Policy Dialogue

Special Education: Viewpoints on the Massachusetts Situation

Following its publication in early 1994 of Special Education: Good Intentions Gone Awry by Edward Moscovitch, Pioneer Institute conducted two roundtable discussions further targeting the issue of special education in Massachusetts. The participants included leaders in public education, local and state government, and special education. Among the participants were the following:

-Mike Capuano, mayor, City of Somerville

-Perry Davis, superintendent, King Philip Regional School District

-Allan Osborne, assistant principal, Snug Harbor Community School, Quincy, Massachusetts

-Nick Paleologos, former chair, Massachusetts Legislative Joint Committee on Education, Arts and Humanities

-Fred Tirrell, superintendent, Needham School District

Pioneer presented the participants with a series questions concerning the current dynamics, underlying problems, and possible reforms of special education. Pioneer has reproduced excerpts from those sessions in the following pages with the permission of the participants.

Standard of Service

Pioneer Institute: How does the standard of service implicit in "maximum feasible benefit" affect educational opportunities for all Massachusetts children?

Nick Paleologos: Well, I come at it from the perspective of an ex-legislator. I don't think you can change the system unless you change the special education legislation, Chapter 766. To accomplish meaningful change, you don't need to look further than the four corners of the law itself. Until you change the words that are in the law, the systemic changes necessary to bring the system back under control won't happen. That language, "maximum extent feasible," more commonly known as maximum feasible benefit, has driven the costs of special education through the roof. The people with children in regular education can make a valid argument: Why shouldn't my child be entitled to the maximum feasible benefit, too? And they have a legitimate gripe.

I don't think we should get rid of Chapter 766, but I don't see how you can deliver regular education at the school level, let alone enriched regular education, as long as the standard of maximum feasible benefit stays for a certain group of kids. Any way you try to come at it, the local school system isn't going to be able to deliver high-quality regular education because those resources are being drained off to a separate and expensive system. This, to me, is the fundamental question: How do you change the special education entitlement in such a way as to free up resources at the local school level while at the same time preserving an adequate standard for the genuinely handicapped kids for whom the law was originally written?

It's tough to choose how to spend a million dollars. Are you going to spend a million dollars giving five kids very, very special services, and a thousand kids nothing, or vice versa. There has to be some standard. However, the existing standard, it seems to me, needs to be modified. When the legislature last looked at maximum feasible benefit, the thrust was to move in the direction of the federal law (P.L. 94-142), which stipulates a "free, appropriate public education" for special needs students. The federal law, which is utilized by most states, is based on Chapter 766, but doesn't go quite as far. The relatively excessive costs in Massachusetts in our view then, were, and are, a direct result of the maximum feasible benefit standard.

I know it's easy to say that changing to the federal standard of free, appropriate public education is not going to make a lot of difference, but it will. We're in the fix we're in because a few early court cases broadly interpreted the language. As soon as it's decided that free and appropriate doesn't mean the sky's the limit, the whole system will change. For the first year or so after the change, there will be lot of legal activity. But, once the big decision on the first challenge comes down, a new equilibrium will be established.

By changing the statute, schools would have more flexibility not only with the learning disabled, but with all students. The money that is currently spent on the elaborate procedure that has developed around the existing law could be rechanneled into educational improvement across the board.

Perry Davis: We've got federal standards, and we've got state standards. I think that some people in Massachusetts are led to believe that if we go to federal standards, we're not going to service children in special education. Well, 49 other states are doing it, and doing it well.

Ever since 766 passed, we've grappled with this maximum feasible benefit concept as a standard for procedure. And with maximum feasible benefit comes the interpretation that 99 percent isn't good enough. You've got to get 100 percent. The consequence, then, is no matter what you do in special education it's never good enough. Historically, there was greater balance in the interpretation because the original intent of Chapter 766 was to educate these children "in the least restrictive environment," which means with their regular education peers. Unfortunately, since the court case, David D. v. Dartmouth, that standard has been superseded by maximum feasible benefit. That's partly because parents don't always want the least restrictive environment. They often want a private or more restrictive environment. If I'm going to a lawyer and I want my child in a private placement, I don't want my lawyer to tell me "least restrictive environment." Not at $200 an hour.

