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# TRAGIC CHOICES IN SPECIAL EDUCATION: THE EFFECT OF SCARCE RESOURCES ON THE IMPLEMENTATION OF PUB. L. NO. 94-142

*by James H. Stark\**

We cannot know why the world suffers. But we can know how the world decides that suffering shall come to some persons and not to others. While the world permits sufferers to be chosen, something beyond their agony is earned, something even beyond the satisfaction of the world's needs and desires. For it is in the choosing that enduring societies preserve or destroy those values that suffering and necessity expose. In this way societies are defined, for it is by the values that are foregone no less than by those that are preserved at tremendous cost that we know a society's character.<sup>1</sup>

Pub. L. No. 94-142, the Education for All Handicapped Children Act of 1975<sup>2</sup> (Act or EAHCA), and section 504 of the Rehabilitation Act of 1973<sup>3</sup> (Rehabilitation Act or section 504) represent the culmination of the civil rights movement for handicapped citizens in the United States. In the field of public education, both create significant,

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The perspectives of this article have been drawn from my experiences as Director of the University of Connecticut Law School Civil Clinic, which specializes in legal issues pertaining to handicapped persons and represents parents of handicapped children in disputes with school districts arising under the Education for All Handicapped Children Act and the Rehabilitation Act of 1973.

1. G. CALABRESI & P. BOBBITT, *TRAGIC CHOICES* 17 (1978).

2. 89 Stat. 773 (codified as amended at 20 U.S.C. §§ 1401-1461 (1976 & Supp. III 1979)).

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

new legal rights for exceptional children. Their overriding objective, to ensure a "free and appropriate education" for all of our nation's children, states the broad hopes of a mature and compassionate society.<sup>4</sup>

Enormous gains have been made since the enactment of the EAHCA and the Rehabilitation Act in achieving full educational opportunities for handicapped children. Handicapped children are highly visible in today's public schools and better integrated into the mainstream of American public education than ever before. Nationwide, hundreds of thousands of exceptional children now are served competently by a new generation of trained special educators. Many millions of dollars are spent each year in this national effort.

Perhaps it is unrealistic to expect too much progress too soon. Yet it is my conviction, after several years of work in the field, that key goals of the EAHCA are not being fully realized. The expansive objectives of the Act are fundamentally at odds with the financial limitations that American public schools encounter in the 1980s. Resource scarcity is always a chronic problem, but the resources available today to states and localities for education and other social services seem especially limited. These fiscal pressures threaten continued progress toward the ambitious goal of providing quality education for all handicapped children.

This article describes the effects of resource scarcity in special education. A principal thesis is that, taken together, the EAHCA and the Rehabilitation Act establish six principal objectives that conflict with one another and that cannot be realized fully given limited resources. As a result, states and localities are forced to make difficult triage<sup>5</sup> decisions, sacrificing certain objectives to accomplish others. These

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4. Public opinion polls suggest that most Americans embrace this goal. *Why Public Schools Fail*, NEWSWEEK, Apr. 20, 1981, at 64.

5. "Triage" is primarily a medical term, used to describe "the sorting of and allocation of treatment to patients . . . according to a system of priorities designed to maximize the number of survivors." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2439 (1976). But the concept has broader dimensions and can be used to describe any allocation system that seeks to maximize the efficient use of scarce resources. For a discussion of the term as applied to education of the handicapped, see Weinstein, *Education of Exceptional Children*, 12 CREIGHTON L. REV. 987, 990-92 (1979).

The title and some of the principal themes of this article are taken from Professors Calabresi's and Bobbitt's *Tragic Choices*. This illuminating work is a study of the inevitability of scarce resources, the painful choices that scarcity necessitates, and a variety of processes by which societies make those choices. The authors use the term "tragic choices" differently from triage. Tragic choices denotes allocation decisions that conflict with values accepted by a society as fundamental. CALABRESI & BOBBITT, *supra* note 1, at 17. Throughout this article, I use the term in the same way.

triage decisions often have a disparate impact on different disability groups, pitting one group against another.

A secondary objective of this article is to explore federalism issues in the context of special education. If retrenchment in the field is deemed necessary, the question remains whether it should be undertaken by the federal government or by states and localities. The article concludes that although the federal government may find it convenient to delegate responsibility for retrenchment to states and localities, this is a social policy for which standards ought to be set at the national level.

This article is divided into four sections. Section one describes the EAHCA and its six principal objectives. Section two surveys how these objectives conflict with one another, and cannot all be achieved given limited resources. Section three examines in detail the policies of one state, Connecticut, and analyzes how limited resources have caused Connecticut to enact policies that disfavor emotionally disturbed children, a particular disability group under the Act. This section illustrates the effects of triage in special education. Section four examines several national trends in special education, focusing primarily on federalism issues.

## I. THE EAHCA—AN INTRODUCTION

The history of public education of handicapped children in this country is not a happy one.<sup>6</sup> Prior to enactment of the EAHCA, state and local educational authorities generally had broad management authority, either implicitly or by statute, over educational programs for handicapped children. With this authority came virtually unchallengeable discretion to label children as handicapped, to exclude certain children from public education because of "ineducability" or disruptive-ness, and to relegate others to separate, often unequal, institutional facilities.<sup>7</sup> Many state statutes expressly excluded certain children, usu-

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6. This article is forward-looking in its emphasis. There is substantial literature describing the historical treatment of exceptional children in the United States. Some useful sources include THE LEGAL RIGHTS OF HANDICAPPED PERSONS 53-194 (R. Burgdorf, Jr. ed. 1980); W. CRUICKSHANK & G. JOHNSON, EDUCATION OF EXCEPTIONAL CHILDREN (3d ed. 1975); Burgdorf & Burgdorf, *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a "Suspect Class" Under the Equal Protection Clause*, 15 SANTA CLARA LAW. 855 (1975); Comment, *Historical Overview: From Charity to Rights*, 50 TEMP. L.Q. 953 (1977).

7. See, e.g., *Watson v. City of Cambridge*, 157 Mass. 561, 32 N.E. 864 (1893)(determination by school officials to exclude child from school "because he was too weak-minded to profit from instruction" not subject to judicial review if made in good faith); *State ex rel. Beattie v. Board of*

ally the severely disabled, from public education. Some explicitly conditioned the educational rights of handicapped children on financial feasibility.<sup>8</sup> The high cost of educating handicapped children, along with limited state and local resources, resulted in inadequate education for many children.<sup>9</sup> Indeed, immediately prior to the EAHCA's passage, fewer than one-half of the nation's approximately eight million handicapped children were being educated adequately, and 1.75 million had been excluded entirely from public education.<sup>10</sup> The policies contained in the EAHCA were derived in large part from landmark cases that recognized a constitutional basis for a right to public education for handicapped children.<sup>11</sup>

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Educ., 169 Wis. 231, 172 N.W. 153 (1919)(exclusion of multihandicapped disruptive child upheld, *inter alia*, on grounds of depressing effect on teacher and other students). See generally THE LEGAL RIGHTS OF HANDICAPPED PERSONS, *supra* note 6, at 53-68; Wald, *The Right to Education*, in 2 LEGAL RIGHTS OF THE MENTALLY HANDICAPPED 833 (B. Ennis & P. Friedman eds. 1973).

8. A complete tabulation of state statutes describing categories of handicapped children excluded from public education, and other statutory limits on state mandates for the education of handicapped children is contained in several places in the legislative history of the EAHCA. See, e.g., S. REP. NO. 168, 94th Cong., 1st Sess. 20-21, reprinted in 1975 U.S. CODE CONG. & AD. NEWS 1425, 1444-45.

9. S. REP. NO. 168, 94 Cong., 1st Sess. 8, reprinted in 1975 U.S. CODE CONG. & AD. NEWS 1425, 1432.

10. *Id.*

11. In 1971, in Pennsylvania Ass'n For Retarded Citizens (PARC) v. Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971)(temporary restraining order and notice of impending settlement), 343 F. Supp. 279 (E.D. Pa. 1972)(final order and injunction), a three-judge federal court approved a consent agreement establishing that every school age, mentally retarded child in Pennsylvania has a right to a public education. The plaintiffs made procedural due process claims, demanding the right to notice and a hearing before exclusion, termination, or classification into special education programs, and equal protection claims, challenging the statutory exclusion of retarded children from public education. Following an extensive trial, both claims were stipulated to by the defendants and ultimately approved by the court.

While *PARC* focused solely on mentally retarded children, it was followed in the same year by a court order by Judge Waddy in *Mills v. Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972). This case extended the principles established in *PARC* to all handicapped children, holding that all handicapped children have a constitutional right to publicly supported education. The court stated:

The defendants are required by the Constitution of the United States . . . to provide a publicly-supported education for these "exceptional" children. Their failure to fulfill this clear duty . . . and to afford them due process hearing and periodical review, cannot be excused by the claim that there are insufficient funds. . . . The inadequacies of the District of Columbia Public School System, whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the . . . handicapped child than on the normal child.

*Id.* at 876.

Following *PARC* and *Mills*, right to education cases were filed on behalf of handicapped children in 27 states and resulted in similar court decisions. See the remarks of Senator Williams

### A. *How the EAHCA Works*

The EAHCA requires that state and local school districts provide a free and appropriate education to all handicapped children. The Act broadly defines educational handicap. Its coverage extends to the mentally retarded, hard-of-hearing, deaf, speech-impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, other health impaired, learning disabled, deaf-blind, and multihandicapped.<sup>12</sup> A key element of most of these definitions is that the handicapping condition "adversely affects educational performance."<sup>13</sup>

The educational needs of children in these different categories vary widely. Moreover, within the total population of special education students are children whose educational handicaps are extraordinarily severe, affecting every aspect of their lives, and others whose handicaps are mild or subtle, making their problems difficult to detect in the classroom but perhaps easier to remedy once detected. Put another way, handicapped students constitute an extremely diverse group, not equally situated with respect to the Act. Many students may benefit from relatively limited and inexpensive special services, such as an hour a week in a "resource room" or a half-hour with a speech therapist. Others, because of the nature and severity of their handicap, may require twenty-four hour custodial supervision and a host of special services to meet their needs.

The EAHCA mandates that states and local school districts identify all handicapped children in need of special services and provide an education individualized to meet the unique needs of each identified child. Under the Act, an appropriate education consists of special education<sup>14</sup> and related services<sup>15</sup> in accordance with a written "individual-

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describing these cases, 121 CONG. REC. S19,487-91 (daily ed. June 18, 1975). It was on the basis of these cases, and out of a desire to provide increased financial assistance to states to achieve full educational opportunity for handicapped students, that Congress enacted the EAHCA. *See, e.g.*, S. REP. NO. 168, 94th Cong., 1st Sess. 7-8, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 1425, 1431-32; 121 CONG. REC. H23,703-06 (daily ed. July 21, 1975)(remarks of Representatives Brademas & Perkins).

12. 20 U.S.C. § 1401(1) (1976)(definitions). For the most part, the Act merely lists handicapped labels. Working definitions of each handicapped designation are provided in the EAHCA regulations. *See* 34 C.F.R. § 300.5 (1981).

13. 34 C.F.R. § 300.5(8)(i) (1981).

14. According to the Act, "[t]he term 'special education' means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions." 20 U.S.C. § 1401(16) (1976). *See also* 34 C.F.R. § 300.14 (1981).

15. The term "related services" means transportation, and such developmental, corrective and

ized education plan" (IEP) especially designed for each child.<sup>16</sup> The precise type and range of educational services that a child may require is not specified by the Act. The only substantive requirement is that each child's education be provided in the "least restrictive environment" possible.<sup>17</sup> This concept, otherwise known as "mainstreaming," is distinct from the goal of equal educational opportunity. It is an integration principle, designed to curtail historical abuses involving the institutionalization and isolation of handicapped children.<sup>18</sup>

The Act provides a host of procedural protections for parents. Before any child may be labelled handicapped, he or she is entitled to diagnostic testing by certified evaluators.<sup>19</sup> Once the evaluation process is completed, schools must develop an IEP. The IEP is intended to be a comprehensive document, specifying the child's precise level of educational performance, long-term educational goals for the year, and measurable short-term educational objectives. The IEP also must detail the number of hours the child will spend in special education, who will provide special education and related services, and a date for reviewing

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other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counselling services, except that such medical services shall be for diagnostic and evaluative purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children. 20 U.S.C. § 1401(17) (1976). *See also* 34 C.F.R. § 300.13 (1981).

16. *See* 20 U.S.C. § 1412(4) (1976); 34 C.F.R. § 300.130 (1981). *See also* 20 U.S.C. § 1401(19) (1976).

17. The least restrictive environment provisions of the Act contemplate that public schools develop a continuum of programs to meet the needs of handicapped children. *See* 34 C.F.R. § 300.500-.556 (1981). Typically, school systems provide full mainstream (regular classroom) programs, "resource rooms" for tutoring or special help on a part-time basis, and "self-contained" classrooms for handicapped children with relatively severe problems. The presumption is that handicapped children will be educated with nonhandicapped children to the maximum extent possible.

18. A useful history of the institutionalization of retarded citizens and discussion of the least restrictive environment principle is contained in *Halderman v. Pennhurst State School & Hospital*, 446 F. Supp. 1295, 1299-1300, 1314-22 (E.D. Pa. 1977). As applied to the education of handicapped children, mainstreaming is an antisegregation principle, analogous to that established in *Brown v. Board of Educ.*, 347 U.S. 483 (1954). As such, its constitutional origins may lie in associational freedoms guaranteed by the first amendment. *See Wechsler, Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959).

19. 20 U.S.C. § 1412(5)(C) (1976). Diagnostic instruments must be validated for the handicapped population being tested. 34 C.F.R. § 300.532(a)(3) (1981). To insure that test information is reasonably up to date, children are entitled to periodic reevaluations. These must be performed "as frequently [as] conditions warrant," or at the request of a teacher or a parent and no less than every three years. 34 C.F.R. § 300.534(b) (1981).



the objectives of the plan.<sup>20</sup> Once the IEP is planned and written, schools must select a classroom placement that can meet the goals specified in the IEP.<sup>21</sup> If there is no classroom within the school district that is appropriate for the child, the district is obliged under the Act to locate other public classrooms or, if necessary, pay for private day or residential programs that can meet the child's needs.<sup>22</sup>

Throughout this four-stage process, parents have access to all educational, psychological, and health records maintained by the school system.<sup>23</sup> They must receive written notice of any educational decision the school intends to make,<sup>24</sup> and may participate in planning and placement team meetings (PPTs) in which educational decisions are reached.<sup>25</sup> In certain limited instances, parents have the right of prior consent before a school system can take any action on behalf of the child.<sup>26</sup> Superimposed on all this are elaborate state administrative and hearing procedures to protect parental rights, and an explicitly granted private right of action to a state court of appeals, or a trial *de novo* in federal district court, if a parent is dissatisfied.<sup>27</sup>

The Act mandates three further objectives. In accepting federal funds to serve handicapped children, states must establish priorities to locate and serve severely disabled students, historically excluded from public education entirely, or relegated to inferior educational institutions, because of the severity of their handicaps.<sup>28</sup> This statement of

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20. IEP policies and procedures have been a subject of considerable strain for participating states and localities. In 1981, the U.S. Office of Education published a detailed policy statement on IEPs, containing sixty questions and answers regarding common problems. See 1 EDUCATION FOR THE HANDICAPPED LAW REPORT (CRR) 103:43-62 (1981) [hereinafter cited as E.H.L.R.]. See also 20 U.S.C. §§ 1401(19), 1412(2)-(6), 1414(a)(5) (1976).

21. 34 C.F.R. § 300.533 (1981). The instructional needs of children are supposed to be identified independently before any consideration is given to the finding of an appropriate program to meet those needs. Unfortunately, the process often does not work this way. See text accompanying note 49 *infra*.

22. 20 U.S.C. § 1401(16) (1976); 34 C.F.R. § 300.14 (1981).

23. 20 U.S.C. § 1415(b)(1)(A) (1976); 34 C.F.R. § 300.502 (1981). The EAHCA also incorporates by reference the procedures from the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g (1976), to ensure the confidentiality and accuracy of educational records pertaining to handicapped children. See 34 C.F.R. §§ 300.562-.565 (1981).

24. 20 U.S.C. § 1415(b)(1)(C) (1976); 34 C.F.R. § 300.504-.505 (1981). Written notice in the parent's native language must be provided. 20 U.S.C. § 1415(b)(1)(D) (1976).

25. 20 U.S.C. §§ 1414(a)(1)(C)(iii) (1976); 34 C.F.R. §§ 300.226, .344-.345 (1981).

