
Democracy and Due Process

The Case of Handicapped Education

John Earl Haynes

MINNESOTA IS A liberal state, and back in the days when states looked after themselves in the area of education of the handicapped, its programs were among the most generous in the nation. So when the federal government entered the field of special education in 1975 (to force laggard states to meet a reasonable standard, we were told), it seemed that Minnesota had nothing to fear.

We know better now. Twice in the last four years the federal Department of Education has threatened to sue the state of Minnesota for failing to reorganize its special education system along federally prescribed lines—this despite the fact that the federal contribution to the total cost of special education in the state is less than 5 percent. Moreover, in only a few years, the changes Washington has imposed are undermining democratic control of education, taking policy decisions out of the hands of those who pay for the system and placing them in the hands of quasi-judicial officials.

Minnesota's striking case study in social reform through regulation ends with faint signs of a new approach under the Reagan administration. Whatever the outcome, it illustrates well the fundamental clash between democratic control of public services and the "judicial model" of public administration promoted by social reformers in the last decade.

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Early Misgivings

The possibility that the Education of All Handicapped Children Act (Public Law 94-142) might mesh imperfectly with Minnesota's progressive law was already causing concern when the bill was passed in late November 1975. Questions were raised—and emphatic assurances given. In view of what happened later, the sequence of events deserves a closer look.

Within days of the bill's enactment, aides to Representative Martin O. Sabo (a Democrat who was then speaker of the Minnesota House of Representatives) spotted a number of provisions that seemed likely to have adverse effects on Minnesota's special education program. But their harshest criticism of the new statute fell on its due process provision. This is the portion of the statute that outlines what parents can do if they are not satisfied with the program a school offers to their handicapped child. When parents and school disagree, it says,

the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State education agency or by the local education agency or intermediate education agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child. [20 U.S.C. 1415(b)(2)]

Sabo's aides charged that this provision preempted "any state or local decision-making on the implementation of due process in the placement of handicapped children" (memo to Sabo, December 16, 1975).^{*} To be sure, Minnesota law already provided recourse for dissatisfied parents, and its system of hearings held by local school boards (whose members are *not* agency employees) seemed to meet the requirements of P.L. 94-142. What concerned Speaker Sabo and his aides was that the vague wording of the federal statute might pave the way for a challenge to the state and local due process procedures.

Under Minnesota law, locally elected school boards have long been the most important locus of authority over education policy, for handicapped and nonhandicapped children alike. These boards share authority with state law and the state commissioner of education, but theirs is the central role. Thus, until Washington rewrote state law, when parents of a handicapped child were dissatisfied with the program recommended by a school district's professional staff, an appeal would be heard (at the option of the school board) either by the board itself or by a person it designated, with the board retaining the right to review the decision in the latter case. Parents could appeal this decision in turn to the state's commissioner of education. To Sabo, it seemed worth making sure that the new federal law would pose no threat to the local boards' role in settling disputes.

Sabo contacted Congressman Albert Quie on the matter. Quie, a Minnesota Republican, was a leading congressional authority on education and a member of the final conference committee that had written P.L. 94-142. At Quie's suggestion Sabo sent a copy of his aides' analysis to Martin L. LaVor, a senior staffer on the Education and Labor Committee of the U.S. House of Representatives and a principal technical draftsman of P.L. 94-142. LaVor brushed aside the aides' charge that the statute's due process provision preempted state or local authority (letter from LaVor to Sabo's aides, February 10, 1976):

This charge can only be characterized as an absolute classic in the museum of rhetoric, namely, a very large accusation standing on the frail shoulders of a pittance of substantiating evidence. In point of fact, one of the notable distinctions between the procedur-

al safeguard requirements of this law (P.L. 94-142) and the prior P.L. 93-380 is that greater attention was given to ensuring maximum flexibility in order to conform to *varying due process* procedures among the states [emphasis in the original].

The declaration that P.L. 94-142 allowed for "maximum flexibility" in due process procedures was, of course, reassuring to Minnesota lawmakers.^{**}

The Birth of the "Impartial Hearing Officer"

On August 23, 1977, the federal Office of Education (which became the Department of Education in late 1979) issued a set of regulations implementing the law. One of the regulations provided that when parents request a hearing, it "must be conducted by the State education agency or the public agency directly responsible for the education of the child, as determined under State statute, State regulation, or a written policy of the State education agency." Another defined a local public agency to include a public board of education. Both provisions seemed consistent with Minnesota law.

