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Meeting individual educational needs: Legal identification, or systemic support?

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Two years ago I completed a review of Special Education 2000 policy for the government.¹ One of its major themes was the fragmentation of responsibilities and provision, which undermined the policy's intentions to improve educational experiences and outcomes for students with special needs.

It was clear to me that the quality of student education and support was related not just to the funding available, but also to the professional expertise of the teachers, teacher aides and specialist staff, the supply of such expertise, and timely communication among professionals and with parents and students. It was also clear that allocating a substantial proportion of special education funding on the basis of either individual schools (the Special Education Grant, SEG), or individual students (the Ongoing Transitional Resourcing Scheme, now ORRS), made it more difficult to improve quality and to offer the seamless, secure system which was needed.

Sadly, the ORRS scheme has created the perception that only students who have individual identification attached to funding of provision for students through ORRS will have their needs met. This emphasis on individual identification diverts parent and teacher energy into applications and anxiety focused on achieving ORRS identification. Yet I found that the quality of what was actually available for those who do fit the ORRS criteria was variable, and there was no guarantee that all of an ORRS student's needs, or even his or her key needs, would be met. I suggested in the review that the usefulness of the ORRS approach should be examined.

Where are we heading in New Zealand?

New Zealand has now started to develop a more systematic approach to the education of students with special needs. The government has implemented many of the recommendations from my review which were designed to build a more secure and co-ordinated system around schools and students that could better meet student needs.

The transfer of Specialist Education Services to Group Special Education within the Ministry of Education clearly signals the intention to align the work of specialists with the work of schools, and with other sections of the Ministry, particularly at the local level. Attention is being given to the need to share knowledge and to ensure an adequate supply of speech language therapists and others.

Early intervention in early childhood education, including putting more resources into checking and addressing young children's hearing and sight problems, should reduce some special needs surfacing in school. The recent and continuing focus on early literacy and numeracy across the board should also help to curtail "learning disabilities". Inequities within the ORRS system will be addressed as Group Special Education becomes responsible for managing a single fundholding pool, with the ability to delegate resources to schools. Over time, this should make it easier to ensure the supply and availability of good specialists, therapists, and teacher aides, rather than this being dependent on the unequal size of different fundholders' pools.

The Enhanced Programme Fund recognises the reality of "magnet" schools, in a more positive way than SE 2000. In time, the Learning Support Network should enable the sharing of resources, and thus the planning which will enable "wrap around" support, coupled with ongoing professional development and systems within schools (as in the New Brunswick approach, outlined below. If such a network were in place and working well, it would be possible to move to a simple funding approach that does not require the legal categorisation of students with special needs. This would avoid the additional human, financial, legal, and opportunity costs which go with such

categorisation, and which leach away resources that could have gone to provide better quality.

The significance of *Daniels vs the Attorney General*

Unfortunately, the recent High Court decision in the case of *Daniels vs the Attorney General*² could head New Zealand provision for students with special needs in the opposite direction, giving us the deep problems which have been identified in the individual identification approaches being taken in England and the USA (see below).

The basis of the Daniels case is that special education 2000 policy is inconsistent with the Crown responsibility for children with special educational needs, as outlined in the 1964 and 1989 Education Acts. The High Court decision concludes that the Crown has a duty to provide suitable education for children with special needs that are not being met in an “ordinary” school. It refers to the role of the Court to “enforce the minimum content of the right, which requires an individual focus on the learning needs of each child, and provision of extra assistance in proportion to the extent of the child’s particular disability” (p. 46). All special education provision, including RTLB services, would come under the rubric of special services, to which children would be entitled only if they had first been identified as having special needs.

Section 9 of the Education Act 1989 is the basis for this judgement. Yet Section 9 agreements between the parents and the Secretary of Education were IN FACT fixed at the number of places in a limited number of services (special schools, special units, attached classes, and itinerant teacher rolls). These agreements did not cover all students with special needs. It is likely that access to Section 9 agreements – which occurred through enrolment itself – was inconsistent. There were certainly no clearly set out criteria, as there are with the ORRS scheme. Section 9 itself provided no guarantee that all children with special needs would have their needs appropriately met.