26. Under EAHCA regulations, prior parental consent is required in two situations: before conducting a "preplacement evaluation," and before the child's "initial placement" in a special education program. 34 C.F.R. § 300.504(b)(1) (1981).

27. 20 U.S.C. § 1415(e)(2) (1976); 34 C.F.R. § 300.511 (1981).

28. 20 U.S.C. § 1412(3) (1976); 34 C.F.R. § 300.320-.324 (1981).

priority acts as a reparation principle, compelling the states to meet the needs of these unserved and underserved populations.<sup>29</sup> Priority use of federal money for this purpose is required. In the longterm, the Act requires participating states to establish plans to guarantee equal treatment of all handicapped children, "regardless of the nature or severity of their handicaps."<sup>30</sup> There are two objectives expressed in this phrase. One is a nondiscrimination objective, mandating equal treatment among different disability groups. Congress apparently recognized that the total population of handicapped students nationwide is a diverse one, and expressed its desire to avoid preferential treatment of one group at the expense of another.<sup>31</sup> Another objective is for school systems to meet the educational needs of all children, both the mildly and the severely handicapped. This objective does not conflict conceptually with reparation for the most severely handicapped children. States and localities must supplement federal assistance grants with their own funds to meet this long-term goal.

### B. *Fiscal and Administrative Aspects of the Act*

The EAHCA is a categorical assistance grant program. In contrast to the Rehabilitation Act,<sup>32</sup> participation by states in the EAHCA is voluntary. To assist states in meeting the ambitious objectives of the Act, Congress provided federal funds to both state and local educational agencies. It attempted to provide an incentive to states to identify and serve increasing numbers of handicapped children by providing

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29. See notes 8-10 *supra* and accompanying text.

30. 20 U.S.C. § 1412(2)(c) (1976); 34 C.F.R. § 104.33(a) (1981).

31. For example, the conference report on S. 6 states:

The conferees wish to make very clear that . . . it is *not* intended that any one or two categories of disabilities be recognized by . . . any State or local educational agency as the "most severe" categories, but rather that an attempt must be made to reach . . . children with the most severe handicaps *without regard to disability category*.

S. REP. NO. 455, 94th Cong., 1st Sess. 38, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 1480, 1491.

32. Section 504 of The Rehabilitation Act originally was written as an amendment to Titles VI and VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 1971, 1975a-1975d, 2000a-2000h-6 (1976 & Supp. III 1979), and to Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235 (codified in scattered sections of 7 U.S.C., 16 U.S.C., 20 U.S.C., 29 U.S.C., 42 U.S.C. (1976)). Senator Humphrey, who introduced the bill, remarked that section 504 was meant "to guarantee the right of persons with a mental or physical handicap to participate in programs receiving Federal assistance." 118 CONG. REC. S15,947 (daily ed. Sept. 26, 1972), *cited in* R. MARTIN, EDUCATING HANDICAPPED CHILDREN 18 (1979). Compliance with these federal antidiscrimination principles is tied directly to receipt of any federal funds, not simply to any specific educational grants or assistance.

financial awards based on "child counts" in each state and locality.<sup>33</sup> However, the Act is an incentive program that does not, and was not intended to, pay for all the costs of educating handicapped children.<sup>34</sup> Furthermore, not all federal funds are directed to local educational agencies (LEAs) responsible for providing service. Under the current federal allocation formula, seventy-five percent of these funds go directly to localities. The remaining twenty-five percent goes to state education agencies to cover their administrative and program costs.<sup>35</sup> Federal funding, inadequate to begin with, becomes all the more so because sources other than direct service providers receive the funds in question.

In exchange for receipt of inadequate federal dollars, state and local educational agencies subject themselves to stringent oversight by federal agencies and courts. States are required under the Act to submit plans on a yearly basis describing how they will achieve the objectives of the Act.<sup>36</sup> LEAs must in turn prepare local plans documenting their efforts for the respective states.<sup>37</sup> The Office of Special Education

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33. 20 U.S.C. § 1411 (1976 & Supp. III 1979). The Act limits the number of handicapped children for which a state may receive federal funding to 12% of its population aged 5-17. 20 U.S.C. § 1411(a)(5)(A) (1976 & Supp. III 1979). While the Act technically requires a state to serve all handicapped children, the funding formula operates as a disincentive to identify children beyond the 12% ceiling. See Bureau of Education for the Handicapped (BEH) Policy Letter to Martin Hoffenblum, 2 E.H.L.R. 211:81 (Dec. 15, 1977).

34. STATE PROGRAM IMPLEMENTATION STUDIES BRANCH, OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES, SECOND ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF PUBLIC LAW 94-142: THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT (1980) [hereinafter cited as SECOND ANNUAL REPORT]. In 1979, for example, Congress allocated \$804 million to aid states in serving approximately 3.7 million identified special education children nationwide. This figure represents an average allocation per child of \$218, or approximately 6% of what it actually costs to educate the *average* exceptional child. *Id.* at 19. See also Rauth, *What Can Be Expected of the Regular Education Teacher? Ideals and Realities*, 2 EXCEPTIONAL EDUC. Q., Aug. 1981, at 31. This federal allocation is less than 25% of the figure originally recommended by the EAHCA's sponsors in the House of Representatives. Indeed, the only truly controversial question during the legislative debates on the EAHCA involved the level of federal funding for the Act. See, e.g., H.R. REP. NO. 332, 94th Cong., 1st Sess. 59-60 (1975) (remarks of Representatives Quie, Bell, Erlenborn, Buchanan, Pressler, and Goodling); 121 CONG. REC. S19,497-98 (daily ed. June 18, 1975) (remarks of Senators Bellmon, Stafford, and Williams). The final conference report recommended, and the Congress passed, a law containing significantly reduced appropriations. See S. CONF. REP. NO. 664, 94th Cong., 1st Sess. 28, reprinted in 1975 U.S. CODE CONG. & AD. NEWS 1480, 1481.

35. 20 U.S.C. § 1411(c)(1) (1976). See Abeson & Ballard, *State & Federal Policy for Exceptional Children*, in PUBLIC POLICY AND THE EDUCATION OF EXCEPTIONAL CHILDREN 91-92 (F. Weintraub, A. Abeson, J. Ballard & M. Lavar eds. 1976).

36. 20 U.S.C. §§ 1412-1413 (1976 & Supp. III 1979); 34 C.F.R. §§ 300.110-151 (1981).

37. 20 U.S.C. § 1414 (1976 & Supp. III 1979); 34 C.F.R. §§ 300.180-240 (1981).

and Rehabilitative Services (OSERS) engages in yearly site visits to participating states to insure compliance with the Act.<sup>38</sup> OSERS makes policy in several other ways as well, such as policy letters and responses to individual inquiries that raise legal and administrative questions under the Act.<sup>39</sup>

Moreover, OSERS is not the only federal regulatory agency involved in enforcing the Act. Because the Rehabilitation Act and its regulations incorporate by reference many of the basic themes of the Act, the Office for Civil Rights of the United States Department of Education (OCR) also regulates this field.<sup>40</sup> OCR investigates complaints, issues "letters of findings" in response to individual complaints, and initiates "compliance reviews" on its own to examine systemic problems under section 504.<sup>41</sup>

Forty-nine of the fifty states chose to receive federal funds and subject themselves to the compliance mechanisms of the EAHCA in the 1980 fiscal year.<sup>42</sup> When one considers the inadequacy of federal incentive grants, the complex structure of the Act, and its heavy paperwork burdens, one might ask why states would volunteer to participate in this program at all. The reason is clear: because of the overlapping language of its regulations with the EAHCA, the Rehabilitation Act requires states to achieve most of the same objectives under either. States rightly perceive that they might as well accept even limited federal support to educate handicapped children.

### C. *A Framework For Analysis*

To provide a conceptual framework for the discussion that follows, it is useful to summarize six distinct substantive objectives of the

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38. 20 U.S.C. § 1418 (1976). Reports of these annual State Program Administrative Reviews are published at 2A E.H.L.R. 300:01-426:06 (1980).

39. See, e.g., 2 E.H.L.R. 211:01-275 (1979-1981).

40. In particular, regulations under section 504 of the Rehabilitation Act incorporate by reference provisions from the EAHCA for free special educational and related services, 34 C.F.R. § 104.33(c)(1) (1981), an IEP, 34 C.F.R. § 104.33(b)(2) (1981), and due process protections of notice, impartial hearing, and review, 34 C.F.R. § 104.36 (1981). Other protections found in both acts include, *inter alia*: provision of transportation, 34 C.F.R. § 104.33(c)(2) (1981); residential placement as "necessary to provide" a free appropriate public education, 34 C.F.R. § 104.33(c)(3) (1981); a presumption in favor of placements in the least restrictive environment, 34 C.F.R. § 104.34(a)-(b) (1981); and evaluation of handicapped students' needs, 34 C.F.R. § 104.35(b) (1981).

41. OCR's formal and informal policy determinations and responses to inquiries are collected at 2 E.H.L.R. 250:01-257:312 (1979-1981).

42. See also SECOND ANNUAL REPORT, *supra* note 34, at 26-27. The only state that has not chosen to participate in the EAHCA is New Mexico.

EAHCA. The Act requires: (1) identification of all handicapped children in need of special education and related services; (2) mainstreaming, the educating of handicapped children to the maximum extent feasible with nonhandicapped children; (3) reparation, the priority use of federal funds to locate and serve severely handicapped children; (4) equal educational opportunity for both the mildly and severely handicapped; (5) equal treatment among different disability groups; and (6) equal educational opportunity for all handicapped children vis-à-vis all nonhandicapped children.<sup>43</sup>

## II. TRIAGE IN SPECIAL EDUCATION—THE NATIONAL EFFECTS OF SCARCE RESOURCES

The EAHCA and its promulgating regulations establish a highly specific and detailed code expressing ambitious objectives. Courts generally have been enforcing these federal objectives. But given limited resources, states and localities must make difficult triage decisions in special education, decisions that inevitably compromise one or more of the Act's major goals.

To a certain degree, the EAHCA has been a victim of its own success. The data suggests, for example, that Congress's goal of identifying and serving previously unidentified handicapped children largely is being met. In the first three years after the EAHCA regulations became effective, there was an increase of nearly 328,000 handicapped children served nationwide under the Act. This increase came at a time when overall public school enrollment declined by over six percent. Over 3.8 million children, close to ten percent of all school age children nationwide, now are identified under the Act as eligible to receive special education services.<sup>44</sup> During this period, local school budgets for special education rose at the rate of fourteen percent per year, twice as rapidly as overall operating budgets for public schools nationwide.<sup>45</sup>

This national trend of identifying increasing numbers of children as exceptional, and the concomitant increases in the cost of educating them, has caused substantial implementation problems under the Act. The most significant are inadequate local programs and shortages of special education teachers and related services personnel in many

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43. This article does not address the procedural or remedies issues arising under the Act. See *Note, A Confusion of Rights and Remedies: Tatro v. Texas*, 14 CONN. L. REV. 585 (1982).

44. SECOND ANNUAL REPORT, *supra* note 34, at 107-08.

45. Rauth, *supra* note 34, at 31.

states.<sup>46</sup> One of the Act's major objectives is for each local school district to develop a variety of educational placements<sup>47</sup> to meet the needs of each handicapped child. In many rural and inner city districts, this has proved absolutely impossible.<sup>48</sup>

The inadequacy of programs and personnel varies considerably from locality to locality. But where scarcity exists, it hinders achievement of several of the Act's objectives. Children are placed on waiting lists for identification. Program placement is based on the availability of particular programs rather than on the needs of the child.<sup>49</sup> Other problems in enforcing the Act have been identified recently.<sup>50</sup> But if one studies the administrative hearings and litigated cases in the field, four critical problems emerge. First, disputes have arisen regarding the identification of handicapped students and the determination of who is entitled to services under the Act. Second, litigation has proliferated in the area of residential programming, typically the most expensive special education service. Third, many cases have been litigated with regard to the related services provisions of the Act. Fourth, and most pervasively, controversy has developed regarding the meaning and limits of the Act's key phrase, "appropriate education."

#### *A. The Identification Objective and the Effect of Entry Level Restrictions on Mildly Handicapped Students*

Since the Act's passage, controversies have emerged in several states over handicap definitions and questions of particular groups' entitlement to services. There are two principal reasons why identification disputes arise. One is the lack of consensus among educators about the nature and definition of certain educational handicaps, which is reflected by the imprecision of federal regulations defining those handi-

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46. Indeed, 22 states were criticized in 1980 by OSERS for failing to develop adequate programs on a statewide basis. And, although the numbers of special education teachers and related services personnel hired by local school districts has increased each year since the Act's passage, hiring practices have not kept pace with increased needs. SECOND ANNUAL REPORT, *supra* note 34, at 65-69.

47. 20 U.S.C. § 1414(a)(1)(C) (1976); 34 C.F.R. § 300.222 (1981).

48. See, e.g., Shell, *Straining the System: Serving Low-Incidence Handicapped Children in an Urban School System*, 2 EXCEPTIONAL EDUC. Q., Aug. 1981, at 4.

49. SECOND ANNUAL REPORT, *supra* note 34, at 3, 62.

50. Additional problems identified by OSERS in its Report on the implementation of the EAHCA include the following: only 2.6% of the population aged three to five is currently being served; parent participation in PPTs is poor; state monitoring procedures are weak in the areas of IEPs, procedural safeguards, use of the least restrictive environment concept, and protection in the evaluation process. *Id.* at 3-4, 10-13.

caps. Another is the inadequacy of resources in many states. Resource limitations exert substantial pressure on states to restrict *entry* into special education programs. But entry level restrictions compromise the Act's objective of educating all children regardless of the severity of their handicaps, and also are perceived as discriminatory against particular disability groups.

The most notable example of entry level restrictions involves children with "specific learning disabilities." Nationwide, learning disabled children constitute the largest category of special education students, comprising over one-quarter of all handicapped children in the country.<sup>51</sup> But it has proven difficult to establish a workable limiting definition of specific learning disabilities. Assessing the existence of learning disabilities involves at least three discrete steps: measuring intellectual potential or expected performance, assessing actual academic performance, and determining whether the discrepancy between expected and actual performance is serious enough to warrant remedial intervention.<sup>52</sup> Each step involves problems of measurement and definition. As a result, estimates as to the number of learning disabled children in the population vary widely, ranging from one percent to thirty percent of the total school population depending on the criteria used to measure eligibility.<sup>53</sup> Every child has academic strengths and weaknesses. The question that states and localities face is how substantial any child's academic weaknesses must be to justify receipt of special services.

States and localities have responded to this issue in different ways. In an attempt to distinguish between the "slow learner" and the learning disabled child, some have taken the position that a child must have at least average intelligence before he or she can be designated as learning disabled.<sup>54</sup> Others have attempted to supply more specificity to

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51. *Id.* at 161.

52. Regulations define a specific learning disability as:

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

34 C.F.R. § 300.5(b)(9) (1981)(emphasis added).

53. J. LERNER, *LEARNING DISABILITIES: THEORIES, DIAGNOSIS AND TEACHING STRATEGIES* 15-16 (3d ed. 1981).

54. BEH Policy Letter to Susan E. O'Grady, Esq., 2 E.H.L.R. 211:158 (Jan. 10, 1980).

the definition of specific learning disability by adopting formulas to measure the discrepancy between intellectual potential and academic performance.<sup>55</sup>

New York state has been involved in protracted, and as yet unsettled, litigation over the validity of such a definition. In *Riley v. Ambach*,<sup>56</sup> a group of eighteen learning disabled children and their parents brought an action in federal court seeking an injunction against enforcement of three New York state special education regulations. One of these regulations required that learning disabled children exhibit a fifty percent or more discrepancy between expected and actual achievement as measured by standardized tests.<sup>57</sup> The plaintiffs claimed that New York's policies, taken together, indicated "that the state regards learning disabilities as a 'mild' handicapping condition and has relegated this disability to a low priority, 'second-class' status."<sup>58</sup> The district court declared the fifty percent rule invalid and enjoined its enforcement. In reaching its conclusion, it relied upon two principal points: the inaccuracy and imprecision of current standardized testing procedures, and the fact that in adopting EAHCA regulations, HEW itself had rejected a similar guideline as unworkable.<sup>59</sup>

While the *Riley* court did not invalidate the New York policy as a

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55. See BEH Policy Letter to William & Kathleen Hudson, 2 E.H.L.R. 211:56 (June 10, 1978).

56. 508 F. Supp. 1222 (E.D.N.Y. 1980), *rev'd* 3 E.H.L.R. 552:410 (2d Cir. May 19, 1981)(failure to exhaust state administrative remedies).