We have to come to grips with what we can achieve with a special education child in the context of opportunities for all the children in a school district, both in regular and in special education classrooms. We've got to put the issue of maximum feasible benefit on the table. We've created a dinosaur here, and it's going to kill us all in education. I'm doing my budget now. I have 24 out-of-district placements at a cost of $505,000 for tuition and $135,000 for transportation. Not all of them belong in the placements that they're in. I think we could provide a program for them in our school. But under the existing regulations of programming, we aren't given the chance to do it.

I agree we can't remove the legal mandate for exactly the reasons Nick said. There will be a school district or finance committee somewhere in the Commonwealth that will deny education to a child in a wheelchair or some other child with a severe disability. Why? "Because we can't afford it. We'd love to do it, Mrs. Smith, but we can't afford it, we don't want to raise our taxes, nobody will vote for an override." But I do think we'd better look at how we can change the system so that it provides a better level of service in the regular classroom for those children.

Maybe people in the legislative and the executive branches should sit down and read the federal laws and regulations, and have a substantive discussion about whether that can be implemented in Massachusetts. It's working in 49 other states. I don't think it's lowering the standard. I think that position has been put forward as a self-serving argument for a selected minority of special needs children, and quite frankly, it doesn't represent the majority of special needs children being served in our public schools.

Fred Tirrell: Much of our current problem stems from the fact that both the referral system and appeals process are tipped dramatically in favor of the parents, partly because of the maximum feasible benefit standard. It's my understanding that we're the only state in the country that has maximum feasible benefit as our standard of service, rather than free and appropriate education. The reality is that not all that many decisions are actually reached in the appeals process. The majority of the time it is the anticipation of what will happen in front of a judge, rather than the actual outcome of an appeal that drives the process. The bottom line is that it's less costly and less time-consuming to negotiate a settlement.

Parents are now very savvy, and they have very savvy lawyers. They will come in, and we will have to propose a Individualized Education Plan (IEP). They will then counter with a plan of their own, which, more often than not, will be significantly more extensive. All it requires is one change in our plan by the hearing officer, and the school district becomes responsible for their attorney's fees, their witness fees, and the final plan. We have had cases in which--and this is the absolute truth--multiple physicians have accompanied the attorneys to deal with a particular placement. I sit there with our own attorney and our Director of Special Education--and with maximum feasible benefit, we have no chance. No chance.

These issues have to be examined. There's an old expression I'm sure you've all heard, if you do what you did, you get what you got. The reality is we're talking 20, 22 years of special education, what are we doing different now? Has the law really improved our ability to deliver both regular or special education?

Eligibility

Pioneer Institute: How has Massachusetts' approach to eligibility affected the state's special education system, and how could it be improved?

Allan Osborne: Currently in Massachusetts, the focal point of eligibility criteria for special education is a student's failure to progress in the regular classroom, even though the law does say that a student must have some kind of disability. If a child falls behind, a principal then has an affirmative obligation to refer that student to the special education system. The federal law stipulates that a child have a verifiable disability that falls within a specific, predetermined category in order to be eligible for referral. The vast majority of other states use this method in determining the eligibility of a student for referral to special education, and Massachusetts should consider embracing this approach as well.

I think this reform would have a significant impact. We would see a drastic reduction in the LD or the Learning Disabled population. This is one category in which the Commonwealth is way out of line, in terms of population size, compared to the rest of the states. In Massachusetts we don't define a child's handicap. Although a child has to have a disability to get special services, we set no clear parameters on what constitutes a disability. This presents particularly difficult situations with learning or neurological problems. This is the major issue: Until we start to define categorically the types of disabilities, Massachusetts will continue to have problems with the size and costs of its special education system.

One scenario often arises as a result of this ambiguity. I work in a low-income area and don't run into this situation often, but a colleague who works in a middle-class school district tells me that it's almost the fad today to have a child who is learning disabled. If a parent comes in for a report card conference and the teacher says, "Johnny isn't motivated, he doesn't do his homework," the parent's typical response is, "I want an evaluation." Parents want that label of special needs, because it absolves them to a certain extent.

