Parental Rights and Accountability in Public Education: Special Education and Choice of School

Jack Tweedie

Follow this and additional works at: http://digitalcommons.law.yale.edu/ylpr

Part of the Law Commons

Recommended Citation
Available at: http://digitalcommons.law.yale.edu/ylpr/vol7/iss2/4

This Article is brought to you for free and open access by Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Yale Law & Policy Review by an authorized administrator of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.
Parental Rights and Accountability in Public Education: Special Education and Choice of School

Cover Page Footnote
Recent examinations of public education have found a disturbing decline in academic standards and student achievement. Many students are graduating without adequate knowledge and skills to participate fully in our culture and economy, and critics fear that the decline in education has jeopardized our national stature. These criticisms have generated calls for increased funding of schools and strengthened supervision and accountability of school districts, schools, and teachers. Such calls for accountability have commonly focused on strengthening hierarchical control in public education-mandating core curricula for all schools and evaluating and funding schools on the basis of students’ achievements and performance on standardized examinations.
Parental Rights and Accountability in Public Education: Special Education and Choice of School

Jack Tweedie*

Recent examinations of public education have found a disturbing decline in academic standards and student achievement. Many students are graduating without adequate knowledge and skills to participate fully in our culture and economy, and critics fear that the decline in education has jeopardized our national stature.¹ These criticisms have generated calls for increased funding of schools and strengthened supervision and accountability of school districts, schools, and teachers. Such calls for accountability have commonly focused on strengthening hierarchical control in public education—mandating core curricula for all schools and evaluating and funding schools on the basis of students' achievements and performance on standardized examinations.²

At the same time, other reformers have challenged the established structure of authority in public education. They argue that local school boards, district administrators, and state and federal education agencies—hierarchical authorities in education—exercise limited influence over schools' provision of education. Principals and teachers possess considerable discretion because of our conceptions of good teaching and the practical restrictions on organizational control in schools.³ Principals and teachers in schools exert the

---

* Assistant Professor of Political Science, State University of New York at Binghamton. This article is based in part on work I did with Michael Adler and Alison Petch at Edinburgh University on a project funded by the Economic and Social Research Council. I would also like to thank Susan Sterett for her help in writing this article.

3. On the conception of teaching, see R. Glaser, Adaptive Education: Individual Diversity and Learning (1977); J. Goodlad, School, Curriculum, and the Individual, at ch. 1
Parental Rights

most influence over the quality of education, yet the structure of public education largely insulates them from accountability. They often lack the incentives and resources to provide effective schooling, while school boards and administrators lack the power to motivate or replace poor principals and teachers. Indeed, hierarchical efforts to improve schooling often interfere with school leadership and good teaching practices.4

These reformers advocate strengthening school officials’ accountability to individual parents rather than reinforcing hierarchical accountability. For instance, if parents had a greater choice of schools, decisions about whether a child should attend or leave a school would promote accountability in the same way customers’ demands guide companies’ decisions about products and prices. Alternatively, if parents could help plan their children’s education, they could challenge officials’ decisions about their children and thus prompt officials to consider carefully each child’s schooling. If either of these forms of parental accountability were established, parents could monitor their children’s education. Dissatisfied parents could remove their children from the school or challenge schools’ decisions. Moreover, accountability in individual cases would result in a system of accountability. The prospect of losing students or parental challenges would provide school officials strong incentives to improve or maintain quality. Freed of some of the hierarchical restrictions on schools, principals and teachers would have both the power and the responsibility to develop effective schools.5

Hierarchical and parental accountability are based on competing orientations toward school officials’ decisions and actions in individual cases. One approach, the collective welfare orientation, focuses primarily on the achievement of collective ends. In this orientation, concern for hierarchical accountability focuses on how well aggregate outcomes meet collective goals or, when goals are difficult to measure, how well actions in particular cases follow the bureaucratic standards and procedures promulgated by state education officials


and local school boards. A competing approach, the *individual client orientation*, directs case-level decision making toward serving the interests of each individual client. In this orientation, concern for *parental accountability* focuses on parental participation in decision making and how well each decision meets the needs of the child.

These two forms of accountability conflict in important ways, so that strengthening parental accountability restricts the role of hierarchical accountability and the collective welfare orientation in schools. In this Article, I examine two efforts to strengthen parental accountability in public education—parental rights of participation and challenge in special education in the United States, and parental rights of school choice in the United Kingdom. Parental rights can enable individual parents to hold schools accountable for the education their children receive. Yet few parents possess the assertiveness and knowledge to act. Because so few parents take action, no general system of accountability develops. As a result, only children whose parents exercise their rights benefit; others, whose parents remain silent, may be harmed by the diversion of resources to more popular schools to provide special services for individual children in response to assertive parents’ demands.

In short, efforts to strengthen parental accountability in schools have not resulted in better schools and have exacerbated problems of inequity in many public schools. Although a parent should be able to question school officials’ actions and, in some circumstances, move her child to a school she believes would be better, parental accountability must also be considered in the context of schools’ collective welfare orientation. The schools’ responsibility to provide equal educational opportunity to all their students limits parental rights.

