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COMMENTS

THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT SINCE 1975

The concept of public education emerged as an essential component of American society at the time of the Industrial Revolution.1 It was not until 1954, however, that it was determined that such an education, when provided by a state, must be made available on equal terms to all individuals.2 Twenty years later the United States Congress took steps to guarantee the availability of a public education to handicapped children with its enactment of the Education for All Handicapped Children Act of 1975 (EHA or “the Act”).3 This Comment will address four separate aspects of the EHA. Part I will set forth the history of the Act. Part II will analyze its intent. Part III will concentrate on the Act’s substantive and procedural requirements. Finally, Part IV will look at a few prob-


With the coming of the Industrial Revolution, however, major changes occurred in the family’s functions, both as an economic unit and as the training grounds for children. As work organizations developed outside of the family, children became occupationally mobile and sought employment in manufacturing, commercial, or business enterprises. Just as families lost much of their self-sustaining productivity function, so also they lost many of their welfare functions, including the primary responsibility for training children. As a result of these societal developments, the education and training a child received came to be of interest to all of the people in the community, not just to his prospective employers, for without an adequate education he might someday become dependent upon them for his support. Few people in these early times ever thought of an “equal educational opportunity”; rather, the need was for a “general educational opportunity” that provided adequate training or schooling to enable the child in later life to perform some productive and self-supporting role in society. In sum, the public interest served by education emerged when children and men began to employ their labor outside the family, and this “paved the way for public education.”

Id. For a general discussion of legal issues pertaining to public education, see E. REUT-TER, JR. & R. HAMILTON, THE LAW OF PUBLIC EDUCATION (1970).


lem areas which have arisen in the ten years since the Act's implementation, and discuss possible modes of response.

I. THE HISTORY OF THE EHA

In *Brown v. Board of Education*, the United States Supreme Court assessed the constitutionality of state laws permitting or requiring the segregation of white and black children in public schools. "This segregation was alleged to deprive the plaintiffs of the equal protection of the laws under the Fourteenth Amendment." At the lower court levels, a "separate but equal" doctrine was consistently applied, resulting in a supposedly constitutional equality of treatment because "the races [were] provided substantially equal facilities," even though the facilities were separate.

The Supreme Court concluded that the "separate but equal" doctrine had no place in the field of public education due to the inherent inequality of intangible educational considerations. In view of this, the Court determined that a state which has undertaken to provide the opportunity of education must do so "to all on equal terms" in order to comply

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6. 347 U.S. at 488. Section 1 of the fourteenth amendment to the United States Constitution provides in part:

   No State shall ... deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1 (emphasis added).

7. 347 U.S. at 488. The plaintiffs contended that segregated public schools were not "equal" and could not be made "equal." Therefore, they argued, the "separate but equal" doctrine deprived them of equal protection of the laws under the fourteenth amendment. See id.

8. See id. at 492-95. The Court discussed various intangible considerations, including the ability to study with other students, the opportunity for open discussions and exchanges of views, the feeling of inferiority which results from segregation, and the psychological impact segregation has on the educational and mental development of black children.

9. The United States Supreme Court has never held that the right to a public education is a fundamental right, that is, one secured by the federal Constitution. See, e.g., *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973), *reh'd denied*, 411 U.S. 959 (1973). Therefore, the equal educational opportunity doctrine only applies to states which have undertaken to provide public education. See Alschuler, *Education for the Handicapped*, 7 J. L. & EDUC. 523, 524-26 (1978).

10. 347 U.S. at 493.
with the equal protection clause of the fourteenth amendment.\textsuperscript{11}

Despite the Court's pronouncement in \textit{Brown}, it was still many years before the equal educational opportunity doctrine was applied specifically to handicapped children.\textsuperscript{12} The United States Congress first took action in this regard with an amendment to the Elementary and Secondary Education Act of 1966.\textsuperscript{13} Thereafter, Congress began to realize the necessity of providing financial, in addition to procedural, assistance to the states for the improvement of handicapped programs.\textsuperscript{14} In response to this concern, Congress repealed the handicapped provisions of the Elementary and Secondary Education Act of 1966 and created a separate Education of the Handicapped Act in 1970.\textsuperscript{15} This act authorized the availability of financial grants to states to assist in "initiating, expanding and improving programs for the education of handicapped children."\textsuperscript{16}

Increased recognition of the right of handicapped children to a public education prompted many parents to challenge the constitutionality of restrictive state regulations. As a result, the courts began to accept "the fact that handicapped children [had] been in a disadvantaged position similar to that of other

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\textsuperscript{11} Id. at 495.
\textsuperscript{12} See R. M\textsc{artin}, \textsc{Educating Handicapped Children} 11-13 (1979), for a discussion of two reasons behind the exclusion of handicapped children from public schools: "The first was that the persons being injured were not recognized as having rights that they could complain about. The second was a rigid definition of education." \textit{Id.} at 11.
\textsuperscript{13} See Pub. L. No. 89-750, § 161, 80 Stat. 1204 (1966). See also the Senate report on the EHA where it discusses the 1966 amendments:
Prior to that time, the Federal Government had done little to assist in the education of handicapped children, and the effectiveness of existing programs was dissipated by the lack of a single strong administrative body. The Bureau of Education for the Handicapped was established by this law in order to provide the leadership necessary in this field.
\end{flushleft}
minorities and that educational opportunity is their legal right."\(^{17}\)

In 1971, the Pennsylvania Association for Retarded Children (PARC) prevailed over the Commonwealth of Pennsylvania in what is now considered to be the landmark case pertaining to the right to education of handicapped children.\(^{18}\) Prior to the PARC decision, children in Pennsylvania could be excluded from public schools if they were certifiably unable to benefit from education.\(^{19}\) The PARC case resulted in a consent decree recognizing the legal right to public education on the part of handicapped children, as guaranteed by the fourteenth amendment equal protection clause.\(^{20}\)

One month after the resolution of PARC, a class action was filed in the District Court for the District of Columbia alleging that the exclusion of handicapped children from publicly supported education was unconstitutional.\(^{21}\) To reach its decision, the district court in Mills v. Board of Education of

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20. See id. at 1259-60. The district court concluded:

Expert testimony in this action indicates that all mentally retarded persons are capable of benefiting from a program of education and training; that the greatest number of retarded persons, given such education and training, are capable of achieving self-sufficiency, and the remaining few, with such education and training, are capable of achieving some degree of self-care; that the earlier such education and training begins, the more thoroughly and the more efficiently a mentally retarded person will benefit from it; and, whether begun early or not, that a mentally retarded person can benefit at any point in his life and development from a program of education and training.

Id. at 1259. Because Pennsylvania provided a free public education to all regular and exceptional children aged 6 through 21, the court reasoned that the equal protection clause of the fourteenth amendment prohibited the state from denying "any mentally retarded child access to a free public program of education and training," the need for which is demonstrated above. Id. at 1259.

