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# Eight Powerful National Statutes Designed To Evoke Powerful Teaching and Learning: The Uses of the Law in Transforming the Schools

Thomas K. Gilhool

*Not only are there powerful pedagogies, but there are eight national statutes which require us to know them, to choose among and between them, and to put them to use in every school to the benefit of every child. This article first sets out the statutes so the reader may know what they say. Second, it sets out by way of illustration the powerful pedagogies and the other powerful variables in successful schools and shows how the statutes speak to their use. Third, it details the traditions of the common law and the Constitution foursquare into the midst of which Madison's national legislature has now put the eight states-of-the-art statutes. The article seeks to arm the reader — particularly teachers, principals, families, and citizen and corporate school reformers — sufficiently in the mandates of national school law to use them to transform America's schools.*

## The Statutory Invitation

To the great surprise, probably, of most American families, teachers, principals, superintendents, board members, and the large and richly attentive, growing set of citizen and corporate reformers, eight great enactments of the national legislature require the schools everywhere in this country to *consider* thoughtfully and knowledgeably, to *decide* whether to implement or not, and, very likely, to *adopt and implement* the Outcomes-Driven Developmental Model which has made the schools of Johnson City, New York, and of so many other places sing and soar for every child in them.

These powerful national enactments are: Chapter One of the

Elementary and Secondary Education Act of 1965, the Education of All Handicapped Children Act of 1975, the Bilingual Education Act, the Migrant Education Act, the Head Start Act, the Early Education of All Handicapped Children Act of 1986, the Perkins Vocational and Applied Technology Education Act of 1990, and the National Diffusion Network Act.

Chapter One which now sends six billion federal dollars into the schools annually says plainly and clearly:

"A local educational agency may use funds received under this part *only* for programs and projects which are *designed to meet the ... educational needs of educationally deprived children ...*

"[Each] application shall pro-

vide assurance that the programs and projects described are of sufficient size, scope, and quality to give reasonable promise of substantial progress toward meeting the ... educational needs of the children ..."

The Education of All Handicapped Children Act says,

"Each [state and local] plan shall set forth, consistent with the purposes of this chapter, a description of programs and procedures for (A) the development and implementation of a comprehensive system of personnel development which shall include the in-service training of general and special educational instructional and support personnel ..., and effective procedures for acquiring and disseminating to teachers

and administrators ... significant information derived from educational research, demonstration and similar projects, and (B) *adopting*, where appropriate, *promising educational practices* and materials develop[ed] through such projects.”

Similarly, the other statutes say,

“Funds made available under a grant under this part shall be used to provide vocational education in programs that (A) are of such size, scope, and quality as to be effective; (B) integrate academic and vocational education in such programs through coherent sequences of courses so that students achieve both academic and occupational competencies ...” (The Carl D. Perkins Vocational and Applied Technology Act of 1990.)

“The programs assisted under this subchapter include programs in elementary and secondary schools as well as related preschool and adult programs which are designed to meet the educational needs of individuals of limited English proficiency, with particular attention to children having the greatest need for such programs. Such programs shall be designed to enable students to achieve full competence in English and to meet school grade-promotion and graduation requirements.” (The Bilingual Education Act.)

“The Secretary may approve an application submitted under ... this title only upon a deter-

mination ... that payments will be used for programs and projects ... which are designed to meet the special educational needs of migratory children of migratory agricultural workers ... or of migratory fisherman ...” (The Migrant Education Act.)

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“The Secretary may, upon application by an agency which is eligible for designation as a Head Start agency ..., provide financial assistance to such agency for the planning, conduct, administration, and evaluation of a Head Start program focused primarily upon children from low-income families who have not reached the age of compulsory school attendance which (1) will provide such comprehensive health, nutritional, educational, social, and other ser-

vices as will aid the children to attain their full potential; and (2) will provide for direct participation of the parents of such children in the development, conduct, and overall program direction at the local level.” (The Head Start Act.)

“[T]he Secretary shall make a grant to any State which ... has a State plan approved under section 1413 [including the requirement for *adopting promising educational practices* quoted above at n. 3] of this title which includes policies and procedures that assure the availability under the State law and practice of such State of a free appropriate public education for all handicapped children aged three to five, inclusive. ...

“The Secretary may arrange by contract, grant, or cooperative agreement with appropriate public agencies and private nonprofit organizations, for the development and operation of experimental, demonstration, and outreach preschool and early intervention programs for handicapped children which ... (D) offer training about exemplary models and practices to State and local personnel who provide services to handicapped children from birth through age 8, and (E) support the adoption of exemplary models and practices in States and local communities.” (The Early Education of Handicapped Children Act.)

The National Diffusion Network Act says,

“The National Diffusion Net-

work shall be designed to improve the quality of education through the implementation of promising and validated innovations and improvements in educational programs, products, and practices, and through the provision of training, consultation, and related assistance services.

**Certainly, continuing to repeat again and again mindlessly, or even soulfully, what has not worked is barred.**

"[T]he Secretary shall

"(1) acquaint persons responsible for the operation of elementary, secondary, and postsecondary schools with information about exemplary education programs, products, practices, and services;

"(2) assist such persons in implementing programs, products, and practices which such persons determine may improve the quality of education in the schools for which they are responsible, by providing materials, initial training, and ongoing implementation assistance;

"(3) ensure that all such activities, programs, products, and practices are subjected to rigorous evaluation with respect to their effectiveness and their capacity for implementation;

"(4) provide program development assistance toward the

recognition, dissemination, and implementation of promising practices that hold the potential for answering critical needs and that have achieved credibility because of their effective use in schools; and

"(5) ensure that a substantial percentage of the innovations disseminated represent significant changes in practice for schools and teachers."

Plainly there is a persistent and informed intelligence working across these statutes. The eight come to a common point. They require pervasively that schools people come to know quite fully, even encyclopedically, what sets of practices do yield substantial progress and thoughtfully to choose between and among them—a duty, in a phrase, to know and to use the state(s) of the art.

Flying by the seat of the pants is barred. Certainly, continuing to repeat again and again mindlessly, or even soulfully, what has not worked is barred. By these enactments, the national legislature has, long since, directed a radical transformation in the standard pace of school change, namely that everything is for tomorrow, except the killing—the day-by-day destruction of talented, spirited, lovely children. Meandering is no longer permitted.

Madison predicted in Federalist No. 51 "that in the extended republic of the United States, and among the great variety of interests, parties and factions which it embraces, a coalition of a majority of the whole society could seldom take place on any other principles

than those of justice and the general good."<sup>10</sup>

During the 25 years since 1965, out of the hurly-burly and the rough and tumble, Madison's "national legislature" (Federalist No. 10), in not just one but in eight separate statutes—in more than three score enactments, given the frequency with which each statute has been revisited, revised, and reaffirmed—has established an open-textured, authoritative, and binding invitation to know, to choose among, and to use in the schools only the states of the art.

The national legislature has found that there are states of the art: promising practices as contrasted to unpromising, designs capable of yielding substantial progress, as contrasted to minuscule, or mean, or no progress or even regress. The national legislature has authoritatively suggested that we should get

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to know them and, in whatever combinations or variations reason (i.e., a thoughtful, purposive reflection upon experience) may support, choose to use them. In a phrase, the Congress has created a duty upon all schools people to know and to use the state of the art, or

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more accurately, the states of the art.<sup>11</sup>

So there it is. If, as a matter of just plain, good common sense, we did (or if we have to, as a matter of enforceable legal duty) take seriously this open-textured, authoritative, and binding invitation contoured in the eight statutes, to know and to use the *states-of-the-art*, then we would — *all* schools interested people — consider and very likely choose to implement the Outcomes-Driven Developmental Model.

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***Do not the eight statutes appear to require not only consideration of ODDM, but its full adoption and use by every district in the country?***

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The Outcomes-Driven Developmental Model (ODDM) is one powerful set of systems for the organization, support, and evocation of effective teaching and learning. In Johnson City, year after changing year, ODDM has taken children, overwhelmingly from families of low income, to the top of the curriculum. Eighty percent plus graduate with Regents diplomas (as against a mid-40 percent average statewide), nearly none dropping out. Not the usual pattern of urban schools, children's talents high on entry by all standard measures but sharply declining with each passing year in school; but the opposite, a sharp path up-

ward across the grades.

