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Public Policy Foundations for Positive Behavioral Interventions, Strategies, and Supports. *H. Rutherford Turnbull III; Brennan L. Wilcox; Matthew Stowe; Carolyn Raper; Laura Penny Hedges.*

Abstract: This article examines precedents that justify Congress in creating a preference for positive behavioral interventions, strategies, and supports over other interventions in the 1997 Amendments to the Individuals with Disabilities Education Act (IDEA). The authors concluded that the IDEA 1997 provisions are warranted by several well-established precedents based in constitutional law, in the right to treatment and the right to education cases, in moral philosophy, and in democratic-government philosophy.

In an extraordinary bow to empiricism and the demonstrated efficacy of the approach identified by IDEA as positive behavioral interventions, strategies, and supports (PBS; Carr et al., 1999), Congress, in reauthorizing in 1997 the Individuals with Disabilities Education Act (IDEA 1999), explicitly provided for the use of that approach to address specified student behaviors. That choice may seem to be both unwarranted and unprecedented. Some still question the efficacy of PBS, saying that it does not work as well for some students as its advocates assert or that it does not work at all for some students (Mulick, 1994). And some may question why Congress selected this strategy for "most favored intervention" status.

Our purpose here is not to answer those who question the efficacy of the PBS approach. Suffice it to say that the strategy has been the subject of intense professional research for at least the last 10 years and that its efficacy for changing the behavior of persons with developmental and other disabilities was documented at the time Congress reauthorized IDEA in 1997 (see Carr et al., 1999, for a review of the strategy's efficacy as applied to persons with developmental disabilities; for reviews of research on PBS as applied to persons with emotional and behavioral disorder or learning disabilities, see Broussard & Northup, 1995; Dunlap, Kern-Dunlap, Clarke, & Robbins, 1991; Dunlap et al., 1993; Dunlap, White, Vera, Wilson, & Panacek, 1996; Kern, Childs, Dunlap, Clarke, & Falk, 1994; Lewis & Sugai, 1993, 1996a, 1996b; Umbreit, 1995; Vollmer & Northup, 1996). Indeed, in 1997 the evidence in favor of PBS had not been uniformly developed (all children, all types of disability, all types of settings, all types of behaviors) and in fact it is still being developed. Those facts do not negate this dispositive one: There was sufficient scientific evidence for Congress, in 1997, to identify PBS as an intervention that the schools must take into account.

Instead of focusing on the issue of efficacy, we intend to show how very justified Congress was, from legal and related perspectives, in selecting the strategy for favored status. Together with the data on the strategy's efficacy, these justifications should put to rest any objections that may arise concerning Congress's choice. Implicit in our argument is that, given the efficacy of PBS and the large body of law favoring it, professionals, other advocates, families with children with challenging behaviors, administrative law judges, and courts would still be well justified in requiring the strategy in appropriate cases; they do not need to rely solely on IDEA, although they may certainly take great comfort from the fact that the Act prefers PBS in appropriate circumstances. Naturally, we confine our analysis to the law as it existed when Congress acted in 1997; any other explanation would be post hoc and untenable for that very reason.

We will begin by describing IDEA's provisions. We parse the Act, its regulations, and the commentary of the U.S. Department of Education in issuing the regulations. We engage in that analysis because (as we will show) it seems to us that there is a great chance for those who apply IDEA (essentially, professionals) and for those who interpret it (essentially, administrative law judges and judges in state and federal courts) to miss some of the important nuances about the Act, the regulations, and the Department's commentary. Here, we seek to clarify and, where clarification seems impossible (for reasons we will show), to point out where clarification will be useful and how the confusion should be resolved.

We then describe the precedents for Congress in adopting PBS, including PBS's basis in constitutional law, in the right to treatment cases and right to education cases, in moral philosophy, and in democratic-government philosophy. We conclude by restating our general theme, which is that IDEA's provisions are justified by several well-established precedents.

It is appropriate at this point to define the approach at issue. IDEA refers to "positive behavioral interventions, strategies, and supports" (20 U.S.C. [sections] 1414(d)((3)(B)(i) (1999)). The Act does not define the term; nor do the implementing

regulations issued by the Department of Education in 1999 (34 C.F.R. Part 300) or the Department's 1999 comments on the regulations (64 Fed. Reg. 12588 and 12620). Sometimes the published literature refers simply to "positive behavioral supports." The intervention, by any other name, is still the same: "the application of positive behavioral interventions and systems to achieve socially important behavior change" (Sugai et al., *1999, p. 6).*

There are four interrelated components of PBS: systems change activities, environmental alteration activities, skill instruction activities, and behavioral consequence activities (H. R. Turnbull, Turnbull, Wilcox, Sailor, & Wickham, 1999). These combine to form a

> behaviorally-based systems approach [which is applied] to enhance] the capacity of schools, families, and communities to design effective environments that improve the fit or link between research-validated practices and the environments in which teaching and learning occurs. Attention is focused on creating and sustaining school environments that improve lifestyle results (personal, health, social, family, work, recreation, etc.) for all children and youth by making problem behavior less effective, efficient, and relevant, and desired behavior more functional. In addition, the use of culturally appropriate interventions is emphasized.... At the core, PBS is the integration of (a) behavioral science, (b) practical interventions, (c) social values, and (d) a systems perspective. (Sugai et al., 1999, pp. 6-7)

The specific components of PBS-based interventions are dictated by the particular needs of the student who exhibits challenging behaviors--those that IDEA calls "impeding" behaviors. Extended discussion of those components is found in H. R. Turnbull, Wilcox, Stowe, and Turnbull (in press).

