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Bruce G. Sheffler

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NOTES

EDUCATION OF HANDICAPPED CHILDREN: THE IEP PROCESS AND THE SEARCH FOR AN APPROPRIATE EDUCATION

"[I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." 1 This statement by Chief Justice Earl Warren, made in the landmark decision of Brown v. Board of Education, 2 contemplates that black students schooled in segregated facilities would view themselves to be inferior members of the community. 3 Although the veracity of the statement also is evident regarding the schooling of handicapped children, these children for many years had been denied meaningful educational opportunities. 4 Indeed, most handicapped children, whose physical and mental impairments made formal education essential to their successful participation in society, 5 were either excluded from the mainstream of public education or placed in programs ill-suited to their educational needs. 6

Ultimately, however, these exclusionary practices were challenged successfully. 7 The courts, cognizant of the advances in diag-

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3 Id. at 493.
4 See S. Rep. No. 168, 94th Cong., 1 Sess. 8, reprinted in [1975] U.S. Code Cong. & Ad. News 1425, 1432. In 1975, the Bureau of Education for Handicapped Children reported that eight million children in America were handicapped and in need of special education. Id. Less than half of these children were receiving an appropriate education. Another 1.75 million were receiving no education at all. Id.
nostic and instructional procedures and methods used in educating handicapped children, directed state education departments to revise their special education programs to meet the educational needs of such children. Compliance with judicial mandates proved problematic, however, since states frequently lacked the resources to implement fully the required special education programs. Partially because of this funding problem, Congress enacted the Education for All Handicapped Children Act (EAHCA), which provides that states may obtain monies from the federal government sufficient to ensure that a "free appropriate public education" is provided to all handicapped children.


See 20 U.S.C. § 1412(1) (1976). The EAHCA is an enabling act which provides funds to qualifying states to meet the expense of educating handicapped children. See
The elements of an appropriate education, however, are not specified in the EAHCA. Instead, recognizing that the needs of each handicapped child are unique and that no one program can be appropriate for all, Congress mandated the implementation of a process entailing (1) the identification of the unique needs of each child, and (2) the development of a program capable of meeting those needs in the least restricted environment.

Notwithstanding the fact that the EAHCA focuses upon a process for achieving an appropriate education rather than upon a substantive definition of the term, some courts, which are the final arbiters of the appropriateness of educational programs, have expressed dismay over the absence of substantive guidelines. This Note will demonstrate that the confusion as to what constitutes an appropriate education is not the result of a lack of substantive definition, but follows from the courts' misplaced emphasis upon the program chosen rather than upon the process used to develop such a program. Toward this end, the Note will survey those cases which first recognized the right of handicapped children to receive an appropriate education. Next, the evolution of educational philosophies concerning the appropriateness of an educational program, as well as the approach embodied in the EAHCA, will be
examined. The Note will then outline the process set forth in the EAHCA for ensuring that an appropriate education is provided for handicapped children, and critique New York State’s implementation of such process. Finally, upon considering several judicial tests the Note will suggest an alternative approach whereby the appropriateness of a contested educational process may be ascertained.

DEVELOPMENT OF THE EDUCATIONAL RIGHTS OF HANDICAPPED CHILDREN

Education, long regarded as a principal governmental function, generally has not been deemed by the courts to be constitutionally mandated. Rather, the judiciary has viewed the power to devise educational programs as within the discretion of the state, provided some rational basis for the state’s decisions can be shown. Consequently, state legislation which excluded handicapped children from public schools often was sanctioned. Although a few courts suggested that handicapped children comprised a suspect class that could not be excluded from public...

30 Accord, Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (statutes which penalize the exercise of a constitutionally protected right are subject to strict judicial scrutiny). The strict judicial scrutiny standard is used to test state action which “impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class,” Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976) (footnotes omitted), and is not satisfied absent a compelling state interest. See, e.g., Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 305 (1978). See generally Barrett, Judicial Supervision of Legislative Classifications—A More Modest Role for Equal Protection?, 1976 B.Y.U.L. Rev. 89.


35 See id.

36 Id.
The plaintiffs attacked these statutes as unconstitutional, alleging that they violated the due process and equal protection clauses of the Fourteenth Amendment. Respecting their due process claim, the plaintiffs asserted that before a child could be labeled as retarded, and subsequently have his educational placement changed, he must be given notice and an opportunity to be heard. The plaintiffs further asserted that the contested Pennsylvania statutes "arbitrarily and capriciously" denied an education to handicapped children. In connection with their equal protection claim, the plaintiffs alleged that the statutes at issue, which presupposed "that certain retarded children are uneducable and untrainable . . . [lacked] a rational basis in fact." Before these allegations were tried, however, the plaintiffs and the defendant Commonwealth of Pennsylvania entered into several agreements. Although the unconstitutionality of the contested statutes was not conceded in these agreements, Pennsylvania did accede to the plaintiffs' demand that it provide preexclusion hearings to children scheduled to be removed from public education programs. The state also agreed to "provide a program of education and training appropriate to the capacities of" handicapped children.

In assessing whether it had subject matter jurisdiction over the settled controversy, the PARC court reviewed the plaintiffs'
due process and equal protection allegations. The court reasoned that "the stigma which our society... attaches to the label of mental retardation,"47 as well as the educability of retarded children,48 evinced the questionable constitutionality of the challenged statutes.49 Upon further noting that the settlement agreements reached by the plaintiffs and the Commonwealth of Pennsylvania were "fair and reasonable,"50 the court issued the injunctions necessary to impose these agreements upon the defendant Pennsylvania school districts.51

Decided shortly after PARC, Mills v. Board of Education52 also invited a class action brought on behalf of handicapped children excluded from a public education.53 No questions of fact were presented, because the Mills defendants previously had admitted in a consent order that they had failed to provide the plaintiffs and their class with a "publicly supported education" as required by a District of Columbia statute.54 The defendants also conceded that they had failed to provide "constitutionally adequate" hearings for handicapped children.55 Notwithstanding these admissions, the defendants failed to comply with the consent order.56 In defense of their failure to comply, the defendants asserted that the District of Columbia could not afford to provide an education for the members of the plaintiffs' class.57 Rejecting this argument, the Mills

47 Id. at 293.
48 Id. at 296-97. Notably, five leading experts in the field of education for handicapped children testified in PARC that all mentally retarded children can benefit from an education. Id. at 296 & n.49; see Casey, The Supreme Court and the Suspect Class, 40 EXCEPTIONAL CHILDREN 119, 124 (1973).
49 343 F. Supp. 279, 295, 297 (E.D. Pa. 1972). Although the PARC court found that the plaintiffs had presented colorable constitutional claims, it did not render a judgment as to the constitutionality of the contested statutes. See id.
50 Id. at 302. The court viewed Pennsylvania's willingness to enter the agreement as an "intelligent response to overwhelming evidence against their position." Id. at 291. Indeed, the negative publicity generated by the litigation and the potential impact of an adverse holding led the state to enter a detailed and extensive consent agreement. See Kuriloff, True, Kirp & Buss, supra note 42, at 36-37. See also Shapp, supra note 42, at 1085 (the governor of Pennsylvania who authorized the consent agreement "welcomed rather than challenged the [PARC] suit").
53 Id. at 868. The plaintiff class in Mills included mentally retarded and hyperactive children, and children with behavioral problems. Id.
54 Id. at 871.
55 Id.
56 Id. at 872.
57 Id. at 875.
court reasoned that the defendants were “required by the Constitution of the United States . . . to provide a publicly-supported education” to handicapped children. Moreover, the court stated that the District of Columbia’s interest in educating its children outweighed its interest in preserving its financial resources. Consequently, the court held that the District should distribute its funds in an equitable manner sufficient to ensure that no child would be excluded from the educational system.