In still another regulation, however, there appeared a person not found in the statute passed by Congress. This regulation, entitled "Impartial Hearing Officer," stated that a hearing may not be conducted:

- (1) By a person who is an employee of a public agency which is involved in the education or care of the child, or
- (2) By a person having a personal or professional interest which would conflict with his or her objectivity in the hearing.

The text went on to require school boards to pay for the services of these hearing officers (presumably without violating the statutory prohibition on using employees to conduct hearings).

This provision was a significant departure, for it did more than implement the requirement

^{*}All cited source material is in the author's possession.

^{**}About the same time, acting in my capacity as education adviser to Governor Wendell Anderson of Minnesota, I sent a critique of P.L. 94-142 to U.S. Senator Walter Mondale's staff, and received from that office similar assurances that any fears of inflexibility and arbitrary federal intervention in Minnesota's special education program were groundless.

of P.L. 94-142 for hearings on parent-school disagreements. First, it established an assumption that a hearing would be conducted by a single person. At a stroke, it ruled out Minnesota's provision that an entire school board could hear a complaint. Second, it disqualified from the hearing anyone with an undefined "personal or professional interest" not consistent with "objectivity." Federal education officials have subsequently used this requirement to eliminate any state hearing procedure that does not strictly conform to their judicial model of authority.

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It should be noted that the hearing officers decide all aspects of educational policy for a handicapped child, including the substance of the education program, the number and kinds of teachers and therapists to be made available, and the duration and intensity of instruction. Moreover, the federal Office of Education has insisted that, as part of their "impartiality," the hearing officers should make their decisions without regard to the financial resources of the school district, or the effect on other children (handicapped or not) of transferring resources to a particular program or child, or the educational philosophy of the voters as manifested in their choice of elected officials.

The regulations drastically changed the meaning of the due process section of P.L. 94-

142. That section states that a hearing "shall be conducted" by the state, local, or intermediate education agency involved in the particular dispute. But under the regulations, school districts do not "conduct" hearings; they merely *pay* for them. It is the impartial hearing officers who conduct and control the hearings, and schools are present only as defendants, engaged in litigation with accusers.

The First Clash

Flexibly interpreted, the regulations could still have accommodated Minnesota law. State statutes, after all, allowed a school board to designate an individual to hear a complaint, with the proviso that the board had the right to review the decision of its designee. But flexibility must have its limits. And in this case the fact that a school board could still designate one of its own members as hearing officer was too much. Early in 1979 officials of the federal Office of Education notified their counterparts in St. Paul that federal special education funds would be cut off and the state would be sued unless school board members were eliminated from any decision-making role in the education of a handicapped child once a parent had requested a hearing. The argument was that school board members could not be impartial in the federal sense.

After this development, all eight members of Minnesota's congressional delegation (including Sabo, now serving his first term in the House) sent a sternly worded protest to U.S. Commissioner of Education Ernest L. Boyer (March 22, 1979). It said of P.L. 94-142:

This law, whose good intentions we willingly grant, is surely one of the most badly drafted, mischievous acts ever inflicted on the children of Minnesota. It is a prime example of the damage poorly designed federal legislation can inflict on an exemplary state education system.

The letter went on to point out that Minnesota's special education program served 10 percent of the state's school-age children (compared with the national average of 8.3 percent) and cost the state over \$3,000 per child (also well above the national average).

Sabo followed up this letter with another to Chairman Paul Simon of the Subcommittee on Select Education, House Committee on Edu-

cation and Labor (April 30, 1979). It gave a detailed description of Minnesota's successful and established program and an account of the administrative difficulties caused by P.L. 94-142, including, but going well beyond, the matter of due process. Thus, Sabo argued, federal law not only imposed on the state an adversary system for resolving conflicts over programs; it also established an arbitrary numerical quota for handicapped students in each school district, promoted the use of arbitrary categorical labels for handicapped children, and required schools to establish a financial accounting system different from and in addition to the systems they al-

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ready used. Unlike Minnesota's special education system, the system created by P.L. 94-142 actually gave local officials a financial incentive to classify children as handicapped—that is, through its numerical goals, it rewarded districts for labeling children, not for educating them. Above all, however, Sabo emphasized the issue of control of special education by state and local elected officials.