The foundation for PBS-based interventions is a functional behavior assessment (FBA), defined as "a systematic process of identifying problem behaviors and events that (a) reliably predict occurrences and non-occurrence of those behaviors and (b) maintain the behaviors across time. The purpose of gathering this information is to improve the effectiveness, relevance, and efficiency of behavior support plans" (Sugai et al., 1999, p. 13). Although there are several procedures for conducting an FBA, the procedures should lead to three results. The first is hypothesis statements that include three key features: "(a) operational definitions of the problem behavior(s), (b) descriptions of the antecedent events that reliably predict occurrence and nonoccurrence of the problem behavior, and (c) descriptions of the consequence events that maintain the problem behavior(s)" (Sugai et al., 1999, p. 13). The second is "direct observation data supporting these hypotheses" (Sugai et al., 1999, p. 13). The third is "a behavior support plan" (Sugai et al., 1999, p. 13).

When we use the term PBS, we incorporate the definitions of positive behavioral supports and functional behavioral assessment that we set out above. It would have been helpful, of course, if IDEA or the Department had defined these terms.

General Approach: Rebuttable Presumption

In our opinion, IDEA creates a rebuttable presumption in favor of positive behavioral interventions, strategies, and supports (PBS). It does this by acknowledging PBS to be a strategy that Individualized Education Program (IEP) team members must consider in one instance and that they may consider in another.

CONSIDERATION FOR "IMPEDING" BEHAVIOR

Section 1414(d)(3)(B)(i) of IDEA (1999) requires the student's IEP team to consider "special factors" when it develops the IEP, providing that, "in the case of a child whose behavior impedes his or her learning or that of others," the IEP team shall "consider, when appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior."

Team members are not required to use PBS, only to consider whether to use it, other interventions, or no interventions at all. In our judgment, IDEAs language allows the IEP team to "consider" the use of strategies other than, or in addition to, PBS, or to use no interventions at all. Accordingly, we believe that a team may consider other interventions such as a therapeutic drug regimen (relying on medical advice), the use of nonpositive interventions (which are hard to justify under the rebuttable presumption given to PBS), or the continuation, modification, or discontinuation of present (positive or other) interventions (if any). Note, however, that in every such case IEP team members are required to consider PBS, even if they are also considering other strategies.

Positive behavioral interventions, strategies, and supports must "address" the student's behavior. In our opinion, this language means that they must be targeted at preventing, reducing, replacing, or otherwise appropriately addressing the behavior (or behaviors). The basis for our judgment is the precedent of the Board of Education v. Rowley (1982) decision. There, the Supreme Court interpreted IDEA's requirement of an "appropriate education" to mean that the student must be given such services as will enable the student to "benefit" from special education. The "benefit" standard requires that any strategy used to "address" a student's behavior must be one that will "benefit" the student in the sense that it is efficacious for the purpose for which it is used--by changing the student's behavior and thus enhancing the student's ability to benefit from special education and related services.

One problem with the "benefit" standard exists. It is that the courts have not insisted that schools use the most beneficial or best-practice intervention, only that the intervention that they have chosen to use be beneficial (Turnbull et al., in press). Schools may not want to use PBS because it is difficult and expensive to implement or because they do not have the capacity to implement it. Unfortunately, the new IDEA provisions do not change this result: benefit is still as the Court defined it. That is, as some have noted, an Achilles heel for PBS.

DISCIPLINE

Section 1415(k)(1)(A) (1999) gives local education agencies (LEAs) the authority to move a child from the current placement to another of the LEA's choosing (including temporary suspension) for up to 10 school days, or if the child carries or possesses a weapon or illegal drugs on school premises, to an appropriate interim alternative educational setting for up to 45 days. In either case the disciplinary action must be consistent with that applied to children without a disability (must be nondiscriminatory).

Section 1415(k)(1)(B) (1999) imposes on LEAs a special requirement concerning PBS: "[I]f the [LEA] did not conduct a functional behavioral assessment and implement a behavioral intervention plan for such child before the behavior that resulted [in the discipline], the agency shall convene an IEP meeting to develop an assessment plan to address that behavior."

The regulations (34 C.F.R. [sections] 300.520(b)(1) (1999)) clarify that the FBA and behavioral intervention plan (BIP) are required when "either first removing the child for more than 10 school days in a school year or commencing a removal that constitutes a change of placement under [sections] 300.519 [including changes of placement for weapon or drug violations under [sections] 300.520(a)(2)]."

The FBA and BIP requirements make no mention of positive behavioral interventions, strategies, and supports in the event of disciplinary action. However, when the need for discipline arises, the IEP team is required to create, review, or revise any "behavioral intervention plan" for the sole purpose of "addressing" the student's sanctionable behavior. If it has to develop the plan in the first place, it must do so by conducting a "functional behavioral assessment" before implementing a plan based on the assessment.

In our view, the term functional behavioral assessment is inseparable in the research and practice literature from positive behavioral intervention and supports (Sugai et al., 1999). Further, the "impede" provision requires the team to consider PBS to address behavior that impedes learning. A fair reading of the section is that the team must at least consider PBS to address the behavior for which the student is disciplined. Moreover, the Office of Special Education Programs has explained in its commentary on 34 C.F.R. [sections] 300.520 that PBS may comprise the behavioral intervention plan (64 Fed. Reg. 12620 (1999)).

It therefore seems to us that whenever the IEP team is required to examine an existing BIP, the team will be reexamining the extent to which an FBA and possibly a positive BIP should be undertaken and developed.

Constitutional Precedents for

PBS DUAL DOCTRINES

The Constitution of the United States is a powerful justification for Congress's preference for PBS. A few words of explanation are in order.