Further insight into the right-to-education issue, albeit not in the context of the education of handicapped children, was forthcoming in two Supreme Court cases. In *San Antonio Independent School District v. Rodriguez,* an action was brought on behalf of a class of children whose families resided in school districts having low property tax bases. The plaintiff class in *San Antonio* alleged that Texas’ educational funding scheme, which relied in part upon local property taxes, created disparities in per pupil expenditures, and therefore, was violative of the equal protection clause of the constitution.

Rejecting the plaintiff’s equal protection argument, the Supreme Court held that the constitution does not afford a fundamental right to education. The Court thereupon reasoned that because the contested funding statute was rationally related to a legitimate state purpose, it was permissible. Notwithstanding such holding, however, the *San Antonio* Court intimated that there might be a constitutional duty to provide citizens with an education sufficient to enable them to participate in the political

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58 Id. at 876.
59 Id. In support of its holding, the *Mills* court analogized the rights of handicapped children to those of welfare recipients. *Id.; see* Goldberg v. Kelly, 397 U.S. 254, 266 (1970) (state’s interest in preventing wrongful termination of benefits outweighs fiscal interests).
60 349 F. Supp. 866, 876 (D.D.C. 1972). Significantly, the *Mills* court ordered 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.” *Id.* at 880.
62 Id. at 4-6.
63 Id. at 15-16.
64 Id. at 34-36. A statute which impinges upon a fundamental right will be subjected to strict judicial scrutiny. *Id.* at 29; *see* Graham v. Richardson, 403 U.S. 365, 375-76 (1971); Kramer v. Union Free School Dist., 395 U.S. 621, 626 (1969); Shapiro v. Thompson, 394 U.S. 618, 638 (1969); note 30 supra. A statute which does not impinge upon a fundamental right will be upheld if it rationally furthers a legitimate state purpose. 411 U.S. at 17; *e.g.,* McGinnis v. Royster, 410 U.S. 263, 270 (1973).
The Supreme Court again addressed the right to education issue in *Lau v. Nichols*. In *Lau*, non-English speaking students of Chinese ancestry sought to redress the "unequal educational opportunities" engendered by California's public school system, which, *inter alia*, did not mandate bilingual instruction. Although the Court found for the plaintiffs, it did not reach their equal protection clause theory. Rather, upon stating that the provision of English instruction to non-English speaking children "effectively foreclosed [them] from any meaningful education," and would "make a mockery of public education," the Court held that such functional discrimination was violative of section 601 of the Civil Rights Act.

**Educational Philosophies Influencing the EAHCA**

Upon illumination of the plight of handicapped children by the comprehensive PARC and Mills decisions, and upon the Supreme Court's decisions in *San Antonio* and *Lau*, numerous courts held that the states must provide for the education of handicapped children. In compliance with this judicial initiative, all states

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68 Id. at 564-65. The *Lau* Court noted the existence of several educational alternatives: "[t]eaching English to the students of Chinese ancestry who do not speak the language is one choice. Giving instructions to this group in Chinese is another. There may be others." Id. at 565.

69 Id. at 566.

70 Id.

71 Id.

72 Id. at 568-69.

eventually enacted special education statutes. Unfortunately, however, these statutes did not substantially improve the education of handicapped children. Several factors contributed to the inadequacies of state-mandated special education programs, including an insufficiency of funds as well as a dearth of adequately trained personnel. Additionally, the absence of a uniform system of identification prevented many handicapped children from receiving any benefit from legislation directed specifically at them.

Perhaps the most significant obstacle to advancements in the area of special education was the adherence, by educators, to an ineffective educational approach—the segregation of educationally exceptional children into "special" classrooms comprised of other children identified as having the same handicap. Although this approach presupposed that the exceptional child would progress most satisfactorily once removed from the inappropriate and intellectually frustrating surroundings of the normal classroom, it pos-

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*74* Shortly after the PARC and Mills decisions were rendered, a clear trend developed: 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 1972. Prior to 1960, only three states had enacted special education laws and seven more states enacted laws in the 1960's. Now [in 1978] all states have enacted special education laws. . . .


*78* Handicapped students were segregated in various ways. Severely handicapped children, such as the profoundly retarded, were often sent to state institutions. "Education" in these institutions consisted mainly of custodial care. Those children with normal intelligence but with sensory impairments typically were given vocational training. S. Larsen & M. Poplin, *Methods for Educating the Handicapped: An Individualized Educational Program Approach* 4 (1980).

*79* J. McCarthy, *Learning Disabilities: Where Have We Been? Where Are We Going? Selected Convention Papers, Council for Exceptional Children Convention* 33-39 (1969), in D. Hammill & N. Bartel, *Educational Perspectives in Learning Disabilities* 10 (1971); Burton & Hirshoren, *The Education of Severely and Profoundly Retarded Children: Are We Sacrificing the Child to the Concept?*, 45 Exceptional Children 598, 599 (1979); Martin, *Individualism and Behaviorism as Future Trends in Educating Handicapped Children*, 38 Exceptional Children 517, 518-19 (1972). It was believed by many educators that the regular classroom was ill-equipped to meet the individual needs of handicapped children and that such children needed to be shielded from the pressures of the regular classroom. Burton & Hirshoren, *supra*, at 599. It was also believed that specially trained teachers work-
sessed several deficiencies. First, studies indicated that segregation did not appreciably improve the student's learning capacity. Conversely, the integration of such students into the traditional classroom was shown to improve their academic performance substantially. Second, while segregation served to alleviate the disturbances and disruptions sometimes instigated by handicapped children in the regular classroom, children placed in integrated classes tended to be more self-aware and better adjusted than those who were isolated in homogeneous classes. Third, placement of handicapped children in segregated classes exacerbated with homogeneously grouped classes would be better able to effect a meaningful education. S. Larsen & M. Poplin, supra note 78, at 4.

80 S. Kirk, Educating Exceptional Children 199 (2d ed. 1972); Kirp, Schools as Sorters: The Constitutional and Policy Implications of Student Classification, 121 U. Pa. L. Rev. 705, 718, 728 (1973). Although many eminent educators were convinced that segregated classes for handicapped children were undesirable, school administrators were reluctant to depart from the traditional approach. Additionally, regular classroom teachers viewed the integration of handicapped pupils with normal students as a threat to the stability of their classrooms. Hudson, Graham & Warner, Mainstreaming: An Examination of the Attitudes and Needs of Regular Classroom Teachers, 2 Learning Disability Q. 58, 60 (1979).

81 S. Kirk, supra note 80, at 199-201.

82 Dybwad, Avoiding Misconceptions of Mainstreaming, the Least Restrictive Environment, and Normalization, 47 Exceptional Children 85, 86 (1980). The rapid increase in the number of special education classes in the 1960's was not a response to meet the needs of handicapped children, but rather an expedient measure to remove those children from the traditional classroom, where they were viewed as inhibiting the education of normal children. Christoplos & Renz, A Critical Examination of Special Education Programs, 3 J. Special Educ. 371, 373 (1969). Segregation into special education classes often was used as a means to reduce the problems of the regular classroom teacher. See Lora v. Board of Educ., 456 F. Supp. 1211, 1220 (E.D.N.Y. 1978), vacated and remanded, 623 F.2d 248, 249 (2d Cir. 1980). Consequently, children whose cultural or other differences created problems were removed from the regular classroom and placed into special education classes where the instructional level of the class and the expectations of the teachers led to achievement far below their capabilities. See Hobson v. Hansen, 269 F. Supp. 401, 469-72 (D.D.C. 1967), aff'd sub nom. Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969); S. Kirk, supra note 80, at 201. Indeed, those students to be segregated usually were selected pursuant to standardized intelligence tests. Since these tests were culturally and racially biased to white middle-class children, a disproportionate number of minority children, who lacked comparable experiences, were misclassified. Lora v. Board of Educ., 456 F. Supp. 1211, 1220, 1243 (E.D.N.Y. 1978), vacated and remanded, 623 F.2d 248, 249 (2d Cir. 1980); P. v. Riles, 343 F. Supp. 1306, 1308-09, 1314 (N.D. Cal. 1972), aff'd per curiam, 502 F.2d 963 (9th Cir. 1974); Hobson v. Hansen, 269 F. Supp. 401, 407, 422-46, 479 (D.D.C. 1967), aff'd sub nom. Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969); see S. Kink, supra note 80, at 200; Kirp, Buss & Kuriloff, supra note 75, at 49-50.

