ENFORCING THE RIGHT TO AN "APPROPRIATE" EDUCATION: THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT OF 1975

Congress passed the Education for All Handicapped Children Act of 1975 [1] in response to the need for increased funding brought about by the widespread recognition by courts and state legislatures of the right of handicapped children to an adequate education.[2] Although the Act sets forth general requirements states must meet in order to qualify for receipt of federal funds, it does not prescribe the specific educational programs local schools must make available in order to fulfill those requirements. Instead, the heart of the federal control mechanism is a system of procedural safeguards which provides for parental involvement in educational placement decisions. In effect, the Act guarantees procedures whereby parents [3] may challenge the appropriateness of their child's educational program, but provides only the most general guidelines for resolving the substantive questions such challenges may present.

Since the major substantive provisions of the Act have only recently gone into effect,[4] judicial interpretation has yet to clarify those guidelines. The basic purpose of this Note is to suggest some pathways through the substantially unexplored terrain of the Act and to indicate where the chief obstacles are likely to lie. Part I first discusses the forces which led to congressional action. It then sets forth the Act's major substantive requirements and outlines the procedural system through which complaints will proceed. Part II evaluates the Act's procedural system and suggests measures for improving its effectiveness as a means of enforcing the right to an appropriate education. Finally, Part III discusses several substantive areas in which complaints seem likely to arise. This Part attempts to illuminate major areas of potential conflict and to suggest factors decisionmakers [5] should consider in resolving disagreements between parents and schools.

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[1] Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified at 20 U.S.C. §§ 1401-1461 (1976)).

[2] S. REP. No. 168, 94th Cong., 1st Sess. 6, *reprinted in* [1975] U.S. CODE CONG. & AD. NEWS 1425, 1430. The Senate committee referred to judicial action in 27 states. *Id.*

[3] The language of the statute does not specifically limit the right of complaint to parents. 20 U.S.C. § 1415(b)(1)(E) (1976). *See* Krass, *The Right to Public Education for Handicapped Children: A Primer for the New Advocate*, 1976 U. ILL. L.F. 1016, 1068.

[4] *See* p. 1105 *infra*.

[5] The term "decisionmakers" will be used throughout this Note to mean both judges and state or local hearing officers.

This Note is not intended to be an evaluation of the educational policy decisions Congress made in passing the Act.[6] Neither does it include detailed consideration of the many alternative sources of rights and duties in the area of education for the handicapped.[7] Finally, questions relating to the Act's funding provisions — treated extensively in other articles[8] — will be noted here only briefly.

I. The Statutory Framework

The Act's legislative history clearly discloses the influence of a number of "right to education" cases on the legislative process.[9] Although the Supreme Court was never presented with the merits of the due process and equal protection issues raised in these cases,[10] lower federal courts established several bases for a constitutional right to education for handicapped children.[11] The

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[6] Other articles have dealt at greater length with the advantages and disadvantages of various policies incorporated in the Act. *See, e.g.*, Haggerty & Sacks, *Education of the Handicapped: Towards a Definition of an Appropriate Education*, 50 Temp. L.Q. 961, 988–93 (1977); Levinson, *The Right to a Minimally Adequate Education for Learning Disabled Children*, 12 Val. U.L. Rev. 253, 276–81 (1978).

[7] For a discussion of the constitutional theories, see Handel, *The Role of the Advocate in Securing the Handicapped Child's Right to an Effective Minimal Education*, 36 Ohio St. L.J. 349, 358–67 (1975); Krass, *supra* note 3, at 1026–42; Levinson, *supra* note 6, at 259–67. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1976), provides another avenue for litigation. *See, e.g.*, Levinson, *supra* note 6, at 281–84. Cases establishing a "right to treatment" for the involuntarily confined may also form a basis for a handicapped child's complaint. *See, e.g.*, Lora v. Board of Educ., 456 F. Supp. 1211, 1274 (E.D.N.Y. 1978); McClung, *"Do Handicapped Children Have a Legal Right to a Minimally Adequate Education?"*, 3 J.L. & Educ. 153, 162–66 (1974). Various state law grounds may also exist. *See id.* at 166–72.

[8] *See* Note, *The Education of All Handicapped Children Act of 1975*, 10 U. Mich. J.L. Ref. 110, 120–27 (1976).

[9] S. Rep. No. 168, 94th Cong., 1st Sess. 6, *reprinted in* [1975] U.S. Code Cong. & Ad. News 1425, 1430. *See, e.g.*, Mills v. Board of Educ., 348 F. Supp. 866 (D.D.C. 1972); Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971), *modified*, 343 F. Supp. 279 (1972). For discussions of these and other "right to education" cases preceding the Act, see Haggerty & Sacks, *supra* note 6, at 964–84; Handel, *supra* note 7, at 356–58; Herr, *The Children Who Wait*, in The Mentally Retarded Citizen and the Law 252, 255–64 (1976); Krass, *supra* note 3, at 1026–61; McClung, *supra* note 7, at 153–61; Note, *supra* note 8, at 113 n.20.

[10] *See* Frug, *The Judicial Power of the Purse*, 126 U. Pa. L. Rev. 715, 731 n.102 (1978).

[11] *See, e.g.*, Mills v. Board of Educ., 348 F. Supp. 866 (D.D.C. 1972); Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971), *modified*, 343 F. Supp. 279 (1972). More recent cases have continued the trend. *See, e.g.*, Kruse v. Campbell, 431 F. Supp. 180 (E.D. Va. 1977), *vacated and remanded*, 434 U.S. 808 (1977).

scope of rights established through constitutional litigation was limited by the nature of the due process and equal protection doctrines relied upon by the courts. Due process cases established a right to procedural protection — notice and a hearing — before a child could be excluded from school or stigmatized by a label such as "handicapped" or "retarded." [12] Other cases relied on equal protection theories to forbid outright exclusion of handicapped children from the educational benefits made available to others.[13] But while constitutional litigation provided an effective weapon for attacking gross inequities such as total exclusion, constitutional theories gave courts little guidance in fashioning remedies designed to serve the needs of individual children.[14]

In passing the Act, Congress codified and expanded the broadest procedural rights accorded handicapped children in the earlier cases.[15] In addition, Congress authorized large annual appropriations to aid the states in providing expensive new services for the handicapped.[16] Finally, the Act gave courts and administrative hearing officers broad authority to prescribe the details of educational policy in individual cases.[17] However, its broad substantive guidelines did not entirely overcome the difficulty encountered by courts in constitutional litigation in fashioning remedies for individual children.

Since forty-nine states have elected to participate through receipt of federal funds,[18] the Act and the regulations issued under its authority [19] provide a federal statutory description of a handicapped child's right to an education. The Act requires states to provide a "free appropriate public education" to all handicapped children between the ages of three and eighteen by September 1, 1978, and to all between three and twenty-one by September 1, 1980.[20] Included within the definition of handicapped children

[12] *See* Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 295 (E.D. Pa. 1972).

[13] Mills v. Board of Educ., 348 F. Supp. 866, 875 (D.D.C. 1972); *see* Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 297 (E.D. Pa. 1972).

[14] *See* Note, *supra* note 8, at 130.

[15] *Compare* Mills v. Board of Educ., 348 F. Supp. 866, 880–81 (D.D.C. 1972), *and* Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 303–05 (E.D. Pa. 1972), *with* 20 U.S.C. § 1415 (1976). *See also* Stafford, *Education for the Handicapped: A Senator's Perspective*, 3 VT. L. REV. 71, 75–76 (1978); Note, *supra* note 8, at 116–17.

[16] A Senate committee estimated that, on average, a handicapped child is twice as expensive to educate as a nonhandicapped child. S. REP. No. 168, 94th Cong., 1st Sess. 15, *reprinted in* [1975] U.S. CODE CONG. & AD. NEWS 1425, 1439.

[17] *See* p. 1108 & note 37 *infra*.

[18] New Mexico is the exception. Levinson, *supra* note 6, at 277.

