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## The Repudiation of Plato: A Lawyer's Guide to the Educational Rights of Handicapped Children

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# THE REPUDIATION OF PLATO: A LAWYER'S GUIDE TO THE EDUCATIONAL RIGHTS OF HANDICAPPED CHILDREN

*Robert E. Shepherd, Jr.\**

The offspring of the good, I suppose, they will take to the pen or creche, to certain nurses who live apart in a quarter of the city, but the offspring of the inferior, and any of those of the other sort who are born defective, they will properly dispose of in secret, so that no one will know what has become of them.

Plato, *The Republic*<sup>1</sup>

Plato's solution for the handicapped children of Athens advanced some 2400 years ago was rejected by the Supreme Court of the United States in famous dictum in *Meyer v. Nebraska*<sup>2</sup> as being "ideas . . . wholly different from those upon which our institutions rest . . ."<sup>3</sup> However, it took about half a century for the ultimate repudiation of the ideas espoused by the great philosopher as the Supreme Court's 1923 dictum finally bore fruit in federal court decisions establishing a constitutional right to education for handicapped children<sup>4</sup> and in a congressional definition of such a right in the Education for All Handicapped Children Act of 1975.<sup>5</sup> These actions of the last decade have not only put to rest the ancient view that handicapped persons are of no worth and should be set apart or destroyed but they have also wrought at least a small revolution in the delivery of educational and other services to such persons.

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1. 1 PLATO, *THE REPUBLIC* 463 (P. Shorey trans. 1930).

2. 262 U.S. 390 (1923).

3. *Id.* at 402.

4. See, e.g., *Mills v. Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972); *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971), *modified*, 343 F. Supp. 279 (E.D. Pa. 1972).

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

The central purpose of this article is not to explore the constitutional doctrines or theories implicit in the existence of a right to education for handicapped children,<sup>6</sup> nor is it to examine the policies advanced by the federal and state legislation and regulations,<sup>7</sup> for both of these functions have been served well in other forums.<sup>8</sup> The intent here is to provide the general practitioner of the law, or the legal specialist in areas other than education, or the sophisticated lay advocate with a practice manual to guide them through the processes afforded to adjudicate the educational rights of handicapped children.<sup>9</sup> The particular bias of the article is in favor of a

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6. See, e.g., Alschuler, *Education for the Handicapped*, 7 J. LAW & EDUC. 523 (1978); Burgdorf & Burgdorf, *A History of Unequal Treatment: The Qualification of Handicapped Persons as a "Suspect Class" Under the Equal Protection Clause*, 15 SANTA CLARA L. REV. 855 (1975); Dimond, *The Constitutional Right to Education: The Quiet Revolution*, 24 HASTING L.J. 1087 (1973); McCarthy, *Is the Equal Protection Clause Still a Viable Tool for Effecting Educational Reform*, 6 J. LAW & EDUC. 159 (1977); McClung, "Do Handicapped Children Have a Legal Right to a Minimally Adequate Education?", 3 J. LAW & EDUC. 153 (1974); Zettel & Abeson, *The Right to a Free Appropriate Education*, THE COURTS AND EDUCATION 188 (C. Hooker ed. 1978) [hereinafter cited as Zettel & Abeson]; Project, *Education and the Law: State Interests and Individual Rights*, 74 MICH. L. REV. 1373 (1976); Note, *The Right to Education: A Constitutional Analysis*, 44 CIN. L. REV. 796 (1975); Note, *The Right of Handicapped Children to an Education: The Phoenix of Rodriguez*, 59 CORNELL L. REV. 519 (1974); Comment, *The Handicapped Child Has a Right to an Appropriate Education*, 55 NEB. L. REV. 637 (1976); Comment, *Toward a Legal Theory of the Right to Education of the Mentally Retarded*, 34 OHIO ST. L. J. 554 (1973).

7. See, e.g., Baugh, *The Federal Legislation on Equal Educational Opportunity for the Handicapped*, 15 IDAHO L. REV. 65 (1978); Moore & Bulman, *Recent Changes in the Law Affecting Educational Hearing Procedures for Handicapped Children*, 7 U. BALT. L. REV. 41 (1977); Stafford, *Education for the Handicapped: A Senator's Perspective*, 3 VT. L. REV. 71 (1978); Weinstein, *Education of Exceptional Children*, 12 CREIGHTON L. REV. 987 (1979); Contemporary Studies Project, *Special Education: The Struggle for Equal Educational Opportunity in Iowa*, 62 IOWA L. REV. 1283 (1977); Note, *Children Requiring Special Education: New Federal Requirements*, 11 CLEARINGHOUSE L. REV. 462 (1977); Note, *Enforcing the Right to an "Appropriate" Education: The Education for All Handicapped Children Act of 1975*, 92 HARV. L. REV. 1103 (1979) [hereinafter cited as *Enforcing the Right*]; Note, *The Education for All Handicapped Children Act: Opening the Schoolhouse Door*, 6 N.Y.U. REV. L. & SOC. CHANGE 43 (1976) [hereinafter cited as *Opening the Schoolhouse Door*]; Note, *A Procedural Guideline for Implementing the Right to Free Public Education for Handicapped Children*, 4 U. BALT. L. REV. 136 (1974); Note, *The Education of All Handicapped Children Act of 1975*, 10 U. MICH. J. L. REF. 110 (1976) [hereinafter cited J. L. REF.]; Comment, *Public Instruction to the Learning Disabled: Higher Hurdles for the Handicapped*, 8 U.S.F. L. REV. 113 (1973).

8. See, e.g., Haggerty & Sacks, *Education of the Handicapped: Towards a Definition of an Appropriate Education*, 50 TEMP. L. Q. 961 (1977); Levinson, *The Right to a Minimally Adequate Education for Learning Disabled Children*, 12 VAL. U. L. REV. 253 (1978).

9. See, e.g., Handel, *The Role of the Advocate in Securing the Handicapped Child's Right*

broad view of the child's rights and its usefulness will therefore be most pronounced for the person contacted by a handicapped child, or his or her parents, to assist the child in obtaining an appropriate educational program. This article will focus narrowly on the educational rights of handicapped persons and will not touch, except peripherally, upon such issues as architectural barriers, employment rights, or other matters also of concern at the present time.<sup>10</sup> The initial portion of the article will survey in a very summary manner the court decisions and other forces that led to the passage of the 1975 Act and will describe the basic substantive requirements of the Act. Part II of the article will narrow the focus to examine the procedural framework established by the Act, the equally important Section 504 of the Rehabilitation Act of 1973,<sup>11</sup> the regulations implementing each Act, and the state statutes and regulations conforming to the federal mandates as exemplified by Virginia's response to the newly defined rights of the handicapped. Finally, Part III delineates procedural options, strategies and tactics in handling a case under the Acts from initial client contact to the filing of litigation after full utilization of administrative remedies. The focus will be practical rather than theoretical and the article is supplemented by Appendices describing resources to aid the newly informed advocate in advancing the cause of the handicapped child.

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to an *Effective Minimal Education*, 36 OHIO ST. L. J. 349 (1975); Krass, *The Right to Public Education for Handicapped Children: A Primer for the New Advocate*, 4 U. ILL. L. FORUM 1016 (1976).

10. These are undoubtedly important and significant issues that are being addressed increasingly in litigation around the country. However, the length and purpose of this article does not allow for a discussion of these problems. See generally, PUBLIC INTEREST LAW CENTER OF PHILADELPHIA, 504 HANDBOOK (2d ed. 1979); Charatz & Penn, *Postsecondary and Vocational Education Programs and the Vocational Education Programs and the "Otherwise Qualified" Provision of Section 504 of the Rehabilitation Act of 1973*, 12 U. MICH. J.L. REF. 67 (1978); Dubow, *Litigating for the Rights of Handicapped People*, 84 CASE & COMMENT 3 (Mar.-Apr. 1979); Wolff, *Protecting the Disabled Minority: Rights and Remedies Under Sections 503 and 504 of the Rehabilitation Act of 1973*, 22 ST. LOUIS L. J. 25 (1978); Note, *Abroad in the Land: Legal Strategies to Effectuate the Rights of the Physically Disabled*, 61 GEO. L. J. 1501 (1973).

11. 87 Stat. 394 (1973) (codified at 29 U.S.C. § 794 (1976)).

## I. THE JUDICIAL ARTICULATION OF THE RIGHTS OF THE HANDICAPPED AND THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT OF 1975.

The seminal decision in leading to a definition of a right to education for handicapped persons is the historic 1954 Supreme Court pronouncement of *Brown v. Board of Education*.<sup>12</sup> The Court's attention there obviously was focused on the legality of racially segregated schools, but the opinion by Chief Justice Earl Warren offered an equal protection analysis that has proven to be of significant utility to those advocating the educational rights of handicapped children.<sup>13</sup> When the Court decided that a state must make public education available to all children on an equal basis, without regard to questions of race, they fashioned a tool of broader value. The tool thus defined was slow to be applied to handicapped children but once application was made the impact was almost immediate.<sup>14</sup> Two contemporaneous lawsuits in different jurisdictions challenged the exclusion of handicapped children from public education programs and the results of the litigation were similar. In *Pennsylvania Association for Retarded Children (PARC) v. Pennsylvania*,<sup>15</sup> and *Mills v. Board of Education*,<sup>16</sup> the courts reached comparable conclusions in somewhat different contexts. *PARC* was a class action suit brought to enjoin the enforcement of state statutes which had the effect of excluding mentally retarded children from the public

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12. 347 U.S. 483 (1954).

13. The Court in *Brown* stated:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms. *Id.* at 493.

14. See, *The Right to Education: A Constitutional Analysis*, *supra* note 6. See also Recent Cases, *Education: The Right of Retarded Children to Receive an Education Suited to Their Needs*, 77 DICK. L. REV. 577 (1973).

15. 343 F. Supp. 279 (E.D. Pa. 1972), *modifying* 334 F. Supp. 1257 (E.D. Pa. 1971), noted in 18 VILL. L. REV. 277 (1972).

16. 348 F. Supp. 866 (D.D.C. 1972).

schools without due process. Although the case was terminated by the entry of a consent decree which did not address all the issues raised, the court noted nonetheless that Pennsylvania had denied procedural due process to handicapped children by not establishing a hearing procedure preceding either placement in a particular public education program or exclusion from such a program.<sup>17</sup> The district judge acknowledged that placement decisions were critical in this area of education because of the stigmatization that could occur from improper labelling.<sup>18</sup> Relying on the Supreme Court's decision in *Wisconsin v. Constantineau*,<sup>19</sup> the court agreed that due process demanded a fair process before stigmatizing a citizen and a colorable due process claim was thus presented.<sup>20</sup> The *PARC* court's analysis of the equal protection claims was more superficial because of the voluntary consent decree, but the court, relying upon *Brown*, concluded that there were "serious doubts . . . as to the existence of a rational basis"<sup>21</sup> for the state to provide public education programs for some children while denying public education to others because of handicaps.

The United States District Court for the District of Columbia was confronted with similar arguments in *Mills* when a class action suit was brought there on behalf of all out-of-school handicapped children in the District.<sup>22</sup> In December of 1971, a stipulated agreement and order was entered by the court, but scarcely a month later the plaintiffs sought summary judgment in light of the defendants' failure to comply with the earlier determination.<sup>23</sup> In August of 1972, the district judge granted the relief sought by the plaintiffs and declared that all children, regardless of any handicapping condition, had a right to a publicly supported education and that the defendants in the case through their rules, practices and policies had excluded such children without any provision for adequate and timely alternative procedures, thus denying the plaintiff class due

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17. 343 F. Supp. at 298.

18. *Id.* at 293-95.

19. 400 U.S. 433 (1971).

20. 343 F. Supp. at 295.

21. *Id.* at 297.

22. 348 F. Supp. at 868-70.

23. *Id.* at 871-73.

process and equal protection of the law.<sup>24</sup> The defendants' protestations of lack of resources to carry out the relief originally mandated were swept aside by the court on the basis that such lack could not fall disproportionately on the handicapped child.<sup>25</sup> The Supreme Court's subsequent decision in *San Antonio Independent School District v. Rodriguez*,<sup>26</sup> that education is not a constitutionally guaranteed fundamental right did not dilute the major impact of *PARC* and *Mills* on the subsequent development of the law.<sup>27</sup>

As useful as such generalized attacks as those contained in *PARC* and *Mills* might be in focusing attention on the needs of handicapped children generally and as effective as they might be in dealing with issues such as total exclusion, constitutional litigation could not hope to define the parameters of programs designed for specific children with handicapping conditions. This inability to effectively target class action litigation, coupled with the uncertainties wrought by *Rodriguez*, dictated a shift to legislation as the principal tool for fashioning long-term relief for handicapped children. Even by 1972 over two-thirds of the states had adopted some form of mandatory legislation regarding the education of handicapped children.<sup>28</sup> Three years later only two states had failed to adopt mandatory legislation and thirty-seven of the forty-eight states with such legislation had enacted their new special education laws during the decade of the 1970's.<sup>29</sup> Congress extended this move-

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24. *Id.* at 875. The court's constitutional holdings are arguably dicta as the court had already concluded that the school district's actions were violative of District of Columbia statutes and the district's own regulations. *Id.* at 873-74.

25. The court said:

Similarly the District of Columbia's interest in educating the excluded children clearly must outweigh its interest in preserving its financial resources. If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom. The inadequacies of the District of Columbia Public School System whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the "exceptional" or handicapped child than on the normal child. *Id.* at 876.

26. 411 U.S. 1 (1973).

27. Dimond & Reed, *Rodriguez and Retarded Children*, 2 J.L. & Educ. 476 (1973). See also, *The Handicapped Child Has a Right to an Appropriate Education*, *supra* note 6, at 653-57.

28. Zettel & Abeson *supra* note 6 at 198.

29. *Id.* at 198-99; S. Rep. No. 168, 94th Cong., 1st Sess. 20-1, reprinted in [1975] U.S. CODE CONG. & AD. NEWS 1425, 1444-45.

ment to the federal level and painted on a much larger canvas by passing the Education Amendments of 1974 ordering, in Title VI-B, state education agencies to develop and submit to the United States Commissioner of Education detailed, long-range plans for the achievement of full educational programs for all handicapped children within each of the respective states.<sup>30</sup> The same Congress broadened the mandate, however, by the passage of Public Law 94-142—the Education for All Handicapped Children Act of 1975.<sup>31</sup> The legislative history of this Act reveals the debt owed by Congress to *PARC* and *Mills* and to the growing coverage of state laws when the legislators acknowledged that “court action and State laws throughout the Nation have made clear that the right to education of handicapped children is a present right, one which is to be implemented immediately.”<sup>32</sup> The Congress stated the legislative intent of the new Act in broad and expansive language:

It is the purpose of this Act to assure that all handicapped children have available to them, within the time periods specified . . . , a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children.<sup>33</sup>

But it was not simply this lofty purpose that made the 1975 federal legislation so significant; the substantive requirements set forth wrought a revolution in American public education.

The Act incorporated the broadest possible definition of procedural rights for handicapped children contained in the antecedent litigation and it provided for the allocation of large sums of federal monies to the states to soften the burden imposed by the higher costs of special education.<sup>34</sup> The legislation essentially mandates

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30. Pub. L. No. 93-380, Title VI-B, 88 Stat. 579-85 (1974).

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

32. S. Rep. No. 168, 94th Cong., 1st Sess. 17, reprinted in [1975] U.S. CODE CONG. & AD. NEWS 1425, 1441.

33. 89 Stat. 775 (1975).

34. See Stafford, *supra* note 6, at 75-76; *Enforcing the Right supra* note 7 at 1105; J.L. REF. *supra* note 7 at 116-17. The Senate committee considering the legislation estimated that a



that all participating states must provide a "free appropriate public education" to all handicapped children between three and eighteen by September 1, 1978, with an expansion of the upper age limit to twenty-one by September 1, 1980.<sup>35</sup> A "handicapped child" is a child who needs special education and related services because of hearing impairment or deafness, visual impairment or blindness, mental retardation, speech impairment, emotional disturbance, chronic or long-term health impairment, physical impairment, specific learning disability or multiple handicapping conditions.<sup>36</sup> The law further defines a "free appropriate public education" to include "special education and related services" provided at public expense without charge to the parent or child which meet the standards of the state educational agency to include an appropriate preschool, elementary, or secondary school education in conformity with the particular child's "individualized education program."<sup>37</sup> "Special education" means, in the legislative lexicon, specially designed instruction to meet the specific needs of a handicapped child, including classroom instruction, home instruction, physical education and institutional and hospital instruction.<sup>38</sup> The ancillary phrase, "related services," is defined to include transportation and those developmental, corrective and other supportive services (including pathology and audiology, psychological services, physical and occupational therapy, recreation, counseling and diagnostic and evaluative medical services) required to assist a handicapped child to benefit from special education and further include the early identifica-

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

35. 20 U.S.C. § 1412(2)(B) (1976). The implementing regulations define the age limits to include "handicapped children aged three *through* twenty-one," thus creating a discrepancy between the two. 45 C.F.R. § 121a.122(b) (1978) (emphasis added). The Act and regulations provide exceptions with respect to handicapped persons aged three to five and eighteen to twenty-one where State law or a court order is inconsistent with the provision for these age groups. Virginia law provides for special education for "handicapped children between the ages of two and twenty-one . . ." VA. CODE ANN. § 22-10.4 (Cum. Supp. 1979).