83 See generally Sontag, Certo & Button, On a Distinction Between the Education of the Severely and Profoundly Handicapped and a Doctrine of Limitations, 45 Exceptional Children 604, 606 (1979).
Dissatisfaction with the “total segregation” approach led educators to look to alternative theories of education. Indeed, the rise of individualism and behavioralism as educational philosophies was met with great enthusiasm by advocates of special education. Influenced by the soundness of these teaching approaches, those responsible for administering special education programs shifted their emphasis from merely planning for the child according to his handicap, to specifically providing for the child according to his unique needs.

A main tenet of such shift in emphasis was the principle of “normalization,” which contemplates that handicapped children must learn to deal with other nonhandicapped children and, more importantly, to function in society. Educators believed that the best way to teach the adaptive skills necessary to cope in society, namely, to normalize the handicapped child, was to provide an ed-

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86 See S. Larsen & M. Poplin, supra note 78, at 5. The movement to banish segregated homogeneous education for handicapped children was vastly enhanced by an article authored by Lloyd M. Dunn, an esteemed authority in the special education field. Mr. Dunn, for many years a zealous supporter of special education classes, wrote that “[m]uch of our past and present practices are morally and educationally wrong . . . . [A] large proportion of this so called special education in its present form is obsolete and unjustifiable from the point of view of the pupils so placed.” Dunn, Special Education for the Mildly Retarded—Is Much of It Justifiable?, 35 Exceptional Children 5, 5-6 (1968).

87 Burton & Hirshoren, supra note 79, at 599. One of the paramount goals of special education is the optimization of a child’s ability to be an active participant in society. “[T]his has been termed normalization, that is, we must ensure through appropriate opportunities and educational experiences that individuals will enjoy the best quality of life available to them within the limitations imposed by their handicaps.” Id. (emphasis in original); see note 96 infra.
ucation in as conventional milieu as possible. Hence, attention was focused upon assimilating or "mainstreaming" handicapped children into regular classrooms, where both social and academic skills could be developed.

Despite the fact that educators favored the normalization of handicapped children, limited financial resources prevented states from achieving this end. Although the developments in educational methodology had made effective education for handicapped children possible, most handicapped children in the United States continued to be denied an appropriate education. It was in light of such concern that Congress enacted the Education for All Handicapped Children Act.

Mainstreaming has been defined as:

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.

Miller & Miller, supra note 74, at 25 n.86 (quoting Monaco, Mainstreaming, Who?, 13 Sci. & CHILDREN 11 (1976)). Notably, the Board of Regents for the State of New York, recognizing the importance of mainstreaming, has stated that "[t]he quality of many publicly operated or supported educational programs is related to the degree to which children with handicapping conditions are grouped or otherwise combined effectively with other children in the mainstream of our schools and society." N.Y. STATE EDUCATION DEPARTMENT, THE EDUCATION OF CHILDREN WITH HANDICAPPING CONDITIONS 6 (1973).

See Hoben, Toward Integration in the Mainstream, 47 EXCEPTIONAL CHILDREN 100, 100 (1980). Senator Stafford has indicated that the best way to teach the adaptive skills that are necessary to cope in society is to provide an education in as normal an environment as possible. Stafford, Education for the Handicapped: A Senator's Perspective, 3 VT. L. REV. 71, 76 (1978). There are some commentators, however, who doubt that mainstreaming is effective. They suggest that nonhandicapped children will resent the extra attention afforded handicapped pupils. These commentators conclude that such resentment, coupled with misunderstanding and fear, could result in stigmatization and functional segregation more damaging than a separate class would create. See Burton & Hirshoren, supra note 79, at 601; Large, Special Problems of the Deaf Under the Education for All Handicapped Children Act of 1975, 58 WASH. U.L.Q. 213, 244-48 (1980). The majority of available evidence, however, indicates that mainstreamed children are not stigmatized more than those children placed in segregated classrooms. Sontag, Certo & Button, supra note 83, at 611 (citing J. GOTTLIEB, PLACEMENT IN THE LEAST RESTRICTIVE ENVIRONMENT 53 (1978)).


Id.
THE EAHCA AND THE FEDERAL REGULATIONS GOVERNING THE DEVELOPMENT OF THE IEP

Although the EAHCA patently is a special education funding vehicle,\(^4\) the conditions precedent to EAHCA assistance\(^8\) clearly evince a more subtle albeit paramount objective: the normalization of handicapped children.\(^8\) In accordance with such mandate, states seeking EAHCA financial assistance must have in force "a policy that assures all handicapped children the right to a free appropriate public education."\(^7\) Indeed, the obtainment of EAHCA funding is conditioned upon submission to the Commissioner of Education a state plan guaranteeing, \textit{inter alia}, that federal mon-

\(^4\) Id. In setting forth the declaration of purpose, Congress stated:
(8) State and local educational agencies have a responsibility to provide education for all handicapped children, but present financial resources are inadequate to meet the special educational needs of handicapped children . . . .

\(^6\) See \textit{id.} § 1412 (1976) ("[e]ligibility requirements").

\(^8\) See \textit{id.} § 1412(6)(b). EAHCA funding presupposes that the states have established: \textit{procedures to assure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily . . . .

\textit{Id.} (emphasis added); see Concerned Parents v. Board of Educ., 629 F.2d 751, 754 (2d Cir. 1980). Notably, Senator Stafford, one of the authors of the EAHCA, has written that the best way to teach handicapped children the adaptive skills which are necessary to compete in society is to provide an education in as normal an environment as possible. Stafford, \textit{supra} note 90, at 76.

Normalization as a goal of special education is not a recent innovation of the EAHCA. The concept was addressed in an article by M. Reynolds in 1962, \textit{A Framework for Considering Some Issues in Special Education}, in which it was stated:
The prevailing view is that normal home and school life should be preserved if at all possible. When a special placement is necessary to provide suitable care or education, it should be no more "special" than necessary . . . . [C]hildren should be placed in programs of no more special character than absolutely necessary. There should be continuing assessment of children in special programs with a view toward returning them to ordinary environments as soon as feasible.

Dybwad, \textit{supra} note 82, at 87.

\(^7\) 20 U.S.C. § 1412(1), (2)(B) (1976). As defined within the EAHCA, "[t]he term 'handicapped children' means mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, or children with specific learning disabilities, who by reason thereof require special education and related services." \textit{Id.} § 1401(1).
ies will be used only for approved special education programs. Additionally, local state officials must ensure that all children in need of special services will be "identified, located, and evaluated" in a timely manner.