### I. Accountability in Case-Level Decision Making

Notions of accountability in schools rest on particular orientations toward decision making in individual cases. On the one hand, hierarchical accountability focuses on school officials’ accomplishment of collective goals and their adherence to standards and procedures set out by policy makers. Parental accountability, on the other hand, focuses on decisions and actions responsive to parents’ circumstances and choices. In the next two sections, I outline the collective welfare and the individual client orientations toward decision making in schools and explain how they relate to the different notions of accountability.
Parental Rights

A. The Collective Welfare Orientation and Hierarchical Accountability

Schools serve a variety of public purposes, including providing children with knowledge and skills, training a productive workforce, socializing children in the civic virtues of participation and obedience, and fostering racial harmony and social mobility. An emphasis on public purposes underlies the collective welfare orientation toward decisions and actions in individual cases. This orientation incorporates four principles.6

First, school systems direct their efforts toward achieving collective ends—socially defined goals for the schools. School systems' collective ends are determined in a complex and continuing process involving a variety of actors: state and federal legislators, governors, state education officers, school boards, school-level officials, teachers, courts, parents, and students. Strong disagreements about priorities and goals often arise both inside and outside schools.7

Second, school systems aim for the pattern of outcomes that contributes most satisfactorily to their collective goals. Success or failure in individual cases is less important. For instance, many of the recent efforts to reform schools focus on students' scores on standardized achievement tests. Officials examine the overall distribution of scores and their relation to other schools' scores, not whether a particular child performed adequately or up to her abilities.8

Third, school systems are subject to a complex structure of authority.9 Policy makers and higher-level administrators, particularly

6. The description of the collective welfare orientation presented here focuses on schooling. It is based on an orientation developed to address case-level decision making in a wide variety of social programs, such as welfare, education, health care, and housing. See Tweedie, Discretion to Use Rules: Individual Interests and Collective Welfare in School Admissions, 11 L. & Pol'y 189 (1989). Substantial research, led by Michael Lipsky, has focused on the structural similarities of case-level decision making in social programs. Basing the understanding of decision making and accountability in education broadly leads to a focus on the structural elements of education policy and decision making. See M. Lipsky, Street-Level Bureaucracy (1980); E. Brodkin, The False Promise of Administrative Reform (1986); P. Foster, Access to Welfare (1983); J. Prottas, People-Processing (1979); R. Weatherley, Reforming Special Education: Policy Implementation from State Level to Street Level (1979).


8. See, e.g., Benveniste, supra note 2; Stern, supra note 2.

9. R. Campbell, supra note 7; Hanson, Organizational Control in Educational Systems: A Case Study of Governance in Schools, in Organizational Behavior in Schools and School Districts 245 (S. Bacharach ed. 1981); Weick, supra note 3.
those distant from the school site, cannot directly supervise or control decisions made at schools. They attempt to do so by mandating procedures and schedules as well as standards to be applied in deciding individual cases. They also use budget controls and aggregate measures of outcomes to oversee schools.\(^\text{10}\)

Fourth, school systems often must balance various goals. Resource constraints and conflicts among ends require officials at all levels of authority to establish priorities and make tradeoffs.\(^\text{11}\)

In the collective welfare orientation, political and administrative leaders hold school-level officials accountable for achieving goals and adhering to mandated standards and procedures. State legislatures and local school boards can hold schools politically accountable. Both approaches involve \textit{hierarchical accountability}—the links between democratically and administratively determined policy and actions at schools. This chain of accountability traditionally is viewed as a set of personalized links from the highest officials, legislators and the chief executive, through each layer of bureaucracy, down to principals and teachers. Each official is supposed to be held accountable for her actions by superiors and, in turn, is supposed to hold subordinates accountable. The nature of authority in schools and the difficulty bureaucrats have in specifying educational outcomes often result in a focus on compliance with minimum academic standards and reporting requirements.\(^\text{12}\)

\section*{B. The Individual Client Orientation and Parental Accountability}

In the individual client orientation, case-level decision making is responsive to the specific circumstances of each student. Decisions about the education provided to each student are based on individual judgments about that student's needs and interests. Either parents or educators can be responsible for those decisions.\(^\text{13}\) In this

\begin{footnotesize}
\begin{enumerate}
\item Benveniste, \textit{supra} note 2, at 265-66; LeMahieu, \textit{The Effects on Achievement and Instructional Content of a Program of Student Monitoring through Frequent Testing}, 6 \textit{Educ. Evaluation & Pol'y Analysis} 175 (1984).
\item The individual client orientation is rooted in two different sets of ideals: parental responsibility for children and teachers' professional knowledge and expertise. Both sets of ideals reject the domination of the program-wide, collective orientation. Both share a focus on the individual case, flexibility in case-level decision making, and the dominance
\end{enumerate}
\end{footnotesize}
Parental Rights

paper, I focus on parental responsibility as it provides the basis for parental rights and accountability. Meeting the needs of students, defined by their parents, replaces the pursuit of collective ends as the focus of decision making. The individual client orientation rests on four principles.\footnote{14}  

First, decisions in individual cases focus on the student involved. Parental wishes, the circumstances of each student, and the programs or services available at the school define the limits of possible choices. Decision making seeks to identify the needs and abilities of the student and to tailor educational services accordingly.\footnote{15} Many factors are excluded from consideration, such as the circumstances and needs of other students, the structure of courses and services already offered by the school, the demand for those services, and the limits on the school's resources.

