggested that, even though sections of some provincial statutes have been nullified on Charter grounds, "social and political change will continue to be characterized by incrementalism and traditionalism in Canada." (Pitsula & Manley-Casimir, 1989, p. 68).

Poirier, Goguen and Leslie's 1988 study, Education Rights for Exceptional Children, supported suggestions by both MacKay and Manley-Casimir and Sussel for provincial governments to bring into line with Charter guarantees

those education statutes which do not guarantee free appropriate education to all children (Poirier, Goguen and Leslie, 1988).

Discussion

Before 1982 an examination of educational law in Canada involved consideration of Provincial statutes and regulations, and the policies enunciated by School Boards identified in each Province as the administrative agents of Provincial educational policy.

Court decisions were generally confined to review of the administrative actions of Boards. If Boards acted in accordance with statutory mandates and common law principles of fairness, Courts in general did not intervene on questions of substance. Before the introduction of the enforcement and the primacy section of the Constitution, ss. 24 and 52, courts did not have a well-defined mandate to rule on legislative enactments

Court in post-1982 educational law cases now are generally held to have jurisdiction to scrutinize legislation and administrative actions to ensure their compliance with rights guaranteed in the Charter. There is disagreement among theorists about whether the Charter can be interpreted to provide a 'right to education,' about

whether education statutes or human rights statutes are the best place to locate such a right in statute law, and about the degree of judicial involvement to be anticipated in the content of educational programs or in the processes of educational decision-making. It is the clear consensus of legal and educational analysts, however, that the potential effect of the Charter of Rights and Freedoms for exceptional children is substantial, including invalidation of sections of provincial statutes which are in conflict with Charter provisions, and expanded parental influence on the specific parameters of their children's educational programs and placements.

Pre-Charter Canadian case law has recognized a right to attend school in Wilkinson v. Thomas and in Henchel, according to Anderson (1985) and Cruickshank (1983) .Pre-Charter case law regarding children with special needs has established that a Board might or might not have authority to exclude a handicapped child from school attendance, depending on the wording of the Provincial statute (Bouchard v. St. Mathieu-de-Dixville, 1950; Carrière v. Lamont County, 1978; MacMillan v. Commission Scolaire de Ste-Foy, 1981; McLeod v. Salmon Arm Board of Trustees, 1952); that even where a Board was required to provide schooling, that requirement was not absolute (Dore v. la

Commission de Drummondville et. al., 1983); that a Board had an absolute right to place children in whatever type of classroom or school it chose, even when that might require that a family choose between moving to a different city or putting a child into residential care (Yarmoloy v. Banff School District No. 102, 1985).

Pre-Charter case law under Human Right statutes has held that schools are not services or facilities customarily available to the public (Winnipeg School Division No. 1 v. MacArthur, 1982), that exactly the opposite is true (Schmidt v. Calgary Board of Education, 1975); that, while the schools are a service provided to the public, discretionary grants provided to assist children with disabilities are not such a service (Re Alberta Human Rights Commission and the Queen et al., 1986); and that the fact that a Separate School Board did not presently employ the necessary aides and trained teachers to integrate mentally disabled children meant that it lacked the amenities appropriate because of handicap, and hence its refusal to accept three Catholic handicapped children was not discrimination under Ontario's Human Rights Code (Lanark Leeds and Grenville County Roman Catholic Separate School Board v. Ontario, 1987).

Only two post-Charter cases dealing with education and special needs has been decided. In Bales the court held that a Board did not violate a child's S.7 rights to liberty and security by removing him him from a segregated classroom within a regular school and placing him in a segregated school against his parents' wishes. In Antonsen, a court ruled that a Board which indicated to the satisfaction of the court that it had provided a professionally acceptable level of programming had fulfilled its obligation under the provincial Act, even if the parents found the program less than acceptable. The Elwood case, which would have been the first case declaring violation of rights under S.7 and s.15, was settled before trial with a judicially approved settlement which essentially conceded the parents' case.

At this writing three cases, Rowett, Boujolt and Hysert, each alleging violation of Charter rights relative to educational placement of a exceptional child, are proceeding to trial in Ontario. The New Brunswick Robichaud case has been settled out of court to the parents' satisfaction. (Robichaud v. Commission Scolaire No. 39.(1989b). Minutes of settlement and Court approval, in French, September 23, 1989).

IX. Manitoba's Public Schools Act, the Special Education Guidelines, and the Charter of Rights and Freedoms

The Constitution Act of 1982 altered forever the relationship between citizens and their government in Canada. When the equality guarantees of section 15, the final section of the Charter to come into force, became law in 1985, the previous relationship between citizens and their government regarding educational rights was also altered forever. Previously citizens had narrow recourse to apply to the courts for review of educational rights questions, and this review was limited to considerations of correct procedure. Now Provincial statutes and regulations must be consistent with guarantees of equality before and under the law, providing both equal protection and equal benefit. To the degree that a section of a Provincial statute fails to meet this standard it can be declared of no force or effect.

In recognition of the potential impact of s.15, a three-year period between 1982-1985 was provided for Provinces to examine their statutes and regulations for areas of non-compliance with s.15. Some Provinces included

their education statutes in this review, having recognized the highly litigious history of educational issues in the United States.

In Manitoba, constitutional lawyer Dale Gibson was commissioned by Attorney General Roland Penner in 1981 to identify Manitoba statutes which did not comply with the Constitution. Gibson's analysis covered 100 statutes and did not include the Public Schools Act. Gibson noted that this initial consideration should be considered only a beginning and recommended that the balance of some 350 Manitoba statutes, and the regulations pursuant to all statutes, should be examined for inconsistency with the Charter of Rights and Freedoms (Gibson, 1982).

During 1985 and 1986, the provincial legislature in Manitoba approved four omnibus pieces of legislation, each revising a series of related statutory provisions to facilitate Charter compliance (Bill 62, Bill 74, 1985; Bill 23, Bill 34, 1986). No amendments to the Public Schools Act were included in these bills.

Despite Gibson's recommendation, and despite publication of an internal discussion paper by Manitoba Education staff on the Charter's relationship to the Public Schools Act and a public discussion paper on the need for

increased parent involvement and due process, and the receipt of several briefs and studies from the Manitoba Teachers' Society suggesting that aspects of the Act would not stand a Charter challenge, none of the four Ministers of Education who have held office since 1982 has proceeded with substantive amendments.

Few legal cases have raised Charter issues in relation to education, since the 1982 effective date of the bulk of the Charter or the 1985 coming into force of Section 15, the 'equality' section. Several cases dealing with services for exceptional children are proceeding through the court system in Ontario, two cases have been settled out of court, one on the basis of Charter rights (Elwood) and one on the basis of statutory rights (Robichaud), and one case is before the Human Rights Commission in Manitoba at present, according to the Education Director of the Manitoba Association for Community Living.

To date one Supreme Court judgment has interpreted rights under section 15. Although it did not address education or discrimination on the basis of mental or physical handicap, Andrews has laid important groundwork by providing some guidance for lower courts on the interpretation of the word 'discrimination.' Although

opinions advanced by legal and educational theorists on the Charter's potential impact for special education rights are at best speculative, the outlines of rights available to Canadians under the Charter of Rights have also begun to be delineated to some extent in case law which has determined to whom the Charter applies and in what spirit it will most probably be interpreted.

This chapter will a) summarize recommendations made by analysts within Manitoba regarding amendments required to bring Manitoba's Public Schools Act into accord with the Charter of Rights and Freedoms and b) review, in question/answer format, court judgments since 1982 which should impact on issues to be raised in cases relative to special education rights and c) consider possible applications of the Charter of Rights and Freedoms to Manitoba's Public Schools Act and to the 1989 Special Education Guidelines.

Finally, this chapter will address the research questions identified at the beginning of this study.

A. Discussion of Manitoba's Education Statute

In 1986 a paper titled The Charter of Rights and Education in Manitoba was circulated within Manitoba

Education. It was prepared for internal discussion, and listed no author. Like most comparable post-Constitutional discussions, the paper predicted that the Charter's effect would be profound, both at the provincial policy-making level and in day to day operational contexts. The author said:

> Prior to the Charter the school board had the discretionary power to act as it pleased on many issues that were either ignored or unclear as to meaning in the Public Schools Act. Now that the Charter of Rights is in place there is a vehicle for challenge and the rules have become much less clear (Manitoba Education, 1986, p. 1).

The author estimated that the statute in its present form infringed on Charter rights in enough areas to support a variety of court challenges. He recommended both that a major part of the Act should be rewritten to provide "more detailed and specific guidelines for school board action" and that an educational ombudsman be appointed to interpret the relationship between the educational system and the Charter to the educational community and to the public, and to provide child advocacy is specific individual situations.

The author identified the following areas of imprecision in the Act, relative to general educational rights:

1. no definition of what constitutes the "education" which Boards are required to provide, or under what circumstances a Board is allowed to decide to arrange for the education to be provided by a different Division;

2. no requirement that an education be appropriate to individual needs;

3. no mechanism for appeal of Board decisions except for direct appeal to the Minister;

4. no provision for due process in issues of suspension or expulsion

5. unequal distribution of resources in terms of equipment, specialist personnel, and staff-teacher ratio across Divisions, because of which inequality "Manitoba does not provide equal benefit under the law." (Manitoba Education, 1986, p. 9).

6. inadequate provincial monitoring of delivery of compensatory education and language development support for natives.

7. lack of clarity as to Provincial responsibility for native education.

Regarding the effect of the Charter on special needs children, the author said:

> Discrimination against the physically or mentally handicapped individual occurs when a law, regulation or policy denies that individual access to benefits, rights or responsibilities that other individuals who are not handicapped would receive, unless a reasonable alternative is provided to the handicapped individual. Discrimination also occurs when by law, regulation or policy, a handicapped individual is treated in an identical manner to a non-handicapped individual in circumstances where the person's handicap renders him dissimilar to the able-bodied and a difference in benefit results (Manitoba Education, 1986, p. 16).

Among the author's recommendations:

1. Manitoba Education should ensure that the low incidence funding being provided to supplement Divisional spending for specified individual children is sufficient to meet identified needs.

2. Divisional authorities should be able to provide extensive documentation when they prescribes segregated placement outside of a child's neighborhood school.

> In all cases it must be shown that the discrimination against the individual is the very least discriminatory action that can be taken, and that the advantages to the individual in the segregated program outweigh the disadvantages. The onus for this proof is on the authority that establishes the discriminatory procedure (Manitoba Education, 1986, p. 17).

3. The PSA should be amended to require Boards to provide "appropriate approved educational programs," which would

necessitate that Boards determine the supports required by the non-average student to enable him to benefit from the educational system to the same extent as the average student.

4. The PSA should be amended to require establishment of Identification, Placement and Review Committees to ensure that appropriate individual programs are designed, implemented and reviewed.

The Manitoba Teachers' Society, in a submission to the Minister of Education in March, 1987, identified several areas of constitutional jeopardy in the area of special educational services, including the failure of the Public Schools Act to:

1. specify individual rights to special educational services and corresponding Provincial responsibility;

2. reflect the more contemporary and mandatory provisions for assessment, appropriate program placement, creation and review of individual educational plans, involvement in decision-making by parents, guardians and teachers, and due process which are guaranteed in many other Provincial statutes;

3. ensure that access to special educational programming in Manitoba is dependent on demonstration of exceptional learning needs rather than on "negotiation of revenue status" between Divisions and the Province;

4. require enough uniformity of procedures across educational jurisdictions to guarantee that a child's educational rights do not depend upon his place of residence.

The submission noted that under the terms of section 15 and section 24 of the Charter, a claimant had only to establish a reasonable doubt that equal rights had been observed, and that the onus was then on the provincial government to provide evidence of equity (Manitoba Teachers' Society, 1987a, pp. 1-29).

The Manitoba Teachers' Society also addressed the issue of inconsistent entitlements among Provincial jurisdictions and among Provinces in a response to Manitoba Education's 1987 discussion paper on Parent Involvement.

Among the issues raised by the MTS brief in the context of constitutional rights were:

1. The Departmental proposal addressed only the possibility of differences of opinion regarding suitability of educational placement, and made no reference to a

process for resolving differences of opinion on diagnosis or identification of learning needs, which have been highly contentious issues in other jurisdictions.

2. The paper implied that only parents or guardians who were quite persistent in objecting to a placement would be granted a review, rather than urging a commitment to create a model which would facilitate parent involvement and guarantee due process in providing the child with equal benefit of the law.

3. No specific delineation was made of the kinds of conciliation services to be provided by members of the Child Care and Development Branch. CCDB employees who are involved in determining eligibility of exceptional children for financial support did not appear to be appropriate personnel to form an neutral appeal committee.

4. The precise form of Ministerial intervention recommended was not clear.

5. No guidance was provided for a school division or district which might be required to comply expeditiously with Court-ordered placement for an exceptional student.

6. The paper suggested nothing to facilitate increased involvement by teachers, those usually most familiar with

the child in the school setting, in the decision-making process (Manitoba Teachers' Society, 1987b).

B The Emerging Shape of Charter Rights:

In its first Charter decision the Supreme Court signalled that its approach to its new task, that of giving shape and substance to the rights guaranteed to Canadians by the Charter of Rights and Freedoms, would be an active rather than a passive one. Mr. Justice Estey referred to significant American precedents in which the U.S. Supreme Court asserted its power to overrule laws which conflicted with the Constitution, and warned that "narrow and technical interpretation, if nor modulated by a sense of the unknown of the future can stunt the growth of the law and the community it serves." (Law Society of Upper Canada v. Skapinker, 1984).

