

# THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT: OPENING THE SCHOOLHOUSE DOOR

## I INTRODUCTION

Public school education in America is considered a privilege and not a constitutional right.<sup>1</sup> This distinction, however, is blurred by state statutes requiring school attendance or its equivalent for children.<sup>2</sup> Despite the state mandate, a significant number of school age children have never had the chance to go to public school, and an even greater number have received only minimal educational services.<sup>3</sup> For as long as the public school system has been in existence, the handicapped have been neglected. With the passage of the Education for All Handicapped Children Act of 1975,<sup>4</sup> eight million handicapped children, 1.75 million of whom have never had any public education at all, are guaranteed a free public education.<sup>5</sup>

This landmark legislation and accompanying proposed regulations<sup>6</sup> provide a detailed plan covering all phases of the schooling process, including identifying and placing children,<sup>7</sup> setting educational goals for the handicapped,<sup>8</sup> and setting guidelines for the training of educational personnel.<sup>9</sup> The Act also includes related provisions for funding,<sup>10</sup> and due process safeguards.<sup>11</sup> Although the object of the Act is laudable, its practical effect may scarcely resemble the intended result.

This Note will first analyze the major provisions of the Act and consider what Congress intended to accomplish. Second, this Note will explore the consequences when eight million children exercise their rights. Whether or not these rights will be sustained depends in part on how the Act is implemented. The Act's success, however, will ultimately depend upon the level of cooperation received from Congress, teachers, the state, and the community.

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1. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 35-36 (1973).

2. *E.g.*, CAL. EDUC. CODE § 12101 (West Supp. 1977); N.Y. EDUC. LAW § 3205(1)(a) (McKinney 1970).

3. 20 U.S.C. § 1401 note (Supp. V 1975).

4. *Id.* §§ 1401-1420 (Supp. V 1975) (amending 20 U.S.C. §§ 1401-1461 (Supp. IV 1974)).

5. 121 CONG. REC. S10,959-60 (daily ed. June 18, 1975).

6. 41 Fed. Reg. 56,975-98 (1976) (to be codified in 45 C.F.R. §§ 121a.1-654, 121m.1-10).

7. 20 U.S.C. § 1412(2)(C) (Supp. V 1975).

8. *Id.* § 1412(2)(A).

9. 41 Fed. Reg. 56,987 (1976) (to be codified in 45 C.F.R. § 121a.2660 [*sic*]).

10. 20 U.S.C. § 1411 (Supp. V 1975).

11. *Id.* § 1415.

## II MAJOR PROVISIONS OF THE ACT

The Education for All Handicapped Children Act comes close to being what its name implies. Included within the scope of "handicapped children" are the "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."<sup>12</sup> Under the Act, they are to receive a free public education, defined as "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."<sup>13</sup> In addition, they are to receive related services such as transportation and supportive services.<sup>14</sup>

The core of the statute lies in the part entitled "Assistance for Education of All Handicapped Children."<sup>15</sup> Under this part, the federal government makes funds available to the states for their use in accordance with provisions that describe state entitlements, eligibility criteria, and the necessary elements of both state plans and local and intermediate agency applications for benefits.<sup>16</sup> The amount of funding a state receives is based on the number of handicapped children in that state.<sup>17</sup> Only 12 percent of the population aged five to seventeen may be counted as handicapped for purposes of the statute.<sup>18</sup> This figure represents an attempt to prevent a state from inflating its number of handicapped children and thus receiving excess monies.<sup>19</sup> The maximum amounts available to a state are scheduled so that by fiscal year 1982 each state will receive a grant equal to the number of handicapped children aged three to twenty-one in that state who are receiving special education and related services multiplied by 40 percent of the average per pupil expenditure in public elementary and secondary schools in the United States.<sup>20</sup> According to the Act, 75 percent of these funds will be distributed by the state directly to local and intermediate agencies.<sup>21</sup> The state educational agency will retain control of the remainder.<sup>22</sup> Of that 25 percent, the state may use the greater of either 5 percent of the total state allotment or \$200 thousand for administrative costs.<sup>23</sup> Flexibility to tailor the operation of the Act to specific community needs is supplied through the decentralization provisions of these sections.

In order to qualify for funds, each state must prepare a plan that follows closely the guidelines developed in the Act.<sup>24</sup> All handicapped children must

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12. *Id.* § 1401(1) (1970).

13. *Id.* § 1401(16) (Supp. V 1975).

14. *Id.* § 1401(17).

15. *Id.* §§ 1411-1420.

16. *Id.*

17. *Id.* § 1411(a)(1)(A)-(B).

18. *Id.* § 1411(a)(5)(A)(i).

19. 121 CONG. REC. S10,969 (daily ed. June 18, 1975).

20. 20 U.S.C. § 1411(a)(1)(B)(v) (Supp. V 1975).

21. *Id.* § 1411(c)(1)(B).

22. *Id.* § 1411(c)(1)(A).

23. *Id.* § 1411(c)(2)(A)(i).

24. *Id.* § 1413.

first be identified, located, and evaluated. Then the plan must insure that: a) children who have had no education have first priority in receiving education, with second priority going to those with the most severe handicaps;<sup>25</sup> b) individualized programs are developed for each child and reviewed at least annually; c) records of these programs are kept; d) to as great an extent as is possible, handicapped children are educated with normal children (a procedure called "mainstreaming"); and e) procedural safeguards are established.<sup>26</sup> The procedural safeguards include hearings before a state or local educational agency, appeal to the state educational agency, as well as eventual civil action in state court or in federal district court regardless of the amount in controversy.<sup>27</sup> These due process rights are triggered when either a parent or the handicapped person objects to a particular classification, to a change in classification, or to a particular school program.<sup>28</sup> To supplement this basic program and prevent the handicapped from being a permanent drain on society's resources,<sup>29</sup> the Act requires the state to make genuine efforts to encourage employment of the handicapped.<sup>30</sup>

The entire program, although federally funded, is administered by the state educational agency.<sup>31</sup> To participate in the federal program, the state must create an advisory panel composed of interested lay persons, state and local educators, and administrators, to aid in implementing and evaluating the state's program.<sup>32</sup> Furthermore, the Commissioner of Education has a statutory responsibility to evaluate the program and report his findings to Congress.<sup>33</sup>

The requirements outlined above are prerequisites to receiving the minimum amount of aid. Provided there is no conflict with state education law,<sup>34</sup> the state can voluntarily expand its program to include children aged three to five and receive in addition up to \$300 per child.<sup>35</sup>

### III

#### ORIGIN AND EVOLUTION OF THE ACT

The history of federal laws dealing with the education of the handicapped is relatively short. The Elementary and Secondary Education Act of 1965<sup>36</sup> was amended in 1966 to include a new title dealing with the education of handicapped children.<sup>37</sup> Through this title, Congress authorized grants to the states

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25. The proposed regulations define first priority children as "handicapped children who are not receiving any education," and second priority children as "handicapped children, within each disability, with the most severe handicaps who are receiving some but not all of the special education and related services specified in the individualized education programs of those children." 41 Fed. Reg. 56,985 (1976) (to be codified in 45 C.F.R. § 121a.210).

26. 20 U.S.C. § 1412(3)-(5)(B) (Supp. V 1975).

27. *Id.* § 1415(a)-(e).

28. *Id.* § 1415.

29. 121 CONG. REC. S10,969 (daily ed. June 18, 1975).

30. 20 U.S.C. § 1405 (Supp. V 1975).