Identification, as required by the Act, is the first step in the process used to determine which children might need special services. Department of Education regulations provide that once a child has been identified as a possible special education candidate, a full-scale assessment and evaluation must be conducted. This evaluation, consisting of a multifaceted battery of tests, is to be performed by a multidisciplinary team (MDT). Although the regulations do not specifically identify all parties who should serve on the team, they do require that at least one member of the MDT have a knowledge of the suspected handicapping condition. Based upon the child’s evaluation, the MDT determines the student’s eligibility for special education. Although the team may discuss placement options, no placement into a special program is made by the MDT.
Once eligibility has been established, the child's individualized education program (IEP) is developed.\textsuperscript{109} The IEP provides the blueprint for the administration of the educational program by defining the type of special education and related services necessitated by the child's handicap.\textsuperscript{110} This individualized educational plan must be finalized prior to any placement into a special education program.\textsuperscript{111}

A critical part of the education procedure, the IEP is a process\textsuperscript{112} as well as a written document.\textsuperscript{113} As a "process," the IEP involves negotiations between the child's parents and the school district.\textsuperscript{114} These negotiations help define the special educational needs of the child.\textsuperscript{115} The culmination of the IEP "process" is the written IEP document, which is both a management tool for moni-

\textsuperscript{109} 34 C.F.R. § 300.533(b) (1981).
\textsuperscript{111} 34 C.F.R. § 300.342(b)(1) (1981). The Department of Education, in interpreting the IEP requirements under the EAHCA has stated that "[t]he appropriate placement for a given handicapped child cannot be determined until after decisions have been made about what the child's needs are and what will be provided. Since these decisions are made at the IEP meeting, it would not be permissible to first place the child and then develop the IEP. Therefore, the IEP must be developed before placement."
\textsuperscript{46 Fed. Reg. 5460, 5464 (1981).}
\textsuperscript{112} 46 Fed. Reg. 5460, 5462 (1981). The process by which an IEP is developed is an integral part in the system created by the EAHCA. See Kaye & Aserlind, The IEP: The Ultimate Process, 13 J. SPECIAL EDUC. 137, 141-42 (1979). This process consists of a series of meetings of the parties concerned with the education of the handicapped child. 34 C.F.R. §§ 300.343, 300.344 (1981). The importance of a joint development of a program by the necessary participants is made clear by the Department of Education's statement of the purpose of the IEP:
\textsuperscript{46 Fed. Reg. 5460, 5462 (1981).}
\textsuperscript{113} 20 U.S.C. § 1401(19) (1976); 34 C.F.R. § 300.340 (1981). While the IEP process ultimately results in a written document defining the educational system to be employed, the document is not a contract. When the EAHCA was first enacted, however, educators feared that the failure of a child to reach the goals set for him in the IEP would be viewed as proof of the inadequacy of the instruction provided by the teacher. See Weatherly & Lipsky, Street-Level Bureaucrats and Institutional Innovation: Implementing Special-Education Reform, 47 HARV. EDUC. REV. 171, 190-97 (1977). This fear led to the development of IEPs which were couched in the most general terms or which set forth goals which were easily attainable. Id. The regulations incorporated pursuant to the EAHCA alleviated the fears of educators and teachers by explicitly stating that teachers were not to be held accountable for failure to achieve the specific goals set forth in the IEP. 34 C.F.R. § 300.349 (1981).
\textsuperscript{115} Id.
toring the effectiveness of the educational plan\textsuperscript{116} and a binding commitment that the plan as agreed upon will be implemented.\textsuperscript{117}

The IEP process begins with a meeting scheduled within 30 days of the eligibility determination by the MDT.\textsuperscript{118} A representative of the school district,\textsuperscript{119} the child's teacher,\textsuperscript{120} and a parent of the child must attend the IEP meeting.\textsuperscript{121} Once the participants at the meeting reach an agreement regarding the extent of the child's educational impairment, the parties draft the written IEP. Specified within this document are (1) the annual objectives to be achieved in the course of ameliorating the adverse effect of the child's impairment,\textsuperscript{122} and (2) the special education and related services deemed necessary to achieve these objectives.\textsuperscript{123}

Of course, the written IEP serves as the basis for the educational placement of the child, and the special education requirements specified within the IEP document would appear to dictate a placement decision.\textsuperscript{124} If, however, the placement established by the IEP does not meet the parties' approval, the educational rights of the child as set forth in the EAHCA are safeguarded by the right to due process. Notably, the EAHCA mandates that each participating state must establish due process procedures to ensure that an appropriate educational program is provided to handi-


\textsuperscript{118} 34 C.F.R. § 300.343(c) (1981).

\textsuperscript{119} Id. § 300.344(1). The representative of the school district must be "qualified to provide, or supervise" special education. Id.

\textsuperscript{120} Id. § 300.344(2). Senator Stafford has stressed the importance of the presence of the child's teacher at the IEP conference, noting that such participation would avail the teacher of valuable information about the child's handicap. 121 Cong. Rec. 19,483 (1975) (remarks of Sen. Stafford).

\textsuperscript{121} 34 C.F.R. §§ 300.344(3) & 300.345 (1981). It is clear that the Department of Education deems parent participation in the IEP process to be crucial. Indeed, the Department's regulations go so far as to provide that "[i]f neither parent can attend [the IEP meeting], the public agency shall use other methods to insure parent participation, including individual or conference telephone calls." Id. § 300.345(c).

\textsuperscript{122} Pursuant to the EAHCA, all IEPs must include annual goals and short-term instructional objectives. 20 U.S.C. § 1401(19)(B) (1976); 34 C.F.R. § 300.346(b) (1981). The annual goals and objectives are determined with reference to the diagnosis of the student's capabilities and needs. 20 U.S.C. § 1401(19) (1976). The IEPs also provide a means by which to measure yearly progress. Id. § 1401(19)(E); 34 C.F.R. § 300.346(e) (1981); E. CRANDALL, IMPLEMENTATION OF THE INDIVIDUALIZED EDUCATION PROGRAM, A TEACHER'S PERSPECTIVE 19 (1979).


\textsuperscript{124} See id. at 5464.
capped children. Accordingly, prior to identification, evaluation, or any change in an educational program, the handicapped student’s parents must be afforded an opportunity to present their objections. Should such procedures prove unsatisfactory, the aggrieved parties are entitled to a due process hearing, with leave for either party to appeal to the state’s education agency and then to a federal district court.

NEW YORK STATE GUIDELINES FOR THE DEVELOPMENT OF THE IEP

Article 89 of the New York Education Law and the regulations of the State Education Department govern the rights of

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127 Id. § 1415(b)(2); 34 C.F.R. § 300.506 (1981).
127 Id. § 1415(b)(2); 34 C.F.R. § 300.513 (1981); see Stemple v. Board of Educ., 623 F.2d 893, 897-98 (4th Cir. 1980), cert. denied, 101 S. Ct. 1348 (1981).
131 The court in Stemple found a duty owed by the parents to keep the child in her current placement while litigating any issues regarding her program. 623 F.2d at 897-98. Moreover, the court stated that should the parents decide to remove the child from the current school placement and place the child in another setting, the school would not be liable for reimbursement of the child’s tuition. Id. at 898.
132 This presumptive preservation of the status quo while contesting a change in placement is consistent with much of American law. Id. It is also suggested that the maintenance of the status quo is consistent with the philosophy of the EAHCA which strongly emphasizes the need for the child to be placed in the least restrictive environment possible. See 20 U.S.C. § 1412(5)(B) (1976).
handicapped children in New York State. Pursuant to these laws, the Board of Education of each school district is responsible for ensuring that a free and appropriate education is provided to all handicapped children residing within the district. A Committee on the Handicapped (COH) assists the district in determining the proper educational program. In furtherance of this goal, the COH must identify handicapped children and "review and evaluate all relevant information" concerning such children. Upon identification and evaluation, the COH must recommend an "appropriate educational" placement to the school board and to the child's parents.

Recent amendments to the identification, evaluation, program development, and placement regulations provide a comprehensive definition of the evaluation process and attempt to comport New York law with federal requirements. The amendments affect several procedures impacting upon special education. First, they establish a systematic process for the referral of children thought to be handicapped. Under the guidelines of the amend-

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131 N.Y. Educ. Law § 4403(3) (McKinney 1981). The Commissioner of Education is charged with formulating the rules and regulations concerning the identification of handicapped children, id. § 4402(1)(a), and the remediation of the needs of such children. See id. §§ 207, 305(18), 4403(3). Such rules and regulations as may be promulgated must be approved by the Board of Regents. See id. §§ 207, 4402(1)(a).


