The Journal of Law and Education

Volume 24 | Issue 2 Article 4

Spring 1995

Irreconcilable Differences - Defining the Rising Conflict between Regular and Special Education

Bruce Meredith

Julie Underwood

Irreconcilable Differences? Defining the Rising Conflict Between Regular and Special Education

BRUCE MEREDITH *
JULIE UNDERWOOD **

Introduction

It is only a matter of time before the actual fighting begins; the media is already documenting the first skirmishes.[1] As with many internal conflicts, the fight initially will be triggered by money; however, the real causes will be philosophical, enhanced by longstanding pedagogical affiliations. As the title suggests, the upcoming battle is between two of the most powerful forces in the education community: regular and special education. To date, the initial hostilities have been scattered. In fact, in some schools there are few signs of friction, and occasionally signs of open affection, between the regular and special education staff. In a growing number of school districts, however, there is almost open warfare between the regular and special education programs. Each views the other with distrust and, at times, disdain.[2]

---

* Staff Counsel with Wisconsin Education Association (Wisconsin NEA affiliate) since 1977; B.S. in psychology 1968, Northwestern University; J.D. with honors 1973, University of Wisconsin Law School; formerly judicial clerk in Florida Federal District Court and field attorney with National Labor Relations Board. The opinions expressed by Mr. Meredith should not be read to represent the views of the Wisconsin Education Association Council or the National Education Association.

** J.D. Indiana University; Ph.D. University of Florida; Associate Dean of School of Education and Professor in School of Law, University of Wisconsin-Madison; recipient (1994) of Steiger Award for Excellence in Teaching, University of Wisconsin-Madison; served as legal counsel for Herbert J. Grover, former State Superintendent of Wisconsin Department of Public Instruction, in litigation involving Milwaukee Parental Choice Program; served on boards of directors of National Organization on Legal Problems of Education and Council of School Attorneys; counsel for various Wisconsin school districts, particularly in special education litigation; research specialist in legal theories of student rights, school finance litigation, and special education; author of LEGAL ASPECTS OF SPECIAL EDUCATION AND PUPIL SERVICES (with Julie Mead) (1995) and HANDBOOK FOR PRINCIPALS: CURRENT ISSUES IN SCHOOL LAW (with William Camp) (1988, 1992).

1. *Separate and Unequal*, U.S. NEWS & WORLD REP., Dec. 13, 1993.

2. *See* ERIC P. HARTWIG & GARY M. RUESCH, DISCIPLINE IN THE SCHOOL 322-24 (1994). We,

The special education staff often believes (sometimes with good reason) that the regular education teachers do not really want their students in their classrooms and are unwilling to do the extra work necessary to achieve success with these students. By contrast, regular education teachers often believe that special educators are unappreciative of the difficulties of educating a class of 25 to 30 students and frequently allow themselves to be exploited and ultimately "burnt-out" by meeting unreasonable demands from parents and administrators. Administrators are increasingly concerned by the rapidly escalating costs of special education programs which are impeding the ability of schools to operate successful overall education programs within politically acceptable budgets.

The purpose of this article will be to look at both the political and philosophical causes of this conflict and offer suggestions on how the conflict might be reduced. Unless this conflict is addressed, it will intensify and spread for at least three reasons. First and foremost, as resources for schools become tighter, tension will develop over special education's ability to use federal law to command and distribute scarce educational resources to special education programs and away from general education programs. Second, as the full inclusion movement gains strength, more classrooms will be required to simultaneously educate regular and special education students, even though the two classes of students are governed by completely different rules and assumptions. This will increase classroom management problems and produce increased tension among staff as "turf wars" arise. Finally, as the "voucher" debate intensifies, the underlying assumptions of all public education will be analyzed more critically. This will prompt many who are troubled by the costs of special education and the problems attributable to mainstreaming to seek alternative education systems. While these political concerns are important, they should not obscure the more important philosophical and pedagogical issues which underlie many of the surface flashpoints.

At the center of the dispute is an overriding philosophical and pedological issue: regular and special education have developed fundamentally different paradigms or assumptions which govern the way teachers relate to students, parents, governmental bodies, and each other. On a micro level, these different paradigms make it difficult for the two groups to understand and communicate with each other. On a macro level, they impede effective instructional

---

of course, are making generalizations here for the purposes of demonstrating our concept. We do recognize and note that not all schools harbor this conflict. However, we believe the *traditional system* creates and, in fact, fosters the conflict as outlined in this piece.

decisionmaking and resource allocation. As a result, regular and special education, at best, coexist in relative peace and accomplish their separate missions; however, they rarely interact effectively as required by both the Individuals with Disabilities Act (IDEA)[3] and sound public policy. If the two systems are to meet the challenges imposed by scarce economic resources and the voucher movement, then each must function effectively and efficiently. This requires positive interaction. To accomplish this, each system must gain a greater understanding of the other's operating premises and, to the extent possible, integrate and merge them.

Before beginning to analyze the special and regular education paradigms, some general discussion of the concept of a paradigm is necessary. Recently, this concept has been popularized by the works of several authors, most notably Stephen Covey,[4] and the term is in danger of becoming a cliche. However, the term's current popularity should not obscure its long-recognized importance to scientific and philosophical analysis. In the classic work, *The Structure of Scientific Resolution,* Thomas Kuhn detailed how paradigms are formed and changed and discussed the importance they play in solving problems.[5]

One of the most celebrated battles between competing paradigms was the dispute as to whether the earth revolved around the sun or vice versa. Among other things, it pitted a scientific world view against a philosophical one. In the end science prevailed, in part because the philosophical stance could not produce accurate equations or calendars.

The current paradigms of regular and special education have become so different that the discussion between the regular and special community has

---

3. 20 U.S.C. § 1401 et seq.

4. STEVEN R. COVEY, THE SEVEN HABITS OF HIGHLY EFFECTIVE PEOPLE: RESTORING THE CHARACTER ETHICS (1990).

5. In its simplest form, a paradigm is a mindset which allows an individual to assimilate and order information. However, paradigms also apply to groups or communities. It is in this context that they assume their greatest importance. As detailed by Kuhn, paradigms determine the outer parameters of acceptable analysis within a community. As such, they determine what can and should be studied. As a result, paradigms tend to become self-reinforcing and usually change only as result of some external challenge. Moreover, it is particularly difficult for individuals operating within a given paradigm to recognize developing problems since conflicting evidence is frequently seen as irrelevant or unimportant. As stated by Kuhn:

> The proponents of competing paradigms are always at least slightly at cross-purposes. Neither side will grant all the non-empirical assumptions that the other needs in order to make its case. Like Proust and Berthollet arguing about the composition of chemical compounds, they are bound to partly talk through each other. Though each may hope to convert the other . . . neither may hope to prove his case. The competition between paradigms is not the sort of battle that can be resolved by proofs.

THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTION 104 (1973).

become almost as futile as those between the followers of Galileo and Aristotle regarding planetary motion. Since each had a different center for the universe, there was little common ground in the discourse and considerable misunderstanding and distrust. Moreover, there are now serious questions of whether either the regular or special education paradigm is equipped to deal with the challenges of today's education. In the end, both paradigms may be required to undergo change if either is to solve today's most pressing educational problems. [6]

I. Analyzing the Paradigms

Before analyzing and attempting to understand the differences between the foundations of regular and special education, it is important to analyze and understand each system's underlying premises. The chart below summarizes what we believe are the key elements of both regular and special education. The ensuing discussion will elaborate on these differences.

SPECIAL EDUCATION	REGULAR EDUCATION
1. Focused on individual student goals and achievement – Individually negotiated educational programs	1. Focused on group instruction – One size fits all – Political winners determine the size
2. Parental empowerment – Significant parental involvement in program development and evaluation	2. Community empowerment – Political decisionmaking – Taxpayer (not parent) focus
3. Legal accountability – Costs secondary to outcomes – Parents given significant ability to enforce rights in court – Significant judicial review	3. Political accountability – Costs as important as educational outcome – Limited judicial review
4. Federal focus and locus of control	4. State and local focus and center of control

6. Of course, not everyone in either the special or regular education community has identical values. In particular, the regular education community is quite diverse, and many of its members

By way of preface, it should not be surprising that special and regular education have developed differing operating paradigms. The movement behind the development of the IDEA was a result of the failure of the regular education system even minimally to address the educational needs of disabled students. [7] Therefore, it is not surprising that the special education model would reject many key elements of the perceived model developed by the regular education community. Unfortunately, the framers of the IDEA did not fully consider the thorny issues surrounding implementation of a new model through traditional regular education institutions.