The judgement therefore creates a new meaning for Section 9 agreements, if it applies to all parents who believe their child has special educational needs

that are not being met in their school. These parents would be able to seek a Section 9 agreement, presumably appealing if they do not get one. Those with a Section 9 agreement would be able to raise any issues about their child's education with the Crown – the Secretary of Education. If they were still unsatisfied, they could bring their case to court. Given that Section 9 contains no criteria for deciding the existence of special needs, and given other countries' difficult and unsatisfactory experience in trying to define these criteria, and the best way to meet a student's particular needs consistently and equitably, the way is open for continued anxiety and litigation.

Even if it were as easy to test for special needs as it is to test for a broken ankle, the identification of needs does not provide a clear diagnosis of the "treatment" needed, which would provide a once-and-for-all remedy. Individual needs differ as much among students with special needs, even within the same broad grouping, as they do among students whose parents might not seek this legal identification. What is more, students with special needs do not need treatment totally different from the pedagogical response to students with less need for support. There is therefore much scope for contestation of both identification and provision, if individual identification through a legal process is the only way in which students with special needs can access support or additional support.

In some legal cases related to entitlement, the criteria and processes to be followed are clearly set out. Special needs cases are different. It would be difficult for the courts to make decisions relating to a broader category of special needs than is currently covered by the ORRS criteria, and even more difficult to decide what teaching and support would be most appropriate and effective. Such decisions belong with informed educators and specialists, working with parents, within supportive systems where all involved share the responsibility.

What will happen if this High Court decision is upheld after the Crown appeals it? If the law remains unchanged, New Zealand may revert to and in fact stiffen the importance of legal categorisation of individuals, as the route to

provision for students with special needs. This is likely to prove a Pyrrhic victory, not only for the parents and children involved in the Daniels case, but for all students with special needs and their families. It will become even harder to meet their needs. Special education provision will remain fragmented, and become highly contested. Parental and professional energy and resources will be diverted to justification and defence, with the emphasis on bureaucracy and the law courts, rather than on the provision of good quality education and support.

I am even more convinced that this is not the path to take after finding out more about two contrasting policy approaches to meeting the needs of students with special needs: one based on systemic support, and the other on legal identification.

Systemic approach

While no educational system is meeting all the needs of students with special education needs, the New Brunswick system is providing much better quality than most (OECD 1999). The New Brunswick approach is systemic. It has three key aspects:

- Clear legal responsibilities for district superintendents to “place exceptional pupils such that they receive special education programs and services in circumstances where exceptional pupils can participate with pupils who are not exceptional pupils within regular classroom settings to the extent that is considered by the superintendent having due regard for the educational needs of all pupils” (New Brunswick Education Act 12(3)).
- Students with special needs (“exceptional pupils”) are identified for the purposes of meeting their needs, through IEPs (individual educational programmes). Parents must be included in the identification and IEP processes. But students do not have to be identified legally, and funding is not attached to individuals. Funding is allocated to districts through a per capita figure for all students enrolled. The amount given to each district

must be spent on special education services, most of which are located within schools. It is a predictable figure, which allows district superintendents to plan and sustain services, without the district having to “direct resources to unnecessary assessment done only to provide justification for receiving funding for special education services” (Mann & Gerard, 2001).

- Considerable emphasis has been placed on building an infrastructure to ensure that teachers and principals have knowledge and skills to work with *all* students, through professional development and pre-service education, and whole-school development and problem-solving processes, which can quickly and easily involve resource teachers and specialists so that student – and teacher – needs can be met when they need to be met. Each school has a student services team, meeting weekly to monitor programme effectiveness in terms of student and teacher needs, and allocate resources. This team includes parents and students. While individual schools are responsible for responding to all student needs, including those with special needs, they are not expected to do so in isolation, without support. Early intervention in early childhood education and the initial years of school is also a key focus in this approach.

Approaches based on legally-based identification of individuals

Contrast this with approaches based on the identification of individual students within legal terms, before schools receive funding for them, and student needs can be addressed. In England and Wales, and the United States, these are the approaches which have been used, but which are now being questioned.

Legal identification

In England and Wales, around 20 percent of children are identified by their schools as having special educational needs (SEN). Most of these can have their needs met within their school, with advice from a school’s special education needs co-ordinator (SENCO), and sometimes from their local authority. Teachers or parents of students requiring additional support can

request their local authority to provide a statutory assessment, or “statement”; this usually results in some provision, which may include health or social services. The assessment process takes 6 months. Around 3 percent of students have a statement.