[19] 45 C.F.R. § 1212a.1–.754 (1977).

[20] 20 U.S.C. § 1412(2)(B) (1976). The Act provides a limited exception for children ages three to five and eighteen to twenty-one in some states. *Id.*

are the mentally retarded, learning disabled, physically handicapped, and emotionally disturbed.[21]

Eschewing any attempt at prescribing specific educational programs, the Act defines appropriate education as "special education and related services which . . . are provided in conformity with [an] individualized education program." [22] An individualized education program (IEP) is a "written statement for each handicapped child" developed at a meeting among the child's parents, teacher, and a qualified school representative.[23] The statement must describe the child's present level of performance, the objectives of the special education program, the specific services which will make up that program, and "appropriate objective criteria" for determining whether program objectives are being achieved.[24] Exhibiting great faith in the IEP conference to arrive at an acceptable result, the Act contains no specific guidelines for determining the substantive content of an appropriate program. To direct placement decisions, it does include the requirement that handicapped children should be educated together with the nonhandicapped "to the maximum extent appropriate." [25] To reduce misclassification of children, the Act prohibits racially or culturally biased tests and forbids reliance on any single criterion — such as an IQ test — in determining a child's placement.[26]

In order to secure the rights of handicapped children, the Act establishes detailed procedural safeguards. It grants parents the right to present a complaint with regard to "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." [27] Parents are entitled to an "impartial due process hearing" before a hearing examiner who is not an employee of the agency involved in the education of the child.[28] If such a hearing initially takes place at the local level,[29] an aggrieved party may appeal to the state agency for review of the local decision.[30]

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[21] *Id.* § 1401(1).

[22] Id. § 1401(18).

[23] *Id.* § 1401(19).

[24] *Id.*

[25] *Id.* § 1412(5)(B).

[26] *Id.* § 1412(5)(C).

[27] *Id.* § 1415(b)(1)(E).

[28] *Id.* § 1415(b)(2).

[29] Although most states have established procedures whereby an initial hearing takes place at the local level and is followed, where necessary, by an appeal to a state hearing officer, the Act does not require the two-tiered system. *Id.* Massachusetts provides for only a single hearing at the state level. MASS. GEN. LAWS ANN. ch. 71b, § 3 (West Supp. 1979).

[30] 20 U.S.C. § 1415(c) (1976). In hearings at both the state and local levels, the Act gives parties the right to counsel, the right to present evidence and cross-

The Act does not specify whether a state appeals examiner is to make an entirely independent determination or is to rely on the decision of the local hearing examiner if supported by substantial evidence in the record. An independent state-level determination would provide an important assurance of impartiality, given the possible influence of parochial politics and bias on the local hearing officer.[31] Moreover, since Congress gave state educational agencies the ultimate responsibility for overseeing local compliance,[32] a close check on local hearings would serve as an effective tool of state regulation. Although a rehearing at the state level may add to the effort and expense of the parties, they could reduce this burden in appropriate cases by agreeing to rely on the record of the original hearing. On balance, these considerations favor a de novo determination by the appeals examiner.

Where the administrative review procedures fail to resolve conflicts, the Act provides that any party aggrieved by a state determination may bring a civil action in a state or federal court.[33]

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examine witnesses, the right to a record of the proceedings, and the right to written findings of fact and decisions. *Id.* § 1415(d).

[31] *See* Stafford, *supra* note 15, at 78.

[32] 20 U.S.C. § 1412(6) (1976). *See also* Stafford, *supra* note 15, at 78.

[33] 20 U.S.C. § 1415(e) (1976). The Act also includes a "stay put" requirement that allows the child to remain in her current placement pending the outcome of all administrative and judicial proceedings. *Id.* § 1415(e)(3). A child applying for initial admission to public school is entitled to be placed in the regular school program unless the parents and school agree to do otherwise. *Id.*

At least one court has enforced the "stay put" requirement without requiring the plaintiff to exhaust her administrative remedies. In Stuart v. Nappi, 443 F. Supp. 1235 (D. Conn. 1978), the district court enjoined the expulsion of a handicapped child and held that the Act's procedure for reevaluation — an IEP conference — provided the sole means for changing the placement of a handicapped child. *Id.* at 1243. While the court left open the possibility of temporary suspension of a handicapped student in an emergency, *id.* at 1242, the *Nappi* approach raises several potential difficulties.

First, children who have not previously been identified as handicapped may attempt to claim the Act's protection to avoid expulsion. If courts disallow such claims, some children who are in fact handicapped may be denied the full benefit of the Act simply because their change of placement has been labeled "disciplinary." On the other hand, a preliminary hearing by the court to separate valid from invalid claims would thwart the administrative hearing process specified in the Act.

Also, the procedural protections accorded handicapped children under the Act may create disparities in the disciplinary treatment of students who have engaged in similar conduct. *Compare* Stuart v. Nappi, 443 F. Supp. 1235 (D. Conn. 1978) (procedure for changing placement of handicapped child following disruptive incident), *with* Goss v. Lopez, 419 U.S. 565 (1975) (procedure for suspension of nonhandicapped student), *and* Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 158–59 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961) (procedure for expulsion of nonhandicapped student). The perception of this disparity by other students could undermine the credibility of school disciplinary policies.

The court, in addition to receiving the record of the administrative hearings, is required to hear additional evidence at the request of any party, and to render a decision based on the preponderance of the evidence.[34] This suggests that the role of the court is to make an independent determination and not simply to accept the findings of a hearing officer when supported by substantial evidence.[35] Of course, this requirement does not prevent the court from considering the opinions of state and local hearing officers — particularly where they agree — as an important element of the evidence in the case.[36] Finally, in fashioning remedies, the court is empowered to order "such relief as [it] determines is appropriate."[37]

II. The Procedural Approach to Enforcement

The actual services received by an individual child are not specifically prescribed by the Act, but result instead from a consensus arrived at during the IEP conference, or from a decision reached by a judge or hearing officer. Congress adopted this approach for several reasons, the most obvious of which is the immense variety of special needs presented by children with different handicaps. A deaf child has special needs quite unlike those of a mentally retarded child. Even the single label "mentally retarded" encompasses a broad spectrum of widely divergent needs.[38] A system of regulations that prescribed a specific program for each type of handicap would inevitably ignore important

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[34] 20 U.S.C. § 1415(e)(2) (1976).

[35] *See* Lora v. Board of Educ., 456 F. Supp. 1211, 1227 (E.D.N.Y. 1978) (court provides a "de novo" hearing). The legislative history supports this interpretation. The original House version of the bill — making findings of fact by the state agency conclusive if supported by substantial evidence — was rejected by the conference committee and the present language was substituted. S. Rep. No. 455, 94th Cong., 1st Sess. 47–50 (1975), *reprinted in* [1975] U.S. Code Cong. & Ad. News 1480, 1500–02.

[36] *See* Universal Camera Corp. v. NLRB, 340 U.S. 474, 496 (1951). A court's approach is likely to vary depending on the issue in the case. In a case requiring the inference of racial discrimination from statistical data — a procedure familiar to many courts, *see, e.g.*, Lora v. Board of Educ., 456 F. Supp. 1211 (E.D.N.Y. 1978) — few judges would defer to the decision of a hearing officer. On the other hand, in making factual determinations requiring a more specialized knowledge, courts may feel less inclined to substitute their judgment for the conclusions of a specially-trained hearing examiner. *See* Bazelon, *Implementing the Right to Treatment*, 36 U. Chi. L. Rev. 742, 744 (1969).

[37] 20 U.S.C. § 1415(e)(2) (1976). The authority of hearing officers is never defined in the Act. Presumably, either a judge or hearing officer could order implementation of whatever program she deemed appropriate.

[38] *See* Sorgen, *The Classification Process and Its Consequences*, in The Mentally Retarded Citizen and the Law 215, 216 (1976).

differences among individuals.[39] Another explanation for congressional reluctance to adopt more specific guidelines is the lack of agreement among educators as to what programs are most effective for certain handicapped children.[40] This lack of consensus indicates some need for flexibility and experimentation at the local level.