Clarity and constancy of purpose; purposive behavior and judgment on all of the many criss-crossing dimensions of schooling; the constant, and constantly reexamined, use of systematic pedagogies (mastery learning, cooperative learning, computer-assisted instruction), of systematic disciplines (Glasser's is the discipline system of choice in Johnson City), of systematic reach to families, of developmentally sound early childhood education, the systematic integration of Chapter One and handicapped children. ODDM's synthesis (its open-ended, constantly revisited synthesis) of state-of-the-art systems in each of these dimensions of schooling has made it the sole district-wide system of systems validated for dissemination by the National Diffusion Network.<sup>12</sup>

Do not the eight statutes appear to require not only consideration of ODDM, but its full adoption and use by every district in the country? At least by every district not already performing at similarly high levels of outcome? At least by any such district as yet unable to make a reasonable showing that it has adopted some alternative, but nonetheless equally coherent system of systems, which "give(s) reasonable promise of substantial progress"?

But let's step back for a moment.

## **Hard Goods: The Missing Dimension of School Reform**

Current and important school re-

form conversation is conducted in significant part in terms of restructuring: school site-based management, teacher empowerment, family empowerment, principaled leadership, collegial decision-making, professional autonomy, school choice, and such like. Such conversation probes important issues of power, initiative, and responsibility. It focuses upon transforming hierarchy-ridden schools into outcomes-driven schools. And such conversation about changes in the *forms*

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of school governance can itself take great strength from the provisions of the eight statutes.<sup>13</sup>

But, in the end, and in the beginning, the importance of such hierarchy-breaking *forms* is *instrumental*. Such changes in power are important, not for their own sakes, but for the changes in the *content* of schooling which they bring, or fail to bring. Serious changes in power and responsibility as to the schools are a necessary but insufficient condition to the

transformation of schools. Each new form of governance under discussion is only as good, or as bad, as it is powerful in getting us to — in getting into schools — the hard goods, the variables which can directly evoke schools which sing and soar for each child in them.

**The Powerful Variables.** The most powerful variables in schooling — the hard goods — it seems to me are:

- early childhood education<sup>14</sup>
- class size<sup>15</sup>
- school size<sup>16</sup>
- the powerful pedagogies (and disciplines)
- reach by schools to families to engage them in school and at home in the teaching and learning of their children<sup>17</sup>
- gathering social services and social investment into and around the schools to support children and families in learning.<sup>18</sup>

As to each, there are states of the art. Each is plainly accommodated and evoked by the eight state-of-the-art statutes of the national legislature. The statutes invite attention to each of the powerful variables. The statutes accommodate each variable. If attended to seriously, the statutes will evoke and not require, whether as a consequence either of good sense, good common sense and good professional sense, or as a matter of enforceable legal responsibility) consideration of each of the powerful variables and the systematic, state-of-the-art use of each.

For example, Chapter One explicitly includes *early childhood education* in its non-exclusive listing of programs and projects for which expenditures are authorized, providing, of course, that each particular program or project is "designed to meet the educational

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needs of the children" and "gives reasonable promise of substantial progress." Chapter One says, "Such programs and projects may include preschool through secondary programs" as well as "the training of early childhood education professionals (including training in preparation for the implementation of programs and projects in subsequent school years)."<sup>19</sup> An "effective schools program," whose implementation is required in school-wide projects, "means school-based programs that may

encompass preschool through secondary school levels."<sup>20</sup> When a school chooses to do state-of-the-art early childhood education, the program is to be "designed and implemented in consultation with ... early childhood professionals."<sup>21</sup>

Nor are these express invitations limiting; continuing training and support, and materials, may be supported with Chapter One funds. One can even imagine an elementary school (or a middle school, even a high school) focusing all of its Chapter One resources on early childhood education, if it thoughtfully chose to draw its later grade students into cross-age tutoring (itself a powerful pedagogy) of the young children and if the reach-to-family practices present in any state-of-the-art early childhood program were extended also to the families of the older students (a whole family approach where families include children of early and later grade age).

As to *class size*, for example, Chapter One explicitly provides that "funds may be used in school-wide projects for ... activities to improve the instructional program ... such as reducing class size."<sup>22</sup> Similarly, for *school size*, Chapter One encompasses "the construction (and not just new construction but downsizing reconstruction — one building, several schools) of school facilities."

Apart from the express authorizations, of course, the overriding command by each statute of undertakings which are "designed to meet the educational needs of the children, which give reasonable promise of substantial progress,"

which "adopt promising education practices" brings these three powerful variables and the others, given the proof of their effectiveness, within the pale.

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As to reach by schools to families, Chapter One and indeed every one and all of the eight statutes are brilliantly articulate, even if unread and largely unimplemented and nearly never enforced. Chapter One, for example, says,

- "Congress finds that activities by schools to increase parental involvement are ... vital ..."
- "Toward that end, a local education agency may receive funds ... only if it implements

*programs ... for the involvement of parents [which] must be of sufficient size, scope and quality to give reasonable promise of substantial progress toward achieving the [following] goals:*

"(1) to inform parents of ... the specific instructional objectives and methods of the [child's educational] program; (2) to support parents ..., including training, ... to work with their children in the home to attain the instructional 'objectives' ... and to train parents and teachers to build a partnership between home and school... (5) to provide a comprehensive range of opportunities for parents to become informed, in a timely way about how the program will be designed, operated, and evaluated, allowing ... for parental participation [therein]."<sup>23</sup>

Thus, the statute authoritatively instructs the schools to reach to families to evoke a "home curriculum" as Herb Walberg puts it: as Japan systematically and some American schools do, choosing among state-of-the-art, demonstratedly effective ways to do so. And the statute bindingly instructs the schools to inform families of the great range of powerful pedagogies that a school must, with family participation, choose between and among and use when a school designs its teaching and learning program. The Congress — as if, just to be helpful, lest people may stop with reading the statute — thereupon recites in the statute a litany of ways and means to reach to families that reads like

a catalogue of the states of the art in doing so, to wit (in small part):

"parent resource centers, training and support... to make contact in the home, provision of school-to-home complementary curriculum and materials and assistance in implementing home-based education activities that reinforce classroom instruction and student motivation."<sup>24</sup>

Each of the eight schooling statutes, and a large and fast growing number of other federal statutes primarily concerned with social services; income; job development; placement and training; nutrition; maternal, infant, and child preventive health care; foster care and adoption plainly and authoritatively and, as to public instrumentalities, in binding fashion invite the schools and virtually all other public and private agencies to "join forces" in and around the schools in order to deliver a comprehensive and integrated set of social services to support children and their families in learning and teaching. This is not the place to catalogue or parse those binding statutory invitations, except to say they too call upon the agencies to join effectively for children, not willy-nilly in any old showy way, but in sensible,<sup>25</sup> productively promising ways.

***Powerful Pedagogies.*** Widely and devastatingly overlooked is the very existence — let alone of the statutory duty to know and to choose among them — of a large and multivarious array of powerful pedagogies with track records of having brought classrooms, whole

schools, sometimes whole districts — teachers, as well as children — demonstrably to life, to vivid lives of learning. This is not the place for a full, or fully rigorous, review of them. Many are collected in the National Diffusion Network's *Educational Programs That Work: A Collection of Proven Exemplary Programs and Practices*, now in its 7th edition.<sup>26</sup> Let me mention a few, so that a reader may check her own mind's eye pictures of powerful pedagogies against mine and then, let me make four further points about them.

- Benjamin Bloom's mastery learning, as put into practice in Johnson City and in many other places.
- Cooperative learning pedagogies, the varieties from both Minnesota and Baltimore, used somewhere in nearly every state in the country, with order of magnitude gains in learning of science and math and reading and history, for every sort of child.
- Jim Comer's classroom pedagogies, as well as associated child and family reach and supports, which brought two New Haven schools of high low-income from bottom to top on all measures in seven and then four years, and did the same in seven of ten Prince Georges County, Maryland, schools in two years.
- The Adaptive Learning Environments Model, joining mastery and self-directed learning, successful in 15 districts in 9 states, including, vividly, in 2 schools in Canarsie (Brooklyn, New York), perhaps the most

ethnically variegated, but uniformly low income schools in the country.

- Project SEED, created by a Northern California teacher in 1968, strongly Socratic in its methods, used across the Dallas, Texas, district and in 14 schools in Philadelphia successfully to bring fourth, fifth, and sixth graders, in Philadelphia uniformly of low income, usually public housing residents, to mastery of *higher* mathematics.
- Project Touchstone, parts of the Great Books, to evoke critical thinking, successful with atypical students (though as to Great Books, nearly all students may be "atypical") in middle year as well as high grades.
- Montessori, Feuerstein, (used in 22 schools in Detroit, as well as Israel), some vocational pedagogies like Principles of Technology-Physics (used in 64 schools in Pennsylvania and many elsewhere), and the community service pedagogies (used in Maryland and Pennsylvania), each of which takes seriously and systematically embodies the insight that learning proceeds most richly *from the concrete* to the abstract, and in interaction between them.
- Summer Training and Education Program (STEP), developed by Philadelphia's Public/Private Ventures, summer *and* term-time, funded under the Job Training Partnership Act, joining half-day work or community service, half-day

strongly computer-assisted classroom instruction (using some of the most powerful software collected by anyone) and life skills training (all summer hours paid), and yielding two-year gains in math and reading in just one summer for rising ninth graders otherwise destined for drop-out, in Chester and Reading, Pennsylvania, and similarly in 11 states.