31. *Id.* § 1412(6).

32. *Id.* § 1413(a)(12).

33. *Id.* § 1418.

34. *Id.* § 1412(2)(B).

35. *Id.* § 1419.

36. Pub. L. No. 89-10, 79 Stat. 27 (codified in scattered sections of 20 U.S.C.).

37. Elementary and Secondary Education Amendments of 1966, Pub. L. No. 89-750, 80 Stat. 1191.

to initiate or improve education programs. It was not until 1968 that Congress enacted a separate statute exclusively concerned with the educational needs of the handicapped;<sup>38</sup> since its passage, federal assistance in this area has grown from \$2.5 million to \$100 million.<sup>39</sup> The 1970 amendment<sup>40</sup> to the Act consolidated related provisions of previous legislation,<sup>41</sup> and was amended and generally expanded in 1974.<sup>42</sup> Despite the growth of this legislation, Congress concluded that many handicapped children were receiving an inadequate education or no education at all.<sup>43</sup> The time had come for Congress to write a law that would guarantee an education to each child who wanted one.<sup>44</sup>

Congress drew heavily on the findings and decisions in two cases when it began drafting legislation:<sup>45</sup> *Pennsylvania Association for Retarded Children v. Pennsylvania*<sup>46</sup> [hereinafter *PARC*], and *Mills v. Board of Education*<sup>47</sup> [hereinafter *Mills*]. In *PARC*, the Pennsylvania Association for Retarded Children and parents of retarded children filed a class action suit challenging a statute absolving the State Board of Education from the responsibility of educating handicapped children found uneducable or untrainable.<sup>48</sup> In finding for the plaintiffs, the *PARC* court not only acknowledged the right of these children to an education but also outlined in great detail what the state was obliged to do to fulfill its responsibilities. Implementing the provisions of the consent agreement, the court held that free public education could not be offered haphazardly; rather, it must be made available to the handicapped pursuant to a plan covering all areas of the educational process. These areas included the range of programs offered, periodic review of the child's progress, a program for financing, and the training and recruitment of any extra teachers the program might require.<sup>49</sup> The state was prohibited from either denying a child an education or altering his status within the system without a prior hearing.<sup>50</sup> Pursuant to the amended stipulation, the court also held that if a hearing becomes necessary, all the elements of due process, including provisions for notice to the child and his parents, the right to counsel, and the right

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38. Education of the Handicapped Act, Pub. L. No. 90-247, 81 Stat. 804 (1968), as amended by Pub. L. No. 94-142, §§ 2(a), (c), (d), 3, 4, 5(a), (c), 6, 89 Stat. 773 (1975) (codified at 20 U.S.C. §§ 1401, 1405, 1406, 1411-1420 (Supp. V 1975)).

39. 121 CONG. REC. H7148 (daily ed. July 21, 1975).

40. Education of the Handicapped Act, Pub. L. No. 91-230, 84 Stat. 175 (1970), as amended by Education of the Handicapped Amendments of 1974, 20 U.S.C. §§ 1401-1461 (Supp. IV 1974).

41. Legislation incorporated into the 1970 Act includes the Handicapped Children's Early Education Assistance Act, Pub. L. No. 90-538, §§ 1-5, 82 Stat. 901-02 (1968) and provisions for teacher training in fields related to the education of the handicapped which appeared in the Act of Sept. 6, 1958, Pub. L. No. 85-926, §§ 1-7, 72 Stat. 1777.

42. Education of the Handicapped Amendments of 1974, Pub. L. No. 93-380, 88 Stat. 579-85 (codified at 20 U.S.C. §§ 1401-1461 (Supp. IV 1974)). The amendments added: education grants and assistance to Indian reservation schools for fiscal year 1975, Pub. L. No. 93-380, 88 Stat. 580, the requirement that the handicapped not yet receiving education receive priority, 20 U.S.C. § 1413(a)(12) (Supp. IV 1974), and procedural safeguards, 20 U.S.C. § 1413(a)(13) (Supp. IV 1974).

43. 121 CONG. REC. S10,960 (daily ed. June 18, 1975).

44. *Id.* (remarks of Sen. Randolph).

45. *See id.* at S10,963.

46. 343 F. Supp. 279 (E.D. Pa. 1972), modifying 334 F. Supp. 1257 (E.D. Pa. 1971).

47. 348 F. Supp. 866 (D.D.C. 1972).

48. 343 F. Supp. at 282.

49. *Id.* at 288.

50. *Id.* at 284-85.

to present witnesses and expert testimony, must be observed.<sup>51</sup> Furthermore, if public education is not available or a public facility is inadequate to serve a child's needs, the court stated that the state must pay for an outside education.<sup>52</sup> The influence of *PARC* is clearly seen in several of the Act's provisions, particularly those which deal with procedural safeguards.<sup>53</sup>

*Mills* arose when parents of handicapped children who had been excluded from public school sued the District of Columbia Board of Education, demanding that their children be afforded a free and adequate public education. The court, finding for the plaintiffs, relied on a District of Columbia statute that required parents to send their children to school.<sup>54</sup> The *Mills* court assessed the duties of the District of Columbia Board of Education in much the same way as the *PARC* court had done in Pennsylvania but added this caveat: lack of funds do not excuse a state from providing education.<sup>55</sup> If money is scarce, stated the court, it must nevertheless be distributed so that all children benefit.<sup>56</sup> The handicapped should not be obliged to bear a greater burden than other children because of insufficient funds.<sup>57</sup> The *Mills* holding may have spurred the requirement of the federal Act that children who have not received any education get first priority in determining how funds will be spent.<sup>58</sup> The language of the Act, however, reflects a divergent application of the *Mills* mandate. *Mills* imposes a duty to provide some education to all handicapped children. The proposed regulations, on the other hand, interpret the Act quite strictly. They state that money cannot be spent on the second priority children until the needs of all children in the first priority category are met.<sup>59</sup>

In shaping the Act, Congress was also concerned about the financial difficulties inherent in funding so far reaching a statute. With an estimated \$4 billion required to achieve the Act's purpose,<sup>60</sup> and a Presidential veto anticipated,<sup>61</sup> Congress abandoned as a "high and false goal" an early proposal to spend on each handicapped child an amount equal to half of the average per pupil expenditure.<sup>62</sup> Instead, House and Senate conferees reduced their authorization of the maximum entitlement to a level that seemed only a shadow of the previous House and Senate amount.<sup>63</sup> The original authorization of \$680 million per year was reduced to \$100 million for 1976 and \$200 million for 1977.<sup>64</sup> Another concession to financial expediency was the decision to limit the number of children served by the Act to 12 percent of the number of children, aged five to seventeen, in a given state. This figure tallies with a conser-

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51. *Id.* at 303-06.

52. *Id.* at 311-12.

53. 20 U.S.C. § 1415 (Supp. V 1975).

54. 348 F. Supp. at 873-74.

55. *Id.* at 876.

56. *Id.*

57. *Id.*

58. 20 U.S.C. § 1412(3) (Supp. V 1975).

59. 41 Fed. Reg. 56,985 (1976) (to be codified in 45 C.F.R. § 121a.214). For a definition of first priority and second priority children, see note 25 *supra*.

60. 121 CONG. REC. H7150 (daily ed. July 21, 1975).

61. 121 CONG. REC. H7758 (daily ed. July 29, 1975).

62. *Id.*

63. 121 CONG. REC. S20,430 (daily ed. Nov. 19, 1975).