The United States Supreme Court relied on the fourteenth amendment and similar reasoning in the Brown decision 17 years earlier. See supra text accompanying note 11.
District of Columbia\textsuperscript{22} relied on the holdings of Brown\textsuperscript{23} and an earlier District of Columbia District Court case, \textit{Hobson v. Hansen},\textsuperscript{24} in addition to its interpretation of federal regulations and the United States Constitution.\textsuperscript{25} The court concluded that the Board of Education of the District of Columbia must not only provide an equal education for handicapped children,\textsuperscript{26} but also afford a "constitutionally adequate prior hearing and periodic review of their status, progress, and the adequacy of any educational alternatives."\textsuperscript{27}

After the successful conclusions of \textit{PARC} and \textit{Mills}, thirty-six additional right-to-education suits were filed on behalf of handicapped children.\textsuperscript{28} It thus became increasingly apparent to Congress that the time had come for the federal government to establish detailed standards pertaining to the

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    \item \textsuperscript{22} 348 F. Supp. 866 (D.D.C. 1972).
    \item \textsuperscript{24} 269 F. Supp. 401 (D.D.C. 1967). The court in \textit{Hobson} found the denial to poor public school children of the educational opportunities available to more affluent public school children unconstitutional:
        - From these considerations the court draws the conclusion that the doctrine of equal educational opportunity - the equal protection clause in its application to public school education - is in its full sweep a component of due process binding on the [school] District under the due process clause of the Fifth Amendment. \textit{Id.} at 493 (footnote omitted).
    \item \textsuperscript{25} \textit{See} 348 F. Supp. at 873. The court stated: "Plaintiffs' entitlement to relief in this case is clear. The applicable statutes and regulations and the Constitution of the United States require it." \textit{Id.}
    \item \textsuperscript{26} \textit{See id.} at 874. The court determined:
        - Thus the Board of Education has an obligation to provide whatever specialized instruction that will benefit the child. By failing to provide plaintiffs and their class the publicly supported specialized education to which they are entitled, the Board of Education violates the above statutes and its own regulations. \textit{Id.}
    \item \textsuperscript{27} \textit{Id.} at 878. The court further discussed:
        - The defendants are required by the Constitution of the United States, the District of Columbia Code, and their own regulations to provide a publicly-supported education for these "exceptional" children. Their failure to fulfill this clear duty to include and retain these children in the public school system, or otherwise provide them with publicly-supported education, and their failure to afford them due process hearing and periodical review, cannot be excused by the claim that there are insufficient funds. \textit{Id.} at 876. The issue of insufficient funding is discussed in more detail \textit{infra} note 39 and accompanying text. \textit{See S. Goldberg, supra} note 17, at 3-4; \textit{see also R. Martin, supra} note 12, at 14-15.
    \item \textsuperscript{28} R. Martin, \textit{supra} note 12, at 15. \textit{See generally S. Goldberg, supra} note 17, at 3.
\end{itemize}
education of handicapped children. Congress' first response was the enactment of section 504 of the Rehabilitation Act of 1973. This section outlawed handicap-based discrimination in any program, including public education, which received direct or indirect federal financial assistance.

Section 504 was not sufficiently clear regarding its applicability to public education, however. This prompted Congress to act in a more specific manner. In 1974, an interim statute was enacted to enable Congress to analyze the handicapped situation. "The ensuing year of study culminated in the Education for All Handicapped Children Act of 1975."

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   No otherwise qualified handicapped individual in the United States, as defined in . . . this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service . . . .
   Federal regulations promulgated pursuant to § 504, adopted in 1977, were originally codified at 45 C.F.R. § 84 (1984). They now exist at 34 C.F.R. § 104 (1984) and provide for enforcement by the Office of Civil Rights of the Department of Education. See generally S. GOLDBERG, supra note 17, at 4, 189-223; R. MARTIN, supra note 12, at 17-20.
32. See R. MARTIN, supra note 12, at 18.
34. One author observed:
   Dissatisfied with the progress being made under these earlier enactments, and spurred by two district court decisions holding that handicapped children should be given access to a public education, Congress in 1974 greatly increased federal funding for education of the handicapped and for the first time required recipient States to adopt "a goal of providing full educational opportunities to all handicapped children." The 1974 statute was recognized as an interim measure only, adopted "in order to give the Congress an additional year in which to study what if any additional Federal assistance [was] required to enable the states to meet the needs of handicapped children."
and the promulgation of implemental regulations by the Department of Health, Education and Welfare in 1977.36

II. THE PURPOSE OF THE ACT

At the time the EHA was enacted, only about half of the nation's eight million handicapped children were receiving an education appropriate to their developmental needs.37 Prior legislative and judicial actions taken at both the state and national levels, while having resulted in some progress, had failed to adequately establish an equal and complete educational system for handicapped children.38 At the root of this developmental lag was the insufficiency or total unavailability of the financial resources necessary to assure handicapped children a "free appropriate public education."39 Although it had been held that "the lack of funding [could] not be used as an excuse for failing to provide educational

36. Originally codified at 45 C.F.R. § 121a; these regulations now exist at 34 C.F.R. § 300 (1984).


39. See S. Rep. No. 168, supra note 13, at 8, reprinted in 1975 U.S. CODE CONG. & AD. NEWS at 1432. The Senate report identified inadequate funding as the basis of both inappropriate and nonexistent educational services to handicapped children. See infra notes 45, 47-49 and accompanying text.

See also Comment, supra note 34, at 1050, in which the author stated: "Congress passed the Education for All Handicapped Children Act [of 1975] in response to its perception that a majority of this nation's handicapped children 'were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to "drop out."' " Id. (citing H.R. Rep. No. 332, 94th Cong., 1st Sess. 2 (1975)). The Act therefore provided that the necessary "federal money may be expended to assist state and local agencies in educating handicapped children, and conditions this assistance upon a state's compliance with extensive goals and procedures."

40. See S. Rep. No. 168, supra note 13, at 8, reprinted in 1975 U.S. CODE CONG. & AD. NEWS at 1432. The term "free appropriate public education" appears extensively throughout the EHA. Its interpretation has been the subject of much debate and litigation. See infra notes 115-47 and accompanying text for a more complete discussion in this regard.
services," in many instances it became financially impossible for the states to implement the services required.

Public Law No. 94-142 was therefore proposed "to establish and protect the right to education for all handicapped children and to provide assistance to the States in carrying out their responsibilities under State law and the Constitution of the United States to provide equal protection of the laws." As the constitutional right to a public education on the part of handicapped children was not in issue, it is clear that the overall intent of the EHA was primarily one of financial assistance.


42. S. Rep. No. 168, supra note 13, at 7-8, reprinted in 1975 U.S. CODE CONG. & AD. NEWS at 1431-32. See also Comment, supra note 34, at 1050.


44. See supra notes 9 & 20 and accompanying text for a discussion of a state's constitutional obligation to provide an equal educational opportunity to handicapped children.


The Senate report discussed the effect of insufficient funding and remedial assistance on handicapped education programs:

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

There is no pride in being forced to receive economic assistance. Not only does this have negative effects upon the handicapped person, but it has far reaching effects for such person's family.

Providing educational services will ensure against persons needlessly being forced into institutional settings. One need only look at public residential institutions to find thousands of persons whose families are no longer able to care for them and who themselves have received no educational services. Billions of dollars are expended each year to maintain persons in these subhuman conditions. This Nation has long embraced a philosophy [sic] that the right to a free appropriate public education is basic to equal opportunity and is vital to secure the future and the prosperity of our people. It is contradictory to that philosophy when that right is not assured equally to all groups of people within the Nation.
The Senate subcommittee examining the proposed legislation delineated six distinct purposes of the Act. These six objectives coupled the intent of financial assistance with the overriding concern for guaranteeing a free appropriate public education to all handicapped children.

In the first place, the Act was designed to “focus the distribution of funds to the States based on an incentive formula related to the actual delivery of services by a time certain to all handicapped children.” The new entitlement formula provided for payments based on the number of handicapped children eligible to receive services and a percentage of the incremental cost of educating a handicapped child above the average pupil expenditure in a public school system.

Certainly the failure to provide a right to education to handicapped children cannot be allowed to continue.