The Fifth Amendment prohibits the federal government from denying any person life, liberty, or property without due process of law. The Fourteenth Amendment prohibits a state from denying any person life, liberty, or property, and requires a state to provide "equal protection" of law to anyone in its jurisdiction. These two doctrines undergird IDEA's PBS provisions.

REQUIREMENT OF DUE PROCESS

The phrase "due process of law" encompasses two different principles. The first relates to "procedural due process of

law"; the second to "substantive due process of law."

Procedural Due Process

In a nutshell, procedural due process refers to the ways and procedures whereby government restricts the life, liberty, or property interests of its citizens. In IDEA, for example, the "procedural safeguards" include evaluating and then developing an Individualized Education Program (IEP) for a student (20 U.S.C. [sections] 1414 (1999)), mediation, administrative hearings, judicial hearings, access to records, and correction of records (20 U.S.C. [sections] 1415 (1999)). These provisions exist to assure participatory decision making between the school on the one hand and the student and his or her parents on the other, and also to assure that the student/parent(s) and the school have a way of holding each other accountable for complying with IDEA. Procedural due process concerns itself with "how" the government acts.

Substantive Due Process

By contrast, substantive due process sets limits on those individual interests (life, liberty, and property) that the Constitution protects and upon which the federal or a state government may not infringe without substantial justification. Indeed, whenever a government seeks to infringe upon one of those interests, it must do so in a manner consistent with the procedural due process standards (the "how"). Thus, the substantive due process principle is concerned with what the government may or may not do with respect to life, liberty, and property. Even knowing that the substantive due process principle protects certain "whats," or interests, is only part of the matter. There is more.

LIBERTY INTERESTS: PERSONAL AUTONOMY

As just pointed out, the doctrines of substantive due process and procedural due process protect an individual against various types of governmental action with respect to a person's liberty. Those protections are warranted because individual autonomy is constitutionally valued.

Accordingly, a legally competent person (one not adjudicated as mentally incompetent) may consent to many actions affecting him- or herself and his or her personal autonomy. For example, a person may consent to prescription medications or surgeries or possess pornographic materials. The right of autonomy inheres in the constitutional principle of substantive due process: The liberty of the person entails liberty to control one's body. For example, a person has a right to contraception and abortion. But a person may not consent to anything and everything; the state has an interest in a person's well-being and in the well-being of the state as a whole (Cruzan v. Director, 1990, holding that a state may insist on special safeguards when the death of a person in a persistent vegetative state will occur if food and water are withheld).

Likewise, a mentally competent adult may resist, and withhold consent to, many state or private actions that others--including state agencies and agents--may want to impose on the person. Thus, for example, a person may refuse various kinds of behavioral or biomedical interventions (Rogers v. Commissioner, 1983). Similarly, if a state offers a person an aversive intervention, the person generally may refuse it; only when the state has a particularly powerful reason to use such an intervention may the person's right to refuse be overridden. (These rules about consent by a mentally competent adult do not necessarily apply to minors and may not apply in practice to adults who, although not adjudicated incompetent, still function as though they were incompetent. This is not the place to discuss the law of consent. For an excellent recent discussion, see Dinnerstein, Herr, & O'Sullivan, 1999.)

The phrase "aversive interventions" generally refers to those that cause pain, tissue damage, or humiliation to the person subject to the intervention (Sugai et al., 1999). Within that definition are included corporal punishment, seclusionary or isolation time-out, noxious or toxic substances, deprivation of health-sustaining necessities, electric shock, sensory deprivation, restraints, or drugs (unless electric shock, restraints, or drugs are medically prescribed; H. R. Turnbull et al., 1999).

The more a compelled intervention fundamentally alters the personhood of the individual, the more justified a court is in scrutinizing the state's use of that intervention and the higher must be the state's justification for its use. It follows that the state's use of aversive interventions is constitutionally limited, for these interventions have the purpose and often the effect of changing not just the person's behavior, but arguably the person's own essential self. They are behavioral modifications, yes; they are, however, more fundamentally, personhood modifications.

Thus, if a state has a legitimate interest in compelling a person to undergo mind-and-behavior altering surgery or medication, the courts and legislatures are compelled to give very close scrutiny to what the state wants to do (its ends), the interventions it chooses (its means), and the circumstances under which it offers or compels the intervention (the degree of control the state has over the person; Gelman, 1995). This is where the doctrine of least restrictive alternatives/drastic means comes into play.

LEAST RESTRICTIVE ALTERNATIVE DOCTRINE

Briefly stated, the least restrictive alternative (LRA) doctrine holds that if government has a right to act at all, it must act in the way that is the least restrictive of, or intrusive on, an individual's liberty or property (Dean Milk Co. v. City of Madison, Wis., 1951). Thus, the doctrine accommodates the state's right to act and an individual's rights to life, liberty, and property (H. R. Turnbull, Biklen, Brooks, Boggs, & Ellis, 1981; Turnbull & Turnbull, 2000). IDEA carries out that principle through its provisions for a student to have access to the general curriculum (20 U.S.C. [subsections] 1412(a) (5) and 1414(d) (1999)) and through its provisions for PBS (20 U.S.C. [sections] 1414(d) (1999)).

The doctrine has been at the center of disability law reform efforts. In response to claims by institutionalized persons with disabilities that the states had no sufficient reason to place them into, or keep them in, institutional settings, federal courts in the early 1970s began to apply the LRA doctrine on behalf of those facing civil commitment (Shelton v. Tucker, 1960) and those with disabilities who had already been institutionalized (Levy & Rubenstein, 1996; O'Connor v. Donaldson, 1975; Parham v. J.R., 1979; Wyatt v. Stickney, 1972). In a nutshell, the Supreme Court and other federal courts established the rule that, in matters affecting the liberty interests of persons with disabilities, the state may act in only those ways that infringe upon individuals' liberties to the least degree consistent with the state's interests of protecting them from themselves (the parens patriae doctrine), or of protecting others from them (the police power doctrine). In time, these cases laid the foundation for state legislatures to enact "patients' rights laws," essentially protecting the interests of persons in institutions, and eventually for the Congress to amend the Social Security Act's Medicaid provisions (42 U.S.C. [sections] 1396a (1999)) to provide for home- and community-based services (Levy & Rubenstein, 1996; Olmstead v. L.C., 1999).

