Legislative Notes: The Education of All Handicapped Children Act of 1975

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The Education of All Handicapped Children Act of 1975\(^1\) purports to confirm a national commitment to full equality of educational opportunity for the nation’s eight million handicapped children\(^2\) by means of an expanded program of financial assistance to the states to aid them in the massive court-mandated effort\(^3\) to provide an education for every handicapped child. This legislation commits the federal government to assist the states in meeting the direct costs of educating handicapped children.\(^4\) To qualify for the federal subvention, an educational agency is required to establish an individualized educational program\(^5\) for every handicapped child and to implement a system of procedural safeguards which guarantees due process in placement and programming decisions.


\(^2\)The Bureau for the Education of the Handicapped placed the number of handicapped children between birth and age twenty-one in 1974 at more than eight million. H.R. REP. No. 332, 94th Cong., 1st Sess. 11 (1975); S. REP. No. 168, 94th Cong., 1st Sess. 8 (1975). The Bureau estimated that 1.75 million handicapped children were receiving no educational services in 1974, while another 2.5 million were receiving "an inappropriate education." H.R. REP. No. 332, 94th Cong., 1st Sess 11 (1975).

\(^3\)See notes 7-23 and accompanying text infra.


\(^5\)See notes 89-93 and accompanying text and Part V A infra.
and provides a grievance mechanism that includes the right to bring a civil action.\footnote{6}

This note discusses the principal provisions of the 1975 Act as they relate to the developing law of the educational rights of handicapped children. These provisions are considered from two perspectives: their operational meaning or effect on the implementation of educational programs for handicapped children, and the role they may play in future legal efforts to obtain an education for every handicapped child appropriate to his or her special needs.

The note is divided into five sections. Part I reviews the landmark judicial decisions which have established the right of handicapped children to participate in free, public education. The basic provisions of the Education of All Handicapped Children Act of 1975 are then presented in Part II. The funding provisions are discussed in Part III with particular emphasis upon the tension between the promise of federal largesse and the expense of compliance with statutory and judicial requirements. Part IV reviews prior efforts to obtain judicial recognition of a substantive right to an appropriate education and suggests some ways in which the 1975 Act may alter the framework of judicial consideration of this endeavor. Finally, Part V examines in detail the Act's provisions for individualized educational programs and procedural safeguards. The utility of these provisions to persons who seek to hold educational agencies accountable for their special education programs is stressed. In addition, particular attention is paid to certain legal problems that are likely to emerge from the implementation of the complaint procedure incorporated into the 1975 Act.

I. JUDICIAL RECOGNITION OF THE HANDICAPPED CHILD'S RIGHT TO EDUCATION

Mandatory special education for all handicapped children acquired constitutional momentum in the early 1970's when two federal courts indicated that the exclusion of handicapped children from public education could be a denial of their constitutional rights to equal protection and due process. In Pennsylvania Association for Retarded Children \textit{v.} Pennsylvania,\footnote{7} [P.A.R.C.] a class action on behalf of mentally retarded children excluded from the public schools as uneducable or untrainable, a three-judge federal court approved a consent decree in which the parties

\textsuperscript{6}See notes 94-97 and accompanying text and Part V B infra.
agreed that all mentally retarded children were capable of benefiting from a program of education and training.\textsuperscript{8} The public school officials were required to place each mentally retarded child in "a free, public program of education and training appropriate to the child's capacity . . . ."\textsuperscript{9} The court found that the labeling of a child as mentally retarded imposed a serious stigma;\textsuperscript{10} therefore, it concluded that full due process protections must be afforded to the child before such a label could be imposed by the school.\textsuperscript{11}

The principles enunciated in \textit{P.A.R.C.} were extended to all handicapped children in \textit{Mills v. Board of Education.}\textsuperscript{12} The court held that no handicapped child could be excluded from a regular public school assignment unless the child was provided "(a) adequate alternative educational services suited to the child's needs, which may include special education or tuition grants, and (b) a constitutionally adequate prior hearing and periodic review of the child's status, progress, and the adequacy of any educational alternative."\textsuperscript{13} The District of Columbia was ordered to provide each child of school age "a free and suitable publicly-supported education regardless of the degree of the child's mental, physical or emotional disability or impairment."\textsuperscript{14} A constitutional basis for this obligation was found in the principle expounded in \textit{Brown v. Board of Education}\textsuperscript{15} that "where the state has undertaken to provide [the opportunity of an education, that opportunity] is a right which must be made available to all on equal terms."\textsuperscript{16} By denying handicapped children access to publicly-supported education, the District of Columbia had violated the due process clause.\textsuperscript{17} The school system's defense of insufficient funds was rejected on the ground that the District's interest in educating the excluded children outweighed its interest in preserving its financial resources.\textsuperscript{18} If sufficient funds were not available, the court said, then the available funds must be expended in such a manner that no child would be entirely excluded from a publicly supported education.\textsuperscript{19}

\begin{itemize}
\item \textsuperscript{8}\textit{Id.} at 307.
\item \textsuperscript{9}\textit{Id.}
\item \textsuperscript{10}\textit{Id.} at 293.
\item \textsuperscript{11}\textit{Id.} at 303-04.
\item \textsuperscript{12}348 F. Supp. 866 (D.D.C. 1972).
\item \textsuperscript{13}\textit{Id.} at 878.
\item \textsuperscript{14}\textit{Id.}
\item \textsuperscript{15}347 U.S. 483 (1954).
\item \textsuperscript{17}348 F. Supp. at 875.
\item \textsuperscript{18}\textit{Id.} at 876.
\item \textsuperscript{19}\textit{Id.}
Despite some well-reasoned concern regarding the precise scope and precedential value of *P.A.R.C.* and *Mills*, these decisions served as a springboard for the vigorous assertion of the constitutional right to education for all handicapped children. Three fundamental propositions from these cases have served as the underpinnings of the asserted right to education. First, the equal opportunity principle enunciated in *Brown v. Board of Education* will be applied to the practice of excluding handicapped children from public education. Second, identification, classification, and placement of handicapped children must be accompanied by full procedural due process safeguards. The *P.A.R.C.* decision also embraced an educational notion that has become a vital corollary of the equal protection principle. The court found that *every* handicapped child could benefit from some type of education or training. As a result it was no longer necessary to show that the

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21 *347 u.s. 483 (1954).*


23 Once again the decisional position of *P.A.R.C.* and *Mills* made it uncertain whether the full complement of procedural safeguards obtained in the opinions were constitutionally required. The courts in both cases approved sets of procedures previously agreed to by the parties which included prior notice, a trial-type hearing, rights to counsel, presentation of evidence, cross-examination of witnesses, impartial hearing officer, and a written decision based upon the record with the burden of proof on the educational agency. Pennsylvania Ass’n for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 304-05 (E.D. Pa. 1972); *Mills v. Board of Education*, 348 F. Supp. 866, 880-81 (D.D.C. 1972). In neither instance, however, did the court expressly state that handicapped children were entitled to *all* of these procedures as a matter of constitutional right. See note 40 infra for a fuller consideration of the constitutional question left open by *P.A.R.C.* and *Mills*.

handicapped child could fit into the existing educational program; rather the program had to be tailored to the child's needs.

A. Equal Protection

Following the breakthrough created by *P.A.R.C.* and *Mills*, counsel and commentators fashioned a broad spectrum of arguments designed to buttress and expand the basic principles enunciated in those cases. Perhaps the greatest effort and attention was devoted to the application of equal protection to the condition of handicapped children. Even after *P.A.R.C.* and *Mills* the exclusion of handicapped children continued, and advocates were therefore anxious to invoke the strict scrutiny standard of equal protection analysis, knowing that few discriminatory classifications could withstand judicial application of this standard.\(^{25}\)

1. Suspect Class — The contention was made that handicapped children qualified as a "suspect" class because they were a vulnerable and stigmatized minority, lacking in political power and frequently subject to discrimination.\(^{26}\) Consequently, it was argued that legislative classifications that caused the suspect "handicapped" category to be invoked, for example, statutory exceptions to compulsory attendance laws, should be subjected to strict scrutiny and overturned if found to constitute invidious discrimination.\(^{27}\) This argument has met with some success in the courtroom.\(^{28}\)

2. Fundamental Interest — Advocates have also sought to employ the other catalyst of strict scrutiny, "fundamental interests." It was believed that the Supreme Court's statement in *Brown v. Board of Education* that "today education is perhaps

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Typically, compulsory school attendance laws have excepted children thought to be uneducable or otherwise unfit for schooling. The plaintiffs in *P.A.R.C.* successfully challenged Pennsylvania's statutory exclusions by producing expert evidence that all mentally retarded children were capable of benefiting from a program of education and training. Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 296 (E.D. Pa. 1972). With this showing, the rationality of the legislative classification of handicapped children was undermined and their continued exclusion became an arguable denial of equal protection. *Id.* at 297.

Because the *P.A.R.C.* decision took the form of a consent decree the court did not feel obliged to decide whether strict scrutiny standards would apply to the education of handicapped children. The court was satisfied that the plaintiffs had established a colorable claim even under the less stringent rational basis test of equal protection. *Id.* at 283 n.8.


\(^{27}\)Dimond, *supra* note 22, at 1100-02.

\(^{28}\)See *In re G.H.*, 218 N.W.2d 441 (N.D. 1974). See also Colorado Ass'n for Retarded Children v. Colorado, No. C-4620 (D.Colo., filed Dec. 22, 1972) (handicapped persons may constitute a "suspect class").
the most important function of state and local governments’’ provided a foundation for the claim that education was either a constitutional right or at least a fundamental interest that could not be denied in the absence of a compelling state interest. But in San Antonio Independent School District v. Rodriguez the Supreme Court rejected this argument, holding instead that education per se was neither a constitutionally guaranteed right nor a fundamental interest.

3. Rational Basis — Although Rodriguez was a setback for the proponents of equal educational opportunity for handicapped children, the “minimum rationality” standard of traditional equal protection proved sufficient to propel handicapped children through the school house door. The courts in both P.A.R.C. and Mills had found it unnecessary to venture beyond “minimum rationality” standards to uphold the plaintiffs’ claims. The critical factor that rendered the exclusionary provisions vulnerable to attack was the judicial acceptance of the proposition that, regardless of the type and severity of handicap, all children could benefit from some form of educational program. Upon acceptance of this proposition the exclusion lost its justification, since the distinction drawn in the compulsory education statutes between handicapped and nonhandicapped children lacked a rational basis. Administrative and fiscal excuses might still be offered for the continued exclusion of handicapped children from public education, but these arguments had already been answered in Mills. Hence, any states that excluded

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29 347 U.S. at 493.
32 Mr. Justice Powell’s opinion denied that education was a constitutional right on two grounds. He rejected the argument based on Brown with the observation that “the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection clause.” 411 U.S. at 30. Recognizing that the right to education was not explicitly guaranteed by the Constitution, he then considered whether it was implicitly guaranteed by virtue of its relationship to “the effective exercise of First Amendment freedoms and to intelligent utilization of the right to vote.” 411 U.S. at 35. This contention was also rejected. 411 U.S. at 36-37.
33 See Developments in the Law—Equal Protection, supra note 25.
34 See note 20 supra.
35 See notes 18-19 and accompanying text supra. This is not to say that the courts have arrived at a wholly satisfactory solution to the problems created by limited fiscal resources. In Mills the court insisted that the school district fund special education programs even if that meant an overall reduction in the level of per pupil expenditures throughout the system. Yet, courts have been reluctant to mandate an “equal dollars” standard of equal educational opportunity. See, e.g., Fialkowski v. Shapp, 405 F. Supp. 946, 958 (E.D. Pa. 1975). One course of action may be to require the state to provide additional funds to assure an adequate educational program for handicapped children. A similar action has been taken in the area of desegregation remedies. In Bradley v. Milliken, 540 F.2d 229 (6th Cir. 1976), the District Court on remand from the Supreme Court ordered the State of Michigan, which had been found guilty of segregative acts, to pay at least half of the added costs of certain “educa-
handicapped children from its program of free, public education would be accused of violating the equal protection clause of the fourteenth amendment.

