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Martin A. Kotler
Widener University

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THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT: A PARENT'S PERSPECTIVE AND PROPOSAL FOR CHANGE

Martin A. Kotler*

PREFACE

For two years, beginning in the fall of 1991, I was involved in an ongoing legal battle with the Delaware County, Pennsylvania Intermediate Unit No. 25 regarding the "appropriateness" of preschool programming for my son. To a large degree, the following Article has its origin in that battle. Nevertheless, the point of this Article is neither to get even for wrongs, real or imagined, nor to utilize these pages to supplement the already extensive briefs and formal arguments made in that case. Rather, I believe that my position as a law professor, lawyer, litigant, and parent of a disabled child gives me a somewhat unique perspective on the Individuals with Disabilities Education Act (IDEA or Act), and the Act's shortcomings in practice, in theory, and in underlying assumption. The following pages lay out some of those shortcomings and what can be done to remedy them.

* Professor of Law, Widener University, School of Law. B.A. 1972, George Washington University; J.D. 1975, University of California, Hastings College of Law; LL.M. 1984 & J.S.D. 1989, New York University School of Law.

1. In Pennsylvania, Intermediate Units (IUs) are public entities created under state law and charged with the responsibility for providing special education services for students between the ages of 6 and 21. In 1990, the Pennsylvania legislature passed the Early Intervention Services System Act (EISSA), PA. STAT. ANN. tit. 11, §§ 875-101 to -503 (Supp. 1994) (effective July 1, 1991) which placed responsibility upon the Pennsylvania Department of Education to provide programming for children between the ages of three and six. Id. § 875-304. The EISSA also gave the Department of Education authority to contract for the provision of these services with the Intermediate Units. Id. § 875-304. Delaware County Intermediate Unit 25 entered into such an agreement with the Department of Education thereby making it responsible for the provision of free, appropriate, public education under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1485 (Supp. V 1993), and state law.


In response to the inevitable charge that my personal involvement in litigation under the Act distorts my perspective rather than enhances it, I believe two comments are in order. First, the purpose of writing this preface is to inform the reader of my involvement from the outset, so that the reader can assess the content of my views in the light of that information. My second comment goes to my motivation and that of others who engage in the process of legal writing. It seems self-evident that we write to persuade our chosen audience, whether other law professors, the practicing bar, the bench, or legislators, that our ideas are right and thus worthy of adoption or at least consideration.

Some years ago I am told, David Brinkley was accused of not being “objective” in his public comments regarding some event. His response, or at least the one attributed to him, was that it was not his job to be objective, but that it was his job to be fair. Along the same lines, my goal in writing this Article is not to be objective, but rather to present various issues about which I have very strong beliefs, in a sufficiently compelling manner to persuade the objective reader that my analysis is correct. If, as some colleagues have suggested, that makes this Article “advocacy” rather than “scholarship,” so be it. Although I will attempt to be fair, the reader is the ultimate judge of whether I have succeeded in that attempt.

Before beginning any discussion of the relevant legislation, I believe it is important to describe an ongoing debate within the community of psychologists, both as a reference point for the discussion which follows and for the light which this debate sheds on the Act. This debate concerns autism, which was first identified as a distinct collection of symptoms by Dr. Leo Kanner in 1943. Dr. Kanner observed children who displayed no dysmorphic features or other significant signs of physical abnormality, but who failed to communicate with and to form significant attachment to other people.

Initially, the study of autism was dominated by adherents of a psychoanalytic approach. During the 1950s and 1960s, the leading explanation for autism was that children suffering from it had been shown insufficient love by their mothers and began to look inward and reject those around them as a
defense to parental rejection. This theory of autism, commonly referred to as the "refrigerator mother" theory, held sway within the community of psychologists for about twenty years. During that period of time, parents—particularly mothers—were subjected to psychoanalysis to discover why they had rejected their children. According to one study conducted during this period, autistic children were being institutionalized by adulthood at a rate as high as seventy-six percent.

By the late 1960s and early 1970s a number of psychologists, including Dr. Eric Schopler, himself a former adherent to the psychoanalytic approach, recognized the destructive fallacy of this view. Schopler posited that autism was neurological in origin, but of unknown etiology. Importantly, he viewed the disorder as a single entity, rather than as a collection of behavioral symptoms.

5. See, e.g., Bruno Bettelheim, Love is Not Enough: The Treatment of Emotionally Disturbed Children (1950) (stressing the role of parents' method of showing love in the formation of their children's emotional disorders); Bruno Bettelheim, The Empty Fortress: Infantile Autism and the Birth of the Self (1967) (suggesting that parental indifference or hostility to a child is the root of infant autism); see also Cheryl D. Seifert, Theories of Autism 67-68 (1990) (discussing Bettelheim's psychoanalytic theory and treatment).

6. P. Mittler et al., Prognosis in Psychotic Children: Report of a Follow-up Study, 10 J. MENTAL DEFICIENCY RES. 73, 75 (1966). Bettelheim's theory itself called for the removal of the child from the home. See Seifert, supra note 5, at 67 ("During the 1960s, when Bettelheim's therapeutic ideas prevailed, it was recommended that the autistic child be removed from parental influence and care to provide an environment totally different from the one he was presumed to have abandoned in despair.").

Most studies showed institutionalization rates between 40 and 45%. See Eric Schopler et al., Evaluation of Treatment for Autistic Children and their Parents, 21 J. AM. ACAD. CHILD PSYCHIATRY 262, 266 (1982).

7. See, e.g., Eric Schopler, The Development of Body Image and Symbol Formation through Bodily Contact with an Autistic Child, 3 J. CHILD PSYCHOL. & PSYCHIATRY 191, 195 (1962) (basing his observations of an autistic child on "certain concepts derived from the typical mothering process").

8. See Eric Schopler, Specific and Nonspecific Factors in the Effectiveness of a Treatment System, 42 AM. PSYCHOL. 376, 379 (1987) ("For several decades autism was interpreted in terms of psychodynamic theory, which explained the syndrome as a social withdrawal from cold, hostile, and rejecting parents. However, no empirical evidence was produced for this interpretation."); see also Eric Schopler, Parents of Psychotic Children as Scapegoats, 4 J. CONTEMP. PSYCHOTHERAPY 17, 17-22 (1971) (discussing the scapegoating of parents of autistic and psychotic children by mental health professionals and suggesting ways of combatting it).

9. See Michael Rutter & Eric Schopler, Autism and Pervasive Developmental Disorders: Concepts and Diagnostic Issues, 17 J. AUTISM & DEVELOPMENTAL DISORDERS 159, 166-71 (1987) (discussing autism in terms of the underlying deficit rather than the symptoms of that deficit); see also O. Ivar Lovaas & Tristram Smith, Intensive Behavioral Treatment for Young Autistic Children, in 11 ADVANCES IN CLINICAL CHILD PSYCHOL. 285, 316 (Benjamin B. Lahey & Alan E. Kazdin eds., 1988) (observing that
Schopler and his colleagues at the University of North Carolina (UNC) assumed that recovery was impossible until such time as the neurological cause could be identified and addressed. Based on this assumption, they developed a methodology aimed at teaching autistic children skills sufficient to avoid institutionalization. Specifically, the goal of UNC's "Division TEACCH" was, and is, to permit the autistic child to remain in the community, albeit in highly supervised, structured living and employment environments. For many years, Division TEACCH was adopted widely by public school systems throughout the country as the model of special education for autistic individuals.

In 1970, Dr. O. Ivar Lovaas, a professor of psychology at the University of California at Los Angeles (UCLA), began a controlled study attempting to determine whether he could improve the social and intellectual functioning of young autistic children by subjecting them to an intensive "behavioral" approach at an early age. Fifty-nine children, all of whom

"organic theories of autistic behaviors have apparently not considered the possibility of reversibility of organic damage with early environmental interventions").

10. See generally SOCIAL BEHAVIOR IN AUTISM 265–371 (Eric Schopler & Gary B. Mesibov eds., 1986) (discussing programs designed to teach autistic children social behaviors). Schopler has, in fact, claimed that his program has reduced the institutionalization rate significantly. See Schopler et al., supra note 6, at 266–67. Whether this reduction is attributable to the programming or to the nationwide trend toward deinstitutionalization of the psychiatric population has been questioned. See Lovaas & Smith, supra note 9, at 319–20.

11. Division TEACCH (Treatment and Education of Autistic and Related Communication Handicapped Children) is a division of the Department of Psychiatry, School of Medicine at the University of North Carolina-Chapel Hill.

12. See J. Gregory Olley, The TEACCH Curriculum for Teaching Social Behavior to Children with Autism, in SOCIAL BEHAVIOR IN AUTISM, supra note 10, at 351, 356. Olley describes TEACCH's goals as follows:

The TEACCH Social Skills Curriculum emphasizes social skills which can reasonably be taught in schools but which have wide application in home, work, recreation, and other community settings. This emphasis upon independent functioning does not mean that all or even a substantial portion of autistic adults are expected to live independently. Good social skills make even partial participation in adapted tasks with supervision more feasible, and they surely make acceptance by members of the community more likely.

Id.

13. One possible reason for the widespread adoption of TEACCH is that it may have been the best program in existence when it was first developed.

14. O. Ivar Lovaas, Behavioral Treatment and Normal Educational and Intellectual Functioning in Young Autistic Children, 55 J. CONSULTING & CLINICAL PSYCHOL. 3, 13 (1987); see also Lovaas & Smith, supra note 9. Earlier studies regarding the behavioral treatment of autistic children are discussed in AUBREY J. YATES, BEHAVIOR THERAPY 246–72 (1970) and Lovaas & Smith, supra note 9, at 293.
had been diagnosed as autistic by physicians or psychologists not connected with the study, were assigned to either an experimental group or one of two control groups. The nineteen children in the experimental group received more than forty hours per week of one-on-one therapy provided primarily by undergraduates at UCLA. Nineteen others in the first control group received ten or fewer hours per week of the same type of one-on-one therapy. The remaining twenty-one children were assigned to the second control group and received traditional types of programming that were available in the community.

Following two to three years of this programming, nine of the nineteen children (forty-seven percent) from the experimental group were able to pass normal first grade in a public school, while none of the children from the first control group and only one child from the second control group were able to do so.16

Table 1, on the following page, summarizes the results of Dr. Lovaas' study.

A follow-up study published in 1993 showed that of the nine children who had been integrated fully into the public schools, eight remained intellectually and socially indistinguishable from their peers.17 These studies indicate that autistic children may recover from their disability, thus permitting them to be fully integrated into public schools.

During the same period of time, psychologists at other institutions who were utilizing similar, intensive behavioral intervention began to report results similar to those reported

15. For a complete description of the study's methodology, see Lovaas, supra note 14, at 4-5.

16. Id. at 6-7. It is in this context that the validity of the claim that there is a single entity which can be characterized as "autism" becomes important. See supra text accompanying note 9. If the disorder is a single entity, it is difficult to explain why only some children respond to the intensive therapy. If, on the other hand, there are a number of conditions which can cause similar symptoms, then to have some, but not all, children respond to a particular treatment is understandable. The important question for researchers is not why the treatment is ineffective in some cases, but what there is about those children who responded well that distinguishes them from those who did not. See Lovaas & Smith, supra note 9, at 314 (noting that differences in children's responses to treatment may suggest different cases of autism and may complicate research on symptoms common to all autistic children).

TABLE 1
EDUCATIONAL PLACEMENT AND MEAN AND RANGE OF IQ AT FOLLOW-UP

<table>
<thead>
<tr>
<th>Group</th>
<th>Recovered</th>
<th>Aphasic</th>
<th>Autistic/Retarded</th>
</tr>
</thead>
<tbody>
<tr>
<td>Experimental</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>N</td>
<td>9</td>
<td>8</td>
<td>2</td>
</tr>
<tr>
<td>MIQ</td>
<td>107</td>
<td>70</td>
<td>30</td>
</tr>
<tr>
<td>Range</td>
<td>94-120</td>
<td>56-95</td>
<td>---*</td>
</tr>
<tr>
<td>Control Group 1</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>N</td>
<td>0</td>
<td>8</td>
<td>11</td>
</tr>
<tr>
<td>MIQ</td>
<td>---</td>
<td>74</td>
<td>36</td>
</tr>
<tr>
<td>Range</td>
<td>---</td>
<td>30-102</td>
<td>20-73</td>
</tr>
<tr>
<td>Control Group 2</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>N</td>
<td>1</td>
<td>10</td>
<td>10</td>
</tr>
<tr>
<td>MIQ</td>
<td>99</td>
<td>67</td>
<td>44</td>
</tr>
<tr>
<td>Range</td>
<td>---</td>
<td>49-81</td>
<td>35-54</td>
</tr>
</tbody>
</table>

Source: O. Ivar Lovaas, Behavioral Treatment and Normal Educational and Intellectual Functioning in Young Autistic Children, 55 CONSULTING & CLINICAL PSYCHOL. 3, 7 tbl. 3 (1987).
Note: Dashes indicate no score or entry.
*Both children received the same score.

by Dr. Lovaas, namely that roughly half of the children suffering from autism can recover from the disabling symptoms of their disorder if provided with highly intensive, behavioral therapy at a very young age.18
Those unfamiliar with American special education might assume that such a programming breakthrough would be hailed and embraced by the educational establishment. Unfortunately, that has not been the case. Despite the lack of evidence that the Lovaas findings are wrong, there has been enormous resistance to implementing Lovaas-type programs. 19

The disagreement over whether to provide TEACCH or Lovaas-type programs is not unique. In fact, disagreements are apt to occur in many areas related to the education of developmentally disabled children. Most, however, ultimately flow from conflicts in basic underlying assumptions regarding the children's ability to learn. 20 An assumption that autistic children cannot learn, or that they cannot learn very much, shapes the decisions regarding the types of programs provided for them, including their methodology, intensity, and goals. This assumption also shapes views about the validity of expenditures for such programs. 21

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19. This is not to say that Dr. Lovaas' methodology has not been criticized. See, e.g., Gary B. Mesibov, Treatment Outcome Is Encouraging, 97 AM. J. ON MENTAL RETARDATION 379 (1993); Eric Schopler et al., Relation of Behavior Treatment to "Normal Functioning": Comment on Lovaas, 57 J. CONSULTING & CLINICAL PSYCHOL. 162, 162–64 (1989). But see O. Ivar Lovaas et al., Clarifying Comments on the Young Autism Study: Reply to Schopler, Short and Mesibov, 57 J. CONSULTING & CLINICAL PSYCHOL. 165, 165–67 (1989) (responding to criticism); Donald M. Baer, Quasi-Random Assignment Can Be as Convincing as Random Assignment, 97 AM. J. ON MENTAL RETARDATION 373 (1993) (same); Tristram Smith et al. Comments on Replication and Evaluation of Outcome, 97 AM. J. ON MENTAL RETARDATION 385 (1993) (same).

20. Perhaps the best definition of "mental retardation" is that provided by H. Carl Haywood: "[M]ental retardation is not an entity. It is a collection of well over 200 syndromes that have only one element in common: relative inefficiency at learning by the methods and strategies devised for other people to learn." H. Carl Haywood, Reaction Comment, in PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, THE MENTALLY RETARDED CITIZEN AND THE LAW 677, 677 (Michael Kindred et al. eds., 1976).

21. In fact, in at least one article the entire method of evaluating the effectiveness of the Individuals with Disabilities Education Act, and the resulting conclusions, were based largely on an assumption of the children's limited capacity. William H. Clune & Mark H. Van Pelt, A Political Method of Evaluating the Education for All Handicapped Children Act of 1975 and the Several Gaps of Gap Analysis, LAW & CONTEMP. PROBS., Winter 1985, at 7. The authors engaged in an extensive and perceptive critical analysis of the Act which indicated clearly that as implemented, the Act was not accomplishing its reformist goals. Nevertheless, using what they called a "political method" of analysis, they concluded that many of the key elements of the Act, including the requirement of "individualized" programming, were unrealistic and expendable. Id. at 54–55. "Coarse programmatic categories are probably all that can be managed," they wrote. Id. at 54. "Tutorial programs would be nice for handicapped children, but they would be nice for other children, too." Id.
Even if agreement existed as to the ability of disabled children to learn, however, there would remain the potential for disagreement on the mechanics of the educational process. For example, even within a model that accepts that many children have the capacity to reach the level of their nondisabled peers, assessing an individual child's capacity and deciding how to respond to uncertainty regarding that capacity will remain problematic. Furthermore, even if there is basic agreement on capacity, assessment, and goals, there is room for disagreement as to whether the program or methodology which has been selected is being implemented effectively.