Justified Governmental Action

The constitutional interest in liberty is not absolute. If, however, the state seeks to restrict an individual's liberty, even by the least restrictive means, it must first have a very strong reason for its action. Of course there are circumstances, fortunately few of them, when a state may override a person's liberty/autonomy interests and compel/impose an intervention. When life is at stake, when the significant interests of third parties are apt to be impaired, or when the core ethics of an affected profession are challenged, there is a state interest in overcoming the constitutional doctrine of autonomy. Thus, compelled vaccination as a prerequisite for public school attendance (Jacobsen v. Massachusetts, 1905), compulsory education (subject to some religion-based exemptions, Wisconsin v. Yoder, 1972), restriction on the withdrawal of life-sustaining interventions (Cruzan v. Director, 1990), and prohibition of suicide and the means for suicide (Vacco v. Quill, 1997; Washington v. Glucksburg, 1997) are well within the power of the state.

Requirement of a Correlation Between Means and Ends

Within the doctrine of the least restrictive alternative, and indeed fundamental to the constitutional assurance of substantive due process, is the requirement that the state's ends and its means correspond to each other. A state may not pursue legitimate ends except by means that do not correspond closely to, and advance, the ends. The ends-means correlation finds its expression in both the doctrine of the least restrictive alternative and the IDEA. Thus, if a government wants to restrict a person's liberty, it must do so in the least restrictive environment (LRE): An institution is presumed to be more restrictive than a community placement, and special education is presumed to be more restrictive than general education (20 U.S.C. [subsections] 1412(5) and 1414(d) (1999); Olmstead v. L.C., 1999).

Likewise, if a government has an interest in modifying an individual's behavior for state-based purposes, the government must use the means (interventions) and environments (places or sites) that are least restrictive of the person's right to be free of governmental restraint. For example, if the state seeks to protect students and faculty from the behavior of students with a disability that impedes their learning, the state must use the means that are least restrictive of the autonomy of students who have impeding behavior, and it must employ those means in the settings that are the most inclusive/typical/ restrictive. In short, the doctrine of the least restrictive alternative requires a careful calibration of an individual's interests, government's ends (purposes), and the means the government uses (the interventions or environments it chooses).

Requirement of Efficacy

Even if there is a careful calibration of those three factors, there is yet another constitutional requirement. It is that the means must be efficacious for the purposes for which they are used. For example, unless physical restraints will achieve the legitimate state purposes for which they are used, they may not be used (Youngberg v. Romeo, 1982). Likewise, a state may not compel a person to take medications unless the medications will produce changes in the biomedical/ behavioral condition that the state is justified in seeking (Riggins v. Nevada, 1992; Washington v. Harper, 1990).

Requirement of Therapeutic Purposes

Finally, even if the ends and means correlate, the least restrictive interventions and sites are used, and the interventions and sites are efficacious, the state must meet one more test. Usually, it must be able to prove that there is a strong therapeutic justification for what it wants to do (Foucha v. Louisiana, 1992; Winick, 1995). From the perspective of habilitation, this makes a great deal of sense: Without the efficacious and therapeutic action by a state, the individual would deteriorate to an unacceptable level or engage in such injurious behavior that the person's life or health would be in serious jeopardy. It is not enough that the intervention be efficacious; it must also be used for the purpose of, and with the effect of, providing a benefit to the individual (as contrasted to a benefit for the state alone).

In sum, the doctrine of the least restrictive/drastic alternative/means/environment requires (a) justified governmental action, (b) a correlation between the goal and the means, (c) efficacious means, and (d) therapeutic rationale (in lieu of punishment or convenience for the state). The consequence of these components of the doctrine is that there is a wholly justified constitutional presumption in favor of positive interventions (including, in IDEA, PBS) and against nonpositive (sometimes called "aversive") behavioral and biomedical interventions (Gelman, 1995).

REQUIREMENT OF EQUAL PROTECTION

The principles of substantive due process (Fifth Amendment, applicable to the federal government) and of equal protection (Fourteenth Amendment, applicable to the states) converge to create still another constitutional basis for PBS.

By now, nearly every reader is familiar with the Supreme Court's decision in Brown v. Topeka Board of Education (1954), holding that a state may not subject Black students to different and therefore inherently unequal education solely because they are Blacks. Comparably, most readers are familiar with the principles in the early right to education cases (Mills v. Board of Education, 1972; Pennsylvania Ass'n for Retarded Children v. Commonwealth, 1971, 1972) that schools may not exclude students with disabilities solely because they have disabilities.

These cases reflect the doctrine of equal protection: Similarly situated people (in these cases, "Black students" and "disabled students") may not be treated differently from other similarly situated individuals ("White students" and "nondisabled students") simply because of their unalterable, unchosen trait (race or disability). All of these children and youth have two traits in common: They are students (eligible by reason of age to go to school) and they can learn (are capable of benefiting from, and participating in, the state's school programs). Their differences--the traits of race and disability--are educationally insignificant and meaningless. The fact of a child's race or disability is simply a cipher as far as the state is concerned; all that matters is that the child is of school age and is capable of learning. For that reason, they are of the same "class"--they are of the same group (students)--and must be treated equally in that they all must be admitted to and given the opportunity to attend school.