- TEACH, Reading Recovery, and other structured tutoring including cross-age tutoring by students and of students.

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- Advanced Placement Pedagogies, particularly with atypical students: Jaime Escalante in East Los Angeles, but also in mountainous western North Carolina, in two score Pennsylvania schools and otherwise with the support and assistance

of the College Board.

- Developmentally-sound early childhood pedagogies, pre-school through Grade 4, as done in Farrell, Pennsylvania, Grand Rapids, Michigan, with HIPPY in Arkansas, "parenting education" in Missouri and San Antonio, now mandated in all 75 school districts in the Province of British Columbia and in Kentucky under The Kentucky Education Reform Act of 1990.

The Outcomes-Driven Developmental Model, as the only comprehensive school improvement arrangement thus far validated by the National Diffusion Network, has a decision-making component which is knowledge-driven. ODDM districts and the schools therein purposively and intentionally study, acquire, incorporate, and productively orchestrate data-based new knowledge from research understandings and proven best professional practices. Thus nearly all of the powerful pedagogies here illustratively mentioned, and the other powerful variables, have been put into practice in ODDM's system of powerful systems.

*What Powerful Pedagogies Are.* Each of the powerful pedagogies embodies in a systematic working whole the multiple complex dimensions of current professional knowledge about successful teaching and learning. The powerful pedagogies are, each of them, systems, or working models (in the second sense of the meaning of "exemplary": that they bring together, they express, in a commendable, usable whole a critical quantum

of the multi-variate, many-splendored, interacting dimensions of successful teaching and learning).

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They are *not* propositional — one subject, one verb, one object. They *do not* comprise one operation; there is nothing singular or univocal about them. They *cannot* fairly be demeaned or dismissed as one-factor, ostensive "magic bullets." They stand in weighed contradistinction to the shallow checklists of teacher "behaviors" which have proliferated the school landscape, in teacher "evaluation" and even in "teaching" people to teach.

They honor the crucial under-

standing that professional knowledge — in the teaching professions, as in all professions — requires a multifarious command, *both* in the mind *and* in the fingertips. In any great teaching moment, scores, indeed hundreds, of propositions interact, more or less systematically. The powerful pedagogies incorporate and integrate the multivariate insights of theory (i.e., ordered reflections upon experience) and of experience (i.e., the genesis and testing ground of theory) *and* bring them to tip-of-the-fingers, systematic life.

*The Implications for Teaching Professional Knowledge.* The brilliant recent book of the American Association of Colleges for Teacher Education, *Knowledge Base for the Beginning Teacher* (1989), the work of AACTE's continuing "Knowledge Base Action Group," which persuasively affirms and demonstrates, within the corners of one volume, the existence of powerful knowledge base(s) for teaching and learning is defective only on this count. It remains, in setting forth the knowledge base(s), largely propositional. As the preface declares: "three chapters deal explicitly with *general* knowledge about teaching ... [.] other chapters on pedagogy draw from the root disciplines to sketch *foundational information* about learning principles [i.e., most often mere singular propositions] and classroom climate."

This otherwise great work is nearly bereft of attention to powerful pedagogies, (as contrasted to mere powerful "principles"), to working systems or working models, which *integrate* the principles. The dif-



ference is an epistemological, as well as a practical difference. An abiding deficiency of the common *foundations courses*, it has often seemed to me, is that they are at best framed in terms of statements of mid-level abstraction. They offer edgeless generalizations stated at middle levels of abstraction. Unlike grand theory or high-level generalizations, they are insufficiently rich, encompassing, and rigorous to support deductions of what a teacher might do and how. And they are insufficiently specific, insufficiently rich in concrete particulars either to be directly put to use by a teacher or to support induction to integrated theory, and hence integrated use of concrete particulars.

None of this is surprising in professional preparation institutions which have so radically separated clinical learning from classroom, thought from experience. Such divorce denies the established pedagogical understanding (good for college students as for Maria Montessori's young children) that theory is appreciated (seen, actively understood *and* relished *and* used) best when it is felt (actively observed, its operational consequences experienced) in concrete practice, and vice versa. This is among the points John Goodlad makes in prescribing "Centers of Pedagogy" in *Teachers for Our Nation's Schools* (1990).

Imagine if every new teacher graduating from the universities had had sufficient clinical experience in, say, *three* diverse but powerful pedagogies (say, one from the set of child development-based pedagogies, *a la* Jim Comer or

Feuerstein or Montessori; one from the mastery learning pedagogies; one from cooperative learning), and sufficient opportunity to reflect upon the theories embodied in each pedagogy to have achieved a real, albeit beginning, intellectual as well as finger-tip practical mastery.

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Imagine the richness of result, and the richness of collegial discussion, decision, and action, in any school lucky enough to hire a handful of such teachers to its faculty. (And the pay-off in transforming the schools would, of course, come even earlier from any such standard requirement; for if universities were to immerse preparing teachers in the clinical practice of powerful, systematic pedagogies and in in-

tegrated reflection upon that practice, to the point of real beginning mastery, they would have to find or help create clinical sites which use those pedagogies, thus evoking and proliferating state-of-the-art schools.)

*The Non-Singularity of the Legal Duty To Use States of the Art.* The eight federal statutes do not require schools to adopt *one* pedagogy. There is nothing singular about the statutory state(s)-of-the-art duties. They cannot, fairly, be demeaned or dismissed as mandating one factor, "teacher proof," magic bullet solutions.

The state(s)-of-the-art statutes *do* require the schools to know and thoughtfully to consider a decent array of powerful pedagogies (and the other state(s) of the art), and to decide. *The statutes do require the schools to make a choice or choices between and among state(s) of the art and to see those choices through.* (And, of course, thoughtfully to revisit such decisions as substantial progress or not — outcomes — may suggest).

The statutes mandate *no* singular decision; they *do* mandate decision(s). It is this characteristic *which renders* the statutory mandate, the *invitation* — authoritative and binding to be sure, as any such an invitation from the national legislature is; an invitation *that cannot be refused* — also "open-textured." The statutes invite and indeed direct our attention, and a decently thorough attention at that, to what a state(s)-of-the-art world can attain.

They require that we choose to

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dwell somewhere, even move freely, if thoughtfully, about, within that rich and spacious world. So long as we dwell in a state(s)-of-the-art world, we may live and work autonomously.

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***As this case and others enforcing the states-of-the-art statutes show, when a Court makes a decision under these statutes and enters orders, the decision and orders are based in, draw upon, and incorporate best professional knowledge.***

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The federal court cases which have enforced the state(s)-of-the-art statutes make the point plain. In *Campbell v. Talladega County, Alabama School Board*, a case arising under the promising practice provisions of P.L. 94-142, for example, the form (and content) of the order was: defendants are enjoined to provide Joseph Campbell with a program of education adopting the model used by H. D. Fredericks and Teaching Research, or any other program defendants can demonstrate is substantially equal in effectiveness. The way the Court said it was:

"The Court notes that it was extremely impressed by the testimony of Dr. H. D. Fredericks of Teaching Research in

Monmouth, Oregon. Teaching Research has the only 'model' training program for administrators and teachers serving severely handicapped children which has been given official approval by the United States Department of Education. In addition to training teachers and staff, Teaching Research has also been involved in the development and use of model programs and curricula for severely handicapped students. One means by which defendants may comply with this decree is to engage the services of Teaching Research in the development of an appropriate program."<sup>27</sup> (emphasis supplied)

As this case and others enforcing the states-of-the-art statutes show,<sup>28</sup> when a Court makes a decision under these statutes and enters orders, the decision and orders are based in, draw upon, and incorporate best professional knowledge.

*The Necessity for Creativity.* Nor does the federal statutory states-of-the-art duty suppress professional creativity. On the contrary the statutes multiply the occasion for professional creativity and heighten the opportunities to exercise it.

Replication — as Seymour Sarason persuasively insists<sup>29</sup> — is not imitation. Replication is a profoundly creative act. Replication engages — in profoundly challenging ways, replication requires — a thorough, thoughtful, and reflective knowledge and analysis of both context and initiative, and

self-conscious, coherent, informed, and intentional decision(s).