36. *Id.* § 1401(1). This is a two step test applying the Act to a child who is 1) handicapped, and 2) requires special education and related services. If the first test is met but not the second, then the protection of Section 504 of the Rehabilitation Act would be required. 29 U.S.C. § 794 (1976).

37. *Id.* § 1401(18).

38. *Id.* § 1401(16).

tion and assessment of handicapping conditions.<sup>39</sup> The final critical definition, of the term "individualized education program," provides for a written statement to be developed for each handicapped child in a meeting of a representative of a local education agency or counterpart regional agency charged with the provision of special education with the teacher, the child's parents or guardians and the child, when appropriate, and which writing must include: 1) a statement of the child's present level of educational performance; 2) a statement of annual goals and short-term instructional objectives; 3) a description of specific educational services to be provided the child along with a statement of the extent to which the child will be able to participate in regular educational programs; 4) the projected initiation date and expected duration of educational services; and 5) a delineation of appropriate objective criteria and evaluation procedures and schedules for determining, at least annually, whether the instructional objectives established are being achieved.<sup>40</sup> The definitions are critical to the enforcement of the Act because they establish the boundaries of the rights delineated so broadly by Congress.

The federal program established by the Act is to be administered by the Bureau of Education for the Handicapped in the United States Office of Education which also has responsibility for teacher training and research into the education of the handicapped.<sup>41</sup> Federal funds may be utilized to acquire equipment and to construct necessary facilities although the facilities must be used for the purposes for which they were constructed for at least twenty years or the federal government may recoup that portion of the cost paid out of federal funds.<sup>42</sup> Each recipient of federal funds is charged to "make positive efforts to employ, and advance in employment, qualified handicapped individuals" although this language appears

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39. *Id.* § 1401(17). Related services would seem to be required only when special education is being provided. See Bureau of Education for the Handicapped Policy Letter to James T. Micklem, January 2, 1979, 2 Education for the Handicapped Law Report (CRR) 211:86 (1979) [hereinafter cited as EHLR]. If related services are needed without special education, then Section 504 of the Rehabilitation Act would have to provide the basis for these services. 29 U.S.C. § 794 (1976).

40. *Id.* § 1401(19).

41. *Id.* § 1402.

42. *Id.* § 1404.

to be largely hortatory.<sup>43</sup> The United States Commissioner of Education is also authorized to "make grants to pay part or all of the costs of altering existing facilities" so as to remove architectural barriers to the free movement of handicapped persons but no funds have yet been appropriated to fund this section of the law.<sup>44</sup>

The funding formulas are contained in section 611 of the Act and they provide for the allocation of federal funds to each state based on the number of handicapped children between the ages of three and twenty-one receiving special education and related services.<sup>45</sup> The principal funding formula is predicated on a percentage of the average per pupil expenditure in public elementary and secondary schools which establishes the total fund of money to be divided among the states. Beginning in fiscal year 1978 the Act creates a fund based on five per cent of the average per pupil expenditure multiplied by the total number of handicapped children being served. The funding formula rises significantly to ten per cent in fiscal year 1979, to twenty per cent in fiscal year 1980, to thirty per cent in fiscal year 1981, and to forty per cent for fiscal year 1982 and for every year thereafter. Thus, if the average per pupil expenditure in the initial year was \$1,400, then five per cent of this amount would be seventy dollars. If, during the prior school year, there were five million handicapped children, the fiscal authorization would be five million x \$70 = \$350,000,000. Assuming comparable figures for ensuing years, by fiscal year 1982 the authorization would total \$2,800,000,000. The individual states will receive an allocation based on the number of handicapped children being served and the percentage this number represents as compared to the nation as a whole. The state's total handicapped count cannot exceed twelve per cent of its school age (5-17) population, the number who are learning disabled cannot exceed one-sixth of that figure, or two per cent of the school age population, and no child counted for purposes of funding under the Elementary and Secondary Education Act of

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43. *Id.* § 1405.

44. *Id.* § 1406.

45. *Id.* § 1411. At least one court decision views "the main purpose of the Act [to be] the funding of special schools for the handicapped," a rather narrow view of the legislation. *Eberle v. Board of Educ. of the School Dist. of Pittsburgh*, 444 F. Supp. 41, 43 (D.Pa. 1977), *aff'd*, 582 F. 2d 1274 (3d Cir. 1978). See also *Loughran v. Flanders*, 470 F. Supp. 110, 113 (D. Conn. 1979).

1965<sup>46</sup> can be included in the tabulations.<sup>47</sup> If, after these exclusions, a state has a tabulated total of 100,000 handicapped children which would represent two per cent of the national figure, that state would receive two per cent of the federal appropriation or \$7,000,000 of the hypothetical \$350,000,000 described above for the first year of the authorization. No state can receive less than the amount received in fiscal year 1977, and Guam, American Samoa, the Virgin Islands and the Pacific Trust Territories are limited to one per cent of the total appropriation. Further limitations are placed on the use of the state share of the funds with a state being permitted to spend fifty per cent of its federal grant at the state level on support services in 1978 with the other half passing directly to local education agencies and that breakdown shifts to 75%-25% in favor of the local agencies in fiscal 1979 and ensuing years.<sup>48</sup> The state may not spend more than five per cent of the federal funds, or \$200,000, whichever is greater, for administrative costs.<sup>49</sup> As with the states, local education agencies are entitled to a share of the federal funds that represent proportionately the number of local handicapped children as compared with the number statewide.<sup>50</sup>

To establish eligibility for federal funds under the Act, the state must demonstrate that it assures all handicapped children the right to a free appropriate education and that it is proceeding on a timetable to a "goal of providing full educational opportunity" for the children.<sup>51</sup> The state must also establish priorities with the initial preference being for handicapped children not receiving an education and the second priority going to the handicapped children

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46. Pub. L. No. 93-380, 88 Stat. 484, 491 (1974) (codified at 20 U.S.C. § 241 c-1). Now repealed by Pub. L. No. 95-561, 92 Stat. 2180 (1978) (see 20 U.S.C. § 2771 (1979)). The learning disability ceiling has been controversial and has effectively been superceded by regulations issued by the Commissioner of Education pursuant to § 5(b) of Pub. L. No. 94-142, 89 Stat. 773, 794 (1975). See now 45 C.F.R. §§ 121a.5, 121a.540-.543, 121a.702(a)(2) (deleted) (1978).

47. The computations included are based largely on an analysis found in NATIONAL SCHOOL PUBLIC RELATIONS ASSOCIATION, EDUCATING ALL THE HANDICAPPED: WHAT THE LAWS SAY & WHAT SCHOOLS ARE DOING 14-15 (1977).

48. 20 U.S.C. §§ 1411(b)(1), (c)(1) (1976).

49. *Id.* §§ 1411(b)(2), (c)(2).

50. *Id.* § 1411(d). The Act cannot be utilized to allow a state to give financial aid to private schools that engage in racially discriminatory practices. *Bishop v. Starkville Academy*, 442 F. Supp. 1176 (N.D.Miss. 1977).

51. *Id.* § 1412.

within each category of "disability, with the most severe handicap who are receiving an inadequate education."<sup>52</sup> The state is further obligated to establish requirements for: 1) local education agencies to draw up individualized education programs for each child; 2) procedural safeguards for children and parents; 3) tests and evaluations to be provided in the child's native language (as defined in the Bilingual Education Act<sup>53</sup>) or "mode of communication" which are not either racially or culturally discriminatory; and 4) "to the maximum extent appropriate" have handicapped children educated in the "least restrictive environment" that is consistent with the child's needs.<sup>54</sup>

The Act further establishes very strict procedural safeguards for handicapped children and their parents to include: 1) the right to examine all relevant records pertaining to identification, evaluation and educational placement; 2) the right to obtain an independent educational evaluation of the child; 3) a right to written prior notice in their native language of any proposed action which would initiate or change the identification, evaluation or educational placement of a child or the provision of a free appropriate education for the child; and 4) the right to present complaints about any action affecting the child.<sup>55</sup> If the child is a state ward or his or her parents or guardians are unknown or unavailable, special procedures including the appointment of a surrogate parent to protect the child's interests are mandated.<sup>56</sup> The provisions establishing procedures for impartial due process hearings to provide a forum for the determination of parental complaints regarding identification, evaluation, placement and provision of services constitute the most significant substantive reforms to special education around the country. Parents or guardians are thus given access to a hearing and appeal mechanism for the review of a broad range of grievances pertaining to all aspects of the handicapped child's educational experience. There is a right to an impartial due process hearing afforded by the local educational agency and to an impartial administrative review at the state level.

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52. *Id.* § 1412(3).

53. *Id.* § 880b-1(a)(2).

54. *Id.* § 1412.

55. *Id.* § 1415.

56. *Id.* § 1415(b)(1)(B).

At any administrative hearing the parties have "(1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children, (2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses, (3) the right to a written or electronic verbatim record of such hearing, and (4) the right to written findings of facts and decisions . . . ."<sup>57</sup> The Act also provides a legal remedy where administrative proceedings have proved unavailing with parties afforded the right to bring a civil action regarding a complaint under the law in a state court of competent jurisdiction or in a federal district court without regard to the amount in controversy.<sup>58</sup> Pending the outcome of any proceedings, the child will remain in the current educational placement in the absence of an agreement to the contrary, although a child out of school will be placed in school unless the parents or guardian object.<sup>59</sup> This sketchy highlighting of the major substantive provisions of the Act will provide a backdrop before which the specific dramas must be played out. The substantive framework of the legislation delineates rights and responsibilities that outstrip by far the limits of past litigation and provides a multicolored tapestry to serve as background for the assertion of educational rights for specific children.

## II. THE PROCEDURAL RIGHTS AFFORDED BY SECTION 504 OF THE REHABILITATION ACT OF 1973, THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT OF 1975, REGULATIONS IMPLEMENTING THESE ACTS AND VIRGINIA LAW AND REGULATIONS.

Section 504 of the Rehabilitation Act of 1973<sup>60</sup> has been described as the first civil rights law for handicapped persons and its language is simple, direct and forceful: "No otherwise qualified handicapped individual in the United States, as defined in section 706(6) of 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 finan-

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57. *Id.* § 1415(d).

58. *Id.* § 1415(e).

59. *Id.* § 1415(e)(3).

60. Pub. L. No. 93-112, § 504, 87 Stat. 394 (1973) (codified at 29 U.S.C. § 794 (1976)).

cial assistance."<sup>61</sup> This provision tracks, in both intent and language, the provisions of the Civil Rights Act of 1964<sup>62</sup> and Title IX of the Education Amendments of 1972<sup>63</sup> as they apply to race and sex discrimination. Although the Education for All Handicapped Children Act of 1975 affords broad protection for handicapped children, it will only apply in those jurisdictions which elect to participate.<sup>64</sup> However, Section 504 applies to any state or school district that receives federal funds at all, regardless of participation in the more specific legislation. It provides relief in such areas as architectural barriers<sup>65</sup> where the 1975 law is simply hortatory, and it places certain constraints on local education agencies as employers as well as in their educator roles.<sup>66</sup> The simple one-sentence forcefulness of Section 504 gave birth to more than twenty pages of regulations which flesh out the law.<sup>67</sup> Similarly, regulations issued pursuant to the Education for All Handicapped Children Act of 1975 give added depth and dimension to the procedural requirements of the law.<sup>68</sup> Rather than simply providing a survey of the federal regulations and implementing Virginia law and regulations, a focus upon the specific problem areas should prove most useful to the advocate.

#### A. *School Records*

A frequent issue will be presented by the two-edged sword of accessibility to a handicapped child's school records. The issue is characterized as such because parents may desire access to the records themselves while at the same time wishing to limit access to others with no perceived legitimate interest or need for the records. Congressional action predating Public Law 94-142 gave significant protection to children and their parents by the passage of the Fam-

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61. *Id.*

62. Pub. L. No. 88-352, § 1, 78 Stat. 241 (1964) (codified at 42 U.S.C. §§ 2000-2000h-6 (1976)).

63. Pub. L. No. 92-318, § 901, 86 Stat. 235, 373 (1972) (codified at 20 U.S.C. § 1681 (1976)).

64. *Id.* § 1412. New Mexico is the sole apparent exception. Levinson, *supra* note 8, at 277. Section 504 will also be important for a child with a history of a handicap but who is not presently defined as such, or for the child who is handicapped but not deemed to be in need of special education and related services. See note 36, *supra*.

65. Compare 20 U.S.C. § 1406 (1976) with the regulations under § 504 at 45 C.F.R. §§ 84.21-.23 (1978).

66. Compare 20 U.S.C. § 1405 (1976) with 29 U.S.C. 794 (1976).

67. 45 C.F.R. §§ 84.1-.61 (1978).

68. 45 C.F.R. §§ 121a.1-.754 (1978).

ily Educational Rights and Privacy Act of 1974—the so-called “Buckley Amendment.”<sup>69</sup> This Act specifically guarantees parents access to their child’s school records and narrowly limits access to those same records by other persons, agencies or institutions, and the Education for All Handicapped Children Act of 1975 reiterates and reinforces the provisions of the earlier Act. The legislation and regulations specifically provide for the confidentiality of student records with personally identifying information,<sup>70</sup> and state law and regulations buttress this pervasive policy.<sup>71</sup> These provisions reinforce the earlier Act by providing in detail that parents shall have the right to inspect and review any education records relating to the child upon request and in no event later than 45 days after the request has been made.<sup>72</sup> This broad right includes more specific

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69. Pub. L. No. 93-380, § 513(a), 88 Stat. 571 (1974), amended by Pub. L. No. 93-568, § 2, 88 Stat. 1858 (1974) (codified at 20 U.S.C. § 1232g (1976)). The regulations issued pursuant to this Act may be found at 45 C.F.R. §§ 99.1-.67 (1978). See generally, Carey, *Students, Parents and the School Record Prison: A Legal Strategy for Preventing Abuse*, 3 J. L. & EDUC. 365 (1974); Carter, Harris & Brown, *Privacy in Education: Legal Implications for Educational Researchers*, 5 J. L. & EDUC. 465 (1976); Note, *The Buckley Amendment: Opening School Files for Students and Parental Review*, 24 CATH. U.L. REV. 588 (1975); Note, *Federal Genesis of Comprehensive Protection of Student Educational Record Rights: The Family Educational Rights and Privacy Act of 1974*, 61 IOWA L. REV. 74 (1975).

70. 20 U.S.C. §§ 1412(2)(D), 1417(C) (1976); 45 C.F.R. §§ 121a.129, -.221, -.500, -.561, -.563-.564, -.571-.572, -.575-.576 (1978).

71. VA. CODE ANN. §§ 22-275.26-.28 (Cum. Supp. 1979); VA. DEPT. OF EDUC., MANAGEMENT OF THE STUDENT’S SCHOLASTIC RECORD IN THE PUBLIC SCHOOLS OF VIRGINIA (Rev. 1979); VA. DEPT. OF EDUC., REGULATIONS AND ADMINISTRATIVE REQUIREMENTS FOR THE OPERATION OF SPECIAL EDUCATION PROGRAMS IN VIRGINIA 53-60 (Rev. 1979) [hereinafter cited as VA. SPEC. ED. REGS.].

72. 20 U.S.C. § 1415(b)(1)(A) (1976); 45 C.F.R. §§ 84.36, 121a. 562(a) (1978); VA. SPEC. ED. REGS. 53. See also 20 U.S.C. § 1232g(a)(1)(A) (1976); 45 C.F.R. § 99.11(a) (1978). The Virginia regulations coincide with the federal regulations in requiring compliance with a parental request for access within “forty-five (45) days after the request has been made” (VA. SPEC. ED. REGS. 53), but the definition of “days” in the Glossary to the regulations refers to the term as meaning “administrative working days, exclusive of Saturdays, Sundays, and officially designated holidays of the local school division.” VA. SPEC. ED. REGS., Glossary 2. This definition would not appear to be consistent with the intent of either Act or their regulations as allowing for extensive delays by a local school division when a request is made shortly prior to a vacation period so that action could be delayed for ten or eleven weeks. Even without an intervening vacation, the definition would require only compliance within about nine weeks, or some 63 calendar days. The Bureau of Education for the Handicapped takes the view that all “days” are intended to be calendar days. Bureau of Education for the Handicapped Policy Letter to Frederick Weintraub, September 25, 1978, 2 EHLR 211:67 (1979). VA. CODE ANN. § 22-275.26.1. (Cum. Supp. 1979) seems to give a right to access simply upon appearance “in person during regular hours of the school day and request to see such records.”



rights to: 1) explanation and interpretation of the records upon reasonable request;<sup>73</sup> 2) copies of the records at only the reasonable cost of reproduction;<sup>74</sup> 3) access by an authorized representative of the parents to the records;<sup>75</sup> 4) a list of the types of records maintained by the agency and the location of these records;<sup>76</sup> 5) request the amendment of the records if the parent believes the records are inaccurate, misleading or violative of the privacy or other rights of the child;<sup>77</sup> 6) notice by the agency of the fact that personally identifiable information collected under the Act is no longer needed and the right to destruction of nonessential information upon request;<sup>78</sup> and 7) consent before personally identifiable information is disclosed to anyone other than officials of participating agencies or used for a purpose other than that authorized by the law or regulations.<sup>79</sup> If the local educational agency disagrees with the parental request for amendment of the records the agency shall, on request, provide a hearing to allow the parent to challenge information in the records that is misleading, inaccurate or violative of the child's rights.<sup>80</sup> If the parent's arguments at the hearing are persuasive then the records must be amended in accordance with the earlier request. A failure to so convince the agency, however, will nonetheless entitle the parent to place in the records an explanation of the parent's

73. 45 C.F.R. § 121a.562(b)(1) (1978); VA. SPEC. ED. REGS. 53. *See also* 45 C.F.R. § 99.11(b)(1) (1978).

