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Judicial Barriers to Inclusive Education as a Human Right: An Analysis of Relevant Legal Cases in Japan

ABSTRACT

Article 24 of the CRPD guarantees inclusive education as a fundamental human right. In Japan, the education policy has shifted from a segregated education to an inclusive one with the ratification of the CRPD. However, recent lawsuits on children with disabilities and their school placement/attendance reveal such policy changes are not reflected in practice. In this article, we reviewed notable court cases in Japan to investigate how Japanese courts interpreted the reform of the legal system. We divide the article into two parts: Firstly, we describe the history of Japanese education reform. Secondly, we discuss the court cases with regard to Japanese education system reform and the schooling of children with disabilities over three time periods. Our findings show that the court continues to make judicial decisions based on the old notion of segregated education and fails to recognize or even understand that inclusive education is a fundamental human right.

KEYWORDS

Human Rights; Inclusive Education; Court Litigation; Reasonable Accommodation; Symbiotic Society

Points of Interest

- Inclusive education should be a human right, but many countries, including Japan, still have school systems where students are segregated.
- The history of changes in laws on Japanese schooling system is explained.
- This study analyzed the main purports of legal cases about school attendance of children with disabilities in Japan and its changes over time.
- This study found that the court's decisions made after the changes in laws to schooling system in Japan still did not adequately reflect its philosophy of inclusive education as a human right.
- The study recommends that it is necessary to have open discussions about “inclusive education” as a human right.

Introduction

Education for children with disabilities in Japan is facing a major turning point. Behind this is

the trend toward the realization of inclusive education worldwide. UNESCO's 1994 Salamanca Declaration advocated the realization of "Education for All" and invigorated international discussions on inclusive education for children with disabilities. In 2006, the United Nations Convention on the Rights of Persons with Disabilities (CRPD) confirmed inclusive education as the fundamental human right of all learners (Article 24). The CRPD's philosophy founded on the "social model" of disability has since been reflected in the Japanese revised Basic Act on Persons with Disabilities in 2011 and the Act on The Elimination of Discrimination against Persons with Disabilities in 2013, prohibiting discrimination based on disability and the need for provision of reasonable accommodation. In addition, the educational provisions of the revised Basic Act on Persons with Disabilities state that "to the extent possible, children and students with disabilities shall be educated along with children and students who are not disabled" (Article 16 (1)). This provision prompted a new schooling system and further improvement to the educational environment for children with disabilities. With the development of such reform in educational laws and systems within the country, Japan ratified the CRPD in 2014 and has been working towards operationalizing inclusive education.

The School Education Act, which is an act that stipulates the specifics of the school system, has used the term "special education" since 1947 and has regulated the education of children with disabilities. As the Ministry of Education, Culture, Sports, Science, and Technology (MEXT) (2001) points out, special education has been developed from the viewpoint of effectively providing refined education by establishing educational opportunities in response to the type and degree of disability. Recently, with the conceptualization of normalization and diversification of disabilities, there was a shift in the support system from supports based on disability type to individualized support based on the needs. As such, the revised School Education Act was enforced in 2007, which prompted the conversion of schools from "special education" to "special *needs* education" and expanded the definition to include disabilities, such as Learning Disability (LD), Attention Deficit Hyperactivity Disorder (ADHD), and high functioning autism. Along with the new definition, the law recommends a) "Individual Education Support Plan" as a mechanism to appropriately respond to diverse needs, b) special needs education coordinator as key personnel to coordinate and liaise for people and institutions providing educational support, and c) introduction of the Wide Area Special Needs Cooperation Council as a network to support high-quality educational support (MEXT 2003).

Further, in the special needs education system, "diverse learning opportunities" are made available as a continuum from special needs schools (conventional special schools), special needs classes, and pull-out. The continuum of learning opportunities is in hopes of an inclusive education system toward a "symbiotic society" (MEXT 2012). Special needs schools aim to

provide the necessary knowledge and skills to overcome difficulties stemming from disability and promote independence for students with disabilities (School Education Act Article 72).

Special schools for the visually impaired and hearing impaired shifted to compulsory education in 1948 and were fully implemented in 1956. For students with intellectual disabilities, physical disabilities, and health impairments, the compulsory education system was not adopted until 1979. Further, the special needs class within the mainstream school was established, and such a facility was intended for children with intellectual disability, physical disability, physical weakness, vision weakness, and hard of hearing (School Education Law Article 82(2)). In addition, the establishment of special needs classes for speech and language disorders, and autism / emotional disorders has been recognized (October 4, 2013, Notification No.756 issued by the Director of Elementary and Secondary Education Bureau of the MEXT). The “*tsū-kyū*” system stipulated in Articles 140 and 141 of the Enforcement Regulations of the School Education Act is a form of pull-out / resource room system where students spend the majority of their time learning in the mainstream class while being pulled-out for specific support based on student’s disability. This system was institutionalized in 1993 excluding students with intellectual disabilities. In 2006, this form of support expanded to include students with LD and ADHD. However, students with intellectual disabilities continue to be excluded based on the notion that these students benefit more from small group instruction in special needs classes (Ministry of Education 1992).

