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The Handicapped Child's Civil Right as it Relates to the "Least Restrictive Environment" and Appropriate Mainstreaming

**DARVIN L. MILLER***

and

**MARILEE A. MILLER**

Education is one of the most valuable, expensive, and basic commodities supplied by the state to its citizens. It is so vital to the development of responsible, educated citizens and economically productive workers, all fifty states have compulsory school laws. Parents or guardians have a responsibility imposed by the state to make sure every child receives the education offered by the state. The state has a reciprocal responsibility to provide every child with an adequate education.

Perhaps one of the most difficult areas that the state has faced in providing an adequate education to all children is the area of the handicapped. Of the approximately 8 million handicapped children between birth and age 21, only 3.9 million are receiving an appropriate education. If
the remaining handicapped children, 1.75 million are receiving no educational services, and 2.5 million are receiving inappropriate instruction. Furthermore, because their educational handicaps have not been identified, there are still other handicapped children that would fall into the two latter categories.

For more than a decade, long before the passage of 20 U.S.C. §§1401-1420 (Supp. 1976) (Public Law No. 94-142 (1975), many concerned citizens and educators were similarly concerned about the number of handicapped children who were not receiving educational services. But an equally disturbing issue was being raised by a few enlightened special educators: that many handicapped children who had been identified were receiving inappropriate instruction. Studies were showing that children who had been identified, diagnosed, and placed in special classes or schools relating to disability categories possessed greater ability than what was being realized in those placements. Special education’s practice of removing identified handicapped children from regular education and placing them in special classes or schools for special instruction was brought up for serious reconsideration by the end of the sixties.

There were those in special education who saw inappropriate placement and instruction to lie primarily in the assessment model being used. By the end of the sixties and early seventies, these professionals (Cohn, 1967; Dunn, 1968; Severson, 1970; Lilly, 1970; Samuels, 1971; Bateman, 1972; Deno, 1973; and others) were arguing that failure to learn should not necessarily be cause for examining the child for internal states which would suggest the inability to be educated. Focusing attention exclusively on the child in diagnosis often unfairly places the responsibility for failure on that child.

The two primary traditional models of assessment utilized for many years include:

1) the medical-etiologic model which attempts to set forth causal rationale for past failure and focuses on remediating the disability or disabilities via different therapies;

2) the psycho-educational model which stresses the correction of the disability or disabilities that have been assessed with standardized achievement, ability, and diagnostic tests dealing with the central psychological processes of the child.

To search for the defect that resides in the child and to point an accusing
finger of cause at the child is to focus attention away from external variables which educators can implement for conditions of optimal instruction. Hence, to more effectively assess handicapped children, there should be a search toward how best to match the specific needs of children with appropriate instructional alternatives which can be made available to them to educate them and nurture their self-realization. Instructional options need to be isolated within the context in which the child is expected to perform in order to expedite academic and social change for the child.

The voices of special educators who were asking for reconsideration would perhaps have remained faint if it had not been for court decisions that only accelerated the inevitable. The right of a handicapped child to an appropriate educational program was being reviewed by the courts.

To provide the least restrictive alternative environment for handicapped pupils, the cascade system for placement is a programing model whereby handicapped pupils could gradually transfer back to the mainstream. What was discovered almost immediately, however, was

1Handicapped children not only have a right to an education; they have a right to an effective, appropriate education. This concept has recently been relied upon for normal children, also. For example, there have been some cases in California where parents have sued the schools and state for graduating their children when those children have not acquired basic reading and mathematical skills. The school's duty is not only to teach, but to ensure learning.

2The cascade model involves a “cascade of services.” The objective is to put the child in the “least restrictive environment.” In other words, an institutional setting or home for the handicapped is more restrictive than a segregated class or handicapped day school. Similarly, having a special education teacher come into the regular classroom at various times to help the handicapped child or segregating the child for certain periods is less restrictive than segregated classes for the handicapped only. The handicapped child must be placed in a program that is as close to a regular education as possible, without denying him the special assistance he needs to achieve an optimal education.

3There are four well-recognized mainstreaming models that can be employed for teaching handicapped children in the “least restrictive environment.” They include: the Systematic Instructional Model, the North Sacramento Project, Data Based Instruction, and A Regular Classroom Approach to Special Education.

The Systematic Instructional Model involved six sequential steps: (1) initial assessment (discovering what the child can and cannot do); (2) determining objectives and sequences (deciding what to teach); (3) selection of instructional activities (how to teach); (4) ongoing assessment (how each child is progressing); (5) program modifications; and (6) implementation (getting the program to work). S. Lowenbraun & J. Affleck, Teaching Mildly Handicapped Children in Regular Classes 15-111 (1976).

The North Sacramento Project put the handicapped children into regular classrooms. With the help of aides and their peers, the handicapped children made gains of over 1 year on the average in basic skills subjects—in the first half-year of mainstreaming. The Project emphasized positive reinforcement. K. Beery, Models for Mainstreaming 81-88 (1972).

Data Based Instruction is an individual program modification system. The handicapped child's personal educational program is continually evaluated according to the child's periodic test results. The child's program has the same curriculum objectives as the regular class. S. Deno & P. Mirkin, Basic Procedures in Data Based Instruction 2-45 (1974) (Special Education Project, USOE #0-71-4155-603).

A Regular Classroom Approach to Special Education entails the instruction of regular classroom teachers by consulting teachers. The regular classroom teacher learns to apply behavior analysis and individualized instruction procedures when teaching the moderately handicapped child. Fox, Egner, Paolucci, Perelman, McKenzie & Garvin, An Introduction to a Regular Classroom Approach to Special Education, Instructional Alternatives for Exceptional Children 22-43 (E. Deno ed. 1973).
that the one-way traffic of sending handicapped children to special classes or schools was difficult to reverse because regular education had not been changing to adapt for children who learn quite differently.

Handicapped children who were placed back into regular classrooms, or just left there because they were never identified, floundered in the traditional undifferentiated curriculums and teaching methodology. Resource rooms, taught by special education teachers, quickly became the part-time special classes for these children so they would not fail entirely in the educational process. The children could have "special instruction" by being scheduled for certain periods during the school day and then being placed in the mainstream of regular education for the remainder of the day. Thus, the "pull-out" and "fix-up" philosophy was being continued. In the large majority of cases the special education resource teacher never became involved in instructional programing and team-teaching for handicapped children in the mainstream of regular education. On the whole, this situation continues to this day.

This article is concerned with how federal law can foster the appropriate mainstreaming of handicapped children in the public school system. Already close to 50 percent of the nearly 8 million handicapped children have been placed in regular classrooms for a sizeable portion of their education. Since Public Law No. 94-142 mandates the "least restrictive environment" and school systems must provide proof for any segregation of handicapped children, administrators will no doubt be more inclined to place handicapped children in the mainstream. The enigma is that handicapped children are being ushered back into the mainstream without appropriate preparation for them in the regular classroom. Commonly their individualized educational programs do not even provide a framework for measuring the children's success in their new educational environments.

The problem lies in the failure of school officials to properly effectuate mainstreaming as mandated by federal law, thereby denying the handicapped child's civil right to a free, appropriate public education. We will address the problem as it relates to requirements in existing law, assess the status of educational and legal knowledge, set forth the practical problems of implementation, and make our suggestions for resolution of the problem.

THE PROBLEM

Underlying the provision for a "least restrictive environment" in Public Law No. 94-142, § 612(5)(B), is the handicapped child’s civil right to receive a free public education like every other child in the United States. To limit in any way a handicapped child’s opportunity to receive an education equal to his potential is to deny that child’s civil right. Therefore, it is incumbent upon state and local education agencies to not demur in fully complying with this basic principle in the law.

The primary vehicle used to describe an appropriate education that is equal to the handicapped child’s potential is the individualized education program (IEP). This written statement is to clearly set forth the child’s present level of functioning, instructional objectives as related to annual goals, services needed to educate the child, and a follow-up evaluation to determine if the instructional objectives have been met. The program statement should also show the extent to which the child can be educated with children who are not handicapped and show the method for programming the child’s educational objectives, accompanied by criteria for measuring his attainment. Thus, the program outlines the least restrictive environment.