Similar broad readings of rights, and narrow readings of justified restrictions of rights, were delivered in Hunter et al. v. Southam Inc., 1984; R. v. Big M. Drug Mart, 1985; R. v. Oakes, 1986 and Reference Re Section 94(2) of the B.C. Motor Vehicles Act, 1986.

MacKay has noted that, in the Eve case, (E. (Mrs.) v. Eve, 1986) the court was 'perceived as creating a new

right, the right to procreate." He quoted Mr. Justice Lamer as noting that "the Crown's parens patriae jurisdiction exists for the benefit of those who cannot help themselves, not to relieve those who may have the burden of caring for them." The case, he said, was relevant for two reasons: it demonstrated the court's willingness to articulate rights for the first time, and it illustrated the court's role as a defender of those unable to defend themselves.

The following section provides a brief overview of court decisions on issues which would probably be considered in the event of a challenge to Manitoba's education legislation on the basis of infringement of Charter rights

Will Courts overturn provincial education statutes?

Section 52 of the Constitution says that any law that is inconsistent with the Constitution, the supreme law of the land, is, "to the extent of the inconsistency, of no force or effect."

The Supreme Court addressed the educational rights of children the second time that it interpreted the Charter, and the first time that it used the Charter to revoke

legislation. The Court ruled unanimously that Quebec's Act 101 was incompatible with constitutional guarantees in section 23 regarding French language education (Quebec Association of Protestant School Boards v. Attorney General of Quebec, 1984).

Courts have found sections of Provincial education statutes to be in conflict with s.23 guarantees relative to French language rights in Alberta (Mahe v. the Queen, 1985), Ontario (Marchand v. Simcoe County Board of Education, 1986; Reference re Education Act of Ontario and Minority Language Education Rights, 1984), Saskatchewan (Commité Des Écoles Fransaskoises Inc. v. Saskatchewan, 1988) and Prince Edward Island (In the Matter of a Reference to the Supreme Court of Prince Edward Island in Banco pursuant to the Judicature Act, 1988). Cases are pending in several other Provinces (Soucie, 1988).

Courts have invalidated sections of Provincial education statutes which required compulsory religious observances in Ontario (Zylberberg v. Sudbury Board of Education, 1988) and British Columbia (Russow and Lambert v. Attorney General of British Columbia, 1989).

In Newfoundland an appeal court invalidated a section of the School Attendance Act under which a parent was fined

with no opportunity for a hearing or an appeal (R. v. Kind, 1985).

Does the Charter apply to the actions of School Boards?

Section 32(b) says that the Charter applies to "the legislature and government of each province in all matters within the authority of the legislature of each province."

This has been interpreted by the Supreme Court of Canada to mean that the Federal Cabinet is bound by the Charter and that its decisions may be scrutinized and struck down by courts (Operation Dismantle Inc. v. R., 1985) and that the Charter applies to the actions of legislative, executive and administrative branches of government which spring from statutory authority (Retail Wholesale and Department Store Union Local 580 et al. v. Dolphin Delivery Ltd., 1986).

In a 1986 decision in Ontario Mr. Justice White outlined a general purposive test:

> ...I conclude that it is the purpose of the Charter to permit review of situations where a government actor acts in such a way that the effect of its action, whether such action be of a legislative or administrative nature, potentially infringes a value protected by the Charter.

Mr. Justice White concluded:

> The Charter of Rights is concerned not only with governmental action that has as its purpose the abridgement of Charter rights, but it also regulates situations where the effect of the governmental action is to deny an individual his or her guaranteed rights or freedoms (Re Lavigne and Ontario Public Service Employees Union, 1986, p. 480).

The Charter has been determined to apply specifically to some actions of school boards at least, although the case law is mixed. Mr. Justice Anderson, in a case relating to mandatory retirement, said:

> In my view it is fair to conclude that a school board is created under a comprehensive statute dealing with education and has a clearly defined role within the scheme of the statute, and to conclude in consequence that the actions of a board may properly be said to be, for the purposes of the Charter, the actions of the "legislature" or "government" of Ontario (Re Ontario English Catholic Teachers Association and Essex County Roman Catholic School Board, 1987, p. 561).

Ultimately, the Court decided that the Charter did not apply because the mandatory retirement policy was not "law" within the meaning of ss. 15(1) and 52(1), but involved a contractual agreement. Leave to appeal has been granted.(Zuker, 1988, p. 149).

In Noyes, although the Court ruled that none of the plaintiffs Charter rights had been infringed, the Court appeared to accept that the Charter applied both to the actions of a Board acting in its capacity as an employer,

and to the B.C. School Act (Noyes v. School District No. 30 (South Caribou), 1985).

In cases involving actions of school officials in relation to students, courts have assumed or held specifically that school boards exercise delegated legislative authority and hence that board members, administrators and teachers are subject to the Charter in their dealings with students (H., 1985; J.M.G., 1986; J.M.G. (leave to appeal refused), 1987).

Hogg, in Constitutional Law of Canada, has summarized this broad approach to applicability:

> It follows that any body exercising statutory authority, for example the Governor in Council or Lieutenant Governor in Council, minister, officials, municipalities, school boards, universities, administrative tribunals and police officers, is also bound by the Charter. Action taken under statutory authority is valid only if it is within the scope of that authority Since neither Parliament nor a Legislature can itself pass a law in breach of the Charter, neither body can authorize action which would be in breach of the Charter. Thus the limitations on statutory authority which are imposed by the Charter will flow down the chain of statutory authority and apply to regulations, by-laws, orders, decisions and all other action (whether legislative, administrative or judicial) which depends for its validity on statutory authority (emphasis added) (Hogg, 1985, p. 671).

How may s.15, the equality section, apply to special education issues?

In February 1989 the Supreme Court delivered its first judgment on a case alleging violation of section 15 rights, in the case of a lawyer denied the right to practise law in British Columbia before becoming a citizen. Although the case did not address discrimination on the basis of mental handicap, it was awaited with interest and concern because it was expected to provide the first Supreme Court definition of "discrimination" under Section 15.

It was noted by advocates for the handicapped (Bickenbach, 1987-1988) and by more general legal commentators (Lepofsky & Schwartz, 1988; Smith, 1988) that the hopes of disabled persons to benefit directly from the promise of s. 15 would be significantly diminished if the Court found that to treat similarly situated persons similarly did not constitute discrimination, or that legislation which was discriminatory was nonetheless reasonable and fair because the purposes it served, and the means used to serve them, were more important than the effect of the legislation on the person adversely affected.

In Andrews Chief Justice Dickson framed the two-stage formula described above by Hogg and MacKay:

1. Does the law or practice in question infringe or deny rights guaranteed by s. 15(1) of the Charter of Rights and Freedoms?

2. Can the infringement or denial of rights be justified by s. 1 of the Charter as a limit "prescribed by law as can be reasonably justified in a free and democratic society?"

Six Supreme Court justices found that section 42 of the British Columbia Barristers and Solicitors Act infringed the equality provisions of s.15 of the Charter by discriminating against a group on the basis of personal characteristics (citizenship), even though citizenship is not one of the enumerated grounds in s. 15. According to Madam Justice Wilson: "Non-citizens are a group lacking in political power, vulnerable to having their interests overlooked and their rights to equal concern and equal respect violated." (Andrews v. Law Society of B.C., 1989, p. 289).

Four of six justices found as well that the law was not justified under s. 1 because the government could not establish that the discrimination related to pressing and substantial concerns. Justices McIntyre and Lamer considered the law to be saved under s. 1.

Although he dissented from the majority on the issue at trial, Mr. Justice wrote a lengthy judgment on the interpretation and application of S.15 of the Charter, with which Justices Wilson, L'Heureux-Dubé and Chief Justice Dickson agreed completely. McIntyre J.'s findings were:

1. The similarly situated test cannot be accepted as a fixed rule when resolving equality questions. "Consideration must be given to the content of the law, to its purpose, and its impact upon those to whom it applies, and also upon those whom it excludes from its application." (Andrews v. Law Society of B.C., 1989, p. 303).

2. Section 15 was designed to ensure equality "in the formulation and application of the law." It was intended to remedy shortcomings in the Canadian Bill of Rights and "has a large remedial component." (Andrews v. Law Society of B.C., 1989, pp. 303).

3. The requirement for a finding of discrimination has been clearly enunciated at the Supreme Court level. To find discrimination it is not necessary to prove discriminatory intent, but merely to demonstrate discriminatory impact.

4. McIntyre J. defined 'discrimination thusly:

> I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed (Andrews v. Law Society of B.C., 1989, p. 308).

The court previously ruled in Skapinker that equality is a broader concept than non-discrimination. If a benefit is delivered to some, it must be delivered equally to all. A law which does not ensure equal benefit to all whom it involves, or which in its administration delivers benefits to some children and deprives others of those benefits infringes on Charter rights under s.15(1). A finding of discrimination under s.15 would not require a prior finding of a right to an education.

If discrimination is proven under s. 15, how may it be justified under s. 1?

Courts have ruled that the onus of justifying the infringement of a Charter right rests on the party or agency seeking to uphold the limitation. The Supreme Court has held that the objective of the law in question must be

pressing and substantial (R. v. Oakes, 1986) and that the means chosen must be proportional to the end. Proportionality has been described as having three aspects:

> ...the limiting measures must be carefully designed, or rationally connected to the objective; they must impair the right as little as possible; and their effects must not so severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the abridgement of rights. (R. v. Edwards Books & Art Ltd., 1986, 768).

Courts have also ruled that in order to be saved under s.1 as a reasonable limit "prescribed by law," a rule must be in written form rather than oral tradition or practice, and that the law must prescribe standards of sufficient precision to allow regulation of conduct. The Ontario Court of Appeal in 1983 upheld a lower court ruling that the powers of the Ontario Censor's Board infringed the Charter because, although the Board's powers were authorized by statute, the statute supplied no standards to control the exercise of powers (Re Ontario Film and Video Appreciation Society and Ontario Board of Censors, 1983).

The Ontario Court of Appeal found similarly in the Reference re Minority Language Education Rights case in 1984, ruling that limitations placed on Charter-protected minority language rights could not be left to the "unfettered discretion of existing school boards, no matter

how competent and well-meaning those boards may be." The Court further said:

> It is both interesting and helpful to note that the U.S. Supreme Court has developed the constitutional principle that the legislature may not grant administrative bodies an unfettered discretion to regulate constitutionally protected activities or to make decisions which directly affect the exercise of constitutionally guaranteed substantive rights. The court has developed the "void for vagueness" rule which requires legislatures to set reasonably clear and specific standards in circumstances where the grant of an unfettered discretion leads to arbitrary, discriminatory or otherwise unconstitutional restrictions upon guaranteed rights or imposes unnecessary inhibitions upon the exercise of constitutional rights (IN THE MATTER OF a reference to the Court of Appeal pursuant to the Constitutional Questions Act R.S.O. 1980 Chapter 86 by order-in-Council 2154/83 respecting the Education Act R.S.O. 1980 Chapter 129 and Minority Language Educational Rights, 1984, pp. 44-45).

Conclusion:

Charter Application to Manitoba's Public Schools Act

Manitoba appears to be the only Province, with the exception possibly of Prince Edward Island, which has not responded to the North American movement toward special education reform, and Canadian expectations for change generated by the Charter of Right and Freedoms, by updating its education statute (Csapo & Goguen, 1989). The decision of the Government of Manitoba to issue "mandatory" Guidelines rather than to update its statute in order to

assure Charter compliance has introduced an additional element of uncertainty to the issue of the application of Charter rights.

Parents in Manitoba who feel that the right of their exceptional child to an appropriate education has been infringed and that they have exhausted the possibilities of discussion and diplomacy with their local school board have several alternatives.

They may apply to a court for one of several remedies following judicial review. Certiorari is the remedy sought to invalidate an existing decision and send it back to be decided again. Prohibition is the remedy used to prevent a decision being made in the first place. Mandamus is used to require a public body to carry out a statutory duty. The ex parte injunction approach was used in the Elwood and Robichaud cases described above.

Plaintiff parents may also, under s.24 and s.52 of the Charter, apply to a court of competent jurisdiction for a judgment that a statute or section of a statute is inconsistent with the Charter and hence "without force or effect."

Use of either of these approaches in Manitoba will require that a court determine under which authority - the

Public Schools Act and its accompanying Regulations, or the 1989 Guidelines - public school boards in Manitoba now operate. The ramifications of both possibilities are discussed:

Alternative #1: Special Education in Manitoba: Policy and Procedural Guidelines for the Education of Students with Special Needs in the Public System has the force of law.

Some possible arguments for this interpretation are:

1. Ministerial authority. The Minister is authorized to enact law via this mechanism. Section 4(1) of the Education Administration Act says:

> For the purpose of carrying out the provisions of this Act according to their intent, the Minister may make such regulations and orders as are ancillary thereto and are not inconsistent therewith; and every regulation or order may under, and in accordance with the authority granted by, this section has the force of law...(Education Administration Act, 1987).

2. Mandatory language. Among the "mandatory" statements in the Guidelines, which would seem to differentiate them from discussion papers or general expressions of Ministerial preference, are the following:

> The purpose of this document is to bring together the policies and general guidelines which direct the provision of special education programs and services in Manitoba.(p. 1).