Second, the orientation recognizes that parents are primarily responsible for their children's education.\footnote{16} This principle of respect for parental responsibility means that parents should be able to participate in decisions about their child's education, that their wishes should be respected when possible, particularly in choice of school and design of educational programs, \footnote{17} and that parents should be able to challenge officials' decisions to an impartial decision maker.\footnote{18}

of individual decisions rather than program policies. The key difference involves their conflicting emphases on parental control and teachers' autonomy.

14. Like the collective welfare orientation, this description of the individual client orientation is based on a broader model developed to apply to social programs generally. See Tweedie, supra note 6; Simon, The Invention and Re-invention of Welfare Rights, 44 Md. L. Rev. 1 (1984). The individual client orientation, as it applies to schooling, relies on the ethic of adapting teaching to the particular needs and abilities of each child. See, e.g., R. Glaser, supra note 3; D. Schon, The Reflective Practitioner 329-36 (1986).

15. Tailoring the student's educational program to her needs and abilities is especially prominent in special education. See S. Kirk & J. Gallagher, Educating Exceptional Children, at ch. 2 (3d ed. 1979); Walberg & Wang, Effective Education Practices and Provisions for Individual Differences, in Handbook of Special Education: Research and Practice 113 (M. Wang, M. Reynolds & H. Walberg eds. 1987). Gartner and Lipsky argue that the individualized focus of special education should be extended to all students. Gartner & Lipsky, Beyond Special Education: Toward a Quality System for All Students, 57 Harv. Educ. Rev. 367, 388 (1987).

16. This principle is dominant in the parental responsibility version of the individual client orientation, but would be subordinated to the professional judgment of teachers and other educators in the professional expertise version. See, e.g., R. Glaser, supra note 3, at 83-88.


18. These principles of participation are based on the idea of education as a property right. See Reich, The New Property, 73 Yale L.J. 733 (1964).
Third, the focus on individual cases and the responsiveness to parental involvement require flexible approaches in individual cases. Decisions in such cases therefore are not subject to predetermined rules and procedures that would restrict arbitrarily parental wishes and school officials’ judgments. Officials draw upon a variety of responses to tailor a program to parental wishes and student needs.19

Finally, response to the wishes of parents and needs of students comes before policy making. Decisions in individual cases are not determined by applying the school’s policies. Focus on the individual case, respect for parental responsibility, and case-level flexibility combine to preclude explicit tradeoffs in the school’s case-level decision making.20 The student’s needs and the parents’ choices determine what the school provides.21

Accountability in the individual client orientation differs greatly from hierarchical accountability. Rather than being accountable to higher level policy makers, school-level officials are directly accountable to parents for decisions and actions that involve their children. The exact nature of the accountability depends on the rights parents possess and the consequences of those rights for the school.

With parental accountability, school officials are held accountable for satisfying parents’ demands rather than for achieving public purposes. What is important to individual sets of parents determines what is important to school officials. In systems in which school enrollment influences budgets and staff, schools have incentives to respond to parents’ educational preferences, much as business firms (or private schools) must attend to prospective customers’ preferences. The right to exit can create markets in education. Schools are held accountable in the same way that the local supermarket is held accountable: attract a sufficient number of customers (parents) and prosper; fail to do so and close.22


21. The individual client orientation does not, of course, magically resolve the problem of limited resources. It only excludes such considerations from case-level decision-making and does not confront explicitly the problem that the sum of individual decisions is likely to overwhelm the whole of the program. In practice, school officials cope with limited resources through informal techniques of rationing. See P. Foster, supra note 6, at 90-102; M. Lipsky, supra note 6, at 81-104; R. Weatherley, supra note 6.

22. For discussions of the logic of markets in education, see Chubb & Moe, supra note 4; J. Coons & S. Sugarman, supra note 5; M. Friedman & R. Friedman, supra note 17.
Parental Rights

Parental accountability does not work exclusively through market-like mechanisms. Parents also can hold school officials accountable by participating in decisions that affect their children or by using their rights to challenge decisions and actions that do not follow established standards, as they do in special education in the United States. Accountability is still centered on satisfying parents about their children’s education, but parents must first be dissatisfied enough to challenge school officials. And, as with market accountability, the system of accountability depends on the pattern of actions of an individual parent holding (or not holding) officials accountable.\(^\text{23}\)

Parental accountability and hierarchical accountability conflict in important ways, as do their underlying orientations toward case-level decision making. I have developed them here as ideal types but, in reality, schools are often simultaneously held responsible for meeting the needs of individual children and serving collective ends, despite inadequate resources that require tradeoffs. The conflict between these two orientations is seldom worked out explicitly. Because of the conflict, neither of the two orientations is wholly realized, and the different notions of accountability remain in tension.\(^\text{24}\)

II. Parental Rights and Accountability in Education: Special Education and Choice of School

This section will examine the effect of parental rights and accountability in two policy areas—special education in the United States and choice of schools in the United Kingdom.

The Education for All Handicapped Children Act of 1975\(^\text{25}\) gave American parents of handicapped children the right to participate in decisions about their children’s education and the right to challenge ultimate decisions at formal hearings. The Education Act 1980\(^\text{26}\) and the Education (Scotland) Act 1981\(^\text{27}\) gave parents in the United States and choice of schools in the United Kingdom.


\(^{26}\) Education Act 1980, ch. 20, §§ 6-7.