The Office of Education was unmoved. Responding to the congressmen, Commissioner Boyer said that "every other state now follows the [federally prescribed] process," and repeated his demand that Minnesota conform (April 20, 1979). Led by PACER Center Inc. of Minneapolis (Parent Advocacy Coalition for Educational Rights), professional advocates for the handicapped also assailed the Minnesota congressional delegation. Parents of handicapped children were phoned and told that their congressmen were against educating the handicapped, and these parents in turn called the offices of the congressmen to denounce what they believed was an act of cruelty toward helpless children.

The PACER Center also prepared an elaborate rebuttal to the points raised by the congressmen. The rebuttal lavished praise on P.L.

94-142 and its implementation by the Office of Education, disparaged Minnesota's program of special education, and strongly attacked giving school board members any role, beyond raising revenues, in educational programs for handicapped children. The PACER Center particularly objected to allowing the elected school boards any control at all over the amount of money spent on special education. It is worth noting, parenthetically, that the PACER Center's principal source of funding for fiscal years 1978 and 1979 consisted of \$271,000 in discretionary grants from the federal Office of Education (Department of Education to Sabo, January 8, 1981).

Under a barrage of criticism for insensitivity toward the retarded, most of the Minnesota congressmen retreated. The others pressed on, only to have their case seriously weakened when Albert Quie, newly elected governor of Minnesota, failed to support the state's position. And when Quie, harried by budget matters, allowed the state's Department of Education to lobby state legislators on behalf of the federal demands, leaders in the state legislature who had planned to defy those demands gave way. In June 1979, the Minnesota legislature meekly revised its statutes on school governance to meet the federal requirements. It barred school boards from any role in disputes on the appropriate educational program for a handicapped child, except for paying the bill for the hearings and for any program an impartial hearing officer might order.

The Minnesota surrender completed what turned out to be a nationwide campaign by the Office (now Department) of Education on the

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issue. By now, all fifty states had barred elected school boards from hearing or resolving disputes over the educational programs of handicapped children. The entire area of special education—affecting 8 to 10 percent of American school students and a higher proportion of total

school expenditures—was largely removed from local democratic control.

The Second Clash

Minnesota had conceded the key point by eliminating elected officials from its hearing procedure; but its surrender was not complete enough for the U.S. Department of Education. The reason is that the state had attempted to soften the harshest aspects of the quasi-judicial system imposed from Washington by continuing a procedure known as conciliation.

The state had always regarded adversary procedures as an inappropriate way to settle disputes between school administrators and parents. State law provided, therefore, that an informal conciliation conference would precede any formal hearing on a dispute. In this conference the parties could explore various options without being forced into the accusatory and defensive postures typical of full-dress hearings; if they failed to reach an agreement, the matter then proceeded to the more formal procedure. When the Minnesota legislature agreed to exclude elected officials from formal hearings, it kept its provision for informal conciliation conferences.

Up to this point, the federal Department of Education, intent on eliminating elected officials from the hearings in Minnesota, had not raised any objection to the conciliation conferences. Indeed, in his April 1979 letter to Sabo, U.S. Commissioner of Education Ernest Boyer had said, "we do not oppose conciliation efforts and, in fact, think they might be very useful." He demanded only that Minnesota law require the conciliation conference to be held within two weeks of a parent's request and the formal hearing to follow within thirty days so that the conference could not be used to delay the formal hearing unreasonably. This timetable was implemented.

The conciliation process worked well. In the 1979-80 school year, for example, 175 disputes between parents and school professional staffs were brought to conciliation conferences, and of that number 168 were settled by mutual agreement and only 7 proceeded to formal hearings. By contrast, the less populous state of Connecticut held 118 hearings that year, while Massachusetts, a more populous state, held 343.

Minnesota's 7 hearings cost a total of \$32,284 in legal fees and other expenses, an average of \$4,612 each (reports the Education Committee of the Minnesota House of Representatives). At that rate, if all 175 disputes had gone to the hearing stage, the state would have had to spend almost \$800,000 more—money that in the event it was able to spend on services to children.

The success of the conciliation process seemed to surprise and infuriate the federal education bureaucracy. Its goal was to have special education policy set under a nationwide system of quasi-judicial hearings. And conciliation conferences—despite their low cost and seeming acceptability to parents, school professionals, school boards, and state legislators—did not fit into that mold. Early in 1981 the U.S. Department of Education ordered Minnesota to give up its process or face—once again—the loss of federal aid. The state Department of Education then tried to appease Washington by adopting new rules (1) providing that conciliation would not be used to delay formal hearings (an easy promise to make, since the system had never been used in that fashion) and (2) bypassing the conciliation process entirely in certain cases where it was deemed unlikely to succeed. The state educators also promised to ask the Minnesota legislature to get rid of its mandatory conciliation law altogether. In a February 27 letter, Washington accepted the state's offer, but with the understanding that a parent's participation "in any meeting" would fulfill the mandatory conciliation requirement. The latter interpretation, if taken literally, would define the process out of existence.