> In Manitoba, as a matter of public policy, all children are entitled to a public school education. The public Schools Act requires that "Every school board shall provide or make provision for education in Grades 1 to 12 inclusive for all resident persons who have the right to attend school" (Section 41(4)). This section of the Act constitutes mandatory legislation for school divisions/districts to provide education programs for all children, including those children with special learning needs.
>
> It is the policy of Manitoba Education and Training to provide for all children in Manitoba access to learning opportunities which are commensurate with their needs and abilities (p, 2).
>
> The Minister of Education and Training is responsible for establishing overall education policy directions, for approving programs and for supporting authorized activities in education. It is the responsibility of school boards to implement education policies and deliver approved educational programs in an effective and efficient manner (p. 7).

As well, timelines are specified for compliance with the data-gathering and reporting components of the Guidelines, and the word shall rather than may, normally the operative word distinguishing mandatory from permissive legislation, is used throughout.

3. Delegated legislation. The Guidelines constitute delegated legislation and are hence binding. According to Hogg:

> When a legislative scheme is established the Parliament or the Legislature will usually enact the scheme in outline only, and will delegate to a subordinate body the power to make laws on matters of detail...Sometimes a power of law-making is delegated

> to a single minister or a court, an administrative agency or a municipality, a university or a public corporation (Hogg, 1985, pp. 283-4).

If a court holds that the Guidelines have the force of law, then Divisional policies which conflict with the policies and procedures which they mandate are void, since Boards must operate in accord with statutory requirements. A court will need to decide if the Guidelines, by their formulation or their administration, act to deprive some children of equal benefit under the law, and if this discrimination can be justified as necessary under s. 1 of the Charter.

A number of areas for possible challenge present themselves, largely on the basis of weakness or imprecision in the Guidelines themselves. A parent might argue that his child was denied equal benefit with non-handicapped children or with other children with similar disabilities who were educated in a different school Division which interpreted the Guidelines' mandates differently.

In the former case, the plaintiff parents might argue that non-handicapped students are able to take advantage of a regular educational system which the Province oversees and supervises through a system of approved, graded courses of study, while neither the program provided to their

handicapped child or the process of establishing and evaluating it is prescribed or overseen by provincial authorities except in the vaguest terms.

Plaintiff parents might also argue that their child was denied benefits equal to other similarly disabled children in other school Divisions whose programs provided features such as greater access to specialist personnel, a written individualized education plan developed by personnel with expertise in the needs of that particular child, opportunity for integrated rather than segregated placement because of the Division's willingness to hire and train paraprofessionals, or access to pre-vocational and vocational training, to name only a few potential areas of concern.

Some of the areas in which the Guidelines might be cited as not guaranteeing equal benefit, or as allowing discriminatory effect, are:

1. Lack of definitions. The Guidelines provide no definitions of terms, and specifically no definitions of the students who are the subject of the Guidelines. This is the most serious weakness, because it pervades all areas.

Divisions are directed to provide programs commensurate with the needs of all children, including students who are variably described as "the special education population" or "students with special needs.". Some procedures are required for "students with special learning needs," while others are to be used for "students who require extensive modification of their educational program." Boards are directed to conduct a needs survey and report data on programming, placement and resource allocation relative to the above population. Existing policies differ greatly from one Division to another, as identified in tables 2 and 3, above. It is quite reasonable to assume that one Division might define a "special needs" student as a child who did not make an appropriate or reasonable amount of progress in a regular classroom setting; another might apply the definition to children who demonstrate a specified degree of age-grade discrepancy; another might apply the definition, and hence allocate extra resources, only to those students who are identified as eligible for additional funding from Manitoba Education and Training.

Two difficulties flow from this failure to offer to Boards any definition of terms, or any guidance as to the process for identification and assessment of specialized

needs in children. The important difficulty in a Charter rights context is that, coupled with the fact that existing policies regarding exceptional children vary so greatly across Divisions, this imprecision virtually guarantees that the quality and quantity of special education services available to a child will also vary greatly from one Division to another.

The other difficulty is that the utility and comparability of a Provincial data base collected on this basis will be severely limited.

2. Individual Education Plan. The Guidelines do not define an Individual Education Plan and permit almost total discretion to Divisions as to the students for whom such a plan is required.

Additionally, no minimum format is suggested for the structure or contents of an IEP, and no distinction is supplied between the "goal-directed written Individual Education Plan" required for students who "require extensive modifications of their individual program" and the "comprehensive plan, developed and reviewed on a regular basis by the educational team" which is supposed to direct "programming and placement decisions for all students with special learning needs." (p.6). The

Guidelines also note that both comprehensive plans and IEP's are for Divisional use only and are not to be sent to Manitoba Education. Hence there will be no monitoring of plans by Provincial authorities.

The formulation of a written Individual Education Plan, as a collaborative effort between parents and professionals is required by the American legislation, and in several Canadian jurisdictions. It is recognized that the IEP is the concrete expression of the process by which an education appropriate to a child's individual needs is assured and a measure of accountability is introduced.

3. Least Restrictive Environment. There is no onus for Boards to justify the educational necessity or the appropriateness of a particular placement. The Guidelines say that in most cases placement in the regular classroom with supports will provide the least restrictive and most enabling environment for most children, but placement of students anywhere on the continuum of possibilities is entirely at the discretion of the Board or Divisional administration.

Regular vs. segregated classroom placement has been the pivotal issue in the two cases settled recently to the satisfaction of parents (Elwood and Robichaud) and is the

issue in Rowett, a case presently before the courts in Ontario in which the plaintiffs claim that the 1980 amendments to the Education Act in Ontario are of no force or effect because they violate s. 15 of the Charter by denying pupils placement in an age-appropriate, regular classroom in a neighborhood school (Wilson, 1989, p. 91).

4. Transportation. The Guidelines say that Divisions/Districts must provide "appropriate transportation for students with special needs who require such services." (p.8.) Equal benefit of this critical service might easily be denied to children who do not fall within a particular Division's definitions, or who are not enrolled in self-contained classes. Additionally, this very imprecise instruction is in conflict with Manitoba Regulation 1/86 (3)c, which says that a child may be considered a transported pupil

> if the pupil attends a special class of children who are mentally retarded, physically handicapped, emotionally disturbed or hard-of-hearing, or if the pupil does not attend a special class of children, but is certified by a duly qualified medical practitioner as being physically handicapped.

5. Early Intervention. Regarding early intervention, the Guidelines say:

> School divisions/districts shall provide early identification and intervention programming. Such

> special education programming, provided at the earliest possible stage of development, is critical for children with special learning needs and may lessen the deleterious effects of disabilities on their learning (p. 6.)

It is difficult to fathom how a Board is to meet these expectations without further definitions. Typically, early intervention is a term applied to provision of services to re-school children, ages birth to six, designed to enhance development of at-risk children or to counter the impact on the child's development of an established condition. A recent survey of availability of these services across Canada revealed that early intervention services are variably available in the Yukon and the Territories, Newfoundland/Labrador, Saskatchewan, Alberta and Ontario, with funding generally split between Education and Social service ministries. Manitoba was one of four Provinces whose contacted representatives did not respond to the survey (Kysela, & McDonald, 1989).

By "early" the Guidelines may imply only services to school-aged children, but there is no indication of the kind of services or the type of student for whom they are indicated. The instructions could be interpreted as requiring Boards to assess some or all of the pre-school children resident within its boundaries and offer pre-

school programming to those demonstrating some (unspecified) degree of handicap, or to provide pre-school services or funding for such services to resident children already identified by outside agencies as having special needs. The Public School Act, s. 259, provides that children are eligible to attend school when, they are six or will be six 12 weeks after the beginning of the fall term. Provision of kindergarten or nursery programs is at the option of Boards.

6. Culture-fair assessment. The Guidelines, like the Act, are silent on the topic of assessment of children in their first language, and the need to identify and program for learning difficulties which relate primarily to a child's incapacity with the language of instruction.

To the author's knowledge no Canadian jurisdiction has yet addressed this in its statute or regulations. Erroneous school classification resulting in disproportionate placement of some pupils in special education classes because of race or ethnicity has been held to violate the equal protection clause of the American Constitution (Turnbull, & Fiedler, 1984). Since the "equal protection" reference in s.15 of the Charter has been widely held to be analogous to the American provision, it

seems reasonable to be expect this to be a litigious area in this Province.

7. Appeal Process. The Guidelines specify that, if a parent/guardian and school personnel are not able to resolve differences at the Board level, either may apply for conciliation to the Child Care and Development Branch of Manitoba Education and Training (CCDB). The Special Needs Arbitration Panels to be established in each region of the Province will consist of a representative of Manitoba Education and Training, and an educator and member of the community, both resident in the region, all to be appointed by the Minister. The process is to kept "as informal as possible" and Panel decision are to be final.

Even the preliminary description of the mandate of the Special Needs Arbitration Panel indicates that this process may miss the opportunity to avoid some of the problematic outcomes of the Tribunal process in Ontario. From 1980 to 1988 approximately 250 Appeal Board hearings were conducted in Ontario, with fourteen reaching the regional and provincial-level Tribunals. A study by Metcalf of 18 early Appeal Board hearings is relevant to Manitoba's proposals in the following areas:

1. Appeal Process. In Manitoba all three members of the Appeal Panel are to be appointed by the Minister The Guidelines make no mention of parental nomination of a member or suggestion of a pool of names acceptable to parents from whom the Minister might nominate.

In Ontario parents are allowed to nominate one of the three-member Appeal Board. Even with this system, Metcalf reported widespread parental dissatisfaction. In her sample Appeal decisions supported the parents' decision in only one-third of the cases. Parents perceived the system to be unfair and to be biased against them, possibly because they saw the process as being weighted against them from the outset because two of the three Appeal Board members were educators. They described their communication with schools as significantly more frequent and more open than it was described by school superintendents. They described high costs in terms of financial investment and emotional stress. Presence of a lawyer for the parents, or for both parents and Board, was associated with parents' satisfaction and superintendents' dissatisfaction with the outcome and was associated with an outcome favoring parents. Presence of a local school board staff member on

the Appeal Board was associated with parental dissatisfaction.

Wilson, Cleal, Godsell and Sheppard reported that, of the initial 68 appeals held, school boards won their case more frequently than parents, possibly reflecting the uneven voting weight of the Board and the fact that appeal board chairpersons were selected by the school board (Wilson, Cleal, Godsell, & Sheppard, 1989, p. 138).

An important result of the Metcalf study is that "both parents and superintendents reported that the process worked most frequently in the best interest of the school system, followed by the best interest of the parents, and least frequently in the best interest of the student (Metcalf, 1987, p. 111). This would seem to indicate that the process was not working as it was intended when introduced by Education Minister Bette Stephenson in 1980.

Efforts to keep Manitoba's appeal process informal and cooperative rather than competitive should be designed with these findings in mind

As well, as was noted in a Manitoba Teachers' Society analysis above, it seems highly questionable to have representatives of the governmental agency responsible for decisions to allocate funding and resources to designated

special needs students, a decision which often has major implications for provision of programming, involved either in the conciliation or in the final appeal processes for students.

2. Appeal of Program. Although the Guidelines reiterate the centrality of parent involvement to the process of designing a child's program, they identify the appeal process as relating only to placement decisions, i.e. the classroom or school setting to which the child is assigned. This is also the case in Ontario, designed in that way apparently to avoid what were seen as excesses or abuses of the IEP process under the American legislation (Hodder, 1984; Wilson Cleal, Godsell, & Sheppard, 1989). The Ontario statute gives parents the right to appeal identification and placement of a pupil, but not the contents of the program in that placement, nor the qualification of teachers or paraprofessionals involved or the level of services provided.

Ontario's approach in this regard has been described as tokenism, and one that has contributed to efforts by parents to use the appeals process itself to exert some measure of control over the content, as well a the physical setting, of the education provided for their children.

In the Dolmage case, the court held that it lacked jurisdiction to consider the appropriateness of a child's program because the Ontario legislation was still in a phase-in period and because the program in question had received Ministerial approval. However, in a obiter dictum the court said that in future, such aspects as the nature and content of program and services must be considered to determine appropriateness of a child's placement.

In the tribunal Ormerod v. Wentworth County Board of Education (1987) counsel for the plaintiffs used the Dolmage obiter dictum to argue the parents' case for provision of specific services. The Tribunal heard the appeal regarding the contents of program, rather than placement, and made an order which called for a new program for the student without specifically holding for either party (Wilson, et al., 1989; Wilson, 1989).

It is to be hoped that parents in Manitoba will not have to use the Appeals process, which is complicated and time-consuming for all whether or not it involves use of lawyers, to succeed in involving themselves in the content of their children's educational programs because the Guidelines' prescriptions in this regard allow total discretion to school boards and do not even suggest

provincial oversight responsibility, since Individual Education Plans are not to be submitted for inspection or approval.

Alternative #2 The Public Schools Act, not the Special Education Guidelines, governs provision of education to exceptional children in Manitoba

A court may find that the Special Education Guidelines are advisory only, and that Boards are legally bound to abide only by the Public School Act and its accompanying Regulations. Possible arguments for this interpretation are:

1. Parliamentary tradition. It is the normal practice in the Canadian legislative context for a government, even in a minority status, to communicate its policies to the public in the form of statutes introduced, debated in and approved by the legislative, assembly. It is difficult to understand why the government of the day would choose to circumvent the legislative process on an issue with such obvious public policy significance.

2. Governmental intent. Four different ministers, representing two different political parties, have had ample opportunity to enact any or all of the contents of

the 1989 Guidelines in the form of a revised education statute, and all four have pointedly refused to do so.