Certainly the parents aren't totally to blame. You have two parents, they're both working, they're trying to make ends meet. They don't want to deal with Johnny who's not doing his homework. Their escape route is to have Johnny labeled "special needs." If he gets special help from tutors in separate classes, then the parents don't have a problem anymore. The teachers stop calling and complaining about Johnny not getting his work done.

In addition to the vagueness of the eligibility criteria, I think there is a problem with who is conducting the evaluations. Today, we have more private evaluators than ever before. I think part of the problem is the lack of consistent standards for personnel executing an "independent" evaluation. This has to be addressed in concert with the eligibility issue. I'm reminded of a conference I attended several years ago on neurology and neurological problems. Dr. Mel Levine, the neurologist, at the time I think he was with Children's Hospital, made an interesting observation. He said that Massachusetts has more neurologically impaired children per capita than any other state. He went on to say that, coincidentally, we have more neurologists per capita than any other state as well.

Fred Tirrell: I think Allan makes an excellent point about evaluators. Parents have a legal right to an independent evaluation, and they quite frequently go to hospitals to have them done by hospital people, not school people. Not surprisingly, they look at things as hospital people. They order tests and more tests, and they order therapies, and so forth and so on. For instance, you could have a child in your school who stutters, but that would have absolutely no impact on this child's ability to do math or to do science or to do reading. However, the evaluation says, "This child has a stuttering problem and needs a program for stuttering from the Carroll School." This is exactly the kind of thing that has contributed to the special education system's getting out of control.

As the educational authorities in our districts, we have very little control over this separate system. In Needham, an upper middle-class community, our special education population went from 12 percent to 17 percent of the total school population in the last five or six years. To say that 17 percent of our school population needs special education services is indefensible. Moreover, every year for the last five years over 90 percent of the kids have taken the SAT test. This means we may have some kids who took the SAT that are on IEPs.

Some people might suggest that it shouldn't matter how you are evaluated or whether you have a categorically defined disability. If you need extra help you should get extra help. This is a valid point. However, I still believe that we need to go back to who should be doing identification. I think eligibility based on categorization administered by school personnel, rather than hospital people, would make a big difference in the determination of strategies to remediate these educational problems. I think it would make a major difference.

We have limited resources and a changing school population. As educators and administrators, we will have to rethink fundamentally our strategy for delivering education. Simply cutting more administrators, more secretaries, more programs, and charging more fees will not be sufficient. We have to look at the issue differently: rather than broad eligibility to a separate system, we need to deal more effectively on-site with all students. In Needham, we've tried a model that we call the PLC, or personalized learning

center. We take children who are having specific difficulties and assign them to the PLC for a set period of time. There is no team and no IEP, none of that stuff. Massachusetts needs more of this type of innovation. What we've got is not good right now; it's hurting children, it's hurting school systems. And it will only get worse as time goes on.

Perry Davis: I certainly agree that we have a definition problem. As Allan said, Massachusetts doesn't clearly define handicapping conditions, and therefore we are, from the outset, in a very expansive discussion with parents about a child's educational disability. Schools are now being told that if the child has the slightest emotional problem, it becomes an educational problem. If the child has gone to court and a well-intentioned juvenile probation officer says to the parent, "You can't control him, well, go see your school, and ask about special education service." All of a sudden, a child who stole something is being referred to the school because the probation officer says, "Go see the principal of the school, Johnny's got a problem."

My fundamental issue is lack of specificity about what is a handicapping condition. An evaluation team has the responsibility to evaluate a child educationally. If a child does have a handicap, or disability that is education-based, then the school has a responsibility to serve that child. This can be particularly effective with new entrants, a pre-school population, or children that have never been identified as special education. However, this process can break down at the high school level. All of a sudden, Johnny is not doing his homework, and the parent wants him evaluated for special education. As an educator you say, "Wait a minute. I've got nine years of history where this child has been successful at school." But by then the legal process has been set in motion, and special education services are being given to Johnny for a homework problem.