In reality, the IEP becomes the only written agreement between all the parties involved (child, parent, local educational agency, state agency) to insure that the handicapped child will be provided with an appropriate education. Yet this agreement is not a legally binding document and the state and local educational agencies “[do] not violate these regulations if the child does not achieve growth projected in the annual goals and objectives.” This places the onus of whether the handicapped child has had an appropriate assessment and is receiving an appropriate education on the parent or surrogate parent, if the handicapped individual is a minor. This person must judge as to whether the child’s civil right is being safeguarded or violated.

The burden of this position is twofold. First, local educational agency administrators and professional teams that conduct assessment and instructional programming tend to develop IEP’s based on existing resources available in the school districts rather than including specific services needed for handicapped children without regard to local availability of such services. Further, there is a tendency to encourage parents, most of whom do not know what other educational options may

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14 The regulations include provisions which are designed (1) to assure that all handicapped children have available to them a free appropriate public education; (2) to assure that the rights of handicapped children and their parents are protected; (3) to assist states and localities to provide for the education of handicapped children; and (4) to assess and assure the effectiveness of efforts to educate such children.


16 Id.
be open to their children, to endorse suggested IEP's agreed upon by the assessment/programing teams. While the due process procedures afford parents the opportunity to obtain independent evaluations at public expense, the parents usually accept what the school district and its "specialists" offer. Secondly, even though parents may pursue independent evaluations, either at public or their own expense, in order to provide an appropriate IEP, the local and state educational agencies will not be placed in jeopardy for not meeting the objectives set forth in the IEP's, as already indicated. Handicapped children and their parents are still left at the mercy of the local and state educational agencies.

Hence, this leads to the crucial issue, which is the placing of a handicapped child in the "least restrictive environment" and providing an appropriate program in the mainstream of regular education, when suggested in the IEP. What can be done to provide quality control of mainstreaming procedures and to keep local educational agencies from placing handicapped children into regular education classrooms without clearly setting forth in the IEP's how the individual objectives, based on the needs of the children, will be met? And, if quality control is not provided and objectives are not met, what will occur in order to safeguard the civil rights of the children?

**STATUS OF KNOWLEDGE RELATING TO THE PROBLEM**

*History of Education Relating to Appropriate Mainstreaming of Handicapped Children*

While many state constitutions have included provisions for free public education to all children for up to a century, this end has not been fully reached for children with handicapping conditions. As the compulsory school attendance laws came into existence, the practice of placing severely handicapped individuals in state institutions continued while the mildly handicapped were left to "sink or swim" in regular class settings. With the lack of individualized assessment procedures and teaching techniques in general education, many of the mildly handicapped children failed in the mainstream. As a result, special classes and schools for the handicapped developed a half century ago. Special education with its special class model for all kinds of handicapping conditions received a real nudge forward as regular educators were only too happy to have the "poor learners" removed from their classrooms. So, "special education as a subsystem of the total education system, responsible for the joint provision of specialized or adapted programs and services (or for assisting others to provide such services) for exceptional children and youth" became a permanent entity in education. With it, however, con-

continued the segregationist position, held for centuries in Western culture, that somehow handicapped individuals are quite different from other people, as revealed in the approach towards abilities testing, and perhaps even less human. Thus, the handicapped child rather than the educational program is at fault for his failure to learn, therefore, this child needs a different program that will suit the category of the child’s handicapping disabilities.

Since the turn of the century, public schools have practiced segregating handicapped children into special classes for instruction. Labeling them according to handicapping categories (i.e., visually handicapped, hearing handicapped, mentally retarded, emotionally disturbed) provided a method whereby these children could be excluded from the mainstream of regular education and enabled funds to be earmarked for more extensive and expensive education. Now, upon learning of the potentially dehumanizing effect of categorizing and segregating handicapped children in education, regular education is faced with the need for changes that will provide appropriate education in the mainstream. Similarly, special education is faced with redefining its role of being a resource to these children in the mainstream without excessive categorization and “pull-out” programs.

With evidence accumulating that questions the efficacy of segregated programs for the handicapped, professionals and parents alike have called into question such practices in public schools. In allowing special education to become a “dumping ground” for regular education, unequal opportunities for the education of the handicapped developed. As a response, mainstreaming arose to alleviate this inequity. Most simply, “mainstreaming is the conscientious effort to place handicapped children into the least restrictive educational setting which is appropriate to their needs.” It provides services to the handicapped along a continuum of educational settings based upon the needs of the handicapped child. “As educators focus more carefully on the individual and his or her uniqueness, they ... move away from grouping children categorically by handicap, away from special schools and special classes, and at 8-11.

See G. Hoelke, Effectiveness of Special Class Placement for Educable Mentally Retarded Children (1966); S. Kirk, Research in Education, in Mental Retardation (H. Stevens & R. Heber eds. 1964); M. Reynolds, Categories and Variables in Special Education (1966) (paper presented to USOE/CEC Conference on Special Education, University of Maryland); Deno, Special Education as Developmental Capital, 37 Exceptional Children 229-37 (1970); Dunn, Special Education for the Mildly Retarded—Is Much of It Justifiable?, 35 Exceptional Children 5-22 (1968); Reynolds & Ballow, Categories and Variables in Special Education, 38 Exceptional Children 357-66 (1972); Smith & Kennedy, Effects of Three Educational Programs on Mentally Retarded Children, 24 Perceptual and Motor Skills 174 (1967).

W. Tice et al., Mainstreaming: Helping Teachers Meet the Challenge 7 (1976).

Id. at 8.
and away from other manifestations of the assumptions about homogeneity."

The educational trend toward mainstreaming is paralleled and supported by a similar legal trend. Federal, state, and local law provides the foundation for public education. The interplay between the law and educational theories determines the character of the child's education. The present and future provision of public education is better understood after an examination of public education's historical background and past treatment of handicapped children.

Legal Treatment and Transition

Although there was the traditional lag between educational theories and the law necessary to support those theories, the legal structure adapted to the changing educational structure. When the normal tenure of a public education expanded, the compulsory school laws also extended the number of years the American child was required to attend school. The longitudinal growth of public education is now evidenced by the commonness of public kindergartens and higher education, whether college or vocational. Furthermore, Public Law No. 94-142 not only recognizes that some states have public educational programs for the three to five year old, but it also encourages use of the federal funds for the handicapped child newborn to two years of age.

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During the century of longitudinal growth there was a simultaneous

[A] free appropriate public education will be available for all handicapped children between the ages of 3 and 18 within the State not later than September 1, 1978, and for all handicapped children between the ages of 3 and 21 within the State not later than September 1, 1980, except that, with respect to handicapped children aged 3 to 5 and aged 18 to 21, inclusive, the requirements of this clause shall not be applied in any State if the application of such requirements would be inconsistent with State law or practice, or the order of any court, respecting public education within such age groups in the State.


Section 4(A) of Senate Report No. 94-168 sets out the entitlement formula. S. REP. No. 94-168, 94th Cong., 1st Sess. 2-3 (1975). Section 4(B) establishes eligibility and the respective age requirements:

Thus, the Committee bill provides that a State, in order to be eligible for funding, must have a "right to education" policy for all handicapped children, that all handicapped children aged three to twenty-one will have available to them by September 1, 1980, a free appropriate public education. With respect to handicapped children, aged three to five and aged eighteen to twenty-one, inclusive, the Committee bill provides that such requirement shall not be applied in any State if the application of such requirement would be inconsistent with State law or practice, or the order of any court, respecting public education within such age groups in the State.

Id. at 3. The 3 to 21 span is followed in the classification procedures, also. "(1) A limitation is established on the number of children a State may count for purposes of the entitlement. This limitation has been set at 10 percent of a State's population of all children aged three to twenty-one." Id. at 28. See also id. at 50.

Not all the legislators agreed that the extended age span for public education should be discretionary with the states.

According to information the Committee has received, 35 states have laws which provide services to children with handicaps at an age less than six years old. There are 15 states and the District of Columbia then where services are not required for at least some group of handicapped children below school age, but even some of these states have laws which permit such services to such handicapped children.