A. The Special Education Paradigm

Of the two systems, special education is the easier to analyze because it is the smaller and more recently developed. Most importantly, unlike regular education, it does have at least a semi-official "constitution": the IDEA. If one analyzes the IDEA's structure and development, several clear themes emerge. [8] In discussing these themes, an exhaustive analysis of the IDEA's origins or requirements will not be developed. Many excellent descriptions already exist. [9] Instead, we will concentrate on its overall structure.

First, the IDEA requires education to be centered on individual students. The heart of the IDEA is the Individual Education Program (IEP) which requires that a specific individual educational plan be developed. [10] This plan must contain the goals for a particular student, together with an education plan that describes how the school will meet these goals. [11] How indi-

---

would reject the authors' characterization of their views. Nevertheless, each system has produced a general traditional method of viewing problems which permits a substantial degree of generalization.

7. *See* 20 U.S.C. § 1400(b).

8. Indeed the preamble of the IDEA, itself, provides considerable insight into its underlying philosophy:

> It is the purpose of IDEA to insure that all children with disabilities have available to them . . . free appropriate public education, which emphasizes special education related services designed to meet their unique needs, to insure that the rights of children with disabilities and their parents or guardians are protected, to assist states and localities to provide for the education of all children with disabilities and to assess and assure the effectiveness of efforts to educate children with disabilities.

See 20 U.S.C. § 1400(c) (1991).

9. *See, e.g.*, L.F. ROTHSTEIN, SPECIAL EDUCATION LAW (1990); H. RUTHERFORD TURNBULL III, FREE APPROPRIATE PUBLIC EDUCATION: THE LAW AND CHILDREN WITH DISABILITIES (1993); JULIE K. UNDERWOOD & JULIE F. MEAD, LEGAL ASPECTS OF SPECIAL EDUCATION AND PUPIL SERVICES (1995).

10. For a general discussion, see UNDERWOOD & MEAD, *supra* note 9, at 93-96.

11. *See* HARTWIG & RUESCH, *supra* note 2, at 99-142.

vidual special needs students function together or within the broader educational environment is given little consideration. The primacy of individual over collective instruction is most evident in the court's analysis in *Honig v. Doe.* [12] As will be discussed in more detail, *Honig* upheld the right of a special education student to maintain continuity in his individualized instruction plan even when the physical safety of other students was threatened.

Second, the IDEA gives parents considerable power within its system. Each child thought to be in need of special services must be referred and evaluated by a Multidisciplinary Team prior to implementation of an IEP. The IDEA and implementing regulations require the district to attempt to include the child's parent(s) at all critical meetings. Parents have the right to appeal the initial classification and placement of their child as well as any change in placement and program through a due-process hearing and, ultimately, court litigation. In practice, this gives an involved and concerned parent significant bargaining power with the district since a district may choose to mollify an unsatisfied parent rather than proceed through a time-consuming and potentially costly hearing process. [13]

Third, the IDEA reinforces legal accountability. The IDEA requires that each student be provided a "free appropriate public education," commonly known as FAPE. [14] To accomplish this, the IEP team must be convened

---

12. 484 U.S. 305 (1987).

13. *See* 34 C.F.R. 300.513 (1988); UNDERWOOD & MEAD, *supra* note 9, at 93-98; S. Goldberg & P. Kuriloff, *Doing Away with Due Process: Seeking Alternative Dispute Resolution in Special Education*, 42 EDUC. L. REP. 491 (1987).

14. 20 U.S.C. § 1401(18) (1991) provides:

> (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 education agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 614(a)(5).

See also Board of Educ. of Hendrick v. Rowley, 458 U.S. 176 (1982). *Rowley* involved a hearing-impaired first-grade student who had been "mainstreamed" into a regular first-grade classroom. The student's IEP included a speech therapist for three hours each week and a special tutor for one hour a day. Her parents challenged her IEP, arguing that under the law, their daughter was entitled to the services of a qualified sign-language interpreter in order for her to maximize her education. The school authorities defended the IEP, citing the student's progress and denied her parent's request. Although the lower courts ruled in favor of the parents, interpreting the law as requiring services to maximize each child's potential, the Supreme Court disagreed. The Court found that since the student was progressing under the current IEP, her education was "adequate," as required by the law. While there is a core substantive component to FAPE, *Rowley* emphasized compliance with the IDEA's extensive procedural requirements.

for each child at least an annual basis to write a new IEP and determine whether the child's program is appropriate. [15] An elaborate set of due process procedures is designed to protect the child's interest and ensure that the district fulfills its mandate to provide a free appropriate education, and districts are aware that they may be sued if they fail to satisfy parents' expectations. [16] The district is allowed few excuses if a child does not receive an appropriate education. Cost is treated as only a secondary consideration. [17] Even blatantly obstructionist parents will not be sufficient to excuse a school from fulfilling its mandate. [18]

Finally, the IDEA has a federal focus. The general contours of special education are defined more by Congress, the Department of Education, and the Office of Civil Rights than by the states and local districts. In theory, substantial federal funds were to accompany these federal mandates. In practice, funding has been well short of the Act's premise and continues to decline in terms of percentage of actual costs. [19]

The four key elements of the special education paradigm, set forth in IDEA, are: individualized student instruction, significant district accountability, substantial parental involvement, and a federal locus of power. [20] These interrelated

---

15. 20 U.S.C. § 1414(a)(5); 34 C.F.R. § 300.343.

16. Despite the IDEA's substantial protections, some parents of disabled students contend that many of the Act's benefits are illusory. They argue that the failure of Congress and the courts to define a clear substantive education standard undermines the IDEA's effectiveness. These parents argue that they are afforded extensive procedural due process, but this process does not protect meaningful substantive rights.

17. Collins & Zirkel, *To What Extent, If Any, May Cost Be a Factor in Special Education Cases*, 71 EDUC. L. REP. 11 (1992).

18. Board of Educ. of Community Consol. Sch. Dist. No. 21 v. Illinois State Bd. of Educ., 938 F.2d 712 (7th Cir. 1991).

19. "[F]ederal aid for students with disabilities has never exceeded 12.5 percent of the national AAPE (average per pupil expenditure), and only reached fully authorized levels during the first two years that the program was effective." Thomas B. Parrish & Deborah A. Verstegen, *The Current Federal Role in Special Education Funding*, 22 EDUC. CONSIDERATIONS at 36 (1994).

20. Another author expressed the special education paradigm in somewhat different terms. According to him, there are six basic principles of special education law:

1. zero reject, or the right of every child to be included in a free, appropriate, public supported educational system;
2. nondiscriminatory classification, or the right to be fairly evaluated so that correct education programs and placement can be achieved;
3. individualized and appropriate education so that education can be meaningful;
4. least restrictive placement so the child may associate with nondisabled students to the maximum extent appropriate to his or her needs;
5. due process so that the child and child's advocates may have an opportunity to challenge any aspects of education; and
6. parental participation so that the child's family may be involved in what happens in

factors define the way problems are viewed and resolved. In practice, these components affect the delivery of special education services by sensitizing education authorities to the need to: (1) look at the needs of each student as an individual, (2) substantially involve parents in decision-making, (3) carefully document individual student need and achievement, and (4) operate within the bright light of judicial oversight. Political concerns, such as costs and needs of the collective educational package, are only secondary considerations.

When viewed in isolation, there is nothing wrong with any of these features. Nevertheless, they are likely to cause difficulties in schools because, as will be discussed, virtually none of these principles are shared by the regular education community.

B. The Regular Education Paradigm

It is much more difficult to assess the assumptions underlying regular education. Unlike special education, regular education has no one defining piece of legislation or fundamental legal tradition. As a result, the community of regular educators is more fragmented and diverse. Nevertheless, there are several features of classroom education which seem "self evident" or nearly so.

First, the focus of instruction is centered on groups rather than individuals. While most teachers, administrators, and elected officials pay "lip service" to the concept of individualized instruction, most regular education staff instruct groups and are evaluated in terms of their success with groups. This is evident from a number of common practices as discussed below.

In contrast to an IEP, most regular instruction is derived from a general curriculum, often developed on a district-wide basis and implemented through a common plan of staff instruction. Most teachers' "individual" lesson plans pertain to class or group instruction. When teachers are evaluated, they are judged primarily on their ability to control and instruct an entire class, and only rarely on their success with a particular student. Similarly, to the extent districts are evaluated at all, they are usually judged by their overall student averages on standardized tests, by their graduation rate, or by the number of National Merit finalists. There are, no doubt, exceptions to this principle, and many elements of the current school reform movement are now emphasizing more individualized student instruction and assessment. However, these exceptions merely reinforce the underlying proposition that regular education is designed primarily to focus upon collective achievements.

---

school.

