Legal Regulation and Professional Discretion in Schools

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Abstract

The paper aims to analyse how pupils' equal educational opportunities are warranted. We focus on how regulations of adapted education and the right to special needs education provide school leaders' and teachers' room for discretionary decision-making, how it is interpreted and how discretionary power is justified. The paper draws on findings from an interdisciplinary study (education and law) on the transformation of legal standards into professional actions in schools. This paper employs interview data from three compulsory schools (grades 1–10), legal documents, and public reports, and the analysis is guided by a conceptual distinction between structural and epistemic aspects of discretion. Based on our findings, we question whether the discretionary space regarding special needs education gives too many opportunities for action and, hence, weakens pupils' legal rights. Under the guise of a common school, there is a risk that pupils' special needs are made invisible.

Keywords: professionalism, professional discretion, legal regulation, school leadership, special needs education, adapted education

Introduction

Legal regulations and requirements represent one of the main pillars in the governing architecture of schooling. Protection of children's rights is a legitimate concern in school administration and practice. Legal requirements in education serve several purposes like creating a climate of opinion and putting forth requirements for schools to follow certain procedures and (sometimes) to regulate activities on a more general level. Since few school leaders and teachers are trained lawyers, this raises questions about how school leaders and teachers apply the law and how the discretionary power of the profession is justified (Fjørtoft, Vatn, & Eriksen, 2017; Møller & Karseth, 2016; Novak, 2018; Ottesen & Møller, 2016).

Processes of juridification in education and other welfare sectors have been identified, indicating more detailed legal regulation and a tendency to frame emerging problems or conflicts in legal terms (Andenæs, 2006; Bergh & Arneback, 2016; Jakhelln & Møller, 2016; Østerud, Engelstad, & Selle, 2003). Following Magnussen and Nilsen (2013), "juridification processes comprise more detailed legal regulation of already regulated areas" while "legal regulations of new areas and conflicts and problems are increasingly being framed in legal terms" (p. 229). According to Blichner and Molander (2008), juridification also means increased judicial power. They noted that, "given certain judicial competencies, the main sources of this power are law's indeterminacy and/or lack of transparency" (p. 45).

Indeterminacy and lack of transparency increase the power of experts in and outside the legal system (Blichner & Molander, 2008, p. 45). As such, juridification gives rise to tensions such as the tension between professional discretion and legal regulations (Aasen, Gloppen, Magnussen, & Nilssen, 2014). It follows that it is important to unpack the way that legal norms are translated into social practices and how school leaders and teachers legitimise their

work in schools. Although lawmakers regulate actions, there is space for discretion in professional work. Discretion is dependent not only on discretionary space, but also on reasoning, as the entrustment of discretionary power is based on a notion that professionals can make reasoned judgments and decisions (Wallander & Molander, 2014). Hence, professional discretion rests on trust in the ability to make sound decisions on behalf of social authorities.

The Nordic countries have long been regarded as prime examples of strong welfare states with certain unique qualities such as a high level of trust (Lundahl, 2016). Although the impacts of neoliberal policies are visible in the educational system, some argue that there are still some common inclusive traits—and it is still permissible to speak of a Nordic education model that stresses social justice and equality (Imsen, Blossing, & Moos, 2016).

This paper aims to analyse how school leaders and teachers understand and encounter legal issues in their work at the local school, and how pupils' rights to equal educational opportunities are warranted. In this paper, we use the Norwegian Education Act's Section 1-3 (aiming at ensuring adapted education for everyone) and Section 5-1 (protecting pupils' right to special needs education if required) as a case to investigate how school leaders and teachers interpret legal norms and how they construct and legitimise their work in practice. These sections are central in securing equal education opportunities for individual pupils during primary and secondary education. Hence, how school leaders and teachers interpret and apply these regulations is crucial in providing fair education for all pupils.

Accordingly, the paper addresses the following questions: : How do regulations and legal standards about adapted education and the right to special needs education describe school leaders' and teachers' room for discretionary decision-making? How do school leaders and

teachers interpret their leeway to act based on the regulations and how do they justify their professional discretionary power?

The paper is organised as follows: We start by positioning the paper in relation to research on professionalism and forms of school governance. Our analytical framework and core concepts derive from the presented research. The subsequent section addresses legal regulations of education in Norway with a focus on the two paragraphs mentioned above. This information is necessary to grasp the study's findings. The next section describes the methodology and the selection of data. Finally, we present the analysis and discuss the findings in relation to the analytical framework. A main argument is that finding the pathways to achieving equal education opportunities depends on public will, political decisions, and legal regulations. However, it also requires that professional work in schools and classrooms is based on discretionary reasoning and justified decisions. The study indicates a need for strengthening these aspects in teacher education and school leadership programs.