We also have to reconsider some of the hard realities about children with disabilities. Children who have a limitation do in fact have less potential to achieve in some areas. A parent of a child with an IQ in the 70s insisting that his boy be prepared to go to a four-year college, that parent has unrealistic goals. And yet that parent is holding the school system fully accountable for achieving them. No matter how you talk to that parent, private school, public school, it doesn't matter, he doesn't hear it. We've got a law that speaks to handicapping conditions, but we have never faced the fact that people with disabilities sometimes do have limitations.

Educators can work with parents. However, we have to understand and distinguish between the educational and the medical implications of a particular handicap. Right now schools are dealing with the issue of attention deficit disorder. I believe it's a legitimate disability. However, the reality is that many children who have that disability can be adequately treated without ever being on an IEP. I have a student who has Krohn's Disease and has trouble coming to school because of this incredible intestinal disease, but doesn't have an IEP. In and of itself, this problem doesn't qualify that individual for special education assistance. When that person is not able to come to school, we provide a tutor. But when that child comes back to school, the child is able to function, on medication, in a regime of therapy prescribed by physicians. We need to find a way to get school systems back to focusing on providing educational solutions for all children.

Appeals & Program Management

Pioneer Institute: How have program requirements and the appeals process affected the ability of school districts to develop solutions and provide services for special needs children?

Perry Davis: Having been in education for over 23 years, most of that time as a special education teacher and administrator, I believe that the concept of maximum extent feasible is an ideal. Everybody applauded it when Chapter 766 was passed, but now the courts have defined it in such a way that, as Fred said, school districts will almost always lose judicial rulings.

However, the appeals process, in and of itself, isn't the problem. I think any law in this field--and 94-142 is a civil rights law--needs to a have process granting some recourse when officials are not doing what the law says. I think the issue is that the law is ill-defined, and so we have this open-ended problem that we can't get a handle on. It's hard for a school administrator to work with parents and children in special education to develop effective programs when we must deal with this kind of craziness.

I'll give you an example. There is a student in my district who's deaf. We've hired a full-time hearing interpreter for her to be in every class. The student comes to school only about 40 percent of the time at this point. Her parent is now saying, "She's not coming to school anymore because I want her to go to a school for the deaf, and you're going to pay for it; so don't call me until you make those changes in her IEP." And, if I call the Massachusetts Department of Education they'll say, "Well, she's got a case because

the courts have said she has a right to be among like peers." I only have one hearing-impaired child in my school. But I also have a federal directive called inclusion, which says children should be educated with their classmates in a regular education setting.

See, that's the craziness of it at this point. We are willing to spend the money, $18,000 to $20,000 for this student, to have a one-on-one interpreter in every class. Teachers are willing to teach her in every class and work with her. But the parent is saying, "No, I think she ought to go to this school for the deaf." And the department's position is, "Well, you know, like peers."

Part of our trouble is a systems problem. In order to effect a real change, it has to take place in the classroom. We have to empower our classroom teachers to understand that they can work with a broader spectrum of students. When students are outside a particular range, say gifted or special needs, too often the teacher says, "I can't teach them, you've got to come up with another program to deal with that population." I think we have to work with our teachers and get them to realize that with adequate assistance they can educate those students.

In each building, the principal, as the instructional leader of that building, has to be able to allocate resources effectively. If Mrs. Jones is teaching first grade, and three or four of her students are really having trouble reading, can we successfully support her? Can we provide an aide to assist her in managing divided reading groups? As a superintendent, when people come to me I want to be able to say, "Let's talk about how we can reallocate some resources." I'd rather hire a $15,000 aide to address two or three students' problems in class than have those three kids referred for evaluation, put on IEPs, and placed into more restrictive placements. Unfortunately, like most school districts, we don't often have that flexibility.

I think the crux of the issue is getting parents to look at alternatives to special education that will help. Fundamentally parents just want the right things for their children; they don't really care if it's special education or regular education. They just want to know that somebody is helping their son or daughter in the learning environment.

Allan Osborne: There is a clear difference in the special education case law between those states that have the federal standard, or something like it, and Massachusetts. I believe that today hearing officers and judges interpret free and appropriate to be fundamentally different than maximum feasible benefit. Massachusetts problems worsened in this respect in the mid-80s. Historically, those two standards were seen as essentially similar. In fact, hearing officers in Massachusetts used to start proceedings by stating the federal, not the state standard. However, a case arose in Dartmouth in 1985, David D. v. Dartmouth, that changed all that. David was a 17 year old with Down's Syndrome who had received special education services for many years. Despite academic progress, he began to develop social and behavioral problems and his parents claimed that the school district's special education plan had failed him. They wanted a residential placement.