B. Procedural Due Process

Due process demands arose initially with respect to the testing and classification practices used to exclude individuals from school or to place them in special education programs. A series of reports and cases detailing the misclassification of educationally disadvantaged and non-English speaking children as mentally retarded led to proposals for due process safeguards.36 Similar demands were voiced with respect to the labeling and placement or exclusions of the genuinely handicapped.37

In P.A.R.C. and Mills the courts approved procedures designed to protect the due process rights of handicapped children. These safeguards included:38

(a) written notice of the proposed action, with specification of the reasons therefor, including all relevant data; the right to an impartial hearing before an impartial hearing officer if the parents object to the action;
(b) access to all pertinent records and to independent diagnostic services;
(c) right to counsel, to confront and cross-examine witnesses, and to present evidence; and
(d) a decision by the hearing officer based solely upon the

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37 Schwartz, supra note 22, at 130-33.
evidence presented, with the burden of justification on the educational agency. \(^{39}\)

Following the *P.A.R.C.* and *Mills* orders approving the full panoply of procedural safeguards, advocates maintained that these provisions were required to protect the "liberty" interest of handicapped children in light of the stigmatization inherent in classification as handicapped and to protect their putative "property" interest in a free, public education. \(^{40}\)

\(^{39}\) The remarkable congruence of the due process provisions in *P.A.R.C.* and *Mills* is marred only by a discrepancy with respect to the burden of proof. In *P.A.R.C.* the Amended Stipulation states that a "proposed change in educational status shall be approved only if suggested by substantial evidence on the whole record of the hearing" but that introduction by the educational agency of an official report recommending the change "shall discharge its burden of going forward with the evidence," thereby requiring the parent to introduce evidence. 343 F. Supp. at 279, 305 (E.D. Pa. 1972). Arguably, the burden of persuasion has also been shifted to the child and his parents by this language. Compare *Mills*, which expressly provides that the defendants (i.e., the educational agency) "shall bear the burden of proof as to all facts and as to the appropriateness of any placement, denial of placement, or transfer." 348 F. Supp. at 866, 881 (D.D.C. 1972).

\(^{40}\) See, e.g., Wald, *supra* note 26, at 837; Schwartz, *supra* note 22, at 128-29; Dimond, *supra* note 22, at 1111-12.

While the purpose of the present discussion is to sketch the legal developments that presaged congressional enactment of the Education of All Handicapped Children Act, leaving until later sections the analysis of the legal issues, a few words are in order at this point concerning the constitutional dimensions of procedural due process as applied to the admission, classification, and placement of handicapped children. As indicated in note 23 *supra*, the *P.A.R.C.* and *Mills* courts did not pass on whether the extensive procedural safeguards incorporated in their orders were constitutionally required to assure fundamental fairness. In *Goss v. Lopez*, 419 U.S. 565 (1975), which considered the question of the process due students suspended from school for ten or fewer days, both the majority and dissenting opinions doubted that the education area was an appropriate place to inject a full panoply of trial-type procedural safeguards. *Id.* at 578, 583; *id* at 590-91 (Powell, J. dissenting). See also, Kirp, *Proceduralism and Bureaucracy: Due Process in the School Setting*, 28 STAN. L. REV. 841 (1976). Although the Court recognized that the extent of the process due is contingent upon the significance of the possible deprivation of liberty or injury to property interests, 419 U.S. at 572-76, it imposed only what it called "rudimentary precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school." *Id.* at 581. These "rudimentary precautions" simply required "in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charge against him and, if he denies them, an explanation of the evidence . . . and an opportunity to present his side of the story." *Id.* The Court expressly abjured mandating full trial-type safeguards in this situation. *Id.* at 583.


The uncertainties regarding the constitutional dimensions of due process only serve to emphasize the significance of the 1975 Act in this area. The Act mandates as a condition for financial assistance the implementation of the full range of procedural safeguards adopted in *P.A.R.C.* and *Mills*. 20 U.S.C. § 1415 (Supp. V 1975). See Part V B 3 infra.
C. Right to Education

A third constitutional claim is the substantive right to an effective education. 41 Although its appearance in the education of the handicapped area has been limited thus far to a few cases involving tuition grants to private schools 42 and educational programs for the institutionalized handicapped, 43 this claim may become the basis for considerable legal conflict in the near future. 44

The notion that underlies this position is that the right to education is meaningless unless the programs are responsive to the special needs of handicapped children. The legal foundation for this claim has not been fully developed, although its basic outlines are visible. Rather than attempting to specify educational content or techniques, proponents have sought to establish that a substantive right to an effective education is implicit in present law. For example, one advocate has drawn upon the intimation in Rodriguez of a right to a minimum education to support the claim of handicapped children to an education that is appropriate to their needs. 45 Others have built their claims to an effective education upon state constitutional or statutory provisions that assure educational opportunities for all. 46 Regardless of the legal theories employed, however, the courts will be asked to rule that the right to education for handicapped children necessarily requires educational agencies to provide programs that are appropriate to these children’s needs and that meet those needs effectively. 47

II. THE EDUCATION OF ALL HANDICAPPED CHILDREN ACT OF 1975

A. Prior State and Federal Legislation

Education in the United States has traditionally been regarded as

41 The issue of the scope and nature of the right to an education is broader than the issue, discussed in Part I A 2, of whether any such right is a “fundamental interest.”
42 See, e.g., In re Held, Docket Nos. H-2-71 and H-10-71 (Family Court, Westchester County, New York, Nov. 29, 1971); Kivell v. Nimointin, Civil No. 143913 (Sup. Ct. Fairfield County, Conn., filed July 18, 1972). Both of these unreported cases are collected in L. Burrello, H. DeYoung & L. Coleman, A Compilation and Review of Litigation Affecting the Handicapped 202-03 (N.D.) (on file with the University of Michigan Journal of Law Reform).
44 The legal bases for asserting such a claim and the impact of the 1975 Act on these assertions are more fully discussed in Part IV.
46 See McClung, supra note 20, at 166-72.
47 The eligibility and state plan requirements in the Education of All Handicapped Children Act of 1975 as vehicles for asserting the claim to an appropriate education are examined in Part V B 2 infra.
a responsibility of the states. In keeping with the critical socializing role assigned to education forty-nine states have enacted compulsory education laws of one form or another. In addition, numerous state constitutions guarantee basic educational rights to their citizens. Notwithstanding these provisions, however, handicapped children have often been excluded from public education by virtue of exceptions to the compulsory attendance laws. A few states had developed alternative programs for some categories of handicapped children at an early date. Yet as recently as 1971, a year prior to the P.A.R.C. and Mills decisions, only seven states had adopted mandatory education legislation that included all handicapped children, while twenty-six additional states had mandatory programs for one or more categories of handicaps.

Involvement of the federal government in the education of handicapped children commenced in 1966 when Title VI was added by amendment to the Elementary and Secondary Education Act (ESEA) of 1965. Title VI established a grant program "for the purpose of assisting the states in the initiation, expansion, and improvement of programs and projects (including the acquisition of equipment and where necessary the construction of school facilities) for the education of handicapped children." In 1970 a separate Education of Handicapped Children Act was enacted to replace the ESEA's Title VI. The basic thrust of the program, however, remained the development of educational resources and the training of personnel.

After P.A.R.C. and Mills legislative efforts intensified on both the state and federal levels. Spurred by an increasing number of court actions, virtually every state enacted some form of mandatory special education legislation. Meanwhile, Congress began consideration of an expanded program of federal assistance. The effort first bore fruit in the Education of the Handicapped Amendments of 1974. The new provisions evidenced the impact of recent adjudication on congressional attitudes. For the first time

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50 Id. at 11-12.
55 See S. REP. No. 168, 94th Cong., 1st Sess. 20-21, Table 2 (1975).
each state was required to establish a goal of providing full educational opportunities for all handicapped children as a condition for receiving a grant under the Act. As a further prerequisite for eligibility, the Amendments required procedural safeguards patterned on those in *P.A.R.C.* and *Mills.* In an effort to assist the states in meeting their constitutional and statutory obligations to provide educational opportunities for all handicapped children a new entitlement formula was adopted that geared payments to the number of children aged three to twenty-one inclusive in the state.

**B. The 1975 Act**

Despite the significant boost given to education of the handicapped by the 1974 amendments, that legislation was viewed as an interim measure by congressional supporters. Subsequent legislative history revealed two major sources of dissatisfaction: inadequate funding of the state aid program, and the slowness of the states in implementing court-mandated equal educational opportunities for the handicapped. It was suggested that the federal government would have to assume a much larger share of the cost of educating handicapped children if the states were to be able to provide the educational programs to which the millions of handicapped children were legally entitled. Supporters recognized that increased financial assistance alone would be insufficient to speed implementation and that compliance mechanisms would also have to be tightened.

The legislation that eventually emerged as the Education of All Handicapped Children Act of 1975 was responsive to these congressional concerns. In an endeavor to provide financial assistance to the states in amounts commensurate with the growth of special education programming a new grant formula was developed. Beginning with fiscal year 1978 a state would be entitled to receive

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60 A state would be entitled to a maximum amount equal to $8.75 for every child aged three to twenty-one in the state. This formula was initially adopted in 1974 for fiscal 1975 only (Pub. L. No. 93-380, § 614, 88 Stat. 580). The 1975 Act extended the application of this formula through September 30, 1977 (Pub. L. No. 94-142, § 2(a), 89 Stat. 773).
63 *See* *S. REP. NO.* 168, 94th Cong., 1st Sess. 8-9 (1975).
65 Fiscal year 1978 begins on October 1, 1977, and ends September 30, 1978. For the fiscal periods from 1975 through September 30, 1977, a maximum entitlement for each state of $8.75 times the number of children aged three through twenty-one in that state was retained. *See* note 60 *supra.*
an amount of money equal to the number of handicapped children aged three to twenty-one receiving special education multiplied by a percentage of the average per pupil expenditure in public schools in the United States during the second preceding year. The percentage figure would escalate from 5 percent for the fiscal year ending September 30, 1978, to 10 percent in the next fiscal year, and then by 10 percent steps to 40 percent for the fiscal year 1982 and thereafter. Although the Act contained no specific authorizations for the years after fiscal 1977, the annual cost for a fully funded program under the new formula was estimated to be in excess of 3.1 billion dollars by 1982.