Analytical Framework and Core Concepts: Professional Discretion in the Age of Accountability

Professionalism has historically been seen as a distinct model for organising work, marked by the capacity to manage an exclusive area of expertise through commitment to profession-specific values, collegial control, and occupational closure (Abbott, 1988; Freidson, 2001). During the last decades, this model has been challenged (Anderson & Cohen, 2015). One aspect of this debate is related to the marketisation of professional work, in which professions adopt business logic and begin to understand their work and mandate in terms of efficiency and customer orientation (Brint, 1994, 2001; Brock, Powell, & Hinings, 1999; Trujillo, 2014).

Another aspect is related to the emergence of managerialism, which brings the logic of the bureaucracy to the foreground and generates regimes of accountability in which external actors and systems audit the indicators used to measure professional performance (Dent & Whitehead, 2002). The latter aspect has been interpreted as a threat to the professional space of discretion and autonomy, as discretionary judgment guided by codes of professional ethics and monitored by the profession itself is losing ground (Evetts, 2009).

Furthermore, while researchers have pointed to a shift of governing strategies that depends on the appearance of deregulation, they have also underlined an equally strong central steering through “various policy technologies, including curriculum control” (Ozga, 2009, p. 150). Travers (2007) described this as the “new bureaucracy” of quality assurance which is visible in education and other parts of the public sector facing increased pressure to evidence accountability to the public and the public purse (Murphy & Skillen, 2015, p. 632). For instance, from a UK context, Murphy and Skillen (2015) asked whether public-sector professionals still have sufficient time to make professional judgments. Their research showed the effect of time compressions, and the authors argued that the consequences of time as a function of professional practice “can easily be ignored at the organizational level, the level that lies at the center of accountability modes” (p. 639). The teachers in their study mentioned lack of time to develop quality relationships with the children as one consequence.

Although the knowledge base of a profession today seems contested and less stable than earlier (Jensen, Lahn, & Nerland, 2012), the basis for professional work lies, as in previous times, in the capacity to perform work in ways that are informed, guided by, and validated against shared knowledge and established conventions for practice. As long as professions are entrusted with the task of applying knowledge to particular cases, they are also entrusted with discretionary power (Molander, 2016). According to Molander (2016, p. 60), discretion comes with a demand of accountability as the individuals should be able to account for their

judgments and decisions. For many welfare rights such as the right to special needs education, the eligibility criteria are not clear-cut, which means that the professionals may have rather extensive discretionary power. According to Molander and Grimen (2010), discretionary power is based on trust towards those who hold authority to exercise discretion, and the public expects that they will do so in an acceptable way.

In this paper, the analysis is guided by Molander's conceptual distinction between structural and epistemic aspects of discretion. Structural aspects concern rules and standards, and epistemic aspects concern reasoning and judgment. The advantage of rules or legal standards is that they give legitimacy to decision-making by reducing the influence of illegitimate considerations and personal opinion, but the epistemic aspect of discretion makes it possible to tailor the decision to the particular circumstances of a case. Even in situations where standards for decision-making exist, these must be interpreted, and the information on which decisions are based must be selected and translated into decisions with the help of the professional codes at work in an institution.

Discretion can, on the one hand, be seen as an "opportunity-concept" (Molander, Grimen, & Eriksen, 2012, pp. 214–215) as it designates a space where the agent has the autonomy to judge, decide, and act according to his or her own judgment. If the space of discretion is narrow with predefined procedures and standards to follow, the profession has little discretionary power. On the other hand, it is an "exercise-concept," as it designates the kind of reasoning that results in conclusions about what to do under conditions of indeterminacy. If decisions to a lesser extent are bound to standards and procedures, the profession has considerable discretionary power. Hence, the profession must make reasoned judgments and justify them in relation to given rules (Larsson & Jacobsson, 2013). By employing this lens, we examine how school leaders and teachers carry out discretion between structural aspects (e.g. national regulations and standards) and epistemic aspects (e.g. reasoning and judgment).

Legal Regulation of Education in the Norwegian Context: Adaptive Education and Special Needs Education

Legal regulation of education is the responsibility of national governments, but the Norwegian Education Act also draws explicitly on the United Nations (UN) Universal Declaration of Human Rights (1948) and the UN Convention on the Rights of the Child (1989). To act in the best interest of the child should be a primary consideration (Article 3, Section 1) and is central to what it means to be a professional educator (Stefkovich, 2013). Children rely to a great extent on others for protection and provision of good education for their development (Sandberg, 2016). As such, all countries which have signed the Declaration of Human Rights and the Convention on the Rights of the Child are part of a global policy space even though the regulation of education is a national responsibility.

In Norway, numerous rules regulate schools, and practitioners in schools must know and understand the law to attend to their roles as civil servants (Welstad, 2012). User rights are associated with laws and regulations, and local authorities and schools interact with users who are knowledgeable about their rights; additionally, parents connect with individuals in similar situations through social and digital networks. Accordingly, education professionals at all levels are compelled to anchor and justify their practices in accordance with the law. The interpretation of legal standards is, nonetheless, usually highly situational and cannot be based on strictly legal considerations; furthermore, teachers and school leaders have traditionally been highly autonomous. During the last 10 years, however, schools have experienced increased centralised regulation in terms of coordination by measuring, monitoring, and evaluating educational outcomes (Møller & Skedsmo, 2013; Skedsmo, 2009). For example, since 2006, national inspection has been used as a governing tool to control the legal practices

of municipalities and schools (Hall, 2016a, 2016b), and the inspection is currently developing more in the direction of other European inspectorial systems (Hall & Sivesind, 2015). Also, studies have indicated that more power has been granted to the principal at the expense of the teachers' discretionary space (Hult & Lindgren, 2016; Møller, Prøitz, Rye & Aasen, 2013).