74. 45 C.F.R. §§ 121a.562(b)(2), -.566 (1978); VA. SPEC. ED. REGS. 53, 55. *See also*, 45 C.F.R. §§ 9.5(a)(2)(iii), -.8 (1978).

75. 45 C.F.R. § 121a.562(b)(3) (1978); VA. SPEC. ED. REGS. 54. *See also* BEH Policy Letter to Linda McMay, Feb. 7, 1978, 2 EHLR 211:10 (1979).

76. 45 C.F.R. § 121a.565 (1978); VA. SPEC. ED. REGS. 55.

77. 45 C.F.R. § 121a.567 (1978); VA. SPEC. ED. REGS. 55. *See also* 20 U.S.C. § 1232g(a)(2) (1976); 45 C.F.R. § 99.20 (1978).

78. 45 C.F.R. § 121a.573 (1978); VA. SPEC. ED. REGS. 59-60. This provision is intended to extend parental rights beyond those guaranteed by the Family Educational Rights and Privacy Act. Bureau of Education for the Handicapped Policy Letter to W. Duane Miller, August 25, 1978, 2 EHLR 211:61 (1979). The policy letters are policy interpretations from the State Policy and Administrative Review Branch of the Division of Assistance to States, Bureau of Education for the Handicapped, Department of Health, Education and Welfare, provided in response to letters of inquiry. They will hereinafter be cited as: BEH Policy Letter to . . . . , date, . . . . EHLR . . . . (1979). *See also* 45 C.F.R. § 99.13(1978).

79. 45 C.F.R. § 121a.571 (1978); VA. SPEC. ED. REGS. 58. *See also* 20 U.S.C. § 1232g(b)(2)(A), -(b)(4)(B) (1976); 45 C.F.R. §§ 99.30-.31 (1978).

80. 45 C.F.R. §§ 121a.568-.570 (1978); VA. SPEC. ED. REGS. 56-58. *See also* 45 C.F.R. §§ 99.21-.22 (1978).

position, and this explanation must be maintained so long as the records are retained and must accompany every transmission of the contested records to any other party.<sup>81</sup> The regulations also require that the child be "afforded rights of privacy similar to those afforded to parents, taking into consideration the age of the child and type or severity of disability."<sup>82</sup> This provision seems unduly vague and less than amply protective of the child's privacy rights which may not be consonant with the privacy rights of the parent.<sup>83</sup>

### *B. Identification, Evaluation and Testing of the Handicapped Child*

The law and regulations place an affirmative obligation on school officials to locate and evaluate children who are handicapped or suspected of being handicapped.<sup>84</sup> However, a parent may also initiate an evaluation of his or her child based on concerns born of perceived difficulties on the part of the child, as may physicians, teachers, social workers or others in contact with the child. The child may not be evaluated or tested without parental consent and the 1975 legislation and implementing regulations mandate parental involvement at every stage of the evaluation and placement process.<sup>85</sup> Regardless of the identity of the person or agency initiat-

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81. 45 C.F.R. § 121a.569; VA. SPEC. ED. REGS. 56-7.

82. 45 C.F.R. § 121a.574 (1978). The Virginia Code goes even further and provides that local school boards may require written parental consent before a child can obtain access to his or her school records. VA. CODE ANN. § 22-275.26.1 (Cum. Supp. 1979).

83. The Supreme Court has recognized that in certain circumstances a child may have privacy rights independent of his or her parents and independently enforceable. *Bellotti v. Baird*, 99 S.Ct. 3035 (1979); *Carey v. Population Services*, 431 U.S. 678 (1977); *Bellotti v. Baird*, 428 U.S. 132 (1976); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976). Thus far, the Court's definition of this right of privacy has been limited to abortion and contraception access cases and the Court has viewed the rights of children vis-a-vis their parents in a more limited light. *Parham v. J. R.*, 99 S.Ct. 2493 (1979); *Wisconsin v. Yoder*, 406 U.S. 205 (1972). Here, the privacy interest to be asserted for the child is against the schools and not the parents and should be given broader recognition and fuller protection. *Compare Goss v. Lopez*, 419 U.S. 565 (1975); *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969).

84. 20 U.S.C. §§ 1412(2)(C), -1414(a)(1)(A), -1417(a)(1)(C) (1976); 45 C.F.R. §§ 84.32, 121a.128, -.220 (1978); VA. SPEC. ED. REGS. 6, 11-12. *See also* *Mattie T. v. Holladay*, Civil Actin No. DC-75-31-S, 3 EHLR 551:109 (N.D. Miss. Jan. 26, 1979); P-1 v. Shedd, No. 78-58, 3 EHLR 551:164 (D. Conn. Mar. 23, 1979).

85. 20 U.S.C. §§ 1414(a)(1)(C)(iii), -1415(b)(1)(C) (1976); 45 C.F.R. §§ 121a.500, -503-504 (1978); VA. SPEC. ED. REGS. 15. *See also* 45 C.F.R. § 84.35 (1978).

ing the evaluation process, there must be written notice to the parents which must be in the native language or other mode of communication of the parent and in language understandable to the general public. This notice must contain: 1) a full explanation of the procedural safeguards mandated and provided; 2) a description of the actions proposed and the options available; 3) a description of each evaluation record, test or report used by the agency; and 4) a description of any other factors that may be relevant to the decision-making process.<sup>86</sup> The tests and materials used in the evaluation process must not be racially or culturally discriminatory,<sup>87</sup> and they must be provided and administered in the child's native language or mode of communication unless it is clearly not feasible to do so.<sup>88</sup> The evaluation process must be complete, individually tailored to the child and administered by a multidisciplinary team of trained personnel including at least one teacher or other specialist with knowledge in the area of suspected disability.<sup>89</sup> The tests and evaluative materials must be validated for the specific purpose for which they are used and must be selected and administered so as to achieve credible results (even though the child has impaired sen-

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86. 20 U.S.C. § 1415(b)(1) (1976); 45 C.F.R. §§ 121a.500, .503, .504 (1978); VA. SPEC. ED. REGS. 15, 43-35. The admonition to use the parents' "native language" is defined in the same sense as that term is used in the Bilingual Education Act and means ". . . the language normally used by that person, or in the case of a child, the language normally used by the parents of the child." 20 U.S.C. §§ 880b-1(a)(2), 1401(21), 1415(b)(1)(D) (1976); 45 C.F.R. § 121a.9 (1978); VA. SPEC. ED. REGS., Glossary 6.

87. 20 U.S.C. § 1412(5)(C) (1976); 45 C.F.R. § 121a.530(b) (1978); VA. SPEC. ED. REGS. 16 (this provision was not included in the Virginia regulations until the 1979 revision).

88. 20 U.S.C. § 1412(5)(C)(1976); 45 C.F.R. § 121a.532(a)(1)(1978); VA. SPEC. ED. REGS. 16. The "native language" requirement is defined in other provisions. See note 86 *supra*. The "other mode of communication" provision seems to contemplate sign language, braille, or oral communication if a child is deaf or blind, or has no written language. See comment to 45 C.F.R. § 121a.9 (1978). That same comment contemplates the use of "the language normally used by the child and not that of the parents, if there is a difference between the two." *Id.*

89. 20 U.S.C. § 1412(5)(C) (1976); 45 C.F.R. §§ 84.35, 121a.532-.533 (1978); VA. SPEC. ED. REGS. 16-17. The evaluation process in Virginia is frequently triggered by the local school screening committee which will determine eligibility for evaluation. VA. SPEC. ED. REGS. 14-15. After evaluation is completed, an eligibility committee will determine the child's eligibility for special education and related services, as was true prior to the passage of Pub. L. No. 94-142. *Id.* at 20-21. However, the role of the eligibility committee is much more limited than before and the group has no power to name a placement or specify services. *Id.* at 20. Eligibility committees in Virginia are continuing to assure an unduly broad role and the advocate should be alert to prevent the usurpation of the role of the IEP meeting. The evaluation, eligibility and IEP roles must be kept separate and distinct.

sory, manual or speaking skills) and the assessment must include "all areas related to the suspected disability including, where appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities."<sup>90</sup> The evaluation process for a child with a suspected specific learning disability parallels the general process but includes more detailed requirements as to team composition, diagnostic criteria and contents of the evaluation report.<sup>91</sup> The placement decision following evaluation must be based on a variety of information sources, including tests, teacher recommendations, physical condition, social or cultural background and adaptive behavior, and it must be a group decision by knowledgeable persons.<sup>92</sup> The decision also must be in conformity with the principle of the least restrictive environment and has to lead to development of an individualized education program.<sup>93</sup>

If the parents refuse to consent to the initiation of the evaluation process, the local educational agency can initiate due process proceedings to override the lack of parental consent.<sup>94</sup> Likewise, the absence or unavailability of a parent is not an insurmountable impediment to evaluation, since a "surrogate parent" may be utilized to perform the parental role and act as an advocate for the child.<sup>95</sup> If a parent disagrees with the results of the evaluation process or with the placement conclusions reached through that process, he or

90. 45 C.F.R. §§ 84.35(b), 121a.532 (1978); VA. SPEC. ED. REGS. 16-17.

91. 45 C.F.R. §§ 121a.540-.543 (1978); VA. SPEC. ED. REGS. 17, 19, 21. These regulations supplement the basic regulations issued under Pub. L. No. 94-142. See also BEH Division of Assistance to the States Bulletin #9, Apr. 19, 1978, 2 EHLR 203:04 (1979).

92. 45 C.F.R. §§ 84.35(c), 121a.533 (1978). The knowledgeable persons could include a social worker (BEH Policy Letter to Dale Almlie, Mar. 7, 1978, 2 EHLR 211:14 (1979)) or an optometrist or ophthalmologist (BEH Policy Letter to Dr. Linda J. Jacobs, July 21, 1978, 2 EHLR 211:42 (1979); BEH Policy Letter to Dr. Linda J. Jacobs, August 14, 1978, 2 EHLR 211:54 (1979)).

93. *Id.*

94. 45 C.F.R. § 121a.504(c) (1978); VA. SPEC. ED. REGS. 45; BEH Policy Letter to Frederick J. Weintraub, May 3, 1979, 2 EHLR 211:90 (1979). This presents one of the most troublesome issues where the parent, normally presumed to have the child's best interests at heart, refuses to consent to an evaluation in a situation where the teacher or school suspects the existence of a handicapping condition. See notes 283-284 *infra*. Prior parental consent to evaluation, since revoked, cannot support a new evaluation. BEH Policy Letter to Ms. Lillian Kudwa, April 18, 1979, 2 EHLR 211:89 (1979).

95. 20 U.S.C. § 1415(b)(1)(B) (1976); 45 C.F.R. § 121a.514 (1978); VA. SPEC. ED. REGS. 50-52.

she has the right to secure an independent educational evaluation from a source not connected with the public agency.<sup>96</sup> This independent evaluation may even be secured at public expense unless the agency can demonstrate, after a due process hearing, that the internal evaluation was appropriate.<sup>97</sup> The results of the independent evaluation must be considered by the agency in making a placement decision and may be presented as evidence in any future hearing concerning the child.<sup>98</sup> A hearing officer also may request an independent educational evaluation as a part of the hearing process, and in this instance, the evaluation will also be undertaken at public expense.<sup>99</sup>

The critical nature of the identification, evaluation and testing processes has been amply demonstrated by a series of cases contesting the use of culturally or racially biased testing procedures.<sup>100</sup> Although several of the cases such as *Larry P. v. Riles*<sup>101</sup> and *Hobson v. Hansen*<sup>102</sup> were decided at a relatively early stage in the post-segregation era of education litigation, the problem has apparently been a persistent one as indicated by the recent decisions in *Lora v. Board of Education*<sup>103</sup> and *Mattie T. v. Holladay*.<sup>104</sup> As pointed out

96. 45 C.F.R. § 121a.503 (1978); VA. SPEC. ED. REGS. 42-43.

97. 45 C.F.R. §§ 121a.503(b), -.506 (1978); VA. SPEC. ED. REGS. 42.

98. 45 C.F.R. § 121a.503(c) (1978).

99. 45 C.F.R. § 121a.503(d) (1978); VA. SPEC. ED. REGS. 47.

100. See Dimond, *supra* note 6, at 1090-91; Kirp, *Schools as Sorters: The Constitutional and Policy Implications of Student Classification*, 121 U. PA. L. REV. 705 (1973); Krass, *supra* note 9, at 1021-22; Shea, *An Educational Perspective of the Legality of Intelligence Testing and Ability Grouping*, 6 J. L. & EDUC. 137 (1977); Sorgen, *Testing and Tracking in Public Schools*, 24 HAST. L. J. 1129 (1973); Zettel & Abeson *supra* note 6 at 201-05; *Opening the Schoolhouse Door supra* note 7 at 54-5; Note, *Educational Testing: A Challenge for the Courts*, 1973 U. ILL. L. F. 375; Note, *Constitutional Law-Limiting the Use of Standardized Intelligence Tests for Ability Grouping in Public Schools*, 51 N.C.L. REV. 1564 (1973); Note, *Equal Protection and Intelligence Classification*, 26 STAN. L. REV. 647 (1974); Note, *Constitutional Requirements for Standardized Ability Tests Used in Education*, 26 VAND. L. REV. 789 (1973); Comment, *Segregation of Poor and Minority Children into Classes for the Mentally Retarded by the Use of IQ Tests*, 71 MICH. L. REV. 1212 (1973).

101. 343 F. Supp. 1306 (N.D. Cal. 1972), *aff'd*, 502 F. 2d 963 (9th Cir. 1974).

102. 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F. 2d 175 (D.C. Cir. 1969). See Note, *Hobson v. Hansen: Judicial Supervision of the Color-Blind School Board*, 81 HARV. L. REV. 1511 (1968); Note, *Hobson v. Hansen: The De Facto Limits on Judicial Power*, 20 STAN. L. REV. 1249 (1968).

103. 456 F. Supp. 1211 (E.D.N.Y. 1978). *Lora* dealt with a strikingly high and disproportionate number of minority students in programs for the emotionally handicapped. *Id.* at 1213-14, 1221, 1256-64.

above, both the Education for All Handicapped Children Act of 1975 and its implementing regulations have specifically addressed this issue<sup>105</sup> and there is an affirmative obligation on the state educational agency to monitor the performance of the local agency. This responsibility would seem to include an assessment of the racial proportions in various special education programs and an investigation into the reasons for any racially disproportionate assignments.<sup>106</sup> Previous commentators have pointed to the inadequacies of the procedural remedies under the Act and regulations to deal with testing deficiencies in the absence of aggressive monitoring by the state agency, and it has been posited that class action litigation or similar litigative strategies may be necessary to police discriminatory testing practices.<sup>107</sup>

Less profound but equally destructive problems may inhere in the evaluation process when parents complain about either the incomplete nature of the testing or the inaccuracy of the conclusions reached. The regulations prescribe that the assessment must relate to "all areas related to the suspected disability," but they do not attempt to specify how many or what precise tests must be utilized to reach a placement decision.<sup>108</sup> Consequently, much will be dependent on whether the decision-makers construe the regulative requirement broadly to mandate the use of an extensive battery of tests to insure reliability in evaluation. The risks of misclassification and erroneous placement are so great and the consequences of incorrect labelling are so devastating,<sup>109</sup> that any doubts about the pro-

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104. Civil Action No. DC-75-31-S, 3 EHRLR 551:109 (N.D. Miss. Jan. 26, 1979). The disproportion in this case appeared in programs for the mentally retarded. Slip op. at 3, 17-24.

105. *Supra* note 87.

106. It would seem that the State educational agency overseeing local compliance with the law and regulations under 45 C.F.R. § 121a.601 (1978) could engage in the same threshold statistical analysis relied upon by the courts in *Lora* and *Mattie T.* to filter out serious racial and cultural disproportions in certain programs. A failure to pursue such an analysis would appear to be an abdication of the monitoring responsibilities clearly mandated by the law.

107. *Enforcing the Right supra* note 7 at 1116. Pursuit of remedies under Title VI of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000d to 2000d-4 (1976)) would not necessitate the demonstration of a discriminatory intent seemingly required by the 1975 legislation. *See Lora v. Board of Educ.*, 456 F. Supp. 1211, 1277-78, 1292 (E.D.N.Y. 1978).

108. 45 C.F.R. § 121a.532(f) (1978); VA. SPEC. ED. REGS. 16.

109. *See Sorgen, The Classification Process and Its Consequences*, in *THE MENTALLY RETARDED CITIZEN AND THE LAW* 215, 218-19 (1976). The judge in *Lora* acknowledged the risks and dangers of misclassification as being very real and profound. 456 F. Supp. at 1265.

priety of ordering additional testing should be resolved in favor of completeness in testing.<sup>110</sup> Disagreements between experts will also create difficult decisions for hearing officers especially in light of the accustomed deference paid to experts by lay decisionmakers.<sup>111</sup> However, these are decisions that must be made and cannot be avoided by what sometimes appears to be a simplistic presumption in favor of school experts.