Under the equal protection doctrine, if an intervention is not applied to all persons similarly situated, there is a facial violation of the doctrine: On the face of it, the unequal treatment violates the equal protection assurance. That is why IDEA provides as follows with respect to the discipline of students with disabilities: If students without disabilities may be disciplined for certain conduct, then students with a disability may also be disciplined for the same conduct (but with different protections and consequences, 20 U.S.C. [sections] 1415 (1999)).

If the state asserts that it has a right to treat unequally some people who are or seem to be of the same "class" as others similar to them, then the next inquiry is whether there is a defensible rationale for what the state does in unfavorably treating one subset of the overall class of people. Here, the inquiry is whether the state interest in unequal treatment is justifiable and, within that inquiry, whether the state's ends and its means are congruent with each other (City of Cleburne v. Cleburne Living Center, 1985). Further, when the state acts with respect to individuals with disabilities, it must prove simply that its action is reasonable--its justification (ends) and actions (means) are reasonable. Unlike cases where it treats racial minority groups or women less favorably than racial majority groups or men, the state does not have to prove special, or heightened, justification for its action (City of Cleburne v. Cleburne Living Center, 1985; Heller v. Doe, 1993).

How can the state meet the "reasonableness" test? It can meet it by showing that its ends/means were not premised on prejudice alone (City of Cleburne v. Cleburne Living Center, 1985; School Board of Nassau County v. Arline, 1987; Southeastern Community College v. Davis, 1979) or that there is a professionally defensible reason for what it did (Riggins v. Nevada, 1992; Washington v. Harper, 1990; Youngberg v. Romeo, 1982). Thus, for IDEA to require a school to consider using PBS does not disadvantage students with disabilities; rather, it treats them favorably because it provides them with a benefit of demonstrated efficacy.

REQUIREMENT OF JUDICIAL DEFERENCE TO PROFESSIONAL JUDGMENTS

Nearly every time a state seeks to interfere with a person's liberty or autonomy, or to treat one group of similarly

circumstanced people differently from another such group, the Supreme Court has required the state to justify its behavior on the basis that the consensus within the appropriate profession is that the state's action is defensible by professional standards. This is the doctrine of judicial deference to professional judgment, sometimes also called the doctrine of presumptive validity: It is presumed that action based on professional standards is valid.

A court will defer to a professional judgment if (a) the professional actually engaged in a decision-making process, (b) the professional chose an efficacious intervention, and (c) that particular intervention is at least the normal, usual prescribed intervention in the professional's discipline and in the community in which the professional practices (Board of Education v. Rowley, 1982; Olmstead v. L.C., 1999; School Board of Nassau County v. Arline, 1987; Youngberg v. Romeo, 1982).

When the professional has a choice between two equally efficacious interventions, the professional is entitled to deference if he or she chooses either one, subject to one limitation: He or she must have engaged in a process of evaluating these equally efficacious interventions and he or she must choose the one that is less restrictive of the person's autonomy. The corollary of this rule is that when the professional has a choice between an intervention of proven efficacy and one that is not of proven efficacy, the professional must choose that which is of proven efficacy and must reject the one that is unproven or that, is experimental, especially if its use could impair the autonomy of the individual on whom it is used (Kaimowitz v. Department of Mental Health, 1973).

Clearly, the degrees of intrusion are relevant. If an intervention is highly intrusive, it is presumptively less favored than others that are less intrusive, assuming that the different interventions are efficacious. This is the rule of least restrictive/intrusive means. Thus, the most intrusive interventions are the most closely scrutinized. That is, a court asks: Was this intervention really and truly necessary? And, likewise, the state or professional has the greatest burden of justifying the intervention; in effect, the state or professional must prove that the intervention was really and truly necessary and must give reasons for that conclusion. Similarly, when an intervention is only somewhat intrusive, it is more preferred than the most intrusive but less preferred than one that is even less intrusive than the one under scrutiny. Given that PBS is empirically efficacious and by definition "positive," and given that the disfavored interventions are "aversive," IDEA is solidly consistent with the professional-deference rule.

REQUIREMENT OF A NEXUS

Finally, the constitutional concerns about substantive due process (personal liberty and autonomy), procedural due process (the right to protest state action), equal protection (similar treatment of similarly situated individuals), and least restrictive/intrusive alternatives (including the doctrines related to relative efficacy, intrusion, and deference to professional judgment) must be calibrated against yet another requirement. There must be a nexus--a logical connection--between the person's rights and the state's interests, the intervention, and the environment (site or context) in which a valid (defensible) intervention is used.

For example, assume that the state has a valid reason to compel a person to be within its care, custody, or systems. That reason does not give carte blanche to the state to compel the person's acceptance of any intervention that the state may select. There are limits on what behavioral, biomedical, or educational interventions/treatments may be forced upon those in state compulsory custody, care, or systems. Interventions used with minors in schools must be very carefully chosen: School attendance is compulsory and minors are relatively defenseless within school systems (relative to the power of schools over them); students with disabilities are especially vulnerable because of their disability.

If, however, a person, especially a legally competent adult, voluntarily admits him- or herself to a state mental health or developmental disabilities system and seeks the state's therapeutic aid, and if the person is not dangerous to others, the state has somewhat greater leeway in choosing an intervention/treatment than when it deals with a minor in its school system. Consistent with good professional practice, it may offer positive interventions, electro-convulsive shock treatment, or psychotropic drug regimens, for example. (It may not offer or compel interventions that state law prohibits, including some regarded as "aversive.") The person is an adult, has sufficient capacity to decide to admit him- or herself, and indeed has admitted him- or herself in order to receive the state's assistance; moreover, the person (theoretically) has the legal right to refuse the intervention and discharge him- or herself from the institution if he or she does want to accept what the state offers (the rules change for an adult who is legally incompetent and for minors, Dinnerstein et al., 1999).