133 N.Y. Educ. Law § 4402(1)(b)(1) (McKinney 1981). The COH is "composed of at least a school psychologist, a teacher or administrator of special education, a school physician, a parent of a handicapped child residing in the school district . . . and such other persons as the board of education or the board of trustees shall designate." Id. See New York State Educational Department, Guidelines for Carrying Out the Responsibilities of the Committee on the Handicapped (1978) [hereinafter cited as COH HANDBOOK].


135 Id. § 4402(1)(b)(3)(a). Pertinent information includes such "evaluations and examinations as necessary to ascertain the physical, mental, emotional and cultural-educational factors which may contribute to the handicapping condition, and all other school data which bear on the child's progress." Id. (emphasis added).

136 Id. § 4402(1)(b)(3)(b); see [1981] 8 N.Y.C.R.R. § 200.4(c). An appropriate placement is determined by developing an educational program designed to meet the needs of the individual student. In re Board of Educ., 18 N.Y. Dep't Ed. R. 183, 185 (1978).

137 Letter from Robert R. Spillane, Deputy Commissioner of Education, to Organizations and Individuals Concerned About Regulations of Education of Children with Handicapping Conditions (April 1981). The amended regulations were adopted by the Board of Regents on April 24, 1981. Id. They are to become effective July 1, 1982. Id.


139 See 8 N.Y.C.R.R. § 200.4(a) (effective July 1, 1982). Before the amended regulations
ment, the COH, upon referral, must notify the parents of a suspected handicapped child that a special education evaluation is being sought, and must obtain parental consent for the evaluation. If consent is withheld, the parents are extended an opportunity to participate in an informal conference to discuss the necessity for a diagnostic evaluation. Notably, as under the preexisting regulations, the school district may determine the child's need for a diagnostic evaluation in the absence of parental consent.

Second, the new regulations provide detailed and comprehensive mechanisms to ensure that the evaluation is nondiscrimina-
tory and is administered validly. These provisions seek to guarantee an accurate assessment of the impairment's impact upon the child's education.144

Third, the new regulations change the options available to the COH when determining placement of a handicapped child.145 In an attempt to ensure that the child's placement is based upon his needs rather than upon the handicapping condition, the new regulations have deleted the former requirements for the grouping of children according to their identified handicap.146 While the emphasis in placement still is upon homogeneous grouping, the children are grouped according to the type of remediation needed as opposed to the type of handicap exhibited.147

Fourth, the amended regulations make substantial changes in the IEP process which is initiated upon the completion of the child's diagnostic evaluation. Ratifying a practice employed by

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144 See 8 N.Y.C.R.R. § 200.4(b) (effective July 1, 1982). An important addition to the evaluation procedure is the requirement that the evaluation include an observation of the child in his current educational setting. Id. § 200.4(b)(2)(vii). A personal interview with the child is not required pursuant to the new regulations. See id. But see Lora v. Board of Educ., 456 F. Supp. 1211, 1235 (E.D.N.Y. 1978), vacated and remanded, 623 F.2d 248 (2d Cir. 1980).

145 Compare [1981] 8 N.Y.C.R.R. § 200.4(c), (e) with 8 N.Y.C.R.R. § 200.6(e), (f) (effective July 1, 1982).

146 The proper classification of a handicapped child was viewed as essential for the development of an appropriate program. See In re Joan & James M., 18 N.Y. Dep't Ed. R. 49, 49 (1978). Special education classes formerly were defined by the handicapping conditions that the members of the class exhibited. [1981] 8 N.Y.C.R.R. § 200.4(c). Under the new regulations, however, a special class may comprise students of the same handicapping condition or "pupils grouped together for instructional needs rather than by handicapping condition." 8 N.Y.C.R.R. § 200.6(f) (effective July 1, 1982). Classifications of students' handicapping conditions, however, are still very important. For instance, when a child's IEP is challenged, the hearing officer must have a clear understanding of the child's handicap in order to determine the appropriateness of the educational program. In re Charles & Isabella M., 18 N.Y. Dep't Ed. R. 158, 160 (1978). Nevertheless, while the etiology of the handicap is a factor in classification, In re Diane B., 17 N.Y. Dep't Ed. R. 471, 472 (1978), the classification is primarily based upon the child's needs. See In re James S., 18 N.Y. Dep't Ed. R. 25, 26 (1978). Therefore, although a child's test results may indicate a deficiency in intellectual capacity, the child may not be classified as mentally retarded unless an inability to benefit from regular education is also demonstrated. In re Handicapped Child, 18 N.Y. Dep't Ed. R. 496, 500 (1979).

147 8 N.Y.C.R.R. § 200.6(f) (effective July 1, 1982). The new regulations have expanded upon the theory that placement should be determined in accordance with a child's individual needs, not the label of his handicap. The regulations "will allow for children to be better served within the special education programs and provide districts the necessary flexibility to meet pupil needs without being inhibited by arbitrary grouping requirements." REVISION OF REGULATIONS, supra note 138, at ES 3.11.
many districts in the state, the regulations have divided the development of the IEP process into two phases. During the first phase of the IEP, the COH classifies the child's handicapping condition and supplies a written program and placement recommendation to the board of education and to the parents of the child. The COH recommendation indicates the present level of the student's educational development, the annual goals of the recommended corrective program, and any services needed to implement the program. If the parents fail to consent to the proposed corrective program within 30 days following notice, or if they object to the COH recommendation, a formal impartial hearing may be requested in writing. When no parental objection is raised, the board must act upon the recommendation. Of course, any changes made in implementing the recommendation are subject, upon parental request, to a hearing.

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149 See Revision of Regulations, supra note 138, at ES 3.6 (new regulations adopt procedures used in "pilot' school districts throughout the State").
148 8 N.Y.C.R.R. § 200.4(c) & (e) (effective July 1, 1982). Prior to the recent amendment, the New York regulations provided that the IEP should include the five items stipulated by the federal regulations. See [1981] 8 N.Y.C.R.R. § 200.4(g)(1). These items were:
(i) a statement of the present levels of educational performance . . ;
(ii) a statement of annual goals, including short-term instructional goals;
(iii) a statement of the specific educational services . . . to be provided . . . and the extent to which the pupil will be able to participate in regular education programs;
(iv) the projected date for initiation, and anticipated duration, of such services;
(v) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether the instructional objectives are being achieved.

Id. This IEP was to be developed at a planning conference of the IEP team at the time the child entered the program. Id. § 200.4(g)(2). Such a procedure was in line with that adopted by Congress, namely, the establishment of the IEP process as a unit to be developed prior to the educational placement of a handicapped child. See 20 U.S.C. § 1401(19) (1976). The New York regulations prior to 1981 nominally endorsed this procedure. Nonetheless, the recent division of the IEP process into two parts, each completed by different persons, was encouraged by the Education Department. See COH HANDBOOK, supra note 133, at 4-5; N.Y. STATE EDUCATION DEPARTMENT, OFFICE FOR EDUCATION OF CHILDREN WITH HANDICAPPING CONDITIONS, SERVING THE LEARNING DISABLED CHILD IN NEW YORK STATE 13-14. The newly adopted regulations ratify this procedure. See 8 N.Y.C.R.R. § 200.4(c) & (e) (effective July 1, 1982); Revision of Regulations, supra note 138, at 3.10.
150 8 N.Y.C.R.R. § 200.5(b) (effective July 1, 1982).
151 Id. § 200.4(c)(2)(ii), (vi) & (vii).
152 Id. § 200.5(c) (effective July 1, 1982).
153 Id.
154 The time frame for approving the COH placement recommendation has been changed by the 1981 regulations. Prior to the implementation of the amended regulations, the board of education was required to place a child within 60 days of receipt of the COH
The second phase of the IEP process takes place after the child has entered the board-approved special education program. During this phase, a planning conference is held in order to develop short-term instructional objectives and evaluation criteria for the child. The parents of the child, the child’s teacher, and a representative of the school district participate in the development of these instructional goals.