The following pages identify the relevant considerations and offer some suggestions as to how these conflicts can be reduced, eliminated or resolved.

I. INTRODUCTION: THE IDEA AS CLASSICAL LIBERAL LEGALISM

In many respects, the Individuals with Disabilities Education Act and its predecessors can be seen as examples of classical liberal legalism.\textsuperscript{22} As such, the Act first involves the selection of goals, identification of values, and assignment of rights through a pluralist political process.\textsuperscript{23} Second, the Act seeks to

As I will try to make clear in the course of this Article, special education practices have little to do with what would be "nice" and a great deal to do with what is essential. This is a significant distinction, because disabled children's opportunities for meaningful lives are at stake.

\textsuperscript{22} See MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW 146–58 (1990) (discussing social contract theory as based on the idea of freedom of contract between independent individuals); Joel F. Handler, Dependent People, The State, and the Modern / Postmodern Search for the Dialogic Community, 35 UCLA L. REV. 999, 1008–12 (1988) (describing the special education system under the Act as a regulatory failure); David Neal & David L. Kirp, The Allure of Legalization Reconsidered: The Case of Special Education, LAW & CONTEMP. PROBS., Winter 1985, at 63, 65 (discussing legalization as a means of policymaking "premised on the classically liberal belief that individuals, and not the organization charged with delivering a good or service, can best safeguard their own interests").

\textsuperscript{23} Professor Minow uses the terminology of "rights" rather than "legalism." MINOW, supra note 22, at 146–56. Professors Neal and Kirp use the term "legalization," which they define as a method of giving "substance to a policy objective" characterized by "a focus on the individual as the bearer of rights . . . and the employment of legal techniques such as written agreements and court-like procedures to enforce and protect rights." Neal & Kirp, supra note 22, at 65; see also Mark G. Yudof, Legalization of Dispute Resolution, Distrust of Authority, and Organizational Theory: Implementing Due Process for Students in the Public Schools, 1981 WIS. L. REV. 891, 895 ("Legalization
ensure that the selected goals will be implemented, the identified values protected, and the assigned rights enforced against competing claims through the utilization of fixed procedural rules to prevent the more powerful from evading those goals and values.\(^{24}\)

The Act espoused two interrelated substantive goals: (1) disabled children were to be provided with a free, appropriate, public education,\(^{25}\) and (2) such education was to be provided in the least restrictive environment.\(^{26}\)

The justification for these goals overtly embraces both a Kantian rights theory and a Benthamite utilitarian basis.\(^{27}\) A rights theory requires the provision of education as an acknowledgement of the disabled person's dignity as a human being. A utilitarian model, on the other hand, requires the reduction of disability because of the long-term cost effectiveness of such reduction, and reflects the prevalence of an economic model of law which is itself based on a utilitarian philosophical and political foundation.\(^{28}\)

rests on the idea of individual rights, particularly procedural entitlements against the state, which may or may not advance the collective interest.”).  

24. Handler, supra note 22, at 1061; see also infra text accompanying note 30.  
27. One author has described the interplay between these two types of values as follows:

Values were to be discovered either through the utilitarian calculus or Kantian-based ontological rights. Whose values should prevail? Whether utilitarian or Kantian, the state would not choose. Rather, the task of the state was to provide a neutral framework. Under utilitarianism, the ends, the good life, would be the sum of preferences. The Kantians reject utilitarianism as a basis of moral law; its instrumentalism does not provide sufficient protection for freedom and rights and treats individuals as means to the happiness of others rather than as ends in themselves. The Kantians take rights much more seriously, but it is still fundamental to the preservation of these individually-based rights that the state remain neutral; they cannot be overridden for the general welfare. . . . Neither utilitarians nor Kantians can agree on what values are fundamental or on what frameworks are appropriate to enhance those values. Through the bargaining of pluralism, the political community would agree upon certain values, and these would be enacted into law.

Handler, supra note 22, at 1061 (citation omitted).  
28. This utilitarian model is reflected in the goals of the EHA's sponsors, described by the United States Court of Appeals for the Third Circuit as follows:

The EHA's sponsors stressed the importance of teaching skills that would foster personal independence for two reasons. First, they advocated dignity for handicapped children. Second, they stressed the long-term financial savings of
Certainly, there is nothing unique in the notion of law being rooted in both philosophical traditions. Although in many areas of the law this may result in conflict, special education policy seems to be one of those areas where the goals of both traditions can be promoted simultaneously.

This is not to say, however, that merely identifying the goals, values, and rights underlying the Act will result in their implementation in the special education context. Provision for the inevitability of implementation failures represents yet another facet of legalism—protection of values. In other words, in drafting the Act it was necessary to readjust existing power structures to protect those rights. As Professor Handler explained:

There is also the issue of power. Laws are not always clear, and people, including officials, cannot be counted on to be always law-abiding. According to the liberal legalists, the weak can protect themselves in the day-to-day dealings with officials through the rule of law. Formalism is the substantive restraint on all, citizens and officials alike; procedural due process is the mechanism by which the weak can protect themselves from the lawbreaking powerful.

early education and assistance for handicapped children. A chief selling point of the Act was that although it is penny dear, it is pound wise—the expensive individualized assistance early in life, geared toward teaching basic life skills and self-sufficiency, eventually redounds to the benefit of the public fisc as these children grow to become productive citizens.

Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171, 181–82 (3d Cir. 1988). These goals were expressed in a Senate report stating:

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


30. Handler, supra note 22, at 1061.
Notwithstanding the procedural protections set forth in the Act,\(^{31}\) scholars and parents are virtually unanimous in criticizing the manner in which the Act functions.\(^{32}\) Ambiguity and disagreement regarding what constitutes a substantively "appropriate" program are commonplace. The formalistic procedures to protect parental rights have not served to level the playing fields between parents and educators.\(^{33}\) Procedural protections all too often have been reduced to mere empty ritual for all but the most educated and wealthy.\(^{34}\)

Once we accept that the system is not working as envisioned, there are essentially two responses possible. The first is to insist that "legalization" is a method which is incapable of dealing with this problem because it often pits relatively powerless individuals against a complex and powerful bureaucracy. Certainly some writers have taken this position. Those writers have analyzed the problem of education for the disabled from the perspective of other schools of legal thought, primarily feminism or communitarianism.\(^{35}\)

If, however, we are not yet prepared to abandon legalization as a means by which social problems can be solved, then it becomes necessary to look at the Act, considering its terms, its goals, and its underlying assumptions to determine how it is

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32. See, e.g., MILTON BUDOFF & ALAN ORENSTEIN, DUE PROCESS IN SPECIAL EDUCATION: ON GOING TO A HEARING 44–45 (1982); Clune & Van Pelt, supra note 21.

33. As Professor Handler noted:

The average parent, especially in lower socio-economic classes, does not have the ability to participate. In addition to the psychological burdens of coping with a handicapped child, most parents lack the information and the resources to deal with the school bureaucracy. Both participation in the meetings and consent to the placement are usually formalities only. . . . Parents are outgunned: they are strangers confronting a group of people who have worked together and struck a bargain . . . .

Handler, supra note 22, at 1010.

34. See BUDOFF & ORENSTEIN, supra note 32, at 44–46; Clune & Van Pelt, supra note 21, at 34–36.

35. See Handler, supra note 22, at 1034–49 (discussing the major trends in jurisprudence which compete with the liberal legal model); see also MINOW, supra note 22 (discussing the treatment of difference by social contract theory, law and economics theory, and critical legal studies). Some writers are skeptical of the possibility of abandoning formalism. Professor Yudof, for example, has asserted that "[n]onformalism is premised on trust, and trust is lacking in the school environment. Formalism did not create that mistrust, it is merely a manifestation of the underlying lack of community." Yudof, supra note 23, at 920.
failing, why it is failing, and what, if anything, can be done about it. In order to engage in such an analysis, it is necessary to recognize that the sources of failure or the impediments to success can be located in areas both internal and external to the Act itself. Although much of this Article deals with the internal shortcomings of the legislation, of even greater importance to the success of the Act is the existence of an underlying social consensus in favor of educating the handicapped. In the absence of such a consensus and broad-based willingness to be bound by the Act, failure is inevitable.  

The lack of consensus as to the possibility of achieving major increases in a child's intellectual and social functioning may be the sign of a self-fulfilling prophecy in operation. Low expectations lead to ineffective programming. Poor programming yields poor results. Poor results are then interpreted by many as proof of the original misperception that education for the disabled child is a well-meaning but ultimately futile gesture.  

If this misperception continues to exist and the goals of the Act are not perceived as being within the realm of possibility, the briefly formed consensus which prevailed when the Act was passed will evaporate, particularly in the face of scarce resources. As a result, the Act will become largely superfluous in the day-to-day realities of the provision of special education.

The key assumption underlying this Article is that success is attainable, and, once attained, can break the cycle of low expectation and failure which currently drives the system. Once the fundamental underlying commitment to special

36. There are a number of reasons why the public might be unwilling to be bound by the Act. Some of these reasons are as follows:

With sharply increasing local and state tax burdens, those who perceive no real benefit from public schools may also be more critical of educators' performance. Such critics may begin to view education as a private and not a public good. The civil rights movement, the perceived failure of many Johnsonian social programs and a growing anti-professional bias may further contribute to the decline in public trust in public schools.

Yudof, supra note 23, at 896 (citation omitted).

education is reestablished, interpretation and amendment of the existing legislation to realize that commitment is entirely possible within the framework of the liberal legal tradition.

II. The Substantive Goals Underlying the IDEA

A. A Brief History of the Pre-Act Exclusion of Disabled Children From the Schools

1. Primary or Initial Exclusion—The events leading up to the passage of the Education for All Handicapped Children Act (EAHCA) and the manner in which these events influenced the content and structure of the Act are relatively clear. A form of primary or initial exclusion existed because many statutes expressly barred disabled children from attending public schools. Successful legal challenges to this type of intentional exclusion commenced in the 1970s with Pennsylvania Ass'n of Retarded Children v. Pennsylvania and a series of similar cases elsewhere. Clearly much of the Act can be seen as an attempt to remedy this problem. The legislative history of the Act specifically notes that 1.75 million handicapped children between birth and twenty-one years of age were "receiving no educational services at all."
Another form of "primary" or "initial" exclusion from the regular classroom resulted from misuse of the special education system to rid the public schools of children deemed undesirable, whether because of behavior or racial or ethnic prejudice. In other words, children were incorrectly placed into special education when they were not in need of such services, could not derive an appropriate level of benefit from such services, and could derive an appropriate level of benefit from placement in a regular education class.

The same type of primary exclusion can occur as a result of poorly designed testing measures which either intentionally or unintentionally exclude children from regular education when that would be an appropriate, beneficial placement. In fact, there was a long history of abuse in the utilization of standardized testing with the result, and sometimes for the purpose, of misplacing children into special education classes, thereby achieving a de facto exclusion from public education. The victims of this de facto exclusion certainly included, but were not limited to, children who were labeled "disruptive."

Describing the history of special education in America, one commentator wrote:

Attacks on quality [of special education classes] proliferated. A group of Boston school teachers told an investigating team from the Massachusetts Institute of Technology that "special classes are used as a 'dumping ground' for children who are trouble-makers in their regular classes. These children often do not have low I.Q.'s. Results of the Stanford-Binet tests are sometimes deliberately rigged." Even more startling, a highly placed official in the California State Department of Public Instruction admitted that the intent of that state's classes for the educable mentally retarded (EMR) from the

handicapped children are not being met); David Kirp et al., Legal Reform of Special Education: Empirical Studies and Procedural Proposals, 62 CAL. L. REV. 40, 41 (1974) (noting that "typically, state law denies the most severely handicapped youngsters any right to publicly supported schooling").

44. Kirp et al., supra note 43, at 43 (testing changes).
45. See infra note 53 and accompanying text for a discussion of the impact of inappropriate placement in special education classes.
46. See Kirp et al., supra note 43, at 43-44 (noting that testing changes in Philadelphia and Washington, D.C. in the 1960s revealed that two-thirds of handicapped students had been misclassified, and discussing which groups of students are more likely to be placed in special education).
47. Id. at 44.
late 1940s to the mid-1970s was not to provide intensive services and education so that a child could return to regular classes. The expectation and the practice was permanent placement in the EMR class until the youth “dropped out” of school.\footnote{48. Marvin Lazerson, \textit{The Origins of Special Education}, in \textit{SPECIAL EDUCATION POLICIES: THEIR HISTORY, IMPLEMENTATION AND FINANCE} 15, 39 (Jay G. Chambers & William T. Hartman eds., 1983) (citations omitted) [hereinafter \textit{SPECIAL EDUCATION POLICIES}]. It is interesting to note that the Stanford-Binet IQ test was used widely as a predictor although that was certainly not the intent of its inventor. \textit{See infra text accompanying note 62.}}

In addition to the disruptive child, racial and ethnic minorities were long-standing victims of the educational system. Data reflect the fact that a disproportionate number of these children were placed in special education classes.\footnote{49. \textit{SEYMOUR B. SARASON \\& JOHN DORIS, EDUCATIONAL HANDICAP, PUBLIC POLICY, AND SOCIAL HISTORY: A BROADENED PERSPECTIVE ON MENTAL RETARDATION} 324-25, 340-42 (1979).} The misplacement was often simply a means of accomplishing segregation.\footnote{50. Some of the implications of the decision in \textit{Brown v. Board of Education}, 347 U.S. 483 (1954), were not lost on the parents of special needs children. Commentators have observed that:}

\begin{quote}
From its origins, special education was tied to views of racial inferiority; without the ethnic and racial antagonisms of the World War I years, special education would have received only the most minimal attention. The racial biases that made minorities the most likely candidates for placement in inadequate special education classes continued into the post-World War II period. Indeed, the biases played much the same role they had before: public education and special education expanded simultaneously, in the 1950s and 1960s, allowing school systems both to incorporate large
\end{quote}

\begin{quote}
Although the 1954 desegregation decision did not deal directly with mental retardation, the striking down of the “separate but equal” clause [sic] by the Supreme Court came to have enormous consequences for mentally retarded people. The argument that separate but equal facilities insidiously affected both black and white children was not lost on some people who had similarly viewed the consequences of special classes. Mental retardation, like so much else in our society, became food for legal and judicial thought.
\end{quote}

\textit{SARASON \\& DORIS, supra note 49, at 2.}
numbers of nonwhite pupils into the schools while simultaneously segregating them within the schools.51

As in the case of the disruptive child, standardized testing was intentionally or negligently misused to segregate children. The tests employed yielded inaccurate results, either because of built-in cultural bias or because of the obvious disadvantage in test taking faced by children who did not speak, read, or write English as a first language—or perhaps at all.52

Regardless of the reasons for it, misdiagnosis by itself can result in long-term exclusion. Thus, for example, a child with a learning disability which affects receptive and/or expressive communication skills might be misdiagnosed as suffering from retardation and excluded from the regular classroom. Long-term exclusion may occur for two reasons. First, there may be a reluctance to rethink one's opinion after initially labeling a child. It has long been recognized that once a child has been labeled, that label may well follow him long after it has ceased to be objectively appropriate.53 Second, once a child has been labeled and placed into typical "low intensity" special education classes, the child will be taught less and thus fall further behind

51. Lazerson, supra note 48, at 40. But see Clune & Van Pelt, supra note 21, at 17 (noting the possibility that factors other than racial discrimination might account for the disproportionate number of black children in special education classes).