57. *Id.* The plaintiffs also challenged the Commissioner of Education's disapproval of all residential schooling for learning disabled children and his policy that all school districts serving learning disabled children in excess of two percent of their school populations would be subjected to an annual site visit. *Id.*

58. *Id.* at 1229.

59. *Id.* at 1242-43.

Following a review of objections to the formula, HEW rejected the rule and the formula. 42 Fed. Reg. 25084, December 29, 1977 . . . Regarding the formula, HEW commented: "Many commentators objected to the formula proposed for establishing a severe discrepancy between ability and achievement. Their concerns fell primarily into four areas: (1) The inappropriateness of attempting to reduce the behavior of children to numbers; (2) the psychometric and statistical inadequacy of the procedure; (3) the fear that use of the formula might easily lend itself to inappropriate use to the detriment of handicapped children; (4) the inappropriateness of using a single formula for children of all ages."

*Id.*

It also has been noted that a formula requiring a 50% discrepancy between ability and achievement might lead to a "yo-yo" syndrome, whereby a student with a greater than 50% discrepancy would receive services until that level fell to below 50%; services then would be discontinued, the gap would increase, and a student again would qualify for services. See BEH Policy Letter to William & Kathleen Hudson, 2 E.H.L.R. 211:56 (June 10, 1978).



form of triage, impermissible under the Act, it might have done so. The plaintiffs' evidence suggested that the policy was an attempt to conserve limited resources by reducing the number of mildly learning disabled children in the state.<sup>60</sup> The effort has been necessarily controversial for two reasons. First, it exclusively affects one disability group. As such, it has been perceived as seriously compromising the Act's goal of affording equal treatment among all handicapped groups. Second, as an entry level restriction, it disfavors children with relatively mild or moderate handicaps. As such, it conflicts with the Act's goal of providing an appropriate education for both the mildly and severely disabled.

### *B. Residential Programming Disputes—The Tension Between Reparation and Mainstreaming*

Whereas entry level restrictions deny services to mildly handicapped children, residential programming restrictions and disputes tend to affect children with the most severe and disabling handicaps. The Act's mainstreaming objective mandates educating children to the maximum extent feasible in the least restrictive environment. Separate residential schooling is therefore considered a choice of last resort for the most severely disabled children, those who cannot reasonably profit from education in public school. Residential programming is the most problematic and frequently litigated special education issue in the nation.<sup>61</sup> The EAHCA regulations provide that if residential placement for a handicapped child is "necessary to provide special education and related services" to that child, it must be provided at no cost to the parents.<sup>62</sup> But residential programs exert great financial pressures on local school budgets. The result is that both the educational necessity of residential programs and the fiscal arrangements regarding these programs are often the subject of controversy.

Since the Act's adoption, many states have been criticized for their policies and practices regarding residential programming. Education agencies in several states have attempted to establish inter-agency agreements with other state agencies to share the cost of residential

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60. The *Riley* plaintiffs offered evidence that in the one-year period after adoption of the Commissioner's 50% discrepancy policy, the number of identified learning disabled students in New York dropped from 28,172 to 12,167. 508 F. Supp. at 1240.

61. COUNCIL FOR EXCEPTIONAL CHILDREN, 13 UPDATE NO. 4, at 5 (1982). See Mooney & Aronson, *Solomon Revisited: Separating Educational and Other Than Educational Needs in Special Education Residential Placements*, 14 CONN. L. REV. 531 (1982).

62. 34 C.F.R. § 300.302 (1981).

programs for handicapped children, an approach supported by EAHCA regulations.<sup>63</sup> Yet few have done so successfully, with much litigation the result.<sup>64</sup> In these cases, parents often find themselves in the middle of lengthy contests over the relative responsibilities of participating agencies and face frustrating delays in services.<sup>65</sup>

In some states, residential programming has not been provided at no cost to parents, despite the language of the EAHCA regulations.<sup>66</sup> Several states have been criticized by OSERS or OCR for improperly charging parents for such items as transportation, raw food costs, and other unspecified fees.<sup>67</sup> Other states have attempted to erect barriers to residential programming by prohibiting all out-of-state placements.<sup>68</sup> Illinois was criticized by OCR recently for attempting to place a \$4500 limit on the amount expendable for any special education child, a

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63. 34 C.F.R. § 300.600 comment (1981).

64. See, e.g., *Kruelle v. New Castle County School Dist.*, 642 F.2d 687 (3d Cir. 1981); *William D. v. Shedd*, No. H-81-165 (D. Conn. Aug. 7, 1981); *Papacoda v. Connecticut*, 528 F. Supp. 68 (D. Conn. 1981); *Erdman v. Connecticut*, 3 E.H.L.R. 552:218 (D. Conn. Aug. 22, 1980); *North v. District of Columbia Bd. of Educ.*, 471 F. Supp. 136 (D.D.C. 1979). These cases are analyzed at text accompanying notes 154-65 *infra*.

65. Disagreements over the limits of educational responsibility underlie many of the disputes over residential programming. Several states have attempted to distinguish residential placements made for educational purposes from those made for other than educational purposes. In the few cases involving this issue that have reached the courts, the question is not whether residential placement is necessary for the child, but whether some reasonable theoretical *and* financial limit can be set upon public schools' responsibility for these placements. One federal district judge criticized these practices:

It is unfortunate that the two agencies of the District having responsibility for plaintiff's care are seeking to shift the responsibility to each other—the Board of Education claiming that plaintiff's problems are emotional, and the Department of Human Resources asserting that they are educational and further that it will not undertake to tend to his treatment without a formal finding that the parents have neglected him. It may be that the fault lies with the antiquated state of the District of Columbia laws; but in any event, it is unfortunate that the assistance of this Court had to be invoked under federal statutes to resolve what essentially are internal bureaucratic disputes.

*North v. District of Columbia Bd. of Educ.*, 471 F. Supp. 136, 141 (D.D.C. 1979).

66. See, e.g., OCR Complaint Letter of Finding (LOF) (School Dist. #220 (Ill.)), 2 E.H.L.R. 257:200 (Feb. 12, 1981)(parents may not be required to use insurance to pay for residential programs); OCR Complaint LOF (Pa. Dep't of Educ.), 2 E.H.L.R. 257:106 (Apr. 7, 1980)(state violated § 504 by failing to pay full residential costs, resulting in private school billing parents fixed fee for unspecified services); OCR Complaint LOF (La. Dep't of Educ.), 2 E.H.L.R. 257:100 (Jan. 30, 1980)(state must pay for educational costs in both educational and "treatment and care" placements); OCR Complaint LOF (N.H. State Dep't. of Educ.), 2 E.H.L.R. 257:13 (Jan. 23, 1979)(districts required under § 504 to pay excess costs of residential placement after State SEA cap reached).

67. See, e.g., OCR Complaint LOF (Md. Dep't of Educ.), 2 E.H.L.R. 257:97 (Feb. 26, 1980).

68. See, e.g., OCR Complaint LOF (Scottsbluff (NE) School Dist. No. 32), 2 E.H.L.R. 257:21 (Aug. 14, 1978).

figure far less than the typical cost of a residential placement.<sup>69</sup>

These residential programming cases constitute the best available evidence of how limited resources frustrate EAHCA objectives. The financial impact of residential placements on school districts, especially small ones, can be catastrophic. School administrators ask themselves why public schools should be responsible for room and board costs of residential placements when parents of nonhandicapped children assume the room and board costs of their own children. Residential placements for handicapped children divert substantial funds otherwise available for nonhandicapped and less seriously disabled children. Courts and federal regulatory agencies uniformly have invalidated restrictive policies of state and local school districts in this area.<sup>70</sup> Nevertheless, because of the highly individualized nature of many of these cases, resistance continues at the local level.

The early seminal civil rights cases in the field of education of handicapped children<sup>71</sup> broadly defined educational responsibility for the severely retarded to mean instruction in the most basic of life skills, such as eating, toileting, and self-care.<sup>72</sup> Congress's statement in the opening paragraph of the Act made it clear that the EAHCA adopted this broad standard.<sup>73</sup> In justifying this expansive goal, Congress concluded that it would be less expensive in the long run for states to maximize the potential of severely handicapped children in order to avoid a lifetime of custodial care in institutional facilities.<sup>74</sup>

This view of educational responsibility conflicts markedly with the fiscal limits that schools across the nation now face. Public educational facilities are under fire in popular journals for failing to meet the most rudimentary educational goals of regular students. With declining SAT scores, apparent widespread functional illiteracy, and "bright flight"<sup>75</sup> from our public schools, it is increasingly difficult for many educators to justify spending large sums for the more arcane, complex, and, many believe, perhaps irremediable problems of the seriously handicapped.<sup>76</sup>

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69. OCR Complaint LOF (Ill. Bd. of Educ.), 2 E.H.L.R. 257:82 (Feb. 27, 1980).

70. See notes 64-65 *supra*.

71. See note 11 *supra*.

72. See, e.g., *PARC*, 343 F. Supp. at 296.

73. Pub. L. No. 94-142, § 3, 89 Stat. 774 (amending 20 U.S.C. § 1401 (1976)).

74. See, e.g., S. REP. NO. 168, 94th Cong., 1st Sess. 9, reprinted in 1975 U.S. CODE CONG. & AD. NEWS 1425, 1433. This important objective of the EAHCA recently was noted in *Kruelle v. New Castle County School Dist.*, 642 F.2d 687 (3d Cir. 1981). See also Weicker, *The Need for a Strong Education for All Handicapped Children Act*, 14 CONN. L. REV. 471 (1982).

75. *Why Public Schools Fail*, NEWSWEEK, Apr. 20, 1981, at 65-66.

76. See, e.g., OCR Complaint LOF (Oyster River (N.H.) School Dist.), 2 E.H.L.R. 257:228

The most commonly litigated issue involves the educational necessity of residential programming for children. It is here that the objectives of reparation and mainstreaming may collide.<sup>77</sup> Recent findings indicate that the mainstreaming requirements of the Act are being satisfied. Indeed, one could go further and say that mainstreaming, of all the Act's objectives, has been a resounding success. Some ninety-four percent of all handicapped children nationwide now are being educated in regular public schools.<sup>78</sup> Yet an ironic turn of events may have transpired here. Mainstreaming originally was conceived to protect children from unnecessary isolation. But because mainstreaming is usually less expensive than residential or private day programming, it is often cheaper to utilize the least restrictive environment concept to maintain handicapped children in public schools. Thus, in the many judicial actions filed around the nation pertaining to the least restrictive environment, nearly seven times as many parents seek education outside public schools than seek a less restrictive setting within public schools.<sup>79</sup> It is possible that because of financial pressures, mainstreaming is succeeding too well and the needs of severely handicapped children, who

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(Jan. 29, 1981)(School terminated profoundly retarded child from all special education, arguing he could not benefit from education. Held: violated both § 504 and the EAHCA.).

77. The mainstreaming concept has three distinct components: a programmatic component, a geographic component, and, in some states at least, a policy preference for public over private educational facilities. Programatically, mainstreaming means educating handicapped children in regular education classrooms with nonhandicapped children, or, where necessary, segregating them from the nonhandicapped children for as limited periods as possible. *See* note 17 *supra*. Geographically, mainstreaming requires that schools consider the proximity of the chosen classroom or school to a child's residence, resulting in preferences for neighborhood schools over more remote ones, for classrooms in contiguous towns over more distant ones, for in-state placements over out-of-state placements. SECOND ANNUAL REPORT, *supra* note 34, at 81.

Certain states have added to their least restrictive environment policies the additional requirement that local school districts consider and reject as inappropriate all public placements before any private placements can be considered. *See, e.g.*, DIVISION OF INSTRUCTIONAL SERVICES, BUREAU OF PUPIL PERSONNEL AND SPECIAL EDUCATIONAL SERVICES, CONNECTICUT STATE DEPARTMENT OF EDUCATION, MEMORANDUM ON POLICY CLARIFICATION OF STATE APPROVAL OF PLACEMENTS OF SPECIAL EDUCATION STUDENTS IN PRIVATE SCHOOLS (1980):

Local school districts must examine all placement options in the following order when it becomes necessary to educate a handicapped child out of district:

- A. appropriate program options within the local school district or in another school district;
- B. education service centers (ESC) or other regional programs;
- C. approved private facilities for special education within Connecticut;
- D. out of state private facilities approved for special education by the state in which that school is located.

78. SECOND ANNUAL REPORT, *supra* note 34, at 5.

79. COUNCIL FOR EXCEPTIONAL CHILDREN, 13 UPDATE NO. 4, at 5 (1982).

cannot reasonably function except in residential schools, are being compromised.<sup>80</sup>

### C. *Related Services Disputes*

The Act defines free and appropriate education to include "special education and related services" provided at public expense in conformity with an IEP.<sup>81</sup> According to the Act, the term "related services"

means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counselling services, except that medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.<sup>82</sup>

Curiously, there was virtually no discussion during legislative debates on the Act regarding the objectives and limits of this expansive language.<sup>83</sup>

One point, however, generally has been accepted: the specific related services listed in the Act and its enforcing regulations were not intended to be exhaustive, but merely suggestive of the kinds of supportive services that schools, in appropriate circumstances, must provide to handicapped children. For example, neither catheterization nor sign-interpretation for the deaf are listed services, yet leading court decisions have concluded that they must be provided by public school personnel.<sup>84</sup> And at the state and federal administrative level, parents have litigated, often successfully, their children's rights to a bewildering array of services, including music therapy,<sup>85</sup> "therapeutic recreation,"<sup>86</sup>

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80. *But see* text accompanying notes 144-45 *infra*.

81. 20 U.S.C. § 1401(18) (1976).

82. 20 U.S.C. § 1401(17) (1976).

83. Senator Humphrey did comment on the floor that almost three million handicapped, while enrolled in public schools, "receive none of the special services that they require in order to make education a meaningful experience." 121 CONG. REC. S10,982 (daily ed. June 18, 1975).

84. *See* 20 U.S.C. § 1401(5), (13) (1976); 34 C.F.R. § 300.6 (1981). *See also* Tokarcik v. Forest Hills School Dist., 665 F.2d 443 (3d Cir. 1981); Rowley v. Board of Educ., 632 F.2d 945 (2d Cir. 1980), *cert. granted*, 101 S. Ct. 1343 (1981); Tatro v. Texas, 625 F.2d 557 (5th Cir. 1980); Note, *A Confusion of Rights and Remedies: Tatro v. Texas*, 14 CONN. L. REV. 585 (1982).

85. Mass. State Educ. Agency (SEA) Dec. No. 1554 (Joseph L. v. Boston Pub. Schools), 3

myofunctional therapy,<sup>87</sup> sign language training for parents,<sup>88</sup> detoxification,<sup>89</sup> and the assistance of a "visual computer."<sup>90</sup> Thoughtful educators have expressed serious concern over the placement of increasing responsibility on schools for services historically delivered by other agencies.<sup>91</sup>

Litigation involving related services has resulted almost uniformly in decisions upholding the broad requirements of the Act.<sup>92</sup> Yet as a practical consequence of scarce resources, tensions continue to exist between local practices and federal expectations, leading to triage decisions at the state or local level. For example, even as to expressly listed related services, such as occupational therapy and physical therapy, states and local school districts sometimes have adopted restrictive policies.<sup>93</sup> And several states have adopted policies limiting public school responsibility to provide psychotherapy to children with serious emo-

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E.H.L.R. 501:133 (Jan. 25, 1979)(parents' request for music therapy held a required related service for autistic child).

86. OCR Complaint LOF (Westside (NE) Community School Dist. 66), 3 E.H.L.R. 257:23 (Aug. 28, 1978)(recreation and swimming held a related service).

87. Cal. SEA Dec. No. 107, 3 E.H.L.R. 502:101 (June 11, 1980)(parents request for myofunctional therapy held not a related service because not required for child to benefit from special education under 34 C.F.R. § 300.13 (1980)).

88. Cal. SEA Dec. No. SH-221 (*In re* San Mateo County Sup't of Schools), 3 E.H.L.R. 502:199 (Nov. 10, 1980)(parents' request for sign language training for themselves held a related service under 34 C.F.R. § 300.13(6) (1980)).

89. Cal. SEA Dec. No. SH-176 (*In re* Capistrano USD), 3 E.H.L.R. 502:129 (July 25, 1980)(parents request for residential placement denied, but detoxification held a required related service under 34 C.F.R. § 300.13 (1980)).

90. Ga. SEA Dec. No. 1980-31 (*In re* Robin S.), 3 E.H.L.R. 502:232 (Jan. 13, 1980)(parents' request for visual computer for visually impaired child denied; school not obligated to provide "best" education).