Problems Associated with New York’s Bifurcated IEP Process

Although several of the amendments outlined above appear to be in conformity with EAHCA mandates, it is submitted that the adoption of a two-phased IEP is ill advised. Significantly, New York’s bifurcated IEP excludes the impaired child’s parent and teacher from Phase I, a crucial segment of the IEP process. Surely, it is the teacher, with a knowledge of teaching strategies and of the impaired child’s classroom performance, who can provide critical input into the Phase I placement decision. In addition, it is the parent of an impaired child who...
most vigorously would advocate that child’s best interests. Indeed, neither the school administrator nor the special education teacher, both parties to Phase I, has the knowledge required to provide information regarding the activities conducted in the regular classroom, nor a parent’s desire to obtain the most effective education for his child.

It is submitted, moreover, that the parents and teacher of a handicapped child are in the best position to know those services and aids which most effectively would provide the compensatory skills necessary to remediate specific impairments. Similarly, New York’s bifurcated IEP process could cause skills and services, chosen as they are by the COH, to be selected in accordance with preconceived educational criteria, not in accordance with the unique needs of an impaired child. Because the mainstreaming of a handicapped child may create a stressful situation for the regular classroom teacher, that teacher must be permitted an opportunity to specify those teaching aids and special services needed to effect integration. Otherwise, a negative response by the teacher important member in that he/she alone is knowledgeable regarding the specific educational characteristics and needs of the youngster that will serve to mold and direct the goals, objectives, and services eventually delineated in the IEP.

S. Larsen & M. Poplin, supra note 78, at 380 (emphasis in original).

160 See Note, Appropriate Education, supra note 17, at 1110-13.

161 See S. Larsen & M. Poplin, supra note 78, at 380-83.

162 See 8 N.Y.C.R.R. § 200.4(c) (effective July 1, 1982).

163 See Large, supra note 90, at 256.

164 Bensky, Shaw, Gouse, Bates, Dixon & Beane, Public Law 94-142 and Stress: A Problem for Educators, 47 Exceptional Children 24, 27 (1980). Such tasks as team meetings, paperwork, and monitoring and evaluation of IEP’s impose time demands upon the already burdened teacher which may result in a negative response to the mainstreaming process. Weatherly & Lipsky, supra note 113, at 189-95. It is suggested that this problem can be averted. Preparatory courses designed to equip teachers with the skills and methods necessary to achieve successful integration are essential. Naor & Milgram, Two Preservice Strategies for Preparing Regular Class Teachers for Mainstreaming, 47 Exceptional Children 126, 129 (1980). Additional planning time, reduced class size, and the provision of trained teaching aides should also be considered. Weatherly & Lipsky, supra note 113, at 195-97. It has been suggested that the IEP process itself should be designed to reflect these teacher needs. C. Davis, Mainstreaming Versus An Appropriate Education (“Use” not “Abuse” of the IEP) 7-9 (Jan. 1979) (unpublished work distributed to advocates of handicapped children). As the IEP must include all the special services that are needed to allow the child to function successfully, it must include teacher support services. Id. at 4-8. Of course, if the IEP process is to reflect such needs, changes in the existing regulations must be forthcoming. Moreover, a commitment must be made on the part of the State of New York to encourage school districts to provide the support services the regular classroom teacher needs.
to the mainstreaming process may ensue.\textsuperscript{165}

New York's IEP process also excludes parents and teachers from funding decisions, since it is in Phase I that "scarce educational resources" are allocated.\textsuperscript{166} It appears that such an exclusionary practice is possessed of several negative concomitants. First, because the cost of educating handicapped children is significant, school districts might be reluctant to provide for all of the needs of such children.\textsuperscript{167} Second, absent parental participation, resource allocations are likely to be conditioned upon the etiology of the handicap, not upon the handicapped student's unique needs.\textsuperscript{168}

Finally, it is notable that New York's bifurcated IEP process permits placement of a handicapped child before the educational objectives for that child have been defined and accepted.\textsuperscript{169} Clearly, such an approach is in derogation of the EAHCA, which mandates the maintenance of a handicapped student's educational status quo until the entire IEP process is completed.\textsuperscript{170} Of course, the potential consequence of such an approach is an inappropriate placement decision, for if the parent fails to contest the placement decision made in Phase I, a subsequent challenge of Phase II educational objectives will not repeal such placement.\textsuperscript{171} Because the educational objectives complementary to the COH's placement decision cannot unilaterally be implemented if attacked by the parent,\textsuperscript{172} it appears that such an attack would deprive the child of

\textsuperscript{165} See Weatherly & Lipsky, supra note 113, at 189-95.


\textsuperscript{167} Educational objectives are determined by the COH during Phase I. 8 N.Y.C.R.R. § 200.4(c) (effective July 1, 1982).

\textsuperscript{168} See Note, Appropriate Education, supra note 17, at 1109-10. The school district's "assessment of the child will tend to be based on the district's existing resources, rather than on the specific needs of the child." Large, supra note 90, at 256.

\textsuperscript{169} See 8 N.Y.C.R.R. § 200.4(d) (effective July 1, 1982).

\textsuperscript{170} See 8 N.Y.C.R.R. § 200.5(d) (effective July 1, 1982).

\textsuperscript{171} See Note, supra note 111.

\textsuperscript{172} See 8 N.Y.C.R.R. § 200.4(e)(3).
the administrative and educational support services necessary to render such placement appropriate.

**Judicial Tests for Appropriate Education**

Once a parent assumes an active role in the development of an IEP, the likelihood of a dispute increases, since the parent's perception of his child's needs may differ from the perceptions and interests of a school district. Although, in the ideal situation, the parties may settle their differences without resorting to the courts, judicial involvement sometimes is necessary. While the opposing parties must marshal the evidence in support of their views, it is the responsibility of a court, when presented with a dispute, to determine which educational alternative best provides for an appropriate education. Unfortunately, however, the EAHCA does not expressly define "appropriate." Consequently, the courts have fashioned various definitions of the term.

In *Rowley v. Board of Education*, for example, the Southern District of New York held that an appropriate education must engender "academic equality." In *Rowley*, the parents of a deaf child, after exhausting their administrative remedies, brought suit seeking to have a sign language interpreter placed in their daughter's classroom. Although the plaintiffs' school district had recommended that the child be placed in a regular class program with the services of a speech therapist, a tutor for the deaf, and an FM wireless hearing aid, the child's parents contended that the rec-

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172 See Large, supra note 90, at 258.
174 See id. § 1401 (definitions).
175 483 F. Supp. 528 (S.D.N.Y.), aff'd, 632 F.2d 945 (2d Cir. 1980) (per curiam), cert. granted, 50 U.S.L.W. 3334 (U.S. Nov. 2, 1981) (No. 80-1002). The action originally was brought against the Board of Education of the Hendrick Hudson Central School District, which had denied the plaintiff's request for special services. 483 F. Supp. at 529 & n.1. The New York State Commissioner of Education, who had upheld the decision of the district, was joined in the litigation as a necessary party. Id.
176 See 483 F. Supp. at 534.
177 Id. at 531. Notably, the plaintiff's parents were both deaf, and upon discovery of their child's deafness, they raised their child with the use of "total communication," which is a combination of lip reading, visual cues, and sign language. Id. at 529-30. Although total communication is a widely accepted method of communication, it is only one of many alternatives. See Large, supra note 90, at 229-40. Because experts disagree as to the value of the "total communication" process, see id. at 236-37, it was not clearly improper for the defendant school district to refuse to place a sign interpreter in Amy Rowley's classroom, see 483 F. Supp. at 529.
178 Rowley v. Board of Educ., 483 F. Supp. 528, 531 (S.D.N.Y.), aff'd, 632 F.2d 945 (2d
ommended services did not rise to the level of an appropriate education as required by the EAHCA.\textsuperscript{180}