\(^{27}\) Education (Scotland) Act 1981, ch. 58, §§ 28A-28F.
Kingdom the right to request admission of their children to the
school of their choice, required school district authorities to grant
those requests absent statutory grounds of refusal, and enabled par-
ents to appeal refusals of admission to a particular school. These
two systems, emphasizing parental rights, illustrate the operation of
parental accountability in education. They demonstrate how assert-
tive and knowledgeable parents can use rights to improve the educa-
tion of their children. But conflicts among parental concerns,
limited school resources, and competing collective ends raise diffi-
cult questions about the system-wide benefits of parental
accountability.

A. Parental Rights in Special Education in the United States

A long campaign by advocates for rights for handicapped chil-
dren, seeking to overcome the entrenched resistance of most school
districts to special education, resulted in the Education for All
Handicapped Children Act of 1975 (EAHCA). The Act established
the right of special-needs children to “free appropriate public edu-
cation” and also gave parents of such children the right to partici-
pate in and to challenge decisions made about their children’s
education.28 Reformers sought to end the exclusion of handicapped
children from public education. Under the new law, school officials
and parents were to cooperate in designing an “individualized edu-
cation plan” (IEP) tailored to the needs and abilities of each child.
When possible, handicapped children were to be educated in regu-
lar classrooms. Reformers hoped that parental participation, in-
cluding the right to appeal, would make special education more
accountable to the needs of the children and the wishes of their
parents.29

subsequent amendments). In Board of Educ. v. Rowley, 458 U.S. 176 (1982), the U.S.
Supreme Court held that the phrase “free appropriate public education” in EAHCA
required only that schools offer handicapped children individually tailored instruction
and support services that enable them to benefit from education. See also Irving Indep.
for child with spina bifida despite expense); Burlington School Comm. v. Department of
Educ., 471 U.S. 359 (1985) (public school must pay expenses at private school if that is
determined to be the appropriate placement).

29. Abeson, supra note 23; Note, Enforcing the Right to an ‘Appropriate’ Education:
The Education for All Handicapped Children Act of 1975, 92 Harv. L. Rev. 1103 (1979);
Neal & Kirp, The Allure of Legalization Reconsidered: The Case of Special Education,
48 Law & Contemp. Probs. 63 (1985); Tweedie, The Politics of Legalization in Special
Education Reform, in Special Education Policies: Their History, Implementation, and
Parental Rights

Before passage of the Act, most school districts considered special education a marginal function, allotting it limited resources or support from administrators and other school personnel. Many handicapped children were excluded altogether from public school, while the special education classes that did exist were usually separated from the rest of the school. Regular classroom teachers often used special education as a dumping ground for disruptive children. Despite the variety of children in these programs, special education departments usually focused only on a few of the most common handicapping conditions, such as mental retardation and learning disabilities. They relied on simple diagnostic frameworks to assign most handicapped children to the available programs, but often selected a few children for focused consideration and special treatment.\(^{30}\)

The EAHCA has produced significant change. First, it authorized a substantial increase in federal funding for special education (although appropriations only reached a fraction of the amount authorized) and led to more spending by state and local governments.\(^{31}\) Second, it encouraged schools to bring in all handicapped children who had been excluded from public education.\(^{32}\) Third, it has enabled some parents to increase their participation and influence over decisions concerning their children's education. Many parents have used their rights to obtain special services for their children. Some parents have been able to secure private school placement for their handicapped children at public expense.\(^{33}\)

Despite these advances, the effects of increased parental rights in special education have been limited. Individual parents have held school officials accountable for decisions affecting their children, but no general system of accountability has developed. Moreover, limited resources continue to restrict the variety of programs that schools can offer and prevent decision makers from focusing on the needs and abilities of each child. To cope with the volume of cases,


\(^{32}\) Clune & Van Pelt, supra note 31, at 15-16; Singer & Butler, supra note 31, at 132.

\(^{33}\) Clune & Van Pelt, supra note 31, at 31; Singer & Butler, supra note 31, at 141-44.
school officials and special educators often have been forced to adopt routine assessment and placement practices. Thus, many handicapped students have been evaluated according to a list of standard criteria, then sorted into an existing category and provided the educational program assigned for that category. In addition, few handicapped children have been moved out of special classes and into the mainstream.34

Although new parental rights have helped win benefits for handicapped children, these rights have not turned schools away from their collective welfare orientation. While school districts have altered their procedures to comply at least formally with the IEP requirements established in the legislation, parents have been unable to challenge the balance of power in educational planning. School officials have retained primary influence over special education planning. Furthermore, educators facing limited resources have circumvented formal individualized procedures and instead have used standardized diagnostic methods.35

When parents have participated assertively in the decision making process, they have exercised a meaningful check on school officials' discretion in individual cases. Parental participation in IEP meetings, however, has been limited. While many parents attended these meetings shortly after the act was implemented, participation soon faded, allowing professional educators to reassert control. Even when parents have attended IEP meetings, school officials have limited their involvement. Key decisions often have been made in closed conferences before parents have a chance to participate at meetings. Officials have then used the IEP meetings to gain parents' consent to the program they have already selected.

School officials usually have resisted proposals that required new or expensive services. Administrators and teachers have used jargon and invoked professional expertise to intimidate and befuddle parents.36 When parents have had the confidence to persist,


35. Bickel, supra note 19; Clune & Van Pelt, supra note 31; E. Hargrove, supra note 34; Singer & Butler, supra note 32, at 132.