The Right to Inclusive Education in the CRPD

According to UNESCO (2021), the CRPD supports enrolment to the mainstream school, but does not position the existence of special schools as a violation of the Convention and has granted the practice of inclusive education to be interpreted and determined on the discretion of states parties. In response to this situation, the UN Committee on the Rights of Persons with Disabilities (2016) compiled General Comment No.4 (GC4) and shared their concern on how Article 24 of CRPD does not clearly prohibit the provision of segregated education, and therefore, low-quality, segregated education remains deeply rooted in many of the countries. GC4 noted that the mainstream education system and the special/segregated education system are incompatible (para 40) and recommend that there is a need to progressively break away from segregated education (para 70). It also prohibits “legislative or regulatory provisions that limit their inclusion based on their impairment or its 'degree' ” (para 18). In other words, the decision of the school destination based on the type and degree of the disability should be denied, and the development of an inclusive education based on the need and improvement of the educational environment is required.

Transitions of the School Attendance System in Japan

Japan's first school for children with disabilities was Kyoto Blind, Deaf and Mute hospital, which opened in 1878, but many children with disabilities were excluded from public education as students. After the end of World War II in 1947, the School Education Act came into effect, and the institutional security of the right to receive education for children with disabilities was made. Yet, schooling was not compulsory for children attending special schools. Even after the school attendance for the Blind and Deaf became compulsory in 1948, the criteria and procedures for determining the placement of study or deferment for schooling remained underdeveloped, leading the schools to be able to make their own decision about acceptance of such students into their schools (Okubo 1980). In addition, data on number of children of special education were not established, which was a major barrier at that time in assessing the actual needs of children with disabilities (Ministry of Education 1978). Therefore, in 1953, the Ministry of Education issued “Criteria for Distinguishing Students requiring Special Treatment for Education” (June 8, 1953, Notification No.303 issued by the Vice Minister of Education), hereinafter referred to as “Determination Criteria”) to ensure that each child can receive education according to their abilities, and indicate the definition of disability and appropriate educational measures. In addition, the School Health Act of 1958 (current School Health and Safety Act) stipulated that the Board of Education must exempt students from their school attendance obligations and provide guidance to special schools based on the results of medical examinations for schooling.

Due to the revision of the Order for Enforcement of the School Education Act in 1962, the “Determination Criteria” expired, and for the first time, the degree of disability of students who should attend a special school were established by laws and regulations (Article 22-2 “School attendance standards”). This mirrored the partial revision of the School Education Act and the enactment of the Act in which educational measures accompanied for children and students requiring special treatment for education (October 18, 1962, Circular Notice No.380 issued by the Director of Elementary and Secondary Education Bureau of the Ministry of Education). This led to promoting educational measures and school attendance to align with disability type and degree of disability. The following year's "Appropriate Measures and Guidance for The Blind and Deaf” (December 23, 1963, Circular Notice No.435 issued by the Director of Elementary and Secondary Education Bureau of the Ministry of Education) made an obligation for parents/guardians to enroll students who are blind and/or deaf to schools for the blind and deaf. Ironically, this also made the attendance to a mainstream school as a violation of laws and regulations (Hatano 2008; Nakamura and Oka 2015). Thus, by the pre-1960s, school

attendance guidance based on the type and degree of disability was thoroughly implemented, and a systemic foundation for segregated education was established.

Then, in 1979, the compulsory education system of special schools (schools for the disabled) with intellectual disabilities, physical disabilities, and health impairments was started, and the right to education for children with disabilities became realized. However, the previous year, the Ministry of Education issued "Educational Measures for Children Requiring Special Treatment in Education" (October 6, 1978, Circular Notice No. 309 issued by the Director of Elementary and Secondary Education Bureau of the Ministry of Education) and retained a mechanism, once again, to automatically force the relevant students to attend special schools (Nos. 380, 435 -discontinued notifications). Thus, on one hand, this change led to all children, including those with severe disabilities who were previously exempted from attending schools to be able to attend schools. On the other hand, this further separated special schools from mainstream schools, creating a controversy for promoting segregation (Koyama 2011). This system continued for half a century, despite criticism to the government for establishing this segregation.