Perhaps the most significant reason Congress failed to prescribe more specific standards is the traditional notion that education is primarily a state and local concern.[41] Despite the far-reaching procedural provisions of the present statute, Congress was apparently unwilling to take the further step of ordering that specific programs be made available — a process that could lead to federal allocation of state and local funds. In the end, the hard choices required to determine the extent of the rights of particular children were consigned to the discretion of local administrators and to the judges and hearing officers who review their decisions.

In entrusting local authorities with the responsibility of creating individualized programs for all their handicapped children — without providing clearer guidelines as to the substance of such programs — Congress may well have expected too much of local school administrators. Even assuming good faith on the part of school officials in dealing with the problems of handicapped children,[42] budgetary constraints will inevitably color many decisions and restrict the range of alternatives offered in the formulation of individualized educational programs. Conscious that extra dollars spent on special education may be cut from other portions of the school budget,[43] local school administrators may

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[39] Still, greater particularization in some areas seems desirable. For example, more explicit testing requirements would be useful. Requiring a basic core of evaluation procedures in all cases would provide important protections without great expense. *See* note 69 *infra*.

[40] *See* Kirp, Buss & Kuriloff, *Legal Reform of Special Education: Empirical Studies and Procedural Proposals*, 62 CAL. L. REV. 40, 47 (1974) ("The response to almost any interesting question concerning the education of the handicapped is either that the answer is unknown or that no generalizable beneficial effect of a given treatment can be demonstrated.").

[41] *See, e.g.*, Epperson v. Arkansas, 393 U.S. 97, 104 (1968) ("By and large, public education in our Nation is committed to the control of state and local authorities."); 121 CONG. REC. 19,498 (1975) (remarks of Sen. Dole).

[42] Prejudice against the handicapped may sometimes influence the response of teachers and administrators. *See, e.g.*, Martin, *Some Thoughts on Mainstreaming*, in CONTEMPORARY ISSUES IN SPECIAL EDUCATION 230, 231 (1977). Racial prejudices may also be reflected in placement decisions. *See, e.g.*, Lora v. Board of Educ., 456 F. Supp. 1211, 1263–64 (E.D.N.Y. 1978); MASSACHUSETTS ADVOCACY CENTER, DOUBLE JEOPARDY: THE PLIGHT OF MINORITY STUDENTS IN SPECIAL EDUCATION (1978).

[43] Funds available from the federal government are not intended to cover the entire cost of educating the handicapped. The amount received by states is determined

focus on what is available within the school system rather than on what is most appropriate for an individual child.

Other factors unrelated to a child's needs will also affect the programs offered by the school system. One such factor may be the lack of expertise of teachers and administrators.[44] Another may be the workload of school administrators who must help formulate and implement individualized education programs. Often they may cut corners,[45] or attempt to persuade parents that their child does not require special programs, simply because they have no time to deal with the problem.[46]

Of course, clearer substantive guidelines would not add more dollars to the budget or more hours to the administrator's day. But a local official is less likely to ignore a clear statutory mandate — violation of which could threaten the receipt of federal funds[47] — than to bend flexible rules. Moreover, the threat of a parental complaint would be more credible where clear regulations made it apparent that the child's rights were being denied.

Ideally, a parental complaint procedure would provide a realistic enforcement mechanism even in the face of ambiguous standards. In practice, however, the voices of many parents may never be heard. Whether through deference to the experience and expertise of educators, or because ignorance of handicapping con-

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by multiplying the number of handicapped students identified and served by a fixed dollar figure — determined each year by calculating a certain percentage of the average per pupil expenditure in the nation. 20 U.S.C. § 1411(a)(1) (1976). Most of this money is then distributed to localities solely on the basis of the number of children they serve, with no regard for the nature of the handicaps involved. *Id.* § 1411(d) (1976). Localities therefore have an incentive to identify handicapped children but not to place them in expensive programs. A school system may receive no more federal money for a child placed in a $20,000 per year full-time residential program than it does for a child who requires $200 worth of special reading instruction in the regular public school. A federal funding scheme responsive to the level of special services a local system provides would remove some of the financial pressure that now influences placement decisions.

[44] The majority of public school teachers in the United States have little or no training in educating the handicapped. *See* NATIONAL ADVISORY COUNCIL ON EDUCATION PROFESSIONS DEVELOPMENT, MAINSTREAMING: HELPING TEACHERS MEET THE CHALLENGE 18 (1976) [hereinafter cited as MAINSTREAMING].

[45] The most likely method of cutting corners will be standardization of administrative functions. *See* Kirp, Buss & Kuriloff, *supra* note 40, at 47; p. 1111 *infra*. Such a response is particularly troublesome because of the importance of individualization in educating the handicapped.

[46] *See* R. WEATHERLEY & M. LIPSKY, STREET-LEVEL BUREAUCRATS AND INSTITUTIONAL INNOVATION 60–62 (1977). The additional paperwork which administrators must complete as a result of legislative requirements may exacerbate the problem. *Id.*

[47] *See* 20 U.S.C. § 1416 (1976).

ditions renders their expectations of their child too low,[48] many parents may rely without question on the judgment of teachers and school officials in making placement decisions.[49] As a result, the discretion of local administrators will often go unchecked.

This problem is particularly acute in the case of poorer and less educated parents.[50] Such parents may defer to the judgment of school officials because they cannot adequately understand the complex issues involved in placement decisions,[51] or because they do not know their rights under the Act.[52] Similarly, poor parents may forego a challenge because they cannot afford the time away from work or the cost of an attorney. Since class differences parallel racial differences in many areas, the problem of the passive parent may contribute to the disproportionate assignment of minority students to less favorable educational placements.[53]

Given the importance of the parental complaint mechanism as a means for enforcing substantive rights, it is necessary to seek new methods for increasing the effectiveness and accessibility of that mechanism. Probably the most effective means would be to make certain that all parents receive sufficient notice of their children's rights before any action is taken by the school. For reasons of administrative convenience, schools may formulate IEP's on a mass production basis and present them to parents as a fait accompli.[54] Uninformed parents may be unaware that alternative programs exist. Judges and hearing officers can help deter such abuses by carefully scrutinizing the procedures followed by schools in all cases. They should make certain that parents are notified *before* any school action is taken, that the notice clearly explains the rights of students and the alternative placements available,[55] and that every opportunity is given parents to take part in the IEP formulation process. Strict adherence to

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[48] *See* Krass, *supra* note 3, at 1018–19 n.18; S. REP. No. 168, 94th CONG., 1st Sess. 9, *reprinted in* [1975] U.S. CODE CONG. & AD. NEWS 1425, 1430.

[49] *See* R. WEATHERLEY & M. LIPSKY, *supra* note 46, at 51 & n.87; *cf. Debate Rises on Mandatory School Plans for Handicapped*, N.Y. Times, Jan. 15, 1979, at A10, col. 1 (reporting low instance of parental complaints).

[50] *See* Lora v. Board of Educ., 456 F. Supp. 1211, 1252–53, 1256 (E.D.N.Y. 1978); Sorgen, *supra* note 38, at 237–38.

[51] In some instances the complexity may be created by educators whose specialized jargon awes parents into silent acquiescence. *See* R. WEATHERLEY & M. LIPSKY, *supra* note 46, at 53.

[52] *See* Lora v. Board of Educ., 456 F. Supp. 1211, 1252–53 (E.D.N.Y. 1978).

[53] *See id.* at 1256.

[54] *See Debate Rises on Mandatory School Plans for Handicapped, supra* note 49, at A10, col. 2.

[55] The court in Lora v. Board of Educ., 456 F. Supp. 1211 (E.D.N.Y. 1978), suggested that the parties call upon communications experts to develop materials comprehensible to the poorly educated. *Id.* at 1295.

procedural requirements would provide strong evidence of a school's good faith in attempting to comply with the Act. On the other hand, a haphazard approach to procedural safeguards should lead a decisionmaker to view the assertions of school authorities with suspicion.