Parental Rights

they often have won special services for their children. Such outcomes, though, have been the exception. Too few parents have been sufficiently assertive in IEP meetings to overcome officials' preference for program planning and against individualized planning.\(^{37}\)

To assert their due process rights, parents must be aware that these rights exist. They must also be able to make arguments persuasively, invest the time and effort necessary to present their case, and be willing to risk future antagonism from school officials.\(^{38}\) Few have been able to meet all these criteria. Studies show that appeals have been made on behalf of less than 1% of children receiving special education services. Well-to-do parents have appealed more frequently and therefore have gained the greatest benefits from the right to appeal.\(^{39}\) Even when parents have won, school districts have sometimes continued to resist and to delay the implementation of IEPs ordered in hearings.\(^{40}\) Finally, school districts have generally limited the effects of hearing decisions to the particular appealed case.\(^{41}\) Thus, the appeal process has not led to system-wide improvements for handicapped children.

The reforms brought about by EAHCA also have had some negative side effects. The costs of IEP meetings and hearings, as well as funding for expensive programs sometimes ordered in those hearings, have diverted resources from special education and regular education programs. In some cases the reforms have curtailed the ability of school districts to serve their handicapped and non-handicapped populations. Educators also have been overburdened by paperwork requirements, especially in the first few years of implementation.\(^{42}\)

---

37. Clune & Van Pelt, supra note 31; R. Weatherley, supra note 6.
Not all school districts have fallen prey to these problems. Some have made positive efforts to include parents in special-education decision making; a noteworthy example has been the program in Madison, Wisconsin, which provides advocates on request to assist parents.43 Such laudable initiatives, however, merely illustrate the commitment of some officials to special education. They do not prove that an educational system emphasizing parental rights can function when officials are uncooperative.

The continued belief of most educators in the collective welfare approach to education has generally frustrated the development of parental accountability in special education. Officials have viewed their responsibilities in broad, programmatic terms. They have tried to bring parental wishes into line with their programs as a whole, resisting implementation of individualized procedures. The vague requirement of "appropriate education" and the low level of participation among parents have enabled officials to limit the impact of successful appeals to a few cases. Most districts have been able to deflect parental accountability, responding to particular parents' demands only when forced to and seeing those demands as aberrations rather than mandates for system-wide change.

B. Parental Rights of School Choice in the United Kingdom

Granting parents the right of school choice in the United Kingdom illustrates how parental rights can change the pattern of decisions and actions in particular cases. The British experience, however, also demonstrates that strategies of parental accountability are limited by the primarily collective welfare orientations of education officials and that parental rights can impair officials' efforts to offer educational opportunities to all children in their area.

Parents' wishes that children attend a particular school can conflict with education officials' abilities to manage the number of children attending each school. Parents often prefer a particular school because it is closer to home, maintains better discipline, or offers a better education for their child.44 Education officials, however, generally see admissions as a managerial task, and are not concerned

43. J. Handler, supra note 38. See also Singer & Butler, supra note 31, at 141.
44. Several surveys have been conducted to determine parents' reasons for requesting a particular school. See M. Adler, A. Petch & J. Tweedie, Parental Choice and Education Policy (1989) [hereinafter M. Adler]; A. Macbeth, D. Strachan & C. Macaulay, Parental Choice of School in Scotland (1986) [hereinafter A. Macbeth]; A. Stillman & K. Maychell, Choosing Schools (1986). See also infra text accompanying notes 60-62.
Parental Rights

with which schools particular children attend. They often set admission limits for schools, so that no school is overcrowded or enrolls so few children that it cannot offer economically a full range of courses.45

Until 1982, Britain dealt with this potential conflict by giving local education officials in England, Wales, and Scotland broad discretion to establish school admission policies and to make admission decisions about particular children. Officials had to take account of parents' wishes about which school their child attended, but were free to override those wishes to prevent overcrowding or under-enrollment.46

Government supporters of parental choice wanted to strengthen the parental role in school admissions. Borrowing from the structure of clients' rights in welfare programs, the government established statutory standards to govern education officials' decisions and instituted local appeals so that parents could challenge decisions. Advocates for parental choice of school argued that parents are the best judges of what education most suits their child. With the right to send a child to any school, parents could ensure that their child received appropriate education and that schools would respond to their concerns about education and school quality.47

The Education Act 1980 (for England and Wales) and the Education (Scotland) Act 1981 gave parents three important rights in school admissions. First, parents have a right to request a particular school for their child. Second, the child must be admitted to the school unless a statutory ground of refusal exists. In England and Wales, officials could refuse the request if granting it would cause "prejudice [to] the provision of efficient education or the efficient use of resources."48 In Scotland, the primary ground of refusal was stated more restrictively; schools could refuse parents' requests only if granting them was "likely to be seriously detrimental to order and discipline at the school or the educational well-being of the pupils.