91. See, e.g., Schonberg & Melander, Reflections Upon the Trend of Education to Assume Comprehensive Responsibility for Child Development and Welfare (Dec. 17, 1980)(discussion paper presented to the Committee to Study Special Educational Placement of the Conn. General Assembly).

92. See, e.g., *Papacoda v. Connecticut*, 528 F. Supp. 68 (D. Conn. 1981); *Woods v. Pittman*, 3 E.H.L.R. 552:442 (D. Miss. June 17, 1981). See also note 84 *supra*.

93. Several years ago, the California Department of Education contended that occupational therapy and physical therapy may be construed as either a medical or an educational service, a position inconsistent with the plain language of the Act and subsequently disapproved by the BEH. BEH Policy Letter to Gordon Duck, 2 E.H.L.R. 211:148 (Nov. 9, 1979). Certain school districts in Pennsylvania for a time attempted to limit occupational and physical therapy services to consultation and evaluation only. OSERS Policy Letter to Stuart A. Law, 2 E.H.L.R. 211:219 (July 29, 1980). Some Connecticut towns have informal policies limiting occupational therapy and physical therapy to severely physically handicapped children, with the result that independent therapists may be reluctant to advocate services to children with real but more moderate needs. Telephone interview with Easter Seal Foundation, Meriden, Conn. (Apr. 11, 1980).

tional problems.<sup>94</sup>

The impact of these exclusionary policies varies. Clearly, a decision to limit occupational or physical therapy disfavors children with physical handicaps, while a decision to limit psychotherapy disfavors those with emotional handicaps. Less overtly, the choice of policy will have differing effects on the mildly and severely handicapped. For example, Connecticut's informal practices governing occupational therapy and physical therapy favor seriously physically handicapped students over more moderately physically handicapped students.

#### D. *The Severely Versus the Mildly Handicapped—An Aside on Cost-Efficiency Issues*

When the needs of mildly and severely handicapped children are pitted against one another, how should choices be made? Thus far, little has been said about cost-efficiency issues. Two different kinds of cost-efficiency questions should be distinguished. One concerns whether intervention works at all, and the other asks whether the handicap is worth the *social* cost of remediation, assuming the effectiveness of intervention.

It would be convenient if we could prioritize EAHCA objectives on the basis of the efficacy of intervention for particular disability groups. Unfortunately, this is not possible at the present time.<sup>95</sup> There are many studies that attempt to demonstrate the efficacy of certain kinds of treatment for certain populations.<sup>96</sup> But given the great variety of handicapping conditions and interventions, and the continuing lack of knowledge about the effectiveness of many of these interventions, it is impossible to establish a coherent special education policy based

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94. See, e.g., Cal. SEA Dec. No. 51-1-74 (*In re* Palo Alto City Unified School Dist.), 3 E.H.L.R. 502:186 (May 27, 1980); Conn. SEA Dec. No. 80-93 (Bill D.), 3 E.H.L.R. 502:259 (Jan. 19, 1981); Conn. SEA Dec. No. 79-38 (Edward K.), 3 E.H.L.R. 501:315 (Feb. 8, 1980); Conn. SEA Dec. No. 79-06 (Alison I.), 3 E.H.L.R. 501:257 (Nov. 30, 1979); Ga. SEA Dec. No. 1980-28 (*In re* Richard H.), 3 E.H.L.R. 502:203 (Nov. 13, 1980). This issue is analyzed in Part III of this article.

95. As Kirp, Buss & Kuriloff have observed:

The response to almost any interesting question concerning the education of the handicapped is either that the answer is unknown or that no generalizable beneficial effect of a given treatment can be demonstrated. This lack of knowledge, which is hardly peculiar to special education, makes it difficult to predict the consequences of any policy change.

Kirp, Buss, & Kuriloff, *Legal Reform of Special Education: Empirical Studies and Procedural Proposals*, 62 CAL. L. REV. 40, 47-48 (1974).

96. See, e.g., B. Smith, *The Argument For Early Intervention*, ERIC Clearinghouse on Handicapped & Gifted Children Fact Sheet (1981) (collecting sources on the efficacy of early intervention in the treatment of handicapping conditions).

upon efficacy principles.

This fact has important implications for the EAHCA goal of providing reparation to our most severely handicapped children. There are many unanswered questions about the efficacy of special education for the severely and profoundly impaired. School administrators wonder whether intervention for the most severely disabled is an efficient use of resources. Yet the EAHCA and the judicial decisions that produced it were premised on the assumption that intervention for the severely handicapped is effective. As one federal court has noted, "the language and the legislative history of the Act simply do not entertain the possibility that some children may be untrainable."<sup>97</sup>

The goal of serving mildly handicapped children, while raising efficacy questions, also raises social utility questions. For example, a federal agency concluded in a recent policy decision that children with lisps and stutters must be provided speech therapy as a related service, even if these children have no other special education problems and their speech handicaps have no impact on their academic performance in the classroom.<sup>98</sup> We may assume that lisps and stutters are remediable given appropriate intervention.<sup>99</sup> The question here is whether these impediments are worth the social cost of remediation. Again, the EAHCA goal of providing an appropriate education to all handicapped children, irrespective of the severity of the handicap, legally forecloses states and localities from answering that question in the negative.

#### E. *Appropriate Education—Toward A Meaningful Concept of Equal Educational Opportunity*

Nowhere does the EAHCA specify what is meant by an "appropriate" education for handicapped children. This omission is a major shortcoming of the Act, and it has caused some of the most difficult theoretical disputes since its passage. Several of the early commentators spoke of a right to a "minimally adequate" education, but subsequent decisions have not supported this view.<sup>100</sup> The regulations to the Rehabilitation Act adopt an equal protection standard, requiring

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97. *Kruelle v. New Castle County School Dist.*, 642 F.2d 687, 695 (3d Cir. 1981).

98. BEH Policy Letter to Stan Dublinske, 2 E.H.L.R. 211:202 (May 30, 1980).

99. Alvord, *Innovations in Speech Therapy: A Cost Effective Program*, 43 EXCEPTIONAL CHILDREN No. 8 (1977); Manning, Trutna & Shaw, *Verbal v. Tangible Reward for Children Who Stutter*, 41 J. SPEECH & HEARING RESEARCH No. 1 (1976).

100. See, e.g., Levinson, *The Right to a Minimally Adequate Education for Learning Disabled Children*, 12 VAL. U.L. REV. 253 (1977).



schools to provide handicapped children an education designed to meet their needs "as adequately as the needs of nonhandicapped persons are met."<sup>101</sup> Recently, courts have incorporated this standard by reference into the EAHCA,<sup>102</sup> which is not surprising given the constitutional equal protection underpinnings of the Act. Yet the legislative history on this point is inconclusive,<sup>103</sup> and it is difficult to give content to this standard in many special education cases.

The term "equal" is sometimes colloquially used to denote "sameness."<sup>104</sup> That usage is clearly of no relevance here, as no one speaks of the same education for handicapped and nonhandicapped children. By definition, mandated services for exceptional children are both very different from, and far more expensive than, the services provided to nonhandicapped children.<sup>105</sup>

Alternatively, equal educational opportunity could be taken to denote an *equal* right to receive *some* education, rather than a right to equal education.<sup>106</sup> This narrow definition would be consistent with one theme of the early civil rights cases—invalidating the outright exclusion of handicapped students from public education. But as interpreted by courts, the EAHCA rejects this minimum definition, and aims for a more ambitious objective: the right to an equal education.

Defining equal educational opportunity for handicapped students vis-à-vis nonhandicapped students is no easy task. A useful starting

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101. 34 C.F.R. § 104.33(b) (1981).

102. *Rowley v. Board of Educ.*, 642 F.2d 945, 952 (2d Cir.), *cert. granted*, 101 S. Ct. 1343 (1981). See Haggerty & Sacks, *Education of the Handicapped: Towards a Definition of an Appropriate Education*, 50 TEMP. L.Q. 961, 986 (1977).

103. To be sure, during the debates on the EAHCA, several congressmen referred to the Act as an effort to afford handicapped children equal educational opportunity. See e.g., 121 CONG. REC. S10,961 (daily ed. June 18, 1975)(remarks of Senator Stafford); 121 CONG. REC. H11,353 (Nov. 18, 1975)(remarks of Representative Mink). Moreover, there were numerous references in the congressional reports and debates to the decision in *Mills v. Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972), which relied upon an equal protection analysis. See note 11 *supra*. It was far more common, however, for congressmen to speak of affording handicapped children "full" educational opportunity or simply appropriate education. See, e.g., S. REP. NO. 168, 94th Cong., 1st Sess. 18 (1975); 121 CONG. REC. S19,482 (daily ed. Nov. 19, 1975)(remarks of Representative Randolph); 121 CONG. REC. S10,980 (daily ed. June 18, 1975)(remarks of Senator Cranston); 121 CONG. REC. S10,971 (daily ed. June 18, 1975)(remarks of Senator Javits).

104. H. Bedau, *Egalitarianism and the Idea of Equality*, in IX EQUALITY 5 (J. Pennock & J. Chapman eds. 1967).

105. Kirp, Buss & Kuriloff, *supra* note 95, at 52; Krass, *The Right to Public Education for Handicapped Children*, 4 EDUC. FOR HANDICAPPED L.F. 1016, 1019 (1976); Rauth, *supra* note 34, at 31.

106. See Haggerty & Sacks, *supra* note 102, at 974-75; Krass, *supra* note 105, at 1024.

point for analysis is *Rowley v. Board of Education*,<sup>107</sup> a leading Second Circuit opinion now pending review by the United States Supreme Court. *Rowley* involved the claimed right of a very bright, hearing impaired child to a full-time sign interpreter. Amy Rowley was proceeding easily from grade to grade in a regular education classroom, relying upon her excellent lip reading ability. Nevertheless, expert testimony established that without the aid of a sign interpreter, Amy could discriminate only approximately sixty percent of the information conveyed in the classroom. Conceding that even without a sign interpreter, she was receiving an *adequate* education, the Court of Appeals for the Second Circuit nevertheless required provision of a sign interpreter's services on a full-time basis. The court found that Amy was entitled to receive one hundred percent of the auditory information conveyed in the classroom in order to achieve a right *equivalent* to other children to maximize her individual potential.<sup>108</sup>

The *Rowley* decision can be analyzed in two ways. One can focus on Amy's right to achieve an equivalent educational output, or on Amy's right to receive an equivalent educational input in the classroom.<sup>109</sup> Focusing on output, one might characterize the court's holding as follows: talented handicapped children must be provided opportunities equivalent to nonhandicapped children to achieve their own full potential. Focusing on input, one could conclude that handicapped children must be given opportunities equivalent to those provided nonhandicapped children to perceive and discriminate educational information in the classroom.

The *Rowley* decision is of great symbolic significance. But, for many handicapped children, its principles are impossible to apply directly. For the profoundly impaired, it is unrealistic to attempt to guarantee the same educational outcomes or performance. For these children, it is also meaningless to speak of equivalent opportunities to receive educational input. The kinds of tasks for which severely handicapped children are trained, and the kinds of educational information they receive in the classroom, are not comparable to the education provided nonhandicapped children. One can cite *Rowley* and mechanically state that profoundly handicapped children have a right to maximize their educational potential equivalent to that of nonhandicapped children. But measuring such a right, or recognizing such a program when

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107. 632 F.2d 945 (2d Cir. 1980), *cert. granted*, 101 S. Ct. 1343 (1981).

108. 632 F.2d at 948.

109. Haggerty & Sacks, *supra* note 102, at 964.

provided, is difficult at best.

Another leading case, *Battle v. Pennsylvania*,<sup>110</sup> illustrates this dilemma. In *Battle*, the Court of Appeals for the Third Circuit invalidated a Pennsylvania state education policy providing that all children, including handicapped children, were entitled to education for only 180 days, the normal academic year. The court held that this blanket rule violated the EAHCA's objective of ensuring individualized programming for handicapped children.<sup>111</sup> The court further held that a limited class of severely handicapped children would suffer irreparable regression during the summer period as a consequence of Pennsylvania's policy.<sup>112</sup> The court developed a "regression-recoupment" test for adjudicating the right of handicapped children to extended-year programming.<sup>113</sup>

The actual holding of the *Battle* decision proved far easier for the court to reach than its attempt to articulate a standard of appropriate education for the parties. Two of the three judges on the Third Circuit panel addressed this overriding question.<sup>114</sup> One judge concluded that absolute maximization of individual potential was the intended objective of the EAHCA and that the limited financial resources of a state never may be considered in defining an appropriate educational program for the handicapped child.<sup>115</sup> The difficulty with this "ideal" or "best" education approach is that, on its face, it is inequitable to non-handicapped students, guaranteeing a quality of education to handicapped children not offered to others.

The second opinion was the more interesting. Attempting to apply equal protection principles and conceding that the blanket state policy at issue in the case was invalid, the concurring opinion suggested that

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110. 629 F.2d 269 (3d Cir. 1980).

111. *Id.* at 280-81.

112. *Id.* at 275. *See id.* at 282 (Van Dusen, J., concurring).

113. The regression recoupment standard developed by the court refers to the regression a child suffers over the summer months without school or special services, and the amount of time necessary for the child to recoup those losses and return to the performance level of the end of the previous school year. Every child suffers some regression without education. But, according to the court, regression for the severely handicapped can be far more severe and may result in irreparable educational harm. *Id.* at 276 n.9.

114. Judge Hunter discussed at length, but never resolved, the definition of appropriate education in his majority opinion. He concluded only that the Act places ultimate responsibility on the state to define both educational policy and allocation. *Id.* at 277-78. In her dissenting opinion, Judge Sloviter strongly criticized Judge Hunter's failure to come to grips with a definition of the "principal goal of the statute." *Id.* at 284 (Sloviter, J., dissenting).

115. *Id.* at 285-86 (Sloviter, J., dissenting).

local school districts legitimately might eliminate summer programs for handicapped students as long as they did so for valid fiscal reasons and in a way that did not discriminate against handicapped students.<sup>116</sup> The opinion concluded by suggesting that eliminating all summer programs for the handicapped and nonhandicapped alike might be a legitimate policy for school districts to adopt.<sup>117</sup>

This approach has a certain surface appeal. But it fallaciously assumes that all per capita increases in educational costs yield equivalent benefits to students—equivalent “opportunities for self-maximization.” The major premise of *Battle* is precisely the opposite. The marginal utility of summer programs for profoundly handicapped students is not comparable to the marginal utility of, say, summer tutoring programs for children with minor learning problems. If our society is truly concerned about making equitable allocations in the face of financial limitations, we must measure the benefits of particular programs and make decisions on the basis of their *actual* utility to individual children.

How does one measure the efficacy of speech therapy for a student with a stutter against the efficacy of adding fifty social studies texts to the library? In comparing educational programs offered to handicapped and nonhandicapped students to determine whether all groups are being afforded equivalent opportunities to maximize their potential, we are forced to make *ad hoc* judgments about the relative importance of particular services to very different children. Ultimately, these are value choices.

The equivalency problems that are raised when one tries to ensure equal treatment among handicapped groups are just as difficult. Again, the Act does not contemplate giving all handicapped students the same services; the services required for severely retarded and learning disabled children, for example, are very different. Rather, the Act is premised upon notions of proportional equality<sup>118</sup>—the distribution of educational services according to the particular needs of particular

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116. The opinion noted:

Thus, the state education specialists must first attempt to plan adequate programs to meet the needs of individual handicapped children without regard to an inflexible 180-day limit, and then must attempt to fund the programs to the maximum extent feasible. If, thereafter, the state administrators are in some instances unable due to budgetary restraints to furnish the full programs they have devised for each individual, such program cutbacks imposed by legitimate funding limitations will not in themselves place the educational authorities in noncompliance with the statute.

*Id.* at 283 (Van Dusen, J., concurring)(citations omitted).

117. *Id.* at 283 & n.5.

118. *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1166-69 (1969).

disability groups. Again, these distributions must be evaluated in terms of their relative effectiveness for the particular group served. In the absence of definitive empirical data, arguments will persist over the value and necessity of particular services and programs.