To increase the attractiveness of the complaint system to low and moderate income parents, steps should be taken to reduce the cost of complaints. States might consider providing attorneys or advisers [56] to complaining parents free of charge. As an alternative, Congress might authorize the awarding of attorney's fees to successful complainants.[57] A less expensive option may be to bar school attorneys from participating in administrative hearings where the parents are not represented by counsel.[58] This may reduce the adversarial nature of the hearing and encourage the hearing examiner to adopt a more active role as mediator between the parties. In addition, where a child's evaluation is challenged, parents should have the right to obtain an independent evaluation at no expense to themselves.[59] The present regulations leave this right in an unacceptably uncertain status.[60]

Finally, class actions may provide an effective mechanism for overcoming the problems of parental inaction under some circumstances. Parental advocacy groups might sponsor class actions to challenge system-wide inadequacies. For example, a charge that a school system's evaluation procedures were racially biased

[56] In administrative hearings, trained nonlawyers may be more effective and less expensive than attorneys with little experience in this specialized area. The Act provides parents the right not only to legal counsel, but to anyone "with special knowledge or training with respect to the problems of handicapped children." 20 U.S.C. § 1415(d) (1976).

[57] The disadvantage of this approach is that money spent for attorneys might reduce the funds available for educational services. Absent congressional authorization, a court could award attorney's fees only in very limited circumstances. *See* Alyeska Pipeline Service Co. v. Wilderness Soc'y, 421 U.S. 240 (1975); 10 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2675, at 32 (Supp. 1979).

[58] New York City follows this approach. *See* Lora v. Board of Educ., 456 F. Supp. 1211, 1241 (E.D.N.Y. 1978).

[59] Such a right may be expensive if parents are given an unconditional right to choose the specialist to do the evaluation. Massachusetts addressed this problem by providing the right to a free evaluation from any facility approved by the state. MASS. GEN. LAWS ANN. ch. 71B, § 3 (West Supp. 1979).

[60] The regulations provide for an independent evaluation at public expense *unless* the local agency first requests a hearing on the adequacy of the original evaluation and the hearing officer upholds the appropriateness of that evaluation. 45 C.F.R. § 121a.503 (1977). In addition to creating delay by adding another hearing to the process, this provision only gives protection against evaluations which fail to conform to the formal requirements of the Act. It would be difficult for a hearing officer to detect bias or error on the part of the original evaluator without an independent conclusion against which to compare the original.

would almost necessarily be brought as a class action.[61] However, the Act makes no specific provision for the bringing of class actions. It is uncertain under what circumstances a class action may be brought under the Act.[62]

III. Guidelines to Decisionmaking: Determining the Scope of Substantive Rights under the Act

Despite its shortcomings, the parental complaint system is the primary mechanism for enforcing substantive rights under the Act.[63] The nature of the educational services received by all handicapped children will therefore depend to a great extent on the response of judges and hearing examiners who deal with individual complaints. The Act's broad-brush guidelines, while permitting a flexible response to individual problems at the local level, render the task of these decisionmakers exceedingly difficult.

At this early stage in the history of the Act,[64] there is little authority — either scholarly or judicial — which would aid in the

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[61] *See* p. 1116 *infra*.

[62] The administrative rulemakers refused to comment on the question. *See* 42 Fed. Reg. 42,512 (1977). The Act gives courts jurisdiction over actions brought by any party aggrieved by the decision of a state hearing examiner. 20 U.S.C. § 1415(e)(2) (1976). Courts could interpret this provision to require exhaustion of administrative remedies by all members of a plaintiff class. *Cf.* Weinberger v. Salfi, 422 U.S. 749, 763–64 (1975) (court had no jurisdiction to determine claims of unnamed class members who failed to pursue administrative remedies under § 205(g) of the Social Security Act, 42 U.S.C. § 405(g) (1976)). A preferable approach would be to recognize that some of the Act's provisions may go unenforced unless courts can grant system-wide relief in class actions. *See* p. 1116 *infra*. This approach would also avoid the unnecessary burden of numerous administrative complaints on a single issue. *Cf.* Albemarle Paper Co. v. Moody, 422 U.S. 405, 414 n.8 (1975) (awarding back pay to unnamed plaintiffs who had not fulfilled administrative requirements for bringing suit under Title VII, 42 U.S.C. §§ 2000e to 2000e-17 (1976)). It seems probable that at least the class representatives must exhaust the administrative remedies. *See id.*

In Lora v. Board of Educ., 456 F. Supp. 1211 (E.D.N.Y. 1978), the court ruled on several claims under the Act despite the apparent failure of any plaintiffs to pursue administrative remedies. *Id.* at 1291–92. The court avoided the exhaustion issue altogether. *Id.* at 1216 ("This is essentially a constitutional and not a statutory case . . . . Defendants' strong reliance on exhaustion cases is, therefore, inappropriate.").

[63] Other mechanisms do exist. Each state has an obligation to withhold federal funds from local school systems that fail to comply with the Act. 20 U.S.C. § 1414 (b)(2) (1976). While such review may be useful in controlling system-wide abuses, it seems unlikely that a state could commit sufficient resources to monitor inadequacies in individual programs.

[64] The effective date for the section of the Act establishing procedural safeguards was October 1, 1977. Pub. L. No. 94-142, § 8(c) (1975). *See* Eberle v. Board of Pub. Educ., 444 F. Supp. 41 (W.D. Pa. 1977).

application of the Act's broad principles to specific cases.[65] However, even in the absence of more fully developed case law, it is possible to predict major areas of potential conflict. An investigation of several areas where complaints seem likely to arise will illuminate troublesome issues and point the way toward possible solutions.

A. Complaints Regarding Evaluation

Those portions of the Act which prescribe standards for evaluation of children provide a few clear guidelines. The Act proscribes racially or culturally biased evaluation procedures,[66] requires that tests be administered in a child's native language,[67] and provides that no single procedure shall be the sole criterion for determining the placement of a child.[68] Even given these guidelines, however, decisionmakers face difficult factual inquiries in determining what constitutes an adequate evaluation in individual cases. Moreover, the clear prohibition of biased evaluation procedures does not eliminate the difficulty of establishing standards of proof or fashioning remedies in discrimination cases.

1. Inaccurate or Incomplete Evaluations. — Complaints regarding the evaluation of an individual child may take several forms. For example, some parents may assert that their child's evaluation was incomplete because the school omitted particular tests which would provide a clearer picture of the child's needs. Beyond the prohibition of reliance on a single criterion for placement, neither the statute nor the regulations attempt to define how many or what types of tests must form the basis of a placement decision.[69] The regulations call for assessment "in all areas related to the suspected disability."[70] Several considerations suggest that decisionmakers should construe this requirement broadly. The *suspected* disability may be only distantly related to the actual disability, and only a broad range of tests could uncover

[65] Several articles discuss the Act's substantive provisions. *See, e.g.*, Krass, *supra* note 3, at 1063–77; Levinson, *supra* note 6, at 276–81; Note, *supra* note 8, at 135–52.

[66] 20 U.S.C. § 1412(5)(C) (1976).

[67] *Id.* Students with hearing or speech difficulties are to be given tests in their own "mode of communication," *id.*, to ensure that test results which purport to measure aptitude do not actually reflect an inability to communicate. *See* 45 C.F.R. § 1211a.532(c) (1977).

[68] 20 U.S.C. § 1412(5)(C) (1976).

[69] A statutory requirement that certain basic assessments be made in every case, coupled with more specialized inquiries into the area of suspected disability, seems preferable to the general language of the present provisions. *Cf.* MASS. GEN. LAWS ANN. ch. 71B, § 3 (West Supp. 1979) (requiring evaluations at least by a teacher, a physician, a psychologist, and a nurse or social worker).

[70] 45 C.F.R. § 1211a.532(f) (1977).

the real problem. A child with multiple handicaps might be classified only under the most obvious one. Since the consequences of misclassification far outweigh the cost of more extensive evaluation,[71] decisionmakers should be extremely liberal in ordering additional tests when requested.