### C. *The Individualized Education Program*

A major innovation included in the 1975 legislation is the mandated development of an individualized education program (IEP) for each handicapped child at the conclusion of the evaluation process, with a further annual review requirement.<sup>112</sup> The Act develops a natural progression in its requirements by first defining handicapped children in the context of specific disabilities,<sup>113</sup> by next defining special education to include the concept of "specially designed instruction . . . to meet the unique needs of a handicapped child,"<sup>114</sup> and then by describing related services as ancillary services to be provided "as may be required to assist the handicapped child to benefit from special education."<sup>115</sup> The phrase

110. *Enforcing the Right supra* note 7 at 1115. Congress expressed major concern over "erroneous classification" - S. REP. NO. 168, 94th Cong., 1st Sess. 26-27, reprinted in [1975] U.S. CODE CONG. & AD. NEWS 1450-51.

111. *Enforcing the Right supra* note 7 at 1115. A further difficult issue increasingly will be presented in the future by the currently popular mandatory competency tests and their impact on handicapped children. McClung, *Competency Testing: Potential for Discrimination*, 11 CLEARINGHOUSE REV. 439 (1977); McClung & Pullin, *Competency Testing and Handicapped Students*, 11 CLEARINGHOUSE REV. 922 (1978).

112. 20 U.S.C. §§ 1401(18) & (19), -1414(a)(5) (1976); 45 C.F.R. §§ 84.33(b), 121a.4(d), -.130, -.235, -.340-.349 (1978); VA. CODE ANN. § 22-10.4.B (Cum. Supp. 1979); VA. SPEC. ED. REGS. 26-32.

113. 20 U.S.C. § 1401(1) (1976); 45 C.F.R. § 121a.5 (1978); VA. CODE ANN. § 22-10.3(a) (Cum. Supp. 1979); VA. SPEC. ED. REGS. 6-11.

114. 20 U.S.C. § 1401(16) (1976); 45 C.F.R. § 121a.14 (1978); VA. CODE ANN. § 22-10.3(b) (Cum. Supp. 1979); VA. SPEC. ED. REGS., Glossary 12.

115. 20 U.S.C. § 1401(17) (1976); 45 C.F.R. § 121a.13 (1978); VA. SPEC. ED. REGS., Glossary 10; BEH Policy Letter to Barbara Sturm, June 7, 1978, 2 EHLR 211:33 (1979). "Related services" may include such services as social work (BEH Policy Letter to David M. Rosen, Dec. 19, 1977, 2 EHLR 211:1 (1979); BEH Policy Letter to David Rosen, Aug. 18, 1978, 2 EHLR 211:7 (1979)); chiropractic (BEH Policy Letter to Carl M. Haltom, Mar. 31, 1978, 2 EHLR 211:18 (1979)); optometry (BEH Policy Letter to Dr. James W. Ciark, Jr., Aug. 2, 1978, 2 EHLR 211:43 (1979)); and psychotherapy by someone other than a psychiatrist (BEH Policy

“individualized education program” is specifically defined in the Act to mean:

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.<sup>116</sup>

Thus, initially, the IEP must be developed at a meeting with certain specified persons participating: 1) a special education administrative specialist from the local educational agency or its regional counterpart; 2) the child's teacher or teachers; 3) the parents or guardian; 4) the child, where appropriate; 5) other individuals at the discretion of the parents or agency; and 6) either a member of the evaluation team or some other previously named participant who is knowledgeable about the evaluation procedures used and is familiar with the evaluation results when the IEP meeting is pursuant to an initial evaluation.<sup>117</sup> Each of these specified participants has an important role to play in placement decision-making. The special education administrator has a broader view than any other participant of the available resources within the school system to meet the child's perceived needs. The teacher or teachers are frequently going

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Letter to Robert F. Millman, June 5, 1979, 2 EHLR 211:104 (1979)). Hearing aids and psychotherapy if defined as medical services are not included as related services. BEH Policy Letter to Raphael Minsky, April 7, 1978, 2 EHLR 211:19 (1979). It is not a violation of the regulations or Act for the parent's insurance proceeds to go towards payment for related services. BEH Policy Letter to Vanessa M. Sheehan, May 21, 1979, 2 EHLR 211:102 (1979).

116. 20 U.S.C. § 1401(19) (1976). See also 45 C.F.R. § 121a.340 (1978); VA. SPEC. ED. REGS., Glossary 5.

117. 45 C.F.R. § 121a.344 (1978); VA. SPEC. ED. REGS. 27-8.



to have the major responsibility for the day-to-day delivery of services to the child and it is thus appropriate that they have a voice in the planning and placement of the child. The teacher participation will also afford a fuller understanding of the parent's attitudes and a deeper knowledge of what has transpired between the administrators and evaluators on the one hand and the parents on the other.<sup>118</sup> Parental participation is pursuant to a major policy of the Act and is also a necessary prerequisite to the development of any meaningful partnership between the school and the home in dealing with the special needs of the handicapped child.<sup>119</sup> The participation of the child may also be critical to the development of a meaningful program, especially where the child has the maturity and capacity to contribute to the decision-making process. Exclusion of the child may be assumed out of habit as children have generally been solely the consumers of educational services with no voice in determining the character of those services. The "other individuals" regulation permits the inclusion of persons other than those listed despite the expressed preferences for the IEP meeting to be small.<sup>120</sup> An appropriate inclusion pursuant to this provision would be an attorney or lay advocate for the parent or child who may be inarticulate or feels intimidated by school personnel. The last participant, either a member of the evaluation team or some other person familiar with the evaluation process and its conclusions, is intended to be included only in the first IEP meeting following on the heels of the initial evaluation process.<sup>121</sup>

The second facet to the IEP as set forth in the statutory definition is the development of a written statement incorporating the individualized educational program decided upon at the meeting.<sup>122</sup> This statement must include the five provisions delineated in the Act in items (A) through (E). These items are obviously predicated on the assumption that if a decision is made to provide special education

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118. See BEH Policy Letter to Brenda Fox, May 3, 1978, 2 EHLR 211:26 (1979).

119. 45 C.F.R. § 121a.345 (1978); VA. SPEC. ED. REGS. 28-9.

120. 45 C.F.R. § 121a.344(a)(5) (1978); VA. SPEC. ED. REGS. 27.

121. 45 C.F.R. § 121a.344(b) (1978); VA. SPEC. ED. REGS. 27-8.

122. 20 U.S.C. § 1401(19) (1976). See also 45 C.F.R. § 121a.346 (1978); VA. SPEC. ED. REGS. 26. There is a very strong policy in favor of the comprehensive nature of the IEP. *P-1 v. Shedd*, No. 78-58, 3 EHLR 551:164, 171 (D. Conn. Mar. 23, 1979); BEH/DAS Bull. #5, Nov. 17, 1977, 2 EHLR 203:2 (1979); BEH Policy Letter to Donald Clark, Mar. 29, 1978, 2 EHLR 211:17 (1979).

for a handicapped child, then it should be "possible to state what that child's unique needs are, what objective is desired, what is required to achieve it, how long it should reasonably take, and how it will be determined whether or not it has been achieved."<sup>123</sup> The IEP also must include an assessment of the extent to which the child can participate in a normal education program, a mandated focus on the policy of the least restrictive environment.<sup>124</sup> The parent must be given a written copy of the IEP on request,<sup>125</sup> and, although the IEP is not characterized as being contractual in nature, the regulations assert that "each public agency must provide special education and related services to a handicapped child in accordance with an individualized education program."<sup>126</sup> The Act requires that the IEP meeting must be held within thirty calendar days of a determination that the child needs special education,<sup>127</sup> a review of the IEP must be held periodically and in no event less frequently than once a year,<sup>128</sup> the IEP must be in effect before special education and related services are provided,<sup>129</sup> and it must be implemented as soon as possible following the IEP meeting or meetings.<sup>130</sup> Finally, the due process procedures for reviewing special education decisions may be triggered by the parents to assess the decisions contained in the individualized educational program.<sup>131</sup> The formalized, indi-

123. Weintraub, *Understanding the Individualized Education Program (IEP)*, AMICUS 26, at 30 (April 1977).

124. 45 C.F.R. § 121a.346(c) (1978); VA. SPEC. ED. REGS. 29.

125. 45 C.F.R. § 121a.345(f) (1978); VA. SPEC. ED. REGS. 29.

126. 45 C.F.R. § 121a.349 (1978); VA. SPEC. ED. REGS. 27. The regulations also state in the same section, however, that Part B of the Act does not require that any agency, teacher, or other person be held accountable if a child does not achieve the growth projected in the annual goals and objectives. *Id.* This does not detract from possible accountability if the schools do not deliver on the promised program of instruction and services. The court in *Howard S. v. Friendswood Ind. School Dist.*, 454 F. Supp. 634 (S.D. Tex. 1978), pointed to the possibility of school board member liability under *Wood v. Strickland*, 420 U.S. 308 (1975), if there is a blatant failure to perform their obligations. *Id.* at 638.

127. 45 C.F.R. § 121a.343(c) (1978); VA. SPEC. ED. REGS. 26. See also BEH Policy Letter to Bob Van Osdol, Oct. 12, 1978, 2 EHRLR 211:72 (1979).

128. 45 C.F.R. § 121a.343(d) (1978); VA. SPEC. ED. REGS. 26.

129. 45 C.F.R. § 121a.342(b) (1) (1978); VA. SPEC. ED. REGS. 26.

130. 45 C.F.R. § 121a.342(b)(2) (1978). The Virginia Regulation provides for implementation within thirty calendar days after the determination of need for special education is made. VA. SPEC. ED. REGS. 26.

131. 20 U.S.C. § 1415(b)(1)(E), (b)(2) (1976); 45 C.F.R. § 121a.506 (1978); VA. SPEC. ED. REGS. 45.

vidualized educational program is the first generalized legal embodiment of a long held ideal of designing educational programs tailored to the needs of the individual child and it is probably the key to any success for the Education for All Handicapped Children Act of 1975.

#### D. *The Surrogate Parent and the Handicapped Child in State or Other Public Agency Care*

The Act and regulations recognize that there are many handicapped children who are not in the custody or care of their natural parents or legal guardians. The legislation speaks of the establishment of:

procedures to protect the rights of the child whenever the parents or guardian of the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as a surrogate for the parents or guardian.<sup>132</sup>

The Act thus contemplates the use of a surrogate parent in three instances: 1) where no "parent," including a natural parent, a guardian, a person acting as a parent (in legal terms, *in loco parentis*),<sup>133</sup> or a surrogate parent can be identified, 2) where the agency, after reasonable efforts, cannot locate the parents, and 3) where the child is considered to be a ward of the state under the laws of the state.<sup>134</sup> The responsible public agency has the obligation to determine the need for a surrogate parent and to assign a person to serve as the surrogate parent for a child.<sup>135</sup> The surrogate parent is

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132. 20 U.S.C. § 1415(b)(1)(B) (1976). See also 45 C.F.R. §§ 121a.10, -.514 (1978); VA. SPEC. ED. REGS. 50-52; O'Donnell, *An Advocate's View: The Role of the Surrogate Parent*, AMICUS 28 (June, 1977).

133. 45 C.F.R. § 121a.10 (1978); VA. SPEC. ED. REGS. Glossary 7. A "foster parent" may be included in this definition. BEH Policy Letter to Barbara Robbin, Feb. 28, 1978, 2 EHLR 211:12 (1979).

134. 45 C.F.R. § 121a.514(a) (1978); VA. SPEC. ED. REGS. 51.

135. 45 C.F.R. § 121a.514(b) (1978); VA. SPEC. ED. REGS. 51. The state agency itself cannot serve as the surrogate parent where it has custody of the child. BEH Policy Letter to Mary Ann Kish, Aug. 8, 1978, 2 EHLR 211:49 (1979); BEH Policy Letter to Bob Van Osdol, Oct.

to be selected in accordance with state law and must have no conflict of interest with the child while at the same time having the knowledge and skills to insure adequate representation for the child.<sup>136</sup> The surrogate parent may not be an employee of either the agency caring for the child or the education agency although there is no disqualification flowing simply from compensation of the surrogate solely for performing that role by one of the agencies.<sup>137</sup>

The Act and regulations leave many questions unanswered in this critical area. They would appear to allow the use of a surrogate parent in every instance where a child is a ward of the state even though the parents may be known or available or where there may be a foster parent or other individual acting *in loco parentis* who is committed to serving as an advocate for the child. They do not effectively deal with the situation where a child is eligible for representation by a surrogate parent but where custody is in a recalcitrant or insensitive agency or when the child is not being provided an appropriate education by an unaggressive educational agency. Who triggers the designation of a surrogate parent in these situations? Also, the Act and regulations deal only superficially with the parent who refuses to consent to evaluation or to the provision of special education and related services and do not seem to contemplate the use of a surrogate parent in this situation.

#### E. *Transportation*

Handicapped children frequently need specialized transportation resources either in the form of more extensive transportation to special education centers where a normal school placement is not appropriate or in vehicles specially adapted to the needs of handicapped children or transportation with closer personal supervision of the children carried. The 1975 Act and its regulations list transportation as one of the "related services" included in the "free appropriate public education" mandated for handicapped children.<sup>138</sup>

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12, 1978, 2 EHLR 211:72 (1979); BEH Policy Letter to Roger W. Brown, May 16, 1979, 2 EHLR 211:100 (1979).

136. 45 C.F.R. § 121a.514(c) (1978); VA. SPEC. ED. REGS. 51-2.

137. 45 C.F.R. § 121a.514(d) (1978); VA. SPEC. ED. REGS. 52.

138. 20 U.S.C. § 1401(17) (1976); 45 C.F.R. § 121a.13 (1978); VA. SPEC. ED. REGS. Glossary 10.

The regulations further define "transportation" to include: "(i) Travel to and from school and between schools, (ii) Travel in and around school buildings, and (iii) Specialized equipment (such as special or adapted buses, lifts, and ramps), if required to provide special transportation for a handicapped child."<sup>139</sup> Parents and advocates should be careful to insure that the child's individualized educational program specifically provides for any specialized transportation requirements and that these requirements are spelled out in detail.

#### F. *Private and Institutional Placements*

One of the most frequent sources of conflict between the parents and the local educational agency is whether the public school system can provide an "appropriate" program for the child or whether that program can only be provided by either a private day or residential placement.<sup>140</sup> Parents often question the effectiveness of the public programs and desire that the costs, often expensive, of a private placement be paid by the public agency. The critical issue is whether the local educational agency is capable of providing a "free appropriate public education" within the parameters of its presently developed programs. The initial questions involved in addressing this issue are whether the evaluation would appear to call for a unique and specialized form of remediation and whether the "individualized educational program" dictates a residential or other private placement for the provision of such services not available in the public school system's programs. Conflict inheres in these determinations as the parents usually assert that certain services, publicly unavailable, are required by the law while the representatives of the local educational agency, often motivated by fiscal considerations, urge that "appropriateness" may be found at a lesser level of services, and within the public system.<sup>141</sup> Many hear-

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139. 45 C.F.R. § 121a.13(b)(13) (1978). See also 45 C.F.R. § 84.33(c)(2) (1978); VA. SPEC. ED. REGS. Glossary 13-14. If summer transportation is provided to non-handicapped children, then it must be provided to handicapped children. Office for Civil Rights Section 504 Letter to Douglas T. McGarvie, May 11, 1978, 2 EHLR 254:02 (1979).

140. *Enforcing the Right* *supra* note 7 at 1125. Parents are frequently distrustful of the schools where their handicapped child is concerned and will only trust an outside placement.

141. *Id.* at 1109-10, n. 43, 1123. As this commentator points out, there is "an incentive to identify handicapped children but not to place them in expensive schools." *Id.* at 1109, n.

ings flow from this essential conflict and the necessary clash between parents desiring the best possible private program and educators who might desire to place even a severely handicapped child in a regular classroom to minimize the financial impact. "Appropriateness" usually falls somewhere in the middle ground between these two extreme positions. One commentator suggests defining "appropriateness in relation to the actual level of educational services provided for most children within a given school system."<sup>142</sup> This would seem to be consistent with the standard established by the regulations under Section 504 of the Rehabilitation Act which speak of an "appropriate education" as being one "designed to meet individual educational needs of handicapped persons as adequately as the needs of non-handicapped persons are met . . . ."<sup>143</sup> A second issue is presented by the requirement of placing the child in the least restrictive environment which presumably would militate against an institutional or private placement.<sup>144</sup>

If the parents successfully urge that an appropriate program can only be provided in a private placement, or if the local educational agency agrees to such a placement as a part of the IEP, then the handicapped child must be guaranteed all the rights there as if served directly by the public agency and must be provided special education and related services: 1) pursuant to an IEP under the Act and regulations; 2) at no cost to the parents; and 3) at a school or facility that meets all the standards that apply to public agencies.<sup>145</sup> If parents determine to place their handicapped child in a private school or facility despite the availability of a free appropriate public education, they may do so at their own expense but the local educational agency must still make available the special education and

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43. See, e.g., *Ladson v. Board of Educ. of the Dist. of Columbia Govt.*, Civ. Action No. 78-2263, 3 EHLR 551:188 (D.D.C. Mar. 12, 1979); *Michael P. v. Maloney*, Civ. Action No. 78-545, 3 EHLR 551:155 (D.Conn. Mar. 21, 1979); *Matthews v. Campbell*, Civ. Action No. 78-0879-R (E.D. Va. July 16, 1979); *North v. District of Columbia Bd. of Educ.*, 471 F. Supp. 136 (D.D.C. 1979); *In re Jones*, \_\_\_ Misc. 2d \_\_\_, 414 N.Y.S. 2d 258 (Fam. Ct. Queens Co. 1979); *In re Scott K.*, 92 Misc. 2d 681, 400 N.Y.S. 2d 289 (Fam. Ct. N.Y. Co. 1977).