Congress also took steps to remedy a second source of discontent, the slow pace of implementation of mandatory special education programs. It did so by restructuring the application and fund disbursement procedures to make each state accountable for the compliance of its local educational agencies. A state educational agency would screen applications from the local agencies and then submit a single state application to the Commissioner of Education. Disbursement of funds to the state, and through it to the local educational agencies, would be conditioned upon continuing compliance with federal mandates. The burden of monitoring local agency compliance would rest with the state agency, with the Commissioner empowered to withhold funds from any state in which noncompliance by a local agency was found to exist. The intention of the Congress in creating this arrangement was evidently to increase surveillance without an increase in federal manpower while at the same time creating strong incentives for the states to exact compliance. To further insure compliance Congress, as a condition of eligibility for financial assistance, required

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6720 U.S.C. § 1411(a)(1)(B) (Supp. V 1975). A significant feature of the 1975 Act was the adoption of a "pass through" formula designed to assure that, beginning in fiscal year 1979, at least 75 percent of the funds disbursed to each state under the Act would in fact reach the local and intermediate school districts that provide most of the educational services for handicapped children. 20 U.S.C. § 1411(c)(1) (Supp. V 1975).
7120 U.S.C. §§ 1414(b)(1) and (2), 1416(a), 1420 (Supp. V 1975).
74This incentive is vitiated somewhat by § 616(a) of the Act (20 U.S.C. § 1416(a) (Supp. V 1975)) which provides in substance that the Commissioner has the alternatives of making no further payments to the state under the program or of limiting payments to the state educational agency only for local agencies and intermediate units whose actions did not cause or were not involved in the failure.
each state and local educational agency to establish a complaint procedure whereby any person dissatisfied in any respect with an agency’s special education program might enter a complaint and obtain an impartial hearing. This procedure brings problems to the attention of state agencies and the Commissioner without the necessity of mobilizing a corps of federal inspectors.

The Education of All Handicapped Children Act of 1975 contains a number of other provisions that promise to have a significant impact upon special education programming throughout the nation. For the most part these additions have been characterized as efforts to strengthen and clarify provisions enacted in 1974. Yet, they may well transform the character of special education programming. Moreover, they contain the seeds of a major change in the legal contest for full educational opportunity for all handicapped children.

These provisions are to be found in three sections of the 1975 Act that establish the conditions that must be met by any state or local educational agency seeking funds under the Act. The first section specifies the criteria for state eligibility to receive federal assistance. Among the most significant criteria of eligibility are:


2. The state has developed a plan which sets forth in detail (A) an established “goal of providing full educational opportunity to all handicapped children,” a timetable for accomplishment, and a description of facilities, personnel, and services needed; (B) assurance that free appropriate education will be available for all handicapped children aged three through eighteen by September 1, 1978, and for handicapped children aged three through twenty-one by September 1, 1980; (C) a scheme for identifying and evaluating all handicapped children in the state, and a “practical method” for determining those who are currently receiving special education and those who are not being served; (D) certain administrative procedures; and (E) availability of the plan to the community in advance of submission to the Commissioner. 20 U.S.C. § 1412(2) (Supp. V 1975).

3. The state has established priorities for special education designed to reach first all handicapped children not currently receiving special education, and secondly to assist the most severely handicapped. 20 U.S.C. § 1412(3) (Supp. V 1975).

dures adopted by the state with respect to education of the handicapped and documents the state's efforts in meeting these goals.\textsuperscript{82} Finally, to qualify for payments a local educational agency must submit an application to the state educational agency in which it provides assurances that the goals and criteria set forth in the Act are being met.\textsuperscript{83} When read together, the three sections impose the following set of requirements.

By the target date of September 1, 1978, a free, appropriate, public education must be available for all handicapped children aged three to eighteen inclusive,\textsuperscript{84} and by September 1, 1980, all handicapped children of ages three through twenty-one must be served.\textsuperscript{85} An affirmative obligation is imposed upon every local educational agency seeking funds to identify, locate, and evaluate all handicapped children within the agency's jurisdiction.\textsuperscript{86} The Act also requires state and local agencies to give first priority to implementing programs and expending funds for handicapped children not yet receiving special education.\textsuperscript{87} The next priority is to assist the most severely handicapped within each category who are currently receiving an inadequate education.\textsuperscript{88}

The 1975 Act embraces the notion of individualized educational programming designed to meet the unique needs of each child.\textsuperscript{89} This is accomplished by means of an "individualized educational program" (IEP) which is developed as a cooperative effort between the local educational agency involved and the child's parents or guardians.\textsuperscript{90} The IEP must contain a detailed explication of educational needs, institutional goals, services to be provided, and

\begin{itemize}
\item \textsuperscript{82} 20 U.S.C. § 1413 (Supp. V 1975).
\item \textsuperscript{83} 20 U.S.C. § 1414 (Supp. V 1975).
\item \textsuperscript{84} 20 U.S.C. § 1412(2)(A) (Supp. V 1975). The Act also contains an incentive grant program to encourage the development of special education programs for handicapped children aged three to five inclusive. Each state that provides special education to such children may receive a maximum of $300 annually for each such child served, provided the program otherwise meets the Act's requirements for eligibility. 20 U.S.C. § 1419(a) (Supp. V 1975).
\item \textsuperscript{85} 20 U.S.C. § 1412(2)(B) (Supp. V 1975). However, this subsection excepts any state from the requirements with respect to handicapped children aged three to five and eighteen to twenty-one, inclusive, "if the application of such requirements would be inconsistent with State law or practice, or the order of any court, respecting public education within such age groups in the State ... ." Id.
\item The proposed regulations indicate that funds received under the 1975 Act may not be used for "secondary priority children" until a free, appropriate, public education is provided for all first priority children in the jurisdiction. Proposed Regulations, § 121a.214, 41 Fed. Reg. 56,985 (1976). See also the summary discussion regarding "Priorities in the Use of Part B Funds," 41 Fed. Reg. 56,969 (1976).
\item \textsuperscript{89} H.R. Rep. No. 332, 94th Cong., 1st Sess. 13-14 (1975).
\item \textsuperscript{90} The IEP is defined in 20 U.S.C. § 1401(19) (Supp. V 1975). The provisions and implications of the IEP are discussed in Part V A infra.
\end{itemize}
appropriate objective measures of achievement that will permit effective monitoring of the child's progress by the educational agency and by the child's parents.\textsuperscript{91} The IEP of every handicapped child must be reviewed and updated at least annually.\textsuperscript{92} In addition, the "mainstreaming" of handicapped children, that is, placement in regular classrooms with children who are not handicapped whenever possible, is a condition of eligibility for financial assistance under the Act.\textsuperscript{93}

The 1975 Act spells out in detail the due process provisions which every educational agency must implement in order to qualify for financial aid.\textsuperscript{94} In addition, a complaint procedure is blue-printed for every participating state and local agency.\textsuperscript{95} A parent of a handicapped child may complain about any aspect of the educational program and receive a hearing before an impartial hearing officer.\textsuperscript{96} Any aggrieved party may appeal to the state educational agency and finally to a state or federal court.\textsuperscript{97}

The impact upon special education programming of these provisions in the 1975 Act cannot be gauged precisely since the effect will vary from state to state depending in part upon the extent to which similar provisions have already been established in response to public sentiment or judicial prodding. However, it is possible to identify certain broad consequences which are likely to be felt throughout the nation. The remainder of this note examines the implications of the three major elements of the 1975 Act.

### III. FUNDING OF EDUCATION OF THE HANDICAPPED

The Education of All Handicapped Children Act of 1975 represents a dramatic change in the philosophy of federal assistance for the education of handicapped children. Finding that "present financial resources [of the state and local agencies] are inadequate to meet the special educational needs of handicapped children . . . .",\textsuperscript{98} and recognizing that, as a result of judicial mandates,"\textsuperscript{98}
"massive new sums of money are going to have to be spent, by someone, on special education . . . ," Congress in the 1975 Act committed the federal government to assisting state and local educational agencies in meeting their responsibilities by providing funds to pay a portion of the direct cost of educating handicapped children. Under the Act's formula, by 1982, state and local agencies will be entitled to receive more than an estimated 3.1 billion dollars annually for special education. However, the most sanguine observer must acknowledge that, where federal grants are concerned, a significant gap between promise and performance may often appear. Should federal assistance fail to approach projected levels, state and local educational agencies could face additional difficulties in the future.

During the floor debates on the 1975 Act speakers repeatedly voiced the fear that the projected authorization figures recommended by the legislation's sponsors were not only unrealistic but would induce expectations on the part of handicapped children and their parents that could not be met. After much handwringing the Congress decided to retain the authorization figures and the entitlement formula on which they were based, because the figures represented a "costing-out" of the special education programming required by federal and state legislation and judicial decrees. Supporters acknowledged that federal expenditures in this area might be substantially below authorization levels for the foreseeable future. To remedy this conflict a new subsection providing

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101 See notes 65-68 and accompanying text supra.
103 H.R. REP. No. 332, 94th Cong., 1st Sess. 23 (1975).
104 See, e.g., the remarks of Senator Muskie on the occasion of passage of the Conference Report:

It is the task of the authorizing committees to identify the needs for programs such as this . . . . However, the probability that we will fully meet these needs seems small . . . . It strikes me as unlikely that we will be able to fund this program at the full authorization in the near future . . . . I believe we need to understand clearly that large out-year authorizations, such as those included in the bill, do not mean that we will necessarily spend at these levels.


On March 1, 1976, the Ford Administration recommended to Congress a program that would consolidate twenty-four educational programs into a single $3.3 billion grant to the states for education. See Presidential Message on the Financial Assistance for Elementary and Secondary Education Act, [1976] 2 U.S. CODE CONG. & AD. NEWS 432. See also N.Y. Times, March 2, 1976, at 14, col. 4. The plan would eliminate the categorical grant programs for education, including those for the education of the handicapped. Federal funds would be disbursed to the states, which would formulate their own allocation plans. However,
for the ratable reduction of allocations should the entitlements exceed the appropriated funds was enacted.\textsuperscript{105}

Of greater concern than inflated expectations is the prospect that the 1975 Act may actually increase the financial problems of local and state educational agencies in meeting judicial and legislative mandates. Three factors make this result likely. According to congressional estimates, in 1975 approximately 1.75 million handicapped children were not receiving any special education.\textsuperscript{106} School systems must accommodate these children in the immediate future. Also, the 1975 Act restricts the use of aid-to-the-handicapped funds to the payment of "excess costs."\textsuperscript{107} An educational agency is required to expend the same amount per pupil on handicapped as on nonhandicapped children before it can allocate federal funds for "excess costs."\textsuperscript{108} Thus, absent increased local resources the average per pupil expenditure for all children must decline. Moreover, the entitlement formula in the 1975 Act envisions a maximum federal subvention of 40 percent of the average per pupil cost.\textsuperscript{109} Because the education of a handicapped child is often quite expensive\textsuperscript{110} the local agency cannot depend on federal assistance