In other instances parents may complain not that an evaluation rests on incomplete testing procedures, but that the outcome of an evaluation is simply inaccurate.[72] When such complaints arise, hearing officers and judges may confront the task of choosing between highly technical arguments presented by experts from both sides. Despite the difficulty of such inquiries, disagreement among experts provides no justification for avoiding hard questions altogether.[73] Courts undertake equally complex inquiries in many other areas.[74] Moreover, where the evaluation of an individual child is at issue, there is little reason to fear that hard choices will result in system-wide adherence to potentially unsound policies and stifle local creativity. Given the unlimited variety of handicapping conditions, it seems unlikely that a factual determination regarding the accuracy of an individual evaluation could have far-reaching precedential impact.

2. Racially or Culturally Biased Evaluation Procedures: The Testing Quagmire. — In the past, much of the controversy over evaluation has centered around the use of racially and culturally biased testing procedures.[75] Although such procedures apparently continue to receive widespread use,[76] challenges to biased testing may seldom arise through individual complaints. Parents will often be reluctant to challenge the apparently "scientific" results of a

[71] *See* Sorgen, *supra* note 38, at 218–19.

[72] It might be argued in response that decisionmakers are empowered to do no more than ascertain whether the Act's explicit requirements are fulfilled. Under such an interpretation, any nondiscriminatory process which incorporated two or more placement criteria — no matter how unreliable — would be beyond challenge. If the protections of the Act are so limited, then it is not clear why Congress provided the right to an independent evaluation, *see* 20 U.S.C. § 1415(b)(1)(A) (1976). Moreover, to ignore potential inaccuracies is to overlook a fundamental purpose of due process safeguards — to guard against erroneous judgments. *See* Mathews v. Eldridge, 424 U.S. 319, 344 (1976).

[73] While technical complexity and disagreement among experts may justify judicial deference to the views of a qualified administrative hearing examiner, *see* Bazelon, *supra* note 36, at 744, they cannot justify a policy under which a hearing officer defers to the position of a party in interest, such as the school.

[74] *See* Bazelon, *supra* note 36, at 744.

[75] *See, e.g.*, Larry P. v. Riles, 343 F. Supp. 1306 (N.D. Cal. 1973), *aff'd*, 502 F.2d 963 (9th Cir. 1974); Hobson v. Hansen, 269 F. Supp. 401, 478–92 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

[76] *See* Lora v. Board of Educ., 456 F. Supp. 1211, 1243, 1285–86 (E.D.N.Y. 1978).

standardized test.[77] More significantly, a charge that a particular procedure is discriminatory would be difficult to establish without reference to the impact of the procedure beyond the case of an individual child. Individual parents will seldom possess the energy, knowledge, or financial resources necessary to undertake a system-wide investigation. Thus, the Act's procedural system — designed to resolve complaints concerning individual children — provides a poorly suited mechanism for attacking problems that affect an entire local system or perhaps an entire state.[78] Earlier challenges to discriminatory testing have come through class actions.[79] Only to the extent that courts are willing to entertain such class actions under the Act[80] will the antidiscrimination provision provide an effective weapon for advocates.[81]

If such challenges arise, they will probably rely on statistical proof of racially disproportionate impact to establish a charge of discrimination.[82] Courts must then determine what effect is to be given to such a showing. With respect to the fourteenth amendment, the Supreme Court held in *Washington v. Davis*[83] that, absent proof of discriminatory intent on the part of a defendant, disproportionate impact will be insufficient to establish a violation of equal protection.[84] The Court distinguished cases under Title VII of the Civil Rights Act of 1964.[85] Five years earlier, in *Griggs*

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[77] *See* Sorgen, *supra* note 38, at 231; *cf.* R. WEATHERLEY & M. LIPSKY, *supra* note 46, at 53 ("technical jargon lends an aura of science to the [IEP conference] while making much of the discussion unintelligible to the parent").

[78] For this reason, other mechanisms of enforcement may be especially important. If states are to fulfill their statutory obligation to eliminate discrimination in evaluation procedures, *see* 20 U.S.C. § 1412(5)(C) (1976), then state agencies must closely monitor the racial composition of various educational placements at the local level and investigate instances of disproportionate assignment by race. *Cf.* MASS. GEN. LAWS ANN. ch. 71B, § 6 (West Supp. 1979) (requiring state Department of Education to make such investigations).

[79] *See, e.g.*, Lora v. Board of Educ., 456 F. Supp. 1211 (E.D.N.Y. 1978); Larry P. v. Riles, 343 F. Supp. 1306 (N.D. Cal. 1972), *aff'd*, 502 F.2d 963 (9th Cir. 1974).

[80] *See* note 62 *supra*.

[81] Of course, other grounds are available for attacking biased testing. Cases have relied on equal protection, *see, e.g.*, Larry P. v. Riles, 343 F. Supp. 1306 (N.D. Cal. 1972), *aff'd*, 502 F.2d 963 (9th Cir. 1974); Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969), and on Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-4 (1976), *see* Lora v. Board of Educ., 456 F. Supp. 1211, 1277–78, 1292 (E.D.N.Y. 1978). Title VI may provide a preferred basis since it would not require a showing of discriminatory intent on the part of the school district, *see id.* at 1277.

[82] *See* Lora v. Board of Educ., 456 F. Supp. 1211 (E.D.N.Y. 1978).

[83] 426 U.S. 229 (1976).

[84] *Id.* at 238–39.

[85] *Id.* at 246–48. Title VII is codified at 42 U.S.C. §§ 2000e to 2000e-17 (1976).

v. Duke Power Co.,[86] the Court had ruled that disproportionate impact alone is enough to establish a prima facie case of illegal discrimination under Title VII.[87] In *Griggs*, the Court noted that the purpose of Title VII was to "achieve equality of employment opportunities," [88] and to remove "artificial, arbitrary, and unnecessary barriers" to employment of minorities.[89] An inquiry into the purposes of the Handicapped Act suggests that the *Griggs* standard should apply to the Act's antidiscrimination provision. Litigation prior to the Act revealed that discriminatory testing procedures created a barrier to equal educational opportunity for minorities.[90] Since one aim of the Act was to remedy that inequity, and since the Act's language is phrased in terms of effect rather than motivation,[91] racially disproportionate impact should suffice to establish a prima facie case of discriminatory evaluation under the Act.

Once such a prima facie violation has been established, the burden of proof shifts to the school to justify its procedures.[92] Unlike tests in the employment context,[93] however, educational evaluation procedures cannot be defended by proving that they are valid predictors of future performance.[94] Courts have recognized that educational testing results may be nothing more than self-fulfilling prophecies.[95] Biased tests may be accurate predictors of educational progress simply because test results shape the expectations of both teachers and students.[96] Schools could justify the continued use of challenged procedures only by proof that racially disproportionate placements resulted from environmental factors beyond the control of the school. [97]

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[86] 401 U.S. 424 (1971).

[87] *Id.* at 430–31.

[88] *Id.* at 429.

[89] *Id.* at 431.

[90] *See* Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

[91] *See* 20 U.S.C. § 1412(5)(C) (1976) (evaluation procedures must be selected and administered "so as not *to be* . . . discriminatory" (emphasis added)).

[92] *See* Lora v. Board of Educ., 456 F. Supp. 1211, 1277 (E.D.N.Y. 1978).

[93] *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

[94] Sorgen, *supra* note 38, at 231–32.

[95] *See* Hobson v. Hansen, 269 F. Supp. 401, 491 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969) (noting "the likelihood that the student will act out [the testing] judgment and confirm it by achieving only at the expected level" (footnote omitted)); Sorgen, *supra* note 38, at 219 (manner in which a school treats different children a more significant determinant of pupil performance than the initial bases for classification).

[96] Rosenthal & Jacobson, *Teacher Expectation for the Disadvantaged*, SCIENTIFIC AMERICAN, April 1968, at 19; Sorgen, *supra* note 38, at 219.