This emphasis on group progress produces an important political corollary which might be described as a "winner take all" attitude wherein the dominant culture sets uniform rules to which all must adhere. This results, in part, from regular education's desire for conformity and discouragement of individually negotiated educational programs. In practice, this means that, in most schools, there is only one curriculum, one evaluation system, and one student discipline program. Both teachers and students can be forced to submit to the prescribed system unless it can be shown to be unreasonable. [21] Those parents, students, and staff who disagree with the district's policies and goals must either conform or leave. [22]

This emphasis on conformity produces many "traditional" educational disputes. For example, many districts are involved in significant struggles wherein those favoring "traditional" education battle against those in favor what might be labelled Outcome-Based Education (OBE). Each camp in these struggles operates from the same assumption: there is one superior model of education to which everyone in the district is entitled and to which everyone must yield. Contrary to the special education model, under either of these approaches, there would be relatively little negotiation between parents, teachers, and the administration on more individualized models of instruction. [23] To a great extent, one size is supposed to "fit all."

Second, community political concerns, particularly cost, are viewed as critically important in determining the educational product. Not only is regular education targeted to groups rather than individuals, but the "product" itself traditionally has been required to factor in political interests. "Cost" is probably the greatest of these political interests. Recently, a number of states have enacted stringent limitations on spending, regardless of educational needs. [24] However, political concerns are not limited to taxpayer anger. As Chubb and Moe discuss, numerous politically inspired mandates are being imposed upon schools. [25] These may be important, such as courses dealing with drugs and

---

TURNBULL, *supra* note 8, at 25.

21. This principle was recognized in the landmark case of State ex rel. Andrews v. Webber, 8 N.E. 708-(1886).

22. Chubb and Moe discuss this concept in a different contest. JOHN E. CHUBB & TERRY M. MOE, POLITICS, MARKETS AND AMERICA'S SCHOOLS 38-41 (1990).

23. *Andrews*, *supra* note 21; CHUBB & MOE, *supra* note 22.

24. *See* DANIEL MULLINS & PHILLIP JOYCE, CENTER FOR URBAN POLICY & THE ENVT, INDIANA UNIV., TAX AND EXPENDITURE LIMITATIONS AND STATE AND LOCAL FISCAL STRUCTURE (1994); DANIEL MULLINS & KIMBERLY A. COX, CENTER FOR URBAN POLICY & THE ENVT, INDIANA UNIV., A PROFILE OF TAX AND EXPENDITURE LIMITATIONS IN THE FIFTY STATES (1994).

25. CHUBB & MOE, *supra* note 22.

AIDS, or irrelevant, such as courses extolling a particular local industry. In each case, the district or state seeks to ensure that *all* children receive certain information in order to promote values which are deemed critical by the wider political community.

This integration of broad-based political concerns has generally left regular education parents with less power than parents of special needs children or even parents of private school students. When Illinois tried to give parents more power as part of school reform legislation, the Illinois Supreme Court struck down portions of the legislation, holding that it unconstitutionally impaired the voting rights of non-parents.[26] The decision legally reinforced the notion that the schools must operate for the general public good, rather than for the particular benefit of the students attending them.

An argument can be made that the focus on group instruction and overall orthodoxy is merely a manifestation of collective political concerns concerning costs. Under this view, regular education seeks conformity simply because it is more efficient and generates economics of scale: mass production rather than handcraftsmanship. In support of this proposition, observers might note the frequent alliances between fiscal conservatives and backers of traditional education even though each group has significantly different motivations, values, and philosophical heritages.

Third, there is little structured individual accountability and almost none that is legally enforceable. Without entering the debate on whether public schools are succeeding in their mission and whether school boards and administrators are being successful in their efforts at quality control, educators (perhaps appropriately) have avoided the type of judicial oversight that governs special education. Educational malpractice suits have failed as courts uniformly have rejected claims by students that the school district did not provide them with even the rudiments of an adequate education or the opportunity obtain one.[27]

---

26. Fumarolo v. Chicago Bd. of Educ., 566 N.E.2d 1283 (Ill. 1990). *But see* Board of Educ. of Boone County v. Bushee, No. 93-SC-890-DG (Ky. Dec. 22, 1994). For articles discussing generally the role of parents in school reform, see J.L. Epstein, *School and Family Partnerships, in* 6 ENCYCLOPEDIA OF EDUCATIONAL RESEARCH 1139 (Marvin C. Alkin ed. 1992); L. Lynn, *Building Parent Involvement*, 20 NASSP PRACTITIONER (1994); C. Marburger, *The School Site Level: Involving Parents in Reform, in* EDUCATIONAL REFORM: MAKING SENSE OF IT ALL 82 (Samuel L. Bacarach ed., 1990).

27. *See, e.g.*, Peter W. v. San Francisco Unified Sch. Dist., 131 Cal. Rptr. 854 (1976) (rejecting complaint for educational malpractice by high school graduate who could read at only a fifth grade level); Note, *Educational Malpractice: Judicial Recognition of a Limited Duty of Educators Toward Individual Students: A State Law Cause of Action for Educational Malpractice*, U. ILL. L. REV. 474, 475 n.11 (1990) (educational malpractice as a cause of action has been rejected by courts in Alaska, California, Maryland, and New York). Theresa E. Loscalzo, *Liability for Malpractice in*

In addition, schools generally are not required to meet specific standards; oversight is accomplished through the political process. An elected school board hires and evaluates a superinendent who then is responsible for evaluating the overall educational product. While this approach to accountability may be effective, it is highly subjective, relatively slow, and focuses only on the accomplishments averaged throughout a district. In addition, districts generally need not fear direct reprisals from parents complaining of failures of student programs to accomplish their goals.

Finally, just as costs are a key factor in defining the product, they also are central to the evaluation of the product. Increasingly, school boards are evaluating the regular education primarily in terms of its effect on the local millage. In recent years there has been some judicial oversight in the form of state school finance suits challenging the fairness of various school funding mechanisms. However, these suits mainly have focused on equalizing "inputs" and have rarely attempted to compare "outputs," although some commentators believe that this practice is changing.[28] In addition, some states are moving legislatively in the direction of more direct accountability;[29] nevertheless, despite these emerging trends, the primary evaluative tools still remain largely internal and political.

Finally, the locus of power is clearly local or statewide. In *Rodriguez v. San Antonio School District,*[30] the court held that education is primarily a state concern in which the federal government has only limited constitutional interest. While there are a few federal provisions, such as the "Buckley Amendments"[31] and Title IX,[32] which govern specific, narrow aspects of regular public education, the federal government, for the most part, is not a primary player in regular education.[33] Although the federal government has

---

Education, 14 J.L. & EDUC. 595 (1985). *But see* John G. Culhone, *Reinvigorating Educational Malpractice Claims: A Representational Focus*, 67 WASH. L. REV. 349 (1992).

28. *See* William H. Clune, *The Shift from Equity to Adequacy in School Finance*, 8 WORLD & I 389-405 (1993); Julie K. Underwood, *School Finance Litigation: Legal Theories, Judicial Activism, and Social Neglect*, 20 J. EDUC. FIN. 143-162 (1994).

29. *See, e.g.*, Rose v. Council for Better Educ., 790 S.W.2d 186 (Ky. 1989).

30. 411 U.S. 1 (1973).

31. 20 U.S.C. § 1232g (1990).

32. 20 U.S.C. § 1281(a) (1988).

33. There are federal programs for specific purposes such as the McKinley Homeless Assistance Act, 42 U.S.C. § 11301, The Child Abuse Reporting and Prevention Act, 42 U.S.C. § 5101, and the more general Strengthening and Improvement of Elementary and Secondary Schools, 20 U.S.C. § 2701. Although these programs provide funds, they do not generally include broad mandates on issues of educational policy.

recently attempted to assume a leadership role in setting an outcome agenda for regular education, its focus is still on collective, rather than individual accomplishments. [34]

Regular education is therefore premised upon a paradigm very different from that of special education: group learning and instruction, a high sensitivity to broad noneducational political concerns such as costs, a muted interest in particularized parental input, political rather than legal accountability, and a local or statewide power source. It is evident that these concerns are very different from the ones shared by the special education community.