Max Weber, who first formulated the idea of profession, saw two characteristics as essential and defining: (1) a special command of a specialized body of knowledge and (2) a fiduciary duty, as to which one can be held to account, in the exercise of that specialized knowledge, a duty running from one palpable human being, the professional, to another identified particular human being, the client for lawyers, the patient for doctors, the child and his or her family (the particular child or children and their families, student or students, not "children" in the generalized abstract) for teachers.

It is these characteristics of profession which give "professional judgment" legitimacy and which justify "professional autonomy" (autonomous from *extrinsic*, e.g., hierarchical or bureaucratic, interference, though certainly *not* autonomous from the person(s) to whom the fiduciary duty runs and to whom the duty to know and to use special professional knowledge is owed).

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These centrally professional qualities are implicated by any serious

engagement of the statutory states-of-the-art mandate. Nor is only the *reactive* process of replication comprehended by the statutes. *Invention*, including especially *teacher invention*<sup>30</sup>, is, too.

The statutes only require, but they do seriously require, that an invention hold "reasonable promise of substantial progress." Few inventors would wish or intend otherwise. And yes, that an invention may have to be reasonably demonstrated to hold reasonable promise of substantial progress, whether as a new embodiment of recognizably salient theories, or as a reasonable mixing and matching among, or as variations on them is true. But given the interests of children who pass this way but once, could anyone who is a professional expect or wish anything less? Imagine the variations our handful of new well-educated, well-trained teachers could compose and play for the edification of their students and their colleagues.

## The Uses of the Laws (and the Power and Legitimacy of Their Use) in Transforming the Schools

*The Tradition of National Legislative Address of Schools.* The eight contemporary enactments in which the national legislature so powerfully addresses the schools are *not* a departure from the American national tradition. However widely unknown or unappreciated the tradition, the eight are faithfully rooted in and sustain a tradition extending from the

earliest days of the Republic: a tradition of pointed address of the schools by the national legislature on behalf of a whole people.

The very first two significant enactments, beyond the War, of the first national legislature of the then still newly entitled "United States of America" concerned the schools.

In the Northwest Ordinance, July 13, 1787, at Article III, the national legislature — the same Congress which convened the Constitutional Convention — found and unanimously directed that,

"Religion, morality, and, knowledge being *necessary* to good government and the happiness of mankind, *schools and the means of education shall be forever encouraged.*"

In the Ordinance of June 18, 1785, providing for the survey and allocation of all of the lands west of the Alleghenies, the national legislature directed that

"one of every thirty-six [plots], and one-third of the gold, silver, lead and copper found under *any* of the lands, shall be forever dedicated to the use of schools." (emphasis supplied)

But these enactments and the tradition they created are richer and still more salient. The Northwest Ordinance, in its second paragraph, provided also that primogeniture should be abolished and that "estates ... shall descend to, and be distributed among, children and the descendants of a deceased child in equal parts," that is, to *daughters* and sons alike. In

its penultimate paragraph, the Northwest Ordinance provided that "[t]here shall be neither slavery nor involuntary servitude in the said territory." Thus, from the beginning, the national commitment to schools *and* to equality were inextricably joined.

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Why this focal attention to schools and the link of schools and equality in the crucial beginning days of building "one nation dedicated to a proposition"? The Ordinance was express as to why: in the contemplation of the founders a commitment to schools and a commitment to equality are each "necessary to good government and the happiness of mankind."

In addition, the then still fresh and contemporaneous legislated commitments of the states which comprised the new nation informed these earliest national enactments, set their context, and gave the Or-

dinances the full weight of their meaning and the tradition its still richer resonance. The legislated commitments of one of these, Pennsylvania, may serve to illustrate.

William Penn's Charter of Liberties, Sec. 12 (1682) had said "the Governor and Provincial Council shall erect and order all publick schools." William Penn's Laws Agreed Upon In England, Sec. XXVII(1682) first sounded the thereafter constant theme of a purposeful concern particularly for the education of *children* who may be poor:

"all children [shall be] taught some useful trade or skill, to the end none may be idle, but the poor may work to live and the rich, if they become poor, may not want."

Pennsylvania's 1776 Constitution (Art. III, Sec. A(4)) had provided:

"a school [shall be erected and maintained] in each county, for the convenient instruction of youth, salaries to the masters paid by the public, as may enable them to instruct youth at low prices."

Pennsylvania's 1790 Constitution (Art. III, Sec. A(4)) directed that:

"the Governor and Councils shall provide for the establishment of schools throughout the state, in such manner that the poor may be taught gratis."

That provision was repeated exactly in the 1838 Constitution (Art. III, Sec. A(5)).

Thaddeus Stevens—in 1835 a tyro Pennsylvania state legislator; 30 years later the Majority Whip of the United States House of Representatives and, as such, primary author/draftsman of the 13th and 14th Amendments to the United States Constitution, including the 14th Amendment's Equal Protection Clause — invoked this very tradition, then still fresh, to save the country's first common schools act from repeal. Stevens' speech, marked by historians as "second to

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none ever delivered in an American legislative assembly," was occasioned by a taxpayers' revolt against the levies to support Pennsylvania's Free Public Schools Act of 1834. The Free Public Schools Act took half of all profits above 10 percent of all banks, canals, and railroads. In his school-saving address Stevens said:

"Sir, I trust that when we come to act on this question, we shall so cast our votes ... that the blessing of education shall be conferred on every son of Pennsylvania — shall be carried home to the *poorest child* of the *poorest inhabitants* of the meanest hut of your mountains, so that he may be pre-

pared to act well his part in this land of free men, and lay on earth a broad and solid foundation for the enduring knowledge which goes on increasing through eternity."

Stevens praised what he called the "old time method" where

"all were instructed in the same school; all were placed on perfect equality, the rich and the poor man's sons; for all were deemed children of the same common parent — the Commonwealth.

"It is no uncommon occurrence to see the poor man's son, thus encouraged by wise legislation, far outstrip and bear off the laurels from less industrious heirs of wealth. Some of the ablest men of the present and past days never could have been educated except for that benevolent system.

"I know how large a portion of the community can scarcely feel any sympathy with, or understand the necessities of the poor; or appreciate the exquisite feelings which they enjoy, when they see their children receiving the boon of education, and rising in intellectual superiority above the clogs that hereditary poverty had cast upon them. It is not wonderful that he whose fat acres have descended to him, from father to son, in an unbroken succession, should we have sought for the surest means of alleviating it. When I reflect how apt hereditary wealth, hereditary influence, and perhaps as a consequence, hereditary pride,

are to close the avenues and steel the heart against the wants and the rights of the poor, I am indeed to thank my Creator for having, from early life, bestowed upon me the blessing of poverty."<sup>31</sup>

It was as "a right of the poor" that education had entered the national consciousness and was so trenchantly addressed by the first national legislatures in the Ordinances of 1787 and 1785. It was in this tradition that Pennsylvania's Free Public Schools Act, and those which followed everywhere were thus sustained. Three years later, in 1837 in the Pennsylvania Constitutional Convention, Stevens reflected:

"There is nothing in the Constitution so important, nothing which affects so deeply the good or evil of the country as this very subject of education."

It is in this perhaps astonishing, certainly powerful and resonant, tradition of national legislative address of the schools which the eight statutes stand and four-square into the midst of which *our* national legislature has placed the states-of-the-art imperative.

Like the earliest national school enactments the eight are animated by a commitment to equality. They originate in Congresses which enacted also the great Civil Rights Act of 1964 and 1965, seeking equality across lines of race, religion, national origin, and gender, as well as the seminal Elementary and Secondary Education Act of 1965, the health care and rehabilitation services provisions of

Title XIX of the Social Security Act of 1965, and many other statutes seeking equality across lines of income, to end or transcend poverty. Several of the eight were explicitly enacted to implement and enforce the Equal Protection Clause of the 14th Amendment; all, explicitly or implicitly to do so. All of the eight statutes are progeny of the equal protection decision of the United States Supreme Court in *Brown v. Board of Education*.<sup>32</sup>

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*Some Doubters, If Not Resisters.* Nonetheless, occasionally still, some doubters, if not resisters, sometimes say — *not* so much with particular reference to these eight states-of-the-art statutes, so overlooked and unnoticed and unheeded have they been, but in general or with particular reference to the school finance cases, the desegregation cases and *state* "accountability and assessments" statutes of the 1963-1974 era — "national mandates have no place," even "state mandates have no place" and "learning is not to be legislated,"<sup>33</sup> "it cannot be mandated."<sup>34</sup>

Put aside any analysis of what may motivate resisters. Put aside that

doubts will, as a matter of a positivist's prediction of what courts will do, not withstand the plain and powerful content of these laws. The point here is that the conception of law which underlies their view is brittlely positivistic, a conception that has reigned too often in continental Europe but which has never accurately described, and is indeed repudiated by the common law and Constitutional traditions which are ours. Three distinctions may serve to inform and perhaps to resolve the doubts.