As mentioned in the introduction of this article, we address two sections in the Norwegian Education Act which are closely connected, i.e. Section 1-3 on adapted education and Section 5-1 on the right to special needs education; therefore, it is necessary to consider these two statutes in conjunction. *Adapted education* resonates with what is labelled as *inclusive education* in an international context. It is a Norwegian approach promoted as an ideological guideline for school policy as well as a standard for all teaching with a particular reference to the variety of pupils in need of additional support. The term has been revised throughout its history but is still seen as a main strategy to implement inclusive education. Both adapted education and inclusive education have common denominators, implying respect, sensitivity and responsibility for the diversity of human beings. However, the principle of adapted education can be understood as an overarching, non-categorical principle including ideologies and practices as well as collective and individual aspects of education (Fasting 2013, p. 264). While Section 1-3 on adapted education represents a *common principle* to ensure that individual pupils receive equal education adapted to their abilities, Section 5-1 states that special needs education is an *individual right* as these pupils are considered to need a more extensive adaptation, and the Education Act gives them the *right* to special education (Nilsen & Herlofsen, 2015).

Adapted education in compulsory education has been regulated by law since 1975, and the educational policy intended to create equality of educational access and opportunity for all children, regardless of social background, gender, ethnicity, and geographical location. At the same time, the existing special school system was abolished and reorganised into resource

centres. A debate followed about how to organise the schools' inner work to meet the needs of all children, regardless of abilities, capacities, and interests. The change was part of a progressive and innovative educational ideology which dominated Norway in the 1970s (Telhaug, 1990). Politically, it was argued that a school for all should be able to handle all types of pupils on an equal basis by individualized and differentiated teaching within the framework of a class or a group. At the individual level, this approach addresses the diversity of pupils and, therefore, the necessity for individualised treatment to address individual learning abilities. However, the teachers and the schools were not well prepared for such a dramatic shift. The specific kinds of knowledge and modes of thinking which could improve the quality of discretionary reasoning and action had not been part of their formal education background (Haug, 1999).

What seems to be a well-defined national policy about adapted/inclusive education for all has over time changed into a relatively messy construction, and the closer one comes to the classroom, the more confusing the picture becomes. Also, during the last 40 years, shifting governments have changed their conceptualisation of adapted education. The concept was first framed as “integration” (1975–1990), then as “inclusion” (early 1990s), followed by “individualisation” (1997–2005); today, politicians connect the principle of adapted education with learning communities and teaching quality. As such, it is not only a legal and pedagogical concept, but also a political concept that politicians use as a panacea to solve problems such as increasing diversities and gaps in results within the pupil population (Jenssen & Lillejord, 2009).

To strengthen the quality and alignment with the legal regulations, the Directorate for Education and Training (UDIR) published a guide to help and inform teachers and school leaders in defining their room of action with regard to special education. The newest version of the document, hereafter the Guide, consists of 80 pages (UDIR, 2014).

The most recent Norwegian curriculum reform, the Knowledge Promotion implemented in 2006, aimed at reducing the number of pupils who receive special needs education by strengthening adaptive education. The increased emphasis on adapted education may also explain the absence of special needs education as a topic in the curriculum regulations (Nilsen, 2014). However, the amount of special needs education has not been reduced; on the contrary, it increased dramatically during the first years of implementing the Knowledge Promotion (Hausstätter & Thuen, 2014, p. 202). The general legal requirement stated in Section 1-3 is formulated the following way: “Education shall be adapted to the abilities and aptitudes of the individual pupil, apprentice and training candidate.” The legal formulation points to an educational principle, but the term is open for interpretation as well as translations into school practices. In addition, Section 1-3 includes a requirement on early intervention for grades 1–4.

With regard to special needs education, Section 5-1 declares:

Pupils who either do not or are unable to benefit satisfactorily from ordinary teaching have the right to special education. In assessing what kind of instruction shall be provided, particular emphasis shall be placed on the pupil’s developmental prospects. The content of the courses offered shall be such that the pupil receives adequate benefit from the instruction as a whole in relation to other pupils and in relation to educational objectives that are realistic for the pupil. Pupils who receive special education shall have the same total number of teaching hours as other pupils,