Under such a situation, the normalization movement and regional differences in school governance led to a request for a new schooling system. In 2002, a fundamental review of school standards was made (May 27, 2002, Notification No. 291 issued by the Director of Elementary and Secondary Education Bureau of the MEXT). The intent was a) relaxation of schooling standards to broaden the definitions of those who fall under blind/visual impairment, deaf/hard of hearing, intellectual disabilities, physical disabilities, and health impairments, b) introduction of "Certified School Attendance System" (those who are recognized as being able to receive appropriate education from the municipal board of education are able to attend mainstream school), c) the obligation to obtain the opinions of experts in education, medicine, psychology, etc. in determining where children with disabilities are to attend school (Abolition of the Circular Notice No. 309).

Further, with the change from "special education" to "special needs education" in 2007, as part of the obligation process, parents are to be included in the decision making of their child's school placement (April 2007, Notification No. 125 issued by the Director of Elementary and Secondary Education Bureau of the MEXT). In 2013, the obligation expanded parents' opinions to be considered for school transfers as well. In addition, the previous "Certified School Attendance System" (Notification No. 291) was abolished, and all children became eligible for mainstream schooling even for students who are certified to attend special needs schools. Thus, the school attendance standards that functioned to *place* all students into special needs schools can now be used only for determining *eligibility* to enroll/admit into special needs school based

on the type and degree of disability. The decision also must be "conducted with sufficient planning, and the opinions of parents and guardians must be weighed in and respected to the extent possible" (September 1, 2013, Notification No. 655 issued by the Director of Elementary and Secondary Education Bureau of the MEXT).

Thus, the schooling standard that created segregated education for children with disabilities has transformed its purpose. This progress has been one of the results of institutional reforms made with the ratification of the CRPD (MEXT 2012). Still, the number of students in special needs schools have not decreased but instead increased. The number of first grade enrollment in 2014 was 6,341, and in 2019, it was 8,003. This increase is despite the decline of birthrate in Japan. Additionally, the percentage of students in mainstream class or receiving pull-out programs remain small. In 2019, only 7.8% of the total students with disabilities who met requirements of school attendance standards at the elementary school level were in the mainstream classroom. The rest, or the overwhelming majority were in the special class (92.2%)(MEXT 2020). Thus, several questions remain. Does the intention of the policy change to inclusive education functioning without exceptions? What is the impact of the language remaining in the law about disability type and degree of disability to determine the eligibility/admission to special needs education? To what extent are parents' opinions about their child's schooling respected? Ratification of the CRPD has set forth the policy direction toward the realization of inclusive education and the provision of reasonable accommodation, but clearly, the CRPD's philosophy has not fully been put into practice looking at the number of students with disabilities in a segregated setting. To investigate these questions, in the following sections, we examined the court cases with regard to the schooling of children with disabilities.

The Judgment of the Court on the School Attendance of Children with Disabilities and Its Changes

The reform of the school attendance system for children with disabilities in Japan can be viewed in three periods: (1) the promotion period of the special education system for the introduction and operation of the compulsory school system for children with disabilities (first period; before 2002), (2) The transition period from special education to special needs education (second period; 2002-2014), and (3) the reorganization period after the ratification of the CRPD (third period; After 2014). Yoshida and Moribe (2007) covered the situation of education lawsuits for children with disabilities in the first period. At least 77 lawsuits had been filed, of which nine were related to enrollment and promotion. Nagano and Weinberg (2012) have identified three major school lawsuits during the first and second periods. Yoshitoshi and Takahashi (2021) reviewed the first school litigation after the ratification of CRPD and attempted to analyze the

case. However, these previous studies are not intended to capture changes in the degree of understanding the reform of the school attendance system. How has the court interpreted the reform of the legal system toward the realization of inclusive education? The following are articles of the Constitution and laws related to discussions in advance.

The Constitution of Japan:

- Article 14(1): All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin.
- Article 25(1): All people shall have the right to maintain the minimum standards of wholesome and cultured living.
- Article 26(1): All people shall have the right to receive an equal education correspondent to their ability, as provided by law.

Basic Act for Persons with Disabilities:

- Article 4(1): No person may commit an act of discrimination or any other act which violates interests or rights against a person with a disability on the basis of the disability.
- Article 4(2): When a person with a disability currently requires the removal of a social barrier and if the burden associated with said implementation is not excessive, necessary and reasonable accommodation must be given to implementing the removal of the social barrier so as not to be in violation of the provisions of the preceding paragraph by denial to do so.