Parents of handicapped children all too frequently are not able to advocate the rights of their children because they have been erroneously led to believe that their children will not be able to lead meaningful lives. However, over the past few years, parents of handicapped children have begun to recognize that their children are being denied services which are guaranteed under the Constitution. It should not, however, be necessary for parents throughout the country to continue utilizing the courts to assure themselves a remedy. It is this Committee's belief that the Congress must take a more active role under its responsibility for equal protection of the laws to guarantee that handicapped children are provided equal educational opportunity. It can no longer be the policy of the Government to merely establish an unenforceable goal requiring all children to be in school. S. 6 takes positive necessary steps to ensure that the rights of children and their families are protected.

Id. at 9, reprinted in 1975 U.S. CODE CONG. & AD. NEWS at 1433.

46. See id. at 13-14, reprinted in 1975 U.S. CODE CONG. & AD. NEWS at 1437-38.
47. See Haggerty & Sacks, supra note 38, at 984-93.

The Senate Report provided:

The Committee has adopted this formula in order to provide an incentive to States to serve all handicapped children and to assure that the entitlement is based on the number of children actually receiving special education and related services within the State and for whom the State or the local educational agency is paying for such education. It has, however, adopted a formula which assures stability in payment to States so that funds in each succeeding fiscal year will at least be equal to those received in the prior fiscal year.

Id. The Senate and the House differed as to the exact provisions of the formula to be adopted. See S. Conf. Rep. No. 94-455, 94th Cong., 1st Sess. 32, reprinted in 1975 U.S. CODE CONG. & AD. NEWS 1480, 1485. The Senate bill provided for financial assistance to each state of an amount equal to the number of children entitled to services multi-
The second stated objective of the EHA involved assuring "a priority in delivery of services to handicapped children most in need, i.e., those handicapped children who are not receiving educational services and those handicapped children with the most severe handicaps currently receiving an inadequate education."\(^{50}\) Targeting funds at the children most in need of services was perceived as an essential prerequisite to providing a full educational opportunity to all handicapped children within the timetable prescribed by the Act.\(^{51}\)

"[T]o provide an orderly process in the extension of service delivery," with "emphasis on providing early identification and assessment," was the third identified purpose of the EHA.\(^{52}\) The early identification of handicapping conditions and timely implementation of corrective services were thought

\(^{50}\) See S. Rep. No. 168, \textit{supra} note 13, at 15, \textit{reprinted in} 1975 \textit{U.S. Code Cong. \\& Ad. News} at 1439. The House amendments, on the other hand, provided:

The maximum amount of the grant which a State is entitled to receive in any fiscal year is equal to the number of handicapped children aged three to twenty-one, inclusive, in such State who are receiving special education and related services multiplied by a specified percentage of the average per pupil expenditure in public elementary and secondary schools in the United States. . . .

S. Conf. Rep. No. 94-455, \textit{supra} note 49 at 33, \textit{reprinted in} 1975 \textit{U.S. Code Cong. \\& Ad. News} at 1486-87. The specific percentages increased yearly from 5 percent during fiscal year 1978 to 40 percent for fiscal year 1982 and each subsequent year. This compares to the across-the-board 25 percent encompassed within the Senate version. It was the House's proposal which was incorporated into the final version of the EHA. \textit{See} 20 \textit{U.S.C.} § 1411(a) (1) (1982).


to be critical to the avoidance of further delays in a child's educational development.\(^{53}\)

The fourth objective of the EHA was to "provide and reinforce procedural protections for parents and children in all matters relating to the educational process."\(^{54}\) These procedural safeguards, the Act's cornerstone for the protection of handicapped rights, not only mandate increased parental awareness, but also enable both parent and child to challenge every aspect of the child's education.\(^{55}\)

Concerns about the discriminatory treatment which characteristically results from the identification of a handicapping condition,\(^ {56}\) and the danger of inadequate or inappropriate programs which could result from an erroneous classification,\(^ {57}\) formed the basis of the fifth purpose of the Act. This was to "focus directly on the problem of erroneous classification and labelling of children by setting a limitation on the population of children who may be counted as eligible for services, strengthening procedural guarantees, and providing a mechanism for compliance evaluation and investigation of complaints."\(^ {58}\)

Finally, the EHA was designed to "assure sole responsibility for the education of all handicapped children by the State

\(^{53}\) See S. Rep. No. 168, supra note 13, at 18, reprinted in 1975 U.S. CODE CONG. & AD. NEWS at 1442. For discussion of the schools' affirmative duty to provide a free public education to handicapped children, see also R. MARTIN, supra note 12, at 27-43.


\(^{55}\) S. GOLDBERG, supra note 18, at 32-36. R. MARTIN, supra note 12, at 97-120. For a detailed discussion of the procedural protections provided, see infra notes 93-110 and accompanying text.


\(^{58}\) S. Rep. No. 168, supra note 13, at 14, reprinted in 1975 U.S. CODE CONG. & AD. NEWS at 1438. Congress adopted a limitation of "12 per centum of the number of all children aged five to seventeen" in each state as the maximum number eligible for special services. 20 U.S.C. § 1411 (a) (3) (A) (i) (1982).

A limitation on the number of children who could be considered handicapped for the purpose of receiving aid was apparently necessary not only for preventing the erroneous classification of children, see S. Rep. No. 168, supra note 13, at 28, reprinted in 1975 U.S. CODE CONG. & AD. NEWS at 1452, but also for guaranteeing proper expenditure of federal funds. See generally id. at 14-15, reprinted in 1975 U.S. CODE CONG. & AD. NEWS at 1438-39.
educational agency.” This provision was specifically included to cure what Congress considered to be an abdication of responsibility on the part of various state agencies.

Congress relied upon its spending power to accomplish the foregoing goals in Public Law No. 94-142. Therefore, although the Act is not fundamentally binding upon the states, the requirements of the EHA have achieved nearly uniform implementation, both substantively and procedurally, throughout the nation.

III. THE REQUIREMENTS OF THE EHA

The EHA necessarily encompasses a wide variety of implemental provisions. However, to the parents of a handicapped child, two specific elements of the Act have been paramount to the educational development of their child. First, the EHA guarantees a standard of education commensurate with the child’s educational needs. Second, the Act provides a foundation of procedural safeguards which allows parents the right to participate in and challenge their child’s placement.

60. See id. at 24, reprinted in 1975 U.S. CODE CONG. & AD. NEWS at 1448. The Senate report observed that “while . . . different agencies may, in fact, deliver services, the responsibility must remain in a central agency overseeing the education of handicapped children, so that failure to deliver services or the violation of the rights of handicapped children is squarely the responsibility of one agency.” Id. See 20 U.S.C. § 1412(6) (1982) for the implementation of this intent.
61. The EHA has been described as a “categorical assistance grant program, which has the unique characteristic of voluntary participation. To encourage the states to meet the ambitious objectives of the Act, Congress provided federal funds to both state and local educational agencies.” Comment, supra note 34, at 1052.
63. See supra note 9 and accompanying text.
65. See, e.g., 20 U.S.C. § 1402 (1982) (establishing the Bureau for Education and Training of the Handicapped); id. § 1404 (federal funding for the construction of handicapped facilities); id. § 1405 (employment of handicapped individuals); id. § 1415 (procedural safeguards); id. § 1420 (state payments).
66. See Note, supra note 43, at 1103.
67. See 20 U.S.C. § 1412 (1) (1982). All handicapped children are guaranteed a free public education appropriate to their educational needs. For a definition of “free appropriate public education” see infra note 72.
Although each state is responsible for devising its own legal requirements pertaining to the education of handicapped children,\(^6\) compliance with the federal law and regulations is still necessary in order for a state to receive financial assistance.\(^7\) It is the federal format, then, that will be discussed in the following pages.