Evidence indicated that Amy Rowley was performing above average academically, notwithstanding the fact that she could only discriminate slightly more than half of the words spoken by her teacher.\textsuperscript{181} It was proven, however, that with the use of a sign language interpreter, the child's discrimination was 100\% accurate.\textsuperscript{182} Thus, the plaintiffs contended that the school district's failure to provide an interpreter resulted in a deficient education.\textsuperscript{183} The defendant school district, on the other hand, claimed that since Amy Rowley was performing above grade level, appropriate educational services had been supplied.\textsuperscript{184}

Determining that an interpreter \textit{was} required by the EAHCA,\textsuperscript{185} the court distinguished between an "adequate" and an "appropriate" education.\textsuperscript{186} The court held that, although an education may well be "adequate" if viewed with respect to a child's relative achievement within a class,\textsuperscript{187} the assessment of appropriateness entails a further inquiry, namely, whether such education will enable a handicapped child to achieve an academic performance level equal to that obtainable by a nonhandicapped child of similar initiative, motivation, and intellectual ability.\textsuperscript{188} Applying

\textsuperscript{180} Id. at 529.
\textsuperscript{181} Id. at 532, 534.
\textsuperscript{182} Id. at 532.
\textsuperscript{183} Id. at 535.
\textsuperscript{184} Id. at 534.
\textsuperscript{185} Id. at 536.
\textsuperscript{186} Id. at 534. In determining the constitution of an appropriate education, the \textit{Rowley} court noted two extremes. First, the court suggested that "appropriate" could mean adequate, namely, an education which would enable a student to advance each year and eventually obtain a diploma. \textit{Id.} Conversely, the court postulated a definition of appropriate education which would entail guaranteeing each handicapped child an education designed to realize his maximum potential. \textit{Id.; see notes 198 & 199 and accompanying text infra.} The court, however, rejected both of these premises in light of the judicial history of the EAHCA. \textit{Id.}
\textsuperscript{187} 483 F. Supp. at 534.
\textsuperscript{188} \textit{Id.} The \textit{Rowley} court concluded that the right to education cases, upon which the EAHCA was based, dictated that an appropriate education would provide "each handicapped child . . . an opportunity to achieve his full potential commensurate with the opportunity provided to other children." \textit{Id.} (citing \textit{Appropriate Education, supra} note 17, at 1125-26); \textit{see Pennsylvania Ass'n for Retarded Children v. Pennsylvania}, 343 F. Supp. 279, 296-97 (E.D. Pa. 1972); \textit{Mills v. Board of Educ.}, 348 F. Supp. 866, 876 (D.D.C. 1972). Support for this definition of an appropriate education may be found in the regulations adopted pursuant to section 504 of the Rehabilitation Act of 1973. \textit{See Pub. L. No. 93-112, § 504, 87
this "academic equality" test, the Rowley court concluded that since Amy Rowley's educational program "would be more 'appropriate' with than without an interpreter," her program was unacceptable.\footnote{Rowley v. Board of Educ., 483 F. Supp. 528, 536 (S.D.N.Y.), aff'd, 632 F.2d 945 (2d Cir. 1980) (per curiam), cert. granted, 50 U.S.L.W. 3334 (U.S. Nov. 2, 1981) (No. 80-1002). The test used in Rowley first was enunciated in a Harvard Law Review article. See Note, Appropriate Education, supra note 17, at 1126.}

Another definition of "appropriate education" was promulgated by the Eastern District of Pennsylvania in Armstrong v. Kline.\footnote{476 F. Supp. 583 (E.D. Pa. 1979), aff'd on other grounds sub nom., Battle v. Pennsylvania, 629 F.2d 269 (3d. Cir. 1980), cert. denied, 49 U.S.L.W. 3954 (U.S. June 23, 1981).} In Kline, an action was brought on behalf of all severely and profoundly retarded children and all severely and emotionally disturbed children,\footnote{The certified class was defined as "[a]ll handicapped school aged persons in the Commonwealth of Pennsylvania who require or who may require a program of special education and related services in excess of 180 days per year and the parents or guardians of such persons." 476 F. Supp. at 586.} challenging a state public policy which limited public education to a 180-day schedule.\footnote{Id. at 585.} In support of their contention that the state must provide the education necessary for each child to reach his maximum potential, the plaintiffs relied upon the EAHCa's definition of special education as "'specially designed instruction . . . to meet the unique needs of a handicapped child.'."\footnote{Id. at 603 (quoting 20 U.S.C. § 1401(16) (1976)) (emphasis added by court).} The plaintiffs' evidence showed that the interruption in instruction caused by a summer vacation resulted in a significant loss of skills which could only be regained by extended

Stat. 394 (1973) (codified at 29 U.S.C. § 794 (1976 & Supp. III 1979)). "[A]ppropriate education is the provision of regular or special education and related aids and services that . . . are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped are met . . . ." 45 C.F.R. § 84.33(b) (1980); accord Haggerty & Sachs, supra note 8, at 986. But see Rowley v. Board of Educ., 632 F.2d 945, 951-52 (2d Cir. 1980) (Mansfield, J., dissenting), cert. granted, 50 U.S.L.W. 3334 (U.S. Nov. 2, 1981) (No. 80-1002). Judge Mansfield, dissenting from the Second Circuit's affirmance of the district court's academic equality test, stated:

Unaware of the Act's definition and using a definition found in a regulation promulgated under a different Act for a different purpose [section 504 of the Rehabilitation Act of 1973], Judge Broderick formulated a new standard—"that each handicapped child be given an opportunity to achieve his full potential commensurate with the opportunity provided to other children"—which he borrowed from a law review note . . . . No support for this definition is to be found in the Act, its legislative history, or in regulations promulgated thereunder. Had Congress intended such a definition it would have enacted it.
periods of relearning the following year.\textsuperscript{194} Thus, the plaintiffs asserted that the extended vacation period imposed by the 180-day requirement prevented their class from deriving the fullest benefit possible from their educational program.\textsuperscript{195} The defendants countered that the EAHCA did not require this level of education and asserted that only those needs which prevented any benefit from being received from the educational program must be remediated.\textsuperscript{196} Since there was no proof that the regression which occurred in the summer completely nullified the educational gains made during the school term, the defendants argued that the plaintiffs did benefit from the existing program.\textsuperscript{197}

Looking to the legislative and judicial history of the EAHCA,\textsuperscript{198} the \textit{Kline} court found that the educational programs required by the Act must provide for maximum self-sufficiency.\textsuperscript{199} Since adherence to the 180-day rule prevented handicapped children from achieving self-sufficiency, the court held that the Act had been violated.\textsuperscript{200}

1. \textit{Evaluation of Rowley and Kline Tests}

It is submitted that the \textit{Rowley} academic equality test, which entails a comparison of the potential academic achievements of handicapped and nonhandicapped students of similar intellectual abilities,\textsuperscript{201} often is inapposite. For instance, the \textit{Rowley} standard presupposes the existence of testing procedures which accurately can determine the learning potential of a handicapped child.\textsuperscript{202}

\textsuperscript{184} 476 F. Supp. at 593-600.
\textsuperscript{185} Id. at 592.
\textsuperscript{186} Id. at 603.
\textsuperscript{187} Id. at 592.
\textsuperscript{188} Id. at 601-05. The \textit{Kline} court stated that the \textit{PARC} decision, see notes 37-51 and accompanying text supra, was premised, in part, upon the belief that most handicapped children are capable of achieving self-sufficiency and independence from institutional care. Armstrong v. Kline, 476 F. Supp. 583, 603 (E.D. Pa. 1979), \textit{aff'd on other grounds sub nom. Battle v. Pennsylvania}, 629 F.2d 269 (3d Cir. 1980), \textit{cert. denied}, 49 U.S.L.W. 3954 (U.S. June 23, 1981) (No. 80-1002). The court further observed that a principal objective of the EAHCA was to promote the self-sufficiency of handicapped children, and consequently, to enable them to contribute to society rather than burden the public finances. 476 F. Supp. at 604; see S. Rep. No. 168, 94th Cong., 1st Sess. 9, \textit{reprinted in} [1975] U.S. Code Cong. & Ad. News 1425, 1433.
\textsuperscript{189} 476 F. Supp. at 600.
\textsuperscript{190} Id. at 605.
\textsuperscript{191} See note 188 and accompanying text supra.
\textsuperscript{192} In \textit{Rowley}, see notes 176-189 and accompanying text supra, it was possible to determine the effect of the handicap on the plaintiff by comparing the scores of tests given to her
Many handicapped children, however, have unique problems which would invalidate such tests or impede their proper administration. Moreover, while the Rowley test may have some validity when the required comparison can be made, as in the case of a sensory impairment which can be compensated for, it is evident that such an approach is inadequate when the handicap is an intellectual impairment. Clearly, there is no nonhandicapped peer with whom to compare the academic potential of a mentally retarded child. Hence, academic equality can neither be measured nor achieved.