Act for Eliminating Discrimination against Persons with Disabilities:

- Article 7(1): When conducting its administrative affairs or other work, an administrative organ, etc. must not violate the rights or interests of persons with disabilities through disparate and unfair discriminatory treatment on the basis of disability comparing to persons without disability.
- Article 7(2): If a person with a disability expresses the genuine willingness to eliminate the social barrier, an administrative organ, etc., in conducting its administrative affairs or other work, must provide reasonable accommodation to implement the elimination of the social barrier so long as the burden associated with the relevant implementation is not disproportionate, in accordance with the sex, age, and state of the disability of the person with a disability so that the rights and interests of the person with the disability is not violated.

The promotion period of the special education system for introduction and operation of the compulsory education system for schools for the disabled (first period)

The completion of the compulsory education system for schools for children with disabilities in 1979 marked a major turning point, and in the 1980s, the friction between parents and the administration came to surface. According to Yoshida and Moribe (2007), the first trial related to having children with disabilities in compulsory education was the “Hanahata Higashi Elementary School Self-School Attendance Incident” (Tokyo District Court, Judgment of September. 9, 1980). This trial originates from the fact that the child with a disability who refused to attend a segregated education and attempted to attend a mainstream school. The child entered the school premise by climbing over the gate to use the bathroom in the mainstream school and was arrested for attempted entry into the school. The Tokyo High Court recognizes the significance of the movement to improve the education system for children with disabilities, but the Constitution stipulates a system in which children with disabilities attend special schools depending on the degree of disability and took the stance that it does not violate equality under the law (Article 14), the right to education (Article 26), and the laws and regulations thereof. Specifically, the court stated that it is difficult to establish facilities for children with disabilities in all elementary schools, and said, "As currently implemented, the system in which children with disabilities should attend schools for children with disabilities and non-disabled children attend (regular) elementary schools is inevitable given the current stage of the educational system." And further stated that while the movement to realize school attendance for children with disabilities is legitimate, the actions of the supporter inappropriate as a means. (Tokyo High Court, Judgment of January 28, 1982). The Supreme Court also dismissed the appeal and found the supporter guilty (Supreme Court, Order of November 15, 1985).

In 1982, February, two pairs of parents and children (one with hearing impairment and the other with physical disabilities) refused to go to the special school, and filed a lawsuit in Nagasaki District Court. This “Nagasaki School Decision Disposition Revocation Lawsuit” contested the unconstitutionality of the school attendance procedure system for children with disabilities (Minei 1986; Sueoka 2021). According to Shinpuku (1984; 1985), for the child who is hard of hearing, the lawsuit was withdrawn in August 1983 given that the child was given the possibility to attend the mainstream school after attending the school for the deaf for a specified period of time. As a result, after going to deaf school from September 1983, the student was successfully able to transfer to an elementary school in December of the same year. On the other hand, for the child with physical disability (cerebral palsy), they came to an agreement that while attending a special school from February 1984, the student will participate in an exchange education twice a week at local mainstream elementary schools and put an end to one year and

nine months of non-schooling (The "exchange education" refers to educational activities in which students enrolled in special needs schools and special needs classes learn together with students enrolled in regular classes. The term "exchange and joint learning" has been used since 2004.). However, although exchange education was conducted for two months (11 days), the City Council did not recognize the necessity of exchange from the new school year (April), so the lawsuit prolonged. In the process, problems in the school procedure such as insufficient medical examination and explanation were pointed out, along with questioning of who has the authority to make the placement determination, and what law governs such a decision. In May 1986, the lawsuit was withdrawn by the plaintiffs, as the transfer to the elementary school was finally approved. Similar movements began to be observed nationwide before and after this case of dispute, and parents' participation in school decisions and connections with local communities became important.

In the 1990s, there was a remarkable judgment on the high school entrance of a child with muscular dystrophy (Kobe District Court, Judgment of March 13, 1992). In this trial, the student was denied admission to a public high school even though he had met the passing score for the entrance exam because the school believed that the student do not appear to possess the capacity to meet all of the high school graduation requirements due to his disability. The court acknowledged that the pass/fail decision was left to the principal's discretion, but made a landmark decision that it was not appropriate to close the path of admission simply because of physical disability. Specifically, the judge stated that "there is no law denying the admission of persons with disabilities to mainstream high schools", and "that the plaintiff possesses the academic ability to enter the mainstream high school and also wishes to receive education at the mainstream high school, thus it is not permissible to deny the entry to a mainstream high school." Nonetheless, there was no change in the situation at the compulsory education stage. On October 1993, on the "Revocation of Special Education Class Placement Incident" at the Asahikawa District Court, a decision on the right to choose educational placement was questioned. In this trial, the principal of a public junior high school was requested to rescind the decision to place a student with physical disability in special education class without the consent of his parents.