In accordance with the establishment of pupils’ *individual* rights to special needs education, schools must process cases as *individual decisions* according to the rules in the Public Administration Act. According to this act, when decisions address the rights of one or more persons, specific procedures must be followed and the parties are granted a right to appeal. The phrase *do not benefit satisfactorily from ordinary teaching* is a dynamic norm in that its

content and meaning are established in its use; thus, professional discretion is in play. Teachers and school leaders make judgments about what to do under conditions of indeterminacy when they doubt that their pupils benefit satisfactorily from ordinary teaching. However, there is a reference to the preparatory texts regarding how to interpret the requirements for adequate competence in the Guide. Based on the Education Act and the regulation of teacher competence, the Guide states that the local educational authorities are responsible to safeguard that the pupil can benefit from the special education offered. This means that the local educational authorities must ensure that the teaching provided is of sufficient quality. Hence, the level of competence among staff needs to be assessed in line with the needs of the individual pupil (UDIR, 2014 pp. 27–29). The Guide states that staff who are not employed in a teaching position can assist both in ordinary and special needs education if they receive the necessary guidance (p. 28), but they cannot be used as teachers. To use teacher assistants without formal education in special needs education, requires that it must explicitly be stated in the pupil's individual education plan (IEP) (see the Proposition to the Parliament, Prop. 129 L, 2012-2013, p. 40 to paras. 10–11). A recent report from the Ombudsman for Children (2017) expresses a strong concern with regard to competences and claims that the Education Act must be changed to secure the level of competence of those responsible for special needs education. We will return to this in the discussion.

Methods

This study is grounded in a larger interdisciplinary study of multilevel actors within compulsory and upper-secondary education in Norway, aiming at understanding the

transformation of legal standards into school leaders' professional actions.¹ The analysis presented in this paper is based on legal documents, public reports and interview data from practitioners in three compulsory schools (grades 1–10).

In the analysis of legal documents we have followed procedures of legal method which provides a procedure used by lawyers in order to take a stand on a specific legal issue to find a solution to a legal problem from a legal perspective, in our case, Section 1-3 and Section 5-1. It is about identifying the sources of law which form the valid base of the argument and guidelines about how sources of law are to be interpreted (Boe, 2007, p. 84-87).

In a Norwegian context there are no court verdicts based on the legal texts we are examining, and, therefore, the law might be open for extensive discretion. However, texts produced in the preparation of the Educational Act give some directions for interpretation. For example, it is stated that a pupil may be entitled to special education also when he/she has a certain benefit from the ordinary education (Ot.prp no. 46 (1997-98) p. 167, note to § 5-1). This proposition likewise emphasises that the municipality or county municipality cannot legally deny a requirement for special education (at the minimum level mentioned by the law) by pointing out that the budget does not allow for this (Ot.prp. no. 46 (1997-98), p. 167). This is also highlighted in the Guide.

As already mentioned, the understanding of Section 1-3 has changed over time and it opens up for different interpretations. Hence, while laws *regulate* actions they do not specify what subjects must do. As such, what is labelled standard legal interpretation in the Guide developed by UDIR might be amended locally. The legal requirements create a climate of opinion and regulate activities on a more general level (Ananiadou and Smith, 2002), but it is

¹ Legal Standards and Professional Judgment in Education Leadership (the LEXEL-project) is a four-year research project supported by the Research Council of Norway. See <http://www.uv.uio.no/ils/english/research/projects/legalstandardsedu/>

an empirical question how the law is interpreted at the local school. Therefore, it is important to unpack how legal norms are translated into social practices and how practitioners legitimise their work in schools (Ottesen & Møller 2016).

We used purposive sampling to select schools: The schools invited to participate all had recent experience with national inspection regarding pupils' right to special needs education and a good psychosocial environment. In addition, we investigated documents, namely the Education Act, regulations, and guidelines.

To ensure contextual diversity, we chose schools from different geographical regions in Norway. In each school, we conducted individual interviews with the principals and focus groups with deputies and teachers in 2013 and 2014. We used a semi-structured interview guide, which covered data on several topics—including definitions of a good psychosocial environment, knowledge and attitudes towards the Education Act (Sections 1-3, 5-1, and 9a-3) and topics related to accountability systems, professional responsibility, and governing processes.

This paper focuses on the Education Act Section 1-3 (securing adapted education for all pupils) and Section 5-1 (the individual right to special needs education). We conducted and audio-recorded all interviews in locations the informants chose. Depending on the size of the school, we interviewed 6–8 people at each site. In total, the analysis is based on interviews with 23 school leaders, deputies, and teachers (see Table 1). All schools have been renamed.

Table 1: An overview of participants in the study

	Description of school	Informants
Vika School	Compulsory school, levels 1–7 350 students	Individual: school principal Group: 2 deputies Group: 3 teachers
Nordbakken School	Compulsory school, levels 1–10 730 students	Individual: school principal Group: 5 deputies Group: 3 teachers
Øvrefjell School	Compulsory school, levels 1–7 450 students	Individual: school principal Group: 4 deputies Group: 3 teachers

Most interviews lasted approximately 90 minutes. We transcribed all interviews, and the two researchers independently analysed the transcripts to identify emergent themes. We used NVivo software as a tool in this process. We first identified chunks of data where the teachers, deputies, and school leaders talked about how they justified their work with adapted education and warranting the pupils' individual right to special needs education, and how they interpreted their leeway of professional discretion. In the second step, we identified the teachers', deputies', and school leaders' interpretations of the legal regulation as stated in the Education Act, Sections 1-3 and 5-1. Next, the analysis was guided by the conceptual distinction between epistemic and structural aspects of discretion and categories that also reflected the legal principle of adaptive education. This procedure enabled us to combine inductive and deductive approaches for the data analysis. In other words, we started by

describing the emergent themes before using the framework developed by Molander and Grimen (2010) in analysing the epistemic and structural aspects of these themes.