[97] For example, a school may show that children raised in a ghetto environment

Even after a plaintiff prevails in a challenge to testing procedures, the most difficult problem of all may still remain. The science of educational testing is not so finely developed that clear remedies will be readily available in all cases.[98] Where courts or hearing officers order an end to discriminatory procedures, school systems may be hard-pressed to produce a nondiscriminatory substitute. Biased standardized tests may be replaced by an uncertain set of highly subjective criteria which leave broad discretion in the hands of individual educators. Under such circumstances, personal biases — either conscious or unconscious — can produce a different form of discrimination.[99] Because of the absence of clear solutions, the evaluation area calls for particular caution in the formulation of remedies. Courts may find themselves relying heavily on the efforts of the parties to arrive at acceptable solutions.[100] Often, the proper function of the judge or hearing officer may be to serve as a catalyst for cooperation between the parties and to ensure that schools endeavor in good faith to devise practical alternatives to discriminatory procedures.

B. Placement Decisions: The "Mainstreaming" Controversy

Conflicts over the actual services necessary to constitute an "appropriate" educational program will present perhaps the most difficult issues arising under the Act. Such conflicts give rise to two types of questions. First, what is the proper environment in which to educate a handicapped child? And second, what particular services must be delivered to that child? This Section will deal with the former question. The more general question of determining the "appropriate" level of services will be addressed in the final Section.

The Handicapped Act's endorsement of the concept of "mainstreaming" [101] is perhaps its most controversial feature.[102] The

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are more likely to suffer emotional disturbances than other children. *See* Lora v. Board of Educ., 456 F. Supp. 1211, 1256–63 (E.D.N.Y. 1978).

[98] *See id.* at 1247 ("[I]t is too early to expect professional agreement on standardization in the [classification] field. . . . Courts are not in a position to lead the most advanced of the educators, clinicians and theoreticians in enforcing nonexistent standards.").

[99] *See id.* at 1245. Even where tests themselves are nondiscriminatory, personal biases may have an impact on the process of referring children for initial evaluation. *See id.* at 1263–64.

[100] *See id.* at 1294.

[101] Commentators have objected to the use of the term "mainstreaming" in describing the Act, claiming it denotes indiscriminate placement of all handicapped children in regular classrooms. *See* Stafford, *supra* note 15, at 76. The term is used throughout this Section to mean a general policy favoring regular class placement of handicapped children in appropriate circumstances.

[102] *See, e.g.*, Lora v. Board of Educ., 456 F. Supp. 1211, 1268 (E.D.N.Y.

only guideline Congress provided for determining what constitutes an appropriate placement is the admonition that handicapped children should be educated together with the nonhandicapped "to the maximum extent appropriate." [103] Special classes or segregated environments are limited to cases in which "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." [104] Thus, the statute appears to place the burden of persuasion on any party — either parent or school — seeking to remove the child from the regular educational environment. However, the Act provides little guidance for determining at what point education in the regular classroom becomes unsatisfactory. A discussion of the history of the mainstreaming concept in both the legal and the educational contexts may serve to illuminate both the policies supporting the concept and the problems inherent in its application. An understanding of this background suggests several factors decisionmakers might consider in determining when placement in the regular classroom is appropriate.

In the sixties and early seventies, a number of educators began a movement toward increased integration of handicapped students into regular classrooms.[105] These educators questioned the effectiveness of the traditional practice of educating the handicapped — especially the mildly mentally retarded — in separate schools or separate classes.[106] More significantly, they argued that by labeling a child "handicapped" or "retarded" and removing that child from the regular classroom, a school places a stigma upon that child that far outweighs the dubious benefits of separate classes.[107] In addition, noting that special class placement often meant permanent assignment to an environment in which minimal skills were taught and minimal accomplishment was expected, some educators looked to mainstreaming as a solution to the problem

1978); MAINSTREAMING, *supra* note 44, at 1–2; Greenberg & Doolittle, *Can Schools Speak the Language of the Deaf?*, N.Y. Times, Dec. 11, 1977, § 6 (Magazine), at 50–52; *Schools Are Forced to Pay More Attention to Disabled*, N.Y. Times, May 11, 1977, at A20, col. 2.

[103] 20 U.S.C. § 1412(5)(B) (1976).

[104] *Id.*

[105] *See, e.g.*, Dunn, *Special Education for the Mildly Retarded — Is Much of It Justifiable?*, 35 EXCEPTIONAL CHILDREN 5 (1968); Reynolds, *A Framework for Considering Some Issues in Special Education*, 28 EXCEPTIONAL CHILDREN 367 (1962).

[106] Actually, the "traditional" practice of educating handicapped children in special classes began only in this century. *See* Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 294 (E.D. Pa. 1972); Johnson, *Special Education for the Mentally Handicapped — Paradox*, 29 EXCEPTIONAL CHILDREN 62, 62–66 (1962). Prior to this time, many handicapped children were simply excluded from school altogether. Dunn, *supra* note 105, at 5.

[107] *See, e.g.*, Dunn, *supra* note 105, at 9.

of misclassification.[108] Finally, some objected that special classes had become a tool for maintaining racial segregation.[109]

None of these early proponents argued that regular classroom placement was right for all handicapped children all of the time. Instead, they urged schools to provide a flexible system for dealing with children with widely divergent needs. Such a system would include a continuum of alternative placements from the "least restrictive" — the regular classroom — to the "most restrictive" — full-time residence in an institution.[110] A handicapped child would be placed in the least restrictive educational setting in which she could successfully function.

The concept of mainstreaming gained legal significance following the consent decree in *Pensylvania Association for Retarded Children* [*PARC*] *v. Pennsylvania*,[111] a case that had widespread influence on later developments. The court order in *PARC* included the requirement that "among the alternative programs of education . . . available, placement in a regular public school class is preferable . . . to placement in any other type of program." [112] Echoing the arguments of many educators that placement of retarded children in separate classes gives rise to social stigma,[113] plaintiffs in *PARC* contended that due process requires certain procedural safeguards before a state may classify an individual in a manner that is stigmatizing.[114] Under this theory, a handicapped child would be presumed to be correctly placed in a normal classroom. If the school desired to move the child into a separated environment, it could do so only after providing a hearing for the child's parents.[115] Although the Supreme Court's more recent decision in *Paul v. Davis* [116] has cast doubt on the stigma rationale as a trigger to due process safeguards,[117] the argument was widely accepted at the time of *PARC*

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[108] *See* Paul, *Mainstreaming Emotionally Disturbed Children*, in MAINSTREAMING EMOTIONALLY DISTURBED CHILDREN 1, 8 (1977).

[109] *See* Dunn, *supra* note 105.

[110] *See* Abeson, *Education for Handicapped Children in the Least Restrictive Environment*, in THE MENTALLY RETARDED CITIZEN AND THE LAW 514, 516–20 (M. Kindred ed. 1976); Reynolds, *supra* note 105.

[111] 334 F. Supp. 1257 (E.D. Pa. 1971), *modified*, 343 F. Supp. 279 (1972). A similar doctrine emerged in cases requiring treatment for civilly committed mental patients in the least restrictive environment. *See* Chambers, *The Principle of the Least Restrictive Alternative: The Constitutional Issues*, in THE MENTALLY RETARDED CITIZEN AND THE LAW 486 (M. Kindred ed. 1976).

[112] 334 F. Supp. at 1260.

[113] *See* pp. 1119–20 *supra*.

[114] *See* 343 F. Supp. at 295.

[115] *Id.*

[116] 424 U.S. 693 (1976).

[117] In finding that the plaintiffs had a "colorable" due process claim, the

and was codified in the procedural requirements of the Act.[118]

The chief concern motivating the court and plaintiffs in *PARC*,[119] as well as the educators who began the mainstreaming movement,[120] was the widespread practice of "dumping" — placing handicapped children into inadequate special classes[121] in order to rid teachers and school officials of the problem of dealing with the children's special needs. It was against the background of such concerns that Congress passed the Act.