In the first trial (Asahikawa District Court, Judgment of October 26, 1993), the points of contentions included (1) whether the right of the parents and students' rights to choose a mainstream class or a special education class is guaranteed, and (2) whether it is constitutional to give the principal the authority to make the placement decision into special classes. The court held the position that place of education for children is "reasonable as a system as long as the principal who is an expert in education decides from an educational point of view and by

obtaining and considering scientific and medical perspectives." Thus, the school placement decision belonged to the principal rather than the parents. The judge stressed that "the child and their parents' desires are not necessarily superior to the principal's judgment, and what is beneficial to a child with disabilities should not be bound by the children and parents' subjective opinions." In the second trial (Sapporo High Court, Judgment of May 24, 1994), the court while appraising the student and parents' attempt to put their belief in education into practice, he dismissed the plaintiff's complaint by adding the following judgment and reaffirmed the principal's authority.

With regard to the ideal way of admission, even if educational consideration for the child should be the highest priority, class arrangement and classification cannot be determined without the problems of the staff such as educational equipment, teachers and caregivers at the school concerned, and if it is decided based solely on the will of the child or parents, it will sometimes bring considerable confusion to the field of education. It is easily predictable that it will affect the education of other children (Sapporo High Court, Judgment of May 24, 1994).

This case clearly defined school administrators as the decision makers for the school placement, and practically dismissed the parents' right to choose the school placement. In response to the Sapporo High Court decision, Shiraishi (1995) points out that school decision making is to provide appropriate advice and the necessity of including the viewpoint of the student and parents' as the student's right to education. And the decision should have been made based not only on the legal interpretation (words), but also on an educational point of view (practical). This ruling showed that Japan's special education system during this time period did not reflect the trends of the international community and that a fundamental review was necessary to reinforce parents' right to choose schools (Oosawa, 1995; Inoue 1999).

The transition period from special education to special needs education (second period)

In the midst of these unfavorable decisions for children with disabilities, the schooling system was reorganized against the backdrop of decentralization and advances in medicine, science, and technology. 2007 saw the enforcement of the revised School Education Act and a series of systemic reforms that led to the establishment of a new framework from special education to special needs education. In the field of preschool education, there have been cases in which the admission of infants with spina bifida and other disabilities to municipal kindergartens was approved (Tokushima District Court, Judgment of June 7, 2005), and cases in which the

admission of children with medical care needs who wear tracheostomy tubes to preschool was upheld (Tokyo District Court, Order of January 25, 2006) in which it has been judged illegal as violation or abuse of administrative discretion to deny admission to a child when there is no reasonable ground for refusing admission.

At the compulsory education level, in addition to the relaxation of school enrollment standards and the establishment of the certified school enrollment system in 2002, the obligation to obtain the opinions of parents in the school placement decision was introduced in 2007, and different judicial decisions are being made than in the past. In the Nara District Court, the school placement of a child with cerebral palsy who wished to enter a public junior high school was disputed (Nara District Court, Order of June 26, 2009). Since entering elementary school, the child had been enrolled in a special needs class as a student under the certified school attendance system, and with the assistance of his homeroom teacher, had attended all classes, including subjects requiring movement to the classroom, together with children in regular classes (including physical education in which wheelchair mobility training and doable exercises were performed). However, the town board of education decided that the child was not a certified student for entering junior high school, and notified the school to enroll the child in a special needs school. As reasons for this, the town board of education cited (1) inadequate facilities and equipment at the junior high school (e.g., many stairs and steps, which made moving around very dangerous) and (2) the lack of highly specialized teachers assigned to the school. However, the court indicated that measures could be considered to change the classrooms and to reduce the number of stairs and steps to be traversed. Regarding the need for specialized staff, the court also rejected the board of education's argument, pointing out that the establishment of special needs classes and the accompanying addition of teachers and support staff could be considered, and that the lack of experience in accommodating physically handicapped students was not a reason for the lack of teacher staffing.

All of (the board of education's) arguments merely refer to the abstract threat of danger and are contrary to the recent philosophy of special support education, which is to support the efforts of students with disabilities toward independence and social participation, and therefore cannot be accepted. In other words, it should be said that in judging the eligibility of students with disabilities, it is not only from the viewpoint of what the students themselves cannot do, but also from the viewpoint of what abilities they have left and what they can do, believing in their future possibilities and taking into consideration the wishes of the students and their guardians, which is in line with the principle of education in general and the special support education (Nara District Court, Order of June

26, 2009).