By roughly the same token, when a person has been involuntarily committed to a state mental health or developmental disabilities system because his or her behavior is dangerous to others, the state has a greater leeway in choosing an intervention/treatment. As the state's police power increases through the power of involuntary commitment, so too does its power to use various interventions in these settings, including interventions that may be regarded as aversive.

Finally, when a person has been convicted of a crime and is imprisoned, the state has the greatest leeway in choosing an intervention/treatment. This is especially so if the person's behavior, while in confinement, is dangerous to other inmates

or staff (Riggins v. Nevada, 1992; Washington v. Harper, 1990).

Given that the reason for the person's presence in state custody creates a lesser or greater reason for state power over the person and given that the environment (place) where the state delivers its services also affects the state's power over the person, it still does not follow that a person is wholly defenseless against state intervention, even in the most restrictive of involuntary settings (prison). When a person is involuntarily confined, the person's right to consent or to refuse consent does not automatically expire; the person still retains that right, although it is subject to the right of the state to impose a treatment/intervention for therapeutic or for control/safety reasons. Of course, the person's capacity to consent still must exist; the person must be mentally competent. And the issues of voluntary consent (an indispensable element of legally effective consent) necessarily arise: Almost by definition, any involuntary state confinement renders "voluntary consent" doubtful. Finally, when an involuntarily confined person wants to protest whatever action a state proposes, the person must have access to some constitutionally minimal procedural due process safeguards (Washington v. Harper, 1990).

It follows from the person-intervention-place nexus that, in the case of minors and adults who are students with disabilities, the power of the state to compel aversive interventions is offset by the requirement in IDEA that it must prefer nonaversive ones. Here, again, the PBS rule is well grounded in constitutional principle.

SUMMARY

There are several constitutional grounds for PBS. These are not explicitly stated within IDEA. Nor do they need to be, given that the statute must conform to the constitution and its doctrine. These constitutional grounds are (a) substantive due process, (b) procedural due process, (c) least restrictive alternatives and the liberty/autonomy interest (including requirements of justified governmental purpose, means-ends correlation, efficacy, and therapeutic purpose), (d) equal protection, (e) judicial deference to professional judgment (the doctrine of presumptive validity), and (f) the requirement of nexus between person, intervention, and place. It is now appropriate to describe how these doctrines came into play to create a right to treatment and the relationship of the right to treatment to the right to education and the current authority in IDEA for the use of PBS.

Right to Treatment as Precedent for PBS

THE COURTS, CASE LAW, AND DEINSTITUTIONALIZATION

Beginning in the early 1970s, disability advocates launched an effort to deinstitutionalize persons with disabilities who were confined in state institutions, state schools, and state hospitals. Their efforts consisted of three strategies: (a) to change the conditions within the institutions (institutional reform); (b) to discharge those from institutions who can be effectively and safely served in the community (institutional discharge); and (c) to erect barriers to the initial placement of people into institutions (institutional prevention).

As part of their institutional reform strategy, the advocates persuaded the courts that state-confined individuals with disabilities have (a) a right to treatment, also called the right to habilitation; (b) a right to protection from harm at the hands of the state; and (c) a right to procedural safeguards if they have protested a state's action (New York Ass'n for Retarded Children v. Rockefeller, 1973; Wyatt v. Stickney, 1972). The rights to habilitation and protection from harm included (a) the right to be cared for by a sufficient number of trained staff and (b) the right to be treated with the least intrusive means and in the least restrictive setting. The procedural safeguards included (a) internal human rights committees; (b) external monitoring by way of peer review, standard setting, and accreditation; and (c) judicial monitoring by way of access to the courts to redress individual and class grievances. It bears noting that the courts' early decisions were not based on any federal statutes; instead, they rested on the constitutional provisions that we have just discussed. And it is also significant that these internal, external, and judicial safeguards survive in IDEA and its PBS provisions. These provisions include IEP team membership (20 U.S.C. [sections] 1414(d)(1999)), state oversight of local educational agencies' discipline and behavioral intervention plans (20 U.S.C. [sections] 1412(a) (22) (1999)), and development of behavioral intervention plans for students who have been disciplined (20 U.S.C. [sections] 1415(k)(1999)).

CONGRESS AND THE STATE LEGISLATURES

At about the same time as the courts were establishing rights to treatment, against harm, and to procedural due process, Congress and the state legislatures were taking their own steps to protect institutionalized people. In the Medicaid (Title XIX) provisions of the Social Security Act, Congress made funds available to the states on the condition that the states would apply various standards to assure the habilitation of institutionalized individuals (20 U.S.C. [sections] 1396a (1999)). Among these standards was one relating to less drastic means of intervention. Likewise, the states themselves were enacting standards to implement the newly articulated judicial anicongressional standards. The state standards also established the right to less drastic, less restrictive treatment (Levy & Rubenstein, 1996).

Right to Education as Precedent

At the same time that Congress and the state legislature were establishing the rights to treatment, they were also establishing the right to education. As with the right to treatment, this right derived from the Constitution, especially the Fourteenth Amendment's equal protection and procedural due process clauses. The culmination of Congress's efforts is IDEA, first enacted in 1975 (Education for All Handicapped Children Act, P.L. No. 94-142) and most recently restated in 1997 (IDEA, P.L. 105-17, 20 U.S.C. [sections] 1400 et seq. (1999)). IDEA establishes six principles (H. R. Turnbull & Turnbull, 2000). It is instructive to connect them to PBS.