The bill as reported to the full Committee from the Subcommittee on the Handicapped provided for such services to the age group 3 to 5 years of age. As reported to the full Committee, S. 6 reflected the commitment to service for preschool children that was adopted in P.L. 93-380 last year. This position was consistent with present law.

Therefore, we do not agree with the full committee action which makes such service permissive for those states who are not providing services or whose laws prohibit or do not authorize the provision of such services. We think that the action taken by the Committee unwiseely moves the Congress away from the policy in present law which emphasizes the earliest possible service to handicapped children.

Id. at 81-82 (Additional Views of Senators Stafford, Javits, Kennedy, Schweiker, and Hathaway). It is true that early childhood education can be particularly important for the handicapped child. The last paragraph above hints at the potential the federal government has for coercing states to change their laws and educational programs to provide education to three to five year-olds. By refusing to grant money to states that don't authorize or that prohibit public education to handicapped children aged three to five, the desire to obtain the federal money may in effect coerce the states into changing those laws. However, limiting eligibility in that way would be an educated gamble. The federal government would be risking the educations of older handicapped children. If a state did not want to extend education to handicapped children aged three to five, the federal government would not be able to grant money to the state at all, depriving the older children of the benefits of federal monies. Even if the state chose to change its relevant laws, the time lag during the change would also cause fiscal and educational deprivation. It is not likely that a state would be able to change its laws fast enough to meet the September 1, 1978, and September 1, 1980 deadlines.
The three “R’s” were accompanied by more diverse programs, such as industrial arts, home economics, foreign languages, music, and physical education. Around this same period the segregated special education programs started. Whereas there were compulsory education laws for the amount of time the normal child had to attend school, the handicapped were commonly exempt from compulsory attendance. The special consideration appeared to be a privilege. However, its practical effect was to relieve the state from having to provide special education of specified duration or quality. Because facilities were inadequate for instructing the severely or multiply handicapped, those handicapped children sometimes received residential or home instruction, but

Thus, in passing the Senate bill in lieu of the House bill, the timetable was established as follows:

Timetable. The Senate bill requires that the State, in order to be eligible for assistance, submit a plan as required by the Education Amendments of 1974, and that such plan be amended setting forth in detail the policies and procedures the State will undertake or has undertaken to assure that a free appropriate public education will be available to all handicapped children between the ages of 3 and 18 within the State not later than September 1, 1978, and that a free appropriate public education will be available to all handicapped children between the ages of 3 and 21 within the State not later than September 1, 1980. The Senate bill further provides that with respect to handicapped children aged three to five and eighteen to twenty-one, inclusive, that the requirement of providing a free appropriate education in accordance with this timetable, shall not be applied in any State if that application would be inconsistent with State law or practice or the order of any court respecting the public education within such age groups in the State.

The House amendments provided that a State must submit a State plan which shall assure that funds will be expended to initiate, expand, or improve programs which are designed to assure that after September 30, 1978, no handicapped child residing in the State shall be denied appropriate special education and related services.

The House Amendments provide that the requirement applies to any handicapped child who is within an age group for which free public education is provided within the State.

The House recedes.

Id. at 36-37.

30 “Longitudinal” denoting the number of years the child was required to attend school; “latitudinal” denoting the spectrum of subjects taught to the child. Necessarily some of the courses became options, but the variety of educational topics available continued to broaden the educational opportunity.

31 Although statutes did not bar the handicapped from public classrooms, unless they would disrupt the class activities, they commonly made attendance a matter of parental discretion. The common exception from compulsory attendance applied to handicapped children referred to a “physical or mental condition” that made attendance “inexpedient or impracticable.” 1929 Ariz. Sess. Laws, ch. 93, § 21. See also 1921 Idaho Sess. Laws, ch. 215, § 75 1/2 (child’s bodily or mental condition does not permit its attendance at school”); 1912 Ky. Acts, ch. 113, § 4521a (“shown to the satisfaction of the county superintendent of schools that such child is not in proper physical or mental condition to attend school”); MICH. COMP. LAWS §5979(c) (1915) (physically unable to attend).

Upon establishing institutions for the blind, deaf, and dumb, states made attendance at those institutions either compulsory or discretionary. See, e.g., 1929 Ariz. Sess. Laws, ch. 93, §21 (parents fined for nonattendance at school for deaf and blind); GA. CODE ANN. §1429 (Park’s 1914) (“the parent or guardian of any deaf and dumb mute, or semi-mute, shall be permitted, if they so desire, to send such child to the State Institute for the deaf and dumb. . . .”); MICH. COMP. LAWS §§985 (1915) (compulsory education of the deaf if can’t be taught successfully in the public schools), MICH. COMP. LAWS §§988 (1915) (compulsory
severely or multiply handicapped, those handicapped children sometimes usually received none at all. Even if the child could have managed in the special education class environment, the problem of transportation commonly blocked the child's access to education. Because special education was not compulsory, whether the handicapped child received the education was a matter of parental discretion. Unfortunately the discretion commonly resulted in what was easiest for the parent, rather than what was best for the child. Thus the state's failure to compel special education attendance not only relieved it of providing a special education program of satisfactory time and type, but it also reduced the number of students in the special education category. This reduced the costs of special education to the state, although it increased the costs of welfare and lost economic input associated with not educating the handicapped.

The absence of compulsory school laws for the handicapped also indirectly established the legislative priorities of the state. Since the normal child was required to attend school, the required education had to be available.

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See discussion in note 31, supra. Prior to the establishment of special schools for the handicapped, if parents or teachers thought the handicapped student had gleaned all that was possible from the public school, the student was no longer required to attend. The educational goals for teaching the handicapped were commonly much lower than for normal students. The aim was to teach them the basics so that they could be somewhat self-sufficient. The more abstract, intellectual, and advanced subjects were not considered very useful to the handicapped student. As for the mentally handicapped student, if he fell behind and therefore quit learning, the school had taught him all it could.

Residential" here means institutionalized instruction, where the handicapped student would live at the school.

To this day, not all handicapped children receive a proper public education. The trend is one of a recent, progressive surge of educational services for the handicapped. U.S. Office of Education studies show that in 1948 only 12 percent of handicapped children received special education. In 1963 the figure was up to 21 percent, in 1967 it had risen to 33 percent, and by 1971 it was approximately 40 percent. F. Weintraub, A. Abeson & D. Braddock, State Law and Education of Handicapped Children: Issues and Recommendations, 14 (1971). By the 1974-75 year, 55 percent of school-aged handicapped children were being served, but that was still 45 percent away from the absolutes set by the Education for All Handicapped Children Act of 1975. S. REP. NO. 94-168, 94th Cong., 1st Sess. 8 (1975).

The long range implications of these statistics are that public agencies and taxpayers will spend billions of dollars over the lifetimes of these individuals to maintain such persons as dependents and in a minimally acceptable lifestyle. [See id. for statistics.] With proper education services, many would be able to become productive citizens, contributing to society instead of being forced to remain burdens. Others, through such services, would increase their independence, thus reducing their dependence on society.

There is no pride in being forced to receive economic assistance. Not only does this have negative effects upon the handicapped person, but it has far-reaching effects for such person's family.
Therefore, the legislature could easily rationalize that regular education had priority over special education.

In 1972 there was a major turning point. *Pennsylvania Association for Retarded Children v. Pennsylvania* and *Mills v. Board of Education* established the handicapped child's right to an education, proclaiming the "privileged" exemptions to be void as a matter of equal protection.36

Providing educational services will ensure against persons needlessly being forced into institutional settings. One need only look at public residential institutions to find thousands of persons whose families are no longer able to care for them and who themselves have received no educational services. Billions of dollars are expended each year to maintain persons in these subhuman conditions.


Thus, providing educational services to the handicapped will decrease the welfare rolls, will decrease the need for institutional care, will relieve the immediate family of an overwhelming financial burden, and will allow the handicapped person to maintain a sense of pride.