52. See Michael S. Sorgen, The Classification Process and its Consequences, in THE MENTALLY RETARDED CITIZEN AND THE LAW, supra note 20, at 215, 229 ("Language is another factor which can seriously affect the extremely sensitive relationship of tester, child, and testing instrument. The grossest kind of linguistic handicap was evident in Diana (No. C-70-37 (N.D. Cal. Feb. 5, 1970)), where children were tested in other than their primary language."); see also Natalie T. Darcy, Bilingualism and the Measure of Intelligence: Reviews of a Decade of Research, 103 J. GENETIC PSYCHOL. 259, 281 (1963) (noting the effect of the testing instrument on conclusions about the intelligence of bilingual test takers); E. Paul Torrence, Testing the Educational and Psychological Development of Students from Other Cultures and Subcultures, 38 REV. EDUC. RES. 71 (1968) (describing studies finding that scores on educational and psychological tests varied among cultures and attempting to take those differences into account).

his non-disabled peers.\textsuperscript{54} Within a relatively short period of time, catching up becomes a practical impossibility.\textsuperscript{55}

2. Avoidance of Primary Exclusion: The Mainstreaming Requirement—In response to the finding that handicapped children were being excluded from public schools, Congress provided for procedures by which the states were to identify those children who were in need of services and not receiving them, and for further procedures to bring these children into the system.\textsuperscript{56} In recognition of the widespread existence of de facto exclusion from mainstream public education by misclassification and inappropriate placement in special education classes, Congress enacted section 1412(5) of the Act, which sets forth the Congressional preference for integration into the traditional classroom whenever such integration is “appropriate.”\textsuperscript{57}

\textsuperscript{54} There are really two aspects to this claim. The first is simply that less teaching goes on in the special education class, so a widening gap between those in special education and regular education is to be anticipated. \textit{See} Kirp, supra note 53, at 735, 749. The second aspect involves what has been identified as “iatrogenic retardation.” Studies have indicated that if a child of normal intelligence mistakenly is labeled as “retarded” and thereafter treated as though the diagnosis were correct, the child will in fact become retarded. \textit{See} SARASON \& DORIS, supra note 49, at 154–56 (discussing “iatrogenic retardation”).


\textsuperscript{56} \textit{See} 20 U.S.C. § 1412(2)(C) (Supp. V 1993) (requiring states to develop plans to identify, locate and evaluate handicapped children to determine whether they are in need of services); \textit{id.} § 1412(5)(C) (addressing some of the problems of evaluation using standardized testing); Clune \& Van Pelt, supra note 21, at 24 (observing that since the Act has been in effect and assessment techniques have improved, “teachers are finding it more difficult to ‘dump’ children into special education”); \textit{see also supra text} accompanying note 48.

\textsuperscript{57} To be eligible for federal funds a state must establish:

\begin{itemize}
  \item procedures to assure that, to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.
\end{itemize}


One of the Act’s most notable failures is in its effort to integrate regular public education classes. \textit{See} Oberti v. Board of Educ., 995 F.2d 1204, 1214 n.20 (3d Cir. 1993) (indicating that, according to the U.S. Department of Education (DOE), “nearly two-thirds of the state plans submitted for DOE approval in 1991 under the Act were not in compliance with the mainstreaming requirements of IDEA”) (citing DIVISION OF INNOVATION AND DEVELOPMENT, U.S. DEPT OF EDUC., TO ASSURE THE FREE APPROPRIATE PUBLIC EDUCATION OF ALL CHILDREN WITH DISABILITIES 119 (1992)).
3. Secondary Exclusion—Legislation barring children from the schools, misuse of the special education system, poorly designed testing measures, and misdiagnosis all result in what I have termed "primary" or "initial" exclusion. There is, however, another form of exclusion from educational benefits to be considered. If recovery from developmental disability were possible through the provision of appropriate programming, then a failure to provide such programming is as much an exclusion from educational opportunity as misplacement caused by misassessment or bigotry. The failure to provide programming which is needed to permit recovery can be termed "secondary exclusion."

The issue which must then be confronted directly is the significance of a diagnosis of mental retardation, either alone or as part of some other disabling condition. Opinions range across a continuum. At one extreme is the "passive-acceptant approach." One author has described this approach as follows:

The passive-acceptant approach basically reflects the more or less overt assumption that the retarded individual is essentially unmodifiable and, therefore, that his performance level as manifested at a given stage of his development is considered as a powerful predictor of his future adaptation. Strategies aiming at helping him to adapt will consist of molding the requirements and activities of his environment to suit his level of functioning, rather than making the necessary efforts to raise his level of functioning in a significant way. This, of course, is doomed to perpetuate his low level of performance.

At the other extreme is the "active-modificational approach." Underlying this approach is the following assumption:

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58. See supra notes 14-18 and accompanying text.
59. In most cases, autistic individuals are also diagnosed as mentally retarded. See AMERICAN PSYCHIATRIC ASSN, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 35 (3d ed. rev. 1987) [hereinafter DSM III-R]. According to Dr. Gary Mesibov, co-director of Division TEACCH, about 70% of autistic children function in the retarded range. See Gary B. Mesibov, Autism, in 1 ENCYCLOPEDIA OF HUMAN BIOLOGY 505, 507 (1991). There is, however, a significant question as to the reliability of IQ testing in the case of autistic children. See Lovaas & Smith, supra note 9, at 289 (noting that autistic children's IQ scores may not be reliable where they are noncompliant during testing).
Given the proper social, cultural, and educational policy based on the theoretical framework of the human organism as an open system and further, given an investment in the creation of daring, innovatory strategies, retarded performance levels can be raised considerably. The observed low-level performance of the retardate is not accepted as a status quo nor perceived as a fixed ceiling of his capacity, nor as a rigid predictor of his future social and occupational adjustment. The retardate himself, his family, and his educators are helped to realize that society has every expectation that the retardate will be able to perform more adequately and, further, that society will make every effort to see that these expectations are realized. This is quite opposed to the situation that often occurs when psychologists, counselors, and teachers feel it is their duty to "prepare" the retardate and his parents for acceptance of the fact of retardation and for the futility inherent in making unrewarding efforts to raise the child's performance level.  

The idea that intellectual functioning could be improved by educational programming is not new. As early as 1909, Alfred Binet, having developed the "intelligence test," suggested that intelligence could be improved by a method he called "mental orthopedics." During the next fifty years, there were periodic attempts to demonstrate that IQ test results could be increased significantly if appropriate programming were provided. Although studies often showed success, even dramatic success at times, they met with little enthusiasm within the scientific community.

61. Id. at 345.
62. ALFRED BINET, MODERN IDEAS ABOUT CHILDREN 105–18 (Suzanne Heisler trans., 1975). Binet's views that intelligence could be improved, however, were not widely followed. Samuel A. Kirk, Research in Education, in MENTAL RETARDATION: A REVIEW OF RESEARCH 68 (Harvey A. Stevens & Rick Heber eds., 1964) ("American psychologists and educators reacted enthusiastically to the testing movement initiated by Binet. Few, however, followed Binet's ideas on the educability of intelligence. Instead, there arose a pessimistic attitude toward the training of intelligence.").
63. A summary of some of the better known studies is provided in Kirk, supra note 62, at 67–72. See also Feuerstein, supra note 60, at 351–52.
64. As one commentator explained:

There are many reasons for the paucity of such studies. One reason has been the prejudice against the possibility of developing intelligence through educational procedures. Another reason is related to the length of time needed to produce
The striking results of the Lovaas research have again placed the two philosophies underlying developmental disabilities at center stage, and the Lovaas-TEACCH controversy places the basic assumptions underlying those philosophies in stark contrast. TEACCH's adherents rely on a passive-acceptant model and strenuously resist the competing approach. If the active-modificational approach of Lovaas is correct, almost half of the autistic children who are placed in Division TEACCH programming are being deprived forever of a normal life.

Because the passive-acceptant approach adopted by TEACCH and others produces self-fulfilling prophecies, it is critical not to err on the side of that approach since such error would be the functional equivalent of misassessment. The opportunity to catch up necessarily will be lost. Furthermore, there is simply no way to strike a compromise between the two competing programs by adding a few additional hours per week of programming, since the provision of a small

reliable results. A third reason is that the factors of control, attrition, and reliability of measurement tend to discourage experimenters from launching a controlled longitudinal experiment of an educational nature.

Kirk, supra note 62, at 72.

65. For example, authors implicitly relying on this model have explained their assumptions about autistic children as follows:

[O]ur first assumption has always been that anyone diagnosed as autistic in childhood continues to be so as an adult, even though changes and considerable improvement may have occurred. This is consistent with most current definitions of autism, suggesting that it is pervasive and lifelong, and that these clients frequently improve though rarely are cured.

Mary E. Van Bourgondien & Gary B. Mesibov, Diagnosis and Treatment of Adolescents and Adults with Autism, in AUTISM: NATURE, DIAGNOSIS, AND TREATMENT 367, 368 (Geraldine Dawson ed., 1989); see also Mesibov, supra note 59, at 507 (claiming that 70% of autistic individuals test in the retarded range "with IQ scores as stable as those of nonhandicapped children and as accurate in predicting later academic performance").

66. See Arnold Barnett, Misapplications Reviews: Dealing with Autism, INTERFACES, May–June 1989, at 27, 31 (praising the Lovaas study and responding to criticisms of the Lovaas program and the study's methodology); Lovaas & Smith, supra note 9, at 300 ("We do not allow the child to withdraw and be autistic, and parents and treatment personnel are not encouraged to accept or respect the child's 'autism' or 'psychosis.' ").

67. See supra table 1 and accompanying text.

68. See supra note 55 and infra note 180.
The number of hours of intensive programming has been shown not to be beneficial.\textsuperscript{69}

It is critical, therefore, to determine which assumption guides the Act. Although the legislative history does not speak directly to the issue, references to "full educational opportunities"\textsuperscript{70} and "maximum benefits to handicapped children,"\textsuperscript{71} support the proposition that significant progress was seen as achievable, and imply a rejection of the passive-acceptant model.\textsuperscript{72} The Congressional assertion that "[p]arents of handicapped children all too frequently are not able to advocate the rights of their children because they have been erroneously led to believe that their children will not be able to lead meaningful lives," provides further evidence that the Act adopted the active-modificational model.\textsuperscript{73}

The economic-efficiency considerations of the Act and the expressed need to promote the dignity of the child also mandate that the goal of special education placement should be integration, or reintegration,\textsuperscript{74} into the regular classroom at the earliest possible time. The long-term cost effectiveness of intensive, early intervention is clear. In the case of behavioral intervention for young autistic children, Dr. Lovaas noted that:

Clients who achieved normal functioning could be reduced from 40 hours per week to infrequent visits after 2 years.

\textsuperscript{69} See supra note 16 and accompanying text. The Lovaas study found that almost half of the children who received 40 hours per week of one-to-one behavioral therapy recovered completely from their disability. Lovaas, supra note 14, at 5–7. None of the children recovered who were in a control group that received 10 hours per week of the same therapy. Id. Thus, there is no point in supplementing Division TEACCH programs by providing a few hours of the behavioral training with the expectation of getting some improvement. If one wants the result, one must provide the entire program.


\textsuperscript{71} Id. at 6, reprinted in 1975 U.S.C.C.A.N. at 1430.

\textsuperscript{72} See Kruelle v. New Castle County Sch. Dist., 642 F.2d 687, 695 (3d Cir. 1981) (asserting that "[t]he language and the legislative history of the Act simply do not entertain the possibility that some children may be untrainable").


\textsuperscript{74} Currently, it would appear that fewer than five percent of the children assigned to special education classes ever return to the regular education system. See National Ass'n of State Bds. of Educ., Winners All: A Call for Inclusive Schools 9 (1992) [hereinafter Winners All] (citing a 1989 study of 26 large cities by Gartner & Lipsky); see also Kirp, supra note 53, at 749 ("In large city school systems, fewer than one of every ten students assigned to special programs ever returns to regular classes.").
of treatment. Assigning one teacher for 2 years would cost perhaps $40,000 (in 1987 dollars), in contrast to the roughly $2,000,000 incurred by each client requiring a lifelong stay in a restricted setting (an institution or other residential placement).  

This was precisely the argument made by Senators Stafford, Javits, Kennedy, Schweiker, and Hathaway. They argued in favor of including preschool programs for three- to five-year-old children under the 1975 Act noting:

We are cognizant of the concerns of the States regarding their financial capacity to provide a full educational services [sic] to this group of children. Nevertheless, we feel that it is imperative to point out that the benefits of early identification and education, both in terms of prevention of future human tragedy, and in the long-term cost effectiveness of tax dollars, are so great as to justify continued emphasis upon preschool education for handicapped children.

The 1986 Amendments to the Act reflected this belief, and expanded funding to the states if they brought three- to five-year-olds within their special education programs.

The Act's insistence on promoting the dignity of the child is perhaps an even more compelling argument in favor of finding that the Act mandates an active-modificational approach to programming. The symptoms of autism strip the severely

75. Lovaas & Smith, supra note 9, at 313–14; see also supra note 28 (discussing the benefits of early education for disabled children).
76. S. REP. No. 168, supra note 28, at 81, reprinted in 1975 U.S.C.C.A.N. at 1479; see also Weicker, supra note 37, at 474 (criticizing proposed budget cuts).
78. As a 1990 House Report explained:

The Education of the Handicapped Act Amendments of 1986 (Public Law 99-457) significantly expanded the Act by requiring States to expand preschool programs for children with disabilities from age 3 through age 5, with the goal of serving all such children by no later than fiscal year 1991. A new part H authorized Federal formula grants to States for the development and implementation of statewide systems to provide early intervention services for infants and toddlers with disabilities and their families.

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afflicted individual of the very core of what it is to be a person. Although this is partially a product of the cognitive deficits commonly associated with the disorder, even more devastating symptoms are: (1) a lack of communication skills (both expressive and receptive), and (2) an inability to relate to other people and to form interpersonal relationships. Unless an active-modificational approach is adopted, these children not only will be excluded from school, but also will be excluded from the essence of human experience.

4. Avoidance of Secondary Exclusion: The Substantive Appropriateness Standard—Whereas the IDEA addresses explicitly the problem of primary exclusion through the use of mandated integration, it does not similarly address the secondary exclusion problem. In fact, the secondary exclusion issue commonly is perceived to be resolved by the requirement that the educational agency offer substantively appropriate programming “to meet the unique needs of a child with a disability.” The Act’s failure to define “appropriate” in educational or substantive terms is one of its major failures and one of the leading causes of litigation under the Act.

Any discussion of a local educational agency’s substantive legal responsibility to provide programming must begin by noting that section 1412(2) of the Act requires the provision of a “free appropriate public education.” Although section 1401(a)(18) of the Act purports to define a free appropriate public education, “[n]oticeably absent from the language of the statute is any substantive standard prescribing the level of education to be accorded handicapped children.” Thus, it

79. But see supra note 59.
80. DSM III-R, supra note 59, at 34.
82. In addition to the “substantive appropriateness” of a proposed placement, procedural compliance by the educational agency is often an issue. See Hendrick Hudson Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 206–07 (1981) (noting that courts inquiring into the appropriateness of a placement must first determine whether there has been procedural compliance before determining substantive appropriateness); Burlington v. Department of Educ., 736 F.2d 773 (1st Cir. 1984) (stating that the question “whether a proposed IEP is adequate and appropriate ... has both procedural and substantive components”), aff'd on other grounds, 471 U.S. 359 (1985).
85. Rowley, 458 U.S. at 189. The language of the statute is as follows:

The term “free appropriate public education” means special education and related services that—
has fallen to the courts to provide some substantive content to the "appropriateness" requirement of the Act.

The most frequently cited and widely discussed pronouncement on the subject is the Supreme Court decision in *Hendrick Hudson District Board of Education v. Rowley,* 8 a case involving a bright, hearing-impaired child whose parents wanted the district to provide a sign language interpreter in the classroom. 87 Although *Rowley*’s special facts and the Court’s deliberate attempt to restrict its decision to those facts makes it of limited authoritative significance, 88 the case provides a useful starting point in an attempt to give meaning to the "appropriateness" requirement.

The *Rowley* Court was confronted with three choices in seeking to define the extent of programming that must be provided in order to satisfy the "appropriateness" requirement of the Act. First, the Court had the choice to adopt a "maximization of potential" definition of appropriateness. Although the majority rejected such a definition, 89 the dissent, written by Justice White and joined by Justices Marshall and Brennan, criticized the majority for constricting the Act’s requirements. 90 The dissent argued that the legislative history of the Act supported the lower court’s conclusion that the Act required states to provide disabled children with a "basic floor of opportunity ... intended to eliminate the effects of the

(A) have been provided at public expense, under public supervision and direction, and without charge,

(B) meet the standards of the State educational agency,

(C) include an appropriate preschool, elementary, or secondary school education in the State involved, and

(D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.


87. *Id.* at 185.

88. The *Rowley* court limited its opinion as follows:

We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act. Because in this case we are presented with a handicapped child who is receiving substantial specialized instruction and related services, and who is performing above average in the regular classrooms of a public school system, we confine our analysis to that situation.

*Id.* at 202.

89. *Id.* at 189–90.