As will be discussed, this lack of shared values has significant consequences. First, it is unlikely that the special and regular education community will agree on a common program to improve schools. Worse, portions of each paradigm are in conflict and are now producing rather than solving problems. While there are conflicts across the regular and special education paradigms in a host of areas, they are particularly significant in two key areas: resource allocation and classroom discipline. We will focus our discussion on these concerns. Of course, while these two areas have many common and interrelated elements. Nevertheless, each has certain distinct issues and problems. These issues and the related problems can be seen as logical outgrowths of the distinct regular and special education paradigms. [35]

II. Problems Involving Resource Allocation Between Special and Regular Education Programs

A. The Nature of the Problem

The regular and special education paradigms differ substantially both in the importance of cost in developing an educational product and in how educational standards are enforced. Under the special education paradigm, the cost of a particular program is a secondary consideration which theoretically comes into question only after it has been shown that the school district has complied with the requirements of IDEA – *i.e.*, has offered a free, appropriate education to the student. Disputes over compliance with IDEA are subject to significant third-party review through hearings and litigation, and a

34. Goals 2000: Educate America Act, P.L. 103227.

35. Since at least some classroom control issues are directly related to the availability of supplemental services, and since supplemental services are almost always related to the ability of the school to purchase them, the authors will first examine the growing tension between regular and special education over the issue of funding before focusing on classroom control and discipline.

district will be judicially compelled to provide a child with a free, appropriate education, regardless of cost, or to reimburse the parents for financing such an education to the child. [36]

By contrast, cost is a central consideration in determining the "appropriateness" (type and quality) of the regular education program. The political, rather than judicial, process is the primary vehicle for determining whether the education provided is adequate.

Although this different focus has caused regular and special educators to view fiscal issues differently, these differences have remained muted until recently. Unfortunately, recent legislative developments are dramatically changing the nature and intensity of the debate. The reason for this change is simple. As long as there were sufficient funds for special education to meet its federal legal mandates and for regular education to meet its state political mandates, the two systems could coexist in relative harmony. Unfortunately, there is no longer a fiscal cushion.

States and their active constituent groups are increasingly calling for controls on overall education expenditure limits, regardless of need or the effect on educational quality. For example, in Wisconsin, districts generally cannot increase their levy limits by more than 3.1 percent without voter referendum. [37] Other states have enacted even more stringent expenditure controls, and such legislation is now being debated in a myriad of states. [38] If total school expenditures are capped, then maintenance of the separate fiscal values becomes extremely difficult. The system becomes a zero-sum game in which every increase in special education programming potentially results in a corresponding decline in regular education services.

In other words, current state fiscal legislation is increasingly encouraging an educational ecosystem in which the regular and special education communities become direct competitors for an increasingly narrow resource basis. This will bring the competing paradigms into direct conflict, and some adjustments in either or both of the regular and special education models will be required. These adjustments might be accomplished in several ways. Under one change, the special education model could give increased emphasis to collective political interests, particularly

---

36. *See, e.g.*, Florence County Sch. Dist. Four v. Carter, 114 S. Ct. 361 (1993); School Committee of Burlington v. Department of Educ. of Massachusetts, 471 U.S. 359 (1985).

37. WIS. STAT. §§ 121.90-.92 (1993).

38. *See, e.g.*, MULLINS & JOYCE, *supra* note 24; MULLINS & COX, *supra* note 24. *See also* ALLAN R. ODDEN, EDUCATIONAL LEADERSHIP FOR AMERICA'S SCHOOLS: AN INTRODUCTION TO ORGANIZATION AND POLICY (McGraw Hill 1995) (forthcoming).

those associated with costs. Under another, regular education could achieve, by litigation or legislation, a greater legal ability to judicially protect the quality of its product against political attack. Perhaps sensing the inherent problems in both current models, courts are beginning to show a willingness to adopt decisional criteria which modify both paradigms' analyses of cost factors.

With respect to special education litigation, courts are gradually showing an increasing willingness to listen to school district arguments that the requested educational program for the special education student simply costs too much money.[39] Conversely, there is a gradually increasing number of state courts which have been willing to interpret their state constitution to place at least minimum legal requirements on school districts to produce an *overall* education product which meets certain minimum standards, regardless of taxing constraints.[40] It is likely that both of these judicial trends will continue. Nevertheless, at present the majority of states offer virtually no legal protection for the integrity of the regular education product, and federal courts will look at costs associated with special education only in extreme cases. Unfortunately, these already difficult issues bred by society's current fiscal austerity are being significantly enhanced by three related but less obvious trends which are likely to escalate fiscal disputes between regular and special education.

(1) The Increasing Failure to Amortize Special Education Costs

A central premise of the IDEA is substantial federal funding. Additional funding is typically supplied by state resources; and, in the past, many state financing systems have funded special education programs by some form of a sum-sufficient basis. This type of broad-based funding amortizes the cost of special education across a statewide pool. Amortization and distribution of costs is important to the effective functioning of the IDEA. Indeed, it is ironic that despite the heightened focus on the individual in the special education model, effective administration of special education programming is premised on a collective amortization of costs.[41]

---

39. *See, e.g.*, Sacramento City Sch. Dist. v. Rachel H., 14 F.3d 1398 (9th Cir. 1994); Collins & Zirkel, *supra* note 17.

40. *See, e.g.*, Tennessee Small Sch. Sys. v. McWherter, 851 S.W.2d 139 (Tenn. 1993); Claremont Sch. Dist. v. Governor, 635 A.2d 1375 (1993); Alabama Coalition for Equity v. Hunt, No. CV-90-883-R (Ala. Apr. 1, 1993); Rose v. Council for Better Educ., 790 S.W.2d 186 (Ky. 1989).

41. This principle can be illustrated by the current debate over health care insurance. In the health care industry, insurers recognize and accept that certain types of illnesses can cost enormous sums which could devastate a small company or insurer. These illnesses can only be effectively managed if the costs are spread over a sufficiently large pool so that random high-cost cases can become predictable. Smaller employers have had great difficulty insuring adequate coverage because

Obviously, if a district receives substantial funding for its special education costs from the federal government or the state, the cost of any particular program is amortized and distributed sufficiently to prevent great fiscal harm to any one district. However, as individual districts are required to pay an increasing percentage of special education costs, the risk of random, devastating expenditures striking a particular school budget increases. The smaller the district, the greater the risk. This means that the already increasing competitive pressures between regular and special education could become even more intense in districts afflicted by high-cost programs for a few special education students. [42]

Even worse, some initial research suggests that, even over an extended period of time, the distribution of high-cost, special needs students is not geographically random but, in fact, is concentrated in low-wealth districts. [43] Although there are a number of socio-economic explanations for this, a significant one seems to be that the higher costs associated with rearing a special-needs child diverts family income from purchasing housing and, therefore, tends to push parents into low property value, lower-wealth districts. However, regardless of the reasons, it appears that districts which are least able to bear the costs will be required to pay an increasing percentage of their available school funds to special needs students. [44]

(2) Sub Silentio *Expansion of the IDEA*

A second exacerbating factor is the Office of Civil Rights' (OCR) expanding interpretation of the scope of § 504 of the Rehabilitation Act. [45]

---

insurers have become reluctant to assume risks of a high-cost illness unless they were part of a sufficiently large pool to amortize any potential liabilities. If costs cannot be amortized, insurers attempt to avoid them altogether. Hence, many companies seek to exclude classes of individuals who might be considered high risk. The same dynamic can be expected to occur if the risks and costs of special needs education are not amortized properly.

42. The cost of special education programs can often be prohibitive. *See, e.g.*, In re Smith, 926 F.2d 1027 (11th Cir. 1991) ($100,000 for educational placement for child with severe disabilities); Clevenger v. Oak Ridge Sch. Bd., 744 F.2d 514 (6th Cir. 1984) (school's proposed residential program for emotionally disturbed child cost $55,000 annually and parent's proposed placement cost $88,000 annually); Matta v. Board of Educ., 731 F. Supp. 253 (S.D. Ohio 1990) (parents requested reimbursement in the amount of $91,413 for tuition and associated costs of unilateral placement of child with severe mental disabilities and autistic tendencies).

43. Julie K. Underwood, Feasibility Study for the Association for Equity in Funding: Wisconsin School Finance Equity Final Report (Aug. 1994).

44. In addition, the presence of a specialized treatment center or noted programs for certain disabilities will likely act as a magnet as parents seek to live near these opportunities. This can have a dramatic effect in certain districts.

45. 29 U.S.C. § 794 (1973).

Section 504 prohibits a wide variety of entities receiving federal funds from discriminating on the basis of a handicap. Unlike the IDEA, § 504 is not limited to a group of narrowly defined disabilities and, also unlike the IDEA, it provides no additional federal or state funding. In the context of both employment and post-secondary education, an institution's affirmative obligation under § 504 to a disabled individual is limited to that of a "reasonable accommodation." In *Southeastern Community College v. Davis,*[46] the Supreme Court held that an interpretation of the § 504 regulations governing post-secondary education that would require substantial accommodations "would constitute an unauthorized extension of the obligation imposed by the statutes."[47] Thus, in the context of higher education, the Court stressed that the cost of the accommodation on the institution was a substantial factor in determining what accommodations would be required.