47. M. Adler, supra note 44, at ch. 2; A. Maynard, Experiment with Choice in Education (1975); E. Midwinter, Education Choice Thoughts (1980); Sexton, supra note 5.
there” or would require the hiring of new teachers or significant extensions or alterations to the school.49 The Scottish legislation limited justifications for refusing parents’ school requests to conditions at the requested school. The more vague standard in the English and Welsh legislation allowed education authorities to use a much broader range of concerns to justify refusals, including conditions at other schools or in the authority generally. Third, when officials refused a parent’s request, parents could appeal to a local appeal committee. In Scotland, parents had a further appeal to the sheriff (the lowest trial court judge).50

In Scotland, parental rights changed school admissions dramatically, depriving education officials of most of their power to refuse parents’ school requests. Before the establishment of parental rights of school choice in Scotland, officials in all 12 education authorities (essentially, school districts) assigned children to the schools serving their residential area, and most of them refused many parents’ requests. Two of the largest authorities operated “district school” policies that allowed parents’ requests for alternative schools only when special circumstances existed.51 Several hundred requests were refused each year in at least two authorities, and several other authorities refused lesser numbers.52 After the implementation of the 1981 Act, virtually all parents’ school requests were granted in Scotland (64,370 of 66,534 from 1982 through 1985—96.7%).53 Except in a few cases involving reasons specific to the child, such as disciplinary problems, officials did not refuse requests unless the school’s rolls had reached physical capacity.

49. Education (Scotland) Act 1981, ch. 58, § 28A(3)(a). The authorities have used the “seriously detrimental” clause in combination with the other two exceptions to apply to refusals based on their concerns about pupil numbers at the requested school. Other grounds of refusal are specified in the English and Scottish acts, but only those discussed above are relevant to overcrowding and under-enrollment in schools.


51. The description of education authorities’ policies is based on interviews with officials in four authorities and an examination of all authorities’ submissions to the Convention of Scottish Local Authorities during consideration of parental choice legislation. See Tweedie, The Dilemma of Clients’ Rights in Social Programs, 23 L. & Soc’y Rev. 175 (1989).


Parental Rights

As a result, schools in several authorities reached their maximum levels of enrollment, necessitating continued use of temporary buildings and annexes some distance from the main school site despite the availability of places at nearby schools. More importantly, some schools became seriously under-enrolled. During the 1980s, school rolls in Scotland dropped by about one-third. Authorities wanted to use admission limits set below the capacity of popular schools to maintain sufficient numbers of pupils in less popular schools. They could not do so, however, because the statutory grounds of refusal referred only to conditions at the school requested by the parent and to circumstances involving the particular child. Enrollment losses attributable to parents' requests occurred mostly in secondary schools in disadvantaged, working-class areas. Reductions in the allotment of resources and course offerings at these schools increased their disparities with schools that gained pupils as a result of parents' requests.\textsuperscript{54}

In England and Wales, the effect of parental rights was different. Less restrictive statutory language resulted in much less change in school enrollments. Officials in many authorities continued to use admission limits to protect under-enrolled schools. At least 40 of the 104 English and Welsh education authorities set these limits below their schools' physical capacities to maintain adequate enrollment at all their schools.\textsuperscript{55} At the same time, at least five authorities did not use admission limits in this way. They allowed parents' choices to fill popular schools to physical capacity even though less popular schools might be hurt by under-enrollment.\textsuperscript{56}

The appeals procedures established in the 1980 and 1981 Acts resulted in the reversal of some refusals, but appeals did not interfere much with officials' efforts to protect under-enrolled schools. Appeal committees seldom questioned the schools' admission limits. Instead, they granted only a few appeals as exceptions to the


\textsuperscript{55} This count of education authorities is based on a secondary analysis of education authorities' responses to the Stillman and Maychell study, A. Stillman & K. Maychell, \textit{ supra} note 44, and an examination of the Commissioners for Local Administration reports of investigations involving school admission complaints. See Tweedie, \textit{ supra} note 51. It was not possible to determine whether the remaining 66 authorities used admission limits set below their schools' physical capacities.

\textsuperscript{56} All five of these authorities strongly encouraged parental choice prior to the 1980 Act, so it is not clear that the 1980 Act influenced the authorities' rejection of admission limits set below schools' physical capacities. For a discussion of how the content of parents' rights in Scotland and in England and Wales influenced their effectiveness, see Tweedie, \textit{ supra} note 51.
limits. Many education authorities planned for anticipated appeals by leaving a few places open for the committees to fill.\(^{57}\)

Parental rights of school choice in Scotland did not appear to increase school officials' accountability to parents. First, relatively few parents requested alternative schools: only 3.1% at the primary-school level and 2.3% at the secondary-school level. The majority of these requests occurred at entry to primary school and transition to secondary school.\(^{58}\) While the low number of requests suggests that parental choice has had a limited effect on officials, it is necessary to examine the reasons for parents' school requests and the way officials have responded to them to see how parental rights affected educators' accountability.

Parents had many different reasons for staying at or rejecting their district school and for choosing an alternative school. While many parents chose schools based on the quality of staff or facilities, most focused on features of the school outside the control of school officials and therefore outside the scope of accountability. At the primary school level, most parents emphasized the proximity of the school, convenience of travel to it, and the attendance of the child's siblings or friends at the school. At the secondary school level, parents cited similar reasons, although many also noted the lack of discipline at the school or poor examination results.\(^{59}\) Problems with discipline or academic achievement can and should be the responsibility of school officials, but even here a school's level of "success" is often primarily a matter of the kinds of pupils who reside in the school's district. Schools cited for poor examination results and discipline problems were invariably located in economically and socially disadvantaged areas. Indeed, at least one survey of parents found that parents often explicitly chose schools on the basis of the kinds of children who attended them.\(^{60}\)

Surveys of parental school choice raise serious doubts about whether a school's popularity reflects parental views of its quality. While some schools are requested or rejected because of qualities partially attributable to school officials (such as discipline), the overall pattern of requests is strongly influenced by factors unrelated to school quality or officials' actions. Given the important influence of

---

58. M. Adler, supra note 44; Scottish Educ. Dep't, supra note 53 (all cited sources).
59. M. Adler, supra note 44, at ch. 4.
60. Id.
Parental Rights

location and siblings and friends who attend the school on parents’ requests, it seems problematic to reward and penalize schools on the basis of their popularity.\textsuperscript{61} Thus, while a case can be made for allowing parents access to those schools, it is more difficult to justify rewarding them for their popularity. Schools with less advantaged district populations would lose resources, increasing the disparity between the schools and limiting the education available to children remaining in the less popular schools.