In the sections below, we have organised the presentation and analysis of our findings under two subtitles; adapted education and special needs education at the local school, and discretionary reasoning and decision-making at the local school. We have included excerpts from the interviews to illustrate the way our informants described and justified their work to fulfil the legal requirements stated in the Education Act. The predominantly descriptive analysis of findings is followed by a discussion based on our analytical framework.

Findings

Adapted Education and Special Needs Education at the Local School

As already mentioned, the debates about adapted education in Norway have been and remain highly politicised and ideologically based. They resonate with understanding adapted education as both a political and legal concept as well as a pedagogical approach (Haug, 1999; Jenssen & Lillejord, 2009), and some argue that the principle has not been implemented as it should (Markussen, Frøseth, & Sandberg., 2011). In the interviews, we asked the school leaders, deputies, and teachers about their understanding of the term *adapted education*. Their responses proved how ambiguous and open for various interpretations the term is, leaving a large space for discretion within the local classroom (cf. Jenssen, 2011). Everyone was aware of the amendment established in Section 1-3 (The Norwegian Education Act, 1998), which requires the school to prioritise extra help for pupils who struggle with reading and mathematics during their first years at school.² Therefore, resources in all three schools had been reallocated to grades 1–4. In addition, everyone agreed that adapted education meant a

² With this amendment, *adapted education* was communicated as an overarching principle and a norm for *how* the school should organize adapted teaching (Møller & Sivesind, 2016, pp. 166–167).

lot more than focusing on the weak pupils. At the same time, they emphasised the term's ambiguity and indistinctness and how the political climate had shifted over time and led to different ways of conceptualising the term. A deputy head at Vika School framed it like this: "Before, there was a focus on the individual pupil, but now, we have to take the whole class into consideration ... and think about how it is possible to differentiate teaching."

The teachers at Nordbakken School framed the shift in policy in a similar way, noting that "adapted education is a term covering so much; it has become an overarching concept for differentiated teaching, adaption to physical conditions, to pupil groups or if there is a pupil in need of extra help." At the same time, the teachers emphasised that, when it is impossible to adapt the teaching to everyone, priorities are given to those pupils who need extra help. The school leader at Vika School said:

We do take the legal regulation regarding adapted education seriously, and we work hard to fulfil the purpose; however, we know that the bright pupils will always manage very well. The weak pupils require much more help. It's a dilemma all the way through, because all pupils should receive adapted education.

A teacher at Øvrefjell School framed the challenge a bit differently, stating that "the lessons are adapted to the pupils' academic average, and then we try to catch up with the weak pupils." The teachers at Nordbakken School underscored the challenge in dealing with disruptive pupils who create demanding conditions for both the other pupils and the teacher:

If we take all pupils into consideration, it is better to segregate these acting-out pupils, but if we consider his or her best interest, they should receive their teaching within the class. However, those pupils we pity the most are those pupils who never speak up, and risk not being seen.

School leaders and teachers experience many ethical dilemmas during the realisation of adaptive education. Dilemmas arise through tensions between considerations of the individual and those of the pupil body as a whole as well as between individual needs and a prohibition of permanent aptitude differentiation. The teachers touched consistently upon dilemmas relating to managing classes with many pupils while being required to provide adapted education for everyone. One dilemma concerns the relation between the principle of adapted education and the right of special needs education. Often, they argued that pupils with special needs probably would benefit more by participating in ordinary classes if emphasis was to be placed on the pupil's developmental prospects. However, quite often special education was given outside the class because the teachers found it hard to keep up with the expectations related to adapted education when the pupil population was very diverse. Also, when it was justified that a pupil had the right to special needs education, these pupils received a maximum of 5 hours dedicated for special needs education in basic subjects, and most of the time was spent within the class.

The reflections of the school leaders and teachers illustrate that, although the principle of adapted education is in some sense undefined, there are some common professional norms that are used in guiding the discretionary actions at the three schools. To make decisions that support the weakest pupils seems to be a norm that is followed in the classrooms when the teachers have to prioritise resources and attentions.