90. *Id.* at 212–16 (White, J., dissenting).
handicap . . . ."91 Thus, the majority was unwilling to adopt such a standard despite language in the legislative history of the Act that supported it.92

Second, the Court could have adopted a standard requiring the education to be "of benefit" or "any benefit" to the disabled student.93 Under this type of minimal programming approach, as long as the programming provided by the public entity provides a benefit in absolute terms, it satisfies the test. Thus, for example, if a child is functioning at a twelve-month level when she enters the program, and one year later has attained a thirteen-month level, the program would be "appropriate" within the meaning of this standard.94 Under this approach, it would be irrelevant that with a different program, the same child might have attained a twenty-four- or thirty-month level within the same time period. Perhaps more importantly, even if recovery were conceded to be possible, the public entity would not be required to provide the programming which would lead to that recovery.95

91. Id. at 215 (White, J., dissenting).
92. Id. at 189–90; see supra notes 70, 71 and accompanying text. The federal substantive standard of "appropriateness" is a minimum standard only. See B.G. ex rel. F.G. v. Cranford Bd. of Educ., 702 F. Supp. 1140, 1148 (D.N.J. 1988), aff'd, 882 F.2d 510 (3d Cir. 1989). Some states have enacted legislation which would appear to require maximization in programming, or at least something more than that required under Rowley. See generally Conklin v. Anne Arundel County Bd. of Educ., 946 F.2d 306, 316–21 (4th Cir. 1991) (discussing state legislation).
93. The United States Court of Appeals for the Third Circuit rejected this interpretation in Board of Educ. v. Diamond, 808 F.2d 987 (3d Cir. 1986). The Court stated:

The School District's "of benefit" test is offered in defense of an educational plan under which educational regression actually occurred. Literally the School Board's plan might be conceived as conferring some benefit to Andrew in that less regression might occur under it than if Andrew Diamond had simply been left to vegetate. The Act, however, requires a plan likely to produce progress, not regression or trivial educational advancement.

Id. at 991 (citing Hall v. Vance County Bd. of Educ., 774 F.2d 629, 636 (4th Cir. 1985)); see also cases cited supra note 92.
94. This assumes, of course, that the one month increase is attributable to the program and is not just a result of the natural maturation process or supplementary programming privately provided by the parents. See Johnson v. Lancaster-Lebanon Intermediate Unit 13, 757 F. Supp. 606, 619 (E.D. Pa. 1991) (separating the effects of private therapy from that of the IEP).
95. In my own case, this was the position taken by the Delaware County Intermediate Unit. This position, however, was rejected by the Special Education Due Process Appeals Review Panel, which reasoned:
It seems unlikely that the majority in *Rowley* intended to adopt such a minimal definition of "appropriateness." A better interpretation is that the Court adopted a standard which requires the provision of an educational program to allow a child to make meaningful progress toward an attainable goal.96 The goal itself will necessarily vary depending on the individual child's potential or capacity. As one commentator noted:

It might be contended that *Rowley* merely contemplates that each handicapped child receive some net educational benefit, without attempting to measure that benefit against the child's individual goals and objectives. A much stronger case can be made for a two-pronged approach, however, since the EAHCA specifically provides that each child's educational program is to be designed with his individual needs in mind. If the sufficiency of the programming to be provided is not similarly assessed with the child's unique abilities, needs, and objectives in mind, that requirement would be largely nugatory. The *Rowley* decision itself specifically recognized that the "some benefit" standard could only be applied after careful consideration of each individual child's abilities, needs, and objectives. Accordingly, a two-pronged analysis of the substantive sufficiency of educational programming should be employed: This analysis requires both careful examination of the child's abilities, needs, and objectives, and an

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96 See *Rowley*, 458 U.S. at 192 (stating that access to public education must be "meaningful"); see also Doe v. Alabama Dept. of Educ., 915 F.2d 651, 665 (11th Cir. 1990) (requiring more than *de minimis* educational benefits); Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171, 182–84 (3d Cir. 1988) (rejecting a "some benefit" standard and adopting a "meaningful benefit" test); Hall v. Vance County Bd. of Educ., 774 F.2d 629, 636 (4th Cir. 1985) ("Clearly, Congress did not intend that a school system could discharge its duty under the EAHCA by providing a program that produces some minimal academic advancement, no matter how trivial."); Chris D. v. Montgomery County Bd. of Educ., 753 F. Supp. 922, 931 (M.D. Ala. 1990) ("The court cannot agree ... that because Cory has learned *something* in the last several years, he is therefore receiving an educational benefit from special education.").
assessments of whether he is receiving some educational benefit as measured against those objectives.97

The post-Rowley decisions have, in large part, supported the interpretation that the Act requires the provision of services which will permit the child to make progress which is meaningful in view of the child's potential.98 Even assuming, however, that Rowley has provided some guidance in dealing with the question of what is required under the Act from a substantive, educational-programming perspective, definitional problems remain. If progress along some type of continuum is the legal requirement, the two-pronged standard of Rowley does not address the issue of the amount of progress that is required to meet the educational minimum.


Reformers wanted a free, appropriate, public education for all handicapped children: no children would be turned away from schools, no fees would be charged, and the child's expenses at a private school would be paid by the public school if the latter did not offer a suitable program; and the child's education program would be tailored to the child's unique needs. Many special education programs classified and served children according to their primary handicapped condition (e.g., mildly retarded, physically handicapped, blind). An education appropriate to each child's needs encompassed the reformers' dissatisfaction with gross classifications, poor testing procedures, and inadequate programs not responsive to individual children's potentials.

Id. at 60–61.
To say, as the Rowley majority did, that maximization is not required, does not further the analysis substantially. After all, the Act was passed in part in response to, or in furtherance of, emerging case law which required that the disabled receive equal educational opportunity. Inasmuch as the regular public schools are not required to maximize students' potential, there is no reason to believe that better outcomes are intended for disabled children than their non-disabled peers.

The problem, however, is not without solution. Although by no means a universal answer, the degree of progress in many cases can be defined by reference to the Act's stated goal of inclusion. If a disabled child can reach the educational level of an average, non-disabled peer, successfully leave special education, be integrated into the regular public curriculum, and thereafter pass from grade to grade, special education should be substantively designed to attempt to achieve that goal. This standard is mandated by both the "cost effectiveness" and the "dignity of the child" underpinnings of the Act.

5. An Appropriate Program is One Designed to Lead to Integration: Eliminating Tension Between the Substantive Goals—A definition of substantive appropriateness such as the one I am advancing will eliminate what is perceived commonly as a tension or inconsistency between the integration and the substantive appropriateness requirements of the Act. The position that these requirements are fundamentally inconsistent is one taken by Professor Martha Minow. She has written:

[T]he legal framework for special education expresses the difference dilemma. The EAHCA embodies an express tension between its two substantive commitments to the "appropriate education" and to the "least restrictive alternative." This tension invokes the choice between specialized

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100. See supra note 21.
102. This definition, in my opinion, eliminates the potential for viewing the disparate treatment of handicapped children and their non-disabled peers as anything other than equal. Just as a sick child is given medical attention and then sent back to school to join his or her classmates, whenever possible the disabled child should receive highly intensive intervention and then join (or rejoin) the group.
103. See infra Part III.C.1.
services and some degree of separate treatment on the one side and minimized labeling and minimized segregation on the other.\textsuperscript{104}

Professor Minow, however, bases her argument in large part on an underlying assumption of permanence of disabilities.\textsuperscript{105} Using children suffering from visual and auditory impairments as examples, she notes that a better educational opportunity may be provided in a specialized setting rather than in the mainstream classroom.\textsuperscript{106} This model, however, does not encompass the full range of children who come under the Act’s provisions because children with non-permanent disabilities are excluded from this model.

To the contrary, the “appropriateness” requirement and “integration” requirement actually complement each other where short-term, intensive, special education can be designed to allow disabled children to catch up to their non-disabled peers and be educated in the regular classroom. This is particularly true in the case of preschool children because they are at an age at which their presence in a special program has not yet become a stigmatizing event.\textsuperscript{107}

Defining educational appropriateness by reference to the integration goal—where a special education program is appropriate if it is designed to lead to integration into the regular classroom—is entirely consistent with the view of the Rowley Court. In \textit{Rowley}, the Court held that “if the child is

\textsuperscript{104} Martha Minow, \textit{Learning to Live with the Dilemma of Difference: Bilingual and Special Education}, \textit{Law \& Contemp. Probs.}, Spring 1985, at 157, 181; see also Minow, \textit{supra} note 22, at 35–39 (discussing the difference dilemma).

\textsuperscript{105} For a discussion refuting this assumption, see \textit{supra} Part II.A.3.

\textsuperscript{106} Minow, \textit{supra} note 22, at 37–39; see also Kirk, \textit{supra} note 62, at 57–61 (reporting the conclusions of studies comparing the achievement of mentally retarded students in special and regular classes). Kirk noted that one researcher interpreted a number of these studies to mean that “mentally handicapped children in special [education] classes are emotionally better adjusted, have a higher regard for their own mental ability, participate more widely in learning and social activities, and possess more traits desired by their peers than do their counterparts in regular grades.” \textit{Id.} at 59 (quoting T.G. Thurstone, \textit{An Evaluation of Educating Mentally Handicapped Children in Special Classes and in Regular Grades} 170 (1959). \textit{But see} Oberti \textit{v.} Board of Educ., 995 F.2d 1204, 1216 (3d Cir. 1993) (‘‘[T]he court must pay special attention to those unique benefits the child may obtain from integration in a regular classroom which cannot be achieved in a segregated environment, i.e., the development of social and communication skills from interaction with nondisabled peers.’’).

\textsuperscript{107} Although some tension exists between “substantive appropriateness” and the integration requirement after the preschool level, the view that special education is a temporary placement, not a determination of final status, will tend to minimize that tension.
being educated in the regular classrooms of the public education system, [the program] should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade."\(^{108}\)

A preschool program that permits a child to reach the first grade is a necessary prerequisite to a test of appropriateness which focuses on the school-aged child's ability to advance from grade to grade.\(^{109}\) Furthermore, the Court in \textit{Rowley} noted specifically that "[c]hildren who graduate from our public school systems are considered by our society to have been 'educated' at least to the grade level they have completed, and access to an 'education' for handicapped children is precisely what Congress sought to provide in the Act."\(^{110}\)

III. ADJUSTING THE BALANCE OF POWER UNDER THE ACT: THE PARENT-EDUCATOR CONFLICT

\textbf{A. A Brief Background}

There has always been a certain level of conflict in this country regarding the allocation of decision-making power within the context of the establishment of educational curriculum and programming.\(^{111}\) Recognizing that some level of education is necessary to responsibly carry out the role of citizen and voter, courts have long acknowledged that the state has a legitimate interest in regulating educational programming.\(^{112}\) Nevertheless, ultimate control over the educational

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109. See id. at 192 ("[T]he intent of the Act was more to open the door of public education to handicapped children . . . than to guarantee any particular level of education once inside.").
110. Id. at 203.
112. See Blackwelder v. Safnauer, 689 F. Supp. 106, 130–31 (N.D.N.Y. 1988) (discussing the state's interest in educating children and children's interest in receiving an education). The state's interest in educating children was explained by Justice Blackmun as follows:

[T]he Constitution presupposes the existence of an informed citizenry prepared to participate in governmental affairs, and these democratic principles obviously are constitutionally incorporated into the structure of our government. It therefore seems entirely appropriate that the State use "public schools [to] . . . inculcat[e] fundamental values necessary to the maintenance of a democratic political system."
experience traditionally has remained primarily the preroga-
tive of the family and not the state.\textsuperscript{113}

As a practical matter, the general principle of parental choice
has been limited by two factors. First, limited resources
necessarily restrict the range of programming options that can
be made available.\textsuperscript{114} Second, the belief that educators have
superior knowledge regarding programming, may lead to
deferece to their decisions.\textsuperscript{115} This Part will show that in the
case of special education programming, neither of the foregoing
provides a compelling reason for vesting the decision-making
prerogative in the educational establishment.\textsuperscript{116} The conclusion
that educators are not to be given the decision-making power
is supported by the history of parent-educator conflict both
before and after the enactment of the Act.

\section*{B. The Role of Procedural Protections Under the Act}

\subsection*{1. Parental Empowerment—On even a casual review of the
Act, the pervasive Congressional insistence that parents be
involved in decisions affecting the educational placement of
their children is striking.\textsuperscript{117} Under the Act, the child's program
must be developed jointly by the educational agency and the

\textsuperscript{113} See, e.g., Wisconsin v. Yoder, 406 U.S. 205 (1972) (finding that an Amish
parent was not obligated to comply with a state compulsory education law); Meyer
v. Nebraska, 262 U.S. 390, 400–01 (1923) (striking down a statute banning the
teaching of any language other than English prior to the completion of eighth grade
because the statute was an impermissible attempt to "interfere . . . with the power
of parents to control the education of their own"); Morrow v. Wood, 35 Wis. 59 (1874)
("[H]ow it will result disastrously to the proper discipline, efficiency and well being
of the common schools, to concede this paramount right to the parent to make a
reasonable choice from the studies in the prescribed course which his child shall
pursue, is a proposition we cannot understand."). Many of the relevant cases are cited
and discussed in John G. Culhane, \textit{Reinvigorating Educational Malpractice Claims:

\textsuperscript{114} See Stark, \textit{supra} note 37, at 487–88.

\textsuperscript{115} The deference required by Hendrick Hudson Dist. Bd. of Educ. v. Rowley, 458
U.S. 176, 207–08 (1981), was based on the relationship between the state and federal
governments, rather than any particular claim about educators' expertise.

\textsuperscript{116} See infra text accompanying notes 136–54.

\textsuperscript{117} According to one policymaker, the whole point of the IEP process was "to
strengthen the hands of parents . . . . It was a way of individualizing and
contractualizing the relationships and involving parents in the process . . . . It's a way
of enforcing what should be delivered to kids." Neal & Kirp, \textit{supra} note 22, at 72 n.39
(quoted an unidentified interviewee).
In addition, procedural safeguards seek to ensure that the educational unit does not act unilaterally unless the parents, after notice, have abrogated their responsibility.\textsuperscript{119} In fact, the history of the Act makes it apparent that policymakers viewed parental involvement in decisions affecting the child as the primary means by which earlier abuses were to be corrected. As one commentator observed:

The value of individualized planning depends on including an effective advocate for the child in the planning process and enforcing the child's plan. Policymakers recognized the potentially adversary relationship between the school and the child so they empowered parents to act in the child's interest. Parents would represent the child in the IEP meeting. An impartial hearing would resolve disagreements between school officials and the parents. Parents could request an independent education evaluation. The parent's advocate role follows traditional conceptions of parental authority, and policymakers presumed that parents would be effective advocates.\textsuperscript{120}

Such insistence on parental rights is hardly surprising in light of the fact that the prime impetus for reform came from parent groups.

Middle-class white parents of handicapped children led the attack on exclusion from the educational system. They demanded, and they partially got, the right to have the education of their children recognized as a public responsibility. Schools could no longer exclude their children just because they did not belong, and, once admitted, the children had the right to an adequate education, sufficiently funded and staffed. Nonwhite and non-English-speaking parents joined the coalition, in part with the same ends in mind . . . but more often [because] . . . too many of their children were being classified as handicapped and were being channeled into special education programs with little pretense that they would be educated.\textsuperscript{121}

\textsuperscript{120} Tweedie, \textit{supra} note 98, at 61.
\textsuperscript{121} Lazerson, \textit{supra} note 48, at 41.
Although some professional special educators joined the coalition pushing for the adoption of the Act, there has never been a commonality of purpose or viewpoint between parents and special educators.\textsuperscript{122}

The next section will demonstrate that the net result has been a law which clearly embodies a principle of parental participation, but that principle has met with pervasive opposition by members of the special education establishment.

\textbf{2. Post-Act Parent-Educator Conflicts—}Since the enactment of the Act, much of the activity of the special educators has focused on attempting to exclude parents from the processes mandated by the Act. Educator resentment of parental participation in the process of selecting and implementing educational programming for disabled children is well documented.\textsuperscript{123} For example, numerous studies of Individualized Education Program (IEP) conferences report that the conferences do not function as envisioned by the drafters of the Act.\textsuperscript{124} Rather than a cooperative interaction between

\begin{footnotesize}
\textsuperscript{122} Lazerson describes the historic mistrust between parents and the special education establishment and notes that, although some special educators joined with parents in lobbying for Pub. L. No. 94-142, "(p)rofessional special educators found themselves caught in a particular dilemma . . . . Parent participation might be politically necessary, but it was also dangerous." \textit{Id}. The difference in viewpoint between parents and special educators was explained by Tweedie as follows:

Even as the scope of the special educators' involvement has increased so has the outside control of their discretion. Parents have been given considerable say over the education their child receives. Some advocates supported the procedural safeguards because, "We felt we could not trust the professionals so we wanted a procedure whereby the parents could say, 'No, I don't want my child classified as retarded.'" Parents often disagree with professionals; their participation in the IEP meeting and access to procedural safeguards puts them in a position to make decisions that have, in the past, been left to special educators.