In a dissenting opinion in *Rowley*, Judge Walter Mansfield strongly criticized the equal protection standard of appropriate education adopted by the Second Circuit on the grounds that it is judicially unmanageable and has no basis in the legislative history of the Act.<sup>119</sup> Judge Mansfield preferred a more "practical" standard. Reviewing the Act's legislative history, he concluded that its goal was simply to provide an education that would enable each handicapped child to become as independent and productive a member of society as reasonably possible, without regard to maximization of individual self-potential or to evaluation of comparative efforts made for nonhandicapped children.<sup>120</sup> This standard does have some basis in the legislative history of the Act, and has been adopted by at least one other court.<sup>121</sup>

But this formulation does not avoid the difficulties of defining an appropriate education under the EAHCA. Indeed, it is difficult to determine what effect the formulation will have if adopted by the United States Supreme Court. On the one hand, Judge Mansfield's proposed standard seems to state a policy preference for serving severely handicapped children. Under the formulation, handicapped children with relatively mild handicaps, achieving at a reasonably productive and independent level albeit below their own measured potentials, might well be denied special services, making more money available to serve the severely disabled. The efforts required by education agencies to render severely handicapped children independent and productive citizens arguably would continue to require the investment of substantial fiscal resources.

If, on the other hand, one focuses on the "reasonableness" of educational efforts required to produce productive and independent citizens, adoption of Judge Mansfield's formulation might result in a diminished commitment to the needs of the severely disabled. This reasonableness component of Judge Mansfield's formulation could encourage school systems to undertake cost-benefit analyses of children's capacity for independence and productivity rather than attempt to maximize the potential of each child, resulting in earlier decisions to

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119. 632 F.2d at 952-53 (Mansfield, J., dissenting).

120. *Id.* at 952.

121. *See, e.g.,* *Armstrong v. Kline*, 476 F. Supp. 583, 603-04 (E.D. Pa. 1979).

terminate educational efforts for the severely handicapped.

Judge Mansfield's proposed formulation thus does not avoid the interpretation problems that now exist under the generally accepted EAHCA standard of appropriate education. It simply substitutes two new interpretation questions: what are the minimum standards defining a "productive" and "independent" citizenry? How much effort may "reasonably" be required of public schools to train productive and independent students? Such questions are likely to cause continuing difficulty and controversy given insufficient resources for special education.

### III. TRAGIC CHOICES IN SPECIAL EDUCATION—CONNECTICUT'S POLICIES REGARDING SERIOUSLY EMOTIONALLY DISTURBED CHILDREN

Since coming to Connecticut, I have been struck by this state's practices and policies regarding seriously emotionally disturbed children. These policies are shared by other states. Nevertheless, taken as a whole, they have a discernible disparate impact on seriously emotionally disturbed children.<sup>122</sup> They compromise two EAHCA objectives, reparation and equal treatment among different disability groups. In this section, I examine why this is so.

#### A. *Definitional Problems*

Nationwide, seriously emotionally disturbed children constitute the fourth largest disability group under the Act.<sup>123</sup> The EAHCA regulatory definition of "serious emotional disturbance" is slightly over 100 words long.<sup>124</sup> Yet it is a portfolio definition, describing a multitude of

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122. Connecticut has had a progressive record in the field of special education, evincing both a financial and philosophical commitment to the needs of handicapped children. Connecticut's special education laws predate federal legislation by approximately seven years. See CONN. GEN. STAT. §§ 10-76a to -76j (1981).

123. SECOND ANNUAL REPORT, *supra* note 34, at 161.

124. The regulations to the Act define "seriously emotionally disturbed" as follows:

(i) The term means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree, *which adversely affects educational performance*:

(A) An inability to learn which cannot be explained by intellectual, sensory, or health factors;

(B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;

(C) Inappropriate types of behavior or feelings under normal circumstances;

(D) A general pervasive mood of unhappiness or depression;

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.

traits and personality habits. The designation describes autistic and psychotic children on one end of the spectrum, drug abusers and delinquents on the other.<sup>125</sup> The only common denominator among "seriously emotionally disturbed" children is the existence of some form of observed deviant behavior in the classroom that negatively affects "educational" performance.

There are two problems in this definition. First, "normality" and "deviance" are not absolutes. The incidence of serious emotional disturbance varies substantially from community to community and state to state,<sup>126</sup> and disputes sometimes arise over whether individual children warrant the label and the service. Second, neither the EAHCA nor its regulations define the phrase "adversely affects educational performance." As a consequence, educators disagree whether children's emotional problems must have a demonstrable impact on *academic* performance or whether, conversely, social, emotional, and behavioral difficulties by themselves warrant remedial intervention.<sup>127</sup> Courts have not yet addressed this issue directly.

Both Connecticut's residential programming and psychotherapy policies raise this question: Under what circumstances and to what extent should public schools be held accountable for addressing the social and emotional problems of seriously disturbed children?

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(ii) The term includes children who are schizophrenic or autistic. The term does not include children who are socially maladjusted, unless it is determined that they are seriously emotionally disturbed.

34 C.F.R. § 300.5(b)(8) (1981)(emphasis added).

125. *Id.* See Weinstein, *supra* note 5, at 988.

126. For example, in 1979-1980, identified emotionally disturbed children constituted 0.1% of the school age population in Arkansas and 2.62% of the school age children in Delaware. See SECOND ANNUAL REPORT, *supra* note 34, at 166 (Table D-1.3). See also CONN. STATE DEP'T OF EDUC., THE SPECIAL EDUCATION STUDENT IN CONNECTICUT PUBLIC SCHOOLS—SCHOOL YEAR 1979-80, at 15-19 (1980)(comparative prevalence of emotional disturbance in Connecticut towns).

127. The Government Accounting Office recently issued a report analyzing the "adverse effect on educational performance" test as it relates to children with mild and moderate speech impairments. The report recommended that Congress clarify and restrict this phrase to apply only where a handicap causes academic detriment. U.S. GEN. ACCT. OFFICE, REPORT TO THE CONGRESS: UNANSWERED QUESTIONS ON EDUCATING HANDICAPPED CHILDREN IN LOCAL PUBLIC SCHOOLS 52 (1981). For a response taking the position that "there is no universal definition of educational performance" and that "most pragmatic educators and parents would not equate educational performance with academic performance only," see AMERICAN SPEECH-LANGUAGE-HEARING ASS'N, REPORT ON ISSUES AFFECTING THE COMMUNICATIVELY IMPAIRED, GOVERNMENTAL AFFAIRS REV. (1981). The scope of the term "educational performance" is a pervasive and controversial issue under the EAHCA.

## B. Residential Programming Disputes in Connecticut

The EAHCA requires school districts to provide and pay for residential programs if they are necessary for handicapped children to benefit from special education. The premise of the EAHCA is that where a child's handicaps are so severe as to require the consistency and structure of a twenty-four hour program in order for the child to make educational progress, that program must be provided at no cost to the parents.<sup>128</sup>

In contrast to this mandate, the Connecticut legislature has enacted a statutory provision distinguishing between so-called "educational" and "other than educational" residential placements. Connecticut law provides that if a child needs a residential program for educational reasons, then the local school district is responsible for all costs, including special education instructional costs and room and board. When residential placements are deemed to be for other than educational reasons, the financial responsibility of local school districts for these placements is limited to instructional costs.<sup>129</sup> For the purposes of this statute, other than educational services are defined to include "medical, psychiatric and institutional care."<sup>130</sup> The implementing regulations to this statute create an explicit balancing test. The question in each case is whether the educational reasons for a special education residential placement *predominate* over other, noneducational reasons.<sup>131</sup>

Connecticut's statutory scheme has given rise to several problems. It has been criticized by federal regulatory agencies as being inconsistent with the federal mandate that the full cost of residential programs, including room and board, be provided at no cost if necessary to enable

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128. See text accompanying note 62 *supra*.

129. CONN. GEN. STAT. § 10-76d(e) (1981) provides, in part:

Any local or regional board of education which provides special education . . . shall provide such transportation, tuition, room and board and other items as are necessary to the provision of such special education *except for children who are placed in a residential facility because of the need for services other than educational services, in which case the financial responsibility of the school district . . . shall be limited to the reasonable costs of special education instruction as defined in the regulations of the state board of education.*

(emphasis added).

130. CONN. GEN. STAT. § 10-76d(d) (1981).

131. See CONN. AGENCIES REGS., § 10-76a-1, which defines the "at no cost" provisions of Connecticut law. This regulation states: "A board of education shall bear full responsibility for the total cost of any program or placement made *primarily* for special education reasons." (emphasis added).



a child to benefit from special education.<sup>132</sup> It has been a source of substantial conflict between education and social welfare agencies, principally the Department of Children and Youth Services (DCYS).<sup>133</sup> The most common disputes, however, result from the difficulty in clearly distinguishing educational from other than educational placements. One result is that children needing residential programming often are shunted back and forth between state agencies unable to agree upon their respective responsibilities. Another is that parents who have no wish to litigate often are forced to do so.<sup>133.1</sup>

A survey of the 1980 State Department of Education Special Education Hearing Decisions discloses several interesting facts. Disputes over private education programs, mostly residential in nature, ac-

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132. See OCR Complaint LOF (Simsbury (CT) Pub. Schools), 2 E.H.L.R. 257:176 (June 16, 1980)(LEA violated § 504 by attempting to divide special education program into educational and noneducational needs); OCR Complaint LOF (Bethel (CT) Bd. of Educ.), 2 E.H.L.R. 257:55 (Nov. 27, 1979)(school's policy of refusing to pay child's residential placement costs, including costs related to emotional needs, violates § 504; "educational needs are not defined in purely academic or special education terms").

133. Under Connecticut law, the Commissioner of DCYS has responsibility for the care and welfare of all children committed to the department as abused, dependent, neglected, uncared-for, or delinquent children. See generally CONN. GEN. STAT. §§ 17-32, 46b-129, 46b-140(b) (1981). In addition to this responsibility, the Commissioner is authorized by statute to assume responsibility for children not committed to the agency "whom he finds in need of . . . care and protection." CONN. GEN. STAT. § 17-32(b) (1981)(emphasis added). DCYS policies regarding this program are contained in DIVISION OF PROTECTIVE AND CHILDREN'S SERVICES, DCYS, BULL. No. 25 (1980).

133.1. When a determination is made by a local school district that a residential placement is other than educational, parents are faced with three choices. They may litigate that determination, pay room and board expenses themselves, or seek alternative funding sources. For the past several years, alternative funding has been provided through DCYS and its "Noncommitted Treatment Program." Children admitted to this program receive funding from DCYS on a sliding scale basis, based on parental ability to contribute to room and board costs. See *Id.* at 535-36. As a practical matter, the program is not available to parents of financial means. The program is widely utilized and LEAs habitually look to the Noncommitted Treatment Program for financial assistance in residential programming cases. Yet, even for parents who will incur no financial obligation, there are substantial disincentives to being routed into the Noncommitted Treatment Program. First, in contrast to "educational reasons" placements, which under state statute must be provided to students until "the age of 21 or graduation from high school whichever comes first," CONN. GEN. STAT. § 10-76a(b) (1981), the Noncommitted Treatment Program lapses at age eighteen. DIVISION OF PROTECTIVE AND CHILDREN'S SERVICES, DCYS, BULL. No. 25, at 533 (1980). Second, DCYS has placed a two-year limit on funding for residential placements. *Id.*

In 1979, a group of parents brought a largely unsuccessful class action lawsuit, challenging both DCYS's policy of charging parents for residential program costs and procedural problems arising from interagency disputes between DCYS and LEAs in Connecticut. See Michael P. v. Maloney, 3 E.H.L.R. 551:155 (D. Conn. Mar. 21, 1979)(consent decree). Residential program disputes between DCYS and Connecticut LEAs continue and have become so problematic that DCYS presently is considering elimination of the Noncommitted Treatment Program.

counted for most of the administrative special education litigation in 1980.<sup>134</sup> Some of these cases raised questions regarding the child's need for residential programming. More often, however, the issue was purely fiscal. Of 101 hearings held during calendar year 1980, thirty-eight involved the question whether residential placements, basically agreed by all parties to be necessary for a child, were educational or other than educational within the meaning of the Connecticut statute.<sup>135</sup>

Moreover, thirty-five, or all but three, of these cases involved children with serious emotional problems. This is not to say that all thirty-five children had a primary label of seriously emotionally disturbed, but rather that in thirty-five cases, serious emotional or psychological problems were noted by the hearing officer and played an explicit or apparent role in the decisionmaking process.<sup>136</sup> National and state sta-

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134. Of 101 hearings held in 1980, 65 involved disputes over private day or residential programs. CONN. STATE DEP'T OF EDUC. DUE PROCESS UNIT, ANALYSIS OF 1980 SPECIAL EDUCATION HEARINGS 2-3 (undated). A complete compendia of State Department of Education Special Education Hearing Decisions are maintained by the Due Process Unit of the Connecticut State Department of Education in Hartford. These decisions provide a wealth of information on problem areas in Connecticut special education, and are available upon request. A complete set of these materials also is maintained by the University of Connecticut School of Law Civil Clinic.

The amount of administrative litigation in the field has increased substantially since 1978, the first year in which administrative hearings were held. In 1978, 32 hearings were held; in 1979, 55 hearings, and in 1980, 101 hearings *Id.* At the time the research for this article was performed, the figures for 1981 were not yet complete. The following discussion is based on a survey of 1980 decisions only.

135. Of the 38 cases, parents prevailed in nine cases. *See, e.g.,* Conn. SEA Dec. No. 80-101 (Mark B.) (Jan. 30, 1981); Conn. SEA Dec. No. 80-83 (Philip B.) (Dec. 4, 1980); Conn. SEA Dec. No. 80-76 (Luanna Q.) (Oct. 29, 1980); Conn. SEA Dec. No. 80-52 (Michael F.) (July 31, 1980).

School districts prevailed in 29 cases. *See, e.g.,* Conn. SEA Dec. No. 80-95 (Lori B.) (Jan 14, 1981); Conn. SEA Dec. No. 80-89 (Scott L.) (Jan. 8, 1981); Conn. SEA Dec. No. 80-86 (Ronald V.) (Dec. 18, 1980); Conn. SEA Dec. No. 80-79 (Chris S.) (Nov. 21, 1980); Conn. SEA Dec. No. 80-68 (Gordon B.) (Sept. 22, 1980); Conn. SEA Dec. No. 80-59 (Kecia S.) (Aug. 18, 1980); Conn. SEA Dec. No. 80-51 (Charles M.) (July 31, 1980); Conn. SEA Dec. No. 80-37 (Lori W.) (June 27, 1980); Conn. SEA Dec. No. 80-35 (Debby L.) (June 11, 1980); Conn. SEA Dec. No. 80-30 (Michael S.) (June 2, 1980); Conn. SEA Dec. No. 80-20 (Mark Q.) (Apr. 25, 1980); Conn. SEA Dec. No. 80-15 (Stephen M.) (Mar. 27, 1980); Conn. SEA Dec. No. 80-09 (Karl E.) (Mar. 14, 1980); Conn. SEA Dec. No. 80-07 (Anthony C.) (Feb. 21, 1980).

136. Statements of this sort can be somewhat misleading; the cases are in fact quite complex. For one thing, the kind, prominence, and severity of emotional problems exhibited by children in these cases vary greatly. Some were identified as psychotic (Conn. SEA Dec. No. 80-33 (Beth Ann C.) (June 10, 1980); Conn. SEA Dec. No. 80-76 (Luanna G.) (Oct. 29, 1980)); others as anti-social (Conn. SEA Dec. No. 80-93 (Bill D.) (Jan. 19, 1981); Conn. SEA Dec. No. 80-88 (Jeff. E.) (Dec. 19, 1981)). Some were profoundly multihandicapped with severe academic deficits and severe secondary emotional problems (Conn. SEA Dec. No. 80-52 (Michael T.) (July 31, 1980); Conn. SEA Dec. No. 80-38 (Robert R.) (June 26, 1980)); others were classified as truant or disruptive students, with relatively mild academic problems (Conn. SEA Dec. No. 80-45 (Paul

tistics indicate that emotionally disturbed children are placed in separate day and residential settings in greater absolute numbers than most other disability groups.<sup>137</sup> A review of the Connecticut hearing decisions suggests that even these statistics are understated. That is, many seriously handicapped children, although not labeled emotionally disturbed, exhibit emotional and behavioral problems that contribute substantially to their need for residential education. To the extent this is true, the Connecticut residential programming statute, apparently neutral on its face as to different disability groups, has an overwhelming impact on children with a particular type of handicapping condition.

In 1980, children in Connecticut requesting residential programming fared very poorly in administrative hearings. In the thirty-eight cases involving fiscal disputes over residential programs—disputes whether to characterize a placement educational or other than educational under the Connecticut statute—school districts prevailed in over seventy-five percent of the cases.<sup>138</sup> In interpreting the statute, hearing officers are emphasizing several themes that make it difficult for parents to recover the full costs of residential school for their children.