\textsuperscript{106} H.R. REP. No. 332, 94th Cong., 1st Sess. 11 (1975). An additional 2.5 million handicapped children were reported receiving an inappropriate education. Id. See also the "Statement of Findings and Purpose" in the 1975 Act for a somewhat different set of figures. Act of Nov. 29, 1975, Pub. L. No. 94-142, § 3(b)(4), 89 Stat. 774.
\textsuperscript{107} 20 U.S.C. § 1414(a)(2)(B)(i) (Supp. V 1975). The term "excess costs" is defined in the 1975 Act, 20 U.S.C. § 1401(20) (Supp. V 1975), as those costs which are in excess of the average annual per student expenditure in a local educational agency during the preceding school year for an elementary or secondary school student, as may be appropriate, and which shall be computed after deducting (A) amounts received under this subchapter or under title I or title VII of the Elementary and Secondary Education Act of 1965, and (B) any State or local funds expended for programs which would qualify for assistance under this part or under such titles.
\textsuperscript{108} H.R. REP. No. 332, 94th Cong., 1st Sess. 13 (1975). In 121 CONG. REC. H11,349 (daily ed. Nov. 18, 1975), Congressman Quie stated:

[T]o prevent funds from being commingled into the general education budget of a local school district, we have mandated that the money served [sic] cover only the excess costs involved with educating handicapped children. In this way, a school district will have to spend on a handicapped child exactly what it will spend on any other child before it can spend one penny of the Federal dollars. . . .
\textsuperscript{109} See notes 67-68 and accompanying text supra.
\textsuperscript{110} The average cost-index is estimated to be 1.9 times the nonhandicapped child's cost. H.R. REP. No. 332, 94th Cong., 1st Sess. 12 (1975).
to cover all of the excess cost. Again the local agency will have to find additional funds to meet these expenses.\footnote{One factor could reduce the strain on existing resources in some areas. If an agency is already paying the total cost of educating some handicapped children, it may be able to shift a portion of the excess costs to the federal program, thereby releasing funds for use in serving newly enrolled handicapped children. See 20 U.S.C. § 1413(a)(9) (Supp. V 1975). But see the "Comment" to the "nonsupplanting provision" in the proposed regulations, § 121a.109, 41 Fed. Reg. 56,983 (1976), which reads, "in judging compliance with this [nonsupplanting] requirement, the Commissioner looks to see if Part B funds are used for any costs which were previously paid for with state or local funds." The clear indication of the "Comment" is that 1975 Act funds may not be used to supplant state or local funds even though the latter funds were used to cover the excess costs of educating handicapped children. Although the requirement that 1975 Act funds shall be used to supplement existing expenditures is sensible, it is questionable whether the gloss which the Office of Education has apparently placed upon it is consistent with the Act's philosophy of assisting states and localities in meeting the excess costs of educating handicapped children. While the interpretation offered in the "Comment" will have the effect of concentrating federal funds on the education of previously excluded and inadequately served children, it will prevent the reallocation of existing special education funds to meet the "regular" costs of serving these children and it will penalize the states and localities that have already developed full-service programs for many or all categories of handicapped children. If the 1975 Act is in fact intended to assist educational agencies in meeting the excess costs of educating handicapped children, then a way should be found to permit reallocations within special education budgets while at the same time preventing the use of federal funds as a substitute for local revenues.}

This suggests that many states and localities may be unable to provide a full range of educational services for all handicapped children with the resources presently available. Moreover, unless the states and localities are willing and able to readjust priorities to provide significantly more funds for education of handicapped children, they could be caught in a vicious circle, chasing federal aid to meet constitutional and statutory obligations only to find that the funds are insufficient and the use restrictions imposed by the federal legislation counterproductive.

For example, recent judicial decisions provide state and local agencies with little choice but to seek out federal funds. Yet, federal subventions are not likely to provide sufficient additional funds to develop full-service programs for all handicapped children.\footnote{Consider also in this regard the requirement that funds obtained under the Act must be used to provide educational opportunities for all handicapped children not presently receiving special education before any of the funds may be used for the education of handicapped children who are receiving less-than-full-service educations. See note 88 supra.} The problem is compounded by the terms of the 1975 Act which require the Commissioner of Education to cut off education-of-the-handicapped funds of any state or locality that fails to make available a free, appropriate, public education for all handicapped children.\footnote{20 U.S.C. §§ 1412(2)(B) and 1416(a)(1) (Supp. V 1975).} If an agency fails to meet the deadlines of the Act it risks losing the funds it must have to meet the goal set by both the courts and the 1975 Act.\footnote{The Department of Health, Education, and Welfare has been reluctant in the past to use the termination of funds as a compliance mechanism. Tomlinson & Mashaw, The Enforce-}
the educational agency provide an education that is appropriate to the handicapped child's needs. This provision reflects the view that equal educational opportunity has meaning for handicapped children only where the educational program is geared to meet their special needs. A state or locality that fails to implement this goal may lose its federal subvention.

Although the difficulties examined in the foregoing analysis may be avoided, they suggest that the repercussions of the 1975 Act reach beyond disappointed expectations. Unless the level of appropriations is increased dramatically, the 1975 Act may well be regarded not as the culmination of the effort to obtain educational opportunities for all handicapped children but as the beginning of the struggle to obtain adequate funds.

However, a recent development promises to have a major impact in this area. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Supp. V 1975) provides that "[n]o otherwise qualified handicapped individual in the United States ... shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Failure to comply with Section 504 will result in the denial or discontinuance of all programs of federal financial assistance to the offending agency or jurisdiction. Under the regulations proposed to implement section 504 many of the basic rights of handicapped children that have been identified in court decisions and incorporated into the Education of All Handicapped Children Act have been adopted in the sections dealing with elementary and secondary education. Proposed Regulations, Subpart D, §§ 84.31-.38, 41 Fed. Reg. 29,564-65 (1976). Consequently, to receive federal funds for any educational program or activity, an educational agency will have to satisfy the requirements set forth in these regulations. Proposed Regulations, § 84.31, 41 Fed. Reg. 29,564 (1976). This means that an educational agency electing not to participate in the formula grant program of the Education of All Handicapped Children Act will not have to meet the conditions of eligibility for the receipt of funds under that Act. Nevertheless the agency will not qualify for federal funds under any other program by virtue of the requirements imposed under Section 504 of the Rehabilitation Act of 1973.

The intended linkage between Section 504 and the Education of All Handicapped Children Act is discussed in the summary comments to the proposed regulations for the 1975 Act. 41 Fed. Reg. 56,967 (1976).

The enthusiasm of state and local educational agencies may wane further if appropriations remain at or near the fiscal 1977 level. Congress appropriated $315,000,000 for state assistance for fiscal 1977. Departments of Labor and Health, Education, and Welfare, Appropriation Act, 1977, Act of Sept. 30, 1976, Pub. L. No. 94-439, 90 Stat. 1418. Although entitlements will increase annually from October 1978 through 1982, the allocations must be ratably reduced to match appropriations. See note 105 and accompanying text supra. For example, during the 1980-81 school year the federal subvention will be 30 percent of the average pupil cost for each handicapped child served. If the appropriation were limited to $300 million, the disbursement per child (assuming 8 million handicapped children) would be $37.50. However, the average "excess cost" would perhaps be more than one thousand dollars per handicapped child. (The 1972-73 "estimated average expenditure for handicapped students served" was $776. Financial Assistance for Improved Educational Services for Handicapped Children: Hearings on H.R. 70 Before the Select Subcomm. on Education of the House Comm. on Education and Labor, 93d Cong., 2d Sess. 36-37 (1974). This figure cannot be equated with "excess cost" but it does give some indication of the order of magnitude. For purposes of comparison, the 1972 estimated average public school expenditure per pupil was $930. Statistical Abstract of the United States 125 (1972). The
IV. THE IMPACT OF THE ACT ON JUDICIAL RECOGNITION OF THE EDUCATIONAL RIGHTS OF HANDICAPPED CHILDREN

The remainder of this note examines a pair of provisions which can be expected to have a significant impact on future efforts to provide educational opportunities for all handicapped children. The implications of the "Individualized Educational Program" (IEP) and the "complaint procedure" provisions will be viewed in the context of the legal efforts to maximize educational opportunities for all handicapped children.

A. Past Legal Efforts

Two distinct lines of argument have been advanced in the campaign to achieve full educational opportunities for all handicapped children. Each line may be summarized in terms of its dominant goals and principles. The first has been directed primarily at overcoming the exclusion of handicapped children from public education by establishing that a handicapped child is entitled to an equal opportunity to receive a publicly supported education where such education has been afforded nonhandicapped children. To protect the child's educational rights during classification and placement, the strict application of due process safeguards has also been vigorously pressed. This approach has met with remarkable success, as is evidenced by the number of recent court decisions and state special education acts.

A threshold limitation written into the 1975 Act to encourage program efficiency may result in further limitation on available funds. To prevent the spreading of federal funds too thinly the Act bars the distribution of funds to any local educational agency that is entitled to less than $7500 for the year. 20 U.S.C. § 1411(c)(4)(A)(i) (Supp. V 1975). Again assuming a limited appropriation which would net $37.50 per handicapped child, no system would qualify for federal funds unless it had 200 handicapped children.

In apparent recognition of the implications of this threshold provision, Congressman Perkins commented:

I wish to make it clear that there is no intention that the benefits of this program be denied handicapped children in any local school district because of the $7500 limitation. That limitation only affects the flow of money. It does not affect the extension of benefits.

The conference report [i.e., the Act] provides great flexibility in how benefits are to be accorded handicapped children in this situation — and it may very well be and should be that the State will simply return to the local school district Federal moneys which would have been available to it except for the $7500 limitation.

118 See Part I A supra.
119 See Part I B supra.
120 See Part I supra.
The second line of argument is not as well defined. The issue is clear: whether a handicapped child participating in the educational process is receiving an appropriate and effective education. That is, merely to remove the legal barriers to education is insufficient; the educational programs offered must address the special needs of handicapped children. However, proponents of this view have not been able to agree on a legal theory that will secure judicial recognition of the substantive right to the appropriate and effective education which they seek. Efforts to advance this position have encountered judicial opposition due to the difficulties involved in translating the notion of an appropriate and effective education into a manageable judicial framework without requiring the court to assume the role of an educational policymaker. Passage of the Education of All Handicapped Children Act, with its provisions for individualized educational programs and parental complaints, may provide advocates with the means for effectively expressing the goals and principles of the second line of argument in a manner that is acceptable to the courts.

B. Judicial Barriers to Establishment of the Right to an Appropriate Education

The notion of a right to an appropriate and effective education has been used successfully to buttress complaints against the functional exclusion of children who were nominally within the educational system. Where educational agencies have not provided programs that take account of factors such as cultural or language differences, or where authorities have turned educational facilities into little more than human warehouses, this notion has made it easier for advocates and judges to apply the equal protection doctrine even though the children have not been formally denied an opportunity to receive a publicly supported education. However, advocates have been unable to win legal recognition of a substantive right to an appropriate and effective education. The reasons for this failure can be seen by examining the views of the

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121 Three examples of this line of argument are outlined in subsequent paragraphs of this Part. For additional expressions of the basic legal arguments see Part I A 2 and Part I C supra.