Without appropriate educational opportunity, many handicapped children would remain an economic liability to the state. As productive citizens, however, they can become both economic and social contributors to the nation. It has been estimated that one million handicapped children have not received educational opportunities due to provisions in compulsory school attendance laws which exclude them from public education. Exclusion clauses of this type in state laws raise serious moral questions. However, from a pure economic perspective, 90 percent of handicapped children with appropriate education can become tax paying citizens. It has been estimated that each handicapped child that receives an appropriate education is worth at least a quarter of a million dollars to society: half in reduced welfare and institutional costs and half in increased productivity.


"Pennsylvania Association for Retarded Children v. Pennsylvania, 343 F. Supp. 279 (E.D. Pa. 1972), was the first decision to discuss the handicapped child's right to a public education. Actually, the only decision left to the three-judge federal district court was whether to approve the consent agreement and stipulation. The plaintiffs were so successful in their thorough presentation of evidence in the hearings, including testimony from nationally recognized experts in the field, that the defendants pushed for the consent agreement. The plaintiffs in the class action suit got essentially everything they wanted, but the defendants were afraid that the court would be even more "generous" than they were."

The source of the complaint was the total exclusion of persons who were categorized as "ineducable" or "unable to profit" from further education from the public school system. See PA. STAT. ANN. tit. 24, §§ 13-1330, 13-1375 (Purdon Supp. 1978-79). The Pennsylvania statutes also allowed the educational exclusion of persons who hadn't reached the mental age of 5 years or who were not within the compulsory school age span of 8-17. Id. § 13-1304, PA. STAT. ANN. tit. 24, § 13-1326 (Purdon 1972). The solution to the problem was for the Pennsylvania Attorney General to issue official opinions foreclosing the use of the above statutes for educational exclusion of mentally handicapped children. The consent agreement stated that Pennsylvania had a legal responsibility to provide a free public program of education to every child. The state agreed to put each mentally handicapped child in a "free, public program of education and training appropriate to the child's capacity." Pennsylvania Association for Retarded Children v. Pennsylvania, 334 F. Supp. 1257, 1260 (E.D. Pa. 1971). Additionally, when the state provided preschool education, it would offer similar educational opportunities to mentally handicapped children. Id. at 1262. The plaintiffs would be eligible for tuition grant assistance for private school attendance just as other disability groups were. Id. at 1260.

The consent agreement also provided a strong procedural framework. The state only had a few months, until September 1, 1972, to identify, evaluate, and place each plaintiff child.
Twenty-four states plus the District of Columbia enacted laws for the education of the handicapped by 1973, half of those laws being enacted in appropriate educational programs. The stipulation required notice and an opportunity for a due process hearing before a special hearing officer before a mentally handicapped child could be assigned or reassigned to a regular or special educational placement. The court also appointed two specialists in the area, a social scientist and an attorney, to be special masters for the review and approval of the defendants' implementation plan. *Id.* at 1259.

The PARC decision notably touched on the concept of the least restrictive environment. As a derivative of the legal concept of the least restrictive alternative in this case, the injunctive decree stated:

> It is the Commonwealth's obligation to place each mentally retarded child in a free, public program of education and training appropriate to the child's capacity, within the context of a presumption that, among the alternative programs of education and training required by statute to be available, placement in a regular public school class is preferable to placement in a special public school class and placement in a special public school class is preferable to placement in any other type of program of education and training. *Id.* at 1260.


> Each member of the plaintiff class is to be provided with a publicly-supported educational program suited to his needs, within the context of a presumption that among the alternative programs of education, placement in a regular public school class with appropriate ancillary services is preferable to placement in a special school class.

*Mills* also settled the constitutional questions raised in PARC. One PARC defendant had challenged the court's jurisdiction. The court found that there was a constitutional claim under both the due process and equal protection clauses. In regard to the former, the PARC court relied on Wisconsin v. Constantineau, 400 U.S. 433 (1971), comparing the stigma associated with the label “mentally retarded” to the stigma associated with the public posting that one is a habitual drunkard, as in *Constantineau*. Before a stigmatic label can be applied, a hearing is required. *PARC*, 343 F. Supp. at 295. In regard to the equal protection aspect, the PARC court relied on Brown v. Board of Education, 347 U.S. 483 (1954). The court applied the rational basis test, finding that Pennsylvania had no rational basis for denying public education to some children and not to others. *Id.* at 297. The *Mills* court reiterated the constitutional principles and determined that all children were entitled to a public education, regardless of any disability.

The *Mills* suit was grounded in the growing percentage of handicapped children who were not receiving special education. Mentally handicapped and emotionally disturbed children were commonly excluded from school until “small classes” were available for them. Such informal and illegal exclusionary tactics kept 1500 children on waiting lists and an unknown number of others out of the public school system completely. The plaintiffs moved for a preliminary injunction to get the named plaintiff children in the class action into classrooms during legal proceedings. The plaintiffs also moved for the production of lists of excluded children and for an identification effort aimed at discovering what other children were excluded from public education. *Mills*, 348 F. Supp. at 875, 879. Defendants agreed to the motion's requests prior to its hearing.

As in PARC, the plaintiffs' case was presented thoroughly and with unshakable expert testimony. After affidavits, exhibits, memoranda, and oral argument, the judge granted the plaintiffs a summary judgment. The opinion, judgment, and decree discussed the equal protection argument and ordered due process in the form of notice and a hearing prior to suspension or reassignment to or from a special education program. *Id.* at 875. The court pointed out that institutionalized children were to be protected by the District of Columbia social services administration, acting as a parent. *Id.* at 876 n.8. Thus, PARC and Mills declared every child's right to a public education.

Prior to 1960, only three states had enacted special education laws and seven more states enacted laws in the 1960's. Now all states have enacted special education laws, indicating that not only is the legislative attention a movement of the 1970's, but that over half of the states have taken action since 1972.

The turning point also resulted in new federal laws for the education of the handicapped. The first major statement in this regard came in the Education Amendments of 1974 (Public Law No. 93-380). Title I of Public Law No. 93-380 amended the Elementary and Secondary Education Act of 1965. Specifically, amendments were made in regard to "Special Education Programs and Projects for Educationally Deprived Children." This Title dealt with federal grants to be made to state and local educational agencies between July 1, 1973, and June 30, 1978. Subpart 1 emphasized poverty children, while subpart 2 concentrated on state-operated programs for handicapped children. Part C outlined the eligibility and amount criteria for the special grants. Part D also gave the Commissioner sole responsibility for program evaluation.

Title VI, Extension and Revision of Related Elementary and Secondary Education Programs, contained the “Education of the Handicapped Amendments of 1974” in Part B. The grants specifically for handicapped educational programs were limited to the number of hand-

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38The states passing laws for education of the handicapped in 1972 included: Idaho, Louisiana, Massachusetts, New Mexico, Ohio, Pennsylvania, South Carolina, South Dakota, Vermont, Virginia, and the District of Columbia. States issuing protective educational laws before then were: Alabama, Connecticut, Georgia, Hawaii, Illinois, Indiana, Kentucky, Michigan, New Jersey, Oklahoma, Texas, Utah, Washington, and Wyoming. It should be noted that the Pennsylvania law protecting the mentally retarded, passed in 1971-72, was preceded by a 1956 act which still mandates full planning and programing for all handicapped children. S. REP. No. 94-168, 94th Cong., 1st Sess. 20-21 (1975).

39Since PARC and Mills, supra note 36, at least 22 states have had suits filed to enforce the right of mentally handicapped children to a public education, and several other courts have followed the precedent of PARC and Mills. Editorial Introduction, The Right to an Appropriate Free Public Education, in The Mentally Retarded Citizen and the Law, supra note 36, at 251. "Other courts have declined to rule in suits where state legislatures had recently enacted statutes designed to achieve the same goal." Id.

40The three states enacting special education laws prior to 1960 were: Hawaii (1949); New Jersey (1954); and Pennsylvania (1956). The states acting in the 1960's were: Connecticut (1966); Georgia (1968); Illinois (1965); Indiana (1969); Texas (1969); Utah (1969); and Wyoming (1969). S. REP. No. 94-168, 94th Cong., 1st Sess. 20-21 (1975).

41Although all states now have special education laws, some states have not reached their compliance dates yet (Arkansas, Kansas, Maryland, Montana, and North Dakota). As true of most state legislation, the provisions for coverage and the designated ages of eligibility vary from state to state. Id.