64. 121 CONG. REC. H11,349 (daily ed. Nov. 18, 1975).

vative estimate that one out of ten school-age children is handicapped,<sup>65</sup> and is intended to prevent the inflation of figures presented by the states.<sup>66</sup>

Debate also focused on the desirability of using federal funds for education, traditionally a state responsibility.<sup>67</sup> Congress did not want to appear to sanction federal usurpation of a state role, nor did it want to deny federal funds to states with preexisting programs.<sup>68</sup> Presumably, these considerations motivated the conference committee to change the Senate bill from reading that federal funds would be used "to relieve the fiscal burden placed upon States and localities" to reading that the money would be used "to assist States and localities."<sup>69</sup>

The legislative history reveals two other areas of particular concern to Congress: early education programs and "mainstreaming." Although some members of Congress wanted to make early education a priority,<sup>70</sup> the final version of the Act instead provides incentive grants to states that include children aged three to five in their plans. "Mainstreaming" received great support throughout the evolution of the Act.<sup>71</sup> In addition, sections encouraging employment of the handicapped<sup>72</sup> and providing grants for the removal of architectural barriers<sup>73</sup> were passed without opposition. The bill was voted into law by a 407-7 vote in the House and an 87-7 vote in the Senate. On November 29, 1975, it was approved by President Ford.<sup>74</sup>

#### IV GOALS OF THE LEGISLATION

A major purpose of the Education for All Handicapped Children Act is to provide all handicapped children with a "free appropriate public education" responsive to their special needs.<sup>75</sup> Although the choice of instructional methods and the allocation of federal funds among the various uses is left to the states,<sup>76</sup> states are required, whenever possible, to educate handicapped children in the same classroom with non-handicapped children.<sup>77</sup> This policy, known as "mainstreaming," means that "among all alternatives for placement within a general educational system, handicapped children should be placed where they can obtain the best education at the least distance away from mainstream society."<sup>78</sup> Mainstreaming does not mean the indiscriminate placement of handicapped children with "normal" children. Handicapped students would

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65. Molloy, *Law and the Handicapped*, SCI. & CHILDREN, March, 1976, at 7.

66. 121 CONG. REC. S10,969 (daily ed. June 18, 1975).

67. *Id.* at S10,976.

68. 121 CONG. REC. H7756-57 (daily ed. July 29, 1975).

69. H.R. REP. NO. 664, 94th Cong., 1st Sess. 29 (1975).

70. 121 CONG. REC. S10,961 (daily ed. June 18, 1975).

71. *See, e.g.*, H.R. REP. NO. 664, 94th Cong., 1st Sess. 30 (1975).

72. 20 U.S.C. § 1405 (Supp. V 1975).

73. *Id.* § 1406.

74. 11 WEEKLY COMP. OF PRES. DOC. 1338 (Dec. 2, 1975).

75. 20 U.S.C. § 1401 note (Supp. V 1975) (Congressional Declaration of Purpose).

76. National Public Radio & Institute for Educational Leadership, Options in Education, Program No. 37, July 12, 1976, at 6 [hereinafter cited as NPR Program No. 37].

77. 20 U.S.C. § 1412(5)(B) (Supp. V 1975).

78. Molloy, *supra* note 65, at 9.

be assigned to a normal classroom only when neither group is harmed.<sup>79</sup> For instance, a handicapped child may have special reading classes, but take gym or home economics with other children. To reduce the possibility of errors in the placement of handicapped children, the proposed regulations authorize a state to: a) review a child's placement annually; b) act affirmatively to ensure that the quality of education in a mainstreamed classroom will not deteriorate; and c) assume responsibility for a child that a local agency has placed without regard to that child's needs.<sup>80</sup> All possible placements in a continuum ranging from the regular classroom to the hospital or institution must be made available to each child.<sup>81</sup>

The statutory pattern for distributing funds within the state indicates that another of the Act's aims is decentralization. Legislative history supports this interpretation; when the Act was reviewed in the Senate, it was proposed that the state receive 60 percent of the funds and that the local educational agency receive the remaining 40 percent directly.<sup>82</sup> The later decision to alter this division radically by giving localities control of 75 percent of the state's allotment by 1979 clearly speaks against centralized state domination. This decision makes it possible for programs to be established in rural areas where education of the handicapped has been most difficult to achieve.<sup>83</sup> Although the state must formulate a general plan pursuant to the Act which guarantees that uniform requirements be met,<sup>84</sup> a local educational agency is free, within these limits, to create a program that it believes will be most responsive to the needs of the handicapped.

The state educational agencies will be exclusively responsible for the efficient administration of the Act, for no new federal mechanism will be established.<sup>85</sup> From the local perspective, this appears to maintain the current role of state agencies. While expending the federal funds, school districts will be governed by state rules, regulations, and statutes<sup>86</sup> as they were before the passage of the Act. In addition, each local agency must secure state approval for its own educational plan. The state authority to disapprove a local plan, however, is limited to violations of the Act.<sup>87</sup> The decision to vest administration of the act with the state rather than the federal government demonstrates a Congressional desire to avoid encroaching on state autonomy<sup>88</sup> in the area of education.

The Act's escalating funding schedule suggests the additional goal of encouraging a change in federal and state priorities in favor of education of the

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79. TODAY'S EDUCATION, March-Apr., 1976, at 18.

80. 41 Fed. Reg. 56,991-92 (1976) (to be codified in 45 C.F.R. § 121a.442).

81. 41 Fed. Reg. 56,911 (1976) (to be codified in 45 C.F.R. § 121a.441).

82. 121 CONG. REC. S10,970 (daily ed. June 18, 1975).

83. *Id.* at S10,981. *But see Hearings on S.6 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Public Welfare*, 94th Cong., 1st Sess. 112 (1975); National Public Radio & Institute for Educational Leadership, Options in Education Program No. 36, July 5, 1976, at 4 [hereinafter cited as NPR Program No. 36]. These sources suggest that it has been equally difficult to provide services in large urban districts.

84. 20 U.S.C. §§ 1412, 1413 (Supp. V 1975).

85. 121 CONG. REC. S10,970 (daily ed. June 18, 1975).

86. NPR Program No. 37, *supra* note 76, at 9.

87. 41 Fed. Reg. 56,982 (1976) (to be codified in 45 C.F.R. § 121a.86).

88. *See* 121 CONG. REC. S10,976 (daily ed. June 18, 1975).

handicapped. From 1967 to 1975, enrollment of the handicapped in public education programs increased by 1.5 million,<sup>89</sup> and this rapid growth in enrollment will probably continue. To accommodate the influx of new pupils, the Act provides that the amount of funds a state will receive will grow from 5 percent of the average per pupil expenditure in 1978 to 40 percent in 1982.<sup>90</sup> Federal funds will cover less than one quarter of the total education cost,<sup>91</sup> however, since the cost of educating a handicapped child is twice the average per pupil expenditure.<sup>92</sup> The 1976 authorization of \$100 million, divided equally, provided only \$12.50 to each child that year.<sup>93</sup> If the goal of free public education or its equivalent is to be met, both state and federal governments must set a higher budgetary priority on the education of the handicapped.<sup>94</sup>

## V

### THE ACT IN OPERATION: ITS STRENGTHS AND WEAKNESSES

It is difficult to assess objectively what effect opening up the public schools to eight million handicapped children will have on the schools, on teachers, on "normal" children, or on the handicapped themselves. Nonetheless, research on the subject of education of the handicapped, experience of states already providing educational services, and recent court decisions shed considerable light on the strengths and weaknesses of the Act.

