

Transforming the Way We Decide How We Teach

By J. Paul R. Howard

As educators continue to challenge themselves to develop modified and expanded teaching strategies to enable all students to learn and to accommodate the learning styles of all students, one of the more interesting legal questions implicit in that on-going process is: who has the ultimate decision-making authority when it comes to determining what teaching strategies and programs are appropriate for any given student. Historically, that question has been most hotly contested - and litigated - by parents of students with special needs. However, we are now entering what I would term the “third wave” in the debate concerning the special education decision-making process.

Although its precise time-frame varied from province to province, the first round in the debate over the special education decision-making process began in the early 1980s and continued for most of that decade. It arose, naturally enough, after the introduction of legislation providing for the mandatory education of special needs students. Much of the litigation brought by parents in this era was initiated within the context of the education legislation itself, and involved appeals from decision-making bodies established under the legislation to identify special needs students and recommend appropriate placements. On those occasions, though relatively rare, when parents actually challenged the placement decisions in the courts, parents found themselves confronted by a judicial attitude of deference to the decisions of the educators. Understandably, many parents felt that they did not have an effective voice in the decision-making process.

Consequently, in the late 1980s and early 1990s we entered the second wave in what had become the clash between parents and educators for control over the placement decision process. Significantly, this period was marked by many parents and their support groups turning to the legal right, and particularly equality right constructs, to allege that placement decisions with which they disagreed constituted a violation of the equality rights of their disabled children under section 15 of the *Canadian Charter of Rights and Freedoms* and provincial human rights legislation.

The highwater mark of this period was represented by the judgment of the Ontario Court of Appeal in *Emily Eaton v. Brant County Board of Education* (1995),¹ where the Court held that the school board’s placement of a severely disabled youngster in a special education class in a regular school was tantamount to “segregation” and infringed her right to be free from discrimination on the basis of disability as guaranteed by section 15 of the *Charter*. The Court proceeded to find that the Ontario *Education Act*, because it permitted the “segregated” placement, was the source of the unlawful discrimination and thus that the Act was unconstitutional.

From the perspective of litigation strategy, it is easy to appreciate the allure of the equality right challenge. Parents and interest groups correctly perceived that use of equality right constructs would serve to transform the debate from a pedagogical inquiry concerning what placement is in the best interests of the child into a legal question concerning the recognition of the child’s legal right and, significantly, who controls the exercise of that right.

In this vein, the use of the equality right illustrates one of the central themes in the work of feminist scholar Carol Smart, who argues that the law tends to appropriate for itself a certain power in that “it embodies a claim to a superior and unified field of knowledge which concedes little to other competing discourses” of social reality.² The quintessential example of the law in Western society is the legal right, and the equality guarantees are conspicuously powerful because of, among other things, the stigma attendant upon a finding of discrimination.

However, it is important to recognize the limits of legal rights discourse. Rights theorist Ronald Dworkin reminds us that there is a distinction between saying that someone has a right to do *x* and saying that *x* is the right thing to do.³ That is, having a legal right to a particular placement says precious little about the pedagogical merits of that placement. Thus, the Ontario Court of Appeal’s judicial recognition in *Eaton* of an equality right enjoyed by the child, but exercised by the parent, may have assisted parents to assert effective control over the special education decision-making process, but appealing to equality rights to insulate parental choice says nothing about whether that choice is in the best interests of the child.

Our emergence from the second phase of special education litigation was heralded by the Supreme Court of Canada’s judgment in the *Eaton* case, where it overturned the Court of Appeal’s decision and dismissed the parents’ argument that equality rights constructs create a legal presumption in favour of inclusion. It appears the third phase we are entering will see placement decisions returned from being governed by an equality right paradigm to an assessment of whether there is any pedagogical benefit to the placement. Thankfully, this appears to be accompanied by a recognition of the need to strengthen the due process rights of parents. Of course, whether one believes the return to the pedagogical paradigm is a welcome development depends on what values one thinks should govern the way we decide how we teach.

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1. *Eaton v. Brant County Board of Education* (1995), 22 O.R. (3d) 1 (C.A.), rev’d (1997), 142 D.L.R. (4th) 385 (S.C.C.).
2. C. Smart, *Feminism and the Power of Law* (London: Routledge, 1989) at 4 and 9ff.
3. R. Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1978) at 188-89.