45Id. at § 241e-241e-1.

46Id. §§ 241d-11 to 241d-12.

47Id. § 241o.

48Id. §§ 1402, 1403(b)-(c), 1411-1413.
Handicapped children from ages three to twenty-one multiplied by $8.75.\textsuperscript{47} States applying for such grants had to establish procedures and policies for the identification of all handicapped children in the state and a timetable for providing full educational opportunities for them all.\textsuperscript{48} However, there was no follow-up plan to check the application of these procedures or their success. Even if there were blatant failures to use the money as the federal government intended, there were no sanctions for non-compliance in Public Law No. 93-380.\textsuperscript{49}

November 29, 1975, the Education for All Handicapped Children Act of 1975, Public Law No. 94-142 (S. 6), was enacted.\textsuperscript{50} This Act amends the Education of the Handicapped Act, becoming effective in various states.\textsuperscript{51} There are not only extensions in time periods, but also exten-

\textsuperscript{47}Id. \S 1411 (effective through September 30, 1977). In other sections the age span of 5 to 17 years of age is referred to. The new \S 1411 sets the maximum grant amount at:

(a)(1)(A) the number of handicapped children aged three to twenty-one, inclusive, in such State who are receiving special education and related services; multiplied by-

(B)(i) 5 per centum, for the fiscal year ending September 30, 1978, of the average per pupil expenditure in public elementary and secondary schools in the United States;

(ii) 10 per centum, for the fiscal year ending September 30, 1979, of the average per pupil expenditure in public elementary and secondary schools in the United States;

(iii) 20 per centum, for the fiscal year ending September 30, 1980, of the average per pupil expenditure in public elementary and secondary schools in the United States;

(iv) 30 per centum, for the fiscal year ending September 30, 1981, of the average per pupil expenditure in public elementary and secondary schools in the United States; and

(v) 40 per centum, for the fiscal year ending September 30, 1982, and for each fiscal year thereafter, of the average per pupil expenditure in public elementary and secondary schools in the United States;

except that no State shall receive an amount which is less than the amount which such State received under this subchapter for the fiscal year ending September 30, 1977.

It also establishes how the grants are to be distributed and used. \textit{Id.} \S\S 1411(b)(1)-(d). To some extent this discussion of allocations replaces the former \S 1412, which discussed the allocation of appropriations.

\textsuperscript{48}Id. \S 1413(b)(1) (effective through September 30, 1977).

\textsuperscript{49}Besides losing the potential benefits of studying the actual results of the different state plans, the lack of review procedures and sanctions negated the concept of an educational right for all children. It also meant that a noncomplying state could use its grant for its own purposes, a freedom not enjoyed by a complying state. If there had been review procedures and sanctions, funds could have been shifted to complying states so that the best utility could have been realized from the funds in regard to the goal of providing the best possible education for the greatest number of handicapped children.


\textsuperscript{51}\textit{Id.} Although not all states need to request the funds designated in Public Law No. 94-142, and thus do not have to develop the detection, educational, and review plans outlined in the Act, it is a given that the Act creates a right to education for all handicapped children, which is a statutory outgrowth of the common law initiated in \textit{PARC} and \textit{Mills}. See note 36 supra.
sions in coverage and expansions in appropriations. For example, instead of multiplying the number of handicapped children by $8.75 to figure the state's grant, the number of handicapped children is now multiplied by $300.00. This is a sizeable financial commitment, particularly since the state's grant will be at least the same amount each year and is scheduled to progressively increase. It is intended that the state and local educational agencies will be matching these amounts and that the federal monies will be "excess" money to upgrade special education to an even further extent.

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53 Much criticism has been leveled at Public Law No. 94-142's predecessors because they covered only a limited amount of time. The temporal limitation simultaneously induced hurried planning and instant programs on one hand and reluctance to produce any programs because of the amount of time proper planning would take and the fear that money would only be designated for the amount of time mentioned in the statutes. Public Law No. 94-142 not only extends the time limitation, but it establishes a time frame that allows long-range planning. The progressive increases in maximum grant size show a federal commitment to increasing allocations to the states for education of the handicapped. 20 U.S.C. § 1411(a) (Supp. 1975). Although the graduated scale does not guarantee increasing allocations, it is guaranteed that "no State shall receive an amount which is less than the amount which such State received under this subchapter for the fiscal year ending September 30, 1977." Id. See generally id. § 1411.

54 The result is the maximum grant the state can receive. 20 U.S.C. § 1419 (Supp. 1975) reads:

(a) Authority to make grants.
The Commissioner shall make a grant to any State which--
(1) has met the eligibility requirements of section 1412 of this title;
(2) has a State plan approved under section 1413 of this title; and
(3) provides special education and related services to handicapped children aged three to five, inclusive, who are counted for the purposes of section 1411(a)(1)(A) of this title.

The maximum amount of the grant for each fiscal year which a State may receive under this section shall be $300 for each child in that State.

Grants under this subsection support the education of handicapped children aged 3 to 5. The Senate bill used the $300 figure for calculating the state's entire maximum grant. S. Rep. No. 94-455, 94th Cong., 1st Sess. 32, reprinted in [1975] U.S. Code Cong. & Ad. News 1480, 1485-86. The "incentive grants" under subsection (a) above may still be maximum grants in regard to per-child expenses, but it is possible that the conference substitute for calculating the total state grant could supply even more than $300 per child. See note 47 supra.

55 The state's base amount is the size of the grant received for "Assistance for Education of All Handicapped Children" for the fiscal year ending September 30, 1977. The state is entitled to larger future grants. See note 47 supra.

56 Section 1411(c)(2)(B) of Title 20 in the United States Code reads:
The amount expended by any State from the funds available to such State under paragraph (1)(A) in any fiscal year for the provision of support services or for the provision of direct services shall be matched on a program basis by such State, from funds other than Federal funds, for the provision of support services or for the provision of direct services for the fiscal year involved.

Section 1413(a)(9) of Title 20 requires a state plan to:
provide satisfactory assurance that Federal funds made available under this subchapter (A) will not be commingled with State funds, and (B) will be so used as to supplement and increase the level of State and local funds expended for the education of handicapped children and in no case to supplant such State and local funds, except that, where the State provides clear and convin-
Besides meeting the financial problems special education programs have perpetually had, the Act eradicates other barriers. It proclaims the handicapped person’s right to a public education, thereby forcing every state to provide the handicapped person with an education equivalent to the regular education. Admittedly a special education costs the state twice as much to provide on the average, but the Act alleviates some of the financial sting of this federal coercion by providing $300.00 per handicapped child, which is equivalent to one-fourth of the extra expense. These provisions maximize the total amount spent on the public education of the handicapped. Section 1411 also controls the distribution and use of the federal grants, specifying what percentage and dollar amounts can be spent for administration, state use, local educational agency use, and intermediate educational unit use. 20 U.S.C. § 1411(b)-(d) (Supp. 1975).

Costs of appropriate educational services for handicapped children are more expensive as compared with those of educating other children. While cost data often vary from study to study, Rossmiller (1970) reported that the cost of programs for the education of handicapped children ranges from the cost of educating a speech handicapped child, which is 1.8 times the cost of educating a normal child, to 3.64 for the education of a physically handicapped child. Factors relating to such high costs are primarily due to lower teacher-pupil ratios, ancillary personnel, transportation, and demographic factors such as rural areas where few numbers of handicapped children increases the per pupil costs of equipment and facilities. Rossmiller et. al., (1970) using their cost indices, project a minimum 1980 expenditure of about seven billion dollars to provide education to all handicapped children from ages 5 to 17. Projections for total educational expenditures in 1980-81 are 64 billion dollars.

HANDICAPPED CHILDREN'S EDUCATION PROJECT. A SUMMARY OF ISSUES AND STATE LEGISLATION RELATED TO THE EDUCATION OF HANDICAPPED CHILDREN IN 1972, at 32 (1973). Studies done by the National Education Finance Project estimated that the actual cost of educating a handicapped child is on the average, double the cost of educating a non-handicapped child. While this estimate may vary by State, the dollar level of $300 in the Committee bill represents an amount approximately equal to 25 percent of such additional cost, and will provide an amount per handicapped child which will assist States and local educational agencies in providing appropriate education for handicapped children.