#### A. *Potential Difficulties*

##### 1. *Funding*

The Supreme Court's observation in *San Antonio Independent School District v. Rodriguez*<sup>95</sup> that "there is nothing simple or certain about predicting the consequences of massive change in the financing and control of public education"<sup>96</sup> is particularly apposite when applied to the Education for All Handicapped Children Act. Of the provisions in the Act, the financial ones have received the strongest criticism and generated the most controversy. When the Act was still in bill form, one Congressman contended that the required monies would not be appropriated and said, "This bill represents the ultimate in irresponsibility."<sup>97</sup> In general, legislators felt that while the Act looked good on paper, the lack of appropriate funding from national sources, coupled with the limited finances of most states, would combine to render the bill ineffective. Some members of Congress objected that the only way enough money would be found to fund the bill properly would be to withdraw funds from other high priority items in the federal budget.<sup>98</sup> Political considerations, however, make a complete renovation of the federal budget unlikely.

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89. *Id.* at S10,960.

90. 20 U.S.C. § 1411(a)(1) (Supp. V 1975).

91. 121 CONG. REC. H7760 (daily ed. July 29, 1975).

92. *Id.* at H7758.

93. 121 CONG. REC. H7148 (daily ed. July 21, 1975).

94. 121 CONG. REC. H7760 (daily ed. July 29, 1975).

95. 411 U.S. 1 (1973).

96. *Id.* at 56.

97. 121 CONG. REC. H7758 (daily ed. July 29, 1975) (remarks of Rep. Ashbrook).

98. 121 CONG. REC. S20,436 (daily ed. Nov. 19, 1975).

Fiscal criticism continued even after the Act became law. As President Ford said, "Even the strongest supporters of this measure know as well as I that they are falsely causing the expectations of the groups affected by claiming authorization levels which are excessive and realistic [*sic*]." <sup>99</sup> This remark, typical of what has been characterized as the "hypercritical and unhelpful" <sup>100</sup> attitude the executive assumed since the Act's inception, was but another signal that the anticipated funds would not be forthcoming.

Likewise, the states and localities could not be relied upon to furnish the difference. In New York City, for example, the number of special education students rose from twenty-eight thousand to thirty-nine thousand from 1970 to 1975; the education budget was increased by \$136 million correspondingly. But in 1976, while student enrollment increased by another eight thousand, financial emergency forced the city to cut its education spending by \$40 million. <sup>101</sup> Unless federal and state governments find the resources to fund their education programs, the Act will represent nothing more than an empty promise.

## 2. Allocation to States and Localities

If the money is actually authorized and appropriated, the manner in which it is expended will largely determine how successful the Act will be. The Act provides that the state must use its 25 percent allotment of the total state entitlement, less administrative costs, <sup>102</sup> to provide support services and direct services. <sup>103</sup> "Direct services" include "services provided directly to a handicapped child by the State or by contract." <sup>104</sup> "Support services" include "implementing the comprehensive system of personnel development . . . recruitment and training of hearing officers and surrogate parents, and public information activities relating to a free appropriate public education for handicapped children." <sup>105</sup> The state must match this amount from nonfederal funds. <sup>106</sup> Added to the money a local agency receives directly from the state, the money spent on support and direct services can make the difference between merely accommodating the handicapped in an old system and designing a new, ambitious program in the schools. Whether or not the state contribution for direct and support services will be substantial will depend upon the state's ability to keep its administrative costs to a minimum so that most of its federal funds can be used for actual services and equipment.

In some instances, however, the direct funding of localities in proportion to their total number of handicapped children, irrespective of how rich or poor these localities are, may impair the Act's efficiency by channeling money to districts where it is not needed at the expense of those where it could be better used. <sup>107</sup> In the case of an agency that would be entitled to less than \$7,500 under the basic funding schedule, the Act states that such locality will not

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99. N.Y. Times, Dec. 3, 1975, at 31, col. 1.

100. 121 CONG. REC. H7764 (daily ed. July 29, 1975).

101. N.Y. Times, Apr. 25, 1976, § 12, at 1, col. 1.

102. 20 U.S.C. § 1411(c)(2)(A)(i) (Supp. V 1975).

103. *Id.* § 1411(c)(2)(A)(ii). These services must be provided in accordance with the priorities established in § 1412(3).

104. 41 Fed. Reg. 56,987 (1976) (to be codified in 45 C.F.R. § 121a.250(b)(1)).

105. 41 Fed. Reg. 56,987 (1976) (to be codified in 45 C.F.R. § 121a.250(b)(2)).

106. See 20 U.S.C. § 1411(c)(2)(B) (Supp. V 1975).

107. NPR Program No. 36, *supra* note 83, at 15.

receive any funds directly.<sup>108</sup> Instead, the state is authorized to use these funds to provide an appropriate education to the children residing in the area served by the local agency.<sup>109</sup> These agencies must depend on the state's assessment of their needs, rather than on their own assessment. It is doubtful whether they, or for that matter, localities just above the \$7,500 mark, will be able to achieve significant results. They may not be able to do more than hire a few extra teachers, or purchase some educational materials. A totally new facility or extensive teacher training, both of which might be necessary, would be out of the question.

The statute recommends an alternative procedure for such localities which, if adopted, would correct this problem by allowing several local agencies to pool their funds.<sup>110</sup> The state educational agency may require two or more local agencies to consolidate their applications to the state if the agencies receive less than \$7,500 or if the agencies cannot maintain a program of sufficient size and scope to meet the needs of their handicapped children.<sup>111</sup>

The radical decentralization mandated by the Act is not without utility. It permits individual educational agencies to determine their needs and use their funds accordingly. In light of the potential inequalities of service it fosters, however, a unified state-administered plan might have been a better alternative.<sup>112</sup> According to one commentator, such a plan, directed by the state educational agency, would centralize authority, encourage optimal utilization of educational resources, ensure coordinated efforts among involved agencies, and end the practice of sending a child to agencies unwilling to take responsibility for him.<sup>113</sup>

In addition to the funding restraints described above, the state must comply with the educational priorities in the Act.<sup>114</sup> For a state to qualify for assistance under the Act, *all* children between the ages of three and eighteen must receive an appropriate education by September 1, 1978.<sup>115</sup> Yet it is estimated that during 1977-78 second priority students will receive only a basic education and will not receive all the services required under their individualized education programs.<sup>116</sup> Thus it appears that unless federal funding is sharply increased for 1978, many states will be denied funds despite good faith attempts to conform to the Act's requirements. Although all children should be fully served as soon as possible, it seems clear that 1978 is an unrealistic target date. Rather than withholding funds completely in the event that the 1978 full service goal is not met, an alternative might be denying federal aid only if first and second priority children have not been served by 1978 and postponing the full service deadline for all children to 1980.

Another financial problem, related to the economic distress in several states, is sure to arise when educational agencies attempt to make contracts

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108. 20 U.S.C. § 1411(c)(4)(A) (Supp. V 1975).

109. *Id.* § 1411(c)(4)(B).

110. *Id.* § 1414(c).

111. *Id.* § 1414(c)(1).

112. See 121 CONG. REC. H7763 (daily ed. July 29, 1975).

113. *Hearings on S.6 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Public Welfare*, 94th Cong., 1st Sess. 323 (1975).