122 For a forceful statement of this viewpoint see McClung, supra note 20, at 166-72.

123 The grounds for judicial opposition are dealt with at length in Part IV B infra.


The plaintiffs in *McInnis* alleged that the system of public school financing in Illinois violated the equal protection clause by permitting wide variations in per pupil expenditures, thereby depriving certain students with greater educational need of a "good" education.¹²⁸ The court noted, however, that in substance the claim was "that each pupil is entitled to a minimum level of educational expenditures, which would be significantly higher that the existing $400."¹²⁹ The court further noted that "[t]he underlying rationale of the complaint is that only a financing system which apportions public funds according to the educational needs of the students satisfies the Fourteenth Amendment."¹³⁰

The court found two major difficulties with this argument. Considerations of educational policy, local autonomy, and lack of judicial expertise preclude application of a standard based upon the educational needs of students.¹³¹ Furthermore, even if the fourteenth amendment required that expenditures be made only on the basis of the pupils' educational needs, "[t]he only possible standard is the rigid assumption that each pupil must receive the same dollar expenditure. Expenses are not, however, the exclusive yardstick of a child's educational needs."¹³² Concluding that dollar equality could not be the measure of equal protection,¹³³ the court then applied the minimum rationality test to the state's financing scheme and found that the scheme did indeed reflect "a rational policy consistent with the mandate of the Illinois Constitution."¹³⁴

In *Rodriguez* the plaintiffs alleged an equal protection violation and sought to invoke the strict scrutiny standard by claiming that the plaintiffs, as residents of an area with relatively low property values, constituted a suspect class and that education was a fundamental interest.¹³⁵ Although the Court acknowledged that education was a matter of paramount concern in modern society, it rejected the plaintiffs' argument that education merited treatment

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¹²⁸ McInnis v. Shapiro, 293 F. Supp. at 329.

¹²⁹ *Id.* at 331 n.11.

¹³⁰ *Id.* at 331 (emphasis in original).

¹³¹ *Id.* at 336.

¹³² *Id.* at 335.

¹³³ *Id.* at 331 n.11, 335-36.

¹³⁴ *Id.* at 336.

¹³⁵ 411 U.S. 1, 16-17 (1972). For present purposes the suspect class claim may be disregarded; the discussion concentrates on the court's analysis of the fundamental interest claim.
as a fundamental interest. "[T]he importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause." The Court concluded that education was neither explicitly nor implicitly guaranteed by the Constitution. However, while deciding against the fundamental interest claim on the facts presented, the Court seemed to hold open the possibility that a complete denial of educational opportunity might constitute a denial of equal protection.

Having rejected the fundamental interest argument as presented, the Court proceeded to apply the minimum rationality standard and found that the Texas scheme of school financing was constitutionally sufficient. In reaching that conclusion the Court undertook a lengthy explanation of the reasons for subjecting the finance system to minimum scrutiny. Mr. Justice Powell cited a number of factors as justifications for judicial restraint. These included the complexities of fiscal policy, the presence of "the most persistent and difficult questions of educational policy," lack of judicial expertise, and profound questions of federalism. He concluded that "the judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions."

McInnis and Rodriguez illustrate three barriers to judicial acceptance of the right to an effective education. First, there is the concern with discoverable and manageable judicial standards

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136 Id. at 30.
137 Id. at 35. The plaintiffs-respondents had argued that education was "a fundamental personal right because it is essential to the effective exercise of First Amendment freedoms and to intelligent utilization of the right to vote." Id.
138 Id. at 36-37. The Court stated:
Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either right, we have no indication that the present levels of educational expenditures in Texas provide an education that falls short. Whatever merit appellees' argument might have if a State's financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved and where . . . no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.
Id. at 36-37.
139 Id. at 40-55.
140 Id. at 41.
141 Id. at 42.
142 Id. at 42-43.
143 Id. at 44.
144 Id. at 43.
whenever questions of educational needs and goals are raised. Courts are uncomfortable with the task of making educational policy. Nor are they persuaded that they possess the capacity to supervise the execution of those policies. Secondly, the courts share in the widespread skepticism that equal educational opportunity can or should be measured in terms of equality of dollars spent or the recorded progress of students. Scholars have debated for some years the merits of various needs-outcomes approaches to educational equality without arriving at agreement. The courts in both McInnis and Rodriguez seemed impressed by this lack of consensus. At the same time, they appeared to stress the notion that education involves weighty issues of social policy, encompassing matters of resource allocation as well as of societal values with which the courts are neither properly equipped nor entitled to deal. Finally, in Rodriguez the claimants of the right to an effective education were thwarted by the Court’s rejection of the fundamental interest argument. This rejection was doubtlessly a double disappointment; it failed to provide a trigger for the application of the strict scrutiny standard of equal protection, and it failed to provide the mandate the claimants sought for the substantive right to an effective education.

Confronted with these barriers, advocates have scouted a variety of alternative approaches. One commentator sought to keep alive the fundamental interest argument by interpreting Mr. Justice Powell’s remark in Rodriguez regarding the acquisition of minimum skills necessary for the exercise of basic constitutional rights as an endorsement of the notion of a constitutionally guaranteed minimum education. “If this ‘minimal’ education is seen as that minimum amount necessary to the meaningful exercise of first amendment rights, then the goal could be set at, for example, an exercise at a sixth-grade level.” Apparently assuming that children with certain handicaps may not be able to attain a prescribed level of performance, the writer adds that “one’s right is not the right to the ‘meaningful exercise of first amendment rights’ actualized, but, rather, one’s right is the right to approach such an

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145Perhaps the courts also share in a misunderstanding of the thrust of the argument for the substantive right to an effective education. Arguably, the proponents are not seeking identical results but rather a guaranteed opportunity for every handicapped child to receive an education that is sensitive to the special needs of the handicapped.
150Handel, supra note 20, at 355.
exercise, *i.e.*, the right to get as far as one is able toward the minimum." 151

Whether this approach overcomes the obstacles noted previously is questionable, however. For instance, a court would still have to decide which skills were required for the meaningful exercise of constitutional rights. Moreover, it would also have to reach conclusions on the appropriate pedagogy in the process of deciding whether a handicapped child had been accorded "the right to get as far as one is able toward the minimum."

Mindful of the problem of discoverable and manageable judicial standards, another recent article analogizes the minimum program standards for handicapped children to the core curriculum of the schools. 152 A school that failed to develop a program of instruction that aimed at developing a degree of proficiency in the basic skills of reading, writing, and arithmetic might be said to have failed to provide a minimally adequate education for the child under its charge. "Since the school is providing or attempting to provide a minimally adequate education for regular children, equal protection requires that they do the same for handicapped children, even though the definition of minimally adequate education will differ for these children." 153 This would not mean that the adequacy of the program for handicapped children would be judged by the same substantive standard as would be applied to the nonhandicapped, *i.e.*, handicapped children would not necessarily be expected to attain the same levels of proficiency. Rather, the school would be held responsible for developing a program that addresses the special needs of handicapped children in the same fashion that it would be held responsible for providing instruction in reading, writing, and arithmetic in the general curriculum. 154

Again, it is doubtful whether this approach solves the problem of judicial determination of educational programming. A court must still choose the content of the minimum standards it intends to enforce. Either it adopts specific achievement or proficiency levels as minimal — *e.g.*, all students, handicapped and nonhandicapped, must read at the sixth-grade level — or it must determine the kinds of pedagogical techniques and educational services that are required to meet the special needs of handicapped children. Either alternative requires the court to make educational policy.

Another response to the problems encountered in seeking judicial recognition of a substantive right to an adequate and effective

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151 Id. (emphasis in original).
152 McClung, *supra* note 20, at 160.
153 Id.
154 Id.
education has been to pursue "a procedural road to securing a minimally adequate education." This approach eschews direct efforts to obtain judicial prescription of minimum standards for the content of educational programs for handicapped children and asks the courts merely to apply the standards of procedural due process that have become their special province. To follow this path means that "we cannot know for certain whether fair procedure will mean an improvement in every child's education." But,

[w]e can be reasonably sure, however, that such procedures, operating in conjunction with the right to some education, will serve as a prophylactic against the worst educational malpractices. . . . At a minimum, the self-analysis forced upon public policy-makers, teachers, families, and students by procedural fairness in the school classification process insures that schools will begin to attend precisely to real rather than imagined needs.

The procedural road to adequate education is seen as an effective means of overcoming judicial restraint in the area of educational policy. "Judicial action begins and ends with determining fair procedure and enforcing the right to some education." Given the intractability of many of the questions relating to educational policy, for the purposes of constitutional adjudication "that process seems the best way to insure that no child is denied a minimally adequate education."

C. The 1975 Act—Pathway to a Substantive Right to an Appropriate Education?

The previous discussion has reviewed the responses to the judicial barriers to recognition of a substantive right of handicapped children to an appropriate and effective education. It may be seen from that discussion that the problem is less one of constitutional rights than one of effective remedies. The courts are loathe to define the results which must be achieved by students before a school system can be said to provide an appropriate education. The Education of All Handicapped Children Act is significant in this regard because it contains provisions which may substantially

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155 Dimond, supra note 22, at 1119.
156 Id.
157 Id. (emphasis in original).
158 Id. at 1120 (emphasis in original).
159 Id. Others apparently do not share in that judgment. Handel, supra note 20, at 367, explicitly rejects Dimond's contention, while McClung, supra note 20, at 154, feels that counsel for handicapped children may find it necessary to resort to the substantive argument in many instances where procedural efforts prove unavailing.
eliminate the need for judicial definition of educational goals. This result is accomplished by permitting educational agencies in cooperation with parents of handicapped children to prescribe operational goals and standards that will be applied in evaluating the performance of both the children and the educational agencies.\textsuperscript{160} Moreover, the 1975 Act overcomes the fear of "straightjacketing" educational experimentation and innovation that could result from the constitutionalizing of program requirements.\textsuperscript{161} The provision of an administrative complaint and appeal mechanism allays anxiety in this regard.\textsuperscript{162} Should questions of program adequacy reach the courts, the Act structures the issues in familiar and justiciable terms. Rather than having to decide whether an educational program meets some extrinsic standard of appropriateness and effectiveness, the court needs only to determine whether the educational agencies have adhered to statutory procedural guidelines and whether the agencies have conscientiously endeavored to accomplish their self-prescribed educational objectives.\textsuperscript{163}

In order to suggest some of the ways in which the provisions of the 1975 Act may open the door to more effective advocacy of the claim to an appropriate and effective education, the next section of this note examines the IEP and complaint procedures in some detail. Because the implementation of these provisions may also be expected to generate a variety of educational and legal problems, Part V explores a number of these issues as they emerge from the statutory language.

\section*{V. INDIVIDUALIZED EDUCATIONAL PROGRAM AND PROCEDURAL SAFEGUARDS}

The individualized educational program and procedural safeguard requirements of the 1975 Act will influence the shape and substance of special education for handicapped children in a variety of ways. The effects of these provisions on educational agencies and advocates therefore merit careful consideration.

\subsection*{A. \textit{Individualized Educational Program [IEP]}}

As a condition of eligibility for receipt of funds under the Act a local educational agency must provide assurance that in cooperation with the child's parents or guardians it will establish and revise annually a written individualized educational program for each

\textsuperscript{160}See Part V A infra.
\textsuperscript{161}See note 144 and accompanying text supra.
\textsuperscript{162}See Part V B infra.
\textsuperscript{163}See Part V A and B 3 infra.
This written report must set forth the child's present performance, short- and long-term instructional objectives, objective criteria and procedures for performance evaluation, and an evaluation of the progress achieved to date.