Although § 504 does not directly establish the affirmative obligations an elementary or secondary school is required to undertake to educate a disabled student, the Department of Education has adopted a regulation.

> A recipient that operates an elementary or secondary education program shall provide a free, appropriate education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap.[48]

Recently, Professor A. Zirkel inquired whether the undue hardship and reasonable accommodation standard applied in the K-12 context and asked OCR to issue a formal opinion to that effect. This opinion also addresses whether cost to the district should be considered in providing services to and accommodations for students with disabilities.[49] According to OCR, "the clear and unequivocal answer" is that students protected by § 504 also had a right to a free appropriate education without cost limitations.[50] Although no court has adopted OCR's interpretation and many prominent education attorneys have privately expressed disagreement with its interpretation, school

---

46. 441 U.S. 393 (1979).

47. *Id.* at 410.

48. 34 C.F.R. § 104.33(a).

49. *See* Digest of Inquiry, 20 IDELR 134 (1994).

50. *See id.* In terms of this article's premise, one could read Professor Zirkel's inquiry as to whether the regular education paradigm with respect to costs as set forth in Southeastern Community College v. Davis, *supra* note 46, should be applied to disabilities not covered under the IDEA or whether the special education paradigm should apply. The OCR concluded the special education paradigm applied. This was predictable since the office mainly exists to protect the individual rights of disabled individuals and has less contact with the regular education community.

districts can expect a legal challenge and the accompanying legal bills based on cost if they restrict programs to the detriment of a qualified handicapped student.

If the challenge is successful, school districts would be required to implement programs and procedures similar to those set out in the IDEA, even for disabilities not specifically covered by the IDEA. On its face, such a requirement does not seem irrational since it is difficult to understand why some disabilities would merit preferential treatment over others. However, since § 504 brings with it no funding, school districts would be required to spend a greater portion of their budget in quasi-special education programs. Unfortunately, these expenses will not be amortized across any larger unit. This again will place heightened pressure on the regular education budget, particularly in smaller and poorer districts.

(3) The Growing Definition of "Special Needs"

Finally, schools are increasingly experiencing a rapid increase in "at-risk" students who face severe academic challenges from socio-economic or other environmental factors. As courts and OCR increase demands on schools to fund special programs for a wide variety of "disabled" students, it will become increasingly difficult from a political, legal, or even moral perspective to justify large differentiations in expenditures for students diagnosed as suffering from certain "medical" disorders and those who come from economic and social backgrounds which produce classroom problems and behaviors similar to those who flow from diagnosed medical disabilities. The current dispute over programming and funding for Attention Deficit Disorder (ADD) presents the debate in classic form. If current trends persist, it is likely that more classes of "disabilities," with their attendant costs, will be given protected status. As a result, educational services increasingly will be driven by labels which may or may not reflect actual educational needs. This will mean educational funds will be targeted at individuals rather than groups. In terms of the regular and special education models, the increasing attraction of labeling is to gain for a child individual attention and instruction and exempting the child from the necessity of fitting into the conformist strictures of the regular education program.

The combination of all these cost factors will not only increase the political tension between regular and special education on a generalized level, but will also likely strain interpersonal relationships between professionals of the two communities as cost pressures are passed on to staff. These tensions have their roots in the existence of the separate educational paradigms but are being heightened by judicial enforcement of those paradigms.

B. The Judicial Response to the Problem of Emerging Resource Competition

The judicial response to the problem of competing resources appears to have created as many problems as it solved. First, courts were presented with a major conceptual problem by *Rodriguez v. San Antonio School System.* [51] *Rodriguez* rejected any definition of what constitutes a federal standard for educational quality in the context of an overall education program. Nevertheless, the IDEA mandated a national right to a "free appropriate education" for children with certain special needs. However, it provided no substantive definition of the term. Thus, under the IDEA, federal courts were required to define and implement a term which had no ascertainable legislative or judicial definition. As a result, the judiciary had few analytical tools to use in dealing with the difficulties presented by the problems of emerging resource competition. [52] It is therefore not surprising that the courts have not done well in either analyzing or resolving this issue.

There are two common methods courts have employed in order to deal with the potentially negative impact on school districts of special education programming costs. Both are pretenses. One pretense is simply to look at the IDEA as written, rather than as implemented, and conclude that the cost of the program is substantially paid for by the federal government, and that special education costs are therefore not relevant to the local district. [53] Of course, this assumption is not empirically correct. In fact, the IDEA now funds about 10 percent of "special education costs," [54] even though statutorily the IDEA still states the funding level as 40 percent. [55] Nevertheless, a court can simply choose to look at the law as written and conclude that the resulting problems belong to Congress, not the judiciary.

A second pretense is to assume that additional salaried staff time is not an added cost. For example, several decisions suggest that curricula could be modified and individual programs more carefully tailored without discussing when or how this could be accomplished. [56] To the extent the courts

---

51. *Supra* note 30 and accompanying text.

52. *See supra* notes 14, 16.

53. Board of Educ. of Sacramento City Unified Sch. Dist. v. Holland, 786 F. Supp. 874, 877 (E.D. Cal. 1992).

54. Parrish & Verstegen, *supra* note 19, at 36-37.

55. 20 U.S.C. § 1411.

56. Schuldt v. Mankato Indep. Sch. Dist., 937 F.2d 1357 (8th Cir. 1991); Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036 (5th Cir. 1989); Lachman v. Illinois State Bd. of Educ., 852 F.2d 290 (7th Cir. 1988); Roncker v. Walker, 700 F.2d 1058 (6th Cir. 1983).

or OCR require substantial individual planning for students, it is likely that both special education and regular education teachers will be required to spend additional uncompensated hours to meet these new mandates. However, reliance on the "charitable" contributions of teachers will likely be no more effective in solving the problems of a lack of educational resources than relying on private charities to resolve other social problems. In the end, increased time demands on educational employees will result in reduced services to either the regular or special education programs or, more likely, to both programs. [57]

In short, the cost of educating disabled students, under both the IDEA and § 504, is threatening the ability of the educational institution to educate nondisabled students in many districts and, therefore, is placing the entire public education edifice potentially at risk. This stress is primarily caused by society's failure to fairly fund and distribute the costs of educating disabled students. This default places significant pressure on most districts; but individual districts can also be saddled with debilitating costs if a particularly difficult placement occurs. As a result, the quality of education of all students may be adversely affected. Unfortunately, as will be discussed, these problems due to improper funding are being substantially exacerbated by related problems involving classroom control and discipline.

III. Discipline Problems in the "Mainstreamed" Classroom

A. The Nature of the Problem

Many polls suggest that the American public seems to believe that school discipline and classroom violence are among the most serious problems facing schools. [58] Because of the fundamentally different way regular and special education view issues of classroom control and discipline, this area often triggers the most heated conflicts between these groups. The problem

---

57. Another undesirable result of this hidden costing is increased staff tension. Some regular education teachers will grow increasingly angry at the special education community, since the latter will be blamed for the increased workload and the attendant loss of time with the teacher's "regular" class. Some special education teachers will grow angry at regular education teachers for not fully meeting the goals in the IEP and thus leaving the special education teachers to deal with angry and disappointed parents. These parents, unlike those in regular education, have considerable power to take out their frustrations on the special education staff as well as on the school district.

58. *See* Stanley M. Elam et al., *The 25th Annual Phi Delta Kappan Gallup Poll of the Public's Attitudes Toward the Public Schools*, PHI DELTA KAPPAN, Oct. 1993, at 137, 139. Lack of discipline, fighting, violence, and gangs were among the top five categories identifying the biggest problems with which the public schools must deal.

is becoming more significant because schools are increasingly attempting to educate – in regular education classes – children whose disabilities often trigger disruptive, antisocial, or even violent behavior. This is particularly true of children who are classified as severely emotionally disturbed (SED). Courts have struggled with the conflict between the need to maintain an orderly classroom and the IDEA's strong preference for mainstreaming special-needs children. Maintaining this balance has proven perplexing for the courts and unsatisfying for both regular and special educators.

Litigation over discipline for special education students has centered on two areas. The first involves the availability and limitations on mainstreaming a potentially disruptive student. The second involves the type of (mis)behavior required for a mainstreamed child to be removed from a regular classroom. In more stark terms, the issues can be seen as involving the potential for classroom disruption and post hoc discipline for disruptive behavior.