114. 20 U.S.C. § 1412(3) (Supp. V 1975).

115. *Id.* § 1412(2)(B).

116. 41 Fed. Reg. 56,970 (1976).

with private institutions for those children who cannot be placed in a public school. Given the strong possibility that an agency will not be able to meet its financial obligations, many private schools may hesitate to make a contract with such an agency. In Massachusetts, for instance, school committees that place a child in a private facility will only be reimbursed up to an amount equal to the average cost of private education in the state.<sup>117</sup> Whenever private education for the handicapped exceeds this amount, a committee will probably exhaust all other less costly alternatives before sending a child to private school. If an agency does determine that it must send a child to private school, there is still the danger that the school will inflate its tuition to take advantage of the "windfall" the Act has provided.

Given the constraints imposed by an Act which appears to divest the states of their customary control over educational policy and purse strings, many educators doubt that the federal government will secure full cooperation with all provisions of the Education for All Handicapped Children Act.<sup>118</sup>

### 3. *Mainstreaming*

Of vital concern is the response of schools, parents, and teachers to the requirement that handicapped children be mainstreamed with non-handicapped children. Educational theorists favor mainstreaming but caution that it is more effective with certain handicaps, particularly physical handicaps.<sup>119</sup> Few teachers of a "normal" class, however, feel prepared to deal with a sudden influx of handicapped children.<sup>120</sup> It has been asserted that 95 percent of the nation's teachers are unable to deal with the challenges mainstreaming presents.<sup>121</sup>

In Massachusetts, mainstreaming has been in effect since 1974 under a statute which is similar to the Education for All Handicapped Children Act in its requirements and its goals.<sup>122</sup> Like the federal law, the Massachusetts statute emphasizes free education by way of mainstreaming, early and periodic evaluation of pupils by their teachers, and elaborate due process hearings to resolve conflicts.<sup>123</sup> Because of the similarity between the two laws, the successes and failures already experienced in Massachusetts may be indicative of those likely to occur on a national level.

Most teachers approve of the Massachusetts statute but are dissatisfied with its implementation.<sup>124</sup> They do not feel they have been adequately prepared to work with special children. A survey of 639 teachers, which was designed to gauge their readiness to implement the law, documents this response. Researchers found teachers' attitudes vastly influenced by experience and concluded that teachers with previous experience teaching special children were the most optimistic about the statute.<sup>125</sup> Although preparation of teachers

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117. Smith, *Chapter 766: A Problem in Implementation*, B.U. J. EDUC., Feb., 1975, at 10.

118. See, e.g., N.Y. Ass'n for the Learning Disabled News, Spring, 1976, at 1.

119. N.Y. Times, Apr. 25, 1976, § 12, at 15, col. 1.

120. Andelman, *Mainstreaming in Massachusetts Under Law 766*, TODAY'S EDUCATION, March-Apr., 1976, at 20.

121. NPR Program No. 37, *supra* note 76, at 14.

122. MASS. GEN. LAWS ANN. ch. 71B (West Supp. 1976-1977).

123. See also *id.* ch. 71B §§ 2, 5, 6.

124. Andelman, *supra* note 120, at 20.

125. Wechsler, Suarez & McFadden, *Teachers' Attitudes Toward the Education of Physically*

is admittedly critical to the Act's success, there has been far too little provided. In Massachusetts, "only 5 percent of the school systems of the state . . . conducted training on a sustained basis ten months or more during the period between 1972 when the law was enacted, and May 1975."<sup>126</sup> Compounding this problem, those teachers who are trained generally to deal with handicapped children are often not prepared to confront specific learning disabilities.<sup>127</sup>

Several sections of the proposed regulations for the Education for All Handicapped Children Act address this problem in great detail. One section advocates a "Comprehensive System of Personnel Development" designed to guarantee that all teachers will be sufficiently prepared and trained.<sup>128</sup> The comprehensive system forms part of the state plan. The state must ensure that all personnel are trained, and schedule activities to achieve this aim.<sup>129</sup> The state must make inservice training available to all general and special teachers and must also disseminate information concerning education of the handicapped to all teachers and administrators.<sup>130</sup> According to the proposed regulations, a teacher would not be considered properly trained unless he had participated in the program outlined above and also met state certification requirements.<sup>131</sup>

The National Education Association [NEA] has taken a strong stand on the mainstreaming issue. Its Representative Assembly passed a resolution in 1975 which stipulated that the NEA would support mainstreaming only if certain conditions were met. These include: a) teacher preparation for mainstreaming; b) class sizes and curricula alterations to adapt to mainstreaming demands; c) provision for appropriate educational materials and support services for teachers; and d) adequate funds supplied exclusively for the purpose of mainstreaming.<sup>132</sup>

#### 4. Student Identification and Evaluation

A weakness of the Education for All Handicapped Children Act is the absence of any guidelines to aid an educator or administrator in deciding whether or not to include a child in the 12 percent handicap allotment. Furthermore, the Act requires that the teacher identify and evaluate each handicapped child before writing an educational plan for the child without specifying how this is to be done. In response to this problem, the Massachusetts Teachers Association [MTA] publishes and periodically revises a booklet for teachers.<sup>133</sup> This booklet shows educators how to make and record observations upon which a child's identification and evaluation are based. The guide includes sections dealing with: a) the nature of the identification and evaluation process; b) how to make an evaluation using a specific observation checklist;

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*Handicapped Children: Implication for the Implementation of Mass. Chap. 766*, B.U. J. Educ., Feb., 1975, at 17.

126. Andelman, *supra* note 120, at 22.

127. *Id.*

128. 41 Fed. Reg. 56,987 (1976) (to be codified in 45 C.F.R. § 121a.2660 [*sic*]).

129. *Id.*

130. *Id.*

131. 41 Fed. Reg. 56,987 (1976) (to be codified in 45 C.F.R. § 121a.261).

132. TODAY'S EDUCATION, March-Apr., 1976, at 19.

133. Massachusetts Teachers Ass'n, 766: *Questions and Answers and Cases*, (available by writing the MTA).

and c) guidelines for writing an educational plan, with four case studies as examples.<sup>134</sup>

The Act's insistence on evaluation and classification of each handicapped child for whom the state claims a right to funds places emphasis on the practice of putting a diagnostic label on each handicapped child. While labels are necessary for receiving federal aid, they raise the problem of labelling errors. Although the statute states that testing and evaluation materials will be administered so as not to be racially or culturally discriminatory,<sup>135</sup> one educator has remarked that he knows of no test that can be administered in a way that is not racially or culturally biased.<sup>136</sup>

Two cases, *Hobson v. Hansen*<sup>137</sup> and *Larry P. v. Riles*,<sup>138</sup> established that a standardized IQ test is an inaccurate criterion for evaluating certain racial and economic groups. In *Hobson v. Hansen* the use of IQ tests to place students in educational "tracks" geared to level of ability consistently placed blacks in the lowest level track. In determining that such a track system violated black students' constitutional rights to equal protection, the court concluded that racial factors were influential in test performance.<sup>139</sup> Similarly, the court in *Larry P. v. Riles* found unconstitutional the use of an IQ test that put a disproportionate number of blacks in classes for the "educable mentally retarded," as it was culturally biased and did not actually test their ability to learn.<sup>140</sup>

Mislabelling appears to be a widespread problem, yet it is not difficult to correct. A discussion of the problem in the appendix following the regulations for the Rehabilitation Act of 1973 points out that the rate of mislabelling is reduced 50 percent when an "adaptive behavior test" is required in addition to the standardized IQ test.<sup>141</sup> Although no attempt is made to estimate these costs, the discussion suggests that the costs of more and better testing procedures would not be prohibitive.<sup>142</sup> Moreover, the rewards are great; reduction in mislabelling "will yield benefits in the form of increased lifetime earnings capacity and increased life satisfaction of the children involved."<sup>143</sup> A change in testing procedures, of course, will not affect all handicapped children. Those most likely to benefit include minority group children,<sup>144</sup> children with severe disciplinary problems wrongly classified as emotionally disturbed,<sup>145</sup> and those within a group ranging from children with no handicaps who lack strong parental advocates to children on the borderline of needing residential treatment.<sup>146</sup>

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134. *Id.* at 5-10, 15-35.