This provision is intended to reinforce a general trend in the educational community toward individualized instruction, instruction by objectives, and educational accountability. However, the greatest significance of the IEP may be the impetus it provides for the development of educational programming appropriate to the needs of handicapped children.

By requiring cooperative discussion and agreement on educational programs and goals, schools and parents are obliged to consider the special needs of each handicapped child, which in turn should generate pressure for educational programs and facilities responsive to those needs. The absence of, or shortcomings in, these programs and facilities will predictably be reported to school boards, parental advisory groups, and state compliance officers, thereby increasing the motivation of local and state educational agencies to develop and fund a full range of special education programs.

Additionally, the linking of individual needs with specific program recommendations in the IEP should reduce the incidence of functional exclusion resulting from the misclassification that leads to inappropriate placement and programming. Through individualized testing and consultation, followed by individually tailored programs for children needing special education, the conditions that facilitated systematic misclassification and miseducation should be substantially reduced.
Furthermore, the provisions for periodic measurement of perfor­
mance based on the concrete objectives and operational meas­
ures established in the IEP meeting should make it feasible for par­
ents and state compliance personnel to evaluate special educa­
tion programs for appropriateness and effectiveness.

The major legal significance of the IEP provision is that it facili­
tates the development of judicially manageable standards. The per­
formance objectives and measurement criteria are defined by the
educational agency, relieving the courts of the task of formulat­
ing such standards. The individualization of goals and measures
should also reduce anxiety about imposing broad, general require­
ments that may inhibit experimentation. Of course, the converse of
this result is that failure to comply with a specific IEP program is
not suitable for the kind of class action litigation that characterized
the struggle against exclusionary practices.

B. Procedural Safeguards

Congress inserted a new section171 in the 1975 Act "to clarify
and strengthen the procedural safeguards in existing law."172 The
section pulls together three related elements: procedures for the
classification and placement of handicapped students;173 a com­
plaint procedure for parties dissatisfied with any aspect of the
special education program;174 and a guarantee of ultimate legal
recourse.175

Although it is ostensibly an effort to clarify and to strengthen
existing law,176 the new section goes significantly beyond previous
legislation in several respects. The procedural provision, buried
among the state agency requirements in the 1974 Amendments,177
is given a place of prominence in the 1975 Act.178 The complaint
procedure and the federal cause of action appear for the first time
in the new legislation.179

1. Due Process Guarantees — The procedural safeguards sec­
tion outlines the familiar due process requirements of prior written
notice, access to pertinent records, explanation of the child’s pro­

172 S. REP. NO. 455, 94th Cong., 1st Sess. 48 (1975). The former due process provision had
been included in the state plan section as a condition of eligibility. 20 U.S.C. § 1413(a)(13)
(Supp. IV 1974).
176 See note 172 and accompanying text supra.
procedural rights in the parents’ native language, diagnostic and placement tests free from cultural bias, and reliance upon more than one test or indicator for diagnosis and placement.\textsuperscript{180} These procedures are required whenever the educational agency proposes to initiate or change, or refuses to initiate or change, the identification, evaluation, or placement of the child or refuses to provide a free, appropriate, public education to the child.\textsuperscript{181} The language of the section is far from elegant,\textsuperscript{182} but it is nonetheless clear that Congress intended to establish procedural requirements for all of the critical decisions of identification, classification, and placement both before and after the child’s entry into the educational process.

The efficacy of the due process guarantees may depend to a degree upon who initiates the request for classification and placement. Where the school system proposes to test an enrolled child for possible placement in a special education program, due process protects the child from misclassification and inappropriate educational programming.\textsuperscript{183} But where the child is seeking access to special education and the educational agency either refuses admission or denies placement after testing, the due process guarantees may be of limited utility. Unless there is a procedural irregularity which can be used to raise doubt about the validity of the classification the most elaborate due process guarantees will not assure the handicapped child an appropriate educational program.\textsuperscript{184}


\textsuperscript{181}20 U.S.C. § 1415(b)(1)(C) (Supp. V 1975). A separate, detailed set of due process guarantees including the right to counsel, to present evidence and cross-examine witnesses, and to written findings is specified for the complaint procedure, which may be invoked if there is dissatisfaction with the evaluation process or placement decision. See 20 U.S.C. § 1415(b)(2) (Supp. V 1975). See also Part V B 2 infra.

\textsuperscript{182}The awkward phrasing derives from the fusion of provisions directed at the problem of exclusion with provisions applicable to classification and placement.

\textsuperscript{183}20 U.S.C. §§ 1402(19), 1414(a)(5), 1415(b)(1) and (2) (Supp. V 1975). The 1975 Act in effect mandates a two-step procedure for protecting the child against misclassification and inappropriate placement. The first stage is comprised of carefully monitored testing coupled with parental involvement in the establishment of the IEP. The second stage is provision for an impartial hearing in the event of parental objection to any facet of the first stage proceedings.

The procedural safeguards section does not address the question of what happens if the parents of a handicapped child refuse to consent to evaluation or placement. These matters are also considered briefly at note 207, infra. However, the proposed regulations attempt to clarify this matter by providing that “[a] meeting may be conducted without a parent in attendance if the local educational agency is unable to convince the parents that they should attend. In this case the local educational agency must have a record of its attempts to arrange a mutually agreed on [sic] time and place, ... .” Proposed Regulations, § 121a.224(c), 41 Fed. Reg. 56,986 (1976). On the other hand, the proposed regulations also expressly require parental consent to an evaluation before it may be conducted. Proposed Regulations, § 121a.404(b), 41 Fed. Reg. 56,990 (1976).

\textsuperscript{184}On the other hand, a careful evaluation of the educational needs of the child who requests access to special education undoubtedly maximizes the probability of proper classification. Assuring the availability of this type of evaluation may be the most important effect of the due process guarantees. See Dimond, supra note 22, at 1119.
a procedural irregularity, the interests of the child can be protected in an instance of agency denial of admission or placement only if the decision is opened to examination and challenge. Doubtless it was this realization that prompted congressional sponsors to add a complaint procedure to the 1975 Act. 185

2. Complaint Procedure — Any educational agency seeking federal assistance under the Act is required to provide "an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." 186 This provision is critical because it invites complaints not only on the matters of access and classification which have dominated the agendas of advocates and courts to date, but also on matters of appropriateness and accountability. 187

Section 1415 also details the rights and duties associated with the processing of the complaint. The complainant is entitled to a hearing conducted by the appropriate educational agency before an impartial hearing officer who is not an employee of the agency. 188 The complainant has a right to appeal the findings or decision of the hearing officer to the state educational agency. 189 In the hearing the parties have the right to counsel; to present evidence; to question, cross-examine, and compel the attendance of witnesses; to a verbatim record; and to a written statement of findings. 190

3. Effects of the Complaint Procedure — The complaint procedure should strengthen compliance by calling alleged violations of

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185 The House version of the bill, H.R. 7217, contained a separate section (§ 617) which required each state to establish a grievance procedure. Neither the Senate bill (S. 6) nor previous legislation provided a clear indication of the recourse available to children excluded from special education programs. The Conference Committee agreed to the incorporation of most of the House bill's grievance procedure into the final version of the Act as part of a new "Procedural Safeguards" section. S. Rep. No. 455, 94th Cong., 1st Sess. 47-48 (1975).


187 There can be no doubt as to the intended breadth of this provision. In the words of Senator Williams, the chairman of the Senate Committee on Labor and Public Welfare:

I would like to stress that the language referring to "free appropriate public education" [in the clauses providing for parental complaints] has been adopted to make clear that a complaint may involve matters such as questions respecting a child's individualized educational program, questions of whether special education and related services are being provided without charge to the parents of [sic] guardians, questions relating to whether the services provided a child meet the standards of the State educational agency, or any other question within the scope of the definition of "free appropriate public education." In addition, it should be clear that a parent or guardian may present a complaint alleging that a State or local educational agency has refused to provide services to which a child may be entitled [or] alleging that the State or local educational agency has erroneously classified a child as a handicapped child when, in fact, that child is not a handicapped child.


Because of its broad significance, this provision receives extended treatment in Part V B 3 infra.


state and local plans to the attention of the state educational agency and the Commissioner of Education, both of which have the authority to withhold funds for noncompliance.\footnote{Consider the interrelation between 20 U.S.C. §§ 1415(d), 1413(a)(12), 1414(b)(2), and 20 U.S.C. § 1418 (Supp. V 1975). See also note 22 and accompanying text infra.}

Less obvious perhaps is the influence of the complaint provision on the framing of issues. The statute requires the complaint to be heard before an impartial hearing officer who is not an employee of the educational agency involved in the education or care of the child.\footnote{20 U.S.C. § 1415(b)(2) (Supp. V. 1975).} The method of selection of the hearing officer is not discussed in the 1975 Act. Presumably it is left to state and local procedures.\footnote{But see note 197 infra.} Nor is the precise authority of the hearing officer revealed by the statutory language. Evidently he is expected to conduct an adversary hearing in which the representatives of the handicapped child may cross-examine the educational and testing personnel and present expert witnesses.\footnote{The Act does not specify the modus operandi of the hearing, presumably leaving this matter to the states. However, the Act does require the states to grant the parties various rights—to counsel, to present evidence, to examine and cross-examine witnesses, to a verbatim record, and to written findings—which have the effect of mandating a trial-type proceeding. See 20 U.S.C § 1415(d) (Supp. V 1975). The proposed regulations are silent regarding the procedural contours of the complaint hearing. See 41 Fed. Reg. 56,990 (1976).} Since the complaint may encompass "the identification, evaluation, or educational placement of the child, or the provision of a free appropriate education to such child,"\footnote{20 U.S.C. § 1415(b)(1)(E) (Supp. V 1975).} the hearing officer has the implicit authority to render decisions on any of these matters.\footnote{The Conference Report states that "language is adopted to assure that: (a) any parent or guardian may present a complaint concerning any matter regarding the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to such a child." S. REP. No. 455, 94th Cong., 1st Sess. 48-49 (1975) (emphasis in original). It is uncertain whether the sweeping authority that the drafters have apparently conferred upon the hearing officer represents an abiding faith in the adversary process or merely a failure to consider fully the implications of the provisions they have drafted. One suspects a preoccupation with providing a mechanism to combat exclusionary practices and with guaranteeing procedural due process in testing and placement decisions.}

Complaints by parents of handicapped children may challenge the decisions of the educational agency or the adequacy of the educational program. With respect to agency decisions the complaint may either challenge the procedures used in the identification, evaluation, and placement of the child, or the result of these procedures — the substantive decision to classify and place the child in one program or another. Procedural challenges are perhaps the most amenable to review. The list of procedural rights recognized by the courts has been articulated in the 1975 Act as a condition for receipt of federal funds. By examining witnesses and...
producing expert testimony the complainant may demonstrate that his procedural rights have been denied. The effect of this demonstration is not clear, however. Presumably, the hearing officer may order the retesting of the child, or on the basis of the substantive evidence presented he may order placement in a specific program.\textsuperscript{197}

Substantive challenges are more problematic. When the placement choice of the educational agency is challenged by the complainant, the alternatives for the hearing officer are to order retesting or to place the child, whether by endorsing the agency's choice or by making a new disposition. In the latter instance the hearing officer substitutes his judgment for that of the educational agency's personnel. Despite possible reservations about placing this decision in the hands of a lay person\textsuperscript{198} the interests of the educational agency and of the child are protected in some measure by the opportunity to appeal the decision to the state educational agency and to the courts.\textsuperscript{199}

It is more difficult to assess the events that would follow the submission of a complaint questioning the appropriateness or adequacy of an educational program in which a handicapped child is enrolled. A dispute might arise between the child or his parents and the educational agency concerning the objectives to be pursued in the individualized educational program. In resolving this

\textsuperscript{197}This power raises an intriguing question as to the qualifications of the hearing officer. The statute makes no mention of qualifications, except that the person may not be an employee of the agency charged with the education or care of the child. 20 U.S.C. § 1415(b)(2) (Supp. V 1975). May he (or must he) be a person familiar with the education of handicapped children, for example, a special education consultant? If so, the complainant may suspect that his decision will be biased in favor of his professional colleagues in the educational agency. Yet, if he is a layman, he may be asked to make a difficult placement decision based upon technical data with which he lacks a working familiarity.