*Commands Versus Open-Textured Commands.* Command is not the only function of laws. Law has also an "inspiring" function, a "sight-setting" function, a "look what the possibilities are" function.<sup>35</sup> It has a "these shall be our purposes" function, "these values are crucial and shall pervade" function, a "how can these values animate this institution?" function, a "think about this and act upon it sensibly, by your best lights" function. It has a "get off the dime" function.<sup>36</sup>

The crux, I believe, is in the texture of the command, and hence the structure of the duties it creates. The crux is in the difference between a closed command, "here it is, do it exactly this way" and an open-textured one, or as I have too often already put it, "an authoritative and binding but open-textured invitation."

If the states-of-the-art imperatives are the latter, they satisfy the canons of what Allen Odden and Elmore before him have called the "backward-mapping perspective":

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"Backward mapping delegates the specifics of program quality decision-making authority to the level in the system where services are delivered — schools and classrooms. Thus, backward mapping puts teachers and principals in key, program decision-making roles and relegates other levels in the system, including federal and state levels, to a mode of assisting teachers and principals in delivering services that reflect a state-of-the-art level of quality."<sup>37</sup>

If the states-of-the-art command of the statutes is thus open-textured, then the statutes may be recognized as an undertaking by the Congress to itself supply what Tom Vickery calls "transformational leadership by a person or persons with a compelling vision of what can and ought to be."

"Participatory" and "mandatory" are *not* opposites. One can frame — and I suggest that the national legislature has framed — an open-textured invitation so powerful that it *cannot be refused* but which requires also a widespread, thoroughly creative, and real participation in acting upon its acceptance. Such would be the "aligned (and participatory) decision-making" which Tom Vickery correctly notes ODDM itself assigns to and requires of every professional and family participant in schooling. "Aligned" and "purpose" are synonyms.

Just such decentralized, thoughtful, and purposive decision-making is what the statutes' states-of-the-art imperatives require of all

schools people. One cannot, I think, read across the eight statutes without understanding that the national legislature has — as Madison argued it would from time to time — exercised its constitutionally assigned role of "transformational leadership" to supply a "compelling vision of what can and ought to be."

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*Rules Versus Purposive Analysis and Action.* Similarly, law is *not* simply composed of *rules*, let alone stark, propositional, black letter rules, to be mindlessly or slavishly followed. Those who suppose the law is simply about rules — single subject, single verb (passive voice, maybe intransitive), single object (if any) — are kissing cousins to those who suppose that professional knowledge may be adequately stated propositionally. To the contrary.

As anyone who has read an opinion

of a court which, on its face, is about applying a rule (or about choosing among or between rules to apply) to a situation which is before the court knows: the *lawful* inquiry which a court indulges is first, what is (or what are) the *purpose(s)* of the "rule," and second, how, in this situation defined in all its concrete particulars, would the *purpose(s)* be served. The "rules" of the law quickly dissolve, in our tradition, to purposive analysis and the structuring and restructuring of action and of institutions to serve the purpose.

The purpose of each of the eight statutes here — and of their common rule: "schools" people shall know the states of the art, and shall thoughtfully choose between and among them, *and* shall implement (as well as revisit as circumstances require) their choice of states of the art — is that the schools shall meet the educational needs of each and all of the children in them. It is that purpose which must animate the knowledge, decisions, and actions of schools people. If that purpose is served (but *only* as that purpose is in fact served) the "rule" is satisfied.

It is, again, Tom Vickery's "aligned decision-making" — decision-making aligned to purpose (and revisited again and again, insofar as it does not yet, in outcomes, achieve the purpose) — which satisfies the "rule."

Thomas Skrtic in the closing paragraph of, and throughout, his recent book *Behind Special Education: A Critical Analysis of Professional Culture and School Organization* (1991) brings the point to life:

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"In the final analysis cultural transformation and social reconstruction will depend upon adequate methods and conditions for reflective discourse. Given the emerging historical conditions of the 21st century and the fact that democracy is collaborative problem solving within a community of interests, critical pragmatism and "adhocratic" school organization provide us with the method and conditions to resume the critical project of American pragmatism and thus with what is certainly our best — but perhaps our last — chance to save our democracy and ourselves from bureaucracy." (his emphasis)

The statutory states-of-the-art imperative imposes no mere "rule," but bindingly and authoritatively requires *reflective discourse*, of use, and decision and action based in it.

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*Mere Formal Procedures Versus Thoughtfulness.* Critics of legal intervention into schools (or into anything else which is important, for that matter) correctly warn against an unfolding profusion of *processes*, suppressive of purpose, which may follow (and too often

has) from invocation of the law.

Upon the tenth anniversary of the Education of All Handicapped Children Act of 1975, I sat with many dear colleagues in the formulation of that statute. I was astonished to hear many say that that great Act was procedural and only procedural; that all it required were procedures (individual education plans [IEPs]; family and "team" conferences; due process hearings, and so on and on) and that its requirements were exhausted (i.e., fully satisfied) by the provision of those procedures. The burden of that great Act is plainly *substantive* — its states-of-the-art imperatives, its integration imperative and its requirement that families' wishes be taken really into account, accommodated, acted upon, not merely processed.

The profusion of processes proceeds, not from this law or another but instead from bureaucratic undertakings to trivialize substantive duties, rather than to abide and implement them — from reductionist bureaucratic instincts, in the instance of the Education of All Handicapped Children Act, to reduce commanding substantive duties to nicked-and-dimed nothingness.

Procedures and process are implicated by the law only insofar as they *actually* function to extend the respect the law demands to the persons and ideas the law requires be respected.<sup>38</sup> Yes, due process is a requirement of our constitutional scheme — the constitutional "rule" is that no person will be deprived of anything really important to him or to her without due process — but

it is important to understand the *purpose* of due process, and to shave and discard its proliferating *forms* insofar as they *disserve* its purpose.

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The greatest statement is Judge Skelley Wright's, made pointedly in his opinion in *Hobson v. Hansen* which held public school tracking unconstitutional:

"Whatever the law was once, it is a testament to our maturing concept of equality that ... we now firmly recognize that *the arbitrary quality of thoughtlessness* can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme." (emphasis supplied)<sup>39</sup>

The point of procedures is to purge, not to multiply, "the arbitrary quality of thoughtlessness."

The imperative of the states-of-the-art statutes as of the 14th Amendment itself *is* thoughtfulness and action based in thoughtfulness. If thoughtfulness — professional thoughtfulness in this case — is present, procedures take the hind-most.

***The Technology-Forcing Function of the Law.*** Since the origins of the common law tradition centuries ago, one primary and pervasive function of the law has been its technology-forcing function, to stimulate innovation and development and the widespread dissemination and use of the fruits of human creativity and insight. (This is not a sectarian function confined to technology in the "machine" sense, but rather encompasses all of the fruits of human creativity, from the arts as well as the sciences, systems as well as implements).

In this century, perhaps the most famous exemplification of the technology-forcing functions of the law is the *T.J. Hooper Case*.<sup>40</sup> T.J. Hooper was a tug boat. The T.J. Hooper and the ship it was guiding got into trouble in the Atlantic Ocean when a sudden storm blew up. The storm damaged the ship and caused injury and property loss to its clients, who promptly sued.

At that time common practice among tug companies was to get weather information *via* hand signals from shore. Although radio had been invented, even introduced here and there, and its ability to carry weather news to tugs had been demonstrated, radio was not in common use. The T.J. Hooper did not use radio, but if it had, the tug master would have known of the danger and been able to take its client ship to shelter, thus avoiding damage to life, limb, and property.

The case turned on the question of T.J. Hooper's responsibility: was adherence to what was common

practice among tug operators (i.e., hand signals from the shore) enough? Or did the situation demand the use of the state of the art (radio)? The court, in an opinion by Judge Learned Hand, ruled that when important matters are at stake, the legal obligation is to use the state of the art.

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When important matters are at stake, as they are for children in teaching and learning in the schools, the state of the practice is not a sufficient defense to failure. The states of the art, as the Congress has provided, are required.