Successive Ministers of Education have been repeatedly urged in the strongest terms to establish statutory rights for exceptional children in Manitoba, by their own Advisory Committees, by Departmental discussion papers, by the Manitoba Teachers" Society and, most recently, by the Manitoba Association of School Trustees (MAST).

In its 1989 Resolutions to the Minister, MAST said:

> BE IT RESOLVED THAT the Minister of Education, through legislation and regulations, state clearly the province's position on the rights of school-age children with exceptional needs to be placed in the most enabling and least restrictive environment, and
>
> BE IT FURTHER RESOLVED THAT Manitoba Education develop and articulate a provincial Mission Statement and Policy manual pertaining to the education of children with exceptional needs (Manitoba Association of School Trustees, 1989, p. 13).

That the Government of Manitoba has chosen to address this issue through the mechanism of Guidelines rather than enacting mandatory legislation is clear communication of government intent to leave substantial discretion for the formulation and implementation of policy in this regard in the hands of elected school trustees.

This position was articulated by the court in 1984 in Bales. Plaintiffs cited the policies contained in the

British Columbia Ministry of Education's manual of "Policies, Procedures and Guidelines for Special Programs," known as the Red Book, and various Ministerial circulars and directives. They argued that these guidelines established standards which Boards were required to meet in providing education for handicapped children. In response to this argument, the court held:

> In construing the statutory powers of school boards it is, I think, necessary to have in mind that school trustees are directly elected by, and answerable to, the public of their school districts.
>
> Subject to the provisions of the statute, including the supervisory powers of the Minister, the board is given responsibility for establishing and operating the local school system, within whatever limitations may be imposed by the funds available to its views of the needs and wishes of the community. Included in its mandate is responsibility for such changes in the system as become desirable with new developments in educational philosophy and the establishment of priorities for such changes. The Act and regulations must therefore be interpreted with regard for the fact that responsibility for planning and operating the school system is intended to rest with the elected trustees. A narrow construction of their statutory authority could defeat that legislative intention. (emphasis added.)(Bales Bales and Bales v. School District No. 23 Board of School Trustees, 1984, pp. 215-216).

MacKay has noted that the Bales decision was delivered before S. 15 of the Charter, with its onus on the state to justify denial of equal benefit, came into force. The

court conceded that the parents had established that separate school assignment was less beneficial to their son than "mainstreaming," but that the burden remained on the parents, rather than the responding school board, to prove that it was positively harmful to the child. MacKay reminded that "If a Charter violation is found, any such presumption of regularity disappears and it is the government agency which must defend its conduct." (MacKay, 1984b, pp. 228-229).

A court will then need to examine the Public Schools Act itself to determine whether it violates section 15 guarantees to equal protection and equal benefit of the law in its formulation or permits it by its application, and whether such a violation can be justified under s. 1.

The Special Education Guidelines represent a massive improvement over the Act in terms of standards and procedures, even though there are still many areas of vulnerability. The Act is even more vulnerable.

The Public Schools Act provides no standards by which a court might evaluate parental complaints that their child had been denied equal protection or benefit. The Act provides no definition of education; does not require that education be appropriate or that a child receive any

benefit of it; provides a measure of Provincial monitoring and evaluation by prescribing Ministerial oversight of curricula and courses of study for students in graded programs which is not provided for students with special needs; requires Boards only to provide education in grades I-XII; describes no conditions under which a board may or may not decide to transfer the child to a neighboring Division rather than providing programming in its own schools, leaving parents with no recourse and does not prevent or reduce unequal distribution of resources, and hence unequal access to education, between Divisions.

It would appear that a Board may comply with its statutory obligations by providing a child with the opportunity to attend school in a classroom setting which is furnished with a certificated teacher and and free textbooks and which observes basic regulations regarding environmental safety.

A court in Ontario ruled in 1984 regarding minority language educational rights, as noted above, that statutes could be declared "void where vague." Regarding a similarly vague statute, Hogg wrote:

> It is clear from the Ontario Film and Video case that a statutory discretion to act in derogration of Charter rights will not satisfy the requirement of

> precision inherent in the phrase "prescribed by law" unless the discretion is limited by standards. Those standards would not have to be in the statute itself. They could be contained in regulations. But the Divisional Court and the Court of Appeal specifically rejected the argument that standards formulated by the Board and contained in a pamphlet published by the Board were sufficient. While these standards did provide useful indications to a film-maker as to how his film would be judged, they had no legal force and were not binding on the Board. They did not qualify as law in the phrase "prescribed by law" in s.1 (Hogg, 1985, p. 686).

Considering the precedents established in case law regarding the meaning of discrimination and the import of the equality guarantees of s.15, and the deficiencies of Manitoba's Act, there appears little evidence to suggest that a court would consider that Manitoba's Public Schools Act guaranteed students in Manitoba equal benefit and protection of the law in its formulation or in its effect.

Manitoba is virtually the only Canadian jurisdiction which has not amended its education statutes and regulations to accord with Charter rights and to guarantee some standard of appropriate services for exceptional children. Given this fact, and considering the centrality of education in most people's ranking of critical social values, and the affirmation of its central public policy role by the Supreme Court in R. v. Jones, there appears little evidence to suggest that the Government could

convince a court that its failure to guarantee equal benefit of its educational system to all its students is a reasonable limit on children's rights "demonstrably justified in a free and democratic society."

Research Questions

1. What is the legal status of exceptional children, as defined in statutes and regulations, in Manitoba, and in selected other Provinces?

In Manitoba as in other jurisdictions in Canada and throughout North America, initiative for inclusion of exceptional children in the public educational system came about as a consequence of advocacy efforts by parents and organized philanthropic or libertarian organizations. Services were provided by local jurisdictions who petitioned senior governments for adequate funding and a statutory mandate. The stance of the Provincial Ministry of Education has since its inception been passive and reactive.

Legislation was passed in 1975 giving students educational rights similar to those guaranteed to American students in the same year. Manitoba's legislation was repealed before coming into effect, and the Public Schools

Act as passed in 1980 is in effect today, with attendant Regulations.

The existence of exceptional students is not recognized by Manitoba's Act, and they have no statutory or regulatory rights to the sort of procedures regarding identification, placement, appropriate education, parental involvement, parental appeal or parental access to school records provided in most other Canadian jurisdictions.

Statutory enactment of rights and policies for this population of children has been urged by Special Needs Advisory Committees to the Minister of Education on four occasions in the past 14 years.

2. What policies are in place to provide for special educational needs of students in Manitoba school Divisions?

Manuals of 39 Divisions and Districts were examined, as well as separate policy manuals regarding special education available from some urban Divisions. Several urban Divisions have detailed policy positions on many of the policy areas examined, while others operate largely in the absence of formal policy statements. The same variation can be seen across rural Divisions. In general, few Divisions have policies which encourage parental consultation or involvement, or provide job descriptions

for the key personnel involved in delivery of special education services, or require Least restrictive Environment placement as a mandatory or an optional course. Fewer than one quarter of the Divisions surveyed acknowledge the right of the exceptional child to an appropriate education.

In October 1989 the Minister of Education released Special Education In Manitoba: Policy and Procedural Guidelines for the Education of Students with Special Needs in the Public System. These Guidelines incorporate many of the substantive and procedural rights guaranteed to students in other jurisdictions through statutes, and reflect many of the recommendations of Special Needs Advisory Committees from 1975 to 1988. The degree to which these Guidelines establish "right" and/or are binding on Divisions has yet to be established.

3. To what extent and in what areas might section 15 of the Charter of Rights and Freedoms have potential impact on educational rights of exceptional children?

Pre-Charter case law was generally confined to review of administrative actions of Boards. Courts in post-1982 educational law cases now are held to have wider discretion to scrutinize legislation and administrative actions to

ensure their compliance with rights guaranteed by the Charter.

Pre-Charter Canadian cases have recognized a right to attend school, but have established apparently contradictory positions on whether or not a Board might exclude an exceptional child from school altogether and on whether schools are services or facilities generally available to the public and hence protected by Human Rights legislation.

Post-Charter cases have held that a Board did not violate a child's s.7 right to liberty by placing him in a segregated school rather than a regular public school against his parents' wishes and that a Board did not have to provide services to the level a parent wished to fulfill its statutory duty of providing "adequate" education. One case on the same issue citing s.7 and s.15 rights was decided out-of-court very largely to the parents' satisfaction, and several others are proceeding through the courts at present

It is the clear consensus of legal and educational analysts that the potential effect of the Charter is substantial. It may include the invalidation of statutes or parts of statutes which conflict with the Charter by

failing to guarantee the equality rights discussed in s.15. It may include a determination that education is a fundamental constitutional right in itself.

4. To what extent and in what areas might Manitoba's Public Schools Act and the 1989 Guidelines, Special Education in Manitoba, be vulnerable to a Charter challenge?

This question can only be answered by a court determination as to whether the Guidelines have the force of law, or whether the much less prescriptive requirements of the Public Schools Act and its Regulations provide the statutory authority under which Boards operate.

In each case a court, if it adopts the procedure utilized by the Supreme Court of Canada on several occasions, will employ a two-part test: Does the statute (or Guidelines) in question guarantee, in its formulation and its application, equal protection and equal benefit of the law, as required by s. 15? If it does not, thereby abridging a Charter right, can the denial or limitation of rights be established as justified in a free and democratic society, as required by s.1?

Charter case law since 1982 has established the following points: that courts are to give generous rather

than narrowly technical interpretation to rights described in s.15; that the Charter applies to school Boards; that a law offends the Charter if it discriminates in effect, and that it is not necessary to establish discriminatory intent; that statutes, including education statutes, are of no force or effect to the degree that they conflict with Charter rights; that statutes which deal with Charter-protected rights must be worded precisely and specifically and include clear standards for operation; and that when a violation of the Charter is established, the onus is on the authority which wishes to limit rights to establish the necessity to do so under s.1

In light of the delineation of Charter rights established by courts to date, it is the author's conclusion that neither the Public Schools Act nor the Guidelines would withstand a Charter challenge under s.15, although the Guidelines, if found to be mandatory, represent a very substantive improvement over the 1980 statute.

Looking Ahead

It is possible to trace the development of services for exceptional children within the public school system in

Manitoba, and to delineate similarities and differences between this and other Canadian and American jurisdictions. It is possible to identify the statutory and regulatory mandates for educational of exceptional children in Manitoba, and to identify policy statements of specific school divisions. And it is possible to marshall arguments on both sides of the speculative issue of a court's response if asked by parents or guardians of a child to find that their child's constitutional rights to equality are violated by the formulation or application of either the Special Education Guidelines or the Public Schools Act.

Beyond that, it is extremely difficult to make definitive statements about the state of special education services and programs in Manitoba in 1989, other than to note that anomalies abound.

There are few national publications which address the operation of provincial education systems. The most current one, A Summary of Responses to the Special Education Information Sharing Project, published by the Council of Ministers of Education, describes conditions in eight Provinces and the Northwest Territories, but contains no information from Manitoba or Prince Edward Island.

Provincially-published reports examining Manitoba's system are few and often contradictory. There is no definition of "special education" provided in statutes or regulations, other than circular versions in which special class teachers are those who teach children who require special education programs, and "exceptional" students are those "who take the majority of their instruction in special classes." (Manitoba, 1982, p. 5.7).

Since the Ministerial announcement in 1988 redefining eligibility of low incidence categories of students for purposes of students with low incidence handicaps for individual financial support, there is some indication that common usage has begun to define as "special education" or "special needs", and hence eligible to receive additional educational resources, only those children for whom Manitoba Education and Training provides individual financial support.

A 1987 study by a Special Needs Review Committee of River East School Division, titled Challenging Every Child, reported the results of surveys given to resource teachers, classroom teachers and principals regarding issues related to mainstreaming.

Regarding "Satisfaction with Assistance provided," the Report says:

> Resource teachers (52%) and principals (70%) were marginally satisfied. Classroom teachers were 40% satisfied, 40% dissatisfied. A large group (19%) were undecided. Lack of programming assistance seemed to be the greatest complaint. It must be noted, however, that responses to previous questions suggest that teachers may be expecting assistance for students who have not been officially identified as low incidence, and are therefore, not entitled to receive assistance (emphasis added) The response to this question further points to the need for clarification of the criteria for identification (River East School Division No. 9, 1987, p. 10).

One recent article on the use of the consultative-collaborative service model in Manitoba describes it as a true mainstreaming model and seems to imply that it is the norm throughout the Province. The authors say: "The Department of Education estimates that less than 1% of all students are in segregated classes at the time of writing." (Freeze, Bravi, & Rampaul, 1989, p. 58).

Manitoba Education's most recent annual Report indicates that in 1987 2,397, or 1.2 % of Manitoba students were enrolled in special education rather than Nursery to Grade 12 classes. This is only a slight reduction from the 3,598 students (1.4 % of total enrollment) reported in special education in 1970, nearly two decades ago.(Manitoba, 1987-1988, p. 72).

By contrast, FRAME annual budget reports for 1988 report list 5,200 special education students, which is 2.7% of the 1987 K-12 total reported in FRAME statistics, or 2.6% of the total K-12 enrollment reported in Manitoba Education's 1987 Report.(Manitoba, 1988, pp. 45-46). This represents at least a 50% discrepancy It should also be noted that both figures provide placement data, rather than information on the prevalence or range of exceptional learning conditions identified in the school-age population.

The more one examines the information on mainstreaming, the more confused the picture becomes. The Provincial Government's non-statutory but nonetheless clear 1983 guidelines have been described above. In a 1987 telephone survey by the author, Special Education Coordinators in all metropolitan Winnipeg Divisions said that their placement of choice for all students is a regular classroom in the home school if appropriate supports can be provided, and that other models are used only as far as necessary..