The Council for Exceptional Children has apparently opted for expertise. In an article that excerpts portions of the Council's publication, \textit{A Primer on Due Process}, a number of recommendations are made regarding the selection of hearing officers for the type of "impartial due process hearing" mandated by the 1975 Act. One of the recommendations reads: "'Individuals selected should: . . . 2. Possess special knowledge, acquired through training and/or experience, about the nature and needs of exceptional children. An awareness and understanding of the types and quality of programs that are available at any time for exceptional children is essential.'" Abeson, Bolick & Haas, \textit{A Primer on Due Process: Education Decisions for Handicapped Children}, 42 \textit{Exceptional Children} 68, 72-73 (1975).

The proposed regulations add to the uncertainty regarding the hearing officer's qualifications by providing that "'[a] hearing must not be conducted: . . . [b]y any person having a personal or professional interest which would conflict with his or her objectivity in the hearing.'" Proposed Regulations, § 121a.407(a)(2) 41 Fed. Reg. 56,990 (1976). Is an expert on the education of handicapped children barred by this provision from serving as a hearing officer? Or is professional training sufficient insulation against loss of objectivity? One may only hope that the final regulations will further clarify the eligibility requirements for hearing officers.

\textsuperscript{198}See note 197 supra.

\textsuperscript{199}See Part V B 4 infra.
dispute the hearing officer would be obliged to set forth the educational goals which the child and the agency are expected to achieve. A profound faith in the adversary process is required to believe that this procedure will assure the handicapped child an appropriate education.

Where the adequacy of the funding, personnel, or curriculum of the educational program is the target of the complaint, the hearing must address issues that are more complex than the investigation of procedural irregularities or the selection of an appropriate educational program. Having observed the hesitancy of the judiciary to tackle questions of funding and programming, one may anticipate a hearing officer will be similarly trepidacious. Thus, the primary importance of the hearing in this context may be to trigger program review by state and federal officials since the 1975 Act requires that the findings and decision of the hearing officer be transmitted to the state advisory panel. The advisory panel is charged with the duty to advise the state educational agency of unmet needs within the state and to assist the state in reporting developments to the Commissioner of Education. In other words, the hearing may function primarily to draw administrative attention to the substantive issues of appropriate and adequate programming.

The adversarial nature of the complaint hearing should also be taken into account in assessing the impact of the 1975 Act's complaint provision. Unlike the decrees in P.A.R.C. and Mills, the 1975 Act is silent on the allocation of the burden of proof in the hearing. Yet the practical significance of this matter renders it advisable to speculate briefly on how this allocation may be made.

Ostensibly, where an educational agency has initiated a change in educational status, it may be required under traditional administrative law principles to carry the burdens of production and persuasion. Similarly, where a school system rejects a parental request to enroll a child in a special education program, the school may have to justify its decision. If a procedural irregularity can be found, the burden of production may be shifted to the agency to defend its actions. Nevertheless, in the absence of an express mandate in state education or administrative law it is difficult to suppose that even in these circumstances the decision of the educa-

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200See notes 126-147 and accompanying text supra.
203See note 39 supra.
tional agency will not carry a presumption of validity that will effectively place the production- and persuasion-burdens on the complainant.

Situations may be hypothesized in which at a minimum the production-burden would be shifted one way or another, but one suspects that a hearing officer will seldom require an educational agency to establish the validity of a challenged placement decision or educational program without first requiring the complainant to show that the procedural guidelines were violated or that the agency's decision was probably in error. And regardless of where the burden of persuasion is formally placed, the complainant will undoubtedly have to overcome the presumption of validity that attaches to the judgments of the educational experts. 206

While the format of the complaint hearing may be expected to channel disputes in predictable ways, the very existence of a complaint and hearing procedure will influence the provision of educational services for handicapped children. The complaint and hearing procedure serves to bestow legitimacy upon the position of the complainant. Recognizing the right of the parents of a handicapped child to enter a complaint necessarily implies that the needs and opinions of the child and his parents are entitled to the fullest consideration. This recognition does not necessarily mean that educational agencies have been insensitive to these matters, only that the child's position is elevated from that of beneficiary to that of co-decisionmaker. Depending upon the degree of objectivity of parents of handicapped children, results may range from increased parental awareness and involvement to the chaos borne of incessant complaints that may yield educational practices akin to "defensive medicine." 207

206 Handel has outlined the pendular shifts in the burden of production which may be anticipated when challenging the adequacy of an educational program. He also notes that the burden of persuasion falls upon the complainant to show that despite adherence to professional standards the child has not received an adequate education. See Handel, supra note 20.

207 Regarding the pivotal role of the parents in the struggle for recognition of the educational rights of handicapped children, one writer has observed that deeply rooted in our legal and sociological heritage is the position that parents are the natural guardians of their children. Implicit in such a position is the belief that there is an identity or, at least, compatibility of interest between the parent and the child as well as a capability on the part of the parent to care for and deal with the child and represent him in his dealings with society's institutions. However, the time may have come to challenge this fundamental assumption. Murdock, Civil Rights of the Mentally Retarded: Some Critical Issues, 48 Notre Dame Law. 133, 137 (1972).

Insufficient attention has been given to the legal problems created by disbelieving or recalcitrant parents. This lack of attention is perhaps understandable in view of the leading role taken by parents in the legal struggle for educational rights of the handicapped. Whether the elaborate procedural safeguards mandated in the 1975 Act will protect the interests of a handicapped child where the parents refuse to permit the child to be enrolled in a special education program is questionable. Conceivably, an educational agency may use the com-
The effect of the interplay of the complaint and hearing, the mandated due process procedures, and the goals of appropriate and adequate educational programming should also be noted. The complaint and hearing provisions reinforce the guarantees of adequate, unbiased testing and placement and of individualized educational programming. Provision for a complaint and hearing means that failure to comply with the due process and IEP requirements will come to the attention of persons with the power to compel performance by withholding funds. More importantly, perhaps, educational personnel are motivated to exercise their best professional judgments by an awareness that their decisions must withstand scrutiny by their peers and by those who review complaints. The impact of this factor cannot be measured in terms of individualized complaints resolved, but its significance for the overall quality of the educational program should not be underestimated.

4. Appeal to the State Educational Agency — "[A]ny party aggrieved by the findings and decision rendered [by the hearing officer] may appeal to the State educational agency . . . ." In contrast with the complaint hearing where the opportunity to present a complaint is accorded only to "the parents or guardian," an administrative appeal may be taken either by the parents or guardian or by the local educational agency. The state educa-

plaint procedure to force a hearing on the placement of a child that the agency believes to be handicapped where the parents refuse to sanction placement. However, where state or local procedures require parental consent before any testing or evaluation may take place, it is not clear whether the complaint procedure would be available to the educational agency.

The proposed regulations permit an IEP meeting without parental involvement, but forbid evaluation of a child suspected of manifesting a handicap without parental consent. See note 183 supra.

208 See note 191 and accompanying text supra.


211 The right of appeal is restricted to an aggrieved party. What constitutes an aggrieved party is not indicated. Absent such an indication, virtually any dissatisfaction with the decision of the hearing officer is presumably sufficient justification for administrative appeal.

A more difficult question of standing to appeal would be presented by the request for administrative review brought by a public interest association that seeks to represent handicapped children. Historically, organizations such as the Pennsylvania Association for Retarded Children have been instrumental in obtaining judicial recognition of the education rights of handicapped children. The goals of an association seeking participation in order to represent the interests of a handicapped child may conflict at times with those of the parents of the handicapped child. A situation may be imagined in which the parents of children on whose behalf the complaint was entered have decided to accept the hearing officer's disposition despite the association's objection. The association may believe that the decision was incorrect or that the findings of the hearing officer have broader ramifications that will
tional agency is required to conduct an "impartial review" of the prior hearing. The officer conducting such review shall make an independent decision upon completion of such review.

The scope of review is not clear from the statutory language. However, there are two basic possibilities; an independent decision based upon review of the record below or a de novo hearing. The Act is ambiguous in that it refers to a state agency review of the prior hearing, which implies that the hearing below is to be the point of departure, yet it also grants the same due process rights as at the first hearing, including the rights to present evidence and to confront, cross-examine, and compel the attendance of witnesses, thereby implying more than mere record review.

The legislative history does not remove the ambiguity. It is not intended that the review conducted by the state educational agency must necessarily be a de novo review although the reviewing officer should carefully examine the entire record of the hearing, afford parties an opportunity for oral argument, and assure that the procedures followed at the hearing were consistent with due process.

The implication from the Senate floor debate is that the reviewing officer has an option to choose the mode of review, albeit with the assurance of an opportunity for aggrieved parties to present an oral argument.

On the other hand, the nature of the review hearing will often be governed by the nature of the issues raised. A due process complaint may be resolved on the basis of the record below, while a
question of program adequacy may require a de novo hearing at which the policy questions that necessarily surround such matters may be fully ventilated. Questions of placement appear to fall into a grey area between the two extremes since it may be possible to resolve them on the basis of written evaluations and affidavits, yet they may also involve matters of educational policy and program capabilities.

Perhaps the most that can be said with certainty regarding state agency review is that the guarantee of due process safeguards presses in the direction of a trial-type hearing and that the reviewing officer is required to make an independent judgment. Since the Act does not restrict the reviewing officer to a decision based upon evidence in the record, it may be expected that he will conduct a wide-ranging inquiry whenever it is necessary for him to take account of broader issues of educational policy in rendering his decision.

The relationship between state agency review and the statutory compliance machinery must also be considered. The 1975 Act requires a state agency in carrying out its responsibilities for screening local agency applications to "consider any decision made pursuant to a hearing held under [section 1415] which is adverse to the local educational agency or intermediate educational unit involved in such decision." The local agencies may be expected to contest vigorously any decision of a hearing officer that casts doubts on local compliance. However, the Act requires the state to provide a local agency with the opportunity for a hearing before the state may find a violation.