Indeed, in one case, *PARC II*<sup>41</sup>, enforcing the "adopt promising practices" requirement of the Education of All Handicapped Children Act, the turning point came when the defendant Pennsylvania Department of Education and Philadelphia School District offered witnesses to describe the practice of other states and school districts in educating severely disabled students. Upon objection by plaintiffs' counsel to such evi-

dence, the court — Judge Edward Becker, thereafter elevated to the United States Court of Appeals for the Third Circuit — excluded the evidence ruling that the standard under the statute, and defendants' duty, was not the state-of-the-art practice, but the states of the art.

It is in this common law tradition of *T.J. Hooper* and its manifestations across the ages, that the national legislature has squarely rooted the eight states-of-the-art schooling statutes. It is this powerful technology-forcing tradition of the common law that the national legislature has ordained shall be brought to bear in the schools.

***Present Rights.*** One additional tradition of law which the national legislature here draws upon and within which it now squarely has placed the schools illuminates the nature and power of the eight states-of-the-art statutes.

It is the tradition of *present rights*. In *Watson v. City of Memphis*, the Supreme Court of the United States, addressing the unavailability of certain community services, public parks, and other recreational facilities, to racial minorities, said:

"The rights here asserted are, like all such rights, *present* rights: they are not merely hopes to some *future* enjoyment of some formalistic constitutional promise. The basic guarantees of our Constitution are warrants for the here and now and, unless there is an overwhelmingly compelling reason, they are to be promptly fulfilled." (the Court's emphases)<sup>42</sup>



his notion of "present rights" is a long-standing one, attached, as the Court in *Watson* noted, to "any deprivation of constitutional rights."

While the law and rights here are statutory, the national legislature is mainly located the eight enactments in constitutional territory. If the Congress were adumbrating and enforcing the requirements of the Equal Protection Clause.

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***These powerful statutes ... and the powerful pedagogies they require us to know and to use are for today. Tomorrow will not do.***

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The touchstone, harkened to again and again during the national legislature's formulation of the states-of-the-art school statutes, as *Brown v. Board of Education* where the Court had written:

"Today, education is perhaps the most important function of state and local government. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instru-

ment in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity to an education. *Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.*" (emphasis supplied)<sup>43</sup>

By hypothesis, and by the national legislature's continuing observation and judgment, effective schools, schools which actually work to give their children the full benefit of such opportunity, do exist for some. The national legislature's command in the states-of-the-art statutes is that they be made available to all, in the here and now.

These powerful statutes — resonant with the nation's dedication to a proposition of equality, with contemporary, turn-of-the-next-century economic necessity, and with opportunities at hand for every child and every school and every teacher to sing and soar — and the powerful pedagogies they require us to know and to use are for today. Tomorrow will not do.

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*Thomas K. Gilhool, 8th Grade Teacher, Vaux Middle School, Philadelphia, 1989-1990, and Secretary of Education for the Commonwealth of Pennsylvania, 1987-1989, practices law at the Public Interest Law Center of Philadelphia, 125 South 9th Street,*

*Suite 700, Philadelphia, PA 19107. Phone (215) 627-7100; FAX (215) 627-3183.*

## REFERENCES

<sup>1</sup>All of the statutes, but one, are to be found in Title 20 of the United States Code Annotated (U.S.C.A.), four fairly slim volumes, available at every county, bar, and university law library in the country. Each of them is eminently readable, and each deserves to be read and re-read. Like the *Great Works*, as the problem or opportunity in mind changes, a reader will see different, responsive, and probably useful meanings in the statutes — hence, re-read. I have chosen in the text to call the statutes by their most familiar names, although some, as amended have taken on new names. The sections of Title 20 U.S.C.A. where each may be read are noted below; the Head Start Act may be read at Title 42, U.S.C.A. §9831.

<sup>2</sup>20 U.S.C.A. §2721(a)(1) and 2722(c)(1).

<sup>3</sup>20 U.S.C.A. §1413(k)(3). This provision was copied verbatim by the Congress from the original Chapter One, then called Title I (1965) into the Education of All Handicapped Children Act. Note that another provision of EHA says,

"[S]pecial classes, separate schooling, or other removal of handicapped children from the regular educational environment [shall] occur only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."

42 U.S.C.A. §1412(5). The duty from the Act, to adopt promising practices, thus runs with the children into regular classes.

Note, too, the duty upon all state and local educational agencies to provide "a free appropriate public education" to each child. 20 U.S.C.A. §1412(1). An "appropriate ... education" means an education "reasonably calculated to yield [real] educational benefits," the Supreme Court has held in *Rowley v. Board of Education*, 102 S.Ct. 3034 (1982); sounds of Chapter One's requirement that programs be "designed to ... meet ... education needs ..." *supra* at Note 2.

<sup>4</sup>20 U.S.C.A. § \_\_\_\_\_. The Perkins Vocational and Technology Education Act of 1990 is not yet codified in U.S. Code (when it is, it will be at 20 U.S.C.A. §2301 *et seq.*); the provision quoted is of §235 of P.L. 101-392.

<sup>5</sup>20 U.S.C.A. §3282(a). See also §3283(a)(4)(A) and (5)(A) and (7). The Bilingual Education Act.

<sup>6</sup>20 U.S.C.A. §2782(a)(1). The Migrant Education Act.

<sup>7</sup>42 U.S.C.A. §9833(1). The Headstart Act.

<sup>8</sup>20 U.S.C.A. §1419(b)(1)(B) and 1423(a)(1)(D). The Early Education of Handicapped Children Act of 1986.

<sup>9</sup>20 U.S.C.A. §2962(a) and (b). The National Diffusion Network Act.

<sup>10</sup>In Federalist No. 10, considering how "the public voice, pronounced by the representatives of the people, will be more consonant to the public good," Madison writes:

"The question ... is, whether small or extensive republics are most favorable to the election of proper guardians of the public weal, and it is clearly resolved in favor of the latter ...

"It must be confessed that in this, as in most other cases, there is a mean, on both sides of which inconveniences will be found to be. By enlarging too much the numbers of electors, you render the representatives too little acquainted with all their local circumstances and lesser interests; as by reducing it too much, you render them too closely attached to these and too little fit to comprehend and pursue great and national objects. The federal Constitution forms a happy combination in this respect; the great and aggregate interests being referred to the national, the local and particular to the State legislatures." (emphasis supplied)

<sup>11</sup>Council of Chief State School Officers, *School Success for Students at Risk* (Harcourt Brace, Jovanovich 1988) not only contains four of the most trenchant articles on powerful pedagogies—James P. Comer, "Effective Schools: Why They Rarely Exist

for At-Risk Elementary School and Adolescent Students" (pp. 72-88); Patricia Adberg Graham, "Achievement for At-Risk Students," pp. 154-174; Asa G. Hilliard III, "Public Support for Successful Instructional Practices for At-Risk Students," pp. 195-208; Herbert J. Walberg, "Productive Educational Practices for At-Risk Youth," pp. 175-199 — but it publishes the Model State Statute formulated by the Chiefs and recommended for enactment by the 50 states. The Model State Statute, pp. 320-346, embodies states-of-the-art duties, for example:

"The purpose of this statute is to provide each child with educational and related services *reasonably calculated* to enable the child to achieve his or her potential, to become a productive member of society, and to undertake the responsibilities of citizenship.

"Each student enrolled in a public school ... is entitled to be provided with educational and related services *reasonably calculated* to lead to successful completion of a high-school education.

"[E]ach [school district] shall assure that its practices and programs include ... the *adoption of systematic instructional strategies* that: (a) have been *demonstrated to be effective or that show promise of being effective*; (b) are *designed* to assist at risk children in *mastering* the same skills and knowledge expected of all students; and (c) are *designed to assure* co-ordination and integration of programs to assist at-risk children with the entire educational program."

The school codes of at least 18 states already incorporate state-of-the-art duties. In Pennsylvania, for example, since 1911 the school code has said "The board of school directors in every school district shall arrange a course or courses of study *adapted* to the age, development, and needs of the pupils." 24 *Purdon's Statutes* §15-1512. In Oregon: "sound, comprehensive curriculum *best suited* to the needs of the students." *Ore. Rev. Stats.* §326.011. In California: "Any course of study adopted ... shall be *designed to fit* the needs of the pupils for which the course of study is prescribed." *Annot. Calif. Educ. Code* §1204.

The common State Constitutional provisions for "a thorough and efficient system of education" have been understood to incorporate the states-of-the-art duty by the Su-

preme Court and the Legislature of at least one state, Kentucky. See *Rose v. Council for Better Education*, 790 S.W.2d 187 (Ky. Sup. Ct. 1989) (the Kentucky School Finance Case) and the Kentucky Education Reform Act of 1990.