\textit{Tweedie, supra} note 98, at 65-66 (citations omitted).

\textsuperscript{123} \textit{See} Ronald K. Yoshida et al., \textit{Parental Involvement in the Special Education Pupil Planning Process: The School's Perspective}, 44 \textit{EXCEPTIONAL CHILDREN} 531, 533 (1978) ("[T]he attitude data suggest the possibility that a decision making role for parents during planning team meetings may face some strong opposition.").

\textsuperscript{124} \textit{See} BUDOFF & ORENSTEIN, \textit{supra} note 32, at 61-62 (discussing studies which found that parents were not permitted to participate meaningfully at IEP conferences); Sue Goldstein et al., \textit{An Observational Analysis of the IEP Conference}, 46 \textit{EXCEPTIONAL CHILDREN} 278, 282 (1980) ("Of the 14 conferences observed, in only one instance was the meeting actually devoted to specifying goals and objectives jointly between the parent and educators. It is noteworthy that in this instance the father was a psychologist . . . . "); Yoshida et al., \textit{supra} note 123, at 532 ("[P]arents are expected to provide information to the planning team, but they are not expected to participate actively in making decisions about their child's program.").
\end{footnotesize}
educators and parents to design a program which will meet the unique needs of the child, conferences have become "highly formal, noninteractive, and replete with educational jargon." 125

Instead of cooperating with parents, educators frequently attempt to manipulate parents into accepting programs formulated in the parents’ absence. In fact, studies have shown that, although in theory the IEP is to be developed jointly at the conference, it is almost always developed by the educational agency after a placement decision has been made. 126

The reasons for attempts to exclude parental participation are twofold. First, there are institutional barriers to the implementation of the Act. Institutions, such as local educational agencies (LEAs) 127 or intermediate educational units (IUs), 128 frequently yield to the bureaucratic temptation to routinize procedures. Individualized reports are replaced by checklists or boilerplate reports; individualized assessments and programming give way to broad, general classifications of children and standardized programming. 129 Furthermore, bureaucracies are

125. Clune & Van Pelt, supra note 21, at 33. In these conferences, parents may simply defer to educators.

Despite education professionals’ long history of neglecting handicapped children and misusing special education services, parents nonetheless “tend to trust the placement and services recommended by the schools.” This residual trust comes in part from parents’ traditional willingness to defer to professional educational judgment, reinforced by many educators’ studied resistance to any parental input.

Id. (Citations omitted).

126. Id. at 33; see also Goldstein et al., supra note 124, at 281 (noting instances, in their study of IEP development, in which teachers had written IEP’s prior to the parent-teacher conference). Non-compliance with the Act’s requirements is common. See infra note 197. Some courts, however, have been prepared to hold that the exclusion of parents from the IEP process is, by itself, a sufficient basis for finding that the program offered does not constitute a “free appropriate public education.” See, e.g., Spielberg v. Henrico County Pub. Schs., 853 F.2d 256, 259 (4th Cir. 1988) (“It ... violates the spirit and intent of the [Act], which emphasizes parental involvement. After the fact involvement is not enough.”).

129. Clune and Van Pelt describe this trend as follows:

One of the conspicuous failures of the Act was the ideal of an individually appropriate education. What occurred instead was the establishment of routinized special programs. Individualized programs fell victim to lack of technical knowledge, budgetary constraints, and the needs of schools for routinized procedures. As organizations with many functions, schools must be able to plan for special education within a finite budget. The idea of a customized education for every handicapped child violated these fundamental organizational precepts.
frequently unwilling or unable to change even in the face of evidence that it is in society's best interest that they do so.\textsuperscript{130} Perhaps the best explanation for this institutional rigidity is that offered by Professor Kirp. Discussing schools' continued use of the practice of "sorting" children by ability levels long after such practices were known to be educationally ineffective and psychologically damaging, he observed:

To one unfamiliar with the ways in which schools operate, that array of legal, political, and pedagogical criticism might signal imminent and perhaps revolutionary change in schooling practice, precipitated by political crisis, voluntary school action, or judicial intervention. Yet change, though devoutly to be wished, will not occur so readily.

As a generation of would-be educational reformers have learned to their sorrow, long entrenched school practices are not lightly tampered with. School teachers and administrators do not deliberately set out to act arbitrarily; their behavior is at least convenient, and sometimes necessary in light of the constraints placed upon them. That behavior serves particular needs: to maintain order; to provide tranquility for the majority; to define relationships among school personnel, demarcating the boundaries that separate teachers, counselors, and administrators. It is behavior tested and found appropriate (or comfortable) over a considerable period of time. Whether it is functional for the society is almost beside the point; what matters is that it is functional for the school as an institution. To the extent that any bright new idea threatens to undermine this culture of the school, it is for that reason suspect.\textsuperscript{131}

\textsuperscript{130} See Lewis A. Coser, Continuities in the Study of Social Conflict 23 (1967) (observing that “[t]he need for reliance on predictability exercises pressure towards the rejection of innovation”); see also infra notes 136–41 and accompanying text (discussing funding for special education services and who provides these services).

\textsuperscript{131} Kirp, supra note 53, at 794–95 (citations omitted).
Of equal importance in limiting parental participation, however, is a strong resentment by educators of the parental right and power under the Act to challenge the educators' professional judgment. The educators' response has often been to seek consciously to circumvent the principle of parental involvement which underlies the Act.


Although it is clear that the drafters' attempt to empower parents under the Act has not worked as envisioned, this fact does not respond to the question of whether, or to what extent, courts should defer to the presumed expertise of the special education establishment. In other words, if parents could truly be given greater power to influence decisions, would this accomplish the substantive goals of the Act more efficiently than preserving the status quo or even returning to the status quo ante? After all, the goal of equalizing the power of parents and special educators was an instrumental one. It was to be a means of accomplishing certain goals, not an independent goal in itself.

The goals of the Act have been defined in terms of primary and secondary integration for the purpose of promoting the dignity of the child in a long-term cost-efficient manner. Can we realistically expect special educators to promote those goals and protect the child's and society's best interest as defined in terms of those goals? On the other hand, in view of limited resources and a need to achieve measurable results, is it

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132. MICHAEL S. KNAPP ET AL., CUMULATIVE EFFECTS OF FEDERAL EDUCATION POLICIES ON SCHOOLS AND DISTRICTS 143 (1983) (educators disturbed by parental veto of program proposals not because of potential financial burden on school system but because parents can question educators' professional judgment successfully); see also James E. Gilliam & Margaret C. Coleman, Who Influences IEP Committee Decisions?, 47 EXCEPTIONAL CHILDREN 642 (1981) (noting that "parents are frequently left out of the assessment process"); Goldstein et al., supra note 124, at 282 (finding that parents were not treated as equal partners); Yoshida et al., supra note 123, at 532 (discussing results of a study which found that professionals did not think parents should be directly involved in planning their child's education).
133. See supra note 117 and accompanying text.
134. See supra text accompanying notes 24, 30, 120.
135. See supra text accompanying notes 101–03.
workable to place the decision-making power in the hands of parents?

1. Practical Limitations on Educators—As recognized by the drafters of the Act, allocation of the decision-making power to the educational agency would serve to frustrate the intent of the Act. The dispute over programming for autistic children serves to illustrate the institutional shortcomings of educational agencies acting as decision makers. Providing a Lovaas-type program or similar highly intensive and individualized programming, while cost-effective in the long run, is very expensive in the short run. As long as the agency is negotiating program funding on a yearly basis, there may well be an inability or an unwillingness to incur large expenses now, when the savings will not be realized until two or three years later. Furthermore, depending on the structure of the particular state’s educational agencies, the funding responsibility for preschool special education programs may not be borne by the same agency that provides services for school aged children or disabled adults. If this is the case, the preschool funding agency will have to increase its expenditures while the savings will inure to the benefit of a different agency.

Although many courts have taken the position that costs are either completely irrelevant or only one of many factors

136. See supra notes 117–20 and accompanying text.
137. See supra text accompanying note 75.
138. In Pennsylvania, the Intermediate Unit annually negotiates a “mutually agreed-upon written arrangement” (MAWA) with the Commonwealth’s Department of Education under which the Unit becomes responsible for the delivery of early intervention services. See PA. STAT. ANN. tit. 11, § 875-304(a) (Supp. 1994).
139. For a general discussion of funding formulas for special education, see WINNERS ALL, supra note 74, at 30–37. For example, until recently, the system in Pennsylvania created a monetary incentive to take children out of the public schools and place them in special education classes run by the Intermediate Unit. Id. at 33. Even if districts began offering the Lovaas program tomorrow, it would be two to three years before any savings were realized. See supra note 16 and accompanying text.
140. The special education bureaucracy is often wholly distinct from regular education. See WINNERS ALL, supra note 74, at 9 (“Rather than special education supporting the general education system, the two commonly function in separate orbits that may or may not be connected with actual student learning or the needs of the child as a whole.”).
141. See Barnett, supra note 66, at 31 (observing that “local school officials have more incentive to worry about next year’s budget than about costs to some state agency several years hence”).
when choosing between two educationally-appropriate programs, \textsuperscript{143} the reality of the decision-making process is very different. Costs are a major consideration—sometimes the primary consideration—for the educational agency. \textsuperscript{144} In fact, agencies knowingly may jeopardize a child's future well-being by providing inappropriate programming which is less expensive in the short term, even though quite costly in the long term. \textsuperscript{145} One researcher reported:

[A] private school placement for a particular child, while indicated, would not be recommended because of the expense. The core evaluation team's position would be that the child's needs could be met within the public school system, although the principal very vocally opposed the return of the child to his school. System A also maintained an unofficial quota for private school placements. They sought to avoid a private placement unless a child already in a private school could be returned to the public school, thereby opening up a slot. \textsuperscript{146}

Furthermore, as noted earlier, institutions are often resistant to change. \textsuperscript{147} The prior existence of a TEACCH program, for example, may be seen by cost-conscious administrators as sufficient justification for continuing to utilize the TEACCH


\textsuperscript{144} See Budoff & Orenstein, supra note 32, at 186–87.

\textsuperscript{145} One administrator acknowledged:

If I have to sign a bill that someone gets therapy or goes to the [private] school, it's like it's my money, because that's the kind of flak I get. And if I don't watch the treasury, it's my neck that's in a noose. So I become paranoid about the money almost. And so when things get going [at an appeals hearing], it's like "gotta win." I gotta protect that coffer. . . . It becomes a very personal extension of ourselves. As an administrator, you become the program and vice versa. . . . The task becomes to win—to win a battle, as opposed to coming up with what's best for the child—somehow, we've lost that in the process.

\textsuperscript{146} Id.; see also Katharine T. Bartlett, The Role of Cost in Educational Decisionmaking for the Handicapped Child, LAW & CONTEMP. PROBS., Spring 1985, at 7, 8 ("A school district may understand that certain services sought by parents on behalf of a handicapped child would be extremely beneficial to the child, but nevertheless be concerned about the resource implications of those services.").

\textsuperscript{147} See supra text accompanying notes 130–31.
methodology, rather than investigating newly developed methodologies.\textsuperscript{148}

While the Act attempts to deal with this problem by requiring professionals such as school psychologists to remain current in their field,\textsuperscript{149} this solution is inadequate because the individuals with the expertise within the educational entity may have little or no input in selecting the program to be offered.\textsuperscript{150} That function is often performed at the administrative level by individuals who may have little exposure to the children who are to be served.\textsuperscript{151} At the administrative level, short-term cost considerations may be paramount even if administrators are familiar with more effective types of programming.\textsuperscript{152} Additionally, since neither state nor federal legislation requires local educational agencies to assess the effectiveness of their programs in any systematic fashion,\textsuperscript{153} simple institutional inertia

\textsuperscript{148} In my own case, the Delaware County IU viewed the fact that TEACCH methodology was 25 years old as a factor which justified its continued use. I, of course, viewed the program as hopelessly outdated in view of the programming advances which had been achieved during that period of time. See supra notes 130–32 and accompanying text.


\textsuperscript{150} For example, in my case, the school psychologist member of the multidisciplinary evaluation team, having recommended placement in the TEACCH program, later sought to distance herself from that recommendation by disclaiming any personal involvement in the original decision to implement a TEACCH program. Deposition of Dr. Terry Pomper at 87–88, Delaware County Intermediate Unit No. 25 v. Martin K., 831 F. Supp 1206 (E.D. Pa. 1993) (No. 92-3866) (on file with the University of Michigan Journal of Law Reform).

\textsuperscript{151} The state is required to institute "procedures for adopting, where appropriate, promising practices, materials, and technology." 20 U.S.C. § 1413(a)(3)(B)(iii) (Supp. V 1993). Nevertheless, it can be very difficult to have agencies develop any new programming.

\textsuperscript{152} See supra note 145 and accompanying text.

\textsuperscript{153} Alan Gartner & Dorothy K. Lipsky, Beyond Special Education: Toward a Quality System for All Students, 57 HARV. EDUC. REV. 367, 367 (1987) ("[D]ata concerning children who had been certified as handicapped and have returned to regular education . . . are not required in State Plans nor has the Office of Special Education Programs collected them in any other survey.") (quoting Letter from Patricia J. Guard, Deputy Director, Office of Special Education Programs, U.S. Dept. of Educ., to Alan Gartner (Nov. 7, 1986)).
may result in utterly ineffectual programming being offered year after year without triggering a program review.\textsuperscript{154}

Aside from cost, institutional inertia, lack of professional input into program selection, and lack of legislation requiring that programs be reviewed for effectiveness, there is a more fundamental problem. Because so many special educators have adopted a passive-acceptant approach, they have no real expectation that children will make significant progress. Thus, minimal progress meets expectation levels and programs are not changed.

In large part, the minimal expectations problem was exacerbated by the Court's decision in \textit{Rowley}. \textit{Rowley}'s failure to require potential maximization\textsuperscript{155} and the opinion's overall lack of clarity were taken by many educational agencies as a judicial grant of permission to utilize a minimal programming standard.\textsuperscript{156} Given the factors noted above, many agencies have been more than willing to so limit the programming made available.\textsuperscript{157}

Given the fact that educators typically have greater familiarity with the range of available programming options than parents, an inclination to delegate the decision-making power to the educator may be understandable. This would be a more plausible approach, however, if parents and educators were both consciously

\textsuperscript{154} Although 20 U.S.C. § 1414(a)(3)(A) (Supp. V 1993) requires the local or intermediate agency to submit educational achievement data to the state, there is no reason to believe that individual agencies charged with the day-to-day programming decisions are acting on the basis of any test data thereby generated. See \textit{supra} notes 127–31 and accompanying text (discussing institutional inertia). In my own case, for example, when the assistant executive director of the IU was deposed, he was asked whether the IU ever attempted to determine statistically whether their programs were working. He responded as follows:

Well, the last few years with the Early Intervention Department in Harrisburg, they would send out surveys through the course of the year, and they would look for information of numbers of students going into different programs and whether they moved into regular programs or whether they moved on to other programs. I would imagine there would be some information there that would shed some light on that.

Deposition of Dr. Harry J. Jamison, Jr. at 38–39, Delaware County Intermediate Unit No. 25 (No. 92-3866) (on file with the University of Michigan Journal of Law Reform).

\textsuperscript{155} See \textit{supra} notes 89–92 and accompanying text.

\textsuperscript{156} See BUDOFF & ORENSTEIN, \textit{supra} note 32, at 57 ("We asked parents to agree or disagree that 'School personnel tried to sell me on an educational plan by misrepresenting the severity of my child's problems.' Most parents agreed (65%).").

\textsuperscript{157} Clune & Van Pelt, \textit{supra} note 21, at 28 ("The most objective and accurate testing program cannot overcome inadequate resources."); see also BUDOFF & ORENSTEIN, \textit{supra} note 32, at 80 ("[M]ost parents did not see the school systems as acting in good faith. Educational planning teams were seen as recommending programs more because they were cheaper and available than because they would be appropriate.").
The Individuals with Disabilities Act seeking to achieve the same goal. Unfortunately, this is simply not the case. Conscientious parents of disabled children want to maximize their child's prospects. Regardless of the existence of a public-educational policy not based on a maximization of potential, parents should be free to provide maximizing programs, either by supplementing the public program offered or by privately providing a different program. At the very least, parents should have a right to be told about existing programming options.