142. *Id.* at 1125.

143. 45 C.F.R. § 84.33(b)(1)(i) (1978).

144. See text accompanying footnotes 148 through 166 *infra*.

145. 45 C.F.R. §§ 84.33(c)(3) -(4), 121a.302, -.347, -400-403 (1978); VA. SPEC. ED. REGS. 23, 30-31. This would include such expenses as room and board. BEH Policy Letter to David W. Hornbeck, Aug. 29, 1978, 2 EHLR 211:65 (1979).

related services provided to other handicapped children in the school district.<sup>146</sup>

A child in a private school other than specifically for special education services is defined as a "private school handicapped child" and is entitled to such special education and related services as are provided to public school children.<sup>147</sup> Particular regulations have been promulgated to govern the provision of services that "are comparable in quality, scope, and opportunity for participation to those provided to public school children with needs of equal importance."<sup>148</sup>

Despite the regulations and due process procedures provided to resolve conflicts arising under the Act, disputes over the appropriateness of public programs and the need for placement in a private school or facility will inevitably occupy much of the time of hearing officers and school divisions.

### G. *The Least Restrictive Environment*

Probably the most controversial provision of the 1975 legislation is the strong mandate for placement of handicapped children in the least restrictive environment, what is sometimes referred to as "mainstreaming."<sup>149</sup> The strongest statement in the Act is contained in a directive that State educational agencies establish:

procedures to assure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment

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146. 45 C.F.R. § 121a.403(a) (1978); VA.SPEC. ED. REGS. 32-33.

147. 45 C.F.R. §§ 121a.450, -452-456 (1978); VA.SPEC. ED. REGS. 32-34.

148. 45 C.F.R. § 121a.455(b) (1978); VA.SPEC. ED. REGS. 34.

149. Abeson, *Education for Handicapped Children in the Least Restrictive Environment*, THE MENTALLY RETARDED CITIZEN AND THE LAW 514 (1976); Abeson, *The Educational Least Restrictive Alternative*, 2 AMICUS 23 (June, 1977); Miller & Miller, *The Handicapped Child's Civil Rights as it Relates to the "Least Restrictive Environment" and Appropriate Mainstreaming*, 54 IND. L.J. 1 (1978); Zettel and Abeson *supra* note 6 at 203-11; Comment, *The Handicapped Child Has a Right to an Appropriate Education*, *supra* note 6, at 672-77; *Enforcing the Right* *supra* note 7 at 1118-24; *Opening the Schoolhouse Door* *supra* note 7 at 53-4.

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 . . .<sup>150</sup>

The regulations provide even more extensively for a major emphasis on the principle of the least restrictive environment, including a mandated inclusion as a factor in the individualized education program.<sup>151</sup> Whereas other focuses of the Act concentrate on the specific services to be delivered to the handicapped child under the aegis of a "free appropriate public education," this focus necessitates keying in on the proper environment in which this education will be delivered. As previously discussed, the "least restrictive environment" policy would seem to place the burden of proof on any party advocating the removal of the child from the regular classroom,<sup>152</sup> but neither the Act nor the regulations give much guidance for the making of this crucial decision.<sup>153</sup>

Much of the impetus for the "least restrictive environment" principle comes from a historic mistrust for the traditionally segregated delivery of services to handicapped children, especially for the educable or trainable mentally retarded.<sup>154</sup> This mistrust flowed not only from a concern that such a setting was inherently unnatural but also from concerns that such separation had a "labelling" or stigmatizing effect, that it tended to heighten the negative impact from misclassification, that it minimized expectations and thus performance from these children through a "Pygmalion effect," and that it had become an unwitting tool for maintaining racial segregation.<sup>155</sup>

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150. 20 U.S.C. § 1412(5)(B) (1976). *See also* 20 U.S.C. § 1414(a)(1)(c)(iv), -1418(b)(1)(c) (1976).

151. 45 C.F.R. § 121a.346(c) (1978). *See also* 45 C.F.R. §§ 84.34(a), 121a.132, -.550-.556 (1978); VA. SPEC. ED. REGS. 23-24, 29, 32, Glossary 5.

152. *Enforcing the Right supra* note 7 at 1119.

153. *Id. Cf.* BEH Policy Letter to Dr. Greg Frith, Dec. 26, 1978, 2 EHLR 211:84 (1979).

154. Chambers, *The Principle of the Least Restrictive Alternative, THE MENTALLY RETARDED CITIZEN AND THE LAW* 486 (1976); Dunn, *Special Education for the Mildly Retarded—Is Much of It Justifiable?*, 35 *EXCEPTIONAL CHILDREN* 5 (1968); Miller & Miller, *supra* note 148, at 7-8; Reynolds, *Framework for Considering Some Issues in Special Education*, 28 *EXCEPTIONAL CHILDREN* 367 (1962); *Enforcing the Right supra* note 7 at 1119-20.

155. Dunn, *supra* note 153, at 8-9; Miller & Miller, *supra* note 148, at 7; Comment, *The Handicapped Child Has a Right to an Appropriate Education, supra* note 6, at 674-5; *Enforcing the Right supra* note 7 at 1119; *see also* *Hobson v. Hansen*, 269 F. Supp. 401, 484 (D.D.C. 1967).



These educational concerns were reinforced by the legal doctrines evolving in litigation challenging the approaches to the civil commitment of persons, especially children, to institutions.<sup>156</sup> The consent decree in *PARC* also gave impetus to the acceptance of the principle when the court order required that "among the alternative programs of education and training required by statute to be available, placement in a regular public school class is preferable to placement in a special public school class and placement in a special public school class is preferable to placement in any other type of program of education and training."<sup>157</sup> The federal district court in the subsequent contested case of *Hairston v. Drosick*,<sup>158</sup> concluded that exclusion of a minimally handicapped spina bifida child from a regular public classroom situation "without a bona fide educational reason" was violative of Section 504 of the Rehabilitation Act.<sup>159</sup> It was against this backdrop of both litigation and professional judgment that Congress incorporated the "least restrictive environment" policy in the legislation.

The controversy over the policy has been generated from several different sources. Educators, especially classroom teachers, have argued that mainstreaming handicapped children without increasing the training and sensitivity level of the regular classroom teacher or reducing the class size will result in the direction of undue instructional attention to the exceptional child to the detriment of normal students.<sup>160</sup> Special educators urge that special programs will suffer unduly from the emphasis on regular classroom placement with a resulting lag in research and program and technique development.<sup>161</sup> Parents and special educators assert that stigmati-

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156. See Teitelbaum & Ellis, *The Liberty Interest of Children: Due Process Rights and Their Application*, 12 FAM. L. Q. 153 (1978).

157. *Pennsylvania Association for Retarded Children v. Pennsylvania*, 334 F. Supp. 1257, 1260 (E.D. Pa. 1971), *modified*, 343 F. Supp. 279 (1972).

158. 423 F. Supp. 180 (S.D. W.Va. 1976).

159. *Id.* at 184. See also *Matthews v. Campbell*, Civ. Action No. 78-0879-R (E.D. Va. July 16, 1979); *Mattie T. v. Holladay*, Civil Action No. DC-75-31-S, 3 EHLR 551:109 (N.D. Miss. Jan. 26, 1979); *New York State Assoc. for Retarded Children*, 466 F. Supp. 479 (E.D.N.Y. 1978), 466 F. Supp. 487 (E.D.N.Y. 1979); *P-1 v. Shedd*, No. 78-58, 3 EHLR 551:164 (D. Conn. Mar. 23, 1979).

160. See, e.g., Greenberg & Doolittle, *Can Schools Speak the Language of the Deaf?*, N.Y. Times, Dec. 11, 1977, § 6 (Magazine), at 50; Milofsky, *Schooling the Kids No One Wants*, N.Y. Times, Jan. 2, 1977, § 6 (Magazine), at 25, 28.

161. See Greenberg & Doolittle, *supra* note 160, at 102.

zation will be greater in the normal classroom as the handicapped child is increasingly set apart, isolated and shunned by his nonhandicapped peers.<sup>162</sup> Parents also argue that many handicapped children who were already in the "mainstream" when the Act was passed, were drowning, and the perceived rescue and resuscitation has not materialized because administrators have used the policy as a justification for continued "dumping" of the children in a normal classroom setting instead of providing special services.<sup>163</sup> In fact, the utilization of "mainstreaming," which has become almost a pejorative term for the least restrictive environment, has become one of the most emotional issues for many parents and parent groups.

One perceptive commentator has urged that the best approach for decisionmakers in this area is to apply the "maximum integration provision as a rebuttable presumption that every child is properly placed in the regular classroom."<sup>164</sup> One approach urged at an earlier point was to use what is called a "cascade system" with nine alternative educational placements beginning with the regular classroom in the child's regular school and proceeding in increasingly restrictive placement steps to the most restrictive setting of a hospital.<sup>165</sup> This technique, and others designed to enhance implementation of such a policy,<sup>166</sup> may be effective educational tools, but more basic issues need to be addressed. One is the need to deal with the placement of a handicapped child on the basis of the level of services needed by this specific and unique person, rather than on the basis of a label applied after standardized testing. Second, there is a need for a real commitment to individualized education and the variety of resources and methods implied thereby. The third, and perhaps most important, issue is presented by the general inadequacy of training afforded regular classroom teachers in dealing with handicapped children and, equally important, the need for sensitizing "normal" children to interrelating with handicapped children.<sup>167</sup> Finally, there is a profound need to intentionally blur the line be-

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162. *See id.* at 82.

163. *Enforcing the Right supra* note 7 at 1121.

164. *Id.* at 1122.

165. Reynolds, *supra* note 154.

166. *See* Miller & Miller, *supra* note 149, at 3.

167. NATIONAL ADVISORY COUNCIL ON EDUCATION PROFESSIONS DEVELOPMENT, MAINSTREAMING: HELPING TEACHERS MEET THE CHALLENGE 18-19 (1976).

tween regular and special education and move towards greater collaboration, cooperation and integration between the two. An implementation of these goals would lessen somewhat the difficult decision-making under the administrative procedures afforded by the Act although the implementation of the least restrictive environment policy will always be hard.

#### H. *Discipline and Misconduct*

The question of the role of the Education for All Handicapped Children Act of 1975 in student discipline decisions is an issue that has arisen primarily in litigation since the implementation of the Act. Paragraph 24 of the Appendix to the Regulations under Section 504 of the Rehabilitation Act of 1973 points out that "where a handicapped student is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment."<sup>168</sup> Save for a reference to this language in a comment to Section 121a.552 of the Regulations under Public Law 94-142,<sup>169</sup> there is almost total silence on this issue. However, the recent case of *Stuart v. Nappi*,<sup>170</sup> and other later cases,<sup>171</sup> have focused on the procedures to be followed in disciplining handicapped children. In *Stuart* a girl was expelled from school pursuant to normal procedures for disciplinary reasons in spite of Planning and Placement Team recommendations regarding placement and services for a severe learning disability and emotional difficulties.<sup>172</sup> The court concluded that under the 1975 Act and its Regulations there were four specific rights that were violated in Kathy Stuart's case:

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168. 45 C.F.R., Part 84, Appendix A, para. 24 (1978). This is a major issue as school divisions will often argue that a child is dangerous to self or a threat to others in justifying exclusion of the child from the school or from the regular classroom. See, e.g., *Howard S. v. Friendswood Ind. School Dist.*, 454 F. Supp. 634 (S.D. Tex. 1978); *K. B. v. Withey*, Civ. Action No. 78-288, (D.Vt. Dec. 18, 1978); *New York State Assoc. for Retarded Children v. Carey*, 466 F. Supp. 479 (E.D. N.Y. 1978), 466 F. Supp. 487 (E.D. N.Y. 1979).

169. 45 C.F.R. § 121a.552, Comment (1978).

170. 443 F. Supp. 1235 (D. Conn. 1978).

171. *Mattie T. v. Holladay*, Civil Action No. DC-75-31-S, 3 EHRLR 551:109 (N.D. Miss. Jan. 26, 1979); *P-1 v. Shedd*, No. 78-58, 3 EHRLR 551:164 (D. Conn. Mar. 23, 1979); *S-1 v. Turlington*, Case No. 78-8020-CIV-CA, 3 EHRLR 551:211 (S.D. Fla. June 15, 1979). See also *Howard S. v. Friendswood Ind. School Dist.*, 454 F. Supp. 634 (S.D. Tex. 1978) (this is a particularly strong decision).

172. 443 F. Supp. at 1238-39.

(1) the right to an "appropriate public education;" (2) the right to remain in her present placement until the resolution of her special education complaint; (3) the right to an education in the "least restrictive environment;" and (4) the right to have all changes of placement effectuated in accordance with prescribed procedures.<sup>173</sup>

In light of these conclusions, the court ruled that "any changes in plaintiff's placement must be made by a PPT after considering the range of available placements and plaintiff's particular needs."<sup>174</sup> The other later cases are consistent with *Stuart* in supporting the concept that the 1975 Act takes precedence over the normal procedures for disciplining school children if the sanction involves expulsion, long-term suspension or other punishments that may be equated to a change of placement.<sup>175</sup>

### I. *Complaint and Due Process Procedures*

As the prior discussions have indicated, parents are afforded the right under the Act to an adjudication of complaints or of disagreements with school decisions under procedures that comport with due process. Section 615 of the Act is devoted exclusively to "procedural safeguards" and it mandates certain minimal due process procedures to include the following:

- 1) The parental right, personally and by a representative, to examine all records relevant to identification, evaluation, placement, and the provision of a free appropriate public education;<sup>176</sup>
- 2) The parental right to an independent educational evaluation of the child;<sup>177</sup>
- 3) Procedures to provide a surrogate parent for a child where the parents or guardians are unknown, unavailable or where the child is a ward of the State;<sup>178</sup>

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173. *Id.* at 1240.

174. *Id.* at 1243.

175. *Supra* note 171.

176. 20 U.S.C. § 1415(b)(1)(A) (1976). *See also* 45 C.F.R. §§ 84.36, 121a.502, -.562-.566 (1978); VA. SPEC. ED. REGS. 42.

177. 20 U.S.C. § 1415(b)(1)(A) (1976). *See also* 45 C.F.R. § 121a.503 (1978); VA. SPEC. ED. REGS. 42-3.

178. 20 U.S.C. § 1415(b)(1)(B) (1976). *See also* 45 C.F.R. § 121a. 514 (1978); VA. SPEC. ED. REGS. 50-2.

- 4) The parental right to written prior notice of any agency action or refusal to act regarding the initiation of or change in the identification, evaluation, educational placement or the provision of a free appropriate public education to the child;<sup>179</sup>
- 5) The parental right to be provided notice in their native language;<sup>180</sup>
- 6) The parental right to be advised of all the procedures available;<sup>181</sup>
- 7) The opportunity for the parents to present complaints regarding the identification, evaluation, placement, or free appropriate public education for the child;<sup>182</sup>
- 8) The parental right to consent to evaluation or placement of the child;<sup>183</sup>
- 9) The agency right to a hearing on a parental refusal to consent to evaluation or placement;<sup>184</sup>
- 10) The parental right to an impartial due process hearing regarding any disagreement over action or refusal to act under 4) above, which impartial due process hearing must include:<sup>185</sup>
  - a) A right to be informed of any free or low-cost legal and other services available;<sup>186</sup>
  - b) A right to an impartial hearing officer who is neither an employee of an agency involved in the education or care of the child nor has any personal or professional interest which would conflict with his or her objectivity;<sup>187</sup>
  - c) A party's right to be accompanied and advised by counsel

179. 20 U.S.C. § 1415(b)(1)(C) (1976). *See also* 45 C.F.R. §§ 84.36, 121a.504-.505 (1978); VA. SPEC. ED. REGS. 43-4.

180. 20 U.S.C. § 1415(b)(1)(D) (1976). *See also* 45 C.F.R. § 121a.505(b)(2) (1978); VA. SPEC. ED. REGS. 44.

181. 20 U.S.C. § 1415(b)(1)(D) (1976). *See also* 45 C.F.R. § 121a.505(a)(1) (1978); VA. SPEC. ED. REGS. 43.

182. 20 U.S.C. § 1415(b)(1)(E) (1976).

183. 45 C.F.R. § 121a.504(b) (1978); VA. SPEC. ED. REGS. 45.

184. 45 C.F.R. § 121a.504(c) (1978); VA. SPEC. ED. REGS. 45.

185. 20 U.S.C. § 1415(b)(2) (1976). *See also* 45 C.F.R. §§ 84.36, 121a.506 (1978); VA. SPEC. ED. REGS. 45.

186. 45 C.F.R. § 121a.506(c) (1978); VA. SPEC. ED. REGS. 46.