The Audit Commission (2002) found that statutory assessment could target resources for children with very high needs, offer useful planning for those with “complex needs requiring support from many agencies”, and give parents a clear view of what support their child should have, and a mechanism for redress through appeal to an independent tribunal. However, it was “a costly, bureaucratic and unresponsive process which may add little value in helping to meet a child’s needs”; ³parents often found the process “stressful and alienating”; it led to an “inequitable distribution of resources”; and it could provide schools with funding “in a way that is inconsistent with early intervention and inclusive practice” (p. 13). Scarce specialist time was being spent on the paperwork associated with assessment, rather than advising and working with the teachers who had prime responsibility for the students.

As in New Zealand, English and Welsh schools are self-managing. This has created some difficulties for local educational authorities (LEAs) in terms of their ability to monitor provision for children with special educational needs.

The Audit Commission recommends more delegation by LEAs of special needs funding to schools, through per capita amounts (similar to New Zealand’s SEG funding), or special needs registers (either for all SEN students, or for those who would have had statutory assessment). It also recommends clustering of schools to ensure sufficient funding for students with very high needs, more partnership between each LEA and its schools, closer monitoring of school provision and use of special needs funding by LEAs, and early intervention.

However, it also points to the same kind of tensions in terms of quality, supply and accountability as those experienced in New Zealand, where schools are the prime unit of educational administration and funding. It acknowledges that

its recommendations, which are largely within the existing framework, cannot fundamentally address such tensions. It concludes by recommending a “high level independent review to consider options for future reform”.

In the United States, students with special needs must be individually assessed and meet criteria within the federal Individuals with Disabilities Education Act (IDEA) or state law. The IEPs have legal status. Parents who are dissatisfied with the assessment or with what results from the IEP may seek independent mediation or arbitration if their discussions with the school district are unsatisfactory. If that fails, they have recourse to legal action. Inconsistencies in assessment and response occur (Reschly, 1996). An analysis of special education legislation notes that:

Although Congress specified that the education provided to the child must be appropriate to his needs, interpreting this standard has proven to be difficult because of the diversity of the special education population (Martin, Martin & Terman, 1996, p. 34).

The National Research Council’s forthcoming report of its committee on Minority Students in Special and Gifted Education provides a careful review of available evidence and research. It observes that

“it can be quite difficult to distinguish internal child traits that require the ongoing support of special education from inadequate opportunity or contextual support for learning and behaviour”.

It recommends major changes to the current US policy approach, to enable it to provide more integrated support, and move from a “wait-to-fail” identification process to improving the quality of teaching and learning environments, so that fewer students develop special needs related to “learning and emotional disability” (National Research Council, forthcoming).

Barriers to providing effective special education services IN THE UNITED STATES were identified recently by the chair of the System Administration Task Force of the President’s Commission on Excellence in Special Education as “excessive paperwork, a focus on regulatory compliance rather than academic outcomes, and excessive litigation” (Acosta, 2002). There is

concern at the cost of litigation. These costs are not just financial. Mortenson (1998) notes “The majority of special education disputes are unique in the world of civil litigation because they usually involve parties who must maintain a significant relationship”. Legal action can take up to a year to resolve. There has therefore been increasing interest in mediation.

The proportion of special education funding spent on assessing students IS ALSO OF CONCERN (Reschly 1996). In their analysis of funding for special education, Parrish & Chambers (1996) provide a set of criteria which would provide more local flexibility than the current US systems, while retaining accountability to meet student needs, without individual labelling. They conclude that “traditional accountability mechanisms have been more concerned with the *legal* use of funds than whether they are being used *well*”. They recommend a shift to results-based accountability to improve the quality of education for students with special needs.

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¹ Wylie, C. (2000). *Picking up the pieces. Review of special education 2000 for the Ministers of Education*. Available through www.executive.govt.nz or www.minedu.govt.nz

² LSA Daniels & Ors vs Her Majesty's Attorney-General, in the High Court of New Zealand, Auckland Registry, M 1615-SW99, judgement made 3 April 2002.

³ The Audit Commission estimates an average cost of £2500 (around NZ \$8300, just over the average funding for support additional to .1 of a teacher for students verified as having high ORRS needs, and much higher than the verification costs for ORRS, which in 2000 were around NZ\$120, with audits costing NZ\$800-\$1500.