S. REP. No. 94-168, 94th Cong., 1st Sess. 15, reprinted in [1975] U.S. Code Cong. & Ad. News 1425, 1439. Because legislative history reveals no intention that the revised funding scheme would provide a substantially different amount of federal funding, one can conjecture that the federal government still intends to provide a quarter of the additional cost for educating a handicapped child. See note 47 supra. Plus the $300 figure still applies to early childhood education under Public Law No. 94-142. 20 U.S.C. § 1419 (Supp. 1975).

Recalling recent litigation about whether the state must assure each child of an education costing the same amount or being of equal value to that of any other child in the state, one can question whether there is equal protection of the law when more public funds are spent on a handicapped child’s education than on the average child’s education. This equal protection challenge is answered by the Act’s own guarantee: to assure equal protection of the law, each child must be provided with a free appropriate public education. Because such provision costs more in the case of a handicapped child, more public funds must be spent to meet the statutory constitutional requirement of a minimum education. Rather than looking at the amount spent on each child, one must look at the fact that each child, whether handicapped or average, is getting the same commodity from the government—a public education for the same period of time. And arguendo, the average child is more likely to learn more during that period and to take advantage of publicly provided and publicly supported education beyond compulsory school years.
The Act also eliminates parental discretion, making special education compulsory. The Act’s remedial clauses are adequate tools to remove transportation and architectural barriers.

The Act adds some significant substantive components to the federal approach. The states still have to present plans before receiving special education grants. However, now the federal statute establishes general goals. The state first must present a plan for identifying all handicapped children and all federal monies must initially be used to meet that goal. Then the state can move on to the second priority—making sure that each of those children receives an appropriate education. Thus, first priority children are those handicapped children who are unidentified and are not receiving a public education. Second priority children are those handicapped children who are identified but are not receiving an adequate public education.

Another innovation is to require a planning conference between the “experts” and the parents. As mentioned earlier, this conference yields the individualized educational program. One crucial aspect of the plan is

A corollary of a handicapped child’s right to a free appropriate public education and the state’s statutory requirement that it be provided is the parental duty to see that the child receives the education. Now all parents must send their children to school or accept home tutoring during the compulsory school years, as defined by the state. See notes 31-32 supra. See also 20 U.S.C. § 1412(2)(A) (Supp. 1975).


"First priority children" are handicapped children who have not been identified and are not receiving a education. Id. § 1412(3). The proposed federal rules required the state and local educational agencies to use funding for first priority children before it could be used for second priority children or inservice training. 41 Fed. Reg. 56,985 (1976) (§ 121a.210-214). All first priority children had to be identified and provided with a free appropriate public education before funds could be applied elsewhere. Id. There was an obvious gap of criteria for determining when the unknown number of children had been identified and for evaluating the thoroughness and effectiveness of “child find” efforts. The new rules mitigate this “Catch-22” by setting a September 1, 1978 time limit on finding first priority children, although efforts to identify, locate, and evaluate all handicapped children will continue after that date. 42 Fed. Reg. 42,489 (1977) (§ 121a.320-Note). The new rules also softened the requirement that first priority children must have a free appropriate education before funding is shifted; now an “interim program of services” for the first priority child is sufficient if a major component of the child’s proposed education program is not available during the 1977-78 school year. Id. (§ 121a.322).

"Second priority children" are handicapped children who have been identified but who are receiving an inadequate education. 20 U.S.C. § 1412(3); 42 Fed. Reg. 42,489 (1977) (§ 121a.320(b)). These children must be provided with an adequate education by September 1, 1978, so that their respective states can obtain continued funding for the 1979 fiscal year. See generally 42 Fed. Reg. 42,482, 42,485-86, 42,488-90 (1977) (§§ 121a.127-128, 220-225, 300-324); Stadtmueller, Highlights from P.L. 94-142, 18 BUREAU MEMORANDUM 16, 16 (1977) (publication of the Wisconsin Department of Public Instruction) (discussion of priorities).

Id.


See text accompanying notes 15-17 supra.
that it must place the child in the least restrictive environment. The third substantive innovation is a mechanism to supervise the use of the grant, to compel proper development and application of the IEP, and to force compliance with the intentions of the Act.64

Thus the federal and state legislatures embodied the evolving approaches to special education. The new federal statute recognizes the need for considerable funding, the need for uniform priorities, the educational desirability of mainstreaming, and the need for an enforcement mechanism.

**PRACTICAL PROBLEMS OF IMPLEMENTATION**

**General Problems**

Public Law No. 94-142 is not all-encompassing, however. It outlines the criteria for eligibility, distribution of appropriation, due process and enforcement mechanisms, and the appropriate general education theories, but it doesn’t contain substantive details. Despite the statute’s comprehensive approach, it still leaves the bulk of implementation decisions to be enunciated by the Office of Education in the Department of Health, Education, and Welfare in the Federal Register,64 by the educational agencies, and by the courts. General pronouncements are the norm for legislatures, allowing the experts close to the problem to establish the best substantive rules. There is also the advantage that as educational theories evolve, the relevant rules can be easily adapted. But such flexibility can have negative effects. Due to state control, procedures will not be uniform across the country. A local educational agency may have to meet far higher standards and follow stricter procedures when obtaining, retaining, and using federal funds than an agency in another state. Furthermore, the state educational policy is subject to political change, particularly when there is a change in personnel. Different personnel will believe in different educational theories and will have different ideas about their implementation. These criticisms apply to the courts and the HEW Office of Education.

64The weight of responsibility falls primarily on the state educational agency. One way the federal government commands compliance is by requiring detailed planning, which theoretically starts in the schools and local school systems and culminates in the state’s annual program plan. 42 Fed. Reg. 42,480-85 (1977) (§§ 121a.110-.194). The annual program plan requires extensive certification and statistical information, timetables, and plans for the use of facilities, staff, and present and requested funding. Id. The state has considerable control in regard to the plan it adopts, but the adoption process is even federally prescribed. 20 U.S.C. § 1412(7) (Supp. 1975); 42 Fed. Reg. 42,487 (1977) (§§ 121a.280-.284). A state must at least go through the motions of notifying the public of the proposed plan and receiving public comment.

The parts of the Act governing the individualized education program also place responsibility on the state. 42 Fed. Reg. 42,490-91 (1977) (§§ 121a.341-.345). The HEW Office of Education in turn divides the responsibility among public agencies. Id. (§§ 121a.341-.349). This decentralization is not intended to diminish the responsibility or accountability, though, and the statute and regulations use terms of compulsion, such as “shall” and “must.” Id. These words are backed up by the due process procedures. Id. 42,494-97 (§§ 121a.500-.534).

Uncertainty as to the rules will result not only from the inherent flexibility of the statute, but also from the amount of time it will take before the Office of Education, the educational agencies, and the courts develop stable guidelines. Unless the Act is amended, the time span of the Act will elapse before the stabilization is complete.

Meeting the Priorities

The first substantive innovation, established priorities, provides the first example of the statute's substance gap. The rules presented in the Federal Register reiterate the priorities and explain that the first priority, identifying all handicapped children, must be totally completed before funds can be used for the second priority, assuring each of those children of an appropriate public education. However, no criteria are suggested for determining whether the first priority has been met. Neither are any suggestions made about which methods are approved for going about the search. Obviously, every method would be used simultaneously and continuously to achieve the maximum effectiveness. Because identification canvassing is a new educational development, there are no scientific studies giving the best methods according to experience. Yet as a practical matter it is apparent that using all possible methods will result in duplication of effort or overlap, a case of diminishing marginal returns. Likewise, it is unknown how long efforts must continue before the first priority is accomplished. If the identification canvass must be 100 percent effective, the agency may never get to the second priority. Again, this is a consideration in the most efficient use of limited funds.