Under the Act and supporting state legislation, there is an elaborate procedural mechanism charging the state with the responsibility for evaluating the child and communicating the results of that evaluation and proposals for programming to parents. There is, however, no requirement that the educational entity disclose to parents that the educational program which they have formulated is the minimum required by law. The educational agency is only required to ensure the availability of alternative placements or programming which "meet the needs of children with disabilities for special education and related services." Furthermore, even if the agency is aware of such programs, it is not required to advise parents of their existence.

The net result of Rowley has been that parents may not be fully informed during the IEP meeting in which educators often describe "their" programs as "appropriate" without mentioning alternatives or disclosing how they are defining "appropriate." There are a number of sources of this miscommunication and deception. First, the integration goal of the Act is frequently ignored by educators. Second, and arguably most important, is the widespread misconception within the educational community that Rowley requires only the provision of a program that will result in "any progress" without reference to the child's potential. Thus, the confusion engendered by Rowley regarding

158. See supra note 56 and accompanying text.
160. See 34 C.F.R. § 300.551 (1993). In theory, the local agency must offer a range of placement options. In practice, it appears more common that districts adopt the "one size fits all" approach condemned by the dissent in Fuhrmann v. East Hanover Bd. of Educ., 993 F.2d 1031, 1046 (3d Cir. 1993) (Hutchinson, J., concurring and dissenting).
161. See Clune & Van Pelt, supra note 21, at 34 (discussing a study which found that, at the IEP conference, "educators do not raise the touchy issues, such as placement options, potential social stigma, or possible harmful effects of proposed placements") (citing SUZANNE THOUVENELLE ET AL., STUDY OF PROCEDURES FOR DETERMINING THE LEAST RESTRICTIVE ENVIRONMENT (LRE) PLACEMENT OF HANDICAPPED CHILDREN: FINAL PROJECT REPORT 7.67-7.9 (1980) (ERIC Doc. No. 199981)).
162. See supra note 57.
163. See supra notes 96-97 and accompanying text; see also Fuhrmann, 993 F.2d at 1046 (Hutchinson, J., concurring and dissenting).
the "appropriateness" standard results frequently in programming which, at its best, is minimally adequate. Finally, school district personnel are not required to inform parents of the long range goals of the program that they are offering.\textsuperscript{164} Parents are typically unfamiliar with the technical legal standard. Thus, they assume frequently that when school officials assert that a certain program is "appropriate" for a given child, it means the "best" for that child or at least roughly comparable to programming which can be obtained privately.\textsuperscript{165}

2. Practical Limitations on Parents—Parents better understand their child's abilities and potential than a professional who typically makes judgments based on very brief acquaintance with the child. In addition, parents have greater incentive to ensure the best placement. Yet, many parents lack the expertise necessary to make programming decisions. Thus, unrestricted delegation of programming decisions to parents is also unworkable. Even parents who are personally willing to educate their children are unable to take into account some appropriate long-range cost considerations.\textsuperscript{166}

More importantly, parents are frequently incapable of judging outcomes. Those with extremely high levels of expectation may well be disappointed with an outcome which is in reality quite good. More commonly, parents are too accepting of poor outcomes, tending to praise even poor programming,\textsuperscript{167} since they lack the

\textsuperscript{164} The Act's regulations requires only that a new IEP be prepared annually. 34 C.F.R. § 300.552 (1993). The IEP must contain a "statement of annual goals, including short-term instructional objectives." Id. § 300.346.

\textsuperscript{165} It is perhaps the discovery that the evaluators were only attempting to provide the minimum permitted under the Act as interpreted by Rowley that leads to such fierce animosity in those rare cases in which parents do their homework and independently learn that there are programs which will provide a benefit far greater than that offered by the public entity. Available research seems to confirm this. See BUDOFF & ORENSTEIN, supra note 32, at 63–65.

\textsuperscript{166} A related problem arises where the parents' desires and the child's best interests are at odds. For example, what if parents can no longer cope with a child, and seek an expensive residential placement when the child's best interests (educationally) can be served by a day program? See Stark, supra note 37, at 512 (discussing the response of hearing officers to this question).

\textsuperscript{167} H.I. Walter & S. K. Gilmore, Placebo versus Social Learning Effects in Parent Training Procedures Designed to Alter the Behavior of Aggressive Boys, 4 BEHAV. THERAPY 361 (1973). Thus, according to one author:

It is important to demonstrate that autistic children benefit from a treatment program, because some dubious treatments have had enthusiastic followings for many years. For example, Bettelheim (1987), whose psychoanalytic milieu therapy has long been known to be unhelpful for autistic children, recently reported high enthusiasm for his program, with 20 times more applicants than available positions in it.
awareness of what constitutes good programming. As one father of an autistic child argued:

I have met many Boston parents who are satisfied with the instruction their autistic children are getting. A father might proudly point out that (say) this year young John uses a spoon whereas last year he did not.

No one would want to deprive such a parent of any thoughts that give him solace. But two questions that he does not seem to have considered are: (1) How much progress would young John have made even without the program? and (2) How much progress might John have made under optimal conditions?

In short, both lack of expertise and inability to judge outcomes militate against vesting sole decision-making power in parents.

3. General Principles of the Decision-Making Process—Once one accepts that, as a practical matter, there are significant limitations on both parents' and educational agencies' abilities to act as decision makers, it is necessary to establish the general principles which should guide the decision-making process. The primary principle is the maximization of accuracy in providing intensive programming to those who can benefit. A necessary corollary is that uncertainty must be resolved in favor of the child. These principles can be derived from the goals underlying the Act itself.

It is readily apparent that the Act's goal of long-term cost effectiveness will be furthered by determining accurately which children have the capacity to be integrated into the public schools.
and providing those children with the intensive, short-term intervention which will result in that integration. Conversely, the efficiency goal will be compromised to the extent that expensive programming is provided to children who will not benefit from it.\textsuperscript{170} Thus, whatever rules and guidelines are to drive the decision-making process must be rooted fundamentally in maximizing the accuracy of matching programming to students. In turn, accuracy requires maximizing the quality and quantity of information which goes into the placement decision. The relevant information will deal with both individual capacity and programming effectiveness.

The second goal of the Act, promotion of the individual child's dignity, will be furthered by minimizing the extent to which children who can substantially benefit from programming are denied access to it. Since errors will be inevitable, uncertainty must be resolved in favor of providing the programming. While the unsuccessful provision of intensive programming reduces overall cost-effectiveness, deprivation of programming to a child who could have recovered fully would produce an even greater cost, essentially sacrificing that child's life. Such a massive insult to the dignity of that child cannot be permitted.

While obtaining information about programming will be largely the responsibility of the educational agencies, complete disclosure of programming options to parents is essential if the post-\textit{Rowley} abuses are to be eliminated.\textsuperscript{171} In other words, full disclosure

\textsuperscript{170} See supra table 1 (summarizing the findings of Lovaas's 1987 study of the effects of early intensive therapy on integration).

\textsuperscript{171} This is not to say, of course, that all parents wish to be informed. Some parents do not see their role as requiring such knowledge, preferring instead to defer to the expertise of the educational agency. One parent of a disabled child expressed this view, stating: "I don't think I'm in a place to judge whether or not he's receiving the right thing... Getting him up, getting him dressed, and sending him to school. That's my job." David M. Engel, \textit{Law, Culture, and Children with Disabilities: Educational Rights and the Construction of Difference}, 1991 DUKE L.J. 166, 190 (quoting Interview with Rachel Dolan (Oct. 27, 1987)). As Professor Handler has noted, the theoretical "vision [of] shared decisionmaking" is the same in the doctor-patient relationship as in the educator-parent relationship. Handler, supra note 22, at 1004. In such a model:

The doctor brings to the patient medical knowledge and judgment; the patient brings personal values. The law imposes on the doctor the duty of providing information, thus equalizing the relationship and enabling the patient to exercise judgment intelligently and rationally. The patient is to be sufficiently empowered so as to become an autonomous participant. The physician and patient share information and carefully explore alternatives; they share the burdens of decisionmaking. While they are bonded in their joint interests, they respect each other's autonomy.
of programming alternatives acts as an essential check on the system in several ways. First, presentation of the full range of programs considered will require evaluation teams to keep current on new treatment programs and methodologies. Second, increased awareness of new programs may lead professionals to the conclusion that new programs may be less costly and more effective than existing ones. As a result, professionals may adopt new programs or modify existing ones. Third, a disclosure requirement will force educators to acknowledge both to themselves and to parents that the program that they might otherwise have proposed is less effective than available alternatives. Under these circumstances, professional pride should create a strong incentive for educators to seek to exert their influence within the bureaucracy to have new programs implemented. Finally, to the extent that a limitation on parental decision-making power can be justified by the greater expertise commonly possessed by educational agency personnel, a disclosure requirement would, in effect, force the educators to educate the parents, thereby reducing the disparity in expertise and lessening the force of the justification.

D. Application of these Principles in Light of the Potential for Continuing Conflicts

Although utilizing an integration standard to define educational or substantive “appropriateness,” particularly in the context of preschool programs, will help eliminate conflict between parents and educators, it is likely that disagreements will continue to occur routinely.172

Defining “appropriateness” in terms of integration eliminates dispute as to the broad, general outline of appropriate education and eliminates conflict arising from incompatible basic assumptions as to the educability of children.173 Minimal

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172. After all, agreement on a definition will not eliminate institutional rigidity or educator resentment toward parental involvement in the process. See supra notes 127–33 and accompanying text.
173. See supra notes 60–61.
programming not aimed at secondary integration would not meet the definition of appropriateness. Programs such as TEACCH which assume the inevitability of disability\textsuperscript{174} or the immutability of IQ scores could not be utilized until such time as it has been demonstrated that a child has failed to respond to intensive intervention.

1. Assessment of Capacity and Program Selection: Decisions in the Face of Uncertainty—Ignoring, for the moment, the question of conflicts regarding implementation of a given program, it remains clear that disagreements will arise as to the assessment of an individual child's capacity for integration or for "meaningful progress" short of full integration in those cases in which complete integration cannot be accomplished.\textsuperscript{175} Furthermore, there may well be disagreements between parents and educational agencies as to which of several methodologies should be selected in light of the child's particular needs and capacities.

(a) The Present Status of Such Disputes—Currently, when disputes regarding a child's capacity for integration arise, the initial placement recommendation is made by the educational agency.\textsuperscript{176} Parents who can afford a private placement have the option of rejecting the agency's proposal. Parents who cannot afford a private placement do not have this option. They have no choice but to accept the public placement while utilizing the due process procedures of the Act to obtain a determination that the proposed placement was not educationally appropriate.\textsuperscript{177} If it is ultimately determined that the proposed placement was

\textsuperscript{174} See supra notes 10–12, 60, 65 and accompanying text.

\textsuperscript{175} One commentator described the importance of assessment as follows:

The first prong of this test—examination of the child's abilities, needs, and objectives—is particularly critical. In the absence of careful and accurate judgments on these issues, the second-stage inquiry into benefit derived will be based upon an incorrect benchmark, virtually assuring that the child will not receive an "appropriate" education. Thus, if a child's goals and objectives are set at a very modest level as a result of an incorrect diagnosis of mental retardation or an erroneous assessment of the extent to which his mental capacity is impaired, an inquiry into his attainment of the established goals would fail to ensure that he has, in fact, received educational programming which "meets his unique needs."

Wegner, supra note 97, at 186.

\textsuperscript{176} 20 U.S.C. § 1415(b)(1)(C) (1988). In Pennsylvania, in fact, the placement proposal is made by the evaluation team. Although parents are members of the team, they are invariably outnumbered by the representatives of the agency.

inappropriate, the parent who placed the child privately can seek reimbursement.\textsuperscript{178} The parent who was forced to place the child in the inappropriate public program against her better judgment has no remedy other than "compensatory education."\textsuperscript{179} In cases where there was only a brief window of opportunity for integration, however, compensatory education will serve little if any purpose.\textsuperscript{180} When such disagreements arise, there must be a way of resolving them quickly, particularly when the parents do not have the means to utilize a private placement.

In any event, some courts have taken the view that the appropriateness of the agency's proposed placement must be assessed as of the time when it was suggested. In other words, courts may ignore anything that might have been learned about the child's capacity through his actual experience in a private or public placement.\textsuperscript{181} Thus, the hearing officer or the court attempts to determine whether the placement decision appeared appropriate based solely on what was known at the time of the IEP rather than what should have or could have been known at the time of the IEP or was learned later.\textsuperscript{182}

Clearly such an approach will violate the accuracy maximizing principle and fail to promote either the dignity of the child or the goal of long-range cost effectiveness. Promotion of these goals

\begin{itemize}
\item \textsuperscript{179} See Breen, 853 F.2d at 857 (finding an award of compensatory education to be appropriate where the board of education failed to provide a child with an appropriate education prior to a court order); Meiner v. Missouri, 800 F.2d 749, 753-54 (8th Cir. 1986) (holding that where plaintiff's father could not afford to pay for the placement he considered appropriate, and so did not have any expenses, the proper remedy was compensatory education).
\item \textsuperscript{180} The assumption here is that there are "critical stages" in intellectual development. This concept "holds that educative efforts or retraining prior to or at these critical stages will be most effective in bringing about reversibility of retarded performance." Feuerstein, \textit{supra} note 60, at 350-51.
\item \textsuperscript{181} This theory has been widely, though not universally, adopted in this country and forms the basis for emphasizing preschool programs. For example, the Pennsylvania Department of Education has directed Intermediate Units to consider preschoolers eligible for expanded summer programming, noting that "[e]xperts generally agree that the first five years are critical in the development of the child. These years evidence the most rapid periods of development during the human lifespan." JOSEPH F. BARD, \textit{Pennsylvania Dept. of Educ., Basic Education Circulars #23-92A-135} (1992) (on file with the \textit{University of Michigan Journal of Law Reform}).
\item \textsuperscript{182} See, \textit{e.g.}, Fuhrmann v. East Hanover Bd. of Educ., 993 F.2d 1031, 1040 (3d Cir. 1993) (stating that "the measure and adequacy of an IEP can only be determined as of the time it was offered to the student, and not at some later date").
\end{itemize}
requires that decisionmakers have maximum information about the child's capacity in formulating the IEP. The goals of the Act are not furthered when decisionmakers deliberately disregard information about the child which can be easily obtained. The Act must be implemented in a manner which will minimize the possibility that a child's capacity will be underassessed. Underassessment furthers no interest and encourages the educational agency to make decisions based on minimal information.

(b) A Proposal for Solving the Initial Classification and Program Selection Problem—Trial Placement—The question of assessing capacity is partially a function of the formal testing process utilized in formulating the child's IEP. Thus, no one questions the need to develop accurate tests, train the test administrators, and eliminate racial and cultural bias in both the tests and administrators of those tests. More importantly, if one accepts that IQ testing yields a measure of present functioning level, then tests are not accurate predictors of ultimate outcome for many children, and some process should be devised to decrease the risk of misplacement caused by misassessment. The case of autistic children is instructive.

Initial progress in intensive, behavioral programming is the best indicator of whether such programming might ultimately lead to integration or significant improvement. Thus, it is

183. Toward this end, a court should take into account a child's progress after the IEP has been formulated. As one judge explained:

When we are . . . able to test the experts' predictions against the reality of the occurrence, we accept the prediction and ignore the reality at the peril of reaching an unjust result. I do not think the district court gives expert testimony in a state administrative proceeding proper weight when it ignores evidence of what actually happened to the child after the proceeding concluded. Of course, evidence of how things turn out is not always dispositive on the issue of what is appropriate for a particular child, but it seems to me that it is assuredly material. It sheds light on the capabilities of the child and unveils the potential that once hid in the future.

Id. at 1045 (Hutchinson, J., concurring and dissenting) (footnote omitted).


185. In other words, even if the tests are accurate, the significance of the test scores will be seen differently depending on whether the interpreter adopts a passive-acceptant model or active-modificational model. As previously noted, only to those relying on the former is the test result a predictor of future functioning levels. See supra notes 52–55 and accompanying text.