In contrast to this are data from a 1985 Manitoba Teachers' Society study titled Ten Years Later. This was a compilation of 1600 pages of data provided via surveys of

special education teachers, detailing aspects of special education programming in Manitoba 10 years after the passage of Bill 58, five years after its replacement which the Minister insisted contained all of the guarantees of Bill 58. In the MTS study, 72% of those teachers reporting said that they taught completely self-contained classes, and 75% said that their students received instruction only with other special education students (Manitoba Teachers' Society, 1985, p. 49).

To further confuse the picture, Manitoba Education's 1988 Mainstreaming study, described above, reported that in the five divisions studied, including urban, rural and northern settings, 345 of 533 Low Incidence I students enrolled were mainstreamed (Manitoba Education, 1988, p. 7). If this pattern is representative of other Divisions in Manitoba, and Divisional reporting on numbers of students in self-contained placements is accurate, then many less severely handicapped students (formerly called High Incidence students) must be receiving their education in self-contained rather than mainstreamed placements, contrary to prevailing national patterns and contrary to statements of Ministerial preference issued many time since 1975 and just reiterated in the 1989 Guidelines.

The difficulty of gathering accurate data on the prevalence of handicapping conditions and the distribution of children in schools has been noted in national surveys many times. Both the 1978 Special Education Review and, a decade later, the 1989 High School Review underlined that this need remains unmet in Manitoba. It is difficult to understand how the Guidelines, with their failure to suggest any common definitions within which Divisions are to collect and report information, can be part of the solution rather than an exacerbation of the problem. It is also difficult to understand how relevant authorities within the Ministry of Education will be able to demonstrate that they administer a statute which does not offend the Charter's guarantees of equal protection and equal benefit in the absence of reliable data regarding the learning conditions and placements of those same students.

References

Abeson, A., & Ballard, J. (1976). State and federal policy for exceptional children. In F. J. Weintraub, A. Abeson, J. Ballard, & M. L. LaVor (Eds.), Public policy and the education of exceptional children (pp. 83-95). Washington, D. C.: Council for Exceptional Children.

Advisory Committee on Special Education to the Minister of Education The Honourable Keith Cosens. (1981). Special needs students: Manitoba's system in transition. Winnipeg: Manitoba Education.

Advisory Committee on Special Needs. (1988). 1988 Report. Manitoba Education.

Anderson, J. (1985a). An introduction to the Charter of Rights and Freedoms. Manitoba Association of School Trustees Charter of Rights and Freedoms Workshop (pp.1-23). Winnipeg: Manitoba Association of School Trustees.

Anderson, J.C. (1985b). Equality Rights. In An introduction to the Charter of Rights and Freedoms. A paper for presentation to the Manitoba School Trustees Association Charter of Rights and Freedoms workshop, February 9, 1985.

Anderson, J. (1986). Effect of the Charter of Rights and Freedoms on provincial school legislation. In M. E. Manley-Casimir, & T. Sussel (Eds.), Courts in the classroom: Education and the Charter of Rights and Freedoms (pp. 183-202). Calgary: Detselig.

Artibise, A. F. J. (1975). Winnipeg: A social history of urban growth 1874-1914. Montreal: McGill-Queen's University.

Baker, L. D. (1967). The development of special educational provisions for exceptional children in the city of Winnipeg. Unpublished dissertation, University of Toronto.

Ballance, K. E., & Kendall, D. C. (1969). Report on legislation and services for exceptional children in Canada . Council for Exceptional Children, Canadian Committee.

Ballance, K. E., Kendall, D. C., & Saywell, P. (1972). Legislation for exceptional children in Canada, supplementary report: June 1972 . Council for Exceptional Children, Canadian Committee.

Ballard, J. (n.d.). Public Law 94-142 and Section 504 - Understanding what they are and are not. Washington, D. C.: Council for Exceptional Children.

Barbacovi, D. & Clelland, R. (n.d.). Public Law 94-142: Special education In transition. Arlington, Virginia: American Association of School Administrators.

Bargen, P.F. (1961). The legal status of the Canadian school pupil. Toronto: Macmillan.

Barnsley, R. H. (1988). Alberta's new School Act. ATA Magazine, 68(2), 32-34.

Batten, J. (1988). Luke's case. On trial (pp. 135-206).

Beuree, G. (1989). Special education in Nova Scotia. In Csapo. M., & L. Goguen (Eds.), Special education across Canada: Issues and concerns for the 90's (pp. 117-126). Vancouver, B.C.: Centre for Human Development and Research.

Bickel, W. E. & Bickel, D. D. (1986). Effective schools, classrooms and instruction: Implications for special education. Exceptional Children, 52 (6), 489-500.

Bickenbach, J. E. (1987-1988). Equality, the Charter and disabled Canadians. Just Cause, 5(4), 11-14.

Bill 58. (1975). Public Schools Act, Legislative Assembly of Manitoba.

Bill 62. The Charter Compliance Statute Amendment Act, Legislative Assembly of Manitoba.

Bill 74. The Equal Rights Statute Amendment Act, Legislative Assembly of Manitoba.

Bill 23. The Charter Compliance Statute Amendment Act, Legislative Assembly of Manitoba.

Bill 34. The Constitutional Questions Act, Legislative Assembly of Manitoba.

Bill 59 (1987). School Act, Legislative Assembly of Alberta

Blatt, B., Bogdan, R. & Biklen, D. (Eds.). (1977). An alternative textbook in special education. Denver: Love.

Bogdan, R., & Biklen, D. (1977) Missing agendas in social policy: Head Start and the handicapped. In B. Blatt, R. Bogdan & D. Biklen (Eds.). An Alternative Textbook in Special Education. Denver: Love.

Boutin, G. (1984). La préparation des enseignants à l'Iintegration scolaire: La situation au Québec. In P. Grimmet (Ed.), Research in teacher education: Current problems and future prospects in Canada (pp. 119-130). Vancouver,B.C.: Centre for the Study of Curriculum and Instruction, Centre for the Study of Teacher Education, University of British Columbia.

Bowles, S., & Gintis, H. (1976). Schooling in capitalist America. New York: Basic Books Inc.

Boyer, E.L. (1983). High school: A report on secondary education in America. New York: Harper & Row.

Brantlinger, E. A., & Guskin, S., L. (1985). Implications of social and cultural differences for special education with specific recommendations. Focus on Exceptional Children, 18(1), 1-12.

Brantlinger, E. A., & Guskin, S. L. (1987). Ethnocultural and social psychological effects on learning characteristics of handicapped children. In M. Wang, M. C. Reynolds, & H. J. Walberg (Eds.), Handbook of Special Education (pp. 7-34). Oxford: Pergamon Books Ltd.

Brennan, J. (1987). School Act put on hold. Alberta Teachers' Association News, 22(5), 3.

Brennan, J. (1988). Education Minister introduces new School Act. Alberta Teachers' Association News, 22(18), 1.

British Columbia Royal Commission on Family and Children's Law. (1975a). Children's rights (Fifth Report, Part III). Vancouver,B.C.: Author.

British Columbia Royal Commission on Family and Children's Law. (1975b). Special needs of special children (Fifth report, Part IV). Vancouver,B.C.: Author.

Brophy, J. (1984). Research on teaching and teacher education: The interface. In P. Grimmett (Ed.) Research in teacher education: Current problems and future prospects in Canada (pp. 76-92). Vancouver,B.C.: Centre for the Study of Curriculum and Instruction, Centre for the Study of Teacher Education, University of British Columbia.

Canadian Council on Children and Youth. (1978). Admittance restricted: The child as citizen in Canada. Ottawa: Author.

Canadian Education Association. (1985). Mainstreaming: Some issues for school boards. Toronto: Author

Canadian Institute for Research. (1978). A study of the integration of handicapped students in the regular schools of the Calgary

Board of Education. Calgary, Alberta: Calgary Board of Education.

Carlberg, C., & Kavale, K. (1980). The efficacy of special versus regular class placement for exceptional children: A meta-analysis. Journal of Special Education, 14(3), 295-309.

Carlson, L. (1989). Special education in Saskatchewan. In M. Csapo, & L. Goguen (Eds.), Special education across Canada; Issues and concerns for the 90's (pp. 39-46). Vancouver, B.C.: Centre for Human Development and Research.

Chalmers, R. N. (1982). Special education legislation for Ontario. CSE Legal Issues in Education (pp.53-62).Vancouver.

Chambers, J.G. & Hartman, W. (1983). Special education policies: Their history, implementation and finance. Philadelphia: Temple University.

Champoux-Lesage, P. (1989) . Special education in Quebec: Summary of present situation and future prospects. In M. Csapo, & L. Goguen (Eds.), Special education across Canada: Issues and concerns for the 90's. (pp. 93-102). Vancouver, B.C.: Centre for Human Development and Research.

Chinn, P. C., & Hughes, S. (1987). Representation of minority students in special education classes. Remedial and Special Education, 8(4), 41-46.

Christianson, J. A. (1965). A study of the education of handicapped children in Manitoba. Manitoba Department of Education.

Citron, C. (1982) . The rights of handicapped students (Report LEC-2). Denver, Colo.: Education Commission of the States (Policy Analysis and Research).

Clair, J., Hagerty, G., & Merchant, D. (1979). Re-design for teacher education: Assistance for the planning of Deans' Grants Projects. Washington, D.C.: American Association of Colleges for Teacher Education.

Clark, J. A. (1989). Duty to provide education: Antonsen and Antonsen v. Board of School Trustees District No. 39 (Vancouver) et al. BCSTA Legal Opinion File L-1578 . Vancouver, B.C.: British Columbia School Trustees Association.

Collier, C., & Hoover, J. J. (1987). Sociocultural considerations when referring minority children for learning disabilities. Learning Disabilities Focus, 3(1), 39-45.

Committee on Teacher Education and Professional Standards. (1971). Standards for educators of exceptional children in Canada (The

Canadian Committee, Council for Exceptional Children, in collaboration with the National Institute on Mental Retardation) Toronto: Author.

Common, R. W., & Frost, L. G. (1988). The implications of the mismeasurement of Native students' intelligence through the use of standardized intelligence tests. Canadian Journal of Native Education, 15(1), 18-30.

Conn-Blowers, E. A., & Mcleod, H. J. (1989). Special education in Alberta. In M. Csapo, & L. Goguen (Eds.), Special education across Canada: Issues and concerns for the 90's (pp. 19-28). Vancouver, B.C.: Centre for Human Development and Research.

Council for Exceptional Children. (1984). Reply to "A Nation at Risk." (Ad Hoc Committee to Study and Respond to the 1983 Report of the National Commission on Excellence in Education). Exceptional Children, 50(6), 484-494.

Council for Exceptional Children (Manitoba Public Policy Committee). (1987). Memorandum. Winnipeg: Author.

Courtnage, L., & Smith-Davis, J. (1987). Interdisciplinary team training: A national survey of special education teacher training programs. Exceptional Children, 53(5), 451-459.

Crealock, C, Sitko, M., & Allison, P. (1985). Bill 82 implementation study: Final report 1982-1985. London, Ont.: London Public School Board.

Crealock, C. M., & Nediger, W. G. (1983). Bill 82 and you. Toronto: Ontario Public School Teachers' Federation.

Cruickshank, D. (1983). Human rights and Charter rights in special education. B.C. Journal of Special Education, 7(3), 205-220.

Cruickshank, D. (1986). Charter equality rights: The challenge to education law and policy. In M. Manley-Casimir & T. Sussel (Eds.), Courts in the classroom: Education and the Charter of Rights and Freedoms (pp. 51-76). Calgary, Alberta: Detselig.

Crux, S. C. R. (1983) . Special education legislation in Ontario: A practical guide. Orbit, 14(4), 19-21.

Crux, S.C. (1984). Litigation trends in Bill 82. Education Canada, 4-9.

Csapo, M. (1980). A collect call to Ottawa: Will someone accept the charges? In M. Csapo and L. Goguen (Eds.). Special education in Canada. Vancouver, B.C.: Centre for Human Development and Research.

Csapo, M. (1984) Segregation, integration and beyond: A sociological perspective of special education. B.C. Journal of Special Education, 8(3), 211-229.

Csapo, M., & Goguen, L. (1989). Special education across Canada: Issues and Concerns for the 90's. Vancouver, B.C.: Centre for Human Development and Research,

Cummins, J. (1984) . Bilingualism and special education: Issues in assessment and pedagogy. San Diego, California: College Hill Press.

Cummins, J. (1987). Psychological asssment in multicultural school systems. Canadian Journal for Exceptional Children, 3(4), 115-117.

Curtis, C. K. (1985). Education students: Attitudes toward disabled persons and mainstreaming. Alberta Journal of Educational Research, 31(4), 288-305.

Danielson, L. C., & Bellamy, G. T. (1989). State variation in placement of children with handicaps in segregated environments. Exceptional Children, 55(5), 448-455.

David, J., & Greene, D. (1983). Organizational Barriers to Full Implementation of P.L. 94-142. In J. G. Chambers & W. Hartman (Eds.), Special education policies: Their history, implementation and finance (pp. 115-135). Philadelphia: Temple University.

Dunn, L.M. (1968) Special education for the mildly handicapped -- Is much of it justified? Exceptional Children, 35, 5-22.

Edgar, E. & Hayden, A.H. (1984-5) Who are the children special education should serve and how many children are there? Journal of Special Education, 18(4), 523-539.