Sugiyama (2014) noted that this court decision focused on the problem of not making possible considerations even though existing facilities and equipment could be changed or improved, rather than on taking active measures for regular school attendance. He also pointed to the social structure as the source of the problem, and described his success in proving that the school's refusal to accept the child to school had nothing to do with the child's disability. On the other hand, regarding the certification of person of authorized enrollment, a female student in the second year of junior high school who has allergic dermatitis and has been refusing to go to school for a long time (Osaka District Court, Order of July 18, 2008), and a boy in the second grade who suffers from bronchial asthma (Osaka High Court, Order of March 28, 2008) both requested to attend a special needs school and the court allowed the claim as falling under the "health impairments" category of the school attendance standards. Although these two judgments do not necessarily seek to realize inclusive education in regular classrooms, they emphasize the philosophy of special needs education, which aims to meet the educational needs of each individual. It should also be noted that special needs schools function as a schooling option. In this period, along with the promotion of inclusive education, the importance of children's educational needs and the need for rational consideration began to be discussed in earnest.

The reorganization period after the ratification of the CRPD (Third period)

Systemic reforms toward ratification of the CRPD have been in full swing, with the enactment of the 2011 amendment to the Basic Act on Persons with Disabilities, which stipulates the prohibition of discrimination based on disability and the provision of reasonable accommodation, and the 2013 enactment of the Act on The Elimination of Discrimination against Persons with Disabilities. As part of a series of efforts, the School Education Act Enforcement Order was partially amended in 2013, and the obligation to hear the opinions of parents was expanded to include the time of school transfer in addition to the time of school enrollment. At the same time, the provision for person of authorized enrollment, which allowed students to enroll in regular schools on an exceptional basis, was abolished. Based on the premise that all students are to enroll in regular schools, a system was adopted in which those who are deemed appropriate to be enrolled in special needs schools by municipal boards of education are treated as “certified special needs school enrollees”. In 2014, the CRPD was ratified, and as the momentum to promote inclusive education builds, an important judicial decision dealing with the enrollment of children with medical care and the provision of reasonable accommodations is presented.

The Yokohama District Court case of "Request for revocation of notification of school

enrollment, etc." involved the school placement of a child with severe disability who requires medical care such as 24-hour ventilator for respiratory management, nasogastric tube feeding and expectoration suction (Yokohama District Court, Judgment of March 18, 2020). In March 2018, the parents wanted to enroll the child in an elementary school special needs class, but the city board of education determined that the child qualified as a certified special needs school enrollee and designated the child to attend a special needs school established by the prefecture. The parent of the child disagreed with the decision and filed a lawsuit against the city.

The parents claimed that enrollment in a special needs school is illegal because it a) violates inclusive education as a human right, b) unilaterally ignores the parents' wishes and fails to provide sufficient information (no hearing was conducted from the child's doctor or the kindergarten the child attends), c) did not consider the provision of medical care for the child and a reasonable consideration for barriers to mobility (provision of an elevator, etc.). However, the court held that "inclusive education does not exclude education in special needs schools, and therefore, education in special needs schools cannot be said to be contrary to the principles of inclusive education or ... to infringe on the interests of inclusive education." In addition, the designation of school placement must be "consistent with the educational needs of the child according to his or her disability," and the educational needs "are not merely a matter of subjective conflicts of opinion, such as values and educational views, but it is reasonable to understand they refer to objective educational needs for the child based on professional perspectives." The court acknowledged also that the City Board of Education had held discussions to listen to the opinions of the support council consisting of specialists as well as the guardians to reach a consensus, and took the position that it could not be said that information regarding school attendance had not been provided. As for reasonable care, even if the scope of medical care was not expanded to include children on ventilators, it should have been decided at the discretion of the city, taking into consideration its human, material, and financial resources and the court did not rule that there was a lack of reasonable accommodation on that basis.

Although the ratio of the number of children to the number of adults is different in special needs schools compared to special needs classes in elementary schools, and the disadvantage of fewer opportunities for learning through stimulation among children is recognized, this point may be compensated for in special needs schools through the use of residential exchange. ... Since (the Board of Education) is recognized to be operating to listen to the opinions of the support council composed of specialists, and in addition to that, requiring it naturally to listen to the opinions of the child's doctor, to inquire about the situation at the kindergarten the plaintiff attended, and to request the submission of a

medical report from that doctor ... cannot be interpreted as being required to do so. ...Even taking into consideration the fact that the defendant city is a designated city and it is presumed that it is financially feasible to assign nurses to elementary schools, as well as the examples of children with ventilators entering elementary schools nationwide pointed out by the plaintiffs, it cannot be said that the operation of the defendant city lacks reasonable consideration for the handicapped (see Basic Act on Persons with Disabilities Article 4, Paragraph 2, and Act on The Elimination of Discrimination against Persons with Disabilities Article 7, Paragraph 2), or that it is an unreasonable discrimination (Yokohama District Court, Judgment of March 18, 2020).