187. 20 U.S.C. § 1415(b)(2) (1976). *See also* 45 C.F.R. § 121a.507 (1978); VA. SPEC. ED. REGS. 46, Glossary 4. *See also* *Campo Chiaro v. Califano*, Civil No. H-78-64 (D.Conn. May 18, 1978). This disqualifies local school board members or other employees of the agency directly involved in the delivery of educational services. BEH Policy Letter to Walter P. Kennedy, Jan. 20, 1978, 2 EHLR 211:07 (1979); BEH Policy Letter to Glenn Vergason, April 19, 1978, 2 EHLR 211:21 (1979); BEH Policy Letter to Charles L. Kettler, Aug. 11, 1978, 2 EHLR 211:51 (1979); BEH Policy Letter to Lynne Cannon, Sept. 20, 1978, 2 EHLR 211:67 (1979); Office for Civil Rights Policy Interpretation No. 6, 43 FR 36036, Aug. 14, 1978, 2 EHLR 251:03 (1979).

- and by experts;<sup>188</sup>
- d) The right to present evidence and confront, cross-examine and compel the attendance of witnesses;<sup>189</sup>
  - e) The right to exclude evidence not disclosed to the party at least five days prior to the hearing;<sup>190</sup>
  - f) The right to a written or electronic verbatim record of the hearing;<sup>191</sup>
  - g) The right to obtain written findings of fact and decision;<sup>192</sup>
  - h) The parental right to have the child in question present at the hearing;<sup>193</sup>
  - i) The parental right to have the hearing open to the public.<sup>194</sup>
- 11) The parental right to limit accessibility to educational records of their child to officials of educational agencies;<sup>195</sup> and
  - 12) The right to timely and expeditious procedures, including
    - a) Screening all children for certain handicaps within 60 school days of initial enrollment in a public school;<sup>196</sup>
    - b) Action by a local school screening committee on children referred after screening within 10 school days;<sup>197</sup>
    - c) Initiation of formal assessment of suspected handicapped children by the special education administrator within 20 school days of referral by the local school screening committee;<sup>198</sup>
    - d) A determination of eligibility for special education and related services within 45 school days of the initiation of formal evaluation procedures regardless of the initiator;<sup>199</sup>

188. 20 U.S.C. § 1415(d)(1) (1976). *See also* 45 C.F.R. §§ 84.36, 121a.508(a)(1) (1978); VA. SPEC. ED. REGS. 47.

189. 20 U.S.C. § 1415(d)(2) (1976). *See also* 45 C.F.R. § 121a.508(a)(2) (1978); VA. SPEC. ED. REGS. 47. A BEH Policy Letter indicates that a subpoena power would exist. BEH Policy Letter to Gail Imobensteg, Mar. 8, 1978, 2 EHLR 211:15 (1979).

190. 45 C.F.R. § 121a.508(a)(3) (1978); VA. SPEC. ED. REGS. 47.

191. 20 U.S.C. § 1415(d)(3) (1976). *See also* 45 C.F.R. § 121a.508(a)(4) (1978); VA. SPEC. ED. REGS. 47.

192. 20 U.S.C. § 1415(d)(4) (1976). *See also* 45 C.F.R. § 121a.508(a)(5) (1978); VA. SPEC. ED. REGS. 47. The findings and decisions, after deletion of personally identifiable information, must be transmitted to the State advisory panel.

193. 45 C.F.R. § 121a.508(b)(1) (1978); VA. SPEC. ED. REGS. 47.

194. 45 C.F.R. § 121a.508(b)(2) (1978); VA. SPEC. ED. REGS. 47.

195. 20 U.S.C. § 1232g(b)(1) (1976). *See also* 45 C.F.R. §§ 99.30-.31, 121a.571 (1978); VA. SPEC. ED. REGS. 58-9.

196. VA. SPEC. ED. REGS. 13.

197. *Id.* at 14.

198. *Id.* at 14-15.

199. *Id.* at 17.

- e) Development of an individualized educational program and placement within 30 calendar days of a determination that the child needs special education and related services;<sup>200</sup>
- f) Access to education records prior to an IEP meeting or hearing and in no case more than 45 school days after the request has been made;<sup>201</sup>
- g) A final decision from a local hearing officer no later than 45 school days after receipt of a request for a hearing and the posting of a copy of the decision by mail within the same period;<sup>202</sup> and
- h) A final decision from a state hearing officer on review no later than 30 school days after receipt of a request for a review and posting of a copy of the decision by mail within the same period.<sup>203</sup>

The federal and state regulations would appear to avoid the long periods of delay that have marked evaluation and placement in the past but the time limitations would still seem to allow for considerable foot-dragging.<sup>204</sup> In general, however, the administrative procedures afforded by the Act and the regulations promulgated pursuant to it provide far more extensive due process rights that would probably be ordered by the courts at this time.<sup>205</sup> Much of the success of the Act will be dependent upon the objectivity and dedication of hearing officers at the local and State level and upon the availability, knowledge and dedication of lawyers and lay advocates to represent and advise parents and their children.

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200. 45 C.F.R. § 121a.343(c) (1978); VA. SPEC. ED. REGS. 26.

201. 45 C.F.R. § 121a.562(a) (1978); VA. SPEC. ED. REGS. 53.

202. 45 C.F.R. § 121a.512(a) (1978); VA. SPEC. ED. REGS. 49.

203. 45 C.F.R. § 121a.512(b) (1978); VA. SPEC. ED. REGS. 49-50.

204. As pointed out in note 72, *supra*, the failure of the federal and state regulations to define the term "days" as meaning calendar days and, indeed, the active definition of the term in the State regulations to mean school days allows for excessive delay in the process from the time of an initial suspicion of a handicap to completion of due process procedures. A BEH Policy Letter opines that all timelines are intended to mean calendar days. BEH Policy Letter to Frederick Weintraub, Sept. 25, 1978, 2 EHLR 211:67 (1979).

205. The recent Supreme Court decisions in *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816 (1977) and *Parham v. J.R.*, 99 S. Ct. 2493 (1979) would not instill optimism regarding an expansive definition of due process by that Court in the absence of very precise statutes or regulations. *See also Southeastern Community College v. Davis*, 99 S.Ct. 2361 (1979).

### J. *State Appeal and Review*

The local hearing procedure is not the end of the due process afforded to the parties since "any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing."<sup>206</sup> The Act mandates that the "officer conducting such review shall make an independent decision upon completion of such review."<sup>207</sup> At this appellate stage the hearing officer must

- 1) Examine the entire record of the hearing below;<sup>208</sup>
- 2) Insure that the local hearing procedures comported with due process;<sup>209</sup>
- 3) Seek additional evidence if necessary, and this would presumably include the right to order an independent evaluation;<sup>210</sup>
- 4) Afford the same procedural rights guaranteed to the parties at the local hearing if additional evidence is heard;<sup>211</sup>
- 5) Give the parties an opportunity for oral or written argument, or both in the officer's discretion;<sup>212</sup>
- 6) Make an independent decision;<sup>213</sup>
- 7) Give a copy of written findings and the decision to the parties;<sup>214</sup> and
- 8) Act within 30 school days after receipt of a request for a review.<sup>215</sup>

The decision of the State review hearing officer is final unless a civil action is brought in a court to overturn the conclusion reached.<sup>216</sup>

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206. 20 U.S.C. § 1415(c) (1976). *See also* 45 C.F.R. § 121a.510(a) (1978); VA. SPEC. ED. REGS. 48.

207. 20 U.S.C. § 1415(c) (1976). *See also* 45 C.F.R. § 121a.510(b) (1978); VA. SPEC. ED. REGS. 48.

208. 45 C.F.R. § 121a.510(b)(1) (1978); VA. SPEC. ED. REGS. 48.

209. 45 C.F.R. § 121a.510(b)(2) (1978); VA. SPEC. ED. REGS. 48.

210. 45 C.F.R. §§ 121a.503(d), -510(b)(3) (1978); VA. SPEC. ED. REGS. 48.

211. 45 C.F.R. § 121a.510(b)(3) (1978); VA. SPEC. ED. REGS. 48.

212. 45 C.F.R. § 121a.510(b)(4) (1978); VA. SPEC. ED. REGS. 48.

213. 20 U.S.C. § 1415(c) (1976). *See also* 45 C.F.R. § 121a.510(b)(5) (1978); VA. SPEC. ED. REGS. 48.

214. 45 C.F.R. § 121a.510(b)(6) (1978); VA. SPEC. ED. REGS. 48.

215. 45 C.F.R. § 121a.512(b) (1978); VA. SPEC. ED. REGS. 49-50.

216. 20 U.S.C. § 1415(e)(1) (1976). *See also* 45 C.F.R. § 121a.510(c) (1978); VA. SPEC. ED. REGS. 48.



### K. *Litigation*

The 1975 Act not only mandates the development of an extensive and sophisticated administrative procedural system for the provision of due process when conflicts arise, but it also provides for access to the courts upon the completion of administrative procedures. The Congress provided in the legislation that:

Any party aggrieved by the findings and decision made under [local due process procedures] . . . who does not have the right to an appeal under [state review procedures] . . . , and any party aggrieved by the findings and decision under [state review procedures] . . . , shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.<sup>217</sup>

The judicial remedy thus defined is a review of the administrative process at the local and state level, both substantive and procedural. It would seem to require an exhaustion of the administrative remedies although the analysis of the regulations that accompany these rules leaves this question open.<sup>218</sup> A recent district court decision supports this view while agreeing that the willful refusal of a local agency to afford "any education whatsoever" in clear violation of the Act or an inadequate or absent administrative process might excuse a failure to exhaust administrative remedies.<sup>219</sup> Some of the

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217. 20 U.S.C. § 1415(e)(2) (1976). *See also* 45 C.F.R. § 121a.511 (1978); VA. SPEC. ED. REGS. 49. The judicial review provision clearly contemplates an independent evaluation by the court. *Ladson v. Board of Educ. of the Dist. of Columbia Govt.*, Civ. Action No. 78-2263, 3 EHLR 551:188 (D.D.C. Mar. 12, 1979).

218. *See* comment regarding § 121a.511 in Appendix A to 45 C.F.R. Part 121a.

219. *Harris v. Campbell*, Civ. Action No. 78-0929-R (E.D. Va. June 15, 1979). *See also* *Mark T. v. McDaniel*, Div. Action No. C79-222A, 3 EHLR 551:214 (N.D. Ga. June 26, 1979). *Harris* posits that if exhaustion would be futile, it would not be required as a prerequisite to judicial intervention. *See also* *Armstrong v. Kline*, Civ. Actions Nos. 78-172, -132-133, 3 EHLR 551:195 (E.D.Pa. June 21, 1979); *Howard S. v. Friendswood Ind. School Dist.*, 454 F. Supp. 634 (S.D. Tex. 1978); *Loughren v. Flanders*, 470 F. Supp. 110 (D. Conn. 1979). Another

states have followed the federal legislation by statute specifying the "State court of competent jurisdiction" in which jurisdiction for review of the administrative process will be lodged.<sup>220</sup>

Additional legal remedies are afforded through litigation under Section 504 of the Rehabilitation Act although recent decisions have cast some doubt on the efficacy of such an approach.<sup>221</sup> The administrative and judicial procedures delineated by the Education for All Handicapped Children Act and its regulations provide more specific and efficacious remedies for complaints in the elementary and secondary school setting although there may be exceptional situations where other approaches will be desirable. For example, generalized problems may dictate the utilization of class action litigation in situations where failures to comply with the Act are so widespread that compensatory programs not dealt with in the Act may be constitutionally required.<sup>222</sup> In light of these possibilities, the antecedent case precedents may have more than historical interest.<sup>223</sup>

#### L. *Administrative and Judicial Remedies for Review of Programs*

The Act does not rely solely on complaint procedures for individual parents in specific cases to insure compliance with the policies and procedures set forth in the legislation and regulations. The statute makes the state educational agency responsible for monitoring compliance with the Act and for at least annual evaluations of

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case has held that the exhaustion of available administrative remedies under Pub. L. No. 94-142 will suffice to satisfy exhaustion under Section 504. *Boxall v. Sequoia Union High School Dist.*, 464 F. Supp. 1104 (N.D. Cal. 1979).

220. See, e.g., VA. CODE ANN. § 22-10.4.D (Cum. Supp. 1979).

221. See, e.g., *Southeastern Community College v. Davis*, 99 S.Ct. 2361 (1979).

222. See *Enforcing the Right supra* note 7 at 1112-13. The district court's decision in *Mattie T. v. Holladay*, Civil Action No. DC-75-31-S, 3 EHLR 551:109 (N.D.Miss. Jan. 26, 1979), for example, ordered the provision of compensatory education for persons misclassified or inadequately educated even beyond the twenty-first birthday if such is necessary to complete a satisfactory program. Slip op. at 29-31, 3 EHLR at 551:118. This was a consent decree in a class action proceeding. See also *Capello v. District of Columbia Bd. of Educ.*, Civ. Action No. 79-1006, 3 EHLR 551:190, 191-2 (D.D.C. May 9, 1979); *Miles v. Samples*, Civ. Action No. 79-0034-R (E.D. Va. Aug. 31, 1979) (consent decree).

223. *Handel, supra* note 9; *Enforcing the Right supra* note 7 at 1112-13; See text at notes 12-27. Two recent cases have split over whether a private claim for damages exists under P.L. No. 94-142. Compare *Loughran v. Flanders*, 470 F. Supp. 110 (D. Conn. 1979) (no damage claim) with *Boxall v. Sequoia Union High School Dist.*, 464 F. Supp. 1104 (N.D. Cal. 1979) (compensatory damage claim may be appropriate).

program effectiveness.<sup>224</sup> The state agency must prepare an annual plan for submission to the United States Commissioner of Education<sup>225</sup> and the local educational agency must likewise submit an annual application to the state.<sup>226</sup> These plans and applications are reviewed by the monitoring agency for compliance with the Act and regulations and also are compared with performance to ascertain the existence of any gulf between the two.<sup>227</sup> The respective plans and applications may be disapproved by the reviewing agency and funds may be withheld for noncompliance or inadequacy of performance<sup>228</sup> although extensive administrative procedures are established to insure due process in agency review.<sup>229</sup> There is also a provision for judicial review of action by the Commissioner in regard to the state plan.<sup>230</sup>

A generalized administrative remedy is also provided for a parent or parents concerned with noncompliance with the Act or regulations through the filing of a complaint with either the Bureau of Education for the Handicapped or the Office of Civil Rights for the United States Department of Health, Education and Welfare pursuant to procedures established under Title VI of the Civil Rights

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224. 20 U.S.C. §§ 1412(6), 1413(a)(11) & (b), 1414(b) (1976). *See also* 45 C.F.R. §§ 121a.2, -.146, -.193-.194, -.236, -.600-.602 (1978); VA. SPEC. ED. REGS. 2-3; *Mattie T. v. Holladay*, Civ. Action No. DC-75-31-S, 3 EHLR 551:109 (N.D.Miss. Jan. 26, 1979); *P-1 v. Shedd*, No. 78-58, 3 EHLR 551:164 (D.Conn. Mar. 23, 1979).

225. 20 U.S.C. §§ 1412(2), 1413, 1416 (1976). *See also* 45 C.F.R. §§ 121a.2(b), -.110-.151 (1978); VA. CODE ANN. § 22-10.4 (Cum. Supp. 1979); VA. SPEC. ED. REGS. 1-2. The annual plan required by statute and by the implementing regulations can be a very useful tool for the advocate in determining the extent of local compliance with the standards established by the State and for serving as a litmus in testing the adequacy of a local program. The annual program plan for the State may serve as an eloquent expert witness on what constitutes minimum standards for operation of a special education program, and one to which the hearing officer, especially at the state level, must pay extraordinary deference.

226. 20 U.S.C. § 1414 (1976). *See also* 45 C.F.R. §§ 121a.220-.240 (1978); VA. CODE ANN. § 22-10.5 (Cum. Supp. 1979); VA. SPEC. ED. REGS. 35-7. The local annual application can be just as useful to the advocate as the State annual program plan as discussed in note 224 *supra*.

227. 20 U.S.C. §§ 1413(c), 1414(b), 1418 (1976). *See also* 45 C.F.R. §§ 121a.113, -.193, -.601 (1978).

228. 20 U.S.C. §§ 1414(d), 1416 (1976). *See also* 45 C.F.R. §§ 121a.194, -.590 (1978); VA. CODE ANN. § 22-10.4.E (Cum. Supp. 1979); VA. SPEC. ED. REGS. 71.

229. 20 U.S.C. §§ 1414(b), 1416 (1976). *See also* 45 C.F.R. §§ 121a.194, -.580-.583 (1978); VA. SPEC. ED. REGS. 60-2.

230. 20 U.S.C. § 1416(b) (1976). *See also* 45 C.F.R. § 121a.593 (1978). The Virginia regulations similarly provide for judicial review of action by the State Board of Education regarding the local application. VA. SPEC. ED. REGS. 62.