**A. Free Appropriate Public Education**

Section 1412 of the Act mandates that a state shall have "in effect a policy that assures all handicapped children the right to a free appropriate public education" if that state is to qualify for federal funding.\(^1\) Although the Act does define a "free appropriate public education" (FAPE),\(^2\) it is the regulations which delineate the step-by-step method for guaranteeing one.\(^3\)

In this regard, extensive evaluation and placement procedures are provided which must be followed strictly and updated frequently.\(^4\) When a handicapped child\(^5\) moves into a

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\(^{72}\) 20 U.S.C. § 1401(18) (1982) provides:

> The term 'free appropriate public education' means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program under section 1414(a)(5) of this title.

See infra note 77 for the definition of an “individualized education program.” See generally R. Martin, supra note 12, at 57-75.

\(^{73}\) See 34 C.F.R. § 300.1 (1984) which provides:

> The purpose of this part is: (a) To insure that all handicapped children have available to them a free appropriate public education which includes special education and related services to meet their unique needs, (b) To insure that the rights of handicapped children and their parents are protected, (c) To assist States and localities to provide for the education of all handicapped children, and (d) To assess and insure the effectiveness of efforts to educate those children.

See also id. §§ 300.300-349, 300.500-589.

\(^{74}\) 34 C.F.R. § 300.341(a) (1984) dictates that “[t]he State educational agency shall insure that each public agency develops and implements an individualized education program for each of its handicapped children.” Additionally, “at the beginning of each school year thereafter, each public agency shall have in effect an individualized education program for every handicapped child who is receiving special education from
particular school district or "comes of age" within the meaning of the Act,\textsuperscript{76} the first step is the development of an individualized education program (IEP).\textsuperscript{77} The IEP then forms the ba-

that agency." \textit{Id.} § 300.342(a). To "be in effect" does not mean the individualized education program must be reviewed and updated at the beginning of each school year. Rather, it means that the program

(1) has been developed properly (\textit{i.e.} at a meeting(s) involving all of the participants specified in the Act (parent, teacher, agency representative, and, where appropriate, the child)); (2) is regarded by both the parents and agency as appropriate in terms of the child's needs, specified goals and objectives, and the services to be provided; and (3) will be implemented as written.

\textit{Department of Education Policy Interpretation: IEP Requirements, 1 E.H.L.R. 103:46 (1981) (Question #3)} (hereinafter \textit{IEP Requirements}).

Therefore, the only requirement is that "[m]eetings must be conducted at least once each year to review and, if necessary, revise each handicapped child's IEP." \textit{Id.} These meetings may be held at any time during the year, however. \textit{Id.} at 103:47 (Question #9). \textit{See also} 20 U.S.C. § 1414 (a)(5) (1982).


The meaning of each of the elements within the Act's definition is provided by 34 C.F.R. § 300.5(b) (1984). While generally considered to be quite broad in scope, a "key element of most of these definitions is that the handicapping condition 'adversely affects educational performance.'" Stark, \textit{Tragic Choices in Special Education: The Effect of Scarce Resources on the Implementation of Pub. L. No. 94-142, 14 CONN. L. REV. 477, 481 (1982) (citing 34 C.F.R. § 300.5 (8) (i) (1981)).

76. "Each State shall insure that free appropriate public education is available... to all handicapped children aged three through twenty-one within the State... ." 34 C.F.R. § 300.300(a) (1984).

77. The Act defines an individualized education program as follows:

The term 'individualized education program' means a written statement for each handicapped child developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

sis and substance of the child's placement, acting as an educational directive to those who will be teaching him.\textsuperscript{78}

The local education association is responsible for initiating and conducting the meetings at which the IEP is developed.\textsuperscript{79} The child's parents may rightfully attend these meetings, along with various school officials and evaluation personnel.\textsuperscript{80} Specific requirements exist to assure both parental participation\textsuperscript{81} and the proper utilization of evaluation techniques.\textsuperscript{82}

\textsuperscript{78} As one author observed:

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. A system of regulations that prescribed a specific program for each type of handicap would inevitably ignore important differences among individuals. 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. The 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 . . . . 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 hearings officers who review their decisions. Note, \textit{supra} note 43, at 1108-09 (footnotes omitted). See \textit{infra} notes 116-47 and accompanying text for current issues relating to educational programs.

\textsuperscript{79} 34 C.F.R. \textsection 300.343(a)(1984). In the event that a handicapped child is served by a public agency other than the local educational agency, it is the state educational agency which is "ultimately responsible for ensuring that each agency in the State is in compliance with the IEP requirements and other provisions of the Act and regulations." \textit{IEP Requirements, supra} note 74, at 103:44 (Question \#1). The state educational agency is given responsibility for all educational programs in 20 U.S.C. \textsection 1412(6) (1982) and 34 C.F.R. \textsection 300.600 (1984). See \textit{supra} note 60 and accompanying text for the rationale behind this centralized responsibility. \textit{But compare IEP Requirements, supra} note 74, at 103:48 (Question \#11).

\textsuperscript{80} 34 C.F.R. \textsection 300.344 (1984). See \textit{IEP Requirements, supra} note 74, at 103:49-51 (Questions \#\#13-25) for policy interpretations pertaining to attendance at IEP meetings.

\textsuperscript{81} See 34 C.F.R. \textsection 300.345 (1984). In addition to notice requirements, this regulation also provides that "if neither parent can attend [the IEP meeting], the public agency shall use other methods to insure parent participation, including individual or conference telephone calls." \textit{Id.} \textsection 300.345(c). See also \textit{supra} note 55 and accompanying text.

\textsuperscript{82} See 34 C.F.R. \textsections 300.530-.534 (1984). If a child is suspected of having a specific learning disability, additional evaluation procedures are mandated. See \textit{id.} \textsections 300.540-.543. Children with specific learning disabilities are defined as,
Pursuant to regulation, the IEP must contain a “statement of the child’s present levels of educational performance,” both short-term and long-term goals, a listing of the special education and related services to be provided to the child.

those children who have a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. Such disorders include such conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. Such term does not include children who have learning problems which are primarily the result of visual, hearing, or motor handicaps, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.


83. 34 C.F.R. § 300.346(a) (1984). Suggested elements of such a statement include the effect of the child’s handicap on both academic and nonacademic educational performance, the results of objective diagnostic tests, and correlations between the child’s educational level and other aspects of the IEP. See IEP Requirements, supra note 74, at 103:55 (Question #36).

84. See 34 C.F.R. § 300.346 (b) (1984). The rationale behind the inclusion of short-term objectives and annual goals, in addition to at least one annual review of the IEP, is to provide a mechanism to determine:

(1) whether the anticipated outcomes for the child are being met (i.e., whether the child is progressing in the special education program) and (2) whether the placement and services are appropriate to the child’s special learning needs. In effect, these requirements provide a way for the child’s teacher(s) and parents to be able to track the child’s progress in special education. However, the goals and objectives in the IEP are not intended to be as specific as the goals and objectives in daily, weekly, or monthly instructional plans.

IEP Requirements, supra note 74, at 103:56 (Question #37).

The distinction between annual goals and short-term objectives is not only one of duration, but also of substance. Annual goals have been defined as “statements which describe what a handicapped child can reasonably be expected to accomplish within a twelve month period in the child’s special education program.” Id. (Question #38). Short-term objectives, on the other hand, are “measurable, intermediate steps between a handicapped child’s present levels of educational performance and the annual goals that are established for the child.” The short-term objectives “serve as milestones for measuring progress toward meeting the goals.” Id. (Question #39).

85. See 34 C.F.R. § 300.346(c) (1984). Special education is instruction which has been designed specifically, “at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.” 20 U.S.C. § 1401(16)(1982). See also 34 C.F.R. § 300.14 (1984).