Similarly, the Kline court's self-sufficiency test also is problematic. By requiring the maximization of self-sufficiency, the court has established a specific level of educational achievement for handicapped children. Surely, such an objective is not contemplated by the EAHCA, which mandates only the remediation of the affect of a child's handicap upon his educable potential so that he may avail himself of the same educational opportunities provided to nonhandicapped students. Significantly, on appeal of

by sign with those administered orally. Rowley v. Board of Educ., 483 F. Supp. 528, 534 (S.D.N.Y.), aff'd, 632 F.2d 945 (2d Cir. 1980) (per curiam), cert. granted, 50 U.S.L.W. 3334 (U.S. Nov. 2, 1981) (No. 80-1002). It was also possible to measure the plaintiff's I.Q. because she was able to interpret signed tests. See 483 F. Supp. at 534.

203 See S. LARSEN & M. POPLIN, supra note 78, at 72-91. "It is axiomatic that as with all other devices, intelligence tests are influenced by a child's idiosyncratic characteristics, abilities, and deficits." Id. at 82.

204 The author of the Harvard Law Review article which espoused the academic equality test conceded the difficulty of comparing nonhandicapped to handicapped children when the handicapping condition involved an intellectual impairment. See Note, Appropriate Education, supra note 17, at 1126. In circumvention of such difficulty, the commentator suggested other modes of equality, including "an equitable sharing of educational resources." Id. It is submitted, however, that such a comparison is in derogation of the EAHCA. Clearly, for example, an equitable sharing of resources would not permit of the provision of "specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions." 20 U.S.C. § 1401(16) (1976). Similarly, educational resources could not equitably be shared if, as mandated by the EAHCA, handicapped children were to receive such specialized, and costly, aid as "speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services." Id. § 1401(17).


206 The EAHCA is premised upon the "belief that the Congress must take a more active role under its responsibility for equal protection of the laws to guarantee that handicapped children are provided equal educational opportunity." S. REP. No. 165, 94th Cong., 1st Sess. 9, reprinted in [1975] U.S. CODE CONG. & AD. NEWS 1425, 1433. Interestingly, the author of
the *Kline* decision, the Third Circuit dismissed the district court’s self-sufficiency test, reasoning that neither the EAHCA nor the legislative history of the Act mandated the maximization of the self-sufficiency of handicapped children.\(^{207}\)

2. What is an “appropriate” education?

It is suggested that an appropriate education must not be measured in terms of the degree of skills provided to handicapped children or by resort to quantitative assessments of academic achievement. Of course, special education, by definition, is designed to meet the educational needs of the handicapped child.\(^{208}\) Nevertheless, although a child’s impairment may have a direct negative impact upon his realizable academic progress, the EAHCA does not guarantee any child a specific level of educational achievement.\(^{209}\) Hence, a determination of “appropriate” educational services cannot properly be founded upon a mere assessment of academic need.

Clearly, however, the EAHCA does mandate the provision of all services and aids necessary to allow a handicapped child to function in the least restricted environment,\(^{210}\) that is, in an environment which is “extensive enough to permit an individual to be provided specially designed instruction geared to [his] unique needs and to be included in as many regular education activities as feasible.”\(^{211}\) Notably, a least restricted environment is not discrete, but is a “continuum of placements . . . from least to most restrictive.”\(^{212}\)

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Note, *Appropriate Education*, *supra* note 17, confronted with the conceptual difficulties associated with the academic equality test espoused therein, suggested that an appropriate education, for intellectually impaired children, “would require equal opportunity for individual development.” *Id.* at 1126-27.

\(^{207}\) *Battle v. Pennsylvania*, 629 F.2d 269, 279 n.11 (3d Cir. 1980), cert. denied, 49 U.S.L.W. 3954 (U.S. June 23, 1981). According to the Third Circuit, “*Armstrong v. Kline* . . . effectively established a specific *level of achievement* for each individual, i.e., maximization of self-sufficiency. This position goes far beyond ‘establishing the direction toward which the programs required by the statute should aim.’” 629 F.2d at 279 n.11 (emphasis in original).


\(^{211}\) S. LARSEN & M. POPLIN, *supra* note 78, at 312.

\(^{212}\) *Id.* at 313. The continuum of educational environments, from least to most restric-
Therefore, the first step toward determining the appropriateness of an educational plan is to assess whether a child is, at all times, placed in his least restricted environment. Proper placement, however, constitutes only a part of an appropriate education. Given the range of educational environments and the desirability of assimilating handicapped children into society, it is evident that an appropriate education is one which offers a process through which the placement of a child may progress from a more restrictive milieu to a less restrictive milieu, until the integration of the child into a regular classroom is obtained. This, of course, is the process of normalization.

Thus, in assessing whether an educational skill or service is appropriate, a court must analyze the entire educational process specified within a handicapped child’s IEP. The IEP must provide for prompt normalization of the child. Moreover, it must provide the skills and services necessary to effectively integrate the child into his current placement, and at the same time, provide for his advancement into a less restrictive placement. In essence, therefore, the court must determine (1) whether the child currently is placed in his least restricted environment, where his unique needs best can be addressed; (2) whether the skills and services sufficient to enable a child to avail himself of the educational opportunities within his placement milieu have been provided (integration); and (3) whether the skills and services necessary to improve a child’s placement position have been provided (normalization).

Concededly, the aforementioned test is not imbued with absolute guidelines clearly delineating an appropriate educational program. Nonetheless, since education in the least restricted environment is mandated by the EAHCA, and since normalization is the process whereby successive educational surroundings may become decreasingly restrictive, it is clear that courts must assess IEP’s in terms of such normalization potential.

CONCLUSION

In light of the federal government’s diminishing support for
public education programs, it appears that the role of the courts in preserving the educational rights of handicapped children may gain increased importance in the years ahead. Significantly, the President has stated that “the responsibility for education of the young lies, first and foremost, with parents and then with the state and local education agencies whose primary role is helping parents with that task.” Moreover, the Secretary of the Department of Education, a department threatened with extinction, recently wrote that he envisions a “limited Federal role” in public education, and that state and local governments must bear the primary responsibility for fashioning public education programs.

One need only observe the status of the education of handicapped children before the EAHCA was enacted to realize that, should federal funding be curtailed, the coffers of state and local governments would be insufficient to meet the needs of handicapped children. Hence, it appears that the advocates of these children increasingly may be forced to resort to the courts to ensure the provision of equal educational opportunities. Irrespective of the circumstances necessitating judicial involvement, it is hoped that the courts will adopt the goal of normalization as the best method to ensure the appropriateness of educational programs.

Bruce G. Sheffler

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215 Bell, N.Y. Times, Nov. 15, 1981, § 12 (Fall Survey of Education), at 65 (quoting President Reagan).
218 See note 94 and accompanying text supra.