### 1. Children's Problems Beyond School

The first theme in these cases involves the extent to which the child's handicapping condition affects his or her functioning outside of school. To the extent the children are identified as having *more than* educational problems, their placements are being treated as noneducational. These cases may be classified further into two categories. One category includes children who engage in aggressive or delinquent be-

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L.) (July 17, 1980)).

137. Nationwide, 213,000 school aged handicapped children were placed nationally in separate educational programs in 1977-1978. Over 39,000 of these children were identified as emotionally disturbed. In the 1977 school year, 14.3% of all identified emotionally disturbed children were placed in separate programs; 6.1% of all identified handicapped children were so placed. See SECOND ANNUAL REPORT, *supra* note 34, at 176, 178. Connecticut statistics are even more dramatic. In 1979-1980, only 5% of all identified handicapped children were placed in separate schools, hospitals, and institutions. Although emotionally disturbed children comprised only 16.5% of the total population of handicapped children, they constituted 45% of all the children educated in separate schools and facilities. See CONN. STATE DEP'T OF EDUC., THE SPECIAL EDUCATION STUDENT IN CONNECTICUT PUBLIC SCHOOLS—SCHOOL YEAR 1979-80, at 3, 23.

138. See note 135 *supra*. One fascinating aspect of these decisions is that the relative intelligence of these children has a significant impact on the results. Retarded children requesting residential placement, even those with emotional and behavioral problems, fared much better than children of average or above average intelligence. Hearing officers seemed to find it easier to conclude that residential placements of retarded children are more educational than the residential placements of other disability groups.

havior outside of school. The second category includes children who engage in bizarre, disruptive, psychotic, but not delinquent, behavior. In every case where it was found that a child was acting aggressively outside of school or was involved in destructive or antisocial acts, the child's placement was determined to be other than educational.<sup>139</sup> Even in the absence of antisocial or aggressive behavior, children with psychological problems affecting all aspects of their lives fared poorly.<sup>140</sup>

Aggressive, antisocial children pose difficult problems in residential programming disputes. By definition, such children engage in behavior that constitutes or could constitute a basis for juvenile court intervention. At the same time, they may be incapable of meaningful academic achievement in a day facility. In other words, educational and corrective purposes for placing these children in residential programs may exist simultaneously. The Connecticut statute, however, has made these cases relatively easy. When litigated, they result in routine determinations that residential programming is other than educational.

A far different type of case is presented by the child who has significant learning and emotional problems, but has not exhibited dangerous or antisocial behavior. These cases are often decided on the puzzling ground that if the child's problems are affecting the child not only in school but in every aspect of the child's life, residential placement is other than educational. Consider, for example, the case of *Richard M.*,<sup>141</sup> a twelve-year-old learning disabled and emotionally disturbed child. Richard was identified as learning disabled in 1976. From 1976 to 1980, he received learning disabilities programming in his local school district. During these years, he was described as moody, sullen, and having poor peer relationships. His academic performance was below grade level throughout these years. In 1980, Richard's emotional problems worsened. He began to engage in suicidal gesturing and self-mutilating behavior in school. School social work intervention was not helpful. At the suggestion of independent psychiatrists, psychologists, and educators, he was placed in a residential private school. The local school district agreed to the placement and consented to payment of educational costs, but refused to pay room and board costs on the

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139. See, e.g., Conn. SEA Dec. No. 80-64 (Cherie P.) (Sept. 10, 1980); Conn. SEA Dec. No. 80-45 (Paul L.) (July 17, 1980); Conn. SEA Dec. No. 80-24 (Jimmy F.) (May 12, 1980).

140. See, e.g., Conn. SEA Dec. No. 80-50 (Peter M.) (July 28, 1980); Conn. SEA Dec. No. 80-33 (Beth Ann C.) (June 10, 1980).

141. Conn. SEA Dec. No. 80-96 (Jan. 19, 1981). This case has been appealed to the United States District Court for the District of Connecticut, No. H-81-94 (filed Mar. 18, 1981).

ground that Richard's was an "other than educational" placement. Conceding that Richard's emotional problems were long-standing, that they had an impact on his educational progress throughout his school career, and that the private residential program was appropriate for Richard, the state hearing officer nevertheless agreed with the school district. "Richard's needs," the hearing officer concluded, "are primarily other than educational. [They] are impacting upon every area of his life."<sup>142</sup>

*Richard M.* is a fairly typical administrative decision in Connecticut.<sup>143</sup> Its approach is a direct outgrowth of the balancing test created by the statute, and illustrates the state's attempt to define a reasonable limit to educational responsibility. Yet it directly conflicts with the objectives of federal law. Any child with significant psychological problems will manifest those problems outside of school. So, too, a blind or deaf or physically handicapped child is blind or deaf or physically handicapped outside of school. Cases like *Richard M.* suggest that when a child's emotional problems become too *severe*, even if they directly affect the child's academic performance, that child will be denied a free and appropriate education. This result is contrary to the EAHCA goal of providing an appropriate education to severely handicapped children on a priority basis.

## 2. Parental and Home Issues

A second, closely related theme of these decisions involves parental ability to control and cope with a child's handicapping condition at home. Although the evidentiary relevance of this inquiry is not made explicit in any of the cases, a parent's ability to cope with a child's handicap is relevant in evaluating the parent's motive for seeking residential placement. Motive, in turn, is related to the question whether there is a real educational necessity for the placement.

The most basic concept of the EAHCA, the ideal of a free and appropriate education for all children, was left largely undefined by Congress.<sup>144</sup> Rather, Congress chose to place primary reliance on pro-

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142. Conn. SEA Dec. No. 80-96 (Jan. 19, 1981), at 3.

143. Similar cases include Conn. SEA Dec. No. 80-97 (Ernest G.) (Jan. 19, 1981); Conn. SEA Dec. No. 80-64 (Cherie P.) (Sept. 10, 1980); Conn. SEA Dec. No. 80-45 (Paul L.) (July 17, 1980); Conn. SEA Dec. No. 80-36 (Jeffrey C.) (June 13, 1980); Conn. SEA Dec. No. 80-23 (Steven D.) (May 9, 1980); Conn. SEA Dec. No. 80-13 (Richard S.) (Mar. 27, 1980).

144. See Note, *Enforcing the Right to an "Appropriate" Education: The Education for all Handicapped Children Act of 1975*, 92 HARV. L. REV. 1103 (1979). Given the diversity and complexity of educational programs addressed under the Act, Congress believed it impractical to

viding individual procedural safeguards to parents. There is nothing wrong with relegating decisionmaking authority to parents. In our society, we assume for the most part that parents will make rational decisions in the best interests of their children.<sup>145</sup> Yet this statutory structure poses potential conflict of interest hazards. Where a child might be capable of making appropriate educational progress in a day facility, but his parents no longer are willing to try to cope with the child at home, the interests of parent and child are at odds.

Theoretically, hearing officers should reject residential placement altogether in cases where the educational interests of the child appropriately could be met in a day program, but for *illegitimate* parental reasons residential placement is sought. The least restrictive environment provisions of both state and federal laws mandate such a result. However, these cases call for sensitive and difficult judgments. In many marginal cases, no bright line separates the child who "needs" residential placement from the child who does not. In close cases, practical politics often control. Taking the child's school and family situation as a whole, school districts concede the need for residential placement and hearing officers approve them as other than educational.<sup>146</sup>

Nevertheless, hearing officers often do not distinguish adequately between legitimate and illegitimate parental motivation in these cases. The position of some parents that they can no longer cope at home with their handicapped children may, in some objective sense, be unreasonable. In other cases, however, a child's handicapping condition will be so severe that no reasonable parent could be expected to cope with the child. Admittedly, the boundaries of reasonableness are difficult to determine. But even in cases where the hearing officers' conclusions suggest that no reasonable parent could control the particular child at home, residential programming is sometimes deemed other than educational.<sup>147</sup>

Furthermore, focusing on parental ability to cope with the child's handicapping condition at home sometimes skews the results when it seems clear that a child needs residential programming to make any

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legislate, by statute or regulation, specific educational programs for handicapped children. The procedures afforded to parents provide a substitute means to ensure appropriate programming for handicapped children. *Id.* at 1106, 1109.

145. This presumption was recently explained and given wide scope by the Supreme Court in *Parham v. J.R.*, 442 U.S. 584, 601-03 (1978).

146. See, e.g., Conn. SEA Dec. No. 80-68 (Gordon B.) (Sept. 22, 1980).

147. Compare Conn. SEA Dec. No. 80-24 (Jimmy F.) (May 12, 1980) with Conn. SEA Dec. No. 80-59 (Kecia S.) (Aug. 18, 1980).

significant academic progress. *Thomas M.*,<sup>148</sup> for example, involved a twelve-year-old, severely multihandicapped child who was retarded, emotionally disturbed, aphasic, and hyperactive. He engaged in "autistic-like" behavior and had no communication skills whatsoever. His parents sought residential schooling because no day placement had ever been satisfactory for him. The hearing officer agreed that no prior placement had ever been satisfactory and that Thomas needed a highly structured, twenty-four hour program. Nevertheless, the decision concluded that the placement was "primarily for non-educational reasons, to provide *some structure and behavior management in non-school hours.*"<sup>149</sup> The decision focused on the parents' inability to control their son at home, enabling the hearing officer to suggest that Thomas M.'s need for twenty-four hour management was a *parental*, not an educational, concern.

Cases like *Thomas M.* stand the EAHCA on its head. The Act's premise is that when a child's handicaps are so severe as to require the consistency and structure of a twenty-four hour program for the child to make reasonable educational progress, that program must be provided at no cost. Inevitably, such children are difficult to manage at home. But under the Act, this difficulty establishes the theoretical basis for residential placement, not a rationale for treating a child's institutionalization as beyond the limits of educational responsibility.

### 3. The Dichotomy Between Emotional and Educational Needs

A third, and perhaps the most pervasive, theme emerging from the Connecticut administrative decisions is the dichotomy between the emotional and educational needs of children. Hearing officers frequently focus on the nature of the services being provided to the child by the residential school. If the services are designed to address emotional needs or are "therapeutic" in nature, the placement is usually deemed other than educational.

*Bill D.*<sup>150</sup> and *John Peter M.*<sup>151</sup> serve as fairly typical examples of this dichotomy. *Bill D.* involved a sixteen-year-old psychotic child with a long history of "bizarre and deviant behaviors," learning disabilities, and a four-year delay in basic academic skills. In 1980, he was placed in a residential school for emotionally disturbed children. Noting that

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148. Conn. SEA Dec. No. 80-77 (Nov. 17, 1980).

149. *Id.* at 5 (emphasis added).

150. Conn. SEA Dec. No. 80-93 (Jan. 19, 1981).

151. Conn. SEA Dec. No. 80-50 (July 28, 1980).

the academic program of the residential school was similar to one available in Bill's high school and that the residential school was not unique except for the therapeutic services offered, the decision concluded that the placement was other than educational.<sup>152</sup> Similarly, *John Peter M.* involved a severely emotionally disturbed seven-year-old with significant academic problems. Concluding that his residential program was other than educational, the hearing officer held that the local "board of education could provide an appropriate educational program for John Peter were it *not for his therapeutic needs.*"<sup>153</sup>

### C. Judicial Decisions

The dichotomy between the emotional and educational needs of children is a product of Connecticut's statute and regulations stating that "primarily psychiatric" placements are not the responsibility of schools. It is a distinction that several other states have tried to adopt. Nevertheless, federal courts have uniformly rejected education agency attempts to distinguish emotional, or therapeutic, or parenting, or medical needs from educational needs and thereby avoid fiscal responsibility for necessary residential programs.

The first decision to address the question of educational and other than educational placements was *North v. District of Columbia Board of Education*.<sup>154</sup> This case provided a blueprint for subsequent decisions. *North* involved a multiply handicapped sixteen-year-old diagnosed as epileptic, emotionally disturbed, and learning disabled. His medical, emotional, and educational problems were long-standing and severe, resulting in his expulsion from a residential special education school and a concession by his parents that they were totally unable to cope with him. All parties to the litigation agreed that he needed a new residential program. The District of Columbia Board of Education contended, however, that while his emotional difficulties demanded residential treatment, his educational needs could be met by a special education day program. As a consequence, they instigated a neglect proceeding against his parents in order to compel the District of Co-

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152. Conn. SEA Dec. No. 80-93, at 8.

153. Conn. SEA Dec. No. 80-50, at 6 (emphasis added). Schools often argue that they could provide appropriate programs were it not for a child's particular handicap, but this hypothesizing about what a child would be like without his or her handicap is irrelevant. The federal statutes demand that schools provide programs which address children's handicaps. See *Papacoda v. Connecticut*, 528 F. Supp. 68, 72 (D. Conn. 1981).

154. 471 F. Supp. 136 (D.D.C. 1979).



lumbia Department of Human Resources to fund the residential placement.<sup>155</sup>

The court rejected the Board of Education's attempt to separate the plaintiff's emotional and educational needs. While expressing some concern about federal courts' intrusions into the *parens patriae* role of local authorities,<sup>156</sup> the court criticized the efforts of the two local agencies to shift responsibility for the plaintiff's care to one another. It stressed that both the EAHCA and the Rehabilitation Act were designed explicitly to avoid such bureaucratic disputes. Quoting a comment to the EAHCA regulations, the court concluded that responsibility for residential placement of children with a combination of educational, medical, and therapeutic needs devolved on the District's Department of Education as the central agency overseeing the education of handicapped children.<sup>157</sup> The court further suggested that while in some cases it might be possible to "determine whether the social, emotional, medical or educational problems are dominant and to assign responsibility for placement and treatment to the agency operating in the area of that problem," in the present case all of the plaintiff's needs were "so intimately intertwined that realistically it is not possible to perform the Solomon-like task of separating them."<sup>158</sup>

*North* has been closely followed in four subsequent federal decisions. In *Kruelle v. New Castle County School District*,<sup>159</sup> a case involving a profoundly retarded child with cerebral palsy and serious emotional problems, the Court of Appeals for the Third Circuit rejected a Delaware school district's claim that residential placement for social and emotional problems provided services "more in the nature of parenting than education." The court held that the unseverability of the plaintiff's medical, social, and emotional needs was the very basis for holding that the services were an essential prerequisite for learning.<sup>160</sup>

In three Connecticut cases, *Erdman v. Connecticut*,<sup>161</sup> *Papacoda v. Connecticut*,<sup>162</sup> and *William D. v. Shedd*,<sup>163</sup> federal courts have fol-

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155. *Id.* at 138.

156. *Id.* at 140.

157. *Id.*

158. *Id.* at 141. See Mooney & Aronson, *supra* note 61, at 547-49.

159. 642 F.2d 687 (3d Cir. 1981).

160. *Id.* at 694.

161. 3 E.H.L.R. 552:218 (D. Conn. Aug. 22, 1980).

162. 528 F. Supp. 68 (D. Conn. 1981).

163. No. H-81-165 (D. Conn. Aug. 7, 1981).

lowed the lead of *North* and *Kruelle*, and established two standards for residential placement. The primary standard, taken directly from EAHCA regulations, requires a determination of whether residential placement is necessary to provide appropriate special education and related services to a handicapped child.<sup>164</sup> The other standard, taken from *North* and *Kruelle*, suggests that in most cases it is impossible to separate emotional from educational problems; where they are intertwined, local school districts are legally obligated to provide residential placement at no cost to the parents of the handicapped child.<sup>165</sup> The Connecticut cases thus appear to repudiate the balancing test created by the Connecticut statute and suggest that the statute may be invalid on its face. Nevertheless, the statute is still applied in Connecticut.

#### D. *The Problem of Psychotherapy*

Whether intensive mental health services (psychotherapy) are or should be considered related services within the meaning of the EAHCA is a controversial policy question, not only in Connecticut, but across the nation. As a legal question, the controversy derives in part from an ambiguity in the Act's definition of related services. The Act creates a distinction between medical services (including, presumably, psychiatric services), and other supportive services, including psychological services and counseling to which children may be entitled. Services deemed medical in nature are limited to diagnosis and evaluation. Other supportive services are not so limited.<sup>166</sup>

The EAHCA regulations are similar but more explicit. Under the regulations, medical services are limited to diagnosis, but both psychological services and counseling services include treatment as well. Psychological services are defined under EAHCA regulations to include "[p]lanning and managing a program of psychological services including psychological counseling for children and parents."<sup>167</sup> Counseling services are defined as "services provided by qualified social workers, psychologists, guidance counselors, or other qualified personnel."<sup>168</sup> The term psychotherapy appears in neither the statute nor the regulations.