Education Act. (1983). R.S.S., c.17.

Education Act. (1980). R.S.O., c.129.

Education Administration Act. (1987). R.S.M., E10.

Education for All Handicapped Children Act of 1975 (P.L. 94-142) (1976). 20 U.S.C., s.2701.

Endicott, O. (1986a). Does litigation make a difference? Entourage, 1(4), 12-15.

Endicott, O. (1986b). Education rights; parents put on the pressure. Entourage, 1(3), 34-37.

Finkelstein, N. R. (1985). Section 15, Section 1 and the relevance of the U.S. experience. In Law Society of Manitoba. A Practitioner's Guide to Equality Rights (37-57). Winnipeg: Author.

Foster, W. F., & Pinheiro, G. (1988). Constitutional protection of the right to an education. Dalhousie Law Journal, 11(3), 759-832.

Freeze, D. R., Bravi, G., & Rampaul, W. E. (1989). Special education in Manitoba: A consultative-collaborative services delivery model. In M. Csapo, & L. Goguen (Eds.), Special education across Canada; Issues and concerns for the 90's (pp. 47-80). Vancouver, B.C.: Centre for Human Development and Research.

Funk, R. (1987). Disability rights: From caste to class in the context of civil rights. In A. Gartner, & T. Joe (Eds.), Images of the disabled, disabling images (pp. 7-30). New York: Praeger.

Gaffield, C., & West, W. G. (1978). Children's rights in the Canadian context. In H. Berkeley, C. Gaffield, & W. G. West (Eds.), Childrens' rights: Legal and educational issues (pp. 3-14). Toronto: Ontario Institute for Studies in Education.

Ganschow, L. Weber, D. B. & David, M. (1984). Preservice teacher preparation for mainstreaming. Exceptional Children, 51(1), 74-76.

Gartner, A., & Lipsky, D. K. (1987). Beyond special education:Toward a quality system for all students. Harvard Educational Review, 57(4), 367-395.

Gerber, M. M. (1984). The Department of Education's sixth annual report to Congress on PL 94-142: Is Congress getting the full story? Exceptional Children, 51(3), 209-224.

Gibson, D. (1982) . Impact of Canadian Charter of Rights and Freedoms on Manitoba statutes. Winnipeg: Legal Research Institute.

Gilhool, T. K. (1976). Education: An inalienable right. In F. J. Weintraub, A. Abeson, J. Ballard, & M. L. LaVor (Eds.), Public policy and the education of exceptional children (pp. 14-21). Washington, D. C.: Council for Exceptional Children.

Goguen, L. (1980a). Right to education for exceptional children in Canada: A growing national concern. In M. Csapo, & Goguen. L. (Eds.), Special education across Canada: Issues and concerns for the 1980's (pp. 175-184). Vancouver, B.C.: Centre for Human Development and Research.

Goguen, L., & Leslie, P. (1980b). Special education administrative policy development: Toward comprehensive education for all children. Special Education in Canada, 54(3), 22-24.

Gold, Marc. (1985). Equality past and future: The relationship between Section 15 of the Charter and the equality provisions in the Bill of Rights. In Law Society of Manitoba, A Practitioner's Guide to Equality Rights (pp. 23-35). Winnipeg: Author.

Goldberg, S. S. (1982) . Special education law . New York: Plenum Press.

Goodlad, J. I. (1984). A place Called school. New York: McGraw-Hill.

Goodman, L. (1985) The effective schools movement and special education. Teaching Exceptional Children, 17(2), 102-105.

Gottlieb, J., & Leyser, J. (1981). Facilitating the social mainstreaming of retarded children. Exceptional Education Quarterly, 1(4), 57-69.

Goupil, C., & Brunet, L. (1984) Attitudes and behavior towards the mainstreaming of exceptional children. Canadian Journal for Exceptional Children, 1(1), 28-31.

Gregor, A., & Wilson, K. (1984). The development of education in Manitoba. Dubuque, Iowa: Kendall/Hunt.

Gresham, F. (1981). Social skills training with handicapped children: A review. Journal of Educational Research, 51(1), 139-176.

Gresham, F. (1982) Misguided mainstreaming: The case for social skills training with handicapped children. Exceptional Children, 48, 422-423.

Grimmett, P. (1984). (Ed.) Research in Teacher Education: Current Problems and Future Prospects in Canada. Vancouver.B.C.: Centre for the Study of Curriculum and Instruction, Centre for the Study of Teacher Education, and University of British Columbia.

Grimmett, P. (1984). Future Research in Teacher Education. In P. Grimmett (Ed.), Research in Teacher Education: Current Problems and Future Prospects in Canada (pp. 258-268). Vancouver.B.C.: Centre for the Study of Curriculum and Instruction, Centre for the Study of Teacher Education, and University of British Columbia.

Hagerty, G.J., & Abramson, M. (1987). Impediments to implementing national policy change for mildly handicapped students. Exceptional Children, 53(4), 315-324.

Hansard Province of Manitoba. (1975). 30th Legislature, 2nd Session

Hansard Province of Manitoba. (1979). 31st Legislature, 3rd Session

Hansard Province of Manitoba. (1980). 31st Legislature, 4th Session

Hansard Province of Manitoba. (1986). 32nd Legislature, 4th Session

Hansard, Province of Manitoba. (1988). 34th legislature, 1st session.

Heller, H.W. (1984). Special educational professional standards: Need, value and use. Exceptional Children, 50(3), 192-204.

Heller, K. A., Holtzman, W. H., & Messick, S. (1982). Placing children in special education: A strategy for equity. Washington, D.C.: National Academy Press.

Hemphill, M. (1983). Letter to chairpersons, superintendents, secretary treasurers, and special education coordinators. Winnipeg: Manitoba Education

Hemphill, M. (1985). Letter to presidents of Manitoba Association of School Trustees, Manitoba Association of School Superintendents, and Manitoba Teachers' Society .Winnipeg: Manitoba Education.

Hendrick, I. G., & MacMillan, D. L. (1989). Selecting children for special education in New York City: William Maxwell, Elizabeth Farrell, and the development of ungraded classes, 1900-1920. Journal of Special Education, 22(4), 395-417.

Herda, E. (1980). Aspects of general education governance and PL 94-142 implications. Focus on Exceptional Children, 12(5).

Heritage Foundation (1984) The crisis: Washington shares the blame. The Heritage Foundation Backgrounder. Washington, D.C.: The Heritage Foundation.

Hobbs, N., Bartel,N., Dokecki, P., Gallagher, J.,& Reynolds, M. R. (1979). Exceptional teaching for exceptional learning: A report to the Ford Foundation. New York: Ford Foundation.

Hodder, C. (1984). The Education Act (Ontario) 1980: A review. Interchange, 15(3), 44-53.

Hogg, P. (1985) . Constitutional law (2nd ed.). Toronto: Carswell.

Hopkins, D., & Reid, K. (Eds.) ,(1985). Rethinking teacher education. New Hampshire: Croom Helm.

Howarth, M. (1983). A search of the literature on mainstreaming. Toronto: Federation of Women Teachers' Associations of Ontario.

Humphreys, E. H., Davidson, I. F. W. K., & Feeney, J. D. (1986). The Ontario student record and record-keeping ramifications of Bill 82. Toronto: Ontario Institute for Studies in Education.

Kakalik, J. S., Furry, W. S., Thomas, M. A., & Carney, M. F. (1981) The cost of special education (Rand Note N-1792-ED). Santa Monica, Calif.: Rand Corporation.

Karagianis, L. D., & Nesbit, W. (1980). Special education: A changing perspective for educational administrators. The Canadian Administrator, 19(4), 1-6.

Kaufman,M., Agard, J. A., & Semmel, M. I. (1985). Mainstreaming: Learners and their environment. Cambridge, MA: Brookline.

Keeton, A. (1979-80). Special education: A right or a privilege in Ontario. Interchange, 10(3), 66-77.

Keeton, A. (1982). Teacher liability and Bill 82. Ontario Education. 14(2), 12-15.

Kendall, D. (1971). Towards integration. Special education in Canada, 76, 19-25, 28-34.

Kimmins, R., Hunter, W. J., & MacKay, A. W. (1985). Educational legislation and litigation pertaining to the practice of school psychology in Canada. Canadian Journal of School Psychology, 1, 1-10.

Kirk, S. (1962). Educating exceptional children. Boston: Houghton-Mifflin.

Kirp, D., Buss, W., & Kuriloff, P. (1974). Legal reform of special education: Empirical studies and procedural proposals. California Law Review, 62, 41-45.

Koopman, P. R. (1977) Exceptional children in Canada - The disadvantaged elite. In H. Stevenson and D. Wilson (Eds.). Precepts, policies and process: Perspectives on Canadian education. London, Ontario: Alexander, Blake Associates.

Kristjanson, K., & Starec, S. (1975). Survey of special services associated with the Manitoba school system. Interdepartmental Working Group on the Education of Children and Youth with Special Needs. Winnipeg: Department of Education.

Kysela, G. M., & McDonald, L. (1989). Early intervention; Early intervention within the Canadian context. In M. Csapo, & L. Goguen (Eds.), Special education across Canada; Issues and concerns for the 90's (pp. 167-178). Vancouver, B.C.: Centre for Human Development and Research.

Laskin, J.I. (1985) Section 15 of the Charter and Human Rights Legislation. In Law Society of Manitoba, A Practitioner's Guide to Equality Rights (59-81). Winnipeg: Author.

LaVor, M. (1976) . Federal legislation for exceptional persons. In F. J. Weintraub, A. Abeson, J. Ballard, & M. L. LaVor (Eds.), Public policy and the education of exceptional children (pp. 96-111). Washington, D. C.: Council for Exceptional Children.

Law Society of Manitoba (1985). A Practitioner's Guide to Equality Rights. Winnipeg: Author.

Laycock, S. (1963). Special education in Canada. Toronto: Gage.

Lazerson, M. (1983). The origins of special education. In J. G. Chamber, & W. T. Hartman (Eds.), Special education policies: Their history, implementation and finance (pp. 15-47). Philadelphia: Temple University Press.

Lazerson, M., McLaughlin, J. B., McPherson, B., & Bailey, S. K. (1985). An education of value: The purposes and practices of schools. Cambridge: Cambridge University Press.

Lepofsky, M. D., & Schwartz, H. (1988). Constitutional law-Charter of Rights and Freedoms - Section 15 -an erroneous approach to the Charter's equality guarantee: R. v. Ertel. The Canadian Bar Review, 67, 115-128.

Lieberman, L. (1985). Special education and regular education: A merger made in heaven? Exceptional Children, 51(6), 513-516.

Lilly, M.S. (1987). Lack of focus on special education in literature on educational reform. Exceptional Children, 53(4), 325-326.

Loken, G. (1978). Costing programs in special education: Appendix A to A study of the integration of handicapped students in the regular schools of the Calgary Board of Education. Calgary: Canadian Institute for Research.

MacFarlane, R. O. (1959). Report of the Manitoba Royal Commission on Education. Winnipeg: King's Printer.

Maciejko, B. (1985). The working mind: The radical workers' response to public education; Winnipeg, 1912-1921. Unpublished thesis, University of Manitoba.

MacKay, A. W. (1984a) Education law in Canada. Toronto: Emond-Montgomery.

MacKay, A. W. (1984b) . Case comment: Bales v. Board of School Trustees: Parents, school boards and reasonable special education. Administrative Law Reports, 8, 225-230.

MacKay, A. W. (1985). Special Education in Nova Scotia: One step forward and two steps back. The Canadian School Executive, 4(9), 11-13.

MacKay, A. W. (1986a). The Canadian Charter of Rights and Freedoms: Implications for students. In. M. Manley-Casimir & T. Sussel (Eds.). Courts in the classroom: Education and the Charter of Rights and Freedoms (pp. 9-50). Calgary, Alberta: Detselig.

MacKay, A. W. (1986b). The Equality Provisions of the Charter and Education: A Structural Analysis. Canadian Journal of Education, 11(3), 293-311.

MacKay, A. W. (1987a). The Charter of Rights and special education: Blessing or curse. Canadian Journal for Exceptional Children, 3(4), 118-127.

MacKay, A. W., & Krinke, G. (1987b). Education as a basic human right: A response to special education and the Charter. Canadian Journal of Law and Society, 2, (73-95).

MacKay, A. W. (1987c). The Elwood case: Vindicating the educational rights of the disabled. School Law Commentary, 2(2,3),

MacMillan, D. L. (1982). Mental retardation in school and society. Toronto: Little, Brown & Co.

Madden, N., & Slavin, R. (1983). Mainstreaming students with mild handicaps: Academic and social outcomes. Review of Educational Research, 53(4) 519-569.

Magsino, R. F. (1982). Students, parents, educators; An approach to conflict of rights. Interchange, 13(3), 1-17.

Magsino, R. F. (1988). Student rights and the Charter: An analysis of legal and extra-legal considerations. Education Law Journal, 1(1), 233-260.

Manitoba Association of School Trustees. (1989). Resolutions . Winnipeg: Author.

Manitoba Council of Exceptional Children. (1987). Appropriate education, student placement and parent nvolvement: A response.Winnipeg, Manitoba: Author.

Manitoba Department of Education (Child Care and Development Branch). (1981-82). Report of The Manitoba Early Identification and Education Programming Pilot Project 1981-82. Winnipeg: Author.

Manitoba Department of Education. (1977-1978). Bill 58: Guidelines for funding, 1977-1977. Winnipeg: Author.