Upon appeal, a federal court ruled that the Massachusetts law was more stringent and that the state standards should be incorporated into federal law when ruling on the appropriateness of an IEP in Massachusetts. Even though the student was making academic progress in the school district's program, the court held for the parents and the school district was required to provide an expensive residential program.

If the court had decided on the basis of the federal rather than the Massachusetts standard, I think the outcome would have been much different. Since the school districtÕs program was providing educational benefit, a relatively inexpensive special education program within the public schools would have sufficed. I know that in another state a judge recently held that a student was not entitled to a "Cadillac" in terms of an educational program, but to a serviceable "Chevrolet." In Massachusetts, after David D., the student would have received a "Mercedes."

A lot of school districts are feeling pressed between an unrealistic standard of service and the desire to provide less restrictive placements. School districts realize that they've got to make some changes. On the other hand, you've got parents threatening lawsuits if they do it. Many educators feel caught between a rock and a hard place, particularly when the prevailing sentiment is that if you go to a hearing, you're going to lose.

I agree that educators want to innovate for the benefit of the students. We started a program in Quincy, similar to what Fred's got in Needham, which we call Teacher Assistance Teams (TAT). Again, it is essentially a pre-referral process. When a child is having difficulty in the classroom, we recruit teachers from regular education to assist the teacher whose student is having the problem and solve it within the framework of regular education. We've found that this has postponed some evaluations; we're not getting as many this early in the year. Nevertheless, we have run into an unexpected problem: we're getting more parent referrals now. Our suspicion is that teachers avoid the TAT process by putting the bug in a

parent's ear to refer the child. You can't force the parent to go through the TAT process. If they ask for the evaluation, you have to honor the request.
The question then becomes, "How do we, as educators, encourage parents to participate in these alternative programs?" I think we need to give parents specific parameters and timelines. Parents would be more confident if we said, "Look, we're going to try this for x number of days and then evaluate the results." The problems arise if you just say, "Well, let's try this for a while." The parents go away feeling shaky. If we can give them a definite plan of what we're going to do, I think we can convince them. But we need some breathing space in which to make this work.
Perhaps the solution would be for school systems to have a set of pre-approved programs that the parents would have to try for 90 days before they could initiate a referral. I think whether we succeed or not depends on how much confidence they have in us as a school district. If we have their confidence, they'll go along with what we say. If they're already ticked off at us, it doesn't matter what we say.
Mike Capuano: Twenty percent of Somerville's school budget is going to special education, and this figure is rising rapidly. However, I think it's a mistake to frame the solutions to this problem simply in terms of resources. Most people think that enough money is already being spent on education. That being the case, asking for more resources is going to be seen as just another way to give everybody raises or expand bureaucracy.
To a certain extent, I believe this is a management issue. Somerville went through increases in our special education population years ago; recently it has leveled off or fallen slightly. That's the result of a conscientious effort on our part to communicate with teachers and get control of the special education department, to make sure that it isn't used merely for disciplinary circumstances. Three or four years ago, we fired our special education director. We brought in her assistant and gave him direct leadership, but expected absolute accountability. We explained to him that one of the reasons that his predecessor was gone was that our special education growth was going through the roof. We couldn't afford it. Nobody's looking to hurt the children who need it, but you've got to emphasize to people throughout the system that you can no longer just take a kid who's a discipline problem and shift him into special education. The point is we sparked this change internally, but this shouldn't have to happen one town at a time.
I also believe that cities and towns need to be more inventive in helping children learn. In Somerville, we're always looking to offer these kids a better education. We are working with other communities to form collaboratives or cooperative efforts to provide a more effective service. We're currently working with Arlington to help special needs children; we do one part of it, and they do another. As a result, a child actually stays in the community instead of spending two hours on the bus every day. We hope that by being in the community the child has a better chance of being worked back into the regular education system. I can't guarantee this is going to be a money saver. We believe this is the right thing to do, and it also happens to make administrative sense. In fact, when everything is said and done, with the union contracts, negotiation rules, state regulations, and everything else, this is probably going to cost as much as the private placements.
I can't leave a discussion of special education without mentioning the flip side of the disciplinary issue. Everybody says that the issues of discipline and disciplinary actions have been dealt with in the 1993 Education Reform Act. I can tell you that nothing could be further from the truth. What people don't understand is the reform doesn't apply to a child who is in special education.
Somerville has had the strongest expulsion policy in the state for four years now. Anybody over the age of 16 who walks onto school property with a weapon of any kind gets expelled. No discussions, no comments, no appeals. Unless, of course, they're special education. And if they're special education, we can't do it.
We had a perfect example of this in a kid who was a point one. His IEP said that he had a problem with, of all things, authority figures. He didn't listen to teachers, didn't listen to the cops, didn't listen to anybody. One day, he carried a knife to school, brandished it, and threatened another student with it. Yet we could not expel him, because he's a special education child with a problem with authority. That's ludicrous. It completely undermines any support there is out there for special education. I don't know if it's a state law or a federal law or both. But whatever it is, somebody has got to bring the issue up and change it.
Fred Tirrell: In my opinion, Massachusetts has to loosen up a little bit on some of these regulations governing classroom structure. As educators, we should have the flexibility to develop alternative methods of providing these services, perhaps even through the use of technology. The whole system is so labor intensive, including requirements about people to supervise other people. The encouraging thing is that, despite this, people are still very dedicated to delivering the best for students.
I just wonder if, in the interest of moving forward and trying new things, some of the regulations could simply be suspended. Let me give you an example. I know we get to a point when we have so many kids