In part as a result of this statutory ambiguity, state policies on psychotherapy vary widely. A majority of states provide psychological

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164. 34 C.F.R. §§ 300, 302 (1981).

165. See, *Kruelle*, 642 F.2d at 694; *North*, 471 F. Supp. at 141.

166. See note 15 *supra*.

167. 34 C.F.R. § 300.13(b)(8)(v) (1981).

168. 34 C.F.R. § 300.13(b)(2) (1981).

treatment and counseling, but not psychiatric service. Other states require their schools to assume financial responsibility for psychotherapy by any qualified service provider where it is "necessary to enable the child to benefit from special education."<sup>169</sup> Still others rely on a traditional health/education dichotomy to justify a refusal to provide any mental health services to school children.<sup>170</sup>

Connecticut is among a small group of states with the most restrictive policies on psychotherapy. For approximately two years, the Connecticut State Department of Education has had in effect an across-the-board policy that psychotherapy is not a related service under state law.<sup>171</sup> The policy distinguishes between counseling, a related service, and psychotherapy, not a related service.<sup>172</sup> Stating that psychotherapy is a service that "reaches beyond educational problems to address a child's basic personality needs" and that it is the "job of our schools to teach," the State Department of Education will under no circumstances reimburse school systems for the provision of psychotherapeutic services.<sup>173</sup> Connecticut's policy on psychotherapy is its only blanket rule on related services. All other related services issues in the state are resolved on a case-by-case basis.

It is quite plain that Connecticut's policy conflicts with the EAHCA. The psychotherapy issue has been directly addressed in four judicial decisions. All have rejected as overbroad the argument that psychotherapy is always a medical service, and have concluded that psychotherapy can be a related service when a child's emotional problems are shown to negatively affect his academic performance.<sup>174</sup> Indeed, Connecticut's policy is suspect on any one of three grounds. First, it is inconsistent with the language of the EAHCA regulations, which mandate psychological *treatment* in appropriate cases for children whose emotional problems interfere with their learning.<sup>175</sup> Second, by espousing an across-the-board rule, Connecticut's policy undermines

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169. *E.H.L.R. Perspective: "Related Services,"* 1 E.H.L.R. AC20-21 (Supp. 28, July 25, 1980).

170. *Id.*

171. Mark Shedd, Commissioner of Education, Conn. State Dep't of Educ. Policy Letter, Series 1980-81, Circular Letter C-24 (Apr. 8, 1980).

172. *Id.*

173. *Id.*

174. See *Papacoda v. Connecticut*, 528 F. Supp. 68 (D. Conn. 1981); *Gary B. v. Cronin*, 3 E.H.L.R. 552:144 (N.D. Ill. July 17, 1980); *In re "A" Family*, 3 E.H.L.R. 551:345 (Mont. Oct. 30, 1979); *In re Claudia K.*, 3 E.H.L.R. 552:501 (19th Jud. Cir., Lake County, Ill. July 31, 1981).

175. 34 C.F.R. § 300.13(b)(8) (1981).

the EAHCA objective of ensuring individualized educational planning for every handicapped child.<sup>176</sup> Third, by distinguishing between counseling and psychotherapy, it suggests that Connecticut is only obligated to provide mental health services to those children whose emotional problems are relatively mild or moderate.<sup>177</sup> The policy, therefore, also may conflict with the EAHCA's goal of providing services to severely handicapped children on a priority basis.<sup>178</sup>

### E. *Common Themes and Common Questions*

Connecticut's residential programming and psychotherapy policies both create a dichotomy between severe emotional and educational problems. Although analytically distinct, the two policies reinforce one another in practice. Residential programs are sometimes deemed noneducational because of the therapeutic nature of the services the child would receive at a residential school.<sup>179</sup> The policy excluding psychotherapy is buttressed, in turn, by the fact that Connecticut's residential programming statute treats "primarily psychiatric" placements as noneducational. The two policies thus combine to provide moral and theoretical support for the widespread ethos among Connecticut educators that the serious emotional needs of children, even if demonstrably affecting academic performance, are beyond the responsibility of public schools.

Both policies conflict with the plain language of the EAHCA and its regulations. In addition, they compromise two key EAHCA objectives: reparation for the severely disabled, and equal proportional treatment among different disability groups. Yet both policies have proven remarkably resilient. Despite the fact that federal courts have ruled in individual cases that these policies are invalid, both remain very much in force.<sup>180</sup> This creates particular hardship for parents who cannot af-

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176. Cf. *Battle v. Pennsylvania*, 629 F.2d 269, 280 (3d Cir. 1980) discussed in text accompanying notes 110-11 *supra*.

177. In the course of preparing this article, I spoke to approximately fifteen mental health professionals about the meaning of Connecticut's distinction between psychotherapy and counseling. If any common definition arose, it was that there is a continuum of services, ranging from guidance counseling (advice) to counseling (short-term intervention) to psychotherapy (for children with severe and long-term emotional problems). Thus, a decision to exclude psychotherapy affects only children with more severe emotional problems.

178. 20 U.S.C. § 1412(3) (1976); 34 C.F.R. § 300.320(b) (1981).

179. See text accompanying notes 150-53 *supra*.

180. *Papacoda v. Connecticut*, 528 F. Supp. 68 (D. Conn. 1981), did not involve a direct challenge to Connecticut's policy, but only an order seeking reimbursement for psychotherapeutic costs for an individual child. Nevertheless, the decision has not been appealed by the State De-

ford to pursue judicial remedies. One also wonders how and why these policies have endured.

One explanation for Connecticut's policies is that children with serious emotional problems exert disproportionate financial pressure on limited educational resources. As noted earlier, emotionally disturbed children are placed in residential programs in greater absolute numbers than any other disability group.<sup>181</sup> Local school districts in Connecticut contract with private special education schools for residential services and these services are very expensive.<sup>182</sup>

The debate over psychotherapy is also largely economic. States and localities are legitimately concerned that with large numbers of children identified as having emotional problems, a rule mandating this service would create overwhelming financial pressures.<sup>183</sup> It also seems likely that mandating psychotherapy would have a disruptive and costly long-term impact on local personnel practices, requiring school districts to hire more clinical psychologists and psychiatrists, and perhaps fewer school psychologists, social workers, and guidance counselors.<sup>184</sup> It is

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partment of Education and, as far as I can determine, is final.

181. See note 137 *supra*.

182. The per-pupil cost of private residential schooling at approved facilities in Connecticut ranges from a low of \$9,150 to a high of \$34,000 for 10 months, excluding summer programming and transportation. The average cost is somewhere between \$15,000 and \$18,000. See CONN. STATE DEP'T OF EDUC., APPROVED PRIVATE FACILITIES FOR SPECIAL EDUCATION—1980-81 (1980).

183. OSERS has characterized the psychotherapy issue, "[a]t bottom," as "an economic one." *E.H.L.R. Perspective: "Related Services,"* 1 E.H.L.R. AC20 (Supp. 28, July 25, 1980). Reviewing the psychotherapy issue last year, OSERS estimated that the annual cost to schools nationwide of providing this service would be less than 100 million dollars. Dep't of Educ., Memorandum from the Assistant Secretaries for OSERS and OCR to the Secretary of Education 9 (undated). How it reached this figure is unclear.

184. Different certification and licensure requirements are applicable to the fields of psychiatry, clinical psychology, social work, school psychology, and school counseling. In order to be eligible to engage in a therapeutic practice, both psychiatrists and clinical psychologists are subject to strict licensing requirements in Connecticut. By contrast, there is no licensure in the State of Connecticut in the areas of psychiatric social work, school psychology, or school counseling. CONN. GEN. STAT. §§ 10-145 to -151(b) (1981); CONN. TEACHER CERTIFICATION REGULATIONS (14th ed. 1980). Instead, these areas of specialty are subject only to State Department of Education certification regulations. Eligibility for school social work does not necessarily imply any particular experience in psychotherapeutic techniques. All that is required in Connecticut is a master's degree from an accredited school of social work with a major in social casework. CONN. GEN. STAT. § 10-145a-77 (1981). Certification requirements for school psychologists are similar. CONN. GEN. STAT. §§ 10-145a-74 to -75 (1981). School guidance counselors must complete thirty semester hours in a planned program of school counseling services. Neither school social workers, school psychologists, nor guidance counselors are licensed in Connecticut to provide psychotherapy; all may be certified to engage in counseling.

If psychotherapy is mandated as a related service, in the short term disputes inevitably will

not surprising that resistance to EAHCA mandates occurs most strongly where the potential financial effect of those mandates is the greatest.

In addition to reflecting economic pressures, Connecticut's policies, particularly its rule on psychotherapy, also may reflect underlying concerns about family privacy. One litigated case, *School Committee, Town of Truro v. Commonwealth*,<sup>185</sup> illustrates some of the problems lurking here. This case involved an emotionally disturbed child who, for over four years, received from the town private therapy with a clinical psychologist. In 1979, the town proposed a program for therapy either with the school "adjustment counselor" or with a nearby mental health community clinic. The school conceded that the change was proposed for financial reasons. The parents challenged the school plan, arguing a need for continuity in service. The court upheld the parents' position, holding that the school system's offer was not adequate to meet the child's needs.<sup>186</sup> It noted that this was not an issue of the parent "dictating" which psychologist should be utilized, but rather an issue of the child's right to a free and appropriate education. The court concluded, however, that under state law, it did have authority to order provision of psychotherapy by a particular therapist.<sup>187</sup>

The *Truro* case provides a glimpse of things to come. If psychotherapy is treated as a mandated service in states around the nation, local school districts often will attempt to conserve resources by providing the service within the school. Parents, on the other hand, will advocate the provision of psychotherapy by a particular therapist because of the privacy of the relationship. These kinds of disputes have occurred with regard to other kinds of related services.<sup>188</sup> But due to the particular sensitivity of psychotherapy and the intimate rapport that presumably develops between therapist and patient, disputes in this area may be especially difficult.

On the other hand, while concerns about family privacy<sup>189</sup> raise

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arise regarding the difficult question of where counseling ends and psychotherapy begins. See note 177 *supra*. And in the long term, it seems likely that local school districts will begin to hire clinical psychologists, and perhaps psychiatrists, to minimize controversy over the training and competence of their personnel.

185. 3 E.H.L.R. 552:186 (Mass. Super. Ct. June 27, 1980).

186. *Id.*

187. *Id.* at 552:187.

188. See, e.g., Mass. SEA Dec. No. 3486 (*Julie C. v. Marshfield Pub. Schools*), 3 E.H.L.R. 502:170 (Oct. 7, 1980) (right to reimbursement for private physical therapy).

189. Another potential family privacy question involves the confidentiality and control of psychiatric records in schools. The EAHCA incorporates by reference the protections of the Family

difficult and legitimate policy questions, in my judgment they do not fully explain Connecticut's policies. For one thing, such privacy arguments suggest that *fewer* parents would demand psychotherapy as a related service, relieving school systems of some of the fiscal pressures they fear. Moreover, these privacy arguments have little, if any, relevance in the residential programming cases, where the issues are primarily financial.

There is a third, less benign, explanation for Connecticut's policies disfavoring emotionally disturbed children, an explanation having to do with notions of parental *fault*. There is, I believe, a widespread perception that parents are to blame for the psychological problems of their children. This perception, and the reluctance to pay for services considered to be necessitated by poor parenting, may help explain the persistence of Connecticut's policies.

Some of the evidence to support this contention is anecdotal in nature.<sup>190</sup> However, there is also hard evidence for this proposition in the state administrative hearing decisions involving residential programming. A question frequently discussed in these cases is the extent to which parental conflict or pathology has *caused* or *exacerbated* the child's emotional problems. Hearing officers tend to handle the issue delicately and unpredictably.<sup>191</sup> The point is not how issues of parental

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Educational and Privacy Act of 1974, 20 U.S.C. § 1232g (1976). See 20 U.S.C. § 1417(c) (1976). The overall efficacy of this statute is beyond the scope of this article. Nevertheless, one's impression is that internal access to records is common within certain school systems. As a result, parents may well be concerned that intimate information about them and their children will become accessible to a broad range of school personnel if therapeutic services are provided in schools. Parents therefore may choose not to utilize school therapeutic services if alternative services are available.

190. At a recent workshop for Connecticut school board members and special education administrators, I asked the question directly: Why, of all the related services, has psychotherapy alone been subjected to an across-the-board state policy prohibiting the service? One candid answer, accompanied by many vigorous nods: "When I see a child with physical handicaps or a retarded child, I see an 'Act of God.' But frankly, I've never seen an emotionally disturbed child whose parents weren't themselves a little crazy." This answer may suggest that while the overall attitudes of educators toward handicapped children have been positively affected by the EAHCA, a bias may exist towards parents of emotionally disturbed children. Compare results of 1980 hearing decisions at note 135 *supra*.

191. One decision goes out of its way to note, for example, that the child's "neurological problems were not produced by the family . . . nor were the family dynamics the source of Mark's social problems." Conn. SEA Dec. No. 80-101 (Mark B.) (Jan. 30, 1981), at 7. Another concludes that the child's "home [life] could exacerbate his (psychosis) but . . . did not cause (it)." Conn. SEA Dec. No. 80-93 (Bill D.) (Jan. 19, 1981), at 5. Another suggests that the child in question had a "long history of emotional, social and academic problems, many of which centered around her relations with her family." Conn. SEA Dec. No. 80-64 (Cherie P.) (Sept. 10, 1980), at 2.

"fault" influence hearing decisions, but why the issue is considered at all.

Nowhere does the EAHCA state or suggest that special education services should be allocated to handicapped children based upon the relative worthiness of their parents. Yet I would venture to say that most special education advocates, school personnel, and parents would agree that attributions of parental fault often play a significant role in the dynamics of the special education process. School officials, frequently accused by parents of poor teaching, respond in kind by interrogating parents about their child-raising techniques and blaming them for their children's problems. This "finger-pointing" dynamic is perhaps the inevitable consequence of the adversary procedures created by the Act, which pit parents against schools, and the substantial sums of money often at stake.

The perception that individuals' mental health problems can be attributed to parental influences is a popular and widespread one.<sup>192</sup> It should come as no surprise that similar attitudes influence special educators and policy makers. And to be sure, the characterization is often fair. But in particular cases, tracing the etiology of a child's problems to home or other environmental factors, or to organic or neurological causes, is extremely difficult. Indeed, there is a substantial body of psychiatric opinion that determining the cause of any individual's psychological problems is beyond the state of the art.<sup>193</sup> When this is added to the fact that detailed psychosocial information about the family often is not available to hearing officers in residential programming disputes, or to public school personnel, inquiries into parental fault become all the more speculative and inappropriate.

To the extent that such attitudes about parents of disturbed children have influenced Connecticut's policies, these policies constitute a "tragic choice"—a choice that conflicts with basic societal notions of fairness.<sup>194</sup> As Professors Calabresi and Bobbitt have written, translating decisions regarding allocation of scarce resources into "worthiness" decisions has considerable appeal. Fault proceedings permit societies to

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192. See, e.g., J. ELINSON, E. PADILLA & M.E. PERKINS, PUBLIC IMAGE OF MENTAL HEALTH SERVICES 19 (1967). (Sixty-four percent of survey indicated agreement with the proposition that "[t]he mental illness of many people is caused by a lot of fighting and quarreling between their parents during childhood.")

193. See, e.g., D. HENDERSON & R.D. GILLESPIES, TEXTBOOK OF PSYCHIATRY 32 (9th ed. 1962); A. SOLNIT, A. FREUD & J. GOLDSTEIN, BEFORE THE BEST INTERESTS OF THE CHILD 75-77 (1979).

194. CALABRESI & BOBBITT, *supra* note 1, at 17.



avoid admitting that they may be preferring one group over another in a way that violates cultural conceptions of equality. But

[t]his technique depends on the persuasiveness of the proposition that individuals who are denied the scarce goods could, *through their own behavior*, put themselves in the favored category. The greater the plausibility of this notion, the less the responsible political decision to base the result on absolute worthiness violates egalitarian principles. . . . [Otherwise, a] fault approach often simply reflects a hidden political choice to prefer one group to another.<sup>195</sup>

There is, finally, a fourth possible explanation for Connecticut's policies, having to do with the continuing stigma of mental illness. Generally, public opinion surveys indicate that most Americans today have a positive image of mental health services and utilize them more widely than ever before.<sup>196</sup> Nevertheless, the idea of mental illness is still abhorrent in many subcultures, as is the decision to seek psychiatric help.<sup>197</sup> Applied to the field of special education, this attitude has two consequences. First, individual parents often feel stigmatized by the label seriously emotionally disturbed and in close cases often will request another label.<sup>198</sup> Second, because of the stigma of the label and the unwillingness of parents to identify themselves, advocacy organizations for emotionally disturbed children are relatively weak and disorganized compared to other parent groups.<sup>199</sup> Even if these factors did not cause

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195. *Id.* at 73 (emphasis added).