More recently, the mainstreaming doctrine has encountered criticism from a number of sources. Critics have asserted that mainstreaming handicapped children without major changes in the size and structure of regular classes places impossible demands upon the teacher and may lead to neglect of the needs of all students.[122] Some specialists have voiced the fear that emphasis on mainstreaming is diverting necessary funds from the types of special programs that may be most helpful to many handicapped students.[123] Others have argued that the isolation resulting from being "different" in a class where others are perceived as "normal" can be more damaging than the stigma of separation.[124] To the extent that these fears materialize in actual practice, many complaints under the Act may not assert that children are being excluded from the classroom, but that they are being improperly "dumped" into regular classrooms when at least some separate services might be more worthwhile.[125]

PARC court relied on Wisconsin v. Constantineau, 400 U.S. 433 (1971), a case holding that a state must provide notice and a hearing before publicly posting — and stigmatizing — the names of alleged drunkards, *id.* at 436. Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 295 (E.D. Pa. 1972). The constitutional validity of the *Constantineau* holding has been cast in serious doubt by Paul v. Davis, 424 U.S. 693, 701–02 (1976) (finding no violation of due process when police labeled plaintiff an "active shoplifter" without notice or hearing).

[118] *See* 20 U.S.C. § 1415 (1976).

[119] *See* 343 F. Supp. at 294.

[120] *See* Dunn, *supra* note 105, at 20.

[121] For a description of such a class, see Hairston v. Drosick, 423 F. Supp. 180 (S.D. W. Va. 1976).

[122] *See, e.g.*, Greenberg & Doolittle, *supra* note 102, at 50; Milofsky, *Schooling the Kids No One Wants*, N.Y. Times, Jan. 2, 1977, § 6 (Magazine), at 25, 28. A major problem is that most classroom teachers are inadequately prepared to deal with special-needs children. *See* MAINSTREAMING, *supra* note 44, at 18–19.

[123] *See* Greenberg & Doolittle, *supra* note 102, at 102.

[124] *See id.* at 82.

[125] One state official noted that the vast majority of parental complaints seek additional services for their children while only a few seek regular class placement. Interview with Stephen Bardige, Assistant Director, Bureau of Special Education Appeals, Massachusetts Department of Education, in Boston (January 3, 1979).

Judges and hearing officers face a difficult task in attempting to reconcile the Act's maximum integration requirement with the concerns reflected in such complaints. Still, the Act clearly expresses the congressional policy that integration is to be the governing principle in placement decisions.[126] Perhaps the best approach for decisionmakers in this area is to apply the maximum integration provision as a rebuttable presumption that every child is properly placed in the regular classroom. Then, keeping in mind the concerns which motivated the mainstreaming movement as well as the potential problems which can arise from regular classroom placement, decisionmakers must weigh the various factors which could render such placement unsatisfactory.[127] The following discussion attempts to illuminate several such factors.

First, placement in a regular classroom in some cases may be unsatisfactory because an alternative placement offers a promise of significantly greater academic benefit. This factor must be cautiously weighed. The legislative policy in favor of integration should not give way to baseless fears of academic disaster. The party wishing to place a child outside the regular classroom must present clear objective evidence indicating why such a placement should be favored. Also, a decisionmaker should keep in mind that the maximum integration provision requires more than a mere comparing of academic benefits. Regular classroom placement does not become unsatisfactory simply because it is not, from an academic standpoint, the best placement available. Decisionmakers must weigh any potential academic benefit of special class placement against the possible social or psychological detriment that may result from the separation of a child from her nonhandicapped peers.[128] A showing that placement outside the regular classroom promises only a marginal advantage in academic terms should be insufficient to overcome the maximum integration presumption. Finally, decisionmakers should keep in mind that regular class placement need not be an all-or-nothing proposition. Full-time special class placement should never be ordered where part-time removal from the regular class would suffice.

Frequent major disruptions of a class by a handicapped student might also render regular class placement unsatisfactory.[129] Once again, the party seeking removal from the normal environment should have the burden of proof. In particular, a decisionmaker should not infer a likelihood of disruptive behavior from

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[126] *See* Stafford, *supra* note 15, at 76.

[127] *See* 20 U.S.C. § 1412(5)(B) (1976).

[128] *See* p. 1119 *supra*.

[129] *See* 45 C.F.R. § 121a.552 (1977) (comment).

the nature of a child's handicap alone.[130] A clear history of past misconduct should be required. Of course, decisionmakers must be careful to distinguish cases of disruptive behavior by a handicapped child from instances of disruption resulting from the reactions of other children to the presence of a handicapped student.[131]

Where a history of misconduct is established, the inquiry may become even more complex. Past disruptiveness may have resulted in part from inappropriate educational services. Therefore, a decisionmaker should be reluctant to order removal from the regular class where a school has made no previous effort to accommodate the special needs of a child within the regular classroom. Still, placement of a previously disruptive child in the regular classroom over the protest of school authorities may often mean returning the child to a hostile environment. While such hostility provides no basis for discounting the rights of the child,[132] it cannot realistically be ignored. Decisionmakers must search for measures to reduce possible hostility and assure that regular class placement is given a fair chance to succeed.[133]

A final factor that must be considered in determining the appropriateness of regular class placement is the education of the nonhandicapped child. By increasing the demands on the classroom teacher, the presence of a handicapped child might diminish the quality of the education offered to all students in the class. Much of the recent criticism of mainstreaming has focused on this problem.[134] To the extent that mainstreaming is implemented without proper adjustments in the educational environment, integration may be a disaster not only for the handicapped student, but for her nonhandicapped peers as well. At the same time, the rights of handicapped children should not be sacrificed in

[130] Predictions of future disruptive behavior are sometimes unreliable and should be subjected to careful scrutiny. *See* Dershowitz, *Preventive Confinement: A Suggested Framework for Constitutional Analysis*, 51 TEX. L. REV. 1277, 1305–07 (1973).

[131] Nonhandicapped children may react out of prejudice or discomfort at the presence of a handicapped child. The rights of handicapped children should not be circumvented by reference to such prejudices. *Cf.* Cooper v. Aaron, 358 U.S. 1, 7 (1958) (hostility toward integration not a factor for consideration by district court in determining relief); Resident Advisory Bd. v. Rizzo, 425 F. Supp. 987, 1023 (E.D. Pa. 1976) (likelihood of hostile reaction by neighbors no justification for refusing relief under Title VIII of Civil Rights Act of 1968, 42 U.S.C. §§ 3601–3619 (1976)), *modified*, 564 F.2d 126 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978).

[132] *See* note 131 *supra*.

[133] Such measures might include ordering frequent parent-teacher conferences or requiring assignment of the student to a teacher who had not witnessed the previous disruptive behavior.

[134] *See* p. 1121 & note 122 *supra*.

every case of potential conflict with those of more advantaged children.

Since the Act precludes determination of the appropriateness of regular class placement without simultaneous consideration of supplementary aids and services that could render such placement appropriate,[135] close observance of the requirements of the Act should minimize this conflict in most cases. Ideally, provision of proper support services would greatly reduce the special burdens on classroom teachers resulting from mainstreaming of a handicapped child.[136] Of course, schools are likely to plead that fiscal constraints prohibit the reductions in class size or the hiring of additional personnel necessary to bring about this result. But courts have turned a deaf ear to such pleas in the past.[137] To the extent that necessary funds may have to be diverted from other educational programs, the education of nonhandicapped children may be affected. Nevertheless, this result is at least more equitable than placing the full burden of fiscal limitations on the educational rights of the handicapped child.[138]

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[135] *See* 20 U.S.C. § 1412(5)(B) (1976). Necessary supplementary aids and services would vary depending on the child. A learning disabled student might require the assistance of a special teacher who visits the normal classroom for a short period each day. A deaf student might require a full-time interpreter.