There is a substantial body of literature on both of these topics, [59] and we will not attempt a detailed summary here. Rather, we will focus on the relationship between the evolving law and the regular and special education paradigms and, most importantly, on the way the differing perspectives affect the way the members of the regular and special education communities relate to each other on issues involving student discipline. [60]

From the perspective of regular education teachers, classroom disruption distracts teachers from their primary mission: to educate the class. Classroom teachers realize that nothing will doom a positive administrative evaluation quicker than the appearance that the teacher is not in control. Moreover, there is almost an element of morality in this issue. Children who take too much of the teacher's time are seen as "stealing" time and resources from those who "properly" want to learn.

---

59. *See, e.g.*, Erica Bell, *Disciplinary Exclusion of Handicapped Students: An Examination of the Limitations Imposed by the Education For All Handicapped Children Act of 1975*, 51 FORDHAM L. REVIEW 168 (1982); Walter T. Champion, Jr., *The Discipline of Special Education Students in Public Schools*, 12 CAP. U.L. REV. 211 (1982); Theresa Glennon, *Disabling Ambiguities: Confronting Barriers to the Education of Students with Emotional Disabilities*, 60 TENN. L. REV. 295 (1993); Lichenstein, *Suspension, Expulsion and the Special Education Student*, 61 PHI DELTA KAPPAN 459 (1980).

60. Obviously, discipline issues associated with the special needs students will be affected substantially by the school's overall disciplinary methodology and climate. Schools which lack a sound overall disciplinary model will face the greatest challenges in dealing with highly disruptive special needs students. However, regardless of the effectiveness of a school's overall discipline plan, the current special education model will generate difficult issues surrounding classroom control.

In addition, discipline usually is provided in a uniform manner. In many schools, the required response to classroom disruptions in a regular education setting is set forth in a predetermined master discipline plan. This plan usually articulates a uniform system of progressive discipline, depending on the severity of the offense. While all competent teachers recognize the need for individualized response to students, they are also aware that they are potentially subject to both student and administrative censure if the response appears overly customized or biased. The role of the parent is also unclear. While most schools require parental notification for dealing with certain offenses, few schools require that parent and teacher adopt a united strategy in dealing with behavior problems. Ultimately, the parent and student must accede to the school's demands or the student will face increasing discipline, potentially resulting in expulsion.

Special educators tend to view disruptions and student misbehavior differently. To them, misconduct by a disabled student with behavioral problems is not substantially different than a wrong response by a student to an academic question. It is an expected part of the learning process. Moreover, the impact of the disruption on other students tends to be discounted. Teaching all students to deal more effectively with disruptive behavior is seen as a valuable skill which needs to be taught and learned. The special educator's response to a disruption is frequently set forth in the student's IEP. As such, it tends to be individually crafted. As a result, actual disciplinary response may vary widely from student to student and between special regular education. Discipline set forth in an IEP more often will employ nonpunitive corrective measures rather than the traditional detention, suspension, or expulsion model. Further, it is quite common for special educators to enlist the parents in the resolution of the discipline problem, and it is not uncommon for a district to require almost daily parental contact when dealing with certain students.

The issue is not which of the two disciplinary regimes is correct; the problem is that they are so different in their principles and premises. Moreover, as previously discussed, these differing views of discipline are themselves part of even wider differing world views. *Because of these widely different views of discipline, the primary question becomes, whose rules and assumptions apply when a special education student is part of the regular education classroom?* At present, this issue is not only unresolved; it is rarely discussed in a straightforward manner. Nevertheless, it is one which breeds considerable mistrust and confusion between the regular and special education communities. Unfortunately, judicial decisionmaking has increased both the confusion and the mistrust.

B. The Judicial Response to Problems of Competing and Conflicting Classroom Rules and Expectations

(1) Initial Placement Under the Special Education Paradigm

IDEA mandates that children with disabilities be provided an appropriate education in the least restrictive environment. [61] This generally requires education in a mainstream setting, unless a segregated setting is justified based on the disabled child's needs. The impact of a mainstreamed child on students receiving regular education is not discussed in the IDEA. Although one early decision mentioned that a disabled child might be segregated if he were a substantially disrupting force in the mainstreamed setting, this issue was not even discussed until recently. [62]

In fact, it was not until 1989 that the needs of the general classroom were again mentioned as a consideration in determining the placement for a disabled child. In *Daniel R.R. v. State Board of Education,* [63] a court finally provided at least some guidance in this area. In *Daniel R.R.* the court suggested a multi-factored analysis. The first factor to be considered is "whether the state has taken steps to accommodate the handicapped child in regular education." [64] If modifications have been attempted, the court must then inquire whether the efforts were sufficient. Next, the court should weigh the benefits the child received from the mainstream instruction. Finally, the court can focus on "[the] effect the handicapped child's presence has on the regular classroom environment and, thus, on the education that the other students are receiving." [65] The court noted that "regular education instructors [are not required] to devote all or most of their time to one handicapped child or to modify the regular education program beyond recognition." [66] In the end, the court concluded that mainstreaming was not appropriate in that case. [67]

---

61. 20 U.S.C. § 1412(5)(B) states that the State has established

> procedures to assure that, to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

62. *Compare* Roncker v. Walter, 700 F.2d 1058 (6th Cir. 1983) *with* Sacramento Unified Sch. Dist. v. Rachel H., 14 F.3d 1398 (9th Cir.), *cert. denied,* 114 S. Ct. 2679 (1994), and Clyde K. v. Puyallup Sch. Dist., 35 F.3d 1396 (9th Cir. 1994).

63. 874 F.2d 1036 (5th Cir. 1989).

64. *Id.* at 1048.

65. *Id.* at 1049.

66. *Id.* at 1048.

67. In a recent official response to a series of questions, the Department of Education has

If one views the factors enunciated in *Daniel R.R.* in terms of the competing regular and special education paradigms, it is clear that the court used a mixture derived from both models. Unfortunately, the court did not attempt to provide an overall formula by which these various factors are to be weighed. Since *Daniel R.R.* presented a rather extreme case, it is difficult to determine how much weight should be given each factor in a situation where the disabled child could benefit substantially from a mainstream program and would also substantially detract from the academic achievement of the rest of the class.

In addition, the last factor, the effect of a disabled child on a regular education classroom, is itself a multi-faceted question which cannot be answered without resort to an underlying value system. In a utilitarian model, in a class of twenty, even minor harm to nineteen students would aggregate to offset dramatic gains by the mainstreamed student and hence argue against meainstreaming. Any straight summation of benefits gained and lost as a result of the mainstream will virtually always defeat it. A more sympathetic model would discount the minor diminution of achievement by several students (or argue enhancement of tolerance) in order to protect the dignity and rights of the disabled student. But a substantial loss in overall educational attainment by many cannot be dismissed or argued away. Unfortunately, courts have largely ignored this issue precisely because its resolution is so difficult and politically sensitive.

Oberti v. Board of Education of Borough of Clemonton School District[68] presents a closer case and serves as an excellent example of how difficult the issue of choosing an overall framework can become. *Oberti* purported to rely heavily on *Daniel R.R.*, but instead found mainstreaming appropriate. In

---

defined the issue this way:

> In determining if the placement is appropriate under the IDEA, the following factors are relevant:
> - the educational benefit to the student from regular education in comparison to the benefits of special;
> - the benefit to the disabled student from interacting with nondisabled students; and
> - the degree of disruption of the education of other students resulting in the inability to meet the unique needs of the student with a disability.

Although the last criterion purports to take collective interests into consideration, it does so entirely through the viewpoint of the mainstreamed student. The harm to the education of others is bad primarily because it produces harm to the special education student. This type of analysis flows from the special education model which sees all instruction as individual-based. Letter from Judith E. Herman to Robert F. Chase 5 (Sept. 16, 1994) (on file with authors).

68. 995 F.2d 1204 (3rd Cir. 1993).

terms of our model, *Oberti* again purported to utilize a combined perspective; however, it ultimately resolved most of the difficult issues from the special education perspective. [69] This can be seen in several areas.

First, the court's analysis significantly discounted the potential harm to the regular education program as well as the district as a political entity. The court found that in a prior year the student had experienced a number of serious behavioral problems, "including repeated toileting accidents, temper tantrums, crawling and hiding under furniture, and touching, hitting, and spitting on other children." He also "struck at and hit the teacher and the teacher's aide." [70] While the court recognized that the child's prior behavior was troubling, little time was spent discussing the potential impact of such behavior on the class or the school at large. Clearly such behavior would cause substantial alarm to many teachers, parents, and students from the regular education paradigm. The court side-stepped this troublesome political issue by rejecting the district's evidence that the objectionable behavior would likely recur. It did so by adopting the expert testimony on the child's behalf that the difficult behavior problems were at an end.