Finally, parental choice has not promoted parental accountability because education authorities have, for the most part, resisted letting market signals of popularity and unpopularity influence their education policy decisions.\textsuperscript{62} Most school officials discount the value of parents’ school requests as signals of the quality of schools, although many do admit that removal of children from the school by a large number of parents or avoidance of the school in the first place can indicate problems there. Officials have viewed such problems as justifying special efforts at the troubled school, rather than shifting resources from less to more popular schools. Thus, many less popular schools have received extra money. Authorities have emphasized equality of educational opportunity and discouraged diversity among schools.\textsuperscript{63} They have provided additional resources to popular schools to help them cope with the new students, but these increases seldom matched the new expenses.

There is also little evidence that authorities have focused on school popularity in deciding which schools to close in response to falling rolls. School authorities appear to be most concerned with the state of the schools’ physical facilities and saving expenses, sometimes closing older, more popular schools in favor of newer ones and sometimes merging older, more popular schools with

\textsuperscript{61} While schools in well-to-do areas are more popular than others, the expectation that advantaged parents would use their rights of choice more often and more effectively than disadvantaged parents has been questioned in two of the three British surveys examining parents’ choice. See M. Adler, \textit{supra} note 44, at ch. 4; A. Macbeth, \textit{supra} note 44, at 302-3. \textit{But see} A. Stillman & K. Maychell, \textit{supra} note 44, at 80-83, 86-91 (finding a significant positive correlation between parents’ occupational status and educational achievement and the likelihood parents would make a school request).

\textsuperscript{62} This argument reflects the nature of the 1981 Act, which gave parents rights of school choice without requiring authorities to link resources with school enrollments. Such an arrangement would increase authorities’ responsiveness to school choices. Yet as long as authorities maintain general responsibility for running their schools, most act to limit parental accountability.

\textsuperscript{63} A. Stillman & K. Maychell, \textit{supra} note 44, at 44-46.
newer ones at the new site.\textsuperscript{64} \textsuperscript{64} Lastly, authorities seldom examine parents’ reasons for rejecting or choosing a school to determine how the school might be improved or what qualities parents particularly value. School-level officials are almost never informed of parents’ comments about their schools. And school officials generally refuse to take appeal committees’ rationales into account in their own admissions decision making.\textsuperscript{65}

In short, school officials in Britain maintain their collective welfare orientation. Where possible, they refuse requests that conflict with important authority concerns, though the strong form of parental rights in Scotland precludes refusal in most cases. The authority then adopts policies and allocates resources in ways that serve its collective concerns given the patterns of admission that result. It must deal with the constraints of parents’ school requests and the pattern of school admissions, which provide little information about how schools in the authority should be run. School officials do not see themselves as accountable to parents’ choices of schools.

\textbf{III. The Limits of Parental Accountability}

Concerns about the quality of public education have prompted calls for stronger accountability to parents. Advocates argue that giving parents rights enables them to ensure both that their children receive a good education suited to their needs and abilities and that schools maintain quality and offer the most appropriate educational programs. In particular cases, these rights enable parents to hold schools accountable. Parents unhappy with their child’s education can move their child to a more satisfactory school or raise questions about their handicapped child’s education program, often overcoming school officials’ collective welfare orientations and forcing the authorities to give greater consideration to their child’s abilities and needs.

Parental rights, however, have not created a system of parental accountability in public education. In most cases, parental rights in


\textsuperscript{65} M. Adler, supra note 44, at ch. 5; Tweedie, supra note 50.
Parental Rights

special education do not significantly change school officials’ approaches to decision making. A few children get individualized consideration and special programs; most are placed into existing program slots as the result of routine decision making procedures. Parental rights “work” only for the small number of children whose parents participate assertively and knowledgeably in IEP meetings and hearings. More parents use their rights of school choice, yet few hold schools accountable for unsatisfactory educational practices or reward effective schools. Instead, most parents choose an alternative school because it is easier to reach or the child’s siblings or friends attend it.

In addition, school officials resist parental accountability. Parental rights do not affect most case-level decisions. Officials simply treat the pattern of decisions that results from parents’ actions as a constraint within their collective welfare orientations. They usually accept that parental rights reduce their control over particular cases, but refuse to incorporate the effects of rights into their decision making generally. They refuse to adopt the standards that the hearings process produces. And they do not allocate resources on the basis of schools’ popularity with parents. Indeed, less popular schools often receive greater resources.

School officials perceive efforts to increase parental accountability as reducing their control over schools and interfering with their responsibility to provide effective education efficiently to all children. They continue to focus on achieving collective ends. They are most concerned with hierarchical accountability, that is, responding to political officials and higher-level bureaucratic officials.