Because each public educational agency is under an obligation to provide a FAPE to all handicapped children in its district, all special education and related services needed by the child must be included in the IEP, “even if they are not directly available from the local agency, and must be provided by the agency through contract or other arrangements.” IEP Requirements, supra note 74, at 103:57 (Question #44).

86. See 34 C.F.R. § 300.346 (c)(1984). The term “related services” includes:
the extent to which the child will be mainstreamed,⁸⁸ the date of implementation and duration,⁹⁰ and a method of evaluation.⁹⁰ Although extensive evaluation procedures need only

transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.


⁸⁷. See supra note 78 for a discussion of both the necessity and importance of an individual determination of the amount and type of special education and related services to be provided to each handicapped child.

⁸⁸. See 34 C.F.R. § 300.346(c)(1984). The concept of mainstreaming is a result of the congressional mandate that a handicapped child be placed in the least restrictive environment possible. See 20 U.S.C. § 1412 (5)(b) (1982). As a result, each public agency has the obligation to insure:

(1) That to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and (2) That special classes, separate schooling or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

34 C.F.R. § 300.550(b)(1984). See Stark, supra note 75, at 482. See generally R. Martin, supra note 12, at 85-95. See also infra note 131 (for a discussion of current issues involving mainstreaming).

⁸⁹. See 34 C.F.R. § 300.346(d)(1984). In general, the implementation of the IEP must take place immediately after it is finalized. Two exceptions to this exist: "(1) when the meetings occur during the summer or a vacation period, or (2) where there are circumstances which require a short delay (e.g., working out transportation arrangements)." Id. § 300.342 comment. Any such delay must be specified in the IEP. IEP Requirements, supra note 74, at 103:46 (Question #4).

The usual duration of an IEP is twelve months. This is a direct reflection of the short-term/annual goals structure required in an IEP. See supra note 84. In the event a child requires a specific service for more than twelve months, it is possible to project an IEP duration beyond that time period. The annual review and update required by regulation (see supra note 74) still applies, however, resulting in an annual reconsideration of the extended service duration. IEP Requirements, supra note 74, at 103:59 (Question #53).

⁹⁰. See 34 C.F.R. § 300.346(e)(1984). The method of evaluation must include "[a]ppropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether the short-term instructional objectives are being achieved." Id. For practical purposes, these evaluation components are usually incorporated directly into the IEP objectives. See IEP Requirements, supra note 74, at 103:59 (Question #54). See also supra note 84.
be conducted every three years, the child’s IEP must be reviewed annually and updated as necessary.

B. Procedural Protections

Procedural protections afforded to the parents of handicapped children generally fall within two broad categories. First, the educational agency has an obligation to go great lengths to achieve parental participation in preplacement evaluations. This includes elaborate notice requirements and the necessity of gaining parental consent prior to an evaluation or initial placement.

Second, a parent who is unhappy with any aspect of the child’s placement has the right to a full hearing on the matter before an impartial hearing officer. At the hearing, either or both parties may be represented by counsel, present

91. See 34 C.F.R. § 300.534(b)(1984). More frequent evaluations must be conducted, however, “if conditions warrant or the child’s parent or teacher requests an evaluation.” Id.

92. See supra note 74 and accompanying text.


94. See supra note 81 and accompanying text. See Stark, supra note 75, at 483. See also R. Martin, supra note 12, at 97-102, for a discussion of the stringent notice requirements within the regulations.


96. See id. § 300.504. Consent involves full disclosure to the parent of the circumstances in the parent’s native language, a written agreement to the activity for which consent is sought, and an understanding on the parent’s part that the consent is voluntary and may be revoked at any time. Compare id. § 300.504 (b)(2) which clearly states that “[e]xcept for preplacement evaluation and initial placement, consent may not be required as a condition of any benefit to the parent or child” (emphasis added).


98. See 20 U.S.C. § 1415(b)(2) (1982). See also 34 C.F.R. § 300.507(a) (1984), which provides:

A hearing may not be conducted: (1) By a person who is an employee of a public agency which is involved in the education or care of the child, or (2) By any person having a personal or professional interest which would conflict with his or her objectivity in the hearing.

Id.

evidence and cross-examine witnesses. Additionally, each party has the right to obtain a record of the hearing and receive a written copy of the decision. The parents alone, however, possess the right to determine whether the child involved should be present at the hearing and whether the hearing should be open to the public.

The decision rendered by the hearing officer is final and binding unless appealed. Any aggrieved party may appeal the hearing officer's decision to the state educational agency. If this occurs, the state agency conducts an impartial review of the hearing and thereafter renders a completely independent decision. This decision is once again final and binding unless an aggrieved party subsequently files a corresponding civil action.

Throughout the entire process, the child who is the subject of the controversy "must remain in his or her present educational placement." As a result, great concern exists to expedite the hearing and subsequent proceedings so as not to detrimentally affect the child's educational development. In view of this, specific time guidelines have been established for

GOLDBERG, supra note 17, at 35, for a discussion of the necessity of having counsel present at the hearing.

100. See 20 U.S.C. § 1415(d) (1982). See also 34 C.F.R. § 300.508(a)(2) (1984). In addition to the right to present evidence, both parties have the right to prevent the introduction of evidence which had not been disclosed at least 5 days prior to hearing. See id. § 300.508(a) (3). The regulations also afford each party the right to compel the attendance of witnesses. See id. § 300.508(a) (2). For a discussion of problems which may result from compelled witness attendance, see R. MARTIN, supra note 12, at 113-15.


102. See 20 U.S.C. § 1415 (d) (1982). See also 34 C.F.R. § 300.508(a) (5) (1984). In addition to the written decision, both parties also receive the findings of fact upon which the hearing officer based the decision. Id.

103. See 34 C.F.R. § 300.508(b) (1) (1984).

104. See id. § 300.508(b) (2).

105. See id. § 300.509.

106. See id. § 300.510(a).

107. See id. § 300.510(b). A review by the state educational agency consists of an examination of the hearing record, an evaluation of whether due process was afforded, the hearing of any additional evidence deemed necessary to the determination, and, at the discretion of the reviewing officer, an analysis of written and/or oral arguments. See id. § 300.510(b) (1) - (4). The right to counsel continues to all parties at this stage. See id. § 300.510 comment 2. See generally R. MARTIN, supra note 12, at 116-17.

108. See 34 C.F.R. § 300.510(e) (1984). See also id. § 300.511.

implementing the due process procedures, time guidelines which have proven to be quite unrealistic. This problem, along with others that have evolved since the Act’s implementing will be discussed in greater detail in the next section.

IV. CURRENT ISSUES PERTAINING TO THE EHA

Not surprisingly, the two elements of the Act which most concern parents of handicapped children have also been the two largest generators of problems and controversies. Challenges to both the substantive content of educational programs and the requisite due process procedures have produced much litigation. As a result, the EHA has been the victim of a wide range of interpretations. To date, the United States Supreme Court has analyzed provisions of the Act in only four instances. Two of these decisions attempted to give practical meaning to the requirement of a FAPE and will be discussed in the following pages, along with other issues which have yet to reach the steps of the nation’s highest judiciary.

A. Free Appropriate Public Education

As discussed above, the intent of the EHA is to guarantee a free appropriate public education to all handicapped children. Although the Act and regulations delineate procedural steps for deriving a FAPE, nowhere are functional standards set forth to determine when an education is, in fact, “appropriate” to the educational needs of a handicapped

110. See id. § 300.512. A decision must be reached and mailed to each party within 45 days of the receipt of a request for an initial hearing. If appealed, the state educational agency then has 30 days to render and mail its decision. See id. § 300.512(a) - (b). An extension of these timelines may be granted at the request of either party. See id. § 300.512(c).