Legal regulation on the right to special education is, contrary to the regulation of adapted education, linked to individual pupils. The informants explained that the schools follow specific procedures when considering whether to make an individual decision concerning special education. All schools had established routines for following up any reports of concern regarding the pupil's learning outcome based on the ordinary educational provisions, and the concerns were discussed with the counsellors and the parents. A typical routine would

involve the following steps: (a) The teacher should get in touch with the parents and discuss several options for the child; (b) The teacher and the school leader should review how and if class management might be improved; (c) The teacher should discuss the case with the counsellors; (d) If the teacher still worries regarding the pupil's learning outcome, and if the parent(s) or pupil consents, an expert assessment shall be made of the pupil's specific needs; (e) This last step may result in an individual decision regarding special needs education. Such step-by-step routines exemplify how mechanisms of accountability reduce the space of discretionary power; at the same time, the decision is based on human reasoning formed by the mind-sets of persons with discretionary power. Arenas where arguments can be examined in critical discussions within collective settings are established to weigh reasons for and against to test the validity of arguments before final decisions are made. A deliberative epistemic mechanism is at play.

While a decision concerning special needs education must be based on expert assessment of the pupil's specific needs, it must also be followed up at the school and classroom level. This creates a space where discretionary power is exercised. The school leaders argued that they should make arrangements in such a way that pupils with special needs receive adequate benefits from the instruction, but the school's total budget must also cover the subsequent costs. Also, the local educational authorities encourage creative and flexible resource use, and school leaders must comply with these expectations. Therefore, the school leaders argued that adapted teaching within the classroom should be improved to meet the needs of all pupils.

Discretionary Reasoning and Decision-making at the Local School

Although the legal regulations establish some clear procedures regarding special needs education, school leaders and teachers have extensive room for discretionary decision-making.

With reference to Molander's framework, we will examine some epistemic mechanisms that seem to be of importance when school leaders and teachers make decisions.

Education

Educational background is seen as important as an epistemic mechanism. Professionals obtain authorisation to practice through formalised educational programs. Such programs are expected to raise the quality of judgments because professionals have been taught to think and reflect in certain ways based on knowledge, norms, and values.

Our informants had an educational background from teacher education colleges, and they also had several years of experience as teachers and as school leaders. In addition, some had a master's degree in special needs education, some had specialisations in public law, and some had been enrolled in programs in educational leadership or curriculum studies. The interviews demonstrated that participants emphasised adapted education as a basic principle or a legal standard which was almost taken for granted, even though it was challenging to fulfil the expectations. Some also mentioned *Professional Ethics for the Teaching Profession* which the Union of Education Norway published in 2012 (Utdanningsforbundet, 2012). For instance, the school leader at Vika School described how they had discussed the basic values of the teaching profession in several staff meetings and calibrated what each value meant in practice. As a result, a poster was produced, and "this poster is on the wall in every classroom as a reminder for everyone."

Teacher assistants without a formal educational background are frequently used to help the teachers to comply with the legal regulation related to adapted education and pupils' individual right to special needs education as required. Although some of these assistants are helpful in a practical way, their aid cannot be compared to working with a qualified teacher. Additionally, teachers and assistants have little time for joint planning of teaching activities. The teachers at Vika argued that it is wrong to use unqualified assistants, and they are often

tempted to report the situation because there are pupils who do not receive the education as required. However, the teachers know that the school leader is struggling with the budget and a qualified teacher is more expensive (and might be difficult to recruit); hence, they suffer a dilemma each year when the annual report for special needs pupils is to be written.

In this case, these teachers have offered an example of discretionary reasoning; it is hard for them to defend the use of unqualified teacher assistants in their meetings with parents. They are committed to working closely with the pupils to spur curricular and pedagogical improvements. However, they also know that the school does not have enough resources, and they lack the time and energy to satisfy the highly-prized value of adapted education. An additional issue is that the teacher assistants may receive too much space for discretionary power in their interactions with the pupils. Although the law does not regulate what kind of formal education is required for teaching special needs education (Haug, 2014), the preparatory work behind the revision of the Education Act lay out expectations about the level of competence and responsibilities. Many teachers questioned whether pupils with a right to special needs education receive the help they are entitled and whether the offered support is sufficient. Since non-qualified teaching assistants often are delegated the task to follow up pupils with special needs, without sufficient time to collaborate with classroom teachers, there is reason to question whether schools act as responsible providers. The school is faced with a dilemma because local educational authorities encourage more flexible and creative uses of resources, but schools are nevertheless required to give notice to the policymakers when pupil rights are violated due to insufficient funding. As pointed to in the Guide (see above), the municipality cannot legally deny a requirement for special needs education on the basis of lack of funding.

Discretionary Power in Cooperation with other Professions and Parents

All schools emphasised the value of close cooperation with external professionals, especially with the psychological counselling service (PPT). One of the municipalities (in which Nordbakken is located) had chosen to decentralise this service to the local school. As such, the counsellor was a permanent member of the leadership team, and she observed classroom practices and worked closely with teachers to improve practices and learning opportunities for all pupils. This practice was highly valued by both teachers and the leadership team. The other schools had established a resource team with regular meetings with the PPT, and the counsellors also contributed to in-service training for the staff. Mainly the school leaders framed this cooperation as valuable. Recruiting teachers with extra special needs education was another strategy to improve the school's work with adapted education. In addition, they frequently used the different guidelines developed by UDIR based on the Education Act. One of the school leaders at Vika School said, "UDIR has provided their interpretations of the law. It is excellent. They have in a way done the job for you." This excerpt underlines how this leader values that UDIR, by specifying and clarifying entitlements and obligations, has reduced the number of cases that require her to act on her best judgment alone. This school leader also criticised the counsellors for sometimes recommending too much special needs education; therefore, she recommended that the teachers should be restrictive in their demand for an expert assessment.