186. Lovaas and Smith noted that:

Preliminary data indicate that a more powerful predictor than MA [mental age] is how quickly the children learn during the first 3 months of treatment. Children
essential that a trial program of intensive intervention be attempted with all autistic children, and perhaps all developmentally disabled children, as soon as possible following identification of their disability.\textsuperscript{187}

The idea of a trial program is not new. Although normally a child's IEP must be developed before placement, this requirement "does not preclude temporarily placing an eligible handicapped child in a program as part of the evaluation process—before the IEP is finalized—to aid in determining the most appropriate placement for the child."\textsuperscript{188} Trial placements, therefore, should be a standard part of the evaluation process. If the child shows a good response to the intensive intervention, then the finalized IEP would have to utilize that placement until the child recovered or until the child's progress toward integration had halted. If a child fails to respond to the intensive programming within a reasonable time, then an IEP calling for some other program may be warranted.

In either event, the trial placement procedure allows the relevant data concerning the child to be gathered prior to the formulation of an IEP and utilized in the placement process. This ensures that the child's future will not depend on the mere possibility that the educational agency might initially recommend intensive intervention or that parents will be able to utilize a private placement to develop that same essential data.

The need to base programming decisions on reliable data rather than speculation or prior custom is equally compelling. A strong presumption should exist in favor of adoption of a program that has been validated by meaningful scientific outcome studies. On the other hand, programs that are not supported by scientific studies which demonstrate that they will lead to integration should be presumptively disfavored. This by itself should lead

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who initially learned quickly almost always continued to do so, whereas children who learned slowly at the beginning rarely caught up later in treatment.

Lovaas & Smith, supra note 9, at 312. Even this, however, is not wholly predictive. Some children start slowly and then "spurt." Intensive programming must be given enough of a chance to work so that a decision to terminate it will be made with confidence that the particular child is not going to respond.

187. New tests are now being devised which may reliably permit diagnosis as young as 18 months. See Simon Baron-Cohen et al., Can Autism Be Detected at 18 Months? The Needle, the Haystack, and the CHAT, 161 BRIT. J. PSYCHIATRY 839 (1992)(the "CHAT" is the "Checklist for Autism in Toddlers").

188. 34 C.F.R. app. § 300.350 (1993).
to the adoption of programming which is demonstrably effective in achieving the Act's integration goal. 189

In cases in which empirical data do not exist, however, decisions as to the selection of an appropriate methodology invariably will be subject to dispute and eventually must be determined through the formal dispute resolution process. In this case, both the interim placement decision and the dispute resolution process must be handled in a manner which is consistent with the principles previously identified. 190 This can be accomplished by allocating the burden of proof in a manner that will permit more children access to appropriate education. Thus, a rebuttable presumption must be created in favor of: (1) the child's capacity to be integrated, and (2) programs which purport to lead to integration. Only where an agency can show by clear and convincing evidence that a program not designed to lead to integration is educationally appropriate for an individual child could such a program be implemented.

2. Effective Implementation of Programs—The final area of parent-educator conflict in achieving the secondary integration goal of the Act is the implementation of the program selected. 191 It would be illogical to select a program that is designed to lead to integration into the regular school, but conduct that program in a manner that makes accomplishing that goal difficult or impossible. For example, a school might elect to provide the Lovaas program for preschool children for only ten hours per week instead of forty hours per week. Inasmuch as research has demonstrated that ten hours per week does not provide any benefit, 192 a mechanism must be in place by which parents can challenge the effectiveness of the manner in which the program is being implemented.

189. Thus, programs which have not been demonstrated effective, such as "facilitated communication," could be quickly rejected. Recent studies demonstrating the ineffectiveness of facilitated communication are cited and summarized in 7 AUTISM RES. REV. INT'L 7 (1993). TEACCH programming would also be rejected because it is not intended to lead toward integration. Thus, TEACCH would fail the initial test. See supra note 74.

190. See supra notes 169–70 and accompanying text.

191. See BUDOFF & ORENSTEIN, supra note 32, at 75–77 (quoting parents regarding program implementation).

192. See supra table 1 and accompanying text (showing that, although children in control group one received 10 hours per week of the same type of therapy as children in the experimental group, none of the children in control group one recovered).
The same concerns exist regarding the quality and competence of the school district staff charged with the responsibility for the program’s day-to-day operation.\textsuperscript{193} Although problems of teacher competence are largely the educational agency’s responsibility, there is too much at stake in the case of special education programming to leave such problems outside of the scope of an “appropriateness” analysis. Special education has little in common with regular education. If a normal child has the occasional misfortune to be assigned an incompetent teacher for a year, typically the harm caused can be corrected later through a formal or informal remedial process. In the case of preschool programming, on the other hand, there may well be a small window of opportunity\textsuperscript{194} and the consequences of staff incompetence, even for a single school year, are too great to leave to the vagaries of the normal processes of collective bargaining, hiring, firing, and tenure.

Perhaps even more important is the need to establish and institutionalize regular and frequently-employed procedures to assess the outcomes of particular programs and compare the outcomes of one district to other districts.\textsuperscript{195} This will result in the collection of data which will permit decisions as to which programs are best achieving the integration goals of the Act, and why one district’s program is better than another’s. As things presently stand, programming is utilized by schools with no way of ascertaining if it is achieving positive results and no way of comparing different programs or different manners of program implementation.\textsuperscript{196}

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\textsuperscript{193} See BUDOFF & ORENSTEIN, \textit{supra} note 32, at 75 (quoting a mother, who had just visited the program proposed for her child: “The teacher was a nice person, but she is not geared to teach children with problems like my son.”).

\textsuperscript{194} See \textit{supra} note 180.

\textsuperscript{195} See \textit{supra} notes 153–54 and accompanying text.

\textsuperscript{196} The local agency is required to furnish the following to the state agency:

such information (which, in the case of reports relating to performance, is in accordance with specific performance criteria related to program objectives), as may be necessary to enable the State educational agency to perform its duties under this subchapter, including information relating to the educational achievement of children with disabilities participating in programs carried out under this subchapter . . . .

\textsuperscript{20} U.S.C. § 1414(a)(3)(A) (Supp. V 1993). Nevertheless, it appears that no systematic effort is made to compare the result obtained by one program to those obtained by others. \textit{See supra} note 154.
E. The Need for Interim Funding and True Impartiality in Dispute Resolution

It is critical not only to maximize accuracy in providing a child with a substantively appropriate program, but also to do so quickly so that valuable opportunities to achieve progress are not lost. Furthermore, when disputes arise, they must be resolved fairly. The Act’s drafters contemplated that both goals would be met in the resolution of parent-educator disputes.\(^{197}\) The former goal was to be accomplished by the formal requirement of hearing officer impartiality.\(^{198}\) The latter objective was to be accomplished by requiring compliance with specific time deadlines.\(^{199}\) Unfortunately, neither the time deadlines nor

\(^{197}\) Of course, there was also an assumption that the educational agency would comply not only with the procedures established under the Act but also with any administrative agency's order or decision issued pursuant to the established procedures. Unfortunately, that is not always the case.

Even favorable results frequently have been of little comfort to parents. Some education agencies complied with the hearing officer's directives immediately; others waited until a few adverse decisions accumulated. On the other hand, there were many opportunities for procedural gamesmanship and non-compliance. Even if schools lost at the hearing level, they might appeal to the state level for relief from the hearing officer's decision. If the appeal process was not too discouraging, schools could still frustrate the parents by . . . simply refusing to comply. In many instances, nothing compelled schools to provide the program the hearing system required. If these devices were too crude, districts also learned that they could temporarily comply, but then reevaluate the child at the legally mandated point . . . and resubmit that original plan on the basis of their reevaluation.

Clune & Van Pelt, supra note 21, at 36 (citations omitted).

\(^{198}\) 20 U.S.C. § 1415(b)(2) (1988) (“No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.”); see Muth v. Smith, 646 F. Supp. 280, 285 (E.D. Pa. 1986) (“Congress was concerned that handicapped minors and their parents be assured impartial review. To this end, they want to ensure that the individuals conducting the reviews be as free from political and fiscal pressures as possible.”), aff’d sub nom. Muth v. Central Bucks Sch. Dist., 839 F.2d 113 (3d Cir. 1988), rev’d on other grounds, 491 U.S. 223 (1989). Hearing officer bias remains a significant factor affecting the outcome of the hearings. See Peter J. Kuriloff, Is Justice Served by Due Process?: Affecting the Outcome of Special Education Hearings in Pennsylvania, LAW & CONTEMP. PROBS., Winter 1985, at 89, 106.

\(^{199}\) For example, in Pennsylvania, the multidisciplinary evaluation must be done within 45 days of receiving parental permission, 22 PA. CODE § 14.53(i)(1) (1992); the evaluation report must be completed within 10 days after completion of the evaluation report, id. § 14.53(i)(3); an IEP must be developed within 30 days of the issuance of the evaluation report, id. § 14.54(j)(1); if the IEP is rejected by the parents and a "due process" hearing is requested, it must be held within 30 days, 22 PA. CODE § 14.64(o)(1) (1933); the hearing officer must issue a decision within 45 days after the hearing was
The Individuals with Disabilities Act impartiality requirements are accomplishing their goals sufficiently under many circumstances.\textsuperscript{200}

1. The Need for Interim Funding—When a parent-educator dispute arises because the educational agency wishes to remove the child from the regular, public education program and place the child into special education, federal law precludes the removal of the child pending the resolution of the dispute.\textsuperscript{201} The so-called “stay put” rule, however, may serve to preserve the status quo even under circumstances where the status quo is harmful to the child. In cases in which the dispute centers around the appropriateness of the initial preschool placement, application of the “stay put” rule fixes the obligation to pay for a program during pendency of the litigation.\textsuperscript{202} Thus, if parents accept a proposed placement and soon thereafter realize that it is not beneficial to the child, the school district will not be required to pay for a change in placement while the dispute is being resolved. This may result in the continuation of an inappropriate placement for long periods of time while an irreplaceable opportunity to help the child is squandered.\textsuperscript{203}

Similarly, if parents are capable of unilaterally placing their child in a private program, they must do so at their own expense.\textsuperscript{204} The fact that the parents must bear the cost of requested, id. § 14-64(o)(2); exceptions to the decision of the hearing officer and briefs on exceptions must then be filed within 30 days and the opposing side has 20 days after the 30 day period to respond, 1 PA. CODE § 35.211 (1993). If, thereafter, the decision of the appeals panel is appealed to federal district court under 20 U.S.C. § 1415(e)(2) (1988), the statute of limitations will be governed by state law with the federal courts determining which limitations period is analogous and appropriate, because the Act does not specify a time limit. See Tokarcik v. Forest Hills Sch. Dist., 665 F.2d 443, 447–55 (3d Cir. 1981) (discussing the application of various Pennsylvania statutes of limitations to an appeal in federal court pursuant to 20 U.S.C. § 1415(e)(2)).

200. See Kuriloff, supra note 198, at 106 (finding that “[p]arents did worse [at the due process hearing] if the primary work affiliation of the hearing officer was with the local schools”); supra note 197.

201. The federal statute provides:

During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.


203. See supra note 180.

204. This, of course, is one of the reasons that the Act is utilized disproportionately by middle- and upper-class parents. Parents who cannot afford private placements
programming may well put the litigation costs of challenging the educational agency's proposal beyond reach. 205

The question then arises as to what event short of a non-appealable judicial declaration will trigger the educational agency’s obligation to fund a private program during the pendency of the litigation. One answer is that, in an appropriate case, a court may issue a mandatory preliminary injunction requiring public funding during the pendency of the action. 206 There are, however, two problems with this solution. First, one of the requirements for the issuance of an injunction is that the party seeking the injunction must show probable ultimate success on the merits. 207 Early in the litigation process, this is difficult,

are frequently reluctant to antagonize local school district personnel by pursuing their rights under the Act.

Middle and upper class parents do not face such high odds, for they have an exit strategy. Their complaints typically assert the inability of the local school district to provide “appropriate” education and claim reimbursement for tuition in private schools. If this proves unsuccessful, these parents can pay for the private schooling themselves.

Clune & Van Pelt, supra note 21, at 78 (citations omitted); see also Engel, supra note 171, at 169 (“The goals of the EHA may have been thwarted, at least in part, because parents are unwilling to jeopardize relationships by asserting their children’s rights.”); Handler, supra note 22, at 1010–12 (discussing the Madison, Wisconsin plan which provides the parents with an advocate to represent them during the IEP development phase).

205. See BUDOFF & ORENSTEIN, supra note 32, at 146. One parent interviewed by the authors explained:

We looked at the other families and saw that schools are now winning. They write much better plans, though we felt they still didn't have the people in the schools who could carry through. But to win, we would need a sharp lawyer. So we decided not to risk it. It's like everything else: if you're rich, you can fight them. But if we lost, we'd be out the tuition plus the lawyer. So we couldn't do it. So now we're paying the [private school] tuition. I don't know what to do about it. We're really hurting financially.

Id.

206. See Stacey G., 695 F.2d at 955 (finding that neither federal nor state regulations required a preliminary injunction, but remanding to the district court to consider injunctive relief based on “its traditional equitable powers to consider irreparable harm and the likelihood of success in obtaining some relief on the merits”).


For the Court to grant the extraordinary injunctive relief requested, the plaintiffs must clearly demonstrate (1) that there is a substantial likelihood that they will succeed on the merits of the case, (2) that irreparable harm would occur to the plaintiffs absent such an injunction, (3) that an injunction would not substantially harm the rights of the third party, and (4) that an injunction is in the public interest.

Id.
particularly in view of the fact that the Act permits additional evidence to be introduced at the federal district court level. 208 Second, if attempted prior to the time when the case reaches the state or federal court, it is not clear that an administrative law hearing officer has the power to issue such a mandatory injunction. In addition, it can take at least six months to exhaust administrative procedures even if there has been total compliance with all time limits. 209

It is possible, though not entirely certain, that the matter can be resolved under the existing legislation. The stay put rule is applicable "unless the State or local educational agency and the parents or guardian otherwise agree." 210 The question which then arises is whether a decision favorable to the parents by an administrative hearing officer or state reviewing panel constitutes an "agreement" within the meaning of section 1415(e)(3) which would require public funding of a private program pending final resolution. Although language in *Town of Burlington v. Department of Education* 211 would seem to indicate that this is the requirement under the Act, the lack of reported decisions leads one to believe it is utilized rarely. 212

2. *The Need for Impartiality in Dispute Resolution*—Not only are many parents unlikely to utilize the Act at all, 213 but even if they do, it is not clear that parents will prevail at the local or state level as often as they should. 214 The problem in this regard is that local and state administrative hearing officers and review panels often lack impartiality. While the Act provides for an "impartial" third party to carry out the dispute resolution function, 215 this may be inadequate. For example, while the hearing officer cannot be an employee of the school district,

209. *See supra* note 199. This gives the agency an incentive in some cases to deliberately delay and utilize the financial strain on the parents of the disabled child as leverage in any settlement discussions. *See supra* note 197.
211. 736 F.2d 773, 800 (1st Cir. 1984) ("Implementation of a state agency's determination of the appropriate education for a disabled child should not be delayed until ... a final judicial decision has been rendered where an appeal has been taken.").
212. *But see Delaware County Intermediate Unit No. 25 v. Martin K*, 831 F. Supp. 1206, 1221-23 (E.D. Pa. 1993) (holding that parents are entitled to rely on a state ruling that private placement must be funded).
213. *See supra* note 204.
214. Regarding the percentage of cases that parents "win," *see Kuriloff, supra* note 198, at 99 n.48 (noting studies that indicate parents are fully successful in only 4% of all cases, although some of their substantive demands are met in 31 to 42% of the cases).
nothing in the Act prohibits retired school officials or others who have already chosen sides in the parent-educator wars from serving in a dispute resolution capacity.\textsuperscript{216} Furthermore, when the case involves the assessment of alternative methodologies, there is nothing to prevent adherents of one tradition or another from controlling the decision-making process.