ZERO REJECT

The zero-reject principle holds that no student with a disability may be excluded from school on that account alone. When the principle came into conflict with a school district's interests in maintaining school safety and applying educational discipline, the principle prevailed. The Supreme Court held, in Honig v. Doe (1988), that schools may not unilaterally suspend or expel students whose behaviors are manifestations of their disabilities, that schools may apply short-term suspensions, and that students have a right to stay in their present educational placement while they are contesting a school district's discipline decision. The result of Honig is that there is no cessation of education when behavior is a manifestation of disability; a school's law and order interests can be reconciled with a student's right to education through the short-term "safety valve" suspension and through changes of placement and program. As we pointed out above, IDEA carries forward the no-cessation, zero-reject rule and applies it to discipline, with a PBS wrinkle added (20 U.S.C. [sections] 1412(a) (1(A) (1999)).

NONDISCRIMINATORY EVALUATION PRINCIPLE

Given that every student has the right to attend school (zero reject), the next issue is whether the student has a disability and, if so, what are the educational implications of that finding. To answer these two questions, the school must conduct a nondiscriminatory evaluation of he student (20 U.S.C. [sections] 1414(a)(1999)). When appropriate, the student's evaluation should include a function al behavioral assessment (20 U.S.C. [subsections] 1414(d)(3(B)(i) and 1415((k)(1)(B)(1999)).

Educational evaluations developed out of early research on the cognitive capacities of students (Terman, 1926) and out of later research on the language and adaptive abilities of youth and adults with mental retardation. The adaptive behavior assessments are particularly relevant to PBS. Just how requires a short history lesson.

The earliest right to education cases required schools to assess both the cognitive and the adaptive behaviors of students, especially those students categorized as having mental retardation (Larry P. v. Riles, 1984). This requirement was consistent with best practice and professional judgment. Indeed, the American Association on Mental Retardation (AAMR; then the American Association on Mental Deficiency) had defined mental retardation as an impairment resulting from coexisting cognitive and adaptive limitations in cognitive and in functioning/adaptive skills, in certain contexts), but asserts that the assessmentof a person and a finding of mental retardation should occur in the context of the environments in which the person is asked/wants to function and should evoke a right in the person to receive supports to ameliorate the effects of retardation (Luckasson, 1992). The AAMR requirement of context/environment-based evaluation of adaptive behaviors and of supports to ameliorate the effects of mental retardation is particularly relevenat to PBS. This is so because PBS is undergirded by a functional behavior assessment that, by definition, considers the context (site and environment) in which behaviors occur (Sugai et al., 1999; H.R. Turnbull et al., 1999).

Moreover, applied behavior analysis also counseled evaluators to consider the antecedents of behavior, the behavior, and the consequences. In determining the antecedents, applied behavioral analysts were concerned with the physical environment and with the interactions between tie individual and others. Like the language and adaptive behavior researchers, they too considered the context/environment to be significant in explaining why behavior occurs and what might be done (to the context/environment) to modify the behavior.

Finally, the first disability antidiscrimination statute, Section 504 (20 U.S.C. [sections] 794 (1999)), and the second disability antidiscrimination statute, the Americans with Disabilities Act (ADA; 20 U.S.C. [sections] 12101 et seq. (1999)), viewed disability with an eye toward the environment. These statutes established that a person who has a disability also has a right to reasonable accommodations in federally funded programs and activities (Sec. 504) and in the private sector (ADA). Put another way, they asserted that the person has a right to expect society to change the context, the environment, to accommodate the disability. This is the principle of dual accommodations: The person receives an education (IDEA) or treatment/ habilitation so that he or she can accommodate to society, but society also must make changes and accommodate to the person (Sec. 504 and ADA). As we pointed out above, the early emphasis--in both

research and public policy--on environmental accommodations survives in PBS and drives educational evaluations ("functional behavioral assessments").

APPROPRIATE EDUCATION PRINCIPLE

It is not sufficient, or indeed morally defensible, to evaluate and determine that a person has mental retardation and then to fail to respond to that finding. That is why, among other reasons, the right to education cases and, later, IDEA (in its 1975 and now its 1997 versions) require a school to provide an appropriate education for a student with a disability (20 U.S.C. [subsections] 1412(a)(1) and 1414(d) (1999)). The Supreme Court has interpreted "appropriate" to mean "beneficial" (Board of Education v. Rowley, 1982). The "benefit standard" basically is a proxy for the "efficacy" standard (see our earlier discussion about professional judgment and the presumptive validity doctrine). Additionally, when professionals select an intervention, their decisions are entitled to be honored, subject to their compliance with various prerequisites and the "benefit" standard. The "benefit" and "deference" principles are incorporated within PBS: The intervention is undoubtedly beneficial (Carr et al., 1999). Accordingly, Congress is wholly justified in elevating PBS to a most-favored status.

LEAST DRASTIC MEANS/RESTRICTIVE ALTERNATIVE PRINCIPLE

Under IDEA the least restrictive environment (LRE) rule is that, to the maximum extent appropriate for the student, the student will be educated with students who do not have disabilities and will be removed from settings or programs for nondisabled students only if that student cannot successfully be educated with them (the "benefit" standard), even with related services and supplementary supports and services. Also under IDEA, the student has the right of access to the general curriculum (20 U.S.C. [sections] 1414(d)(1999)), and indeed special education is deemed to be a service in support of general education, not a separate place/program into which students with disabilities automatically are placed (20 U.S.C. [sections] 1400(b)(5)(C)(1999)). Undoubtedly, IDEA advances the "environment/context" meaning of the LRE doctrine. Moreover, the services that the student receives, including PBS, should be directed at advancing his or her right to participate in the general curriculum (20 U.S.C. [sections] 1414(d) (1999)). In this sense, PBS advances the programmatic understanding of the meaning of LRE: Its focus is on means, not environment.