However, as suggested by Thomas Kuhn, the underlying problem is not related solely to a problem of empirical proof or a battle of experts. [71] Suppose the experts were to agree that there was a 30 percent risk that the student would again engage in substantial disruptive behavior as described in *Oberti*. Under *Daniel R.R.* and *Oberti*, would such testimony warrant exclusion from or inclusion in a mainstream program? Districts and parents are provided no answer in the case law, and we suspect there would be little consensus among education professionals as to the proper result in such a case.

Second, there was no discussion in *Oberti* as to the actual condition of the classroom into which the disabled student would be mainstreamed, and the court seemed to assume that Oberti was the only challenging child.

---

69. The *Oberti* court set forth the analysis as follows:

[I]n determining whether a child with disabilities can be educated satisfactorily in a regular class with supplemental aids and services...the court should consider several factors, including (1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom; (2) the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; and (3) the possible negative effects of the inclusion of the child on the education of the other students in the class. *Oberti*, 995 F.2d at 1217-18.

70. *Id.* at 1208.

71. KUHN, *supra* note 5, at 3.

However, that assumption is questionable. In fact, many regular education classrooms, have several disabled and nondisabled students who present significant challenges. While adequate supplemental services may allow a teacher to effectively fulfill a mainstreamed student's specific educational goals, as well as meet the general needs of the class, this task becomes far more difficult if the teacher must simultaneously deal with challenging behavior from several students. In addition, fiscally strapped districts frequently compromise the effectiveness of supportive services by centralizing them in one class. Thus, it is common for a district to place a single aide in a classroom and assign a number of students who need the aide's services to that room in order to increase the cost-efficiency of the aide. This not only reduces the effectiveness of the supplemental services, but can radically change the nature and sociometry of that classroom. The failure of courts to adequately address what really goes on in mainstreamed classrooms is a continuing problem facing the education community. [72]

However, the most significant problem with the *Oberti* analysis is that it fails to address what will happen if the court guessed wrong and the troubling behavior recurs. Under the regular education model, there are few legal impediments to prevent quick action in dealing with the problem. However, under current legal guidelines, [73] placements under the IDEA can be difficult for the authorities to change quickly. As a result, poor placements (from the regular education perspective) tend to go uncorrected. This substantially alters the calculus of risk and places the consequences of failure of a mainstream placement primarily onto the regular education classroom. It is the current inability to correct such errors within a reasonable time frame which is giving schools and teachers the most difficulty.

(2) The Difficulty in Changing Placements

In the area of discipline, the dichotomy between special and regular education is striking. Simply stated, a completely different set of rules apply to the discipline of disabled students so that two children could engage in the same behavior and receive entirely different disciplinary treatment, in terms of both procedure and penalty.

---

72. It is likely that one reason why courts do not carefuldly consider the actual impact of a mainstreamed student is that traditionally participants in special education litigation tended to be special education specialists. Historically, neither the interests nor expertise of classroom teachers have been represented in litigation.

73. 20 U.S.C. § 1415(b)(1)(C) (1988); 34 C.F.R. 300.504.

The procedure and practice for dealing with the discipline of regular education students is rather straightforward: school districts have a set of prescribed rules, penalties, and procedures, all enacted within the boundaries of state statutes and the constitutional concept of due process. When a student is accused of violating one of the rules, the corresponding penalty is applied using the procedure set forth. For example, a student who is accused of starting a fight in school may be subject to a suspension for a first offense, or possibly a longer term suspension for repeated offenses. The procedure may be a short informal hearing with the principal or a formal hearing in front of a hearing officer or school board if a full expulsion from school is warranted.

In the special education area, even something as relatively straightforward as a punishment for fighting can require a complicated set of procedures with varying consequences. It is a necessary by-product of the notion of individualization and a disabled student's rights under § 504 and the IDEA. The point is not that the different treatment is wrong or unfair, but rather that it is so complex and often incomprehensible to other students, parents, teachers, and, sometimes, even to practitioners.

Rather than providing a lengthy description of disciplinary procedures under § 504 and the IDEA, we will highlight two[74] concepts which form the core of distinctions between special from regular education discipline. First, different rules apply. In dealing with the discipline of disabled students, the first question is whether the behavior is a manifestation of the student's disability. Disabled students cannot be disciplined through regular education rules for behaviors which are caused by the disability. To do so would be merely penalizing the handicap[75] and may not even be successful in deterring the behavior in the future. This determination may be very difficult to make, especially when the student's disability has an emotional or behavioral component.[76]

---

74. A third difference which should be at least noted is that, under current law, a disabled child may not be totally deprived of services under IDEA, even as a disciplinary measure. This is not true of regular education students who may be expelled with education totally foreclosed, as a disciplinary measure.

75. Doe v. Maher, 793 F.2d 1470 (9th Cir. 1986), *aff'd in part and modified in part sub nom.* Honig v. Doe, 484 U.S. 35; School Bd. of Prince William County, Virginia v. Malone, 762 F.2d 1210 (4th Cir. 1985); Kaelin v. Grubbs, 682 F.2d 595 (6th Cir. 1982); S-1 v. Turlington, 635 F.2d 342 (5th Cir.), *cert. denied*, 454 U.S. 1030 (1981).

76. It is not true that disabled students are immune from discipline. However, for behaviors which are a part of the disability, a disciplinary plan must be developed through the IEP process. This individualized plan may have the same penalties as the regular education rules, but the process may be very complex and generally provides for a set of steps of discipline.

Second, the school district's ability to react to student misconduct is substantially limited. In regular education, the school district has the authority to dictate the placement of a child. This is not true in special education, even when the change in placement is sought as a disciplinary measure.[77] In *Honig v. Doe,* the Supreme Court applied the IDEA's "stay-put" provision strictly and refused to allow a district unilaterally to remove a special needs student who presented an undeniable safety risk from the classroom for more than a 10-day interim period without securing a change in placement through the regular IDEA procedures. The Court did allow for the possibility of interim injunctive relief. However, the district clearly had been left with a substantial burden in securing such relief.

As a result, under *Honig* and its progeny, a school district cannot effectuate a change in placement contrary to the student's IEP without obtaining one of the following: (1) an agreement from the child's parents; (2) a completed due process hearing; or (3) an interim court injunction pending final resolution through one of the first two options.[78] The nuances of *Honig* and the stay-put provisions have been extensively debated and discussed in other articles[79] and will not be repeated here; what is important here is *Honig's* underlying value structure. Under *Honig,* the burden is clearly on the district to justify the use of otherwise seemingly self-evident regular education disciplinary precepts, even when a disabled student severely misbehaves in a regular education setting to the substantial detriment of the collective.

Predictably, the dichotomy established by *Honig* has not been well received by the regular education community. As stated previously, it is difficult to administer two separate disciplinary codes to one group of students. Equally predictably, some districts have tried to evade this result. This is usually done by attempting to redefine the issue and escape from the special education paradigm.

---

77. *Honig, supra* note 75.

78. In *Honig,* like so many other decisions in special education, the seemingly problematic results were justified by relying on pretense. As noted in *Honig,* the district or parents (in theory) should be able to complete a due-process hearing within 45 days. However, most states have not provided sufficient examiners to allow for hearings to be completed in anywhere near that time frame. As a result, the practical impact of *Honig* is to require the district to spend substantial sums of money in order to protect students and teachers from clearly dangerous students. Many districts simply refuse to do so.

79. Dixie Snow Huefner, *Another view of the Suspension and Expulsion Cases,* 57 EXCEPTIONAL CHILDREN ___ (1991); Gail Paulus Sorenson, *Update on Legal Issues in Special Education Discipline,* 81 EDUC. L. REP. 399 (1993); Julie Underwood, *Special Education Discipline: Changing*

(3) Attempts to Change the Disciplinary Paradigm

As many authors have noted, one way to solve problems is simply to redefine them. One frequently employed method of redefining the problem of disciplining special education students is to use the state courts' juvenile justice system when the child's in-school or out-of-school behavior results in violations of the state's juvenile code. Unlike the school district, the juvenile court does not employ the special education paradigm and treat infractions as learning opportunities. There have been only a few cases in which the efficacy of this tactic has been litigated. [80] What case law exists can be read to argue against extreme forms of the practice; however, the results are likely to be very fact-specific.

Nonetheless, the filing of a juvenile petition frequently serves the interests of regular education teachers, particularly where there has been a battery, precisely because it presents an alternative school's invocation of the juvenile justice system and the student's attempt to extricate himself from the state court's jurisdiction is a metaphor for the competing paradigms. Under one model, society must deal with an assault; under the other, a school must deal with an educational problem. The difficulty is that widely different results are obtained depending on which paradigm is used.