The lawyer for the parents severely criticized that the court made no mention of the fact that the individual was seeking education with children of the same age in elementary school, but only stated that "special needs schools do not violate the principle of inclusive education," and did not give any consideration to the fact that "it must be guaranteed as a human right that children with disabilities learn together with children who are not disabled (Ootani 2020). In addition, Yoshitoshi and Takahashi (2021), in light of this decision, found it problematic that in Japan, the scope of parents' participation still remains substantially limited, and discussions on an equal footing have not been established. Regarding the provision of reasonable accommodation, they point out that evaluating educational opportunities and outcomes based on the current educational environment is not in line with the original direction of inclusive education, and that at the operational level, the system remains a "medical model" of disability. The parents appealed the case and moved to a neighboring prefecture. The decision of the board of education at the new location was to allow the child to be enrolled in a regular class.

On the other hand, in the Nagoya District Court, the provision of reasonable accommodation for enrollment in a regular school was disputed (Nagoya District Court, Judgment of August 19, 2020). A junior high school student who was intubated with a T-tube due to subglottic stenosis and his parents requested a) the town board of education to acquire and keep a sputum suction device as a reasonable accommodation. A lawsuit was filed due to following reasons in violation of Article 4 of the Basic Act on Persons with Disabilities and Article 7 of the Act on The Elimination of Discrimination against Persons with Disabilities: b) the town board of education requested the parents to bear the preparation and cost of the sputum suction apparatus and to bring the sputum suction apparatus on the first day of school as conditions for the child's attendance at school, c) the principal requested the parents to accompany the child on field trips, and d) the principal did not make approaches to the guardian of the group commuting to school so that the child could participate in group commute to school

without being accompanied by the parent, e) the fact that they were not allowed to participate in swimming lessons in grades 1-3 and were not allowed to use the same pool as their classmates in grades 4 and onward.

The court held that the guardian cannot request the town to acquire sputum suction equipment, etc., because the Act on The Elimination of Discrimination against Persons with Disabilities (Article 7, Paragraph 2) "stipulates that reasonable consideration shall be given to persons with disabilities as an obligation under public law, and is not a provision intended to grant the right to request reasonable consideration to individual persons with disabilities." In addition, since guardians are obligated to allow their children to receive an education, it was not unreasonable to require guardians to bear the cost of items used in school life, and it was not considered unfair discriminatory treatment or failure to provide reasonable care in having them acquire and bring sputum suction equipment. Regarding the accompaniment, the court held that it was not unreasonable for the elementary school principal, based on the guardian's obligation to allow the child to receive education, to request a certain level of assistance necessary to implement medical care as a measure to realize the child's right to receive education. In other respects, the parents' complaint was dismissed on the grounds that, from the standpoint of safety, it was within the discretion of the school principal. The plaintiff appealed to the Nagoya High Court, but the district court's decision was fully upheld and the plaintiff lost the case (Nagoya High Court, Judgement of September 3, 2021).

(1) Due to the nature (of the sputum suction device), it is difficult to assume that it will be shared by an unspecified number of children, and it is considered that it will be used exclusively for the personal use of the plaintiff child. (2) The plaintiff parents have an obligation to allow the plaintiff child to receive a regular education, and it is not unreasonable for the parents to bear the cost of the goods used by the plaintiff child during his/her school life. (3) Sputum suction equipment can be purchased for tens of thousands of yen and ...a certain amount of subsidy can be received for the acquisition of such equipment. It is not unreasonable to assume that the plaintiff parents should acquire the sputum suction equipment necessary for the plaintiff child to receive medical care (Nagoya High Court, Judgement of September 3, 2021).

Ueki (2021) points out that this decision, like the Yokohama District Court decision, only makes a judgment based on the current status of schools with regard to the financial and human burden to enroll children in regular schools, and lacks the perspective that the provision of reasonable accommodation is mandatory to guarantee the "right to education" of children. In

particular, he states that if free compulsory education is a system that substantiates the "right to education," at least the cost of necessary education (reasonable accommodation) for children should be publicly borne because a situation will arise where children cannot receive appropriate education because their parents cannot bear the "cost of education" (financial and human burden). In addition, as Taira (2021) points out, reasonable accommodation is a highly individualized concept, and if anything the individual needs need to be taken into account. Moreover, the "excessive burden" in reasonable accommodation is essentially a factor on the side of the provider of the accommodation, and the problem is that only the burden on the guardian is taken into consideration. While the CRPD and the legislation prepared for its ratification require enrollment in regular schools and the provision of reasonable accommodation to support such enrollment, judicial decisions do not always reflect this philosophy. The old traditional procedures for school placement decision, which go against the wishes of the guardians, are still latent, and judgments have been made that can be seen as a "regressive shift" from inclusive education to special education.