Teachers and school leaders are compelled to cooperate with parents both before and after taking an individual decision regarding special needs education. They must justify their understanding of the situation and how it might improve. The actions they suggest should be informed, guided by, and validated against knowledge applied to the case, and it is expected that they do it in an acceptable way.

According to the law, the PPT members are required to express how many extra hours the learner needs when Section 5-1 comes into force. The school leader at Nordbakken has experienced that some parents believe they “own” these extra hours and can get them returned if their child has been ill. Therefore, the school leader makes sure it is written explicitly in the individual decision that such extra hours must be seen in connection with other pupils who are suffering from the same types of difficulties. She has made this argument clear both to the counsellors and the parents because the school has to take *all* pupils into account even though one should always have an eye for the individual at the same time. Implicitly, she argued both with reference to the law and to the fact that she must stay within budget. In this example, the Education Act is, on the one hand, restricting the discretionary power; on the other hand, the school leader argued that the number of hours granted through an individual decision is not conclusive, underlining the tension between the rights of the individual and of all pupils. One alternative line of reasoning could be that the pupil who had been ill would be in most need of these extra hours. Such a justification would put the individual needs more to the fore.

We also asked how the school leader dealt with disagreements in perspectives in such a situation, and the school leader at Vika School framed her answer like this:

As a rule, there is no problem. The parents trust our competency, and if they don't, they can decide to complain to the next level; it is okay for us. A larger problem, however, is when we think the pupil should receive help from a psychiatric clinic, and the parents disagree and refuse to follow our advice. We may cooperate with the school nurse or the counsellor to convince the parents. If this doesn't work, we have to get in touch with the Child Protection Service.

The quote demonstrates how the school leader tries to convince the parents to accept the school's assessments of the pupil's situation. In addition, she has experienced “lack of

understanding among parents that resources are limited because parents believe that an individual decision regarding special needs education results in an increased budget, which is not the case.”

All the teachers emphasised the importance of collaboration with parents to succeed as teachers, and they were mostly pleased with their collaboration. However, teachers acknowledged that some parents never follow up and act as though no information had been received from the school. The respondents at Vika were facing new challenges due to the increasing diversity of minority language pupils and expressed that some of the parents were almost too ambitious on behalf of their child. One deputy head explained, “I have to make these parents understand that not everyone may receive extra help. It is great that they are ambitious, but sometimes I think they are demanding too much from the school.”

In the next section, we continue the analysis about the room for discretionary decision-making by school leaders and teachers and how it is justified, discussing the findings in view of our theoretical framework.

Discussion: The Discretionary Power of the Profession

Our study shows that the right to special education requires a discretionary decision when it comes to both whether a pupil is eligible to claim the right to special needs education and what should be offered. The only thing that is determinate in the text of the act is the number of teaching hours; specifically, the act states, “Pupils who receive special education shall have the same total number of teaching hours as other pupils” (Education Act, 1998, Section 5-1). Hence, the right to special education requires discretion “both in determining who [is] entitled to them and to what they are entitled” (Molander, 2016, p. 50).

To make decisions about what the individual pupil is entitled to receive depends on a certain level of professional competences. As mentioned above, a recent report from the Ombudsman for Children (2017) expressed a strong concern and recommended that the Education Act must be changed to secure professional competence. This recommendation will limit the discretionary power of school leaders. At the same time a stronger legal regulation implies that economic arguments cannot be used in the same way as before.

To increase professional competence in special education more generally, the Ombudsman also recommended special needs education should be included in the teacher education curriculum. The Ombudsman additionally asked for national standards and adequate control systems to ensure that the municipalities follow up their obligations under the Education Act and the Convention on the Rights of the Child. At the same time, it is important to emphasise that individual rights may be taken care of collectively within the framework of a class or a group.

Ensuring the level of competence is essential for the profession to be entrusted with discretionary power. The delegation of discretionary power rests on expectations that professionals are making judgments and acting in accordance with their mandate and certified knowledge (Molander, 2016). While our informants put forward strong concerns about how to realise adapted education, the judgments expressed were based on tacit knowledge, sensibility, and holistic thinking. Hence, the reasoning and justification may not be very accessible for parents and others. Even though intuition and special sensibilities may be important, they do not provide the kinds of reasons that should be used to justify discretionary judgments by professionals (Molander, 2016, p. 63).

We find Molander's way of arguing both intriguing and timely. His analytical framework helps us to conceptualise accountability measures that are of importance in improving the

quality of discretionary reasoning. To capture another tension that is central in our analysis, i.e. the tension between spaces of discretion based on economic constraints on the one hand, and discretionary power based on legal regulations and epistemic sources on the other, we move beyond Molander's conceptual distinction between structural and epistemic aspects of discretion.