Manitoba Department of Education. (1978). Special education review: A survey review conducted by the Child Development and Support Services Branch with assistance from the Research Branch. Winnipeg: Author.

Manitoba Education and Training. (1989). Special education in Manitoba: Policy and procedural guidelines for the education of students with special needs in the public school system. Winnipeg: Author.

Manitoba Education. (1986) . The Charter of Rights and education in Manitoba . Author.

Manitoba Education. (1987a). Appropriate education, student placement and parent involvement: A policy direction and consultation paper. Winnipeg: Author.

Manitoba Education. (1987b). Student placement and parent involvement: Policy guidelines for school boards. Winnipeg: Author.

Manitoba Education. (1988). Mainstreaming in Manitoba. Winnipeg: Author (Planning and Research).

Manitoba Education. (1988b). Mainstreaming in Manitoba. Winnipeg, Manitoba: Author.

Manitoba Regulations 6/81, 166/81, 146/83, 13/85, 1/86, 1252/86, 179/88, 464/88, 138/89.

Manitoba Teachers' Society. (1981). Changing realities: A study of education finance in Manitoba. Winnipeg, Manitoba: Author.

Manitoba Teachers Society. (1983). The developing legislative and financial framework for special education in Manitoba. Paper prepared for Learning Assistance Centre Seminar. Winnipeg: Author.

Manitoba Teachers' Society. (1984). The response of the Manitoba Teachers' Society to the report of the Manitoba Education Finance Review. Winnipeg, Manitoba: Author.

Manitoba Teachers' Society. (1985). Ten years later: A study of special education in Manitoba public schools on the tenth anniversary of Bill 58. Winnipeg, Manitoba: Author.

Manitoba Teachers' Society. (1987a) Response to the consultation paper issued by the Minister Of Education entitled 'Appropriate Education, Student Placement and Parent Involvement: A Policy Direction. Winnipeg, Manitoba: Author.

Manitoba Teachers' Society. (1987b). Submission to the Honourable Jerry Storie, Minister Of Education, by the Manitoba Teachers' Society, regarding the Constitutional status Of Educational rights within the Public Schools Act of Manitoba. Winnipeg, Manitoba: Author.

Manitoba Teachers' Society. (1987c). Submission to the Honourable Jerry Storie, Minister Of Education, by the Manitoba Teachers' Society, regarding the provision of equitable access to special education services in Manitoba. Winnipeg, Manitoba: Author.

Manitoba Teachers' Society. (1988a) Ranked proportionate variation in exceptional program enrollment per school division/ district. Winnipeg, Manitoba: Author.

Manitoba Teachers' Society. (1988b). Special education support from the government of Manitoba (1987-1988). Winnipeg, Manitoba: Author.

Manitoba Teachers' Society (1988c). Variation in annual budgetary expenditure within the FRAME operating fund per program function Winnipeg, Manitoba: Author

Manitoba. (1938-1939). Report of the Department of Education.

Manitoba. (1915). Report of the Department of Education .

Manitoba. (1944-1945). Report of the Department of Education.

Manitoba. (1945-1946). Report of the Department of Education.

Manitoba. (1955-1956). Report of the Department of Education.

Manitoba. (1959). Report of the Department of Education.

Manitoba. (1963). Report of the Department of Education.

Manitoba. (1965). Report of the Department of Education.

Manitoba. (1966). Report of the Department of Education.

Manitoba. (1967). Report of the Department of Education.

Manitoba. (1968). Report of the Department of Education.

Manitoba. (1974-1975). Report of the Department of Education.

Manitoba. (1982). Financial Reporting and Accounting in Manitoba Education (FRAME) Manual. Winnipeg: Queen's Printer.

Manitoba. (1987-1988). Report of the Department of Education .

Manitoba. (1987-1988). Report of the Department of Education.

Manitoba. (1988). FRAME Annual Report . Manitoba Education (Schools' Finance Branch).

Manley-Casimir, M., & Sussel, T. (1986a). Courts in the classroom: Education and the Charter of Rights and Freedoms. Calgary, Alberta: Detselig.

Manley-Casimir, M , & Sussel, T. (1986b). The equality provisions of the Canadian Charter of Rights and educational policy: Preparations for implementation. Interchange, 17(3), 1-14.

Manley-Casimir, M. E., & Pitsula, P. (1988). The Charter, culture and the public school curriculum: Emerging perspectives and guidelines. Education Law Journal, 1(1), 37-69.

McBride, S. R. (1989). Special education in British Columbia past, present and future. In M. Csapo, & L. Goguen (Eds.), Special education across Canada: Issues and concerns for the 90's (pp. 1-14). Vancouver, B.C.: Centre for Human Development and Research.

McCallum, S. D. (1987). A giant step for all kids. Entourage, 2(3), 38-39.

McCarthy, M. M., & Deignan, P.T. (n.d.). What legally constitutes an adequate public education? Bloomington, Indiana: Phi Delta Kappa Eeducational Foundation..

McMurray, G. (1983). Special education. In D. Ray, & V. D'Oyley (Eds.), Human rights in Canadian education (pp. 110-128). Dubuque, Iowa: Kendall Hunt.

Mesinger, J. F. (1985). Commentary on "A rationale for the merger of regular and special education " or "Is it now time for the lamb to lie down with the lion?" Exceptional Children, 51(6), 510-512.

Metcalf, L. (1987). Special education appeal boards in Ontario. Unpublished dissertation, University of Toronto.

Minister of Education's Advisory Committee on Bill 58. (1977). First report. Winnipeg: Author.

Minister of Education's Advisory Committee on Bill 58. (1979). Second report. Winnipeg: Author.

Mitchell, C. (1988, September 16). Parental access to school records supported by Minister. Winnipeg Free Press, p. 13.

Moran, M. R. (1984). Excellence at the cost of instructional equity? The potential impact of recommended reforms upon low-achieving students. Focus on Exceptional Children, 16(7), 1-12.

Morsink, C., Soar, R. S. Soar, R. M., & Thomas, R. (1986). Research on teaching: Opening the door to special education classrooms. Exceptional Children, 53(1), 32-40.

Mulcahy, R., Small,J , & Wilgosh, L. (1985). Special education at the University of Alberta. Canadian Journal for Exceptional Children, 1(3), 102-106.

Myles, D. M., & Ratzlaff, H. C. (1988). Teachers' bias towards visible ethnic minority groups in special education referrals. B.C. Journal of Exceptional Children, 12(1), 19-28.

National Coalition of Advocates for Students. (1985). Barriers to excellence: Our imperative for educational reform. Washington, D.C.: U.S. Department of Education.

National Commission for Excellence in Teacher Education. (1985). A call for change in teacher education. Washington, D.C.: American Association of Colleges for Teacher Education.

National Commission on Excellence in Education. (1983). A Nation at Risk.: The Imperative for Educational Reform. Washington, D.C.: US Department of Education.

Nesbit, W., & Karagianis, L. (1980). The Warnock Report: Implications for special education in Canada. Special Education in Canada, 54(3), 11-13.

New School Act introduced in Alberta Legislature. (1987). Canadian Education Association Newsletter, September.

Nicholls, A. C., & Wuester, T. J. (1986). Education and the Charter of Rights and Freedoms. Vancouver, B.C.: EduServ.

Nicholls, A. C., & Wuester, T. J. (1989). Charter issues in education. Vancouver, B.C.: EduServ.

Nicholls, G. (1983). Enhancing equity in Manitoba schools: The report of the Education Finance Review. Winnipeg: Queen's Printer.

Ontario Ministry of Education. (1984). Special education information handbook. Toronto: Author.

Ontario Regulation 554/81.

Organisation for Economic Cooperation and Development. (1976). Reviews of national policies for education. Paris: Author.

Panel for the Study of Education of the Handicapped. (1978) Education for all handicapped children: Consensus, conflict and challenge. Washington, D.C.: National Education Association.

Persi, J., & Brunatti, G. (1987). Cognitive measures and cultural bias: A comparison of the performance of native and non-native low achievers. Canadian Journal of Native Education, 14(1), 15-18.

Pitsula, P., & Manley-Casimir, M. E. (1989). The Charter, educational administration and U.S. case law: Contrasting legal norms and traditions. Education Law Journal, 2(1), 49-72.

Poirier, D. (1986). The Charter of Rights and exceptional children. Paper delivered to Council of Exceptional Children Conference, Winnipeg, Manitoba, February 1986.

Poirier, D., Goguen, L., & Leslie, P. (1988). Education rights of exceptional children in Canada. Toronto: Carswell.

Posno, T. R. (1986). Special education appeal processes: Promise or fallacy. Canadian Journal for Exceptional Children, 3(1), 7-12.

Prasse, D. P., & Reschly, D. J. (1986). Larry P.: A case of segregation, testing or program eficacy? Exceptional Children, 52(4) 333-346.

Public School funding levels are announced. Manitoba News Service, January 15, 1988.

Public Schools Act (1954) . R.S.M., 215.

Public Schools Act (1970) . C.S.M., c.P250.

Public Schools Act (1980) . C.S.M., c.P250.

Public Schools Act. (1980). C S.M. 1980, c.P.250.

Pugach, M. (1987). The national education reports and special education: Implications for teacher preparation. Exceptional Children, 53,(4), 308-314.

Pugach, M., & Sapon-Shevin, M. (1987). New agendas for special education policy: What the national reports haven't said. Exceptional Children, 53(4), 295-299.

Ravitch, D. (1983). The troubled crusade: American education 1945-1980. New York: Basic Books.

Rawlyk, S. (1979). Where is it written? Special Education in Canada, 53(1), 12-15.

Reschly, D. J. (1988b). Assessment issues, placement litigation, and the future of mild mental retardation classification and programming. Education and Training in Mental Retardation, 23(4), 285-301.

Reynolds, M.C., Wang, M., & Walberg, H.J. (1987). The necessary restructuring of special and regular education. Exceptional Children, 53(5), 391-398.

Richardson, J. G. (1979). The case of special education and minority misclassification in California. Educational Research Quarterly, 4(1), 25-40.

Richert, G. E. (1982). Policy issues in the education of exceptional children. B.C. Journal of Special Education, 6(1),11-21.

Riediger, E., Hillyard, A., & Sobsey, R. (1986). Integration of handicapped children: Administrative strategies. Canadian Journal of Exceptional Children, 2(3) 90-96.

River East School Division No. 9. (1987). Challenging every child: The report of the Special Needs Review Committee. Winnipeg: River East School Division No. 9.

Roberts, C. A., & Lazure, D. (1970). One million children - the Celdic Report: A national study of Canadian children with emotional and learning disabilities. Toronto: Crainford.

Sage, D.D., & Burrello, L.C. (1986) Policy management in special education. New Jersey: Prentice Hall.

Samuda, R. J. (1982). Placing immigrant students in the Ontario school system. B.C. Journal of Special Education, 6(3), 249-262.

Sapon-Shevin, M. (1987). The national education reports and special education: Implications for students. Exceptional Children, 53,(4), 300-307.

Sarason, S. B., & Doris, J. (1979). Educational handicap, public policy and social history: A broadened perspective on mental retardation. New York: The Free Press.

Saskatchewan Regulation 1986 E-0.1.

School Act (1988). R.S.A., c.S-3.1.

Shepard, L. A. (1987). The new push for excellence: Widening the schism between regular and special education. Exceptional Children, 53(4), 327-329.

Shotel, J., Iano, R., & McGettigan, J. (1972). Teacher attitudes associated with the integration of handicapped children. Exceptional Children, 38, 677-683.

Silverman, H.,Wilson, A. K., & Seller, W. (1988). The Education Amendment Act, 1980 (Bill 82) Implementation study: Board policies and school level practices. Toronto: Ontario:Ministry of Education.

Singer, J. D., & Butler, J. A. (1987). The Education for All Handicapped Children Act: Schools as agents of social reform. Harvard Educational Review, 57(2), 125-152.

Sizer, T. R. (1984). Horace's compromise: The dilemma of the American high school. Boston: Houghton Mifflin.

Smith, C. L. (1988). Judicial interpretation of equality rights under the Canadian Charter of Rights and Freedoms: Some clear and present dangers. U.B.C. Law Review, Nemetz Edition, 23(1), 65-95.

Smith, J. A. C. (1980). The right to an appropriate education. Ottawa Law Review, 12, 367-391.

Smith, J. A. C. (1981). The Education Amendment Act, 1980. Ottawa Law Review, 13, 199-209.

Snider, W. (1989, June 14). Topeka's schools remain segregated, court rules. Education Week. (Washington, D.C.) p.5.

Solomon, R., Hewitt, L., & Basso, M. (1988) . Toward a coherent school drug and alcohol policy: Defining the legal boundaries. Education Law Journal, 1(1), 1-36.

Soucie, R. (1988). Section 23 of the Charter: Provinccial implementation. Research Branch, Library of Parliament.

Stainback, S., & Stainback, W. (1984). A rationale for the merger of special education and regular education. Exceptional Children, 51(2), 102-111.

Stainback, W., Stainback, S., Courtnage, L., & Jaben, T. (1985). Facilitating mainstreaming by modifying the mainstream. Exceptional Children, 52(2), 144-152.

Storie, J. (1987). Letter to Cordell Barker, President, Manitoba Teachers' Society.

Sussel, T., & Manley-Casimir, M. E. (1986). The Supreme Court of Canada as a "national school board": The Charter and educational change. Canadian Journal of Education, 11(3), 313-337.

Sussel, T., & Manley-Casimir, M. (1987). Special education and the Charter: The right to equal benefit of the law. Canadian Journal of Law and Society, 2, 45-71.

