HISTORY OF SPECIAL EDUCATION

IDEA SPECIAL EDUCATION MEDIATOR TRAINING
NEW YORK STATE EDUCATION DEPARTMENT

VIRTUAL PROGRAM

TUESDAY, SEPTEMBER 8, 2020 – WEDNESDAY, SEPTEMBER 9, 2020
WEDNESDAY, SEPTEMBER 23, 2020 – THURSDAY, SEPTEMBER 24, 2020 (REPEAT)

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I. THE "EARLY DAYS," WHICH PRACTICALLY LASTED 200 YEARS

A. The United States Constitution makes no mention of education. The education of children is the responsibility of individual states. And, though most state constitutions do mention education, none expressly address the education of children with disabilities.

B. In the nineteenth century, most states required a "common school" education, which is to say that the common schools taught the three R's, geography and history. If the student, due to physical or cognitive disabilities was unable to benefit from the common school curriculum, s/he was excluded from school, either practically or legally.

C. Early court cases upheld the exclusion of students with disabilities from public schools where they were "weak in mind," "ruled uncontrollable," or "had a speech impediment and exhibited facial contortions." *See*, *e.g.*, *Watson v. City of Cambridge*, 157 Mass. 561, 32 NE 864 (1893); *Beattie v. Board of Education*, 169 Wis. 231, 172 NW 153 (1919).

D. In many states, specific legislative provisions permitted the exclusion of students with disabilities. Some allowed schools to unilaterally judge whether the child could benefit from a public education or had "habits or bodily conditions detrimental to the school." Others prohibited the attendance of any student "incapable of benefitting from a public school education" if a physician so "certified" at the request of either the district or the parent. Still others, such as North Carolina, even made it a crime for a parent to "persist in forcing . . . [the] attendance" of an excluded student with disabilities. *See* Weber, Mark. (1992) *Special Education Law*

and Litigation Treatise (Horsham, PA: LRP Publications, Inc.).

E. Despite the above case law and statutes, specialized interest groups – typically related to the blind and the deaf – in most states forced the establishment of state schools for them in the mid to late 1880s. On a scattered basis in some school districts in some states, other special education programs were developed in public schools, usually for the mentally or physically impaired.

II. THE BEGINNINGS OF CHANGE

A. The beginning of change came in 1954 with *Brown v. Board of Education*, 347 U.S. 483 (1954). The *Brown* Court recognized that, "[i]n 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."

B. In spite of *Brown*, however, in subsequent decisions, the Court took a hands-off approach when asked to intervene in matters pertaining to the daily operation of school systems. It seemed that school administrators had absolute discretion on school matters unless the challenged conduct implicated basic constitutional values. For example, in *Epperson v. Arkansas*, 393 US 97, 104 (1968), the Court stated, "Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values." Later, in 1977, in *Ingraham v. Wright*, 430 US 651, 681-682 (1977), it stated, "Assessment of the need for, and the appropriate means of maintaining school discipline is committed generally to the discretion of school authorities subject to state law."

C. Judicial reluctance to oversee and sometimes interfere with decision of public educators began to dissipate 15 years after *Brown*. In short, courts began to feel that the unlimited discretion of public educators should at least be subject to judicial supervision where it offended minimal legal or constitutional requirements.

D. In 1969, in *Wolf v. State of Utah*, the state court, relying on *Brown*, declared that two intellectually disabled students, who were denied admission to public schools, resulting in their parents enrolling the students in a private day-care center, at their own expense, were denied a free and appropriate public education under Utah's state constitution.

E. Approximately two years later, two Federal class action suits provided language that would later be included in what ultimately became to be known as the Individuals with Disabilities Education Act. In

Pennsylvania Associations for Retarded Children v. Commonwealth of Pennsylvania, 334 F. Supp. 279 (1972), by means of a consent decree, the parties agreed that no intellectually disabled student, who had been previously deemed uneducable and untrainable by a school psychologist, could be assigned to a special education program or excluded from the public schools without due process. The *PARC* consent decree further required Pennsylvania school districts to provide all intellectually disabled students with "access to a free public program of education and training appropriate to [the] capacities" of each "retarded" student. A process was approved for determining each child's "assignment" involving the participation of the parents and provision for the resolution of any disputes by way of a hearing. Comments were also made that placement of a "retarded" child in a regular education class was preferable.

F. This same approach was taken in *Mills v. Board of Education of the District of Columbia*, 348 F. Supp. 866 (1972), with one notable exception, and that being that a free and appropriate education would be made available to other classes of students with disabilities. More importantly, the court rejected the defense of a lack of money, stating, in part:

> If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system, then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom. The inadequacies of the District of Columbia public school system, whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the 'exceptional' or handicapped child than the normal child.