PROCEDURAL DUE PROCESS PRINCIPLE

The fifth principle under IDEA is procedural due process, also called procedural safeguards. The safeguards include such standard ones as the right to protest (mediation and administrative hearings, followed by judicial hearings) and the right of access to and some control over school records. Because disciplinary action against a student is surrounded by various special procedural safeguards, it is notable that IDEA now requires educators to undertake a functional behavioral assessment, or to redo one that they have already done, in the event of discipline. It is also notable that a functional behavioral assessment is the foundation for a plan of PBS.

PARENTAL PARTICIPATION AND SHARED DECISION-MAKING PRINCIPLE

The final principle of IDEA is that educators, parents, and students (when appropriate) are obliged to collaborate in evaluating a student, developing and implementing an appropriate education for him or her, and assuring his or her access to the least restrictive setting and program (20 U.S.C. [sections] 1414(a)-(d)(1999)). This gives parents a substantial presence in determining whether, and, if so, under what circumstances, the student will receive PBS.

Moral Basis for PBS

Up to this point, we have traced the legal foundations for PBS. There is, however, one other forensic foundation that predates the 1997 reauthorization of IDEA--that PBS (or, in the terms of the argument as originally stated, nonaversive interventions) has a moral basis.

EARLY ARGUMENTS

Early on in the professional and legal debates about the use of aversive interventions, those who opposed them did so by relying on moral grounds, among others. The first of these objections was issued by TASH (The Association for the Severely Handicapped) in 1986 (Guess, Helmstetter, Turnbull, & Knowlton). In the same year, the authors of the TASH monograph were joined by others in developing a critical and thorough analysis of the moral basis for opposing the use of aversive procedures (H. R. Turnbull & Guess, 1986).

The authors of these tracts argued that it is more moral than not to use positive interventions on persons with disabilities. They based their argument on several grounds: (a) the relative efficacy of aversive and nonaversive interventions, where the latter seem to be more efficacious than the former; (b) the effects on the therapist/ intervenor and on the recipient/client of using the aversive interventions; (c) the dual standard under which aversives were more often used on

persons with disabilities than on persons without disabilities; and (d) the application of various doctrines (Judeo-Christian, Kantian, utilitarian, and Aristotelian).

A few years later A. P. Turnbull & H. R. Turnbull (1997) restated the moral argument against aversives, relying not only on moralists but also on the codes of ethics and policy statements of three professional associations, namely, the Council for Exceptional Children, the American Association on Mental Retardation, and TASH.

RECENT ARGUMENTS

The moral argument against aversives was restated last year by Singer, Gert, and Koegel (1999). Like H. R. Turnbull and Guess (1986), those authors defined aversives and asserted that people with disabilities are entitled to be protected by moral rules. Unlike H. R. Turnbull and Guess, they argued that the data concerning nonaversive interventions indicates that nonaversives can replace aversive procedures in all but a very small number of highly unusual cases (H. R. Turnbull & Guess precluded aversives in all situations).

This article is not the place to revisit the moral arguments favoring nonaversives and disfavoring aversives. It is, however, a place to assert that there are quite defensible, and quite persuasive, reasons for favoring nonaversives, now called positive interventions, and that the history of the positive behavioral interventions and supports provisions in IDEA have their lineage in the early debates about the morals of aversive interventions. That is to say, there is a solid moral ground on which the IDEA provisions rest.

Democratic Precedent for PBS

Finally, one of the moral arguments against the use of aversives and in favor of the use of positive means is related to a moral argument but is grounded in democratic political theory. The argument is that the individual is an end, in and of him- or herself. That argument, which is essentially Judeo-Christian and Kantian, has its counterpart in liberal democratic political theory. That theory, derived from such Enlightenment philosophers as Mill, Locke, and Rousseau, holds that the state exists only for the purpose of serving the ends of the individuals who constitute its body politic. The state's existence depends on those individuals' consent to its existence and they consent only (or primarily) for the purpose of securing benefits from a collective entity, the state. It was, after all, for the purpose of establishing their own form of self-government that the signers of the Declaration of Independence pledged their lives and sacred honor; and it was to "form a more perfect Union, establish Justice, ensure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity," that the people of the United States, through their representatives, established the Constitution and adopted the Bill of Rights.

Recognizing the individual as the end and the state as a means leads to the conclusion that any coerced treatment of an individual is defensible if, and only if, it significantly advances legitimate state interests and is the only efficacious and least restrictive/drastic means for doing so. An individual's right to liberty has never been absolute; it is limited by the interests of other individuals, acting through the collective they have created and called the state, to self-protection and general welfare. But the right to liberty also invokes a claim to positive, and against aversive, interventions. This is a claim based on the legal grounds we reviewed above and that Congress acknowledged in IDEA through the PBS provisions.

Some may argue that IDEA is unusually prescriptive in identifying one, and only one, method for addressing students' behaviors. That argument, of course, is flawed. IDEA does not command the use of PBS. Instead, it commands that school decision makers consider whether to use it, or other interventions, to address student behavior.

But even if IDEA were to have prescribed only one method for addressing students' behavior and specified that method as PBS, that in and of itself, while unusual, would not be indefensible. There is a long line of varied precedents for PBS, each of which is grounded solidly in relatively old law (relative to the "age of new or reformed disability law in this country), and in the law's companion disciplines, morality and ethics, and political philosophy.

The challenge should no longer be to PBS as a legally sanctioned intervention or as an empirically solid intervention. Instead, the challenge is to implement PBS consistently with the letter and spirit of the law and with the state of art regarding its use.

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