<sup>12</sup>While I was Pennsylvania Secretary of Education, I asked Pennsylvania school district teams of a superintendent, principal, and teacher union president to go to Johnson City, New York, on its regular Thursday visiting day to see the Outcomes-Driven Developmental Model at work. At the close of his day in the Johnson City schools, one of Pennsylvania's hardest-bitten, toughest, most cynical teacher union president said, "I didn't know schools could be like this."

The National Diffusion Network's validation of ODDM is published at Page F-12, entitled "Outcomes-Driven Developmental Model (ODDM): A comprehensive and systematic program for improving all facets of school operation to produce excellent achievement by all students," in *Educational Programs That Work: A Collection of Proven Exemplary Educational Programs and Practices* (17th Edition, 1991).

The book now in its 17th annual edition is published for the National Diffusion Network, in partial discharge of its duties under the National Diffusion Network Act, by Sopris West, Inc., 1140 Boston Avenue, Longmont, Colorado 80501 and may be purchased for \$10.95 plus \$2.00 shipping.

Neither the annual publication of *Educational Programs that Work: A Collection of Proven Exemplary Educational Programs and Practices* nor the existence in each state of a network outpost (addresses are in the book) exhausts or satisfies—they just barely set the stage for—the statutory duty of the U.S. Secretary of Education "to aggressively notify, seek out and pursue," "to affirmatively arrange" that the persons responsible for the schools be *acquainted with and assisted in implementing* exemplary practices.

This quoted language, suggesting the proactive, outcomes-driven nature of the duty of the Secretary under the National Diffusion Network Act, is the language used by two Courts of Appeals in enforcing similar duties of effective outreach upon public officials under the Early, Periodic Screening, Diagnosis and Treatment (children's preventive health care) provisions of Title XIX of the Social Security Act. See *Stanton v.*

ond, 504 F.2d 1246, 1250-51 (7th Cir. 1974); *Mitchell v. Johnston*, 701 F.2d 337, 748 (5th Cir. 1983).

There is danger, of course, in this. No understanding of my duty as Pennsylvania Secretary of Education turned some superintendents stone cold faster than a modest undertaking to send important departmental communications (particularly those concerned with opportunities to adopt promising practices) directly to principals, teacher union presidents, union building committees, and school board presidents, as well as to superintendents.

Notice that as any of the instrumental, power-shifting reforms, discussed below in the text, expand the power and authority of teachers, principals, family, or community in the schools, the set of "persons responsible for the operation of the schools" expands, and the Secretary's and the Network's duty acquaint and to assist "persons responsible" to implement exemplary practices expands to include them, *all* of them.

Since 1965, Chapter One, for example, has required that "teachers and parents be involved in the design and implementation" of Chapter One undertakings, each in both their design and their implementation. The current statutory language on teacher participation is

"[Each] application shall provide assurance that the programs and projects described ... are designed and implemented in consultation with teachers (including early childhood education professionals and librarians when appropriate)."

U.S.C.A. §2722(c)(1). For school-wide projects under Chapter One, in language concerning site-based management, the requirement is that:

"the school-wide plan has been developed with the involvement of those individuals who will be engaged in carrying out the plan, including parents, teachers, librarians, education aides, pupil services personnel, and administrators."

U.S.C.A. §2725(b)(2).

Each of the eight statutes variously requires that teachers and families be engaged in design, decision-making, goal setting as well as in implementation. The families' requirement of Chapter One is more fully set out and discussed below in the text.

"The rich, and richly descriptive, works of the National Association for the Education of Young Children (NAEYC) (Washington, DC) best capture the concrete particulars — developmentally informed, family-centered, low child-teacher ratios — which make early childhood education such a powerful variable. See also *Right from the Start, The Report of the National Association of State Boards of Education on Early Childhood Education* (1988); the recent reports of the National Association of Elementary School Principals and the Blueprint for Action of the National Conference on Educating Black Children (1986).

Its power, lasting at least throughout a child's school career and into young adulthood, is measured, *inter alia*, in the High-Scope Project and the National Follow Through Reports and celebrated in virtually every school reform report of the last decade.

Despite that and the enabling invitation of so many federal laws, we remain far from its universal availability, especially to children from low income families.

<sup>14</sup>Gene V. Glass, L. S. Cohan, M. L. Smith, and N. N. Filby, *School Class Size: Research and Policy* (1982); (class size of 15, provided teachers are armed to take pedagogical advantage of it, makes order of magnitude difference); Glen E. Robinson and J. H. Witteholz, *Class Size Research: A Related Cluster Analysis for Decision Making* (Education Research Service 1986) (class size of 15, especially for children from families of low income); and most recently, J. D. Finn and C. M. Achilles, "Answers and Questions About Class Size: A Statewide Experiment," *American Educational Research Journal*, Vol. 27, No. 3, pp. 557-577 (Fall 1990) (recipient of the 1990 Outstanding Research Award from the American Association of School Administrators, *Sch. Admin.*, Vol. 47, No. 3, p. 31 (March 1990)). (For a statewide study, Indiana, with similar strong, especially early grades, minority and poor children, results, see J. McGivern, D. Gilman, and C. Tittitski, "The Relation Between Class Size and Achievement," *Elem. Sch. J.*, Vol. 90, No. 1, pp. 46-47, September, 1989).

The last reports the results from extensive use of class size of 15, particularly in the lower grades, in Tennessee, under the initiative of Governor Lamar Alexander, now United States Secretary of Education.

Knowing-in-the-head and knowing-in-the-gut are different things. The second form of

knowledge came to me when 7 of my 22 regularly attending 8th grade students were suspended in one swoop by a vice principal. During four days of a self-contained classroom responsible for all the major subjects, I had but 15 students. Each of these days my colleagues would ask as I entered the teachers' lunchroom, "Gilhool, why are you smiling? Why are you humming?" Answer: "There's real teaching and learning going on today in my classroom." Even with 22, if I knew that (and whether) three students had gotten (anything), I was doing well. With 15, I knew at any given time where 12 or 13 were. With 15 there were three heavy actors still (and two officially "handicapped" students), but the relationship of the other 12 to the 3 was transformed, they brought them in, insisted they be in. Learning, loving, and counseling in the grand sense, class-wide actually happened.

<sup>15</sup>East Harlem's 51 highly differentiated, now high performing (66% of the students at or above grade level, up from 15%) middle schools are all sized 300 students or smaller. (A building is not necessarily a school; some buildings there have three schools, each fully a school, self-contained, autonomous — an important concrete particular in replication: Too many "houses," the celebrated Carnegie recommendation to get the functional equivalent of small schools and their benefits, fail because, e.g., maintaining a single principal and set of vices and so on, across the houses, maintains a span of responsibility and control that sustains the well-learned hierarchical instinct to say "no," to teachers and students alike.)

In Pennsylvania, beginning in 1987, we identified and celebrated high low-income (38 percent to the 80 percent of children from low income families), high-performing (at least 80 percent of the children above criterion, for at least two years in both math and reading in each of the listed grades, 3rd, 5th, 8th) schools. During three years the high performing, high low income schools grew from 43 to 72 to 147. Each year, 3/4 of them were schools sized under 300.

<sup>16</sup>See Herbert J. Walberg, "Families as Partners in Educational Productivity," *Phi Delta Kappan* (February 1984); James P. Comer, "Parent Participation in the Schools," *Phi Delta Kappan*, (February 1986); Joyce L. Epstein, "How Do We Improve Programs for Parent Involvement?" *educational Horizons* (Winter 1988); Diane Scott-Jones, "Families As Educators," *ibid.*

Pennsylvania Dept. of Education, *Support from the Home Team: Families and School Handbook* (1988) collects those articles and a rich set of effective reach to family practices used in Pennsylvania schools, and is available from P.D.E., Bureau of Community and School Support Services, 333 Market Street, Harrisburg, Pennsylvania 17126.

<sup>14</sup> See especially Lisabeth Schor, *Within Our Reach: Breaking the Cycle of Disadvantage* (1989); *Education Week*, Deborah Cohen's feature on "Joining Forces," March 15, 1989. Joining Forces, a joint undertaking of the Council of Chief State School Officers and the American Public Welfare Association, housed at CCSSO, Suite 379, 400 North Capitol Street, N.W., Washington, DC 20201-1511 (202-393-8161) is a fruitful source of exemplary practices in gathering other public and private services and supports for families and children into and around the schools.

<sup>15</sup> 20 U.S.C.A. §2721(a)(2).

<sup>16</sup> 20 U.S.C.A. §2725(b)(1)(E) and 2891(7).

<sup>17</sup> 20 U.S.C.A. §2722(c)(1).

<sup>18</sup> 20 U.S.C.A. §2725(d)(2).

<sup>19</sup> 20 U.S.C.A. §2726.