This time, however, the Minnesota legislature refused to give way as it had in 1979. When it acted in June 1981, it was not merely to ignore but actually to defy the federal demand by specifically endorsing the conciliation law and asking Washington to back down. And for good measure, it added a new section of law intended to prevent the state Department of Education from giving in to federal pressure: "The state board of education shall not adopt any provision in the state plan for special education which reduces the opportunities for parents and school districts to resolve their differences through conciliation." Federal officials have not said anything about giving up, but they have not renewed their attacks either, and the conciliation process has for the moment survived.

The Reagan administration has no current plans to revise P.L. 94-142. Instead, on August 4, 1982, the U.S. secretary of education (now Terrel Bell) proposed to thin out some of the highly prescriptive rules implementing the law—rules on “mainstreaming,” for example, and on the kinds of services that must be provided. The proposal did not, however, restore any significant authority to elected school board members or state officials, nor did it make any move to allow innovation or experimentation in the financial incentives used to encourage schools to provide special education services. Even so, a coalition of handicapped advocacy groups accused the Reagan administration of “an unprecedented attack on the rights of disabled persons.” On September 29, following a barrage of letters organized by advocacy groups and criticism from members of Congress, Secretary Bell withdrew the most important of his revisions. The advocacy groups are continuing in an effort to force withdrawal of the rest of the revisions.

Making Sense of the Attacks on Minnesota

Minnesota’s experience with federal regulation under P.L. 94-142 is baffling unless seen in the context of the great reform movement of the last two decades that, again and again, has replaced democratic means of shaping public policy with structures modeled on the judiciary.

Briefly, it all stems from the problem of how best to protect minorities. The reformers who brought about the explosion of social programs in the 1960s and 1970s saw themselves as advocates for the deprived—that is, minorities needing protection from an oppressive majority. What they were asking of government was that it implement the “rights” of these deprived groups, not that it carry out the will of the majority. This meant reducing the power of elected officials, who are (and are meant to be) highly responsive to majority sentiment in the American democratic system. One means of reducing that power has been to reduce the authority of localities and states and expand that of the federal government. Federal authority is not in itself undemocratic, of course: The President and the members of Congress are elected by the people. But they face massive demands on their time. The size and diversity of the na-

tion, too, make it difficult for them to supervise the detail of broad programs. Consequently, federal authority tends to be delegated—to bureaucracies, mostly—and the influence of majority opinion over public policy is thereby diluted.

Social reformers have thus preferred administrative to popular authority. But their goals have gone beyond the mere setting of policy by a central bureaucracy. To remove the threat that elected officials might someday gain control of the administrative apparatus, they have sought to shift authority over the bureaucracy itself from elected representatives to quasi-judicial officials. This attempt may reflect reformist enthusiasm for judicial activism in general. In the last three decades, particularly at the federal level, judges have found positive programmatic mandates in the Constitution and have proceeded to order detailed remedies. Courts have increasingly named special “masters” to take over powers once held by elected officials, and have compelled elected officials to spend public revenues in particular ways—all on top of a vast expansion of judges’ traditional right to void laws passed by legislative bodies. Unfortunately for the reformers, there are only a limited number of judges, and some of them reject the activism; indeed, in the late 1970s the Supreme Court itself began to question activist assumptions.

Frustrated in some attempts to take authority from legislatures, reformers have increasingly lobbied Congress to delegate it voluntarily—and, more to the point, to give the federal bureaucracies new levers for influencing the activities of local and state governments. Their strategy has been to insert vague due process clauses in federal statutes and to enforce these clauses in ways that require the establishment of quasi-judicial structures to control the delivery of public services. From within these independent structures, the unelected officials interpret the rights of minorities—and, for that matter, majorities—as they see fit.

The story of special education in Minnesota should thus serve as a warning. For some are now calling on Congress to extend the judicial model to the education of all children—and they have supporters within the federal education bureaucracy. If they ever succeed, the special education experience will have helped prepare the way. ■