HISTORY OF SPECIAL EDUCATION

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

A. The United States Constitution makes no mention of education, leaving such to the individual states. Most state constitutions mention education, but not expressly with regard to students with disabilities.

B. In most states, a "common school" education was required (i.e., the 3 R's). If the student, due to physical or mental disabilities was unable to benefit from the common school education, he or she 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." Another case noted that "teaching a child of school age with diminished mental capacity to eat, use toilet facilities, wash, dress and avoid dangers in her immediate surroundings . . . is not educating such child within the meaning of the Education Code." 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); and Case v California, No. 101679 (Super Ct Riverside County, CA 1972).

D. In many states, specific legislative provisions permitted the exclusion of a student with disabilities. Some allowed school authorities to 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," allowing such to be "certified" by a physician at the request of either the district or the parent (to avoid being prosecuted under the compulsory school attendance laws). 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.

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. In 1954, the United States Supreme Court in Brown v Bd of Ed stated:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awaking the child to cultural values, and preparing him for later professional training, and in helping him to adjust normally to his environment. 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. [Emphasis added.]

B. Despite its holding in Brown, the United States Supreme Court displayed a hands off attitude with regard to the behavior of school officials. A lack of expert knowledge was alleged as the basis for not interfering in the administrative discretion utilized in the education of students whether disabled or not. 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. But, with the civil rights movements for African Americans in the 1960s, the judicial reluctance to oversee and sometimes interfere with decisions of public educators began to dissipate. In short, courts began to feel that the unlimited discretion public educators had should at least be subject to judicial supervision where it offended minimal legal or constitutional requirements.

D. The initial decision came from a state district court in Utah in Wolf v Legislature of the State of Utah in 1969. The parents of two mentally retarded students contended under the Utah Constitution's provision that "all" children be provided with a free education that their children should be as well. The court upheld their claim on state equal protection grounds paraphrasing as their rationale most of the language from

Brown.

E. The landmark case was Pennsylvania Association for Retarded Children (PARC) v Commonwealth of Pennsylvania, 334 F Supp 1257 (1971) and 334 F Supp 279 (1972). Premised on the approach taken in Brown, namely that exclusion of students with disabilities from public schools was a denial of due process and equal protection, the court held retarded students could not be excluded without a meaningful opportunity to challenge it. The Park consent decree required the state to provide "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. The next big case was Mills v Bd of Ed, 348 F Supp 866 (1972), arising out of the District of Columbia. The court in Mills, by way of a consent decree, took the same approach as the court in Park but extended it to all students with handicaps. More importantly, it rejected the defense of a lack of money stating, "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 Park and Mills were pending in 27 states. As a result, consent decrees and legislation came in rapid succession mandating that students with disabilities have access to a public school education appropriate to their needs.

III. FEDERAL LEGISLATION.

A. Despite the above litigation and legislative activities in many states, progress in actually educating the disabled was slow and uneven, given a lack of resources and enforcement procedures.

B. In 1973, Congress passed a federal civil rights law for persons with disabilities applying to all recipients of federal funds, namely the Rehabilitation Act of 1973, now commonly referred to as Section 504.

C. Many advocates of the disabled did not believe Section 504 was enough and in 1975 forced Congress to pass the Education for All Handicapped Children Act, then commonly referred to as EHA or 94-142. 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.

D. In 1990, Congress amended EHA, calling it the Individuals with Disabilities Education Act (IDEA) and made other changes in the areas of eligibility, assistive technology devices, transition, etc. In 1991, Congress amended Part H of IDEA regarding early intervention programs for infants and toddlers with disabilities.

E. In 1990, Congress passed the Americans with Disabilities Act, commonly referred to as the "ADA." 42 USC 12101, et seq. It is another federal law which basically 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.

F. In 1997, Congress reauthorized IDEA and in doing so substantially revised many requirements relating to procedural safeguards, private schools, evaluations, IEP meetings, and discipline.

G. In December 2004, Congress again reauthorized IDEA, but this time making significant changes in the areas of discipline, how children with learning disabilities will be determined eligible, transition, and a new dispute resolution mechanism called a "resolution meeting." Regulations were finalized in August 2006. A couple of additional regulations regarding consent and non-attorney advocates were adopted in 2008.

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 IDEA and state special education laws.

B. With 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 disabled 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. Special educators are now faced with the dilemma of having to "trust" general education by giving up the "insurance" of a system protected by labels in order to allow fuller implementation of LRE and "unified educational systems." Further, in doing so the credibility of special educators is being questioned, i.e., for 25 years they have said special education will educate these kids and now they just say general education should educate these kids with our support! And, the "labels" still on students, staff, and money continue to cause problems (e.g., they drive programs/services instead of the students' needs).

In addition, in the face of "zero tolerance" regarding discipline, the different rules governing the discipline of students with disabilities are too often ignored.

Economic, health, and other "non-educational" needs in many family units have caused unprecedented stress on parents, who understandably often look to the schools as a last resort for help.

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