111. See Note, supra note 64, at 950-51. See also Ekstrand, Doctor, Do You Make (School) House Calls?, CHILDREN TODAY, May-June, 1982, at 2, 3.


113. The Smith case will not be discussed in this Comment. That case presented several “questions regarding the award of attorneys fees in a proceeding to secure a ‘free appropriate public education’ for a handicapped child.” 104 S. Ct. at 3460. The Burlington case, relating to procedural issues, is discussed infra note 160.

114. See supra notes 67, 71-72 and accompanying text.

115. See supra notes 74-92 and accompanying text.
child.\textsuperscript{116} It was this issue that the Supreme Court addressed in \textit{Hendrick Hudson District Board of Education v. Rowley},\textsuperscript{117} the Court's first opportunity to interpret a provision of the EHA.\textsuperscript{118}

In \textit{Rowley},\textsuperscript{119} the Court recognized that the definition of a FAPE found within the Act "tends toward the cryptic rather than the comprehensive,"\textsuperscript{120} providing very little guidance to school administrators. Despite the fact that the definition itself was not very functional, the Court reasoned it was still the principal tool provided by Congress for construing that "critical phrase of the Act."\textsuperscript{121} By analyzing this definition in conjunction with the history of the Act,\textsuperscript{122} then the Court derived

\begin{itemize}
\item \textsuperscript{116} As one author commented regarding the vagueness of the FAPE requirements:
\begin{quote}
Attempts to attach a functional meaning to this elusive phrase have resulted in the emergence of a broad spectrum of definitions. The minimal standard of self-sufficiency suggests that an education program is appropriate if a child is taught the skills essential to being independent. At the opposite end of this spectrum are standards which suggest that 'free appropriate public education' is achieved only if the goal is to optimize the child's development.
\end{quote}

Note, \textit{supra} note 64, at 951 (footnotes omitted). \textit{See also} Note, \textit{supra} note 43, at 1125.
\item \textsuperscript{117} 458 U.S. 176 (1982).
\item \textsuperscript{119} Amy Rowley was an academically-gifted deaf student at the Furnace Woods School in the Hendrick Hudson Central School District. During the fall of her first grade year, an IEP was prepared for Amy that provided she would be educated in a regular classroom with supplemental instruction from a tutor for the deaf and a speech therapist. Amy's parents insisted that a qualified sign-language interpreter also be present in all of her academic classes. The school administrators, after consulting with various experts, concluded that a sign-language interpreter was not necessary.

The Rowleys then requested an impartial due process hearing, which resulted in a decision in favor of the school district. This was affirmed by the state educational agency. The United States District Court for the Southern District of New York reversed, based on a determination that the denial of the sign-language interpreter precluded Amy from receiving "an opportunity to achieve [her] full potential commensurate with the opportunity provided to other children." "The Court of Appeals for the Second Circuit subsequently affirmed the District Court's decision. The Supreme Court thereafter granted certiorari to review the decisions of the lower federal courts. 458 U.S. at 184-86 (citing Rowley v. Hendrick Hudson Dist. Bd. of Educ., 483 F. Supp. 528, 534 (S.D.N.Y.), aff'd per curiam, 632 F.2d 945 (2d Cir. 1980), rev'd and remanded, 458 U.S. 176 (1982)).
\item \textsuperscript{120} 458 U.S. at 188.
\item \textsuperscript{121} \textit{Id.}
\item \textsuperscript{122} \textit{See id.} at 188-204. \textit{See generally} \textit{supra} notes 13-36 and accompanying text.
what it considered to be a "tolerable"\textsuperscript{123} standard for regulating the content of educational programs:

Insofar as a State is required to provide a handicapped child with a "free appropriate public education," we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to \textit{benefit educationally} from that instruction. Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP. In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.\textsuperscript{124}

By so stating, the Court concluded that equal access, rather than equal educational opportunity, was the goal of the Act.\textsuperscript{125} The Court established a "basic floor of opportunity"\textsuperscript{126} which need only "be sufficient to confer \textit{some educational benefit} upon the handicapped child."\textsuperscript{127} By attempting

\begin{footnotesize}
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\item 123. See 458 U.S. at 203.
\item 124. \textit{Id.} at 203-04 (emphasis added).
\item 125. \textit{See id.} at 200. The Court reasoned:

\begin{quote}
The educational opportunities provided by our public school systems undoubtedly differ from student to student depending upon a myriad of factors that might affect a particular student's ability to assimilate information presented in the classroom. The requirement that States provide "equal" educational opportunities would thus seem to present an entirely unworkable standard requiring impossible measurements and comparisons. Similarly, furnishing handicapped children with only such services as are available to non-handicapped children would in all probability fall short of the statutory requirement of "free appropriate public education"; to require, on the other hand, the furnishing of every special service necessary to maximize each child's potential is, we think, further than Congress intended to go. Thus to speak in terms of "equal" services in one instance gives less than what is required by the Act and in another instance more. The theme of the Act is "free appropriate public education", a phrase which is too complex to be captured by the word "equal" whether one is speaking of opportunities or services.
\end{quote}

\item 126. 458 U.S. at 201.
\item 127. \textit{Id.} at 200 (emphasis added). In other words, "the requirement that a state provide specialized educational services to handicapped children generates no addi-
\end{itemize}
\end{footnotesize}
to derive a functional standard for the governance of FAPEs, the Court actually raised more questions than it answered.

In the first place, although the Court did give meaning to the Act's definition of a FAPE, it did so with another ambiguous standard. School officials and judges alike are now faced with the problem of determining exactly how much educational benefit qualifies as the requisite "some." In addition, the Court failed to consider the effect of conflicting professional opinions regarding educational benefits. In other words, given the proposition that a handicapped child

1. The Court did attempt to restrict its holding to the facts of Rowley: "We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act." Id. at 202. Lower courts, however, have ignored this limitation and have consistently applied the Rowley rationale to a myriad of fact situations. See, e.g., Rettig v. Kent City School Dist., 720 F. 2d 463 (6th Cir. 1983), cert. denied, 104 S. Ct. 2379, reh'g denied, 104 S. Ct. 3549 (1984); Springdale School Dist. No. 50 v. Grace, 693 F.2d 41 (8th Cir. 1982), cert. denied, 461 U.S. 927 (1983); Yaris v. Special School Dist., 558 F. Supp. 545 (E.D. Mo. 1983), affd, 728 F.2d 1055 (8th Cir. 1984); Lang v. Braintree School Comm. 545 F. Supp. 1221 (D. Mass. 1982).

2. One author observed:

The Supreme Court attempted to resolve the confusion surrounding the meaning of FAPE; however, the scope of special education and related services has yet to be clearly defined. Perhaps the Court intended that they be viewed with respect to the requirements of a beneficial education. However, if this were true, the Court generated more confusion in the area by failing to establish a test for determining the adequacy of educational benefits.

Note, supra note 118, at 646.

3. See, e.g., Frank v. Grover, 1982-83 E.H.L.R. DEC.554:148 (Wis. Cir. Ct.). See also Comment, supra note 34, at 1058, in which the author stated: "Logically, a point must come when the benefits a child reaps are so insubstantial that his education cannot be termed 'appropriate' under any standards." See generally Note, supra note 64, at 950-53; Note, supra note 125, at 198-200.

4. See, e.g., Hessler v. State Bd. of Educ., 700 F.2d 134 (4th Cir. 1983); In re Daniel B., #45 (Aug. 2, 1983) (before the Wisconsin State Superintendent of Public Instruction). See also Kirp, Buss & Kuriloff, Legal Reform of Special Education: Empirical Studies and Procedural Proposals, 62 CAL. L. REV. 40, 47 (1974), in which it is concluded that "[t]he 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." Id. at 47. See generally S. Goldberg, supra note 17, at 25-28.