196. J. ELINSON, E. PADILLA & M.E. PERKINS, *supra* note 192, at 7; Garfield, *Psychotherapy—A Forty Year Appraisal*, 36 AM. PSYCHOLOGIST 174, 175-76 (1981).

197. A. HOLLINGSHEAD & F. REDLICK, *SOCIAL CLASS AND MENTAL ILLNESS*, 3-4, 182, 277, 341 (1958).

198. *See, e.g.*, Conn. SEA Dec. No. 80-65 (Joseph T.) (Sept. 10, 1980). The *Joseph T.* case is unique. Parents seldom litigate the label their child receives because under the Act, any label is a passkey to special education services. Nevertheless, I have never encountered a parent who willingly accepted the label emotionally disturbed for his or her child.

199. This impression was confirmed by interviews of several advocacy group coordinators in Connecticut. For example, the Connecticut Association of Retarded Citizens (CARC) has over 10,000 dues-paying members, a total annual budget of over \$8,000,000, between 400 and 500 paid staff, and 26 member associations across the state. Among its many legislative activities, CARC wrote and lobbied the bill creating the State Department of Mental Retardation. Telephone interview with Margaret Dignoti, Executive Director, CARC (Feb. 24, 1982). The Association for Children with Learning Disabilities on Connecticut (ACLD) has 1,400 dues-paying members, an annual budget of \$10,000, and no paid staff. But it does have an active association of parent volunteers, working out of 17 chapters within the state. ACLD, which does not engage in lobbying, publishes a statewide newspaper and sponsors several statewide conferences a year. Telephone interview with Ruth Tepper, President, ACLD (Feb. 25, 1982).

Connecticut to enact its policies, they may explain the persistence of these policies in the face of contrary EAHCA mandates. Parents of emotionally disturbed children thus far have been unable to organize effectively to demand change.

#### IV. RECENT TRENDS IN SPECIAL EDUCATION—SOME CONCLUDING REMARKS ON THE "NEW FEDERALISM"

Some retrenchment is unavoidable if current financial trends continue. If special education costs continue to rise at double the rate of regular education costs,<sup>200</sup> public support for the EAHCA may decline, threatening the Act as a whole.<sup>201</sup> Thus, even a parents' advocate like myself must ask whether there are equitable ways of cutting back on the Act's mandates by developing solutions that treat all disability groups fairly, but that do not undercut other important objectives of the Act. Further, how should retrenchment be accomplished? By Congress? By federal agencies? By states and localities?

The Reagan Administration currently is reviewing several programs affecting the rights of the handicapped. First, it has renewed its proposal to Congress, rejected last year, to amend the EAHCA to allow "block granting" of special education with other elementary and secondary education programs.<sup>202</sup> Simultaneously, it has ordered OSERS and OCR to undertake a comprehensive review of both EAHCA and section 504 regulations.<sup>203</sup> No specific proposals have

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Parents of emotionally disturbed children have not organized an advocacy group in Connecticut. There is a northeast regional branch of the Council for Children With Behavioral Disorders (CCBD) and a Connecticut State Coordinator of this association. But CCBD is a professional organization comprised primarily of special educators. The group has had difficulty persuading parents to join, despite substantial efforts by its coordinators. Conversation with Prof. Steve Imber, Northeast Regional Coordinator, CCBD (Mar. 2, 1982).

200. See text accompanying note 45 *supra*.

201. The expansive mandates of the EAHCA have already contributed to a "general backlash" against special education, according to a new study that measures the impact of the law on nine states. See *Education of the Handicapped Newsletter*, *Handicapped Law Not Without Its Problems*, Study Says 6 (Oct. 21, 1981).

202. On February 18, 1981, the Reagan Administration, through the United States Office of Management and Budget, submitted to the Congress a proposal to consolidate all or part of 45 separate elementary and secondary education programs into two block grants, with a 20% decrease in overall federal education spending. The plan proposed to consolidate EAHCA programs with such programs as Title I (economically disadvantaged), bilingual education, adult basic education, and emergency school aid, and to give all EAHCA monies to localities rather than both localities and states, and to eliminate virtually all federal oversight over the use of local funds. See *COUNCIL FOR EXCEPTIONAL CHILDREN*, 12 *UPDATE* No. 4, at 18 (1981). This proposal was rejected by Congress and has been resubmitted this year. See Weicker, *supra* note 74.

203. *COUNCIL FOR EXCEPTIONAL CHILDREN*, 12 *UPDATE* No. 4, at 8 (1982).

been finalized. But the EAHCA regulatory review process serves as a useful illustration of the problems the Administration faces. In reevaluating the EAHCA regulations, OSERS has been directed to accomplish four principal goals: minimize the "federal presence" in special education by eliminating unnecessary regulations; reduce unnecessary paperwork burdens on states and localities; relieve fiscal pressures by undertaking a cost-benefit analysis of all substantive mandates; and protect the rights of handicapped children to continued equal educational opportunity.<sup>204</sup> To say the least, achieving these goals simultaneously will not be easy.

OSERS has identified sixteen topic areas for EAHCA regulatory review.<sup>205</sup> Virtually every significant regulatory provision under the Act will be scrutinized to determine whether the regulations contain requirements not specified by relevant statutory provisions or supported by legislative history. Yet only three topic areas exist where changes in current regulatory requirements would result in substantial savings:<sup>206</sup>

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204. *Special Report: OSE Regulation Review*, 1 E.H.L.R. AC 189-91 (1981)..

205. *Id.* at 189. Listed for review are: Definitions of Handicapped Children (including "specific learning disabilities"), 34 C.F.R. §§ 300.5, .540-.543 (1981); Meaning of Special Education and Related Services, 34 C.F.R. §§ 300.13-.14 (1981); State Plans, Local Educational Agency Applications, 34 C.F.R. §§ 300.121-.284 (1981); State Advisory Panels, 34 C.F.R. §§ 300.650-.653 (1981); Annual Reports, 34 C.F.R. §§ 300.750-.754 (1981); Free Appropriate Public Education, 34 C.F.R. §§ 300.1, .4, .300-.307 (1981); Extended School Year Program, 34 C.F.R. §§ 300.300; 300.4 (1981); Suspension and Expulsion, 34 C.F.R. §§ 300.300, .513 (1981); Individualized Education Programs, 34 C.F.R. §§ 300.340-.349 (1981); Services Provided to Children Placed in Private Schools by Their Parents, 34 C.F.R. §§ 300.451-.452 (1981); Comprehensive System of Personnel Development, 34 C.F.R. §§ 300.380-.387 (1981); Due Process Procedures, 34 C.F.R. §§ 300.506-.513 (1981); Nondiscrimination in Evaluation Procedures, 34 C.F.R. §§ 300.530(b), .532 (1981); Least Restrictive Environment, 34 C.F.R. §§ 300.550-.556 (1981); Confidentiality of Information, 34 C.F.R. §§ 300.560-.576 (1981).

206. Of the sixteen areas under review, five would primarily reduce federal compliance procedures perceived to be burdensome. OSERS is considering, for example, accepting "assurances" from LEAs rather than detailed information on their compliance with the Act, *Special Report: OSE Regulation Review*, 1 E.H.L.R. AC 189, 203 (1981), minimizing the federal oversight role over in-service personnel training, *id.* at 217, requiring triannual rather than annual state plans, *id.* at 201, and cutting back on regulatory requirements governing the establishment of State Advisory Panels in Special Education, *id.* at 204. Each of these proposals seeks to reduce the federal role in systemwide state and local decisionmaking. A sixth area identified for study and possible retrenchment involves IEP procedures. *Id.* at 212. Once again, the goal is the reduction of paperwork. While some educators believe that the IEP process is not justified by the many teacher-hours diverted from direct educational services, OSERS' preliminary discussion of the topic suggests substantial support for present requirements. *Id.* at 213.

Of the remaining subjects of regulatory review, three pertain to policy issues that have been confusing, controversial, or subject to litigation, but do not portend either a reduced federal role in special education or any significant potential for cutting back the costs of special education services. These subjects are expulsion and suspension of handicapped children, *id.* at 209, nondis-

restricting the regulatory definitions of special education and related services; redefining handicap definitions under the Act; and constricting the concept of a free and appropriate education. Cutbacks in these areas all present substantial opportunities for cost saving, but any, if approved, would undermine one or more important objectives of the Act.

With regard to the regulatory definition of special education, OSERS has noted the concerns expressed by many states and localities regarding their financial responsibilities for residential placements. Therefore, OSERS is considering limiting the regulatory definition of special education to "educational instruction," deeming custodial care noneducational in some circumstances.<sup>207</sup> Noting further that the EAHCA regulations define "no cost" whereas the statute does not, the agency is considering revised federal guidelines to distinguish, as Connecticut distinguishes, educational from noneducational residential placements.<sup>208</sup> As noted earlier, any decision to limit the concept of educational responsibility primarily would disfavor severely disabled children, compromising the reparation objective of the Act. Further, as shown by the Connecticut experience, the impact within the class of seriously disabled children would fall most heavily on children with severe emotional problems because they are most in need of residential programming.

OSERS' initial study of the related services provisions of the Act notes that the regulations define related services in far more detail than the Act; that they add several new services not expressly listed in the Act;<sup>209</sup> that the legislative history underlying the related services provisions of the Act is weak;<sup>210</sup> and that as a result of litigation, related services have been determined the responsibility of school districts, even though they may reflect a "general life need" of the student rather than principally an *academic* need.<sup>211</sup> As a consequence, OSERS is considering a number of narrowing options, such as deeming the statu-

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criminary evaluation procedures, *id.* at 219, and the least restrictive environment provisions of the Act, *id.* at 220. Four areas theoretically have substantial fiscal implications, but do not appear susceptible to significant cutbacks because existing regulations are consistent with federal mandates established by statute or through litigation. These areas are special education due process procedures, *id.* at 217, out-of-state residential placements, *id.* at 210, extended year programming, *id.* at 207, and services provided to children placed in private schools by their parents, *id.* at 214. Regulatory revisions under consideration in these areas are therefore narrow in scope. *Id.* at 209.

207. *Id.* at 194-95.

208. *Id.* at 195.

209. *Id.* at 195, 197.

210. *Id.* at 194-196.

211. *Id.* at 196.

tory listing of related services in the Act exhaustive,<sup>212</sup> eliminating all regulatory definitions of related services, allowing states to develop their own standards, or itself developing more narrow interpretations at the federal level.<sup>213</sup> But any of these decisions, once made, would affect certain disability groups more than others, depending upon the particular related services designated for limitation.

Handicapped definitions under the Act are being subjected to extensive review. OSERS has indicated that while the EAHCA regulations provide detailed definitions for each handicap under the Act, the statute is mostly silent on handicap definitions.<sup>214</sup> OSERS, therefore, is considering leaving handicap definitions to the states or itself narrowing some of these definitions.<sup>215</sup> But decisions to limit handicap definitions—entry level decisions—affect children with mild or moderate disabilities most seriously, undermining the EAHCA goal of servicing all handicapped children regardless of the severity of their handicap. And, as the continuing controversy over New York's learning disabilities policy illustrates, any decision to limit a particular handicap definition will be perceived as discriminatory with respect to the disability group in question.<sup>216</sup>

Finally, OSERS is considering more restrictive definitions of the EAHCA's key operative phrase, free and appropriate education. Some of its proposals are extremely broad, suggesting that states or the federal government itself might enact more restrictive definitions of appropriate education and, again, more precise distinctions between educational and noneducational services.<sup>217</sup>

None of these proposals has been translated into final action, and any final executive decision is subject to two principal constraints. First, the legislative history of either the EAHCA or the Rehabilitation Act may be clear enough to render suspect particular choices for deregulation. Second, all regulatory revisions will require a notice and public comment period.<sup>218</sup> The concerted efforts of handicapped advocacy groups at the federal level may result in the defeat of deregulation efforts deemed radical or unwise. But again, *any* decision by OSERS in these areas will seriously compromise one or more EAHCA objectives.

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212. *Id.* at 197.

213. *Id.*

214. *Id.* at 194.

215. *Id.* at 195.

216. See text accompanying notes 56-60 *supra*.

217. *Special Report: OSE Regulation Review*, 1 E.H.L.R. AC 207.

218. *Id.* at 191.

In addition to considering what retrenchment decisions should be made, there is also the question who should make them. The central theme of EAHCA regulatory review is to reduce the federal role in education policy. First, OSERS proposes to liberalize and simplify federal mechanisms that monitor state-wide compliance with the Act. Second, as to each of the fiscally significant substantive provisions under review, OSERS equivocates on the important question whether to return primary authority to the states to set standards or to undertake this process itself. The review process is thus consistent with the New Federalism, which is designed to give states and localities more flexibility and reduce the federal presence in state and local decisionmaking.

How does one evaluate the New Federalism as applied to the field of special education? Supporters will say that education historically has been a local prerogative and that it is time to give greater responsibility regarding the formation of educational policy to the states. There is certainly much to be said for this view and no reason to doubt the sincerity of the Administration's motives for making such proposals. However, critics will respond that returning policymaking responsibility in this area to the states is a most unhappy choice. They assert that the very reason for the EAHCA's enactment was the recognition that uniform national standards were needed to protect the interests of handicapped students.<sup>219</sup> Even given strong national policies in the field, state and local resistance often has been tenacious. A decision to relegate greater EAHCA policy responsibility to the states would signal, according to critics, at least a partial return to the serious abuses of the past.<sup>220</sup>

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219. See note 7 *supra* and accompanying text. See also Martin, *Aid for Disabled Is Defended*, N.Y. Times, Jan. 10, 1982, § 13, at 62, cols. 1-3. Edwin Martin was the first Assistant Secretary for the Department of Education during the Carter Administration. In this article, he states:

The need for a national law was inescapably demonstrated by our history. When each state went its own way, virtually everyone passed a law encouraging school districts to educate the disabled . . . . Unfortunately, these laws did not succeed and parents spoke up, asking for stronger laws. As a result, many states passed a second generation of legislation . . . which *required* local districts to educate children and also provided additional funds.

220. See Martin, *supra* note 219. At a national handicapped conference held last year in Washington, D.C., when block granting seemed imminent, it was reported that seven states already had initiated legislative action to repeal their special education laws. Council for Exceptional Children, 59th Annual International Convention (Apr. 15, 1981). The reliability of this report was never established. But the *perception* of advocacy groups for the handicapped is that handicapped persons never have fared well in state and local political processes.

There is, however, a third way of looking at the New Federalism as applied to the field of special education, one suggested by Professors Calabresi and Bobbitt. They state that in periods of limited resources, centralized standard-setting has one significant disadvantage: it necessitates a highly *visible* uniform policy statement that certain national goals must be modified or abandoned.<sup>221</sup> Here, any explicit narrowing of policy objectives by the executive branch would compromise one or more fundamental EAHCA objectives, proving an embarrassment to the national government and making any executive choice more vulnerable to concerted challenge by advocacy groups at the national policy level. By contrast, returning responsibility to the states would make triage decisions more varied and therefore more difficult to challenge. Seen from this perspective, the New Federalism simply may be a "subterfuge,"<sup>222</sup> a convenient way of concealing the difficult choices that scarce resources necessitate.

### CONCLUSION

This article has shown the varying effects of different special education policies on the diverse disability groups protected by the EAHCA. Some policies disfavor the seriously disabled, while others disfavor the mildly and moderately handicapped. In the absence of definitive data on the efficacy of many special education programs, retrenchment choices are sometimes made on the basis of commonly shared attitudes toward particular disability groups. One searches for an overriding value system in which to make these policy choices, and there may be none.

But in the final analysis, the fact that retrenchment decisions raise difficult value choices is not a principled basis for making them by subterfuge. If such decisions are in fact necessary, they should be debated fully and openly, and made finally at the national level. Uniform standards are essential, given the particular sensitivity of issues involving handicapped persons and the fact that so many different groups are provided protections by one omnibus statute. Determining these standards may result in a difficult, devisive process, but as Calabresi and Bobbitt have stated, "[w]e are one nation, and it is offensive to have fundamental allocations depend on the chance of where in the land one lives."<sup>223</sup>

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221. CALABRESI & BOBBITT, *supra* note 1, at 53-54.

222. *Id.* at 73.

223. *Id.* at 53.

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