In a context of accountability regimes that put strong expectations on pupil performance, documentation, transparency, and performativity, the discretionary space is tightened as the control of making the "best judgment." So far, in a Norwegian context, it seems as if a system of strengthened national control has been established, but the school is mainly in control of their quality work. Yet, stories of economic constraints and the pressure to be accountable for maintaining the budget are evident in our findings. As such, our findings indicate that, in many situations, the economic arguments seem to trump the reasoning based on epistemic sources. A result is that practitioners must live with uneasy compromises.

Both teachers and school leaders in the reported study were concerned about the shortage of economic resources, which had a significant influence on the way they justified their decisions. Hence, when decisions are made, teachers and school leaders often feel that the solutions are not optimal for pupils. In many ways, it seems that school leaders and teachers have the same orientation. This is not surprising as teachers are managed by school leaders who are fellow professionals. Hence, there is a basis for shared commitments (Evans, 2010). However, the historical "professional pact" between teachers and school leaders is challenged. The school leaders need to tweak policies and make compromises in order to meet expectations from their superiors at the municipal level. As such, there is a risk that teachers' discretionary power is reduced when school leaders must respond to economic demands. On the other hand, as mentioned above, a stronger legal regulation to secure professional

competence narrows the discretionary power on the municipal level. Hence, the regulation may “trump” the economic arguments put forward by their superiors.

Concluding Remarks and Implication

The paper has addressed the following questions: How do regulations and legal standards about adapted education and the right to special needs education describe school leaders’ and teachers’ room for discretionary decision-making? How do school leaders and teachers interpret their leeway to act based on the regulations and how do they justify their professional discretionary power?

Our analysis displays, first, that regulations and legal standards in the Norwegian context regarding the pupils’ individual rights to special needs education give extensive room for discretionary decision-making by school leaders and teachers. Second, the general legal requirement that is stated in Section 1-3 is even more discretionary. Teachers who participated in this study prioritise those pupils in need of extra help because they find it impossible to adapt the teaching to everyone, no matter what is required by the law. Other teachers may choose to give priority to educational measures that benefited most of the students rather than a particular group of them; or they prioritize those measures that give most pleasure to the group under discussion. Our findings also showed that adapted education has been and is highly politicised and ideologically based, which may explain why adapted education is experienced as a vague and ambiguous legal regulation by practitioners. However, vague and ambiguous standards have both advantages and disadvantages. On the one hand, such standards create space for professional judgment. On the other hand, frustrations can

occur locally because teachers in strong ideological support of adapted education experience lack of structural opportunities.

Third, the findings indicate different ways of justifying decisions among school leaders and teachers. While the formal position as a school leader implies being accountable for external expectations regarding pupils' results, maintaining the budget, and complying with legal regulations, the teachers mainly focused on how their pupils could receive benefits from their instruction. The teachers, particularly in one of the schools in this study, demonstrated an understanding that the school leader must take economic arguments into account, but this requirement creates many ethical dilemmas for them, and there is a risk that pupils' special needs are made invisible under the guise of this common school.

Our study builds on practitioners' accounts of how they work to meet legal requirements. The clearest limitation of the data is the self-reporting aspect, which might reflect intentions rather than practices (Creswell, 2009). Stories about lived experience can be questioned, but they are still important for understanding the interplay between legal standards and professional discretion in particular contexts.

In sum, based on our analysis, we argue that, even though managerial devices have entered our educational policy and schools are faced with dilemmas of discretion based on economic constraints, there is a significant space for discretionary decision-making at the local level. We question whether the discretionary space with regard to special needs education gives too many opportunities for action and hence weakens pupils' legal rights. Under the guise of a common school, which includes all pupils, there is a risk that pupils' special needs are made invisible.

Finding the pathways to achieving equal education opportunities depends on public will, political decisions, and legal regulations. However, as shown in this paper, it also requires that

professional work in schools and classrooms is based on discretionary reasoning and justified decisions. School leaders and teachers must account for many situational and personal matters, which all demand flexibility to help and support pupils. Thus, professional discretion needs to be approached not only on a structural side, but also from an epistemic point of view where arguments redeem claims of validity.

Based on the study, we will argue that it should be possible to address individual rights in a professional way while caring for all pupils. However, teachers must be given the opportunity to develop the required competency, i.e. the specific kinds of knowledge and modes of thinking to address this challenge. From a normative point of view, the epistemic aspect of discretion is fundamental since the delegation of discretionary power to teachers and school leaders is based on the assumption that they are capable of making rigorous judgments. In addition, when local educational authorities encourage more creative and flexible resource use, schools must also tell the governing body and public when pupils' rights are not safeguarded according to legal regulations.

Further research should include observation and examine if and how legal regulation and the current accountability policy context are taking teachers' relations and responsibilities in new directions. We also recommend transnational analysis.

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