A related strategy is for teachers to use state anti-harassment statutes to enjoin a student from certain types of threatening behavior against a teacher. [81] While these injunctions can have substantial symbolic value, it is unclear whether they can be used in the special education context if the result of the injunction is to create a *de facto* placement change. Nevertheless, the use of these statutes addresses a major conceptual flaw in the IDEA. It gives threatened teachers a judicial vehicle to deal with their safety concerns. Under *Honig,* teacher safety is entrusted entirely to the school district. Unfortunately, many districts do not adequately deal with teacher safety issues in part because the IDEA gives no legal recognition or protection of these interests.

Practices After Honig v. Doe, 17 J.L. EDUC. 375 (1988); Mitchell L. Yell, Honig v. Doe: *The Suspension and Expulsion of Handicapped Students*, 56 EXCEPTIONAL CHILDREN 60-69 (1989).

80. HARTWIG & RUESCH, *supra* note 2, at 428-433. *See also* WISCONSIN DEPT PUB. INSTRUCTION, A STUDY OF SECURED CORRECTIONAL FACILITIES (1991). This study reported that seven out of ten juveniles in secured facilities were indentified as eligible for special education under IDEA prior to their placement - the most prevalent disabling condition being severe emotional disturbance. *Id.* at 29. *See also* Allen Morgan v. Chris L., No. 3-93-CV-0524 (E.D. Tenn. Sept. 1994) (school district that failed to prepare IEP for ADHD student violated IDEA by filing a juvenile petition for a vandalism incident before convening an M-team meeting).

81. *See, e.g.*, Bachowski v. Salamone, 407 N.W.2d 533 (Wis. 1987).

Another strategy for districts to resolve disciplinary actions without *Honig* problems is to obtain, in advance, the consent of the child's parents or guardians to impose certain discipline or changes in placements if certain specified behaviors occur. While the legality of such agreements is questionable, this procedure has the advantage of forcing all parties to deal with disciplinary matters in a more practical and less legalistic manner.

Even assuming that federal courts may ultimately block attempts by school districts to use the juvenile justice system in school disciplinary situations or employ a strict interpretation of the IDEA and *Honig* to block any parental waiver of rights, it is likely that aggressive districts will find other methods of changing the focus of disciplinary disputes involving disabled students. [82] The inherent tension associated with educating special education students in a regular education classroom setting will not disappear. To those operating from the regular education paradigm, it seems irrational to allow students to operate in the same classroom and be governed by completely different rules and norms, particularly when the offending child's actions are perceived to be outside any concept of acceptable classroom behavior. To those operating from the special education perspective, such a result is not only mandated by the IDEA, but is completely consistent with a more individualized remedial theory of constructing orderly behavior. We do not believe one paradigm is inherently superior; however, it seems very difficult to employ two different models in one classroom. Moreover, regardless of one's viewpoint, students and teachers must be protected from violence! If this is not done, parents will either inundate the schools with excessive litigation or simply not allow their children to attend public schools. [83]

(4) Emerging Personnel Issues

Finally, the combination of the current case law's failure adequately to address the real world concerns of regular educators in the initial placement and the inflexibility of the IDEA in allowing changes in placement in cases where unpredictable, severely disruptive behavior occurs, produces not only classroom problems, but significant administrative and personnel challenges.

Since regular education historically has stressed interests in collective class instruction, it has allowed teachers great leeway in enforcing norms of class-

---

82. Obviously, the most effective way to help resolve the problem is through legislation. However, *Honig* has given states little leeway to act, and it is hard to pass such specific federal legislation until the problem takes on "national importance."

83. *See, e.g.*, *Bully Terrorizes Coloma Students: Parents Keep Children from School in Protest*, OSHKOSH J., Dec. 1, 1994, at B1.

room behavior. It has attracted and cultivated employees whose temperament and skills match these expectations. As a result, many regular education teachers lack the training or desire to deal with students who present severe behavioral challenges. This means that there is a number of regular educators who are not fully capable of providing first-rate education to all students if the current special education model of discipline is imposed upon them. Many of these individuals will eventually choose to leave or be forced to leave the profession. However, until this transformation occurs, introducing special education principles into the regular classroom will trigger many personnel disputes centering on appropriate classroom control and discipline. [84] By contrast, as courts begin to take district financial concerns more seriously, many special educators will be forced to operate in an environment dedicated more to efficiency than to individual success. This will produce increasingly angry and less successful special education employees. Since special education teachers in certain specialties already are in short supply in many areas, some districts will experience great difficulty in hiring and retaining competent special educators.

In summary, in an environment of shrinking resources, schools are required to deal with increasingly severe disciplinary problems. While mainstreaming is not the primary cause for these problems, it is a significant contributing factor, particularly in the light of the IDEA's "stay-put" requirement and its strict application by the courts. At some point, wholesale incorporation of the special education model of discipline into the regular education classroom may strain both models to the breaking point. It appears that time is fast approaching.

IV. Conclusion

The primary purpose of this article is to offer an alternative analysis of the increasing friction between regular and special educators. Emerging political trends make attention to this issue critical, regardless of whether one agrees with our hypotheses. Throughout this article, we have tried to avoid the obvious temptation to make personal judgments about which model is "better." Both the regular and special education models were developed to

84. Moreover, one should not assume that those leaving the profession as a result of changing norms were not highly competent educators. Many were excellent in educating children within the model in which they were recruited and trained. If dealing with difficult students becomes increasingly important, a different type of educator may emerge. These educators will have better skills in classroom control, but instruction and academic skills may suffer.

solve specific problems, and both have worked well when judged according to measures of success in their respective branches. However, both models have shortcomings when broader evaluative criteria are applied, and neither has been able to assimilate the other's values to form a broader, overarching educational paradigm. Nevertheless, the importance of certain political and educational trends, particularly those associated with cost, educational standards, and classroom safety, are gaining such momentum that they cannot be ignored by either community.

With respect to the regular education paradigm, the emphasis on large group instruction is becoming increasingly problematic. As schools become less homogeneous and beset with more regular education students with significant social and educational deficits, schools must respond with more individualized instruction or risk not meeting the needs of a substantial number of students. In addition, there is increasing pressure from parents of high-achieving students to insist on rigorous programs which allow their children to compete with students receiving expensive private instruction both in this country as well as in foreign markets.

Moreover, there is increasing concern from both ends of the political spectrum over the effectiveness of political evaluation and accountability in ensuring high educational standards. Unless there is direct accountability, a child's opportunity to gain critical learning skills becomes dependent on transient and sometimes capricious attitudes of a broadly representative and unfocused electorate on a given day in one of 36,000 school districts. This prospect seems unfair in a society committed to universal access to something as important as education. However, if educational quality is given more judicial scrutiny, the regular education community must struggle with how to balance professional autonomy and the demand for quality with the increasing political demands for efficiency.

The special education paradigm is coming under attack from at least two directions. First, the achievement of a free, appropriate education for disabled children is increasingly being balanced against its cost. Politically, it is becoming difficult to defend placements for special education students which result in limited benefits to the child and substantial costs to the district. Given the major financial struggles being faced by the regular education community, the allocation of resources to special education appears, to some, misguided. Although special education programs cannot be measured with the current regular education yardsticks, one simply cannot ignore the current fiscal crises in many districts and the fact that special education demands exacerbate them.

A significant number of the current crises facing education exist because schools are forced to operate in a make-believe world by legislative and

judicial decision-makers. They are pretending that costs associated with educating disabled students are being fairly funded, amortized, and distributed when they are not. Underfunded and inequitably funded mandates frequently produce collateral problems, some of which may become as significant as those the mandates initially were intended to resolve. Either funding for special education programs must be increased and made more equitable or the mandates must be modified.

Finally, society is becoming increasingly concerned about violence in the schools. While the vast majority of acts of violence and disruption are caused by regular education students, there can be little doubt that the current special education disciplinary practices significantly impair a district's ability to deal with potentially violent situations. Neither Congress nor the courts will long tolerate actual physical danger to other students, regardless of the perceived benefits of mainstreaming. Since very few special education students have behavior problems which result in a potential for physical harm or severe disruption of a class, it would seem wise to modify the IDEA to give school districts greater leeway in dealing with this relatively narrow problem. If this is not done, far more radical modifications can be expected, which may adversely affect nondisruptive disabled students. Moreover, failure to deal with the problem will increase pressure for vouchers and public support of private schools.

In short, it is important to realize that special educators and regular educators view their missions very differently. Their differing views are highly functional in each sphere and result from both training and experiences. Neither of the two paradigms is inherently superior to the other, and it appears that each group can learn significantly from the other. For mutual learning and benefit to occur, however, there must be open and honest discussion between the groups so that their differences can be acknowledged, understood, and assimilated when possible. While we do not argue for any one particular assimilation, certain emerging political trends suggest that the current regular and special education models must be modified in certain areas if they are to remain politically viable.