Act of 1964.<sup>231</sup> Issues may also be addressed to the State Advisory Panel on the Education of Handicapped Children mandated by the 1975 Act and its regulations.<sup>232</sup>

### III. STRATEGIES AND TACTICS FOR THE ADVOCATE REPRESENTING THE HANDICAPPED CHILD AND HIS OR HER PARENTS.

With the litigative, legislative and administrative backdrop or tapestry firmly in place, the legal or lay advocate must now consider specific strategies and tactics for securing a free appropriate public education for his or her handicapped client. As is true in any area of the law, knowledge of the substantive and procedural backdrop is essential, but it is useless without consideration of the advocacy and representational skills that are the necessary tools for working with the raw materials provided by this knowledge. This portion of the article will focus on these skills and give suggestions from one person's perspective for providing effective representation to a client seeking an appropriate education.<sup>233</sup> The suggestions will attempt to track the chronology of events as they will normally occur in a case of this nature.

#### A. Parental Contact

The initial involvement of the lawyer or advocate will generally come through contact by one or both of the child's parents seeking advice concerning their handicapped child's education. The parents

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231. 45 C.F.R. § 84.61 (1978); Children's Defense Fund, 94-142 AND 504; NUMBERS THAT ADD UP TO EDUCATIONAL RIGHTS FOR HANDICAPPED CHILDREN 24 (1978); *Complaint Procedures Under Sections 503 and 504*, 2 AMICUS 46, (Sept., 1977). Section 84.61 of the Regulations under Section 504 provides that the "procedural provisions applicable to Title VI of the Civil Rights Act apply" to complaints. The regulations governing such proceedings may be found in 45 C.F.R. §§ 80.6-.10, 81.1-.131 (1978). It is still too early in the implementation of Pub. L. No. 94-142 to make a judgment as to which agency affords the best remedy for administrative review of a complaint or the more expedited treatment of same. One case has stayed consideration of a suit until consideration of the complaint by the Department of Health, Education and Welfare. *Stubbs v. Kline*, 463 F. Supp. 110, 117 (W.D. Pa. 1978).

232. 20 U.S.C. § 1413(a)(12) (1976); 45 C.F.R. §§ 121a.147, -.650-.653 (1978). *See also* VA. CODE ANN. § 20-10.13 (Cum. Supp. 1979); VA. SPEC. ED. REGS. 1, 3. The Virginia Regulations also mandate the creation of a counterpart Local Advisory Committee in each locality to perform similar functions. VA. SPEC. ED. REGS. 38-40.

233. For additional perspectives see the articles cited in note 9, *supra* and the excellent pamphlet prepared for parents and advocates, 94-142 AND 504: NUMBERS THAT ADD UP TO EDUCATIONAL RIGHTS FOR HANDICAPPED CHILDREN (1978).

will very frequently be angry, frustrated and very distrustful of authority figures, including possibly you. They will often have been engaged in "combat" with the schools for some time with little success from their perspective, and litigation may be foremost in their minds and expressed desires. It will be very important for you to establish a caring and trusting relationship while tactfully trying to defuse somewhat the emotional content of the parent's attitude.<sup>234</sup> If the parents are seeking to retain you as counsel for them and the child, you should ascertain their ability to pay a retainer, fees and expenses for what may be protracted representation. You should advise them of the possibly time-consuming nature of the process and what your fees might be depending on the stage of the process where action may be terminated.<sup>235</sup> If it is apparent that the parents are and will be unable to afford private representation you should not hesitate to refer them to the state developmental disabilities protection and advocacy office established under the Developmentally Disabled Assistance and Bill of Rights Act<sup>236</sup> as amended by the Rehabilitation, Comprehensive Services and Development Disabilities Amendments of 1978,<sup>237</sup> or to the nearest legal aid office<sup>238</sup> or other advocacy group.<sup>239</sup> You should also direct the parents to any local parent and/or professional group involved with the particular handicapping condition suspected for information, counseling and general support.<sup>240</sup> It will be important for both you and the

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234. The parents of handicapped children are subjected to many pressures beyond those that are self-generated by the simple difficulty of having a child that is less than perfect. The sensitivity of the advocate to these pressures and this vulnerability will be often the most important ingredient in the development of a sound professional relationship. *See generally* Handel, *supra* note 9, at 352-3; Krass, *supra* note 9, at 1018, n.18.

235. *See* Linn, *How Much Is That Lawyer in the Window?*, AMICUS, 44 (Jan./Feb. 1978).

236. Pub. L. 94-103, 89 Stat. 486 (1975) (codified at 42 U.S.C. §§ 6008-6081 (1976)). *See* Maloney, *Advocacy Under the Developmentally Disabled Bill of Rights*, AMICUS 30 (Jan./Feb., 1978).

237. Pub. L. No. 95-602, 92 Stat. 2955 (1978).

238. The various legal aid programs around the country have generally been sensitized to the educational rights of handicapped children and are willing to handle cases for eligible parents and children.

239. Some of the advocacy groups are listed in Appendix A, *infra*, and other groups may be identified through contact with law schools or the State developmental disabilities protection and advocacy office.

240. There are parent and/or professional groups for most disabilities that may be located through the telephone directory or through the school systems. Many of the national offices of these groups are listed in the Children's Defense Fund publication cited in note 233 *supra*, at 33-4.

parents to know as much as possible about the disability and the resources available to remediate it as the matter proceeds. You should also explore with the parents your relationship with them and the child and whose attorney or advocate you are to be.<sup>241</sup>

### B. *Initial Interview*

In addition to the human and personal considerations outlined above, there is certain specific information you will need at the initial interview and there are specific things you need the parents to do. You need to ascertain the age, sex and present educational placement of the child as well as what testing, evaluation or other processes have already taken place. In other words, you want to know what stage in the educational process has been reached prior to contact with you. The advocate must also find out specifically what the parents want for the child and what their source is for this desired placement. If the child is old enough, which would be any age covered by the Act, you should get to know the child and establish a trusting relationship with him or her.<sup>242</sup> If possible, you need to talk with the child alone and find out what he or she wants. You should also try to observe the child in his or her classroom at school to ascertain for yourself the adjustment to the current placement. Finally, you should secure the parents' signatures on an authorization enabling you to secure all the school records as well as on authorizations permitting you to obtain any relevant medical, psychological, psychiatric or other records.<sup>243</sup>

### C. *Obtaining Records*

After securing the necessary authorizations for securing records from the parents, you should transmit them with covering letters to the appropriate persons and agencies. The covering letter should remind the educational agencies of the time limits governing transmittal of records and should urge that the records be expedited.

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241. It is important to clarify the obligations of the advocate to the client and the identity of the specific client—the parent or the child. See Cohen, *Advocacy: Principal Paper, THE MENTALLY RETARDED CITIZEN AND THE LAW* 592 (1976). See also JUVENILE JUSTICE STANDARDS PROJECT, COUNSEL FOR PRIVATE PARTIES 77-97 (1976).

242. See JUVENILE JUSTICE STANDARDS PROJECT, *supra* note 241, at 81-2.

243. See Request and Authorization for Records in Appendix B, *infra*.

Keep in mind that the records sought may be kept in a variety of locations including the child's present school, a guidance office, the school administration office or the school psychologist's office.

#### D. *School Evaluation*

There are two important considerations to keep in mind with regard to the school evaluation process. First, there are specific time limits placed on the various stages of the evaluation process and the advocate must monitor the school to insure that it complies with these limits.<sup>244</sup> Second, you must cultivate a healthy skepticism toward any evaluation performed by school-employed psychologists or testers as there is a natural tendency to recommend placement in programs already in existence and operated by the local school agency even though such programs may not be totally appropriate for the child.

#### E. *Independent Evaluation*

As discussed earlier, there is a fairly broad right delineated in the Act and regulations for an independent evaluation where the parents disagree with either the evaluation results or the placement conclusions reached, and this evaluation may well be secured at public expense.<sup>245</sup> In looking for a person or clinic to perform the evaluation, do not hesitate to consult with a protection and advocacy office or another advocacy or parent group or consider the use of any regional child development clinic.<sup>246</sup> You should contact the director of the clinic or the professional performing the evaluation directly in order to establish a relationship and to speed up the evaluation process. You might also consider requesting that the bill for the independent evaluation be sent directly to the local educational agency as payment might be made without questioning, and conflict over responsibility for the costs may be avoided. The independent evaluation report should be sent directly to you and not to the school agency.

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244. See text at notes 196-204, *supra*.

245. See text at notes 96-99, *supra*.

246. In Virginia, these clinics are operated by the Virginia Department of Health and special education funds assist in the diagnostic aspects of the clinics. VA. SPEC. ED. REGS. 70. Contact should be made with the local health department to ascertain the location of the nearest regional child development clinic.

### F. *School Contact*

The advocate should not hesitate to establish contact with the schools in an attempt to negotiate the resolution of any conflict over a diagnosis or a placement, but care should be exercised to insure that any negotiations are with an appropriate person—a decision-maker such as the special education director—rather than the child's classroom teacher or even the school principal. Any negotiated resolution of the problem should be confirmed in writing and incorporated into the individualized educational program. Any significant correspondence with the schools, such as confirmation of a negotiated agreement, should be sent by registered or certified mail, return receipt requested, and the receipt should be affixed to the carbon copy of the letter in your file. It is also wise to keep the attorney for the school system out of the picture unless he or she is already involved or contact is necessary because of school intransigency or something similar. Once you have become involved in the matter, all contacts with the school regarding an appropriate education should be made by or through you and the parents or other interested persons should avoid direct contact. This will ensure that the child's position will be presented with one consistent voice.

### G. *School Eligibility and Placement Committees and the Individualized Educational Program*

The School Eligibility and Placement Committee, or a similar local school group performing the same function, has a very limited function now in determining whether the child is handicapped and probably in need of special education and related services.<sup>247</sup> The more important role now is played by the meeting for the development of the individualized educational program.<sup>248</sup> You should ensure that the cast of characters for this meeting is complete, and you have a right to be present at the option of the parents.<sup>249</sup> However, the IEP meeting is administrative and not adversarial, thus your role at the meeting should be consistent with that character for the meeting. The advocate should also be aware of the possibility that

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247. See VA. SPEC. ED. REGS. 20-21. As previously noted, not all eligibility committees accept this more limited role and the advocate must remain alert to this. See note 89 *supra*.

248. See text at notes 112-131, *supra*.

249. See text at notes 117-121, *supra*.



a pre-IEP meeting may be held by the school personnel without the parents and this possibility should be foreclosed by a letter to the school requesting that any time a meeting is held to discuss the child's evaluation or placement, the advocate and the parents request that they be so advised and invited. If the time for an IEP meeting is close to the end of the school year, you should request that the meeting be held in May or June rather than in August or September in order to allow any administrative procedures to be completed and a placement made prior to the start of the school year.<sup>250</sup>

The advocate should ensure that the IEP specifically spells out the following: 1) the time schedule for any services to be afforded the child; 2) the persons or agencies who will provide these services; 3) the teacher-pupil ratio in the placement selected; 4) all of the services needed by the child, and whether these needed services are presently available in the system; and 5) whether the services to be provided the child in question include summer school, psychiatric or psychological services, medical or ancillary services, or compensatory programs to enable a child to catch up with his peers.<sup>251</sup>

Any placement decision must necessarily include a balancing between the principle of the least restrictive environment and the concept of appropriateness. This balancing process is especially crucial where a residential or private placement is considered. When the determination is made at the IEP meeting to place the child in a residential or private setting, the advocate must ensure that the IEP includes a provision for tuition, room and board and other incidental expenses, and he or she should be sure that the institution is on the approved list. Also, keep in mind that the burden is

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250. Since the classroom teachers are frequently not available during the summer months, local educational agencies will often refuse to schedule an IEP meeting during that period. A delay until the beginning of school may mean that the child starts school in one setting and then has to move to a different setting with the negative implications such a shift may have.

251. A summer program may be necessary for compensatory purposes. *See, e.g.*, *Armstrong v. Kline*, Civ. Action Nos. 78-172, -132-133, 3 EHLR 551:195 (E.D.Pa. June 21, 1979); *In re Richard K.*, 3 EHLR 551:192 (N.H. June 8, 1979); BEH Policy Letter to Phyllis Torres, Aug. 8, 1978, 2 EHLR 211:50 (1979). Attention should also be paid to physical education and athletic programs for the handicapped child. *See Doe v. Marshall*, 459 F. Supp. 1190 (S.D.Tex. 1978); *Kampmeier v. Harris*, 93 Misc. 2d 1032, 403 N.Y.S. 2d 638 (S.Ct. Monroe Co. 1978); BEH Policy Letter to Robert J. Browne, Jan. 3, 1979, 2 EHLR 211:87 (1979); Office for Civil Rights Policy Interpretation No. 5, 43 FR 36035, Aug. 14, 1978, 2 EHLR 251:03 (1979).

on the local education agency to locate the private resources and set up a pre-placement interview. The advocate should also use care in advising the parents regarding a unilateral private placement because of the risk involved that they will be financially responsible for the costs of the placement.<sup>252</sup>

The IEP must be reviewed at least annually according to the law but you should not simply sit back and await the passage of the year for a review meeting to be held. If a reason exists for a re-evaluation or new placement you should request a meeting at an earlier point. Also, remember that pending any review the child must remain in his or her present placement unless the child is out of school.<sup>253</sup>

#### H. *Notice*

The Code and regulations provide very specifically for notice to the parents, and to you if expressly requested, with necessary contents of the various steps in the process—identification, evaluation and placement, including the IEP meeting, and placement decisions and any placement review.<sup>254</sup>

#### I. *Parental Consent*

The advocate has to be prepared to protect the right to parental consent prior to evaluation or placement accorded by the law.<sup>255</sup> The role of the advocate as a counselor may be critical here where there is any disagreement over an evaluation or placement. Where the interests of the child dictate a certain course of action, it may be necessary for the advocate to persuade the parents to consent to that course.

#### J. *Local Due Process Hearing*

The most important and familiar role for the legally trained advocate in representing the interests of the handicapped child will be in appearing for the child and parents in the local due process hear-

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252. See text accompanying note 146, *supra*. It is also possible that such a private placement by the parents would preclude the treatment of such as a "present placement" for the purpose of determining where the child remains during due process.

253. 20 U.S.C. § 1415(e)(3) (1976); 45 C.F.R. § 121a.513 (1978); VA. SPEC. ED. REGS. 50.

254. See text at notes 179-180, *supra*.

255. See text at note 183, *supra*.

ing and state appeal hearing. This role will be closest to that performed by the lawyer as an advocate in court, or at least in an administrative hearing.

The hearing ordinarily must be held with all parties present and any evidence to be presented at the hearing must have been disclosed to the opposing party at least five days prior to the hearing to be admissible.<sup>256</sup> The hearing must be held and a written decision rendered within forty-five days after receipt of a request for a hearing; the advocate should be alert to preserve the timeliness of the proceedings.<sup>257</sup> The request for the hearing should be directed to the local school board,<sup>258</sup> and it should be sent by registered or certified mail, return receipt requested.<sup>259</sup> Although the regulations are silent as to any subpoena power, they do guarantee a right to "compel the attendance of witnesses."<sup>260</sup> This right may be very critical in connection with a school system employee who is prepared to give testimony favorable to the child but who wants the protection of the fact that his or her testimony is "under compulsion" and thus not volunteered. You have the right to present evidence and to confront and cross-examine witnesses which would appear to minimize the ability of the hearing officer to consider hearsay evidence.<sup>261</sup> The regulations are silent regarding the applicability of formal rules of evidence so it would be logical to assume that they are not controlling. There is also no guidance given regarding the order or burden of proof but it may certainly be argued that the burden of proof should remain with the schools and they would consequently present their evidence first.<sup>262</sup> There is a right to a written or electronic

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256. See text at notes 189-190, *supra*.

257. See text at notes 192, 202, *supra*.

258. VA. SPEC. ED. REGS. 46.

259. See Request for Local Due Process Hearing in Appendix B, *infra*. The use of registered or certified mail with a return receipt is for the purpose of insuring a complete record.

260. See text at note 189, *supra*.

261. *Id.*

262. See J. L. REF., *supra* note 7, at 145. Virginia's proposed manual for hearing officers places the burden of proof "on the local school division to substantiate its action(s) or position(s) regardless of which party, parent or local school division, initiates the appeal." VIRGINIA DEPARTMENT OF EDUCATION, A DUE PROCESS HEARING MANUAL FOR LOCAL SCHOOL DIVISIONS IN VIRGINIA 3 (Second Draft May, 1979). A recent federal court decision indicates that the allocation of the burden of proof to the child and parents is not violative of due process or of Section 504 in a proceeding that antedated Pub. L. No. 94-142. *Stemple v. Board of Educ. of Prince George's Co.*, 464 F. Supp. 258, 260-61 (D.Md. 1979).

verbatim record of the hearing but the advocate should request that a verbatim written transcript be made available in a timely manner following the hearing.<sup>263</sup> The parties also have the right to counsel and to the presence and advice of experts in the problems of handicapped children.<sup>264</sup> Rights also exist at the option of the parents to have the child present and to open the hearing to the public.<sup>265</sup> Consideration should be given to the exercise of these two options as the presence of representatives of parent and advocacy groups could have an impact on a hearing officer as may the presence of a "live" child as opposed to some third party not present. However, this advantage in having the child present should be balanced by the impact on the child of hearing a penetrating and frank discussion of his condition.<sup>266</sup>

The value of the independent evaluation can be quite great at the due process hearing, especially since the hearing officer, although perhaps a lawyer, will most often be largely ignorant of the specialized educational considerations and your expert may play a significant role in educating the hearing officer.<sup>267</sup> For the same reason the expert and any other independent evaluator should be present to testify as the school's experts and witnesses will always be present. You would not want to counter live testimony with stipulated letters or other writings. The advocate should also be sure to use the expert evaluator to educate himself or herself prior to the hearing so as to be better prepared both for the presentation of the evaluator's evidence and for the cross-examination of the school's experts.