135. 20 U.S.C. § 1412(5)(C) (Supp. V 1975).

136. *Hearings on S.6 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Public Welfare*, 93d Cong., 2d Sess. 1862 (1974) (statement of Gregory A. Humphrey).

137. 269 F. Supp. 401 (D.D.C. 1967), *appeal dismissed*, 393 U.S. 801 (1968), *aff'd en banc sub nom.* *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969).

138. 343 F. Supp. 1306 (N.D. Cal. 1972), *aff'd*, 502 F.2d 963 (9th Cir. 1974).

139. 269 F. Supp. at 483.

140. 343 F. Supp. at 1313-14.

141. 41 Fed. Reg. 20,347 (1976).

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* at 20,347-48.

146. *Id.* at 20,342.

Even if labels are correctly assigned, the very act of labelling may prove damaging to the children. A handicapped child or his parents may consider the label pejorative rather than merely diagnostic.<sup>147</sup> Since labels set a child apart from his peers in the classroom, he is different, an outsider. Teachers too often respond to the label rather than the child. Instead of encouraging a student to extend the range of his capabilities, a teacher may treat him as if he were unable to advance. The result is a self-fulfilling prophecy that tends to detain a child at the level he had reached when the teacher first saw him.<sup>148</sup> Studies have shown that "the fact that special programs have lower expectations for their students also increases the likelihood that placements [in special classes] will be permanent."<sup>149</sup>

The evaluation and labelling of a child also pose procedural difficulties. The Act requires the participation and consultation of parents or the guardians of the handicapped children served by the Act.<sup>150</sup> Although the extent of this participation is not defined by the Act, it is probable that parents will want to meet with teachers and discuss a proposed evaluation. In Massachusetts, where teachers are required to be present for evaluation conferences, this has raised an unresolved dilemma. If the conferences are held during school hours, a substitute teacher must be found to cover the class while the teacher is in conference. If the conference takes place after hours, the teacher is obliged to extend the hours of the contractually established work day.<sup>151</sup> Either alternative is costly.

Furthermore, no matter how carefully an evaluation is drawn, disagreements between parents and teachers or school administrators are inevitable. Ideally, these disputes will be resolved through an "impartial due process hearing" conducted by the local or state educational agency or intermediate educational unit.<sup>152</sup> While a teacher's evaluation may be at issue, the teacher need not suffer personal liability for an evaluation a parent finds objectionable, provided it is made carefully.<sup>153</sup> The MTA teachers' guidebook suggests that in order to protect himself a teacher "should be careful and accurate in the manner in which [he] commit[s] to writing information about a child which may be required under the statute."<sup>154</sup> Teachers are advised to "make sure to avoid subjective judgments and include objective and verifiable statements when requested."<sup>155</sup> The guide is very specific about how to achieve an evaluation that will withstand legal tests: each observation should be preceded by "appears to" or "appears to be."<sup>156</sup> Such guidelines should be made available to all teachers on a national level.

Teachers may nonetheless wish to retain legal counsel during the hearings,

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147. NPR Program No. 37, *supra* note 76, at 15.

148. R. ROSENTHAL, *PYGMALION IN THE CLASSROOM* 55 (1968).

149. Kirp, Buss & Kuriloff, *Legal Reform of Special Education: Empirical Studies and Procedural Proposals*, 62 CAL. L.R. 40, 54 (1974) [hereinafter cited as Kirp].

150. 20 U.S.C. § 1414(a)(1)(C)(iii) (Supp. V 1975).

151. Fraser, *Chapter 766 and the Professional Educator*, B.U. J. EDUC., Feb., 1975, at 28-29.

152. 20 U.S.C. § 1415(b)(2) (Supp. V 1975).

153. Massachusetts Teachers Ass'n, *supra* note 133, at 16.

154. *Id.* at 14.

155. *Id.*

156. *Id.* at 16.

which they are allowed to do under the Act.<sup>157</sup> No provision is made in the Act, however, for the payment of teachers' legal fees. The allotment for administrative costs does not cover legal services, so it is not clear how the money is to be secured.

From the parents' point of view, the right to counsel may be a mixed blessing. Cases in Pennsylvania involving hearings under *PARC* have demonstrated that, more often than not, parents will receive a favorable decision when they are represented by counsel.<sup>158</sup> This places a great incentive on parents to retain a lawyer and may work an injustice on those parents unable to afford one. This burden is increased by the nature of judicial review. A parent may appeal an unfavorable decision and ultimately bring a civil action in a state or district court.<sup>159</sup> The court will base its decision largely on a review of the records of the administrative proceedings, rather than on any new evidence the parent may present.<sup>160</sup> This limited review makes the presence of an attorney at the earlier hearings crucial. Parents may receive partial relief under the proposed regulations; these state that if a parent disagrees with an evaluation of his child, he may obtain an independent evaluation at public expense.<sup>161</sup> If the local agency can prove at a hearing that its evaluation was appropriate, however, the independent evaluation must be conducted at the parent's expense.<sup>162</sup>

## 5. Possible Legal Challenges

Supporters of the Education for All Handicapped Children Act contend that it benefits not only the handicapped but "normal" school children as well.<sup>163</sup> Nevertheless, there is concern that the Act in general, and mainstreaming in particular, discriminates against normal children. The Act has been criticized for focusing on the needs of a special interest group rather than the interests of a larger public—normal children, their parents, and taxpayers.<sup>164</sup> Similarly, the Massachusetts statute has been faulted for omitting provisions which deal with gifted children.<sup>165</sup>

Because the free appropriate public education the Act requires<sup>166</sup> will often include services which lie outside the traditional definition of a classroom education, it may be objected that an educational agency should not be responsible for providing these services. Some commentators suggest that schools will ultimately resemble mental health clinics, and argue that the system cannot bear the cost of providing the extensive therapy that some children need.<sup>167</sup> Others disagree and believe that a broader view of education is needed, that the time has come to "challenge present educational concepts based on the nonexistent

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157. 20 U.S.C. § 1415(d)(1) (Supp. V 1975).

158. Kirp, *supra* note 149, at 79.

159. 20 U.S.C. § 1415(e)(2) (Supp. V 1975).

160. *Id.*

161. 41 Fed. Reg. 56,990 (1976) (to be codified in 45 C.F.R. § 121a.403(b)).

162. *Id.*

163. NPR Program No. 37, *supra* note 76, at 13, 17-18.

164. NPR Program No. 36, *supra* note 83, at 15.

165. Smith, *supra* note 117, at 11.

166. 20 U.S.C. § 1412(1) (Supp. V 1975).