Parental rights in special education and school choice illustrate how parents who exercise their rights can affect the education available to other children. Schools have limited resources, and parental rights restrict how officials can allocate these resources. Teachers and other school officials must divert time from their other responsibilities to prepare for and attend IEP meetings. Special services for handicapped children can involve substantial additional expense. While these expenses might be justified in particular cases, individualized procedures make it difficult to balance the benefits received by the child against the costs borne by other children.66 In school choice, parents’ school requests can result in some schools

---
being severely under-enrolled. The education of children remaining in those schools suffers because of reduced curriculum options, reduced resources, and declining teacher and student morale.

Perhaps parental accountability has not gone far enough. However, efforts to strengthen it further would increase its costs. Establishing rights that would grant parents unrestricted choice of school or complete control over a child's special education program would limit the ability of school officials to serve public purposes. Parents' concerns would take precedence, regardless of whether the parents possessed adequate knowledge to judge, whether their decisions affected other children, and whether the parents' concerns and values matched those of the public. Some children might receive better education, depending upon the wisdom of their parents' decisions. Parents who did not act would leave their children subject to the effects of other parents' decisions and the reduced capacity of school officials to compensate for inequalities among schools.

Accountability in education thus must be seen as consisting of two different, and sometimes competing, strands—hierarchical accountability to policy makers and parental accountability to the parents responsible for their children. Schools operate with limited resources and competing ends. School officials should be free to allocate resources among these competing ends, and should be held accountable for their decisions. In other words, the collective welfare orientation is inherent in the structure of public school governance. Parental rights should not undermine that orientation or the hierarchical accountability implicit in it.

IV. The Role of Parental Accountability

Within the framework of the collective welfare orientation, parental accountability has an important role. Since parents have primary responsibility for their children's education, their concerns should be respected when possible. In addition, officials can make mistakes in some cases, and reliance on bureaucratic procedures and standards may result in officials' overlooking important special circumstances in particular cases.67 Parental rights enable parents to monitor school officials' decisions and actions in particular cases. Their focused perspective counters school officials' concerns with the pattern of decisions and actions. Parents can correct officials' mistakes or their having overlooked special circumstances.

67. M. Lipsky, supra note 6; R. Weatherley, supra note 6.
Parental Rights

Parental rights in special education and school choice illustrate how parental accountability can play an important role in educational decisions. Experience with these rights also reveals the limits of that role. Legislators should structure parental rights to avoid unduly restricting schools' abilities to serve collective welfare concerns. They should also recognize that parental rights alone are not adequate to protect individual children from mistakes or abuses in school officials' collective welfare orientations.68

Effective parental rights require both substantive standards and procedures for parents to challenge officials' decisions. The substantive standards should state both parents' specific entitlements and what collective concerns might justify denying those entitlements in a particular case. Using choice of school as an example, legislation might entitle parents to have their child admitted to any school in the district, subject to qualifications about how the pattern of requests might affect the school district's ability to run its schools efficiently and equitably. Drawing on the experience of education authorities in Scotland, the legislation might authorize school districts to set enrollment limits at each of their schools calculated to ensure that no school becomes overcrowded or under-enrolled.69

Procedures are also needed to ensure that school officials respect the substantive standards contained in parents' rights. Parents should be able to challenge decisions concerning their children on any of three grounds: (1) that officials have interpreted incorrectly the substantive standards contained in parental rights in the schools' policies and rules; (2) that officials have erred in their application of the school's policies in their child's case; and (3) that an exception to the school's policies is warranted by their child's special circumstances.70

68. In addition to parental rights, the protection of individual children's interests in education requires some form of hierarchical accountability focused on individual cases. Administrative review of individual cases can provide a check on case-level officials' discretion. Resource limitations prevent review of all or even most cases, but occasional reviews of cases randomly chosen can reinforce the importance of looking hard at each case rather than mechanically applying bureaucratic standards. Review must, however, remain sensitive to the special circumstances that may justify exceptional treatment. See E. Brodkin, supra note 6; Mashaw, The Management Side of Due Process, 59 Cornell L. Rev. 772 (1974).

69. This situation essentially exists in many English and Welsh education authorities operating under the Education Act of 1980, with its more general grounds for refusing parents' school requests. See Tweedie, supra note 51.

70. Discussion of the substantive standards and procedural safeguards necessary to ensure effective rights is based on the argument presented in Tweedie, supra note 51.
Parental rights that contain such substantive standards and procedural safeguards provide parents with the opportunity to participate in decisions about their children’s education without undermining schools’ ability to provide efficient and equitable education. These rights establish parental accountability for individual children, but explicitly reject a system of parental accountability in favor of existing forms of hierarchical accountability. Parental accountability would thus be established within the constraints of the collective welfare orientation.

Critics of hierarchical accountability in public education have identified a number of problems in educational governance and have proposed different forms of parental accountability as a systematic response to those problems. As parental rights in special education and school choice reveal, however, parental rights do not result in a system of parental accountability. Rights enabling individual parents to have a greater say in their children’s education can correct errors and oversights in particular cases, but these rights also can interfere with school officials' efforts to run an efficient and equitable school system. Parental rights can play an important role in public education, but that role should be subordinate to the general responsibilities of school officials and their collective welfare orientations toward those responsibilities.