The state educational agency has the power of decision in regard to whether the needs of first priority children have been met. The local educational agency must prove to the state agency that the first priority requirement is met before funds can be used for second priority children. This area of state discretion raises some interesting equal pro-

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6See note 60 supra. Although the new rules soften the impact of the preference given to first priority children, when the state and local education agencies can shift funding to second priority children and teacher training programs is still an unsettled matter. Until September 1, 1978, an "interim program of services" is allowed for a first priority child when a trained teacher is not available. 42 Fed. Reg. 42,489-90 (1977) (§§ 121a.321-.324). After assuring the child of the interim program, Part B funds can be used for teacher training or other support services. Id. (Comments). The underlying theory is that the funds' use will facilitate and speed up the providing of a free appropriate public education to that child.

7There was similar duplication of efforts in the cases pressing for the handicapped child's right to a public education. See notes 36-37 supra.


9Section 121a.324 reads:

A local educational agency may use funds provided under Part B of the Act for second priority children, if it provides assurance satisfactory to the State

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tection arguments, since some states may require less proof of first priority efforts. The discrepancy could result in a handicapped child not being "found" in one state, whereas he would have been discovered in another. On the other hand, the latter state would probably be expending more funds on second priority children than the first state, raising a related equal protection problem. Similarly, a state could allow expenditures on second priority children in one school district before such expenditures would be made on similarly situated or needy children in another school district.

Planning the IEP

The IEP is useful simply because it concentrates affected individuals' attention on the child's education and development. However, it has variable utility, depending upon the empirical basis and thought behind it, the detail of the plan, and the personal characteristics of the persons attending the meetings for determination and revision of the plan.

Both the Act and the federal rules are vague when discussing the IEP's content. The meeting must establish goals and the means to objectively assess the progress toward those goals at a later date. These general requirements lend themselves to a mere listing of subskills that should be acquired during a year's span. There is no requirement that the IEP spell out the progress of the child with an assessment as to whether that progress is appropriate for him as an individual. Neither is there a requirement that the child's progress be evaluated in relation to the school's curriculum. It is feasible that the child could acquire the named subskills but be totally behind in the respective curriculum. This gap is one of the side effects of inappropriate mainstreaming. The IEP couched in general terms and ignoring the regular curriculum in devising the individual child's plan fosters inappropriate mainstreaming. Inappropriate mainstreaming thus bars the child from a free appropriate education.

The characteristics of the individuals attending the IEP meeting may
also frustrate the purpose of the IEP. The meeting may include just a representative of the public agency, the child’s teacher, and a parent.\(^5\) The representative could easily be the teacher’s supervisor or superior.\(^6\) Therefore, the representative would be prone to “rubber stamp” whatever the teacher proposes. This is true not only because of possible bias, but the mere fact that they work together means they are used to following the same procedures and they probably rely on similar educational philosophies. In such a meeting, the parent is the only person “on the other side.” Yet the parent probably does not know how to evaluate the proposed plan. Two experts wield unlimited power in a conference with a regular citizen. Analogizing to the market situation, it would be an unfair imbalance to require a bargaining session between two diamond experts and an engaged man and to assume that the right price would be set with the man getting the most for his money and getting legitimate goods. Here the Act and federal rules assume that the parent will represent his child’s interest, assuring the child that the best individualized plan for a free appropriate education will be obtained. The parent’s capability in this regard is questionable. The Office of Education apparently relies on the public agency representative’s and the teacher’s professionalism and attempted objectivity to mitigate the expert-parent imbalance.

Forcing Compliance

The Act and federal rules are replete with pronouncements of what state and local educational agencies must do.\(^7\) If in fact the local educational agency does not provide the child with an appropriate education, the state agency can refuse to award funding to the local agency.\(^8\) That refusal must be accompanied by direct service by the state, whereby the state takes on the local agency’s responsibility for the provision of appropriate education for the handicapped.\(^9\) Needless to say, the state will make every effort to gain compliance by the local agency before usurping its function. That reluctance serves a functional purpose, since it is best to have continuous program administration on the local level. A layer of supervision and objectivity in funding would be lost if the state agency assumed the role of the local agency, since taking on the local agency’s...
duties would overburden the state agency. However, that reluctance also makes the state agency prone to overlooking ways that a local agency should improve the commodity it provides to handicapped students. And in the event of noncompliance with state agency directives or requests, the agency may hesitate to take coercive action.

Another factor militating against state enforcement is the desire to get as much funding from the federal government as possible. The more children the state characterizes as being "served," the more funding the state receives. The result is state error on the side of leniency.

Specific Mainstreaming Problems

It is equally easy for the state to conclude that because handicapped students are in the regular classroom they are "mainstreamed." The state will have to rely on the local educational agency's claimed figures of its mainstreaming, unless the state develops independent means of assessment. For example, the state would have to require and evaluate an excessive amount of paperwork from the local agency or it would have to do substantial field supervision; both are cumbersome alternatives. Thus the local educational entities will bear the responsibility for appropriate determination and provision of the "least restrictive environment." 80

The implementation of the least restrictive environment requirement is easier than it would have been under the proposed federal rules. Whereas the proposed rules required the IEP to outline the specific educational services needed by the child, irrespective of their availability, the new rules allow the IEP's limitation to services available and no attempt must be made to supply new services. 82

The most common service relied upon is the resource room. Yet a resource room is inadequate if its instruction does not coordinate with that in the regular classroom and if the handicapped student feels lost in the regular curriculum. 83 There are no immediate sanctions to protect the

80 The state has the freedom to require the local educational agency to file whatever information it needs. 42 Fed. Reg. 42,485-87 (1977) (§§ 121a.193, .232).


82 "The individualized education program for each child must include: ... (d) A statement of specific educational services needed by the child, (determined without regard to the availability of those services) ..." 41 Fed. Reg. 56,986 (1976) (proposed 45 C.F.R. § 121a.225). The correlative section in the new rules reads: "The individualized education program for each child must include: ... (c) A statement of the specific special education and related services to be provided to the child, and the extent to which the child will be able to participate in regular education programs ...." 42 Fed. Reg. 42,491 (1977) (§ 121a.346).

83 In an attempt to quickly revert to the early treatment of handicapped children, i.e., putting them in a regular classroom, educators may be overcompensating. There still is a need for some handicapped students to get segregated instruction.

The recent and rapid growth of special classes for the mentally retarded has come under attack. The attack is largely a result of the misuse of special education classes as dumping grounds for some children and of the total ex-
child from inappropriate placement. Unless a teacher notices inappropriate programing, correction is left to the chance or hope that the parent will not only realize the problem, but will also follow the due process procedures to get the individualized programing changed.4

However, even the due process procedures may fail to rectify the experts’ mistake. The parent has the burden of proof, which may be difficult to meet. In a section at the state conference of the Wisconsin Association for Children with Learning Disabilities, held in Milwaukee, Wisconsin, on October 7-8, 1977, parents of handicapped children shared their legal problems. The most common complaint was that one educator would not testify against another. This unified front of educators is comparable to the unified front of medical doctors in malpractice cases. Although the teacher and members of the IEP planning group are not legally liable for a handicapped student’s failure to meet his IEP goals, the reflection on professional reputations is a sufficient barrier to open colleague testimony.8 That testimony is vital in the administrative appellate process and a subsequent civil action, since proof of inappropriate programing is a specialized educational matter.

The basic practical problem in implementation is compelling the educators to meet and exceed their professional best when devising and applying the IEP. Compulsion is necessary to the extent that there is a lack of time, money, services, and other resources and that there are

4The Act and the federal rules outline the administrative appellate procedures and the right to take an unsatisfactory appellate result to the local court. See 20 U.S.C. §§ 1415, 1417 (Supp. 1975); 42 Fed. Reg. 42,494-96 (1977) (§§ 121a.500-.514). One of the most innovative features of the appellate process is the parent’s right to get an independent educational evaluation at public expense. However, the public agency will probably opt for the “mediation” hearing. Id. § 121a.506. If that impartial hearing results in a determination that the educational program is appropriate, the parent loses the right to an independent educational evaluation at public expense; the evaluation must be at the parent’s expense if one is still desired. Id. § 121a.503. Because the public agency can force a mediation hearing by its own initiative, it could effectively vitiate the right to publicly supported independent evaluations. Id § 121a.506.