5. Judicial Review of the Complaint Process — Congress was not content to rely upon the administrative appeal procedure to protect the interests of handicapped children. It also offered any aggrieved party "the right to bring a civil action with respect to the complaint presented pursuant to this section... in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy." Again, it is unclear whether the scope of the judicial review contemplated by the statute calls for appellate review of an adjudicatory proceeding or for a de novo judicial determination of the dispute. However, the statute provides some hints of the legislative intent. The right to bring a civil action is granted to parties aggrieved by the findings

218 State agency review may be the best forum to consider the broader policy dimensions of programming and placement because of the presumed access of state officials to the requisite data and reports.
220 Similarly, the local agency may be expected to press for judicial review of the state review proceedings. See Part V B 5 infra.
and decision of either the initial hearing or the state agency review. Furthermore, the court is instructed to "receive the records of the administrative proceedings . . . ." These references, together with the placement of the civil action provision within the procedural safeguards section, suggest that the court is expected to undertake the more limited appellate review of the agency decision, rather than a de novo review.

However, these indicia are balanced by others which suggest a more expansive judicial role. The grant of a right to bring a civil action is expressly linked to the "complaint presented pursuant to this section" rather than to the decision of the hearing or review officer. This language is echoed in the Conference Report which specifically provides that the aggrieved party's right to bring a civil action extends "to the original complaint and matters relating thereto." Further, the court is instructed to hear additional evidence at the request of a party and to "grant such relief as the court determines is appropriate." These elements evidence an intention to accord aggrieved parties the opportunity to receive a de novo judicial determination on the merits of the dispute.

On balance, it seems that the Act allows a court to undertake a broad review of the disputed issues of placement and programming as well as a review of the prior administrative proceedings in which these issues have been considered and decided.

The prospective involvement of the judiciary in the determination of issues of educational placement and programming suggests two points for brief consideration. The first involves the doctrine of the exhaustion of administrative remedies. The sequence to be

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224 Id.
225 Id. The paragraph that recognizes the right of civil action is preceded by a paragraph that declares that the decision of the hearing or review officer shall be final, "except that any party involved in such hearing may appeal such decision under the provisions" for state agency review or right of civil action. 20 U.S.C. § 1415(e)(1) (Supp. V 1975). The proposed regulations are silent with regard to the scope of judicial review.
229 This doctrinal label is applied because from a common sense perspective the core issue is whether an aggrieved party will be required to follow the channels of administrative review before the court will entertain a challenge to local or state agency determination. This question seems to be one of timing, i.e., when the court will review the agency action. Thus, the exhaustion doctrine should be applied. See K. Davis, Administrative Law Text 373 (3d ed. 1972). However, the framework of the procedural safeguards section suggests another possibility. Even if the statutory language which confers a right of civil action upon an aggrieved party is read to apply only after an initial complaint has been made to the local agency and after a hearing has been held, a disgruntled parent may try to bring a civil action regarding the initial placement determination in lieu of invoking the complaint procedure. In this situation, the threshold question before the court would be whether it should apply the doctrine of primary jurisdiction and require an agency to consider the substance of the complaint before the court will hear the complaint. See id. Presumably, the policy considerations are similar, but the distinction illustrates further the ambiguities contained in the provision of the Act granting a right to bring a civil action.
followed in obtaining review of a local agency's placement or programming decision in the typical case seems clear. The parent or guardian enters a complaint and receives a hearing. If there is dissatisfaction with the outcome, an administrative review is obtained. The right of civil action is involved only after the administrative review is completed.\(^{230}\)

However, the parents or guardian may wish to short-circuit this procedure, particularly if the purpose is to establish a precedent regarding the education of handicapped children rather than simply to challenge a placement decision.\(^{231}\) This purpose may be accomplished without reference to the right of civil action conferred by the 1975 Act.\(^{232}\) Alternatively, the potential plaintiffs may seek to avail themselves of the statute’s right of civil action. In either case the court must decide whether to apply the exhaustion doctrine. Several reasons may be advanced in favor of its application.

Perhaps the most obvious reason for requiring exhaustion is that the issues may be resolved within the administrative framework without the need for judicial involvement, particularly where the complaint involves procedural matters. Since the procedural requirements have been set forth in detail, an administrative officer will be able to determine compliance in most cases. Where sub-

\(^{230}\) That the parties are required to follow these steps may be inferred from the statutory language:

> Any party aggrieved by the findings and decision made under subsection (b) [the complaint-hearing provision] who does not have the right to an appeal under subsection (c) of this section [the state review hearing], and any party 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 . . . .

20 U.S.C. § 1415(e)(2) (Supp. V 1975). This language seems to require the exhaustion of administrative remedies except for the party prevailing at the complaint hearing.

\(^{231}\) For example, in a recent Pennsylvania case, Fialkowski v. Shapp, 405 F. Supp. 946 (E.D. Pa. 1975), the parents of two severely mentally retarded children claimed that the children were denied equal protection because the local and state school officials failed to provide them with an appropriate education. While the plaintiffs were seeking monetary damages, the complaint in substance raised the issues of whether the state was required to provide each child with an education appropriate to the child's needs and whether the program provided was adequate.

\(^{232}\) Among the possibilities not further discussed in this Note are:

1. A constitutional claim of violation of equal protection.

2. An action in the nature of mandamus against the Commissioner of Education requiring him to withhold funds under the terms of the Education of All Handicapped Children Act, 20 U.S.C. § 1416(a) (Supp. V 1975), or against the state and local educational agencies that are recipients of funds under the 1975 Act to obtain compliance with the congressional requirements. (See K. Davis, supra note 229, at 447-51. See also Tomlinson & Mashaw, The Enforcement of Federal Standards in Grant-in-Aid Programs: Suggestions for Beneficiary Involvement, 38 Va. L. Rev. 600, 630-37 (1972)).

3. An implied right of action as beneficiary of the Education of All Handicapped Children Act against the state and local educational agencies claiming a violation of the terms and conditions of the Act. See, e.g., Mattie T. v. Johnston, No. DC-75-31-S (N.D. Miss., filed April 25, 1975), noted in 9 Clearinghouse Rev. 113 (1975).
stantive issues of appropriateness of education and program adequacy are involved, there may be less prospect for effective resolution on the administrative level, but considerations of efficiency still indicate that administrative review should be attempted first. Indeed, where educational programming is at the center of the conflict, one may expect that a court will welcome the input of state education officials in addition to a full development of the record. Nor should a court be expected to overlook the panoply of procedural safeguards mandated in the 1975 Act, including the right of civil action, which was installed to achieve compliance by means of administrative supervision. A premature consideration of the complex issues of educational placement and programming would waste judicial resources.

However, a court should not automatically refrain from hearing a complaint concerning placement or programming until all administrative remedies have been exhausted. There may be occasions when administrative recourse would be futile. On those occasions the court should not apply the exhaustion doctrine. There may be other occasions when the issues call for judicial decision without regard to the possibility of administrative review, for example, where the exclusion of a handicapped child from the educational system is allegedly based upon a state administrative interpretation of statutory language.

Notwithstanding the potential application of the exhaustion doctrine, the effect of the civil action provision will be to involve the courts more deeply in the formulation and execution of educational policy, providing an ironic twist to the implications of the 1975 Act. It was suggested previously that one effect of the IEP would be to relieve the courts of the task of formulating educational policy and standards of performance in actions involving education of the handicapped to the extent that the written individualized educational programs will spell out educational objectives and perform-

233 See notes 201-203 and accompanying text supra.

234 See, e.g., Fialkowski v. Shapp, 405 F. Supp. 946 (E.D. Pa. 1975), wherein the plaintiffs contended that the review procedures adopted by Pennsylvania after the P.A.R.C. decision were inadequate to address the issue of appropriate education raised by the plaintiffs. Apparently the state Secretary of Education reviewed only the procedures involved in the initial hearing and whether the evidence presented by the school personnel justified the classification made. The district court all but endorsed the notion that unless the review procedures permitted review of the substance of complaints regarding the inadequacy or inappropriateness of the educational programs, they did not afford an adequate administrative remedy. 405 F. Supp. at 957.

235 In reviewing the Conference Report on the floor of the Senate one sponsor informed his colleagues that exhaustion of the administrative procedures should not be required where such action "would be futile either as a legal or practical matter." 121 Cong. Rec. S20,433 (daily ed. Nov. 19, 1975) (remarks of Sen. Williams).

236 See Part V A supra.
ance measures. One conclusion that may be drawn for the present discussion of the complaint and civil action provisions is that they will operate at cross purposes with the IEP in this regard. While the courts may be able to glean manageable judicial standards from the individualized educational programs, thereby avoiding the need to set educational objectives, they may be called upon more frequently to decide whether the programs provided by educational agencies are appropriate to the needs of handicapped children and are being carried out effectively.

Another effect of increased judicial participation may be contemplated with restrained enthusiasm. One unfortunate prospect of the establishment of individualized educational programs is the possibility of harassment and unrealistic demands by parents dissatisfied with their child's special education program and the results obtained thereby. For example, the provision for individualized educational programs may blur the distinction between reasonable objectives and attainment. Many ingredients must be combined to produce a successful education experience. Yet the IEP may encourage dissatisfied parents to blame the educational personnel or the lack of equipment or other supporting services when the projected goals are not met. Of course, such criticism may be deserved. Yet, it must be wondered whether the educational needs of handicapped children can be adequately served should agency personnel find themselves devoting a significant portion of their time to preparing for and participating in administrative and judicial proceedings. The legacy of the procedural safeguards provision of the 1975 Act may be the development of educational programs that are more attuned to the legal system's need for enforceable legal standards than to the complex needs of handicapped children.

VI. CONCLUSION

Senator Harrison Williams, the chief Senatorial sponsor of the Education of All Handicapped Children Act, described it as "the most important Federal legislation affecting American public education since the enactment of the Elementary and Secondary Education Act of 1965." An assessment of the accuracy of this prediction will require many years. However, it is not too soon to draw a number of conclusions regarding this legislation.
The 1975 Act may be expected to shape programs of education for handicapped children in at least three ways. The prospect of federal aid to assist in meeting the costs of educating handicapped children, coupled with the eligibility deadlines imposed, will speed implementation of education programs designed to meet the special needs of all handicapped children in the United States. Although the promise of large-scale federal financial support may prove illusory, the commitment to support the direct costs of special education will provide proponents with significant leverage when seeking larger sums in the future. In addition the IEP and procedural safeguards provisions will undoubtedly influence the form and substance of education for the handicapped in ways ranging from individualized educational programming to state administrative scrutiny of program quality and performance.

The 1975 Act also promises to reshape litigation in this area in a variety of ways. Although constitutional claims will continue to challenge exclusionary practices, the emphasis should shift toward the issue of the child's substantive right to an appropriate and effective education. The Act's provisions establishing placement procedures, complaints and judicial review will channel more disputes over placement and program performance into the courts. Despite the Act's prescription of administrative review, the courts may be expected to become more intimately involved in placement and programming determinations as a result of this legislation.

Perhaps the most notable implication of the 1975 Act, however, is its role as a symbol of a changing attitude toward handicapped persons, for the Act represents the commitment of the nation to equal educational opportunity as a birthright for all handicapped children.

—Donald W. Keim