<sup>20</sup> 20 U.S.C.A. §2726(c)(6).

The Vocational Education Act of 1990 requires state boards to "establish effective procedures by which parents, students, teachers, and area residents will be able to directly participate in state and local decisions which influence the character of programs." The author of this provision pointed out that this language was intentionally adapted from the Head Start Act "because of that program's success in both its outcomes and its involvement of parents. ... with the expectation that the effective procedures to be developed by the states for this purpose will provide for parents and students the same high levels of actual involvement as Head Start does." *Congressional Record* Page H1726, May 9, 1989.

<sup>24</sup> A collection of national enactments requiring public agencies to "join forces" in and around the schools is available from the Public Interest Law Center of Philadelphia.

<sup>26</sup> To get a copy, see Note 11.

Some respected commentators, Edgar Cahn notably, have suggested that the pedagogies catalogued in that National Diffusion Network publication are the strongest candidates to satisfy, *prima facie*, the statutory state-of-the-art duties. I am inclined to think, and I think Cahn would agree, that the too little noticed, let alone celebrated, work of NDN, and, consequentially, its still incomplete reach should allow schools to embrace and courts to accept choices of pedagogies beyond those thus far catalogued, *provided*, of course, they can be demonstrated — reasonably and rigorously demonstrated, most strongly by proven track record on the ground in real schools or by reasonable reflection upon proven experience and argument to variations — to hold real promise of substantial progress.

<sup>27</sup> 518 F.Supp. 47, 56 (N.D. Ala. 1981) (Circuit Court Judge Vance) (P.L. 94-142).

<sup>28</sup> See e.g., *Nicholson v. Pittenger*, 364 F.Supp. 669, 674-75 (E.D. Pa. 1973) (enforcing Chapter One); *Casteneda v. Pickard*, 648 F.2d 989 (6th Cir. 1981) and *Rios v. Reed*, 73 F.R.D. 589 (E.D. N.Y. 1977) (both enforcing the Bilingual Education Act); *Roncker v. Walter*, 70 F.2d 1058 (6th Cir. 1983), *cert. denied* 104 S.Ct. 1960 (1983) (enforcing P.L. 94-142).

<sup>29</sup> Seymour Sarason, *The Predictable Failure of Education Reform: Can We Change Course Before It's Too Late?* at pp. 117-134 (1990).

<sup>30</sup> See the requirements of these very statutes for real teacher participation in the design of programs and projects set forth in Notes 13 and 24.

<sup>31</sup> The Stevens Address of April 11, 1835, is set out in parts, as are the related quotations in the text, in R. Korngold, *Thaddeus Stevens: A Being Darkly Wide and Rudely Great* 34-39 (1974) and T. L. Woodley, *The Great Leveler: The Life of Thaddeus Stevens* 110-123 (1937).

Thirty years later, when on June 13, 1866, the 14th Amendment to the United States Constitution returned to Thaddeus Stevens' House of Representatives from the Senate with its *enforcement provisions*, in Stevens' judgment, radically weakened but with its content — the Privileges and Immunities

Clause, the Due Process Clause, and, particularly, the Equal Protection Clause — unaltered since it had come from his and other House pens, Stevens, just before its passage, spoke his hopes and intentions for the 14th Amendment, that it

"would have so remodeled all our institutions as to have freed them from every vestige of human oppression, of inequality of rights, of the recognized degradation of the poor, and the superior caste of the rich."

Eric Foner, *Reconstruction, America's Unfinished Revolution, 1863-1877*, 254 (Harper & Row, 1988).

<sup>32</sup> In addition, the lineage of the current Bilingual Education Act is directly in *Lau v. Nichols*, 414 U.S. 563 (1974), and of the Education of All Handicapped Children Act of 1975 in *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania*, 343 F.Supp. 279 (E.D. Pa. 1972) (three judge court). The court opinions in both of those cases were grounded in *Brown* and sourced in the Equal Protection Clause.

<sup>33</sup> A. E. Wise, *Legislated Learning: The Bureaucratization of the American Classroom* (1979).

Arthur Wise's critique of the "bureaucratization of the classroom" is, I believe, correct. Such bureaucratization is not, however, a necessary concomitant of law, nor even, I believe a compatible concomitant.

Law existed for centuries before Weber noted the existence of bureaucracy. Weber did not endorse bureaucracy. We are, however, now testing Weber's proposition that we can't get rid of it. And I for one would like to have available the strength law can bring to bear against bureaucracy.

<sup>34</sup> Tom Rusk Vickery, "ODDM: A Workable Model for Total School Improvement" *Educational Leadership*, Volume 47, No. 7, April 1990.

<sup>35</sup> Robert A. Burt, "Constitutional Law and the Teachings of the Parables," 93 *Yale Law Journal* No. 4 (1984); Owen Fiss, "The Forms of Justice: Forward: The Supreme Court, 1978 Term," 93 *Harvard Law Review* (1979).

<sup>36</sup> Alexander M. Bickel, *The Least Danger-*

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ous Branch (1962) (2d ed. 1986).

<sup>17</sup>Allen Odden, "Education Reform, and Services to Poor Children: Can the Two Policies be Compatible?" *Educational Evaluation and Policy Analysis*, Vol. 9, No. 3, pp. 231-243 (1987).

<sup>18</sup>Edward A. Dauer and T. K. Gilhool, "The Economics of Constitutionalized Repossession," 47 *Southern California Law Review* 116 (1973).

<sup>19</sup>*Hobson v. Hansen*, 269 F.Supp. 401, 497 (D.D.C. 1967) affirmed sub. nom. *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969). Skelly Wright cites Justice Brennan in *Baker v.*

*Carr*, "discrimination-in-fact is bad when it reflects no policy." (Justice Brennan's emphasis)

In *Townsend v. Swank* the United States Supreme Court said about tracking:

"(A) classification which channels one class of people, poor people, into a particular class of low paying, low status jobs would plainly raise substantial questions under the Equal Protection Clause."

99 S.Ct. 502, 508 n. 8 (1971). On tracking see J. Oakes, *Keeping Track: How Schools Structure Inequality* (Yale Univ. Press 1985); *Carnegie Council on Adolescent Development, Turning Points: Preparing American Youth for the 21st Century* (Carnegie Corp.

1989). On the markedly unsuccessful practice of grade retention, often the first step in tracking, see M. L. Smith and L. A. Shepard, *Flunking Grades: Research and Policies on Retention* (Falmer Press 1989).

<sup>20</sup>*In re T.J. Hooper*, 60 F.2d 737, 740 (2d Cir. 1932).

<sup>21</sup>*Pennsylvania Association for Retarded Citizens v. Commonwealth of Pennsylvania*, C.A. No. 71-42 (E.D. Pa. 1983).

<sup>22</sup>373 U.S. 526, 533 (1963).

<sup>23</sup>347 U.S. 483, 493 (1954).



*We all dance round in a ring and suppose, while the secret sits in the middle and knows.*

— Robert Frost



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## Coming in the October 1991 Issue of *Quality Outcomes-Driven Education ...*

Articles on *Invitational education* by **Dr. William Purkey**, Co-Director of the International Alliance for Invitational Education and **Dr. Judy Lehr**, Director of the Center for Excellence in Teaching at Furman University and a leader in the invitational education movement.

Articles on *state-of-the-art early childhood education programming* by **Dr. Sue Bredekamp**, Director of Professional Development, National Association for the Education of Young Children; **Marlene Dergousoff**, Primary Team Associate for the exemplary K-3 program developed for all public schools in the Province of British Columbia; and **Dr. Kay Drake and Markie Pringle**, key teachers in the nationally-acclaimed early childhood program at Seawell Elementary School, Chapel Hill, North Carolina — and featured in the recently released ASCD videotape and facilitators manual entitled "Early Childhood Education: Classroom Management/Curriculum Organization."

Comprehensive article on quality schools by **Dr. William Glasser**, Psychiatrist and world-renowned author of publications which include *Schools Without Failure*, *Reality Therapy*, *Control Therapy in the Classroom*; and *The Quality School*.

Articles on the outcomes-driven comprehensive school improvement movement by **Dr. Al Mamary**, Superintendent, Johnson City Central School District, Johnson City, New York, and **Lyle Wright**, Director of the Division of Research and Development, Utah State Office of Education, Salt Lake City, Utah. Dr. William Glasser, in his latest book *The Quality School*, cites the Johnson City ODDM schools as the best examples of quality schools in America. Lyle Wright has given state-wide leadership in Utah to outcomes-driven school system reform. He has also provided leadership for a successful effort which has merged school districts, state office of education, colleges and universities into a collaborative state-wide staff development continuing education arrangement which is a model for all states.