167. Smith, *supra* note 117, at 9.

'normal' child.''<sup>168</sup> The courts may be reluctant to explore this area, especially in light of the traditional deference given to legislative judgments.<sup>169</sup> Resolution of the conflict may better be achieved by accepting the expanded definition of education, yet insisting that the burden be shared with social service agencies, such as Mental Health, Public Health, Youth Services, or Public Welfare.<sup>170</sup> A legislative amendment or supplementary regulations could authorize these agencies' participation.

## *B. Strengths of the Act*

### *1. Economic Advantages*

Despite criticism of the Act as financially unsound, the economic benefits it provides appear to outweigh the costs. Some children, such as the blind, do not need special education for more than a few years, after which they are no longer considered handicapped. They can then enter a program for normal children and eventually become wage earners and taxpayers.<sup>171</sup> A denial of education burdens handicapped children for life, forcing them as adults to seek welfare assistance or placement in state or city institutions. As lifetime institutionalization can cost as much as \$400 thousand per person,<sup>172</sup> society will pay less when it decides to educate. Furthermore, because many handicapped children will be mainstreamed into the present school system, an increased enrollment of 20 percent, for example, will not result in a 20 percent increase in expenses.<sup>173</sup> In order to conform to the limitations placed on mainstreaming by the proposed regulations, some new classes will have to be created and staffed at an additional expense. Nevertheless, the cost would not be prohibitive. New classes can use the facilities that the schools presently own. Moreover, because normal children will also attend these classes, part of the cost can be financed by existing state funds.

The Act will also have the salutary economic effect of creating new teaching jobs. Since programs for the handicapped are labor intensive, implementation of the Act will help reduce teacher unemployment.<sup>174</sup> Even the money expended for administrative procedures, which some claim should be spent directly on education,<sup>175</sup> appears justified if it is viewed as providing an invaluable opportunity for parental and professional participation in the program.<sup>176</sup>

Courts that have conducted this type of balancing have found that the benefits of education outweigh the costs. The court in *Mills* ruled that the District of Columbia's interest in educating its children outweighed its interest in preserving its financial resources.<sup>177</sup> In *Shapiro v. Thompson*,<sup>178</sup> in which the Supreme

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168. Liederman, *Chapter 766—Education as a Right to Be Claimed, Not a Service to Be Begged*, B.U. J. EDUC., Feb., 1975, at 5.

169. See, e.g., *Railway Express Agency v. New York*, 336 U.S. 106 (1949).

170. Smith, *supra* note 117, at 12-13.

171. NPR Program No. 36, *supra* note 83, at 12.

172. R. CONLEY, *THE ECONOMICS OF MENTAL RETARDATION* 322 (1973).

173. See NPR Program No. 36, *supra* note 83, at 11.

174. 121 CONG. REC. H7762 (daily ed. July 29, 1975).

175. *Id.* at H7761.

176. *Id.* at H7764.

177. 348 F. Supp. 866, 876 (D.D.C. 1972).

178. 394 U.S. 618 (1969).

Court struck down a one year residency requirement for welfare recipients, the Court was critical of asserting prohibitive costs as a reason for denial of education.<sup>179</sup> While the Court conceded that a state may attempt to limit its expenses, it pointed out that a state could not do so by discriminating between classes of its citizens.<sup>180</sup> The Court's later ruling in *Rodriguez* does not conflict with the *Shapiro* holding: in *Rodriguez*, the Court expressly denied the existence of any discriminatory impact on a definable class in the Texas school system.<sup>181</sup>

## 2. *Mainstreaming*

The controversial practice of mainstreaming can be justified by looking at the overall intent of the Act rather than at its immediate effects. Given an adequate number of teachers and supplementary services, which will become increasingly easier to obtain as the amount of federal aid increases, mainstreaming can be an extremely effective tool in educating the handicapped. Studies show that deaf children in a mainstream setting demonstrate "dramatic increases in spontaneous speech, increased vocabulary and greater proficiency in lip reading,"<sup>182</sup> and the visually handicapped display progress in mobility and in the use of other senses.<sup>183</sup> Likewise, children with neurological impairments, orthopedic handicaps, and chronic health conditions, "show increased ability to use their innate strengths and to live with their limitations,"<sup>184</sup> in a mainstreamed classroom. As New York State's Commissioner of Education, Ewald B. Nyquist, observed:

In a very real sense, school is a microcosm of society which teaches the child society's values. In a mainstreamed classroom, the school transmits certain humane and compassionate values to each child. At the same time, as the child adopts these values, the shape and form of the society he and his peers will create is enhanced.<sup>185</sup>

Children with a wide range of handicaps will be receiving educational services under the Act.<sup>186</sup> Each student comes to class with his own difficulties and his own gifts. To ensure that every child receives an education appropriate to his needs, the Act requires that an individualized education program for each student be established at the beginning of the year and be reviewed at least annually.<sup>187</sup> Coupled with nondiscriminatory evaluations,<sup>188</sup> preparing individualized programs ought to prevent children with different handicaps, or even children with similar handicaps but varied personal needs or abilities, from being treated in an indiscriminate manner.

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179. *Id.* at 633.

180. *Id.*

181. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 25 (1973).

182. Nyquist, *Mainstreaming: Idea and Actuality*, Univ. of the State of N.Y., State Ed. Dep't, (undated paper), at 5.

183. *Id.*

184. *Id.*

185. *Id.*

186. 20 U.S.C. § 1401(1) (Supp. V 1975).

187. *Id.* § 1414(a)(5).

188. *Id.* § 1412(5)(C).

While the Act officially labels certain individuals as "handicapped," it prevents their being burdened with the label "unworthy of education."<sup>189</sup> The Act gives statutory force to a proposition, held for a long time by medical and educational professionals and recognized by the *PARC* court, that all handicapped persons are capable of benefitting from an education or training program.<sup>190</sup> Again, the benefit of this recognition of the handicapped's potential accrues not only to the handicapped person but to society as well. As the public is made more aware of a handicapped person's capabilities, it will benefit from the contribution he makes as a productive employee and as a participant in community life.

### 3. *Due Process Safeguards*

Finally, the procedural safeguards of the Act assure to the handicapped the right to an education as a matter of due process when it is supplied to other school-age children.<sup>191</sup> Unlike the right to an education per se, which has not been recognized by the courts as a Constitutional right,<sup>192</sup> the rights enumerated in the statute spring from the fact that the states have compulsory education laws. As the Supreme Court pointed out in *Goss v. Lopez*,<sup>193</sup> the right to an education is a property interest created by state statutes and rules.<sup>194</sup> The Court found that once a certain class is entitled generally to a right, it cannot be withdrawn without due process of law.<sup>195</sup>

### 4. *Enforcement*

Recognition of the right to an education through the Act is not sufficient. That right and all those that accompany it must be enforced. To that end, the proposed regulations<sup>196</sup> indicate the interrelationship between Part B of the Education for All Handicapped Children Act and the Rehabilitation Act of 1973.<sup>197</sup> One of the major roles of the Rehabilitation Act is to hasten and help enforce compliance with the Education for All Handicapped Children Act [1975 Act].<sup>198</sup> The provisions of the Rehabilitation Act, however, are designed to apply even if a state or locality decides not to receive funds under the 1975 Act.<sup>199</sup> The Rehabilitation Act, which prohibits discrimination on the basis of handicap in any program receiving federal funds, is based on the principle that the handicapped may require different treatment from the non-handicapped in

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189. 2 LEGAL RIGHTS OF THE MENTALLY HANDICAPPED 837 (B. Ennis and P. Friedman eds. 1973).