5Although the new rules dropped the phrase that the IEP is “not legally binding contract,” the rules do not hold the educators accountable for the child’s failure in reaching IEP goals. 42 Fed. Reg. 42,491 (1977) (§ 121a.349). Although legally it would be productive to have a “contract for educational goods,” the child may be just as responsible for any failure, each child has a unique pattern of educational development, and it would be psychologically undesirable to force a teacher to teach, since that’s the teacher’s responsibility and presumed goal anyway. Furthermore, the teacher helps develop the IEP and could easily affect its content so that all its goals would be easily obtainable. Just as there is a difference between statutes and guidelines, the IEP is a collection not of rules but of goals.
other educational duties and interests vying for their time and attention. There is the additional factor of newness. At this point no one is totally sure how the Act and new rules are to be effected, and the concept of mainstreaming is a relatively new educational theory. Perhaps guidance by the supervising entities will diminish the need for compulsion.

RESOLUTION OF THE PROBLEM

In an attempt to resolve the crucial issue of appropriate mainstreaming of handicapped children, several considerations need to be recognized as fundamental. Programs that have answered these questions effectively have found a measure of success.

First, can effective mainstreaming be implemented by continuing categorization of handicapped children by separating them via assumed inherent abilities as measured by norm-referenced standardized tests without pinpointing specific needs such as how the children can best learn within the curriculum? The very basis of the categorization approach is to measure constant traits within individuals in order to label them for primary groupings, thus providing standardized procedures for placement in educational settings. Not only does such a practice segregate and stereotype the individual toward supposed possession of group behaviors, but it negates assessing the individual's infinite capacity to change and breadth of potential, and disallows the possibility of placement in educational environments designed specifically to develop new learning/coping skills. If criterion-referenced measures and informal diagnostic teaching procedures over a period of time that relate to possible learning outcomes can best assist in pinpointing where to proceed in instruction. If a teacher is to teach a handicapped child in the primary unit, an assessment of the child that will be most serviceable is one that identifies specific areas of educational need as determined over time in more favorable learning formats and procedures. In this way, instructional strategies and materials can best be organized and applied within a meaningful plan for the child no matter where he is on the continuum of service in the least restrictive environment model (i.e., cascade model).

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85 PUT SIMPLY—mainstreaming means putting handicapped children back in the regular classroom for selected experiences. Mainstreaming is, more strictly: (1) an attitudinal system that reinforces the position that all children can learn when attention is given to individual learning styles, learning rates, and varied content; (2) a management system that allows for optional routes to goal achievement; and (3) an organizational support system that provides for the educational needs of all children. Effective mainstreaming addresses the academic and social needs of all youngsters in the least restrictive educational environment. Each categorical designation tends to segregate these individuals from the mainstream of people.


87 S. Deno & P. Mirkin, supra note 8.
Further, such assessment lends itself toward more accurate structuring of objectives in the IEP, evaluation of progress toward meeting the objectives, and communicating program plans to all concerned, including the child.

Second, can effective mainstreaming be implemented without employing an educational program model that utilizes individualized instruction, flexible pupil grouping, and team teaching? Can it be implemented without having teachers (regular and special) trained in procedures that will enhance the use of each for children having varying learning needs? "While some people delight in seeing self-contained classes eliminated, it is forgotten that unless basic changes are made in programing, the children are put back into the very failure situations which originally led to their specialized placements." As John Ryor, president of the National Education Association, has warned, "Mainstreaming is one of the most complex educational innovations ever undertaken and for boards and administrators to plunge their schools into it without advance preparation carries great potential harm for regular and special students and for teachers as well." To move handicapped pupils up to continuum of the least restrictive environment model in education embodies within it the commitment to individualize instruction for all children. Failure to recognize this is to abandon these pupils to undifferentiated classrooms.

Some schools have moved to the establishment of resource teacher positions to assist classroom teachers in programing and teaching handicapped pupils. However, only too often these teachers are relegated to small resource rooms to work with the handicapped either clinically or in small groups via "pull-out" schedules from the mainstream. The attitude or position that prevails is that it is up to the resource teacher to help ameliorate the handicapped pupils' disabilities and "catch-up" with the traditional undifferentiated curriculum of the mainstream. The IEP's that are written fail to address differentiated programing and teaching in the regular classroom where up to 50 percent of identified handicapped children now spend most of their days. Because of it, the regular classroom becomes a very frustrating and defeating setting for many of these children. If resource teachers are to be utilized in schools, they need to assist in individualizing instruction, structuring learning task/interest groups, arranging differentiated learning settings, and at times team teach for the benefit of the handicapped pupils in the regular classroom. Handicapped pupils should be mainstreamed into regular classroom settings only when IEP's address appropriate programing within the classroom and show response to how they can best learn in that setting.

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11K. Berry, supra note 7, at 24.
Handicapped children may be separated at times on the basis of the kind of learning tasks appropriate for them, but whenever appropriate, they should be learning alongside their peers if not with them.

Thirdly, can appropriate mainstreaming ever become a reality if we continue regular and special education as separate systems? These systems have developed their own approaches to personnel training, teacher certification, program funding, administration of programs, and service delivery. Collaboration among these separate functions is now imperative. Institutions of higher education, state educational agencies, and local educational agencies need to establish comprehensive training models for both pre-service and inservice training that will provide personnel development programs at all levels. Some training objectives and models have already been initiated. School administrators, special education personnel, and regular educators need to be involved together in retraining and developing appropriate mainstreaming procedures for handicapped children. Inservice programs need to deal with problems at all levels so they solve them together.

The desired educational methods outlined above can be put into effect. Admittedly the present practices fall short of the ideal. However, the Act and the new rules contain language and procedures that would enable the Office of Education or the state educational agency to push desired practices.

The first innovation of presented goals and priorities now allows the state agency freedom in determining when the local agency has met the initial goals and the first priority. Thus the state agency governs when funding can be shifted to second priority children. By requiring the local agency to present very specific and very individualized IEP's for first priority children before allowing expenditures on second priority children, the state can force the local agency to develop at least some optimal IEP's and the methods or proper form for producing them. In regard to the second priority, the state has the power to foster inservice training programs. The state also has the power to review the programs.

The second innovation is the planning conference. It is valuable that a parent now has statutory rights in the determination of the child's educational future. But the parent's ability to protect the child's legal interest fully is inadequate. There should be an impartial third party or an advocate for the child's interests in the planning group. The representative of the public agency most likely would not meet this objective. However, the agency could bring in an objective expert, and the same option is available to the parent. Ideally the expert would be familiar with both

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*S. Deno & P. Mirkin, supra note 8.
educational and legal theories. Even if there is an educational expert in an impartial role, it would be helpful to have an attorney act as the child's representative, if merely to review the IEP in light of applicable laws. A professional advocate of the child's interests would improve the balance of the planning session immensely and would insure that the goals of the Act and federal rules would be met.

The third innovation deals primarily with obtaining compliance with the Act, the federal rules, and the proposed programs under them. A professional advocate for the child would enhance compliance. The federal government also has considerable power to require specific practices, since it can refuse the state agency's financial requests until the agency includes those practices in its annual program plan. If the practices are just verbalized in the program plan and are not followed in actuality, the federal government can withdraw the funding. Similarly, if a local educational agency fails to follow practices required by the state agency, the state agency can enter the local agency's jurisdiction and provide the handicapped students with more appropriate programs. The federal and state entities have almost unlimited power due to the generalities of the new rules. If they fail to use that power to full advantage, it is feasible that a parent could encourage its use by lobbying, following the due process procedures, and ultimately bringing the case before the courts. The child has an enforceable civil right to a free appropriate public education, which a court could interpret as a right to the optimal education for the child as an individual. That education should and necessarily must result from the best educational theories and practices presently available.

By requiring specific and individualized IEP's and by encouraging varied inservice training programs, the federal, state, and local educational agencies can facilitate proper mainstreaming. Enforcement power provided by the Act and federal rules lies with the educational agencies at all levels and with the parent. It is their responsibility to assure the handicapped child a free appropriate public education.

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