IV. PROPOSAL FOR LEGISLATIVE CHANGE

It is apparent that many of the problems discussed in the preceding pages can be remedied without the need to formally amend the Act. For example, substantive appropriateness of programming for disabled children can and should be understood under the existing Act as encompassing only those programs which are designed to result in integration into the regular public school at the earliest possible time.\textsuperscript{217} Similarly, the need for ongoing assessment of existing programming\textsuperscript{218} and the need for true impartiality of those conducting or reviewing special-education due process hearings\textsuperscript{219} can arguably be addressed within the existing framework.\textsuperscript{220} Nevertheless, a clarification of the Act by formal amendment would serve to enhance the goal of uniformity of interpretation and application.\textsuperscript{221}

\textsuperscript{216} The problem here, of course, is not unique to hearing officers. For example, in Doyle v. Arlington County Sch. Bd., 953 F.2d 100, 102–03 (4th Cir. 1991), the plaintiffs argued that the trial judge should have recused himself since he had served on the county school board prior to his appointment to the bench. The court held, however, that 28 U.S.C. § 455(a) (1988) did not require the judge to do so. \textit{Id.}

In my own case, the hearing officer was a retired special education director for a different school district. She identified with the Intermediate Unit's personnel and position so completely that, at one point in the hearing, she referred to the IU's proposal to institute a variation of TEACCH as "the program that we're... proposing." Transcript of Special Educ. Due Process Hearing at 140–41, \textit{In re Paul Kotler}, (Mar. 10, 1992) (on file with the \textit{University of Michigan Journal of Law Reform}).

\textsuperscript{217} See supra notes 101–10 and accompanying text.

\textsuperscript{218} See supra note 154 and accompanying text.

\textsuperscript{219} See supra notes 215–16 and accompanying text.

\textsuperscript{220} See supra notes 149, 151, 154, 160, 196.

\textsuperscript{221} As one author explained:

Uniform standards are essential, given the particular sensitivity of issues involving handicapped persons and the fact that so many different groups are provided protections by one omnibus statute. Determining these standards may result in a difficult, divisive process, but as Calabresi and Bobbitt have stated, "w[e] are one nation, and it is offensive to have fundamental allocations depend on the chance of where in the land one lives."
Therefore, I propose that the Act be amended in the following manner.\textsuperscript{222}

\begin{itemize}
  \item[A. Clarify the Meaning of “Free Appropriate Public Education”]

The definition of a “free appropriate public education” in section 1401(18) is as follows:

special education and related services that—

(A) have been provided at public expense, under public supervision and direction, and without charge,

(B) meet the standards of the State educational agency,

(C) include an appropriate preschool, elementary, or secondary school education in the State involved, and

(D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.\textsuperscript{223}

In order to clarify the meaning, the foregoing should be amended by the addition of a subsection (E) which would read:

\begin{itemize}
  \item[(E) \textit{whenever possible, are designed to permit the child to make sufficient progress to be integrated, as soon as reasonably possible, into the regular public education system without the need for significant further special education and/or related services.}]
\end{itemize}

This is, of course, the key to understanding the goal of special education. While there will be unavoidable failures to achieve

\textsuperscript{222} Portions which are italicized are proposed additions to the Act. Words in brackets are proposed deletions.

this end in individual cases, its formal recognition as the goal of the Act will positively influence special education.\(^{224}\)

### B. Reorder Priorities in Providing Services

Currently, federal legislation sets priorities for the provision of service by conditioning the state’s eligibility for federal funds on the state’s adoption of a plan containing specified features, including the establishment of priorities. Presently, the first priority group is children who are not receiving any services. Second are the most severely disabled within each disability group. The proposed amendment would insert a new priority class between the first two as follows:\(^{225}\)

**§ 1412 Eligibility requirements**

In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Secretary that the following conditions are met:

(3) The State has established priorities for providing a free appropriate public education to all children with disabilities, which priorities shall meet the timetables set forth in clause (B) of paragraph (2) of this section, first with respect to children with disabilities who are not receiving an education, and second *with respect to children whose potential to be integrated into the regular school system may be jeopardized by the failure to immediately provide appropriate services, and third with respect to children with disabilities, within each disability category, with the most severe disabilities who are receiving an inadequate education* . . . \(^{226}\)

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\(^{224}\) *See supra* text accompanying notes 101–10 (discussing the need to define “appropriateness” in terms of programming which is designed to permit the child to recover and then be integrated into the regular public school system).

\(^{225}\) 20 U.S.C. § 1414 (1988 & Supp. V 1993) describes the requisite features in the LEA’s or IU’s application for funding to the state educational agency. Section 1414(a)(1)(C)(ii), which contains the same list of priorities as section 1412(3), should be amended by adoption of language to keep the priorities in both sections the same.

While the remediation of the pre-Act primary exclusion problem should remain the top priority,\(^{227}\) the prioritization by severity within categories of disability would not necessarily seem to further either the goals of cost efficiency or the child's dignity. As previously noted, these goals will be furthered by the provision of services to those who can benefit\(^{228}\) and this classification cuts across traditional notions of severity, that is, some severely disabled children can receive enormous benefit from services while others cannot. The proposed amendment is added for the purpose of expressly acknowledging that, for some children, there may only be a brief window of opportunity to recover from what may otherwise be a lifetime of disability.\(^{229}\) In those cases, it is essential that the children be identified and appropriate services be provided before the opportunity is lost.

C. Limit the Use of Standardized Tests

The existing legislation recognizes the ongoing problem of inaccurate test scores resulting from racially or culturally discriminatory tests.\(^{230}\) The legislation further recognizes the danger of educational misplacement if decisions are based on a single test. The legislation, however, does not address the problem of using test scores to predict future performance.\(^{231}\) Thus, the existing eligibility requirements of section 1412 should be amended as follows:

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\(^{227}\) One of the Act's notable successes has been to alleviate substantially this problem. According to Clune & Van Pelt, "the most obvious and shocking problem with which the legislation was concerned—the complete exclusion of handicapped children from schools—was the most completely solved." Clune & Van Pelt, supra note 21, at 52. See also supra text accompanying notes 38–47 (noting that the intent of the Act was to bring disabled children who were not receiving services into the system).

\(^{228}\) See supra text accompanying notes 171–72.

\(^{229}\) See supra note 180.

\(^{230}\) See supra notes 49–52 and accompanying text.

\(^{231}\) See supra notes 61–68 and accompanying text; see also supra note 186 (discussing children's ability to learn in intensive programming as a better predictor of recovery than mental age).
§ 1412 Eligibility requirements

In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Secretary that the following conditions are met:

(5) The State has established . . . (C) procedures to assure that testing and evaluation materials and procedures utilized for the purposes of evaluation and placement of children with disabilities will be selected and administered so as not to be racially or culturally discriminatory. Such materials or procedures shall be provided and administered in the child's native language or mode of communication, unless it clearly is not feasible to do so, and no single procedure shall be the sole criterion for determining an appropriate educational program for a child. or used to predict future progress or assess a child's capacity to make progress. 232

Properly designed and administered standardized tests may well provide valuable information as to a child's current level of functioning and valuable insight into present areas of strengths and weaknesses. While this information will be helpful in designing a child's program if an active-modification approach is adopted, it is highly destructive under the passive-acceptant approach. 233 The proposed addition seeks, in effect, to require a presumption of future progress by abolishing a common misuse and misinterpretation of test scores.

D. Strengthen Procedural Safeguards

The procedural safeguards set forth in section 1415 of the Act include the following requirement:

Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this subchapter shall establish and maintain procedures in accordance with subsection (b) through

233. See supra notes 68–69 and accompanying text.
subsection (e) of this section to assure that children with disabilities and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.234

As previously indicated, however, the procedures established have not equalized adequately the power between parents and educators. Therefore, certain changes are needed.

1. Require Full Disclosure to Parents—Presently, section 1415(b)(1)(C) requires the educational entity to provide parents with written notices regarding placements and changes of placement. As previously discussed, in too many cases the achievement of the Act's goals is compromised by a lack of full disclosure of programming options, long range goals for the individual child, and the potential to accomplish those goals in the programs being conducted by the educational entity.235 To help alleviate this problem, the written disclosure requirement should be amended as follows:

§ 1415 Procedural Safeguards

The procedures required by this section shall include, but shall not be limited to—

(C) written prior notice to the parents or guardian of the child whenever such agency or unit—

(i) proposes to initiate or change, or

(ii) refuses to initiate or change,

the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child[]. Such written notice shall fully disclose to the parent or guardian in terms and language understandable to the layman the reason for the agency's proposal, the anticipated potential to later integrate the child into the regular public schools if the proposal is implemented and any other possible placement for the child and the agency's rationale for recommending one rather than another. Whenever possible, all such recommendations and rationales shall be

235. See supra notes 156–65 and accompanying text.
based on empirical data generated by outcome studies of programs done in accordance with professionally accepted methodologies.\textsuperscript{236}

Although requiring full disclosure of programming options to parents is essential if the goals of the Act are to be achieved,\textsuperscript{237} this disclosure need not necessarily occur at the written notice stage. Nevertheless, inasmuch as the child should be assessed and programming options be considered before the educational agency proposes a program, or refuses to initiate or change a program, information regarding alternative programming will have been gathered by the educational agency prior to the placement decision. Thus, the written notice regarding the placement decision can be expanded conveniently to permit the agency to convey programming options to the parents.

2. Ensure Impartial Hearing Officers—As the statute is written, only an employee of the agency that is involved in the dispute with the parents is precluded from serving as a hearing officer. This, however, does not go far enough toward ensuring impartiality. There is nothing in the statute which would preclude a former employee of the agency from serving. More importantly, there is nothing that would prevent an individual from serving who has spent his or her entire career furthering the interests of another educational agency against claims of parents.

To remedy the problems of bias created by employing hearing officers\textsuperscript{238} who either currently work for an educational agency or have worked for one in the past,\textsuperscript{239} section 1415(b) should be amended, in relevant part, as follows:

(2) . . . No hearing conducted pursuant to the requirements of this paragraph shall be conducted by any person who is or has ever been an employee of any educational [such] agency or unit. [involved in the education or care of the child.]

\textsuperscript{237} See supra text accompanying note 171.
\textsuperscript{238} 20 U.S.C. § 1415(b)(1)(B) (1988) provides for the assignment of an individual to act on behalf of the disabled child "whenever the parents or guardian of the child are not known, unavailable, or the child is a ward of the State . . . ." To ensure that the person so assigned can best represent the child's interest, this section should probably be amended in a manner similar to that proposed for § 1415(b)(2).
\textsuperscript{239} See supra note 216.
While the proposed change clearly would disqualify many experienced, qualified, and capable individuals from serving as hearing officers, the need to eliminate both those who are actually biased and those who appear to be biased by reason of their past experiences, however, is essential to the integrity of the process.

3. Abolish the Educational Agency’s Right to Appeal—As the Act is currently structured, under section 1415(c) either the parent or the educational agency has the right to appeal an adverse decision of the hearing officer or to further appeal an adverse decision of the reviewing agency. The proposed amendment alters this so that only a parent or some other person acting on the child’s behalf has the power to appeal. Thus, the following changes to section 1415 are proposed:

(c) Review of local decision by State educational agency

If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party acting on behalf of the disabled child 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. The officer conducting such review shall make an independent decision upon completion of such review. 241

(e) Civil action; jurisdiction

(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, except that any [party involved in such hearing] person acting on behalf of the disabled child may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) of this section shall be final, except that [any party] any person acting on behalf of the disabled child may bring an action under paragraph (2) of this subsection.

(2) Any [party] person acting on behalf of the disabled child aggrieved by the findings and decision made under subsection (b) of this section who does not have the right

241. See id. § 1415(c).
to an appeal under subsection (c) of this section, and any [party] person acting on behalf of the disabled child aggrieved by the findings and decision under subsection (c) of this section, 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. . . .

Once the hearing officer or reviewing officer and parent or guardian of a child agree on an appropriate resolution of the matter, the process should come to an end. In most cases, the LEA's or IU's only legitimate interest in appealing an adverse decision is financial. Since the funding for any program implemented pursuant to this process will ultimately come from the state, the local agencies' legitimate interests are not substantially impaired by an adverse decision.

On the other hand, the illegitimate use of the appeals process—appeal for the purpose of delaying, seeking leverage in negotiation with the parents, or in order to develop a reputation that will discourage parents from asserting their rights under the Act—is all too common. Thus, the proposed amendments seek to make it clear that only one seeking to protect the interest of the child has the right to appeal a decision with which they disagree.

If the foregoing change to sections 1415(c), 1415(e)(1) & (2) are made, then the "stay put" rule of section 1415(3) need not be changed. As discussed earlier, the major drawback of the "stay put" rule is that parents are forced to bear the financial responsibility for a private placement while the educational agency endlessly appeals. This problem largely is resolved by eliminating the educational agencies' standing to appeal.

If the parents appeal the matter to the courts and it is alleged that the child is in immediate need of privately provided programming during the pendency of the litigation which the parents are financially unable to provide, the court's traditional equity power would enable it to issue a mandatory injunction. This would require the state or local educational agency to fund a private program pending final determination

242. See id. § 1415(e)(1) & (2).
243. See supra notes 138–40 and accompanying text.
244. See supra notes 205, 209.
245. See supra text accompanying note 202.
246. See supra notes 206–09 and accompanying text.
in court. The possibility of losing an opportunity to integrate a child into the public schools should clearly constitute "irreparable injury" justifying the exercise of such equitable powers. 247

CONCLUSION

In the tradition of liberal legalism, the Individuals with Disabilities Education Act sought both to create a right to a substantively appropriate education and to protect that right by empowering parents to act on their children's behalf. The widely perceived failure of the Act to accomplish the drafters' intent can be traced to the lack of a definition of "substantive appropriateness" in the Act itself, and to the failure of the courts to provide a meaningful definition thereafter. Another cause of this failure was the significant shortcomings in the Act's attempts to enable parents to deal effectively with school district personnel.

In this Article, I have attempted to deal with both the substantive and procedural shortcomings. I deal with the substantive shortcoming by replacing vague notions of student "benefit" or "meaningful progress" with a definition which I believe is fully supported by the essential justifications for the Act's existence. An educational program is "appropriate" if it is one designed to lead toward full integration or reintegration into the regular public education system, preferably without the need for continuing special education services. If such a program exists, both long-term social cost considerations and society's obligation to promote the dignity of the individual disabled child demand that it be implemented.

While I believe that this definition is already mandated by the Act's identification of both integration and appropriate educational programming as its goals, I have proposed an amendment to the statutory definition of a "free, appropriate public education" in order to make matters more explicit. Agreement on a definition of "appropriateness" will eliminate many problems which currently exist between parents and educators. Nevertheless, parent-educator conflict will inevitably continue to exist. Although the procedural provisions

247. In this context, of course, it would normally be difficult for a parent to convince the court of probable ultimate success on the merits. See supra notes 207–09 and accompanying text.
of the Act may have partially remediated the pre-Act disparity of power between parents and educators, all too often educators can continue to frustrate the drafters' vision of special education as a truly cooperative venture between parent and educator.

I have made a number of proposals which I believe will prove helpful in this context. To the extent that parent-educator conflict is engendered by educators usurping parental decision making by failing to inform parents about available programming, the full disclosure amendment should lessen this conflict.

More importantly, I believe that the proposed full disclosure requirement will force a frank examination of the disparity of outcomes between programming available privately and that available publicly. It is my hope that this will require educators, politicians and taxpayers to confront the elitism which exists in the current system. Through the current practice of pretending that public and private programs are comparable, or at least tacitly representing to parents that the programs are equal, the unfairness is effectively masked and the impetus for improvement blunted.

Having concluded that neither parents nor educators can be entrusted with the sole decision-making responsibility under the Act, it became necessary to look for some general principle which could be utilized to resolve disputes when they arose. The principle of maximizing accuracy in the assessment of the child and selection of an appropriate program for him is mandated both by the cost-effectiveness and the promotion of the child's dignity justifications for the Act. Application of this principle would require, at a minimum, information-generating procedures such as trial placements. It would abolish the use of a "prospecti ve test" for assessing the appropriateness of proposed placements. Appropriateness would have to be assessed by looking at all available information including a child's actual performance in a particular program. Furthermore, the principle would require that hard data be generated on the effectiveness of programming so that the decision-making process can result in a maximum number of children being placed in programs designed to lead to integration.

Finally, some of the proposed amendments seek to correct the devastating problems of delay by expressly prioritizing the provision of services to those with the potential for integration, and by limiting the educational agency's ability to delay the process.
The available research seems to indicate that, on the whole, better results are obtained when intensive intervention is provided earlier rather than later. In cases in which the parents can afford to privately provide programming while the process endlessly unwinds, the child is unharmed. For each child so fortunate, however, there are many others who are simply lost because of the parent's inability to pay for programming when it will do the most good. Once that opportunity is lost, there is no legal remedy worthy of discussion. We as a society cannot afford and should not tolerate this type of inequality.