190. 343 F. Supp. 279, 296 (E.D. Pa. 1972).

191. 20 U.S.C. § 1415 (Supp. V 1975). This section requires that parents be allowed to examine their child's records, that parents receive notice if their child's classification is changed, and that all parents' complaints be handled through an impartial due process hearing.

192. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

193. 419 U.S. 565 (1975). This case involved the suspension of public school children without a hearing. The Court held that such action violated the due process clause of the federal Constitution.

194. *Id.* at 572-73.

195. *Id.* at 574.

196. 41 Fed. Reg. 56,967 (1976).

197. 29 U.S.C. §§ 701-794 (Supp. V 1975), as amended by Rehabilitation Act Amendments of 1974, 29 U.S.C. §§ 701-794 (Supp. V 1975).

198. 41 Fed. Reg. 20,341 (1976).

199. 41 Fed. Reg. 56,967 (1976).

order to be afforded equal access to federally assisted programs and activities.<sup>200</sup>

The Rehabilitation Act's definition of the term "handicapped" is broader than that in the 1975 Act. According to the statute, a handicapped person is one who "(A) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (B) has a record of such impairment, or (C) is regarded as having such impairment."<sup>201</sup> In addition to protecting the currently handicapped, the Rehabilitation Act also protects people incorrectly identified as handicapped; and it protects those who no longer suffer a handicapping condition,<sup>202</sup> thereby eliminating prejudice because of a prior handicap.<sup>203</sup> The regulations that accompany the statute set out in great detail what steps must be taken to eliminate discrimination of the handicapped.<sup>204</sup>

A potential problem posed by the 1975 Act, how to inform the eight million handicapped and their parents of their rights, is resolved by the Rehabilitation Act. The regulations state that a recipient of federal funds has a responsibility to "implement specific and continuing steps"<sup>205</sup> to notify applicants, employees, participants, and other concerned persons that the recipient does not discriminate on the basis of handicap. These efforts coupled with state-wide publicity campaigns such as the one mandated in *Mills*,<sup>206</sup> and advertising by private organizations<sup>207</sup> will increase the effectiveness of the 1975 Act by ensuring that most people potentially affected by the Act are aware of its provisions.

### 5. Long Range Benefits

The principal value of the Rehabilitation Act is its capacity to transform the Education for All Handicapped Children Act from a temporary measure to a permanent remedy against the impact of chronic societal indifference. Since under the 1975 Act states need not provide direct services for handicapped persons once they reach the age of twenty-one,<sup>208</sup> handicapped adults must look to the Rehabilitation Act to provide continuing assistance. For the handicapped, free public education is not so much a goal as an indispensable step toward the ultimate aim of self-sufficiency. As long as the handicapped must depend on society's largesse, autonomy is impossible. Education will do little for the handicapped if, once out of the schools, they are denied membership in the workforce, the one community that can provide self-sufficiency.

A new section of the 1975 Act states that "[t]he Secretary shall assure that each recipient of assistance under this chapter shall make positive efforts to employ and advance in employment qualified handicapped individuals in programs assisted under this chapter."<sup>209</sup> This section seems to have been added

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200. 41 Fed. Reg. 20,296 (1976).

201. 29 U.S.C. § 706(6) (Supp. V 1975).

202. 41 Fed. Reg. 20,305 (1976) (to be codified in 45 C.F.R. § 84.3(j)).

203. 41 Fed. Reg. 20,298 (1976).

204. 41 Fed. Reg. 20,304-11 (1976) (to be codified in 45 C.F.R. §§ 84.1-.54).

205. 41 Fed. Reg. 20,306 (1976) (to be codified in 45 C.F.R. § 84.9(a)).

206. 348 F. Supp. 866, 878 (D.D.C. 1972).

207. N.Y. Times, Dec. 18, 1975, at 83, col. 4.

208. See 20 U.S.C. § 1412(2)(B) (Supp. V 1975).

209. *Id.* § 1405.

as an afterthought since no provisions are made to guide its implementation. "Positive efforts" and "qualified," two key terms in this section, are nowhere defined. Thus employers are left with a margin by which they can exclude the handicapped as unsuited to work.

The Rehabilitation Act, on the other hand, contains employment provisions designed to cover any handicapped person, regardless of age or education status. The terms of this Act must be respected by all recipients of federal funds. Moreover, by incorporating the principle that the handicapped require special allowances in order to receive equal opportunity, the regulations make it difficult for an employer to disqualify an otherwise suitable handicapped person, even if adaptations must be made to adjust to his disability. One provision states that a recipient of federal funds must make a reasonable accommodation to the known physical or mental limits of a handicapped person, unless it can show that this accommodation "would unduly burden the operation of its program."<sup>210</sup> Such accommodation includes freeing handicapped persons from tasks which would be difficult for them but could be performed easily by non-handicapped workers.<sup>211</sup>

The vocational training provisions of the Rehabilitation Act<sup>212</sup> can also enlarge the opportunities of the handicapped adult. These provisions emphasize training for the most severely handicapped<sup>213</sup> and authorize grants for special projects in vocational rehabilitation and new career training.<sup>214</sup> Although such grants are available to all handicapped persons, those with spinal cord injuries, the deaf, and the older blind receive particular attention.<sup>215</sup>

## VI CONCLUSION

At first glance, the Education for All Handicapped Children Act appears to be a revolution not only in education but also in human relations. The Act demands that society both recognize the rights of the handicapped and accept the handicapped as individuals and fellow citizens. But, as Wendell Phillips said, "Revolutions are not made; they come."<sup>216</sup> The Act is not the prelude to a new attitude toward the handicapped but a reflection of change that has already occurred. As milestones like the *PARC* and *Mills* cases and the Massachusetts statute indicate, many people have already embraced the attitudes that the Act has codified.

Unfortunately, the Education for All Handicapped Children Act is flawed. Questions remain with regard to the operation of certain provisions. Teachers who are unfamiliar with mainstreaming techniques<sup>217</sup> will find that teaching special children requires training as well as willingness. Congress and the

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210. 41 Fed. Reg. 20,307 (1976) (to be codified in 45 C.F.R. § 84.12(a)).

211. 41 Fed. Reg. 20,300 (1976).

212. 29 U.S.C. §§ 770-774 (Supp. V 1975).

213. *Id.* § 772(b)(1).

214. *Id.* § 774(b).

215. *Id.*

216. Speech before the Anti-Slavery Society of Boston (Jan. 28, 1852), reprinted in W. PHILLIPS, SPEECHES, LECTURES, AND LETTERS 36 (1891).

217. See text accompanying note 120 *supra*.

states, already burdened by tight budgets, may balk at expending the great sums the Act requires. Handicapped students may be incorrectly evaluated, even when evaluations are conducted with care.

Despite its flaws, the Act has a good prospect of success. Initially, teachers, citizens, and members of Congress may hesitate to accept the new priorities the Act imposes. The Act will be recognized as timely and necessary once it proves educationally successful, more people recognize the handicapped's right to an education, and the financial and personal costs of not educating the handicapped become apparent. Specific regulations will correct many flaws; those that remain seem a fair price to pay for the benefits the Act provides. Educating the handicapped will help them to be independent and will make it possible for them to contribute to, and not draw upon, society's resources. Equally important, the humanitarian dimension of the Act will enable the handicapped to assume their position in the community with dignity.

JO ANN ENGELHARDT