[136] The Act does not indicate to what extent — if any — a court may order changes in the regular classroom itself. In some cases, a reduction in class size may be preferable to — and less stigmatizing than — additional support services within the classroom. Though the Act's mainstreaming provision speaks of "*supplementary* aids and services," 20 U.S.C. § 1412(5)(B) (1976) (emphasis added), the power of a decisionmaker to grant appropriate relief would appear to embrace changes in the educational environment as well. Still, many decisionmakers may be reluctant to intrude so directly into local practices. In some districts, decisionmakers will not face this problem since teacher contracts require class size reductions where handicapped children are mainstreamed. *See* R. WEATHERLEY & M. LIPSKY, *supra* note 46, at 31 & n.69.

[137] *See* Davis v. Southeastern Community College, 574 F.2d 1158, 1162 (4th Cir. 1978), *cert. granted*, 99 S. Ct. 830 (1979) (Section 504 of Rehabilitation Act of 1973, 29 U.S.C. § 794 (1976), requires even "expensive" special services); Hairston v. Drosick, 423 F. Supp. 180, 184 (S.D. W. Va. 1976); *cf.* Barnes v. Converse College, 436 F. Supp. 635, 637–39 (D.S.C. 1977) (noting that the possible financial consequence of future demands by other handicapped students is not a valid consideration for the court).

Advocates have responded to the inadequate funds defense by pointing out that it may be more costly *not* to educate the handicapped, since failure to train children for a self-sufficient life may lead them to rely on public assistance. *See* S. REP. No. 168, 94th Cong., 1st Sess. 9, *reprinted in* [1975] U.S. CODE CONG. & AD. NEWS 1425, 1433.

[138] *Cf.* Mills v. Board of Educ., 348 F. Supp. 866, 876 (D.D.C. 1972) ("The inadequacies of the [school system] cannot be permitted to bear more heavily on the . . . handicapped child than on the normal child.").

C. *Program Decisions: Defining "Appropriate" Education*

At the center of many complaints will be a conflict over the nature and quality of services to which a handicapped child is entitled. Parents will assert that the law requires certain services to be provided. The school representatives — aware of the constraints of their own budget [139] — will contend that "appropriate" means something less.[140]

The language of the Act provides no clear guidelines for resolving such a conflict.[141] Judges and hearing officers must develop standards for evaluating the facts of individual cases. It seems possible to suggest a few general propositions that might lend direction to their inquiry. To begin with, it seems clear that "appropriate" cannot mean the best possible education that a school could provide if given access to unlimited funds. At the same time, it undoubtedly means more than simply opening the doors of the regular classroom to those capable of entering and learning without special assistance. The Act surely contemplates a standard of appropriateness somewhere between these two extremes.

Beyond this almost self-evident conclusion, it is difficult to formulate an abstract standard of appropriateness that provides a convenient measuring rod against which to compare the needs of widely divergent individuals. A helpful standard must be one which recognizes individual learning capacity and determines the extent to which that capacity will be developed. An ideal system would be designed to achieve the maximum development of the intellectual capacity of every child. A more practicable standard might be one which defined appropriateness in relation to the actual level of educational services provided for most children within a given school system.[142] Under such a standard, an appropriate education for a particular child would require services aimed at developing the child's intellectual capacity to the same

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[139] *See* note 43 *supra*.

[140] In some instances, school officials may oppose a parental complaint for political reasons, finding it easier to demand additional funds from local government when they can show that a court has ordered the expenditure.

[141] *See* 20 U.S.C. § 1401(18) (1976).

[142] Of course, such a standard permits inequities between children in different systems. One could argue that "appropriate" must have a fixed meaning for all systems. But, given the tradition of local funding of education, and the reluctance of courts to interfere with that system, *see* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973), it seems unlikely that passage of the Act will create uniformity for the handicapped where none exists for other children. Decisionmakers will be more likely to bend their notions of appropriateness according to local conditions. *Cf.* 80 HARV. L. REV. 898, 902 (1967) (judges likely to be influenced in determination of what is possible by present level of facilities).

degree that the school sought to develop the "normal" abilities of its nonhandicapped students.[143]

Thus, an appropriate education for a physically handicapped child with a normal intellectual capacity would be a program designed to promote academic achievement roughly equivalent to that of her nonhandicapped peers.[144] This standard might require only that the school make classrooms accessible to the student and provide for medical needs that might interfere with classroom performance.[145] An appropriate education for a blind child with normal intelligence would require sufficient auditory or braille instruction to permit academic performance commensurate with normal achievement of nonhandicapped children.

A similar — though perhaps more difficult — comparison might be made in cases of children whose handicaps impair their intellectual capacity. For example, a school system that provides the best in modern facilities and a low student-teacher ratio for its nonhandicapped children could justify neither a failure to provide the best available support services to a mildly retarded child nor a high student-teacher ratio in special programs for the severely retarded. Conversely, a poor school district which educated all of its children in overcrowded classrooms with limited facilities might not be required to offer the most scientifically advanced programs to its handicapped students.[146] In all circumstances, this concept of appropriateness would at least require an equitable sharing of educational resources. Of course, equality would mean more than equal spending for all students;[147] it

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[143] *Cf.* 45 C.F.R. § 84.33(b)(1) (1977) (Section 504 of Rehabilitation Act of 1973, 29 U.S.C. § 794 (1976), requires education which meets the needs of the handicapped as adequately as the needs of the nonhandicapped are met).

[144] An appropriate physical education program for such a child might be determined through a rough comparison to the level of facilities made available to nonhandicapped students.

[145] *Cf.* Hairston v. Drosick, 423 F. Supp. 180 (S.D. W. Va. 1976) (Section 504 of Rehabilitation Act of 1973, 29 U.S.C. § 794 (1976), requires school to provide assistance necessary to permit child with spina bifida to remain in regular classroom).

[146] Of course, the notion of appropriateness, like equal protection, may include a requirement of some minimal level of education in all cases. *Cf.* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 37 (1973) (noting possibility of equal protection violation where school fails to provide the opportunity "to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process").

[147] The Act requires more than equal spending. The funds received under the Act are to be used to meet "excess costs." 20 U.S.C. § 1414(a)(1) (1976). "Excess costs" are costs over and above the school's average annual per pupil expenditures. *Id.* at § 1401(20) (1976); *cf.* Lau v. Nichols, 414 U.S. 563 (1974) (school must do more than provide equal services where non-English-speaking students received no meaningful education without special instruction).

would require equal opportunity for individual development.

In the end, judges and hearing officers must look to a wide variety of sources for their conclusions. They may rely on a consensus of expert opinion where any exists. They may look to practices in similar districts or neighboring states. In future years they may look to previous decisions of courts and hearing officers as precedents. The development of a "common law" for decisionmaking under the Act would eliminate much of the ambiguity of the current standards. There is, however, the danger that it may rigidify those standards and stifle the potential for creative response under the Act. Hearing officers should be careful to regard earlier decisions only as general guidelines for principled decisionmaking and not as mandates that a particular program is *the* appropriate placement for any child with a particular type of handicap.

IV. Conclusion

The Education for All Handicapped Children Act has set the stage for judges and hearing officers to take an active role in the intimate details of educational decisionmaking while seeking to safeguard the rights of the handicapped. The success of that venture will depend in large part on the ability of these decisionmakers to fashion standards for individual cases in the absence of clear statutory guidelines. Until more precise regulations or judicial interpretations add new substance to those guidelines, their task will be exceedingly difficult. At the same time, unless special steps are taken to increase the accessibility of the complaint system for all parents, the promise of the Act may be an empty one for many children.

Still, in the past courts have risen to the challenge of turning vague language into meaningful guidelines for conduct,[148] and judges have been particularly scrupulous in assuring that procedural safeguards provide real protection rather than meaningless formality.[149] In entrusting courts with the ultimate power to review the appropriateness of individual programs, Congress has placed great faith in such judicial virtues. Only further experience with judicial enforcement of the statute will indicate whether that faith was well-placed.

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[148] *See* Friendly, *In Praise of* Erie — *And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 405–22 (1964).

[149] *E.g.*, Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).