The hearing officer, as mentioned above, will often be an attorney but will usually not be an expert in the law governing the rights of the handicapped or in the educational principles that apply to the remediation of handicaps. The hearing officer must be impartial and not connected with the local or state educational agencies.<sup>268</sup> You should contact the hearing officer prior to the hearing to intro-

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263. See text at note 191, *supra*.

264. See text at note 188, *supra*.

265. See text at notes 193-94, *supra*.

266. A strong presumption should exist in favor of the presence of the child since it is the child's rights and educational future that are at stake.

267. The advocate should also utilize the expert to educate himself or herself prior to the hearing, as well.

268. See text at note 187, *supra*.

duce yourself and to discuss the procedures that will be followed in instances not covered by the law or regulations. The decision of the hearing officer must be in writing with both findings of fact and decisions.<sup>269</sup> Pending any review the child must remain in his or her present placement unless the parties mutually agree to a different placement.<sup>270</sup>

### K. *Administrative Review and Appeal*

If there is no local due process hearing procedure provided, or if the parents are not satisfied with the conclusion reached at the local process, an appeal can be taken to the state level with a request for same directed to the State Board of Education, the State Superintendent of Public Instruction, or the state counterpart.<sup>271</sup> The appeal process must be completed within thirty days from the time the request is filed to the time a written decision is transmitted to the parties.<sup>272</sup> There is a requirement that the hearing officer at the state level again be impartial and independent, and the tactical considerations in the preceding section apply equally here.<sup>273</sup> New evidence may be presented at the state level to supplement the record established at the local level, including an independent evaluation, in the discretion of the State hearing officer.<sup>274</sup> The officer also has the discretion to afford the parties an opportunity for oral or written argument, or both, and you should generally request permission to submit both since you will normally be the appealing party and you should grasp every edge you can get.<sup>275</sup> The hearing officer must make an independent decision and transmit written findings of fact and decisions to the parties.<sup>276</sup>

### L. *School Discipline*

The advocate should carefully read the district court decision in

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269. See text at note 192, *supra*.

270. Note 253, *supra*.

271. See text at note 206, *supra*.

272. See text at note 215, *supra*.

273. See text at notes 176-203, 206, *supra*.

274. See text at note 210, *supra*.

275. See text at note 212, *supra*.

276. See text at notes 207, 213-214, *supra*.

*Stuart v. Nappi*<sup>277</sup> when involved in the representation of a handicapped child who is the subject of any school disciplinary proceedings. *Stuart* would dictate that the advocate immediately request a review of the child's educational placement and thus initiate the hearing process to preclude any expulsion or long-term suspension.<sup>278</sup>

#### M. *Judicial Proceedings*

Before initiating any litigation, counsel should be sure to exhaust all available administrative remedies unless either the child is being denied any appropriate education at all or the administrative procedures provided are so inadequate as to render utilization futile.<sup>279</sup> The more difficult decision for counsel is choosing the forum for judicial review of the administrative decisions since the Act and regulations give a choice between a state or federal court.<sup>280</sup> State law may also give a choice between state forums and counsel should explore these various options to determine the most favorable one for his client.<sup>281</sup>

#### N. *Administrative Complaints and Other Strategies*

The advocate should also consider mobilizing parent groups and making a joint or individual appearance before a local or State school board or State Advisory Panel to deal with complaints that are pervasive and widespread. Consideration should also be given to filing an administrative complaint with the Bureau of Education for the Handicapped<sup>282</sup> or with the Office for Civil Rights of the Department of Health, Education and Welfare<sup>283</sup> with copies to the

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277. Note 170, *supra*. See also the strong language in *Howard S. v. Friendswood Ind. School Dist.*, 454 F. Supp. 634, 636 (S.D.Tex. 1978).

278. *Id.* at 1241-3.

279. See *Harris v. Campbell*, *supra* note 219. See also text accompanying note 216, *supra*.

280. See text accompanying note 217, *supra*.

281. For example, although VA. CODE ANN. § 22-10.4.D (Cum Supp. 1979) and VA. SPEC. ED. REGS. 49 both provide for jurisdiction in a circuit court, VA. CODE ANN. §§ 16.1-241.G. and -278 (Cum. Supp. 1979) would seem to give a juvenile and domestic relations district court jurisdiction over cases involving the failure of a school system to comply with state or federal law.

282. See text at note 231, *supra*.

283. *Id.*

State Superintendent of Public Instruction, the State Supervisor of Special Education, the Assistant State Attorney General responsible for the Department of Education, the local Superintendent of Schools, the local Supervisor of Special Education, the Chairman of the local School Board and the local School Board attorney.

### O. *Advocacy Skills and Ethical Issues*

As should be apparent by now, the representation of handicapped children in securing a free appropriate public education is a highly specialized process with which few persons are familiar. Consequently, it is important for the advocate to engage in considerable self-education both as to the law and the particular disability involved in the client's case. There are also some difficult ethical questions presented in the representation of a handicapped child with the most difficult ones being the decision-making issue and the problems involved in a possible conflict between the parent's desires and the child's best interests. The decision-making issue is presented by the temptation for the lawyer or other advocate to decide what is best for the minor, or even adult, handicapped client.<sup>284</sup> The advocate must be willing to consult with, and give credence to, the client and the client's wishes. The parent-child conflict may be even more difficult where the attorney or other advocate is contacted by the parents to represent the handicapped child and it becomes apparent that the parent's wishes diverge from the obvious best interests of the child. This will especially be true where parents desire institutionalization for a child which does not appear necessary and is even violative of the principle of the least restrictive environment.<sup>285</sup> In this situation the advocate should always remember that the handicapped child is the client and the advocate should either persist in advancing the child's interests or withdraw from the proceedings.<sup>286</sup>

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284. See authorities cited in note 241, *supra*.

285. This increasingly will be a problem as the pressure for deinstitutionalization of handicapped children accelerates. A problem may exist as to authority to represent a child without parental consent. See *Doe v. Grile*, Civ. No. F 77-108, 3 EHLR 551:151 (N.D.Ind. Jan. 31, 1979).

286. See authorities cited in note 241, *supra*.

### P. *Other Resources*

There are an increasing number of resources available for the representation of handicapped persons or as technical advisors to persons serving as advocates. A list of these various resources is included in Appendix A to this article, and the advocate should not hesitate to consult with these groups to assist him or her in the case. The advocate should also be prepared to contact the available parent and professional groups for advice and support.<sup>287</sup>

## IV. CONCLUSION

The advancement of the rights of handicapped persons has become the latest in a steady series of civil rights movements since World War II and it has been a long time coming, as the Plato quotation prefacing this article amply demonstrates. The mere passage of legislation and the promulgation of implementing regulations will not alone cause rights long unrealized to magically burst into fruition. It will take the cooperative dedication of educators, parents and advocates to insure the realization of the expressed congressional purpose.<sup>288</sup> There are many unanswered questions in the Acts and their regulations that can only be addressed by the efforts of advocates in hammering out precedents before hearing officers and in the courts. In this, the International Year of the Child, it is appropriate to address to the potential advocate the challenge posed by the late Robert F. Kennedy in the preface to his 1967 book, *To Seek A Newer World*, where he quoted Albert Camus thusly:

Perhaps we cannot prevent this world from being a world in which children are tortured. But we can reduce the number of tortured children. And if you don't help us, who else in the world can help us do this?<sup>289</sup>

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287. See note 240, *supra*. These groups can frequently provide assistance to the clients and supply valuable technical advice to the advocate.

288. See text accompanying note 33, *supra*.

289. R. KENNEDY, *TO SEEK A NEWER WORLD* vii (1967).



## APPENDIX A

## Selected Resources to Assist the Advocate for the Handicapped Child.

## I. National Advocacy and Service Organizations

Center for Law and Education  
Guttman Library  
6 Appian Way  
Cambridge, Massachusetts 02138  
(617) 495-4666

Children's Defense Fund  
1520 New Hampshire Avenue, N.W.  
Washington, D.C. 20036  
(202) 483-1470

Council for Exceptional Children  
1920 Association Drive  
Reston, Virginia 22091  
(703) 620-3660

Developmental Disabilities Law Center  
University of Maryland Law School  
500 West Baltimore Street  
Baltimore, Maryland 21201  
(301) 528-6307

Mental Disability Legal Resource Center  
American Bar Association  
1800 M Street, N.W.  
Washington, D.C. 20036  
(202) 331-2240

Mental Health Law Project  
1220 Nineteenth Street, N.W.  
Washington, D.C. 20036  
(202) 467-5730

National Center for Law and the Handicapped  
211 West Washington Street, Suite 1900  
South Bend, Indiana 46601  
(219) 288-4751

National Juvenile Law Center  
St. Louis University School of Law  
3701 Lindell Boulevard  
St. Louis, Missouri 63108  
(314) 533-8868

Public Interest Law Center of Philadelphia  
1315 Walnut Street  
Philadelphia, Pennsylvania 19107  
(215) 735-7200

Youth Law Center  
693 Mission Street - Second Floor  
San Francisco, California 94105  
(415) 543-3307

## II. Virginia Advocacy Organizations

Virginia Developmental Disabilities Protection  
and Advocacy Office  
Ninth Street Office Building, Suite 100  
Richmond, Virginia 23219  
1-800-552-3962 (outside Richmond area)  
(804) 786-4185 (Richmond area)

Youth Advocacy Clinic  
University of Richmond Law School  
University of Richmond, Virginia 23173  
(804) 285-6370

## III. National and Regional Governmental Agencies

Bureau of Education for the Handicapped  
400 6th Street, S.W.  
Donohoe Building  
Washington, D.C. 20201

Director, Office for Civil Rights  
Department of Health, Education and Welfare  
330 Independence Avenue, S.W.  
Washington, D.C. 20201

HEW (Region III)<sup>290</sup>  
Office for Civil Rights  
P.O. Box 13716  
3535 Market Street  
Philadelphia, Pennsylvania 19101  
(215) 516-6772

#### IV. Virginia Governmental Agencies

James T. Micklem, Director  
Division of Special Education and Support Services  
Department of Education  
P.O. Box 6Q  
Richmond, Virginia 23216  
(804) 786-2673

#### V. Publications

##### AMICUS

National Center for Law and the Handicapped  
211 West Washington Street, Suite 1900  
South Bend, Indiana 46601  
Individual Subscription - \$10.00 per year  
Library and Organization Subscription - \$12.00 per year

Education for the Handicapped Law Report  
CRR Publishing Company  
1156 15th Street, N.W.  
Suite 724  
Washington, D.C. 20005  
General Subscription - \$300.00 per year

Mental Disability Law Reporter  
ABA Mental Disability Legal Resource Center  
1800 M Street, N.W.  
Washington, D.C. 20036  
General Subscription - \$35.00 per year  
Public Defender, Legal Aid, Poverty  
Law Offices and Non-legal Advocacy Programs -\$25.00 per year

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290. This is the region for Delaware, District of Columbia, Maryland, Pennsylvania, Virginia and West Virginia.

## APPENDIX B

Sample Correspondence<sup>291</sup>

## I. Request for Evaluation

(Your Address)

(Date)

Superintendent of Schools  
 (Local Education Agency)  
 (Address)  
 (City, State, Zip Code)

Re: (Name of Child)      Date of birth: (Date)

Dear (Sir or Madam):

This is to advise you that I have been (retained) (requested) to represent Mr. and Mrs. (name) in connection with their efforts to obtain a free appropriate public education for (child's name). My clients suspect that their (son) (daughter) is (describe suspected handicapping condition) and desire an immediate evaluation leading to an individualized education program meeting for placement in a program appropriate for their child's abilities. (Name of child) was born on (month, day, year) and is presently (describe present educational placement).

Would you please schedule (child's name) for an evaluation as soon as possible pursuant to Public Law 94-142 and the implementing federal and state regulations. Please advise me when and where Mr. and Mrs. (name) should bring their child for (his) (her) evaluation.

Thank you very much. With best wishes, I am,

Very truly yours,

(Your name)

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291. These draft letters are based in part on sample letters contained in DEVELOPMENTAL DISABILITIES PLANNING COUNCIL OF VIRGINIA, A LEGAL RIGHTS HANDBOOK FOR THE DEVELOPMENTALLY DISABLED CITIZENS OF VIRGINIA 9-11 (2d Ed. 1978). They should be tailored to fit the specific needs in a given case.

We join in this request for the purpose of consenting to the requested evaluation.

(signature)  
-----  
Mr. (name)

(date)

(signature)  
-----  
Mrs. (name)

CC: James T. Micklem, Director  
Division of Special Education and  
Support Services  
Department of Education  
P.O. Box 6Q  
Richmond, Virginia 23216

II. Request and Authorization for Records.

(Your Address)  
(Date)

Superintendent of Schools  
(Local Education Agency)  
(Address)  
(City, State, Zip Code)

Re: (Name of Child)      Date of Birth: (Date)

Dear (Sir or Madam):

This is to advise you that I have been (retained) (requested) to represent Mr. and Mrs. (name) in connection with their efforts to obtain a free appropriate public education for (child's name). In connection with that representation I wish to secure copies of all the school records, tests and reports on this child and (will be at your office on (date) at (time) to examine and secure copies of these records) (would like copies of these records sent to me at my office along with any bill for copying as soon as possible).

These records are sought pursuant to the provisions of Public Law 94-142 and the "Buckley Amendment" and their implementing regulations. Mr. and Mrs. (name) have joined in this letter to authorize release of the records to me. With best wishes, I am,

Very truly yours,  
(Your name)

We, the parents of (child's name) hereby authorize the release of our child's complete school records to (your name) as our (representative) (attorney).

(signature)  
\_\_\_\_\_  
Mr. (name)

(date)

(signature)  
\_\_\_\_\_  
Mrs. (name)

CC: James T. Micklem, Director  
Division of Special Education and  
Support Services  
Department of Education  
P.O. Box 6Q  
Richmond, Virginia 23216

### III. Request for Local Due Process Hearing.

(Your Address)  
(Date)

Chairman, School Board  
(Local Education Agency)  
(Address)  
(City, State, Zip Code)

Re: (Name of Child)      Date of Birth: (Date)

Dear (Sir of Madam):

This is to advise you that I have been (retained) (requested) to represent Mr. and Mrs. (name) in connection with their efforts to obtain a free appropriate public education for (child's name). Mr. and Mrs. (name) do not agree with the (evaluation) (placement recommended pursuant to the IEP meeting) of (child's name) and wish to request a hearing on this matter pursuant to Public Law 94-142 and its implementing State and federal Regulations. We would like for this hearing to be scheduled as soon as possible. Please advise me of the name, address and telephone number of the hear-

ing officer as soon as his or her identity is ascertained. I would also request that a verbatim written transcript be prepared of the hearing when held.

Please notify Mr. and Mrs. (name) and me of the time, date and place for the hearing when it is scheduled and it might be (desirable) to check with me regarding the proposed date prior to sending out any notices so as to avoid a conflict that would require rescheduling the hearing. Mr. and Mrs. (name) have joined in this letter to confirm their request for a hearing. Thank you very much. With best wishes, I am,

Very truly yours,  
(Your name)

We, the parents of (child's name) join in and affirm this request for a hearing regarding our child's education.

(date)

(signature)  
Mr. (name)

(signature)  
Mrs. (name)

CC: James T. Micklem, Director  
Division of Special Education and  
Support Services  
Department of Education  
P.O. Box 6Q  
Richmond, Virginia 23216

IV. Request for State Review.

(Your address)  
(Date)

Superintendent of Public Instruction  
State Department of Education  
Post Office Box 6Q  
Richmond, Virginia 23216

Re: (Name of Child)      Date of Birth: (Date)  
(Locality)

Dear (Sir or Madam):

This is to advise you that I have been (retained) (requested) to represent Mr. and Mrs. (name) in connection with their efforts to obtain a free appropriate public education for (child's name) in the (local school division) schools. Mr. and Mrs. (name) do not agree with the decision reached on (date) by (name of local hearing officer), the hearing officer for the (local school division) and desire a review of (his) (her) decision pursuant to Public Law 94-142 and its implementing State and federal Regulations. We would like for this review hearing to be scheduled as soon as possible as we request the opportunity to present both written and oral arguments to the hearing officer. Please advise me of the name, address and telephone number of the hearing officer assigned as soon as his or her identity is ascertained.

Please notify Mr. and Mrs. (name) and me of the time, date and place for the hearing when it is scheduled and it might be desirable to check with me regarding the proposed date prior to sending out any notices so as to avoid a conflict that would require rescheduling the hearing. Mr. and Mrs. (name) have joined in this letter to confirm their request for a review hearing. Thank you very much. With best wishes, I am,

Very truly yours,  
(Your name)

We, the parents of (child's name) join in and affirm this request for a review of the local hearing officer's decision of (date) in (local school division) regarding our child's education.

(date)

(signature)  
Mr. (name)

(signature)  
Mrs. (name)

CC: James T. Micklem, Director  
Division of Special Education and  
Support Services  
Department of Education  
P.O. Box 6Q  
Richmond, Virginia 23216