Tarnopolsky, W. S. (1983). Canada's new Charter of Rights and Freedoms. Multiculturalism, 6(2), 11-15, 18.

Taylor, J. M., Tucker, J. A., & Galagan, J. E. (1986). The Luke S. class action suit: A lesson in system change. Exceptional Children, 52(4), 376-383.

Thomas, D. C. (1982). Critical factors in the development of interdisciplinary support services. B.C. Journal of Special Education, 6(2), 141-148.

Timar, T. T. & Kirp, D. L. (1987). Educational reform and institutional competence. Harvard Educational Review, 57(3), 308-330.

Treherne, D., & Rawlyk, S. (1979). Canadian legislative processes. McGill Journal of Education, 14(3), 265-273.

Tucker, J. A. (1980). Ethnic proportions in classes for the learning disabled: Issues on non-biased assessment. Journal of Special Education, 14(1), 93-105.

Turnbull, H. R. III, & Fiedler, C. (1984). Judicial interpretation of the Education for All Handicapped Children Act. Reston, Virginia: ERIC Clearinghouse on Handicapped and Gifted Children.

Tweedie, J. (1983). The politics of legalization In special education reform. In J. G. Chambers, & W. Hartman (Eds.), Special education policies: Their history, implementation and finance (pp. 48-73). Philadelphia: Temple University Press.

U.S. Department of Education. (1986). Eighth annual report to Congress on the implementation of The Education of the Handicapped Act. Washington, D.C.: Author.

U.S. Department of Education (1987) Ninth annual Report to Congress on the Implementation of the Education of the Handicapped Act. Washington, D.C.: Author.

U.S. Department of Education. (1988). Tenth annual report to Congress on the implementation of the Education of the Handicapped Act. Washington, D.C.: Author.

Walker, D. K., Singer, J. D., Palfrey, J. S., Orza, M., Wenger, M., & Butler, J. A. (1988). Who leaves and who stays in special education: A 2-Year follow-up study. Exceptional Children, 54(5), 393-402.

Walker, L. J. (1987). Procedural rights in the wrong system: Special education is not enough. In A. Gartner, & T. Joe (Eds.), Images of the disabled, disabling images (pp. 97-115). New York: Praeger.

Wang, M. C. (1977). Toward achieving educational excellence for all students: Program design and student outcomes. Remedial and Special Education, 8(3), 25-34.

Wang, M., & Birch, J. (1984). Effective special education in regular classes. Exceptional Children, 50(5), 301-399.

Wang, M., & Reynolds, M. C. (1985). Avoiding the catch-22 in special education reform. Exceptional Children, 51(6), 497-502.

Wang, M., Vaughn, E. D., & Dytman, J. E. (1985). Staff development: A key ingredient of effective mainstreaming. Teaching Exceptional Children, 17(2), 113-121.

Watson, P. E. (1974). Planner-Administrator dissonance: A developing dilemma in education. Educational Planning, 9-17.

Weatherley, R.A. (1979). Reforming special Education: Policy implementation from state level to street level. Cambridge, Mass.: Massachusetts Institute of Technology.

Weintraub, F. J., Abeson, A., Ballard, J., & LaVor, M. A. (1976). Public policy and the education of exceptional children. Washington, D. C.: Council for Exceptional Children,

Will, M. (1984). Let us pause and reflect -- But not too long. Exceptional Children,51(1), 11-16.

Will, M. (1986). Educating children with learning problems: A shared responsibility. Exceptional Children, 52(5), 411-416.

Wilson, A. J. (1989) . Ontario's Bill 82 in retrospect. In M. Csapo, & L. Goguen (Eds.), Special education across Canada: Issues and concerns for the 90's. (pp. 81-92). Vancouver, B.C.: Centre for Human Developent and Research.

Wilson, A. J. (1989). Ontario's Bill 82 in retrospect. In M. Csapo, & L. Goguen (Eds.), Special education across Canada: Issues and concerns for the 90's. (pp. 81-92). Vancouver, B.C.: Centre for Human Developent and Research.

Wilson, A. K. (1983a). A consumer's guide to Bill 82: Special education in Ontario. Toronto: Ontario Institute for Studies in Education.

Wilson, A. K. (1983b). Opening the door - A key to the legislation . Toronto: Ontario Public School Teachers' Federation.

Wilson, A. K. (1984). "Integration' means putting resources, not pupils, into regular classrooms. B.C. Journal of Special Education, 8(3), 231-145.

Wilson, A. K., & Humphries, T. (1986). The impact of recent legislation on the role of the Canadian school psychologist. Canadian Journal of School Psychology, 2, 1-6.

Wilson, A. K., & Usher, L. (1985). Who will put Humpty Dumpty together again? Professional liability under Canadian and Ontario special education law. Canadian Journal of Special Education, 1(1), 1-14.

Wilson, A., Cleal, T., Godsell, E., & Sheppard, W. (1989). The special education policy of Newfoundland and Labrador, 1987: An analysis of its potential impact. In M. Csapo, & L. Goguen (Eds.), Special education across Canada: Issues and concerns for the 90's (pp. 133-148). Vancouver, B.C.: Centre for Human Research and Development.

Winnipeg School Division No. 1. (1987). Division teachers interested in a resource position for the 1989-1990 year. Administrative Bulletin, 15(43), 1.

Winnipeg Teachers' Association Ad Hoc Committee on Special Needs. (1983). Report on school-initiated special needs classes in the Winnipeg School Division No. 1. Winnipeg: Author

Wise, A. E. (1986) The impact of judicial intervention in educational policy making: Lessons from the south. In M. Manley-Casimir & T. Sussel (Eds.), Courts in the classroom: Education and the Charter of Rights and Freedoms (pp. 203-211. Calgary, Alberta: Detselig.

Working Group on the Education of Children and Youth with Special Needs. (1975). Educational alternatives for children and youth with special needs, and Educational legislation for handicapped children. Winnipeg: Manitoba Department of Education.

Ysseldyke, J., & Algozzine, B. (1982). Critical issues in special and remedial education. Boston: Houghton-Mifflin.

Zuker, M. A. (1988). The legal context of education. Toronto: Ontario Institute for Studies in Education.

Table of Cases

Andrews v. Law Society of B.C. (1986) 4 W.W.R. 242 (B.C.C.A.).

Andrews v. Law Society of B.C. (1989) 2 W.W.R. 289 (S.C.C.).

Antonsen v. Board of School Trustees District No. 39 (Vancouver). Unreported decision, July 14, 1989. (No. A900280, B.C.S.C.).

Bales Bales and Bales v. School District No. 23 Board of School Trustees (1984) 54 B.C.L.R. 203 (S.C.).

Bliss v. Attorney General of Canada (1979) S.C.R. 183 (S.C.C.).

Bouchard v. St. Mathieu-de-Dixville (1950) 479 S.C.R. (S.C.C.).

Brown v. Board of Education (1954) 74 S. Ct. 696.

Calgary Board of Education v. Deyell (1987) C.H.R.R. 8 D/3668 (Q.B.).

Canadian Odeon Theatres v. Saskatchewan Human Rights Commission and Huck. (1985). 3. W.W.R. 744 (S.C.A.).

Carrière v. Lamont County (1978) unreported (A.S.C. #107134).

Commité Des Écoles Fransaskoises Inc. v. Saskatchewan (1988) 3 W.W.W. 354 (Sask Q. B.).

Dore v. la Commission de Drummondville et. al. (1983) 4 C.H.H.R. D/1377 (C.A.).

E. (Mrs.) v. Eve (1986) 2 S.C.R. 388 (S.C.C.).

Elwood v. Halifax-Bedford Board of School Trustees. (1987). Settlement, described by A. W. MacKay in (1987) School Law Commentary 2, (2,3).

H. (1985) 43 Alta. L. R.(2d) 250 (Prov. Ct. Youth Div.).

Henchel v. Board of Education School Division No. 4 (1950) 2 W.W.R. 369 (A.D.C.).

Hickling Horbay and Legris v. The Lanark Catholic School Board (1986) 7 C.H.R.R. D/3546 (Court of Inquiry).

Hunter et al. v. Southam Inc. (1984) 9 C.R.R. 355 (S.C.C.).

IN THE MATTER OF a reference to the Court of Appeal pursuant to the Constitutional Questions Act R.S.O. 1980 Chapter 86 by order-in-Council 2154/83 respecting the Education Act R.S.O. 1980 Chapter 129 and Minority Language Educational Rights (1984)

In the Matter of a Reference to the Supreme Court of Prince Edward Island in Banco pursuant to the Judicature Act, R. S. P. E. I. 1. C. J., s.38(1), by order in council EC 476/85, respecting the School Act R.S. P.E.I. 1974, Cap S-2, and minority languag (1988) 3(2) School Law Commentary 1 (P.E.I. C.A.).

J.M.G. (1986) 56 O.R.(2d) 705. (leave to appeal refused) (1987) 59 O.R.(2d) 286 (S.C.C.).

Lanark Leeds and Grenville County Roman Catholic Separate School Board v. Ontario (1987) 8 C.H.R.R. D/4235 (Ont. s.C.).

Lavell v. Attorney General of Canada (1974) S.C.R. 1349 (S.C.C.).

Law Society of Upper Canada v. Skapinker (1984) 4 S.C.R. 357 (S.C.C.).

Le Conseil Scolaire No. 39 v. Robichaud. (1989). Unreported decision, in French. April 26, 1989. (40/89 N.B.C.A.).

MacMillan v. Commission Scolaire de Ste-Foy (1981) Cour supérieure 172 (C.S. Qué.).

Mahe v. the Queen (1985) 22 D.L.R.(4th) 24 (A.B.P.Q.).

Marchand v. Simcoe County Board of Education (1986) 55 O.R. 638 (O.H.C.).

McLeod v. Salmon Arm Board of Trustees (1952) 2 D.L.R. 542 (B.C.C.A.).

Nicholson. v. Haldimand-Norfolk Police Commissioners Board (1979) 1 S.C.R. 311 (S.C.C.).

Noyes v. School District No. 30 (South Caribou) (1985) 64 B.C.L.R. 287 (B.C.S.C.).

Operation Dismantle Inc. v. R. (1985) 1 S.C.R. 441 (S.C.C.).

Ormerod v. Wentworth County Board of Education. (1987) Ontario Special Education (English) Tribunal, June 5, 1987.

Quebec Association of Protestant School Boards v. Attorney General of Quebec (1984) 2 S.C.R. 66 (S.C.C.).

R. v. Big M. Drug Mart (1985) 1 S.C.R. 295 (S.C.C.).

R. v. Edwards Books & Art Ltd. (1986) 2 S.C.R. 713 (S.C.C.).

R. v. Jones (1986) 2 S.C.R. 284 (S.C.C.)

R. v. Kind (1985) 50 Nfld. and P.E.I.R. 332 (Nfld. C.A..).

R. v. Oakes (1986) 1 S.C.R. 103 (S.C.).

Re Alberta Human Rights Commission and the Queen et al. (1986) 27 D.L.R.(4th) 735 (C.A.).

Re Dolmage et al. and Muskoka Board of Education (1985) 49 O.R. (2d) 546 (Ont. H.C.).

Re Lavigne and Ontario Public Service Employees Union (1986) 55 O.R.(2d) 449

Re Maw et al. and Board of Education for the City of Scarborough and two other applications (1983) 43 O.R.(2d) 694

Re Ontario English Catholic Teachers Association and Essex County Roman Catholic School Board (1987) 58 O.R.(2d) 545 (Div. Ct.).

Re Ontario Film and Video Appreciation Society and Ontario Board of Censors (1983) 41 O.R.(2d) 583 (Ont. Div. Ct.).

Re Thompson et al. and the Queen in right of Ontario (1988) 63 O.R.(2d) 489 (O.H.C.).

Re Townsend et al. and Board of Education for the Borough of Etobicoke (1986) 54 O.R.(2d) 449 (C.A.).

Reference Re Section 94(2) of the B.C. Motor Vehicles Act (1986) 1 W.W.R. 481 (S.C.C.).

Reference re Education Act of Ontario and Minority Language Education Rights (1984) 47 O.R.(2d) 3 (O.C.A.).

Retail Wholesale and Department Store Union Local 580 et al. v. Dolphin Delivery Ltd. (1986) 2 S.C.R.. 577 (S.C.C.).

Robichaud v. Commission Scolaire No. 39. (1989a).Unreported decision, January 20, 1989. (M/C/1366/88 N.B.Q.B.).

Robichaud v. Commission Scolaire No. 39. (1989b). Minutes of settlement and Court approval, in French, September 23, 1989. (M/C/1366/88 N.B.Q.B.).

Rowett v. York Region Board of Education (1988) 63 O.R.(2d) 767 (O.H.C.).

Rowett v. York Region Board of Education (1989) 4 (2) School Law Commentary (O.C.A.).

Russow and Lambert v. Attorney General of British Columbia (1989) 29 B.C.L.R.(2d) 35 (B.C.S.C.).

Schmidt v. Calgary Board of Education (1975) 6 W.W.R. 279 (Alta. S.C.).

Wilkinson v. Thomas et al. (1928) 2 W.W.R. 700

Winnipeg School Division No. 1 v. MacArthur (1982) 3 W.W.R.(4th) 342 (M.Q.B.).

Yarmoloy v. Banff School District No. 102 (1985) 63 A.R. 390 (A.Q.B.).

Zylberberg v. Sudbury Board of Education. (1988). O.A.C. 23, (O.C.A.). Table of Cases