G. By the mid 1970s, some 36 lawsuits similar to *PARC* and *Mills* were pending in 27 states. Consent decrees and legislation came in rapid succession, but it was not enough. Progress in actually educating children with disabilities was slow and uneven, given a lack of resources and enforcement procedures.

III. FEDERAL LEGISLATION

A. In 1973, Congress passed the Rehabilitation Act of 1973, now commonly referred to as Section 504. Alas, even Section 504, which extended protection to all persons with disabilities and applied to all recipients of federal funds, was, in the eyes of many, insufficient to address the needs of children with disabilities. And, as a result of extensive lobbying, in 1975, Congress passed the Education for All Handicapped Children Act (EHA), which required all states accepting federal funds under the Act to provide all children with disabilities an education. Its stated purpose was to assist state and local educational efforts to assure "equal protection of the law"

and that students with disabilities have available "special education or related services designed to their unique needs." Regulations were passed in 1977 with all states accepting federal funds under the Act being required to make education available to students with disabilities by September 1, 1978.

B. In 1990, Congress first amended the EHA and changed its name to the Individuals with Disabilities Education Act (IDEA). Congress also made other changes in the areas of eligibility, assistive technology devices, transition, etc. In 1991, Congress amended Part H of the IDEA regarding early intervention programs for infants and toddlers with disabilities. (Part H became Part C with the reauthorization of the IDEA in 1997. It continues to be referred to as Part C in the present day.)

C. In 1990, Congress passed the Americans with Disabilities Act, commonly referred to as the "ADA." *See* 42 USC 12101, *et seq*. It is another federal law that prohibits discrimination on the basis of disability much like Section 504. Title II of the ADA applies to "public entities" and accordingly to school districts. It is intended to apply to all programs, activities, and services provided or operated by a public entity. For the most part, its protections to students with disabilities parallel those provided under Section 504, but it may accord additional substantive protections regarding the provision of auxiliary aids and services to students with communication related disabilities, e.g., vision, hearing, and speech impairments.

D. In 1997, Congress amended the IDEA and in doing so substantially revised many requirements relating to procedural safeguards, private schools, evaluations, IEP meetings, and discipline. As a result of these amendments, the focus of the IDEA shifted to improving educational achievement and ensuring the success of students with disabilities in the general education curriculum.

E. In December 2004, Congress again amended the IDEA, but this time making significant changes in the areas of discipline, how children with learning disabilities will be determined eligible, and transition. A new dispute resolution mechanism called a "resolution meeting" was also added. Regulations were finalized in August 2006. A couple of additional regulations regarding consent and non-attorney advocates were adopted in 2008. In 2017, the regulations were amended again, in part, to remove the definition of highly qualified special education teachers.

F. IDEA 2004 represents landmark legislation that focuses on improving the academic and functional outcomes for students with disabilities. New York State took action to ensure that state laws and regulations are clear regarding school districts' responsibilities to implement the federal law, including its requirements to:

- ensure timely and appropriate evaluations, eligibility determinations and services to students with disabilities, including children who are highly mobile, wards of the state and homeless youth;

- promote the use of high quality, research-based instruction for students with disabilities;

- promote less adversarial mechanisms for dispute resolution;

- focus resources on teaching and learning and provide procedural relief to the IEP process; and

- provide procedural protections for students with disabilities subject to discipline.

G. The IDEA is overdue for reauthorization.

IV. HISTORY'S IMPACT TODAY

A. Basically, in the late 60's and early 70's, to get students with disabilities in school and assure them programs both legally and practically, we labeled students, teachers, programs, and money—really setting up almost a separate system concurrently with general education. This approach, with rare exception, has continued under the IDEA and state special education laws.

B. With the IDEA and Section 504 being passed in the mid-70's, the concept of "least restrictive environment" (LRE) is made law—but it is not implemented to any great extent until the 1990s. Why? Probably because both districts and parents initially were just trying to get students with disabilities in school and not worrying about integration/LRE. Also, during the decade and a half between 1975 and 1990, society's expectations for the individuals with disabilities regarding participating in education, employment, and life in general with non-disabled persons was heightened. "Integration skills" typically must be taught in an integrated setting. In the 1980's, LRE was often referred to by its proponents as "inclusion" and asserted as a "civil right."

C. In the 1990's, the push for "unified educational systems" began forcing districts to reexamine the "separate" system set up not only for special education, but other educational areas as well, e.g., bilingual, vocational, etc.

D. Dwindling funding for education generally, a more litigious societal mentality, and increasing federal mandates have placed unprecedented systemic stress on school districts attempting to deliver special education.

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