Discussion

Prior to the full implementation of the compulsory school system of special schools in 1979, many children with disabilities were deprived of educational opportunities because they were exempted from school attendance deferment. In fact, the Ministry of Education conducted the first survey of children (9,263 children aged 6 and 7 as of August 1972) who were exempted from school attendance deferment prior to the full implementation of the compulsory school system of special schools, and found that only 21% of them enrolled in school after being exempted from school attendance deferment (Asahi Shimbun Company 1973). The full implementation of the compulsory school system of special schools had an important meaning for children with disabilities, who had been kept away from educational opportunities for a long time, in exercising their educational rights. However, even though the compulsory school system of special schools itself was groundbreaking, the development of school attendance standards established by law was also regarded as a basis for mechanically determining and enforcing the place of education for children according to the type and degree of their disabilities. The parties concerned and their supporters resisted the "special school in mind" school guidance using the school attendance standards as a shield by campaigning for school enrollment. However, the common view of the court in the first period was to give priority to the judgment of school boards and schools rather than the viewpoint of what kind of education is desirable for the child. This perspective is similar to argument made by Slee and Allan (2001) where they mention that in some Australian states, there is a continuous notion of traditional forms of special education

that impedes the movement towards inclusion.

This type of resilience or engrained notion is in direct conflict with the shift to a special needs education system that has led to decisions that emphasize the educational needs of children with disabilities. The Nara District Court decision suggested an important perspective for understanding the trends in second period. In particular, it is noteworthy that the court concluded that, in order to put the purpose of special needs education into practice, priority should be given to educational support that meets the educational needs of children with disabilities as much as possible, rather than the financial situation of local governments. Behind this conclusion was the judges' careful understanding of the situation based on their on-site inspection of the junior high school. This decision seemed to provide a push for the realization of the principles of inclusive education that is aligned with the social model of disability where the problem lies within the environment rather than the children with disabilities themselves (Asahi Shimbun Company, 2009). However, Mithout (2016) pointed out that the Japanese special education system had developed while promoting the educational individualization of children with disabilities, but that most of these efforts had taken place outside the regular classroom. He then noted that the emphasis on individualization of support has resulted in a discord structure that encourages segregation, and that the transition from special needs schools to regular schools takes a very long time.

In fact, the two court decisions since the ratification of the CRPD (Third period) have not fully approached the principles surrounding inclusive education and reasonable accommodation. In particular, the Yokohama District Court decision focuses on the existence of mechanical procedures, such as hearing the opinions of parents and assessing the status of disabilities, and does not substantially adopt the intention of system reform. The fixed viewpoint that presupposes the maintenance of the current educational environment is also preserved with regard to the possibility of providing reasonable accommodation. The Nagoya District Court decision not only denied the need for public funds to meet individual educational needs, but also did not consider parental accompaniment to be an issue. According to MEXT (2015), there are 1,897 parents nationwide (as of May 2015) who "routinely" accompany their children in public elementary and junior high schools. These children would be placed in a critical situation where they would not be able to attend school and learn without their parents' accompaniment. This fact even has the potential to infringe on the right of children to education, which public education is supposed to fulfill.

Conclusion

The CRPD positions inclusive education as a human right and calls for the provision of

reasonable considerations for its realization. The provisions of the Basic Act on Persons with Disabilities and the Act on The Elimination of Discrimination against Persons with Disabilities must be interpreted in conformity with its principles. However, the most recent decisions have failed to respond to the essence of the principle that the legislation encompasses. Watanabe et al. (2017) argues that the school attendance movements in the 1970s and 1980s, including the Hanahata Higashi Elementary School case, raised the question, "What is learning?", and the need for "learning through conflict" was suggested for the learning of children with disabilities. In other words, he pointed out that the experiences and knowledge (the original needs of children with disabilities) gained through overcoming conflicts by spending time at school with their peers, rather than being reduced to general school subjects and curriculum, have been significantly overlooked. The answer to this question, which continues to be asked, cannot be derived from an unreasonable legal hermeneutics that disregards the fact that inclusive education is a human right. The progress of inclusive education in Japan is in a state of "levelling off," and we are at the crossroads as to whether or not the principles of the law can be embodied in policy. If Japan is going to embrace social model of disability where disability is social, attitudinal, and environmental problems, there is a need to deconstruct the notion of special education as currently is ingrained. One consideration is to expose the current status on children with disabilities more and have open discussions with the public on inclusive education as a human right.

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