in a special education class that we have to have an aide. It's just automatic. I think the number is eight. We have eight kids, for the ninth child I have to go out and hire somebody. Now I might be better off hiring somebody for just one child if the child has a certain type of disability. But just because there are already eight?

We can't be such slaves to process. Our PLC program is a good example. This is essentially a pre-referral program, although I prefer to think of it as a referral-avoidance program. The question is, to what extent might we be able to obtain waivers from the existing procedural requirements to generate these kinds of innovations? Our success might suggest that a sufficiently enriched classroom or some other alternative can avoid most of the point one and point two referrals. My hope is that this type of management initiative can minimize the number of children that enter the special education system.

Principles of Reform

1) The "maximum feasible benefit" standard of service for special needs children should be modified so that all children, both in regular and special education, enjoy a more equitable distribution of educational resources.
2) Special education eligibility should be based on clearly defined disability categories similar to those in the federal special education law (P.L. 94-142).
3) Superintendents and building principals should be given more responsibility and authority for directing resources and delivering educational services to all of their students, including those with special needs.
4) The role of appeals should be to evaluate how fairly a school district has applied the required process rather than the specific composition of an IEP.

Definitions

"maximum feasible benefit:" Under Chapter 766, this is the legal standard of service for the provision of educational and related services to which children classified as special needs are entitled at public expense.
Federal Law 94-142: Passed in 1975, this special education law is broadly similar to Chapter 766, although with significant differences regarding eligibility and parental rights.
"free, appropriate public education:" Under federal law 94-142, this is the legal standard of service for the provision of educational and related services to which children classified as special needs are entitled at public expense.
prototypes: The spectrum of alternatives that describes the degree to which a special needs child is placed in a regular education setting. The categories are identified by sections in the regulations, but are often referred to in an abbreviated form (e.g., 502.2, as "point two"). 502.1: solely in regular classrooms; 502.2: up to 25% of time outside regular classrooms; 502.3: 25% to 60% of time outside regular classrooms; 502.4: substantially outside regular classrooms, but within regular school building; 502.5: private day school; 502.6: private residential school.

Pioneer Institute Policy Dialogues are a series of publications that offer perspectives on specific policy issues. Dialogues are the reproduced remarks of speakers and participants at Pioneer conferences, forums, and roundtables, and are published with their permission. Nothing written here is to be construed as necessarily reflecting the views of Pioneer Institute or as an attempt on its behalf to aid or hinder the passage of any legislation.