One of the leading areas of professional disagreement concerns the concept of mainstreaming, as mandated by the Act's least restrictive environment requirement. See supra note 88. See, e.g., Roncker v. Walter, 700 F.2d 1058 (6th Cir.), cert. denied, 104
need not be provided with the best possible education, there exists no mechanism to determine between two lesser, but equally beneficial, educational programs. In view of present economic conditions and the increased cost of educating handicapped children, the minimum standard set forth by the Supreme Court in Rowley is clearly both realistic and warranted. In response, however, Congress must now act to amend the EHA to include substantive guidelines for following the dictates of the Court.


The "movement toward increased integration of handicapped students into regular classrooms" began in the sixties and early seventies as a result of the questionable effectiveness of educating handicapped children in separate classrooms. Note, supra note 43, at 1119. Special educators began to realize that the minor short-term benefits of segregation were greatly outweighed by the long-term benefits of mainstreaming, which include increased socialization, decreased stigmatization, a more positive self-image, a more advanced curriculum and more diverse educational opportunity. R. MARTIN, supra note 12, at 86-89. See generally Kesselman-Turkel & Peterson, Taking the Tough Route of Fairness, AM. EDUC., Jan.-Feb., 1981, at 6.

More recently, however, the concept of mainstreaming has encountered much criticism. Specialists fear that mainstrearning may place impossible demands upon the teacher and eventually lead to the neglect of all students in the classroom. Additionally, it is feared that necessary funds may be diverted from programs which would be more beneficial to a handicapped child. "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." Note, supra note 43, at 1121.

132. See supra note 127.

133. The preference for "equal access" over "equal opportunity" (supra note 125 and accompanying text) was a direct result of the questionable availability of sufficient funds "to finance all of the services and programs that are needed and desirable in the system. . . ." Rowley, 458 U.S. at 199 (citing Mills v. Board of Educ., 348 F. Supp. 866, 876 (D.D.C. 1972)).

See Department of Educ. v. Katherine D., 727 F.2d 809 (9th Cir. 1984), where the court discussed the effect of monetary factors on educational programs:

Noticeably absent from the Act is any requirement that the [Department of Education (DOE)] provide the best possible education for the eligible handicapped child. Because budgetary constraints limit resources that realistically can be committed to these special programs, the DOE is required to make only those efforts to accomodate Katherine's needs that are "within reason". Id. at 813 (citing Tokarcik v. Forest Hills School Dist., 665 F.2d 443, 455 (3d Cir. 1981), cert. denied, 458 U.S. 1121 (1982)). See also Comment, supra note 34, at 1045, in which the author points out: "The fiscal pressures of today's economy have imposed restraints upon the progress being made toward fulfilling the goal of a 'free appropriate public education.'"

134. Possibilities include mandating the development of IEPs which are reasonably calculated to achieve set minimum gains on certain objective tests, better utilization of the grading and advancement system currently used in public education, and more ex-
Obviously, the strongest dictate emanating from Rowley is the requirement of an "educational benefit" as a necessary element of a FAPE. The Court neglected to define, though, what exactly constitutes "education" so as to give rise to an educational benefit. However saddening it may be, "there is a category of mentally disabled children so severely impaired as to be unable to absorb or benefit from education." When, due to the severity of a handicap, a child is mentally not able to learn, it would seem that the school district should no longer be under an obligation to teach. Neither the Act nor Rowley, however, resolves this issue. As a result, lower court judges and hearing officers have differed in their responses. A clear congressional definition of education is of utmost importance, then, as it would serve to guarantee the proper utilization of limited special education resources by assuring that high paid professional educators are not transformed into high paid professional babysitters.

Another issue which has emerged from the Rowley definition of a FAPE concerns the extent to which related services must be included in a child's educational program. In 1984, the United States Supreme Court encountered a second opportunity to interpret the EHA in Irving Independent School District v. Tatro. There the Court was faced with the issue of whether clean intermittent catheterization (CIC) was a "related service" as defined by the EHA. The Court determined CIC satisfied the necessary requirements of the Act's
definition, thereby imposing an obligation on the school district to provide the service as part of the child's FAPE.

In so concluding, the Court established several limitations on the provision of related services. The greatest of these cautions that "only those services necessary to aid a handicapped child to benefit from special education must be provided." Once again, the Court set forth a legally sound, theoretical standard, but failed to devise concrete, substantive guidelines to aid special educators in determining when a service does, in fact, benefit a child's education.

The EHA was enacted with the intent of allowing the state much leeway in the formation of substantive requirements. The time has come, however, for Congress to withdraw some

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143. The Court analyzed two aspects of the definition of "related services": "first, whether CIC is a 'supportive service' . . . required to assist a handicapped child to benefit from special education'; and second, whether CIC is excluded from this definition as a 'medical service' serving purposes other than diagnosis or evaluation." \(\text{Id. at 3376.}\) The Court initially determined CIC was, in fact, a supportive service: "A service that enables a handicapped child to remain at school during the day is an important means of providing the child with the meaningful access to education that Congress envisioned." \(\text{Id. at 3377.}\) The Court then concluded that CIC was not a medical service, as medical services must be provided by a physician. Because CIC could be administered by a nurse or even a layman with minimal training, it clearly did not fall within the medical services category. \(\text{Id. at 3377-79.}\)

144. 20 U.S.C. § 1401 (18) (1982) provides that a FAPE includes both special education and related services. \(\text{See 104 S. Ct. at 3376.}\)

145. 104 S. Ct. at 3379.

146. \(\text{Id.}\) Other limitations involve the caveat that a child must be handicapped before special education and related services need to be provided, the fact that only CIC services and not equipment were being requested, and a reemphasis of the fact that services required to be performed by a physician do not have to be provided. \(\text{See id.}\)

147. \(\text{See supra notes 131-33 and accompanying text pertaining to the controversial "educational benefit" requirement. See also supra notes 137-39 and accompanying text regarding the ambiguous concept of "education."}\)

of this responsibility and provide more workable guidelines within the federal format. Because state funding is tied directly to compliance with federal regulations, both state legislators and, worse yet, school officials are left with the problem of trying to foresee what types of substantive requirements will withstand federal scrutiny. More comprehensive federal regulations would provide greater certainty to educators, decrease the amount of interpretive litigation, and ultimately reflect in a beneficial manner on the educational programs being provided to handicapped children.

B. Procedural Protections

One of the goals of the EHA was to provide procedural safeguards to parents in all matters relating to their child’s educational process. This goal has manifested itself in elaborate notice requirements, the opportunity to examine records, prerequisites of parental participation and consent, and extensive review procedures. Clearly, parental safeguards are essential due to the disparate positions held by parents and school districts. Just because the district controls the pursestrings and employs the professionals, however, does not eliminate the need, in some instances, to be able to enforce parental cooperation.

149. See supra note 70 and accompanying text. See also Note, supra note 43, at 1110, in which the author observes:

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 - 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. Id. (footnote omitted).

150. See supra notes 54-55 and accompanying text.
151. See supra note 95.
153. See supra notes 94, 96 and accompanying text.
154. See supra notes 97-108 and accompanying text.
155. One author noted that “[t]he due process procedures . . . exist to balance the inequality of bargaining position that exists between parents and education professionals by virtue of the latter’s professional knowledge, institutional position, and larger resource base.” Comment, Compensatory Educational Services and the Education for All Handicapped Children Act, 1984 Wis. L. REV. 1469, 1473-74.
It is not as rare as one might think that parents refuse to cooperate in some manner in the development of their child's educational program. Whether it be the withholding of consent for preplacement evaluations\(^\text{156}\) or the unilateral removal of the child from his current placement,\(^\text{157}\) uncooperative actions on the part of parents both stymie the district administrators and detrimentally affect the child's education progress.\(^\text{158}\) As the Act reads today, the school district must initiate a full-blown hearing in order to gain parental cooperation.\(^\text{159}\) For relatively minor things, such as obtaining consent to a preplacement evaluation, it would seem that less costly and more educationally advantageous options could be devised.

Just as parental non-compliance is harmful to the educational development of handicapped children, so too is stagnation at an improper placement due to pending reviews or appeals. As mentioned above, throughout the challenge process, the child who is the subject of the controversy is required to remain in his current educational placement.\(^\text{160}\) Although

\(^{156}\) See, e.g., Dubois v. Connecticut State Bd. of Educ., 727 F.2d 44 (2d Cir. 1984).

\(^{157}\) See, e.g., Rowe v. Henry County School Bd., 718 F.2d 115 (4th Cir. 1983).

\(^{158}\) See, e.g., Roe v. Milford School Comm., No. 80-1702-Z, slip op. at ___ (D. Mass. Feb. 4, 1983) ("Without the parents' cooperation and genuine desire to work out a satisfactory plan, the procedural requirement is nothing more than an empty ritual generating paper without hope of meaningful results.")

\(^{159}\) 34 C.F.R. \(\S\) 300.506(a) (1984).

\(^{160}\) See supra note 109 and accompanying text. The parents of a handicapped child were recently given a great financial incentive for maintaining their child's current placement during an appeal. The United States Supreme Court in Burlington v. Department of Educ., 105 S. Ct. 1996 (1985) determined that:

parents who unilaterally change their child's placement during the pendency of review proceedings, without the consent of state or local school officials, do so at their own financial risk. If the courts ultimately determine that the IEP proposed by the school officials was appropriate, the parents would be barred from obtaining reimbursement for any interim period in which their child's placement violated [20 U.S.C.] \(\S\) 1415(e)(3).

\(\text{Id.}\) at 2005.

This decision has placed the parents of a handicapped child whose placement is considered inappropriate in an extremely uncomfortable position. They are now faced with determining whether to risk potential damage to their child's educational progress by maintaining the current placement or, in the alternative, risk a potentially large financial loss by unilaterally altering what is later determined to be an appropriate placement.

The Court failed to specifically resolve this predicament. It can be presumed in view of its earlier discussion of the reimbursement issue, however, see id. at 2002-03 and infra
strict time guidelines have been established for each segment of the due process procedures,\textsuperscript{161} compliance is usually the exception rather than the rule.\textsuperscript{162} This appears to be the result of unrealistically short time requirements in the first place,\textsuperscript{163} augmented by increased litigation of EHA claims.\textsuperscript{164}

Longer timeframes are clearly not the answer, as the result would be an equal, if not greater, stagnation period for the child. Rather, the answer lies in reducing the number of parental challenges that reach the hearing and post-hearing stages. One method of doing this which has met with great success on a voluntary basis is the implementation of mediation prior to the hearing.\textsuperscript{165} Although currently not required

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\textsuperscript{161} See supra note 110.

\textsuperscript{162} See, e.g., Mark R. v. Board of Educ., 546 F. Supp. 1027 (N.D. Ill. 1982), aff'd, 705 F.2d 462 (7th Cir. 1983). The United States Supreme Court recognized this problem in the Burlington case. In determining whether the EHA required reimbursement to parents for a private school placement when the public school offering is deemed to be inappropriate, the Court employed in its decision the fact that "[a] final judicial decision on the merits of an IEP will in most instances come a year or more after the school term covered by that IEP has passed." 105 S. Ct. at 2003.

In view of this, the Court determined that the Act required the reimbursement of parents who have schooled their child privately when they were faced with inappropriate public school placement. Reimbursement was viewed as an essential element of "the child's right to a free appropriate public education, the parents' right to participate fully in developing a proper IEP, and all of the procedural safeguards." Id. (emphasis in the original). Without reimbursement, "it would be an empty victory to have a court tell them several years later that they were right but that these expenditures could not in a proper case be reimbursed by the school officials." Id.

\textsuperscript{163} See supra note 110. Given the regulatory language, it is easy to see why these time guidelines are rarely honored. For instance, to render a decision within 45 days of the receipt of a hearing request could very well be humanly impossible, especially in view of the hearing rights set forth in 34 C.F.R. § 300.508 (1984). See also supra notes 99-104 and accompanying text. Not only must time be taken to select a hearing officer and assemble necessary witnesses and evidence, but a typical briefing schedule alone would nearly deplete the 45 days allowed. This would leave little or no time for the hearing officer to make a rational and educated decision concerning the child's future. This seems completely contrary to the congressional intent of providing the due process procedures to guarantee the child's receipt of a FAPE.

\textsuperscript{164} See supra note 111.

\textsuperscript{165} See 34 C.F.R. § 300.506 comment (1984). See generally M. Budoff and A. Orenstein, Due Process in Special Education: On Going to a Hearing 305-
by regulation, mediation, when utilized, often "leads to resolu-
tion of differences between parents and agencies without the
development of an adversarial relationship and with minimal
emotional stress." Given its high success rate, in addition
to its positive relationship and emotional effects, Congress
should seriously consider requiring each state to provide me-
diation as an interim dispute resolution mechanism.

V. CONCLUSION

The determined efforts of both parents and legislators over
ten years ago have resulted in millions of handicapped chil-
dren gaining access to an educational system that had previ-
ously ignored them completely. These children are now being
provided with professional instruction and special services
gearied specifically to their educational needs. Many have also
been successfully mainstreamed into regular classes, to the
benefit of handicapped children and regular students alike.

Obviously, no federal legislation is, or could ever hope to
be, completely free of problems or controversies. In addition
to discussing the history, intent and substance of the EHA,
this Comment has focused directly on a few of the problem

07 (1982), discussing "The Need for Alternative Dispute Resolution Procedures." The
numerous benefits of negotiation in general, and mediation specifically, are set forth.
These benefits are summarized by the following excerpt:

Whereas law operates as a judgment upon acts, the negotiation process is di-
rected toward helping persons with ongoing relationships meet contingencies for
which rules may not provide explicit solutions. The central quality of the negoti-
ation is its capacity to reorient parties toward each other by helping them to
achieve a new shared perception of their interaction and by assisting in the devel-
opment of a program acceptable to both sides.

Id. at 306.

166. Id. See also R. Martin, supra note 12, at 109, for a discussion of mediation:
There are two reasons why mediation is a workable alternative to a full impartial
hearing. First, many parents who complain to schools are not taken seriously.
No one in authority will listen to them. But with the threat of an impartial
hearing, a mediator will suddenly listen. Some percentage of the complaints will
be found to be reasonable and mediation will work because someone finally paid
attention. Second, in many meetings in which the school does not agree with the
parents' complaint there is no incentive for schools to bend over backwards. But
under the threat of a full impartial hearing if the mediation fails, the school will
make extra efforts to work out something reasonable.

Id.

167. Obviously, a critique such as this could not be all encompassing. For further
discussions of special education issues, see generally supra note 131; S. Goldberg,
areas which have surfaced since the Act's implementation in 1975. In particular, this Comment has analyzed the ambiguity problems inherent in the requirements of a FAPE and related services. In addition, several of the Act's procedural deficiencies were identified and discussed. Congress must now take action and amend the EHA to alleviate these problems. Failure to do so will ultimately harm the very same educational programs the Act was designed to protect.

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