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THE EDUCATION FOR ALL HANDICAPPED ACT: HOW WELL DOES IT ACCOMPLISH ITS GOAL OF PROMOTING THE LEAST RESTRICTIVE ENVIRONMENT FOR EDUCATION?

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Handicapped children historically have been educated in special programs separate from the regular programs. The current trend, however, is to "mainstream" a child with learning disabilities into the "least restrictive environment" of the regular classroom. The Education for All Handicapped Act, Public Law 94-142, attempts to embody this principle by placing a handicapped child in the regular education system if assimilation is possible. Inherent in the Act itself, however, are structural weaknesses which frustrate the goals of mainstreaming. The authors focus on the deficient labeling techniques, the inefficient funding mechanisms, and the administrative problems in implementing a cohesive educational system. Suggestions for rectifying these various weaknesses are also offered.

Special education as a subdelivery system⁰ of regular education emerged somewhat simultaneously with the development of special classes during the early part of this century. Since most states had institutions to care for severely and profoundly handicapped individuals, it was the lesser handicapped population that the public schools were obliged to serve in local communities. Most school districts first attempted to educate these children in regular classroom settings. However, teachers expected them to learn at the

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0. The term "delivery system" is used throughout this Article to refer to the structure for the delivery of education to students. The term "subdelivery system" is a derivative of that concept, meaning a portion of that system having a specific identity as a substructure. The terminology implicitly suggests that education is a commodity or tangible quantity that the school system through its structure (a delivery system) delivers to the recipient. That recipient is like a purchaser, or the designated beneficiary of the purchaser (tax-paying parent).

same rate as other children and retained them until they could pass grade-level work. Repeated failures and accompanying behavioral problems of these children caused school officials to search for more satisfactory placements.

The special classroom placement was perceived as the most viable option. Children were categorized with respect to their particular learning problems¹ and placed in distinct classrooms. Such categorical designations of learning problems in special education were then codified on a state-by-state basis through legislation. This legislation took two forms: (1) that which defined special education for purposes of specific state reimbursement to those districts providing such services, and (2) that which related to mandatory education of the handicapped.²

The removal of handicapped children from the regular classroom initiated a trend which fostered dichotomous educational systems for non-handicapped children and those children with special educational needs. The development of these two distinct educational systems apexed in the 1950's and 1960's with the establishment of the Council for Exceptional Children, a professional organization, and The Bureau of Education for the Handicapped, a unit of the Federal government. Similar developments simultaneously occurred at state and local levels. State federations of the Council for Exceptional Children, as well as local and/or regional chapters, were organized. Divisions for handicapped children and departments of spe-

1. The first major thrust was to establish special classes for mentally retarded children. There were also some classes for visual- and hearing-impaired children, as well as for children with speech defects and physical or orthopedic problems. Children exhibiting behavioral deviations were either placed in special classes with retarded children because their behavioral disturbances resulted in low academic performance, or they faced severe disciplinary measures while remaining in regular classrooms.

The primary criteria used to place children in special classes for the retarded were poor academic achievement and low scores on intelligence tests (*e.g.*, Stanford-Binet). Regular classroom teachers were quite willing to have these lesser achieving children, often behavioral problem children as well, removed from their classrooms and placed elsewhere. On occasion, some teachers also were eager to send additional borderline children, *i.e.*, those not having the prerequisite low IQ, to special classrooms.

The special class placement concept grew in popularity, and classes in additional special categories of children (*e.g.*, visually impaired, hearing impaired, and physically/orthopedically handicapped) were developed. Then, a division of the mentally retarded population occurred, referred to as "educable mentally retarded" and "trainable mentally retarded," based on the severity of retardation. Thus, the more severely retarded children remained in local communities to be served by local school districts rather than being referred to state institutions.

Following World War II, the terms "special education classes" and "special education teacher" became widely accepted in reference to classes and teachers of the mentally handicapped. Soon, however, those terms referred to classes and teachers of *all* types of special education programs, with the specific categorical name attached. This practice has prevailed to the present day.

2. B. GEARHEART & M. WEISHAHN, *THE HANDICAPPED CHILD IN THE REGULAR CLASSROOM* 9 (1976). Examples of state legislation are: COLO. REV. STAT. §§ 22-20-101 to 114 (1973); FLA. STAT. ANN. § 228.041 (1977); MINN. STAT. ANN. § 120.17 (1979); N.D. CENT. CODE §§ 59-01 to -09 (1977); VT. STAT. ANN. tit. 16, § 2942-54 (1978).

cial education were developed at the state department and local district levels. Thus, a complete organizational and administrative structure was established to manage a separate system which operated independently of the regular school system with respect to professional preparation, certification, implementation of programs, and allocation of funding resources.³

More recently, however, educators and legislators alike have become aware of the problems inherent in this dual educational structure. As a result, the most recent legislative effort, The Education for All Handicapped Children Act of 1975, Public Law 94-142,⁴ purports to put an end to the distinction between special education and regular classroom placements. The Act grants each handicapped child the right to a free, appropriate education.

3. Legislation supported the establishment of special education in the state departments of education and school districts across the nation. Examples of such legislation are: Act of Sept. 6, 1958, Pub. L. No. 85-926, 72 Stat. 1777 (an act encouraging the education of mentally retarded children through grants to institutions and state educational agencies); Mental Retardation Facilities & Community Mental Health Centers Construction Act of 1963, Pub. L. No. 88-164, 77 Stat. 282 (an act providing assistance in mental retardation education through grants for construction of community mental health centers and research centers as well as grants for other facilities for the mentally retarded); Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (an act strengthening and improving the quality and opportunities within elementary and secondary schools); Education Amendments Act of 1974, Pub. L. No. 93-380, 88 Stat. 484 (an act amending the Elementary and Secondary Education Act of 1965 which also includes topics such as transportation of students, federal programs and their impact, the national reading improvement program, etc.); The Education for All Handicapped Children Act of 1975, 20 U.S.C. §§ 1401, 1402, 1411-20 (1976) (an act providing educational assistance to all handicapped children which also includes state plans, procedural safeguards, judicial review, etc.).

4. The Education for All Handicapped Children Act of 1975, 20 U.S.C. §§ 1401, 1402, 1411-20 (1976), has as its purpose:

to assure that all handicapped children have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs

20 U.S.C. § 1401. The Act establishes procedural safeguards as well as procedures to assure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped

20 U.S.C. § 1412. The Act also provides that the Commission can measure and evaluate the impact of the program as well as the effectiveness of state efforts to assure the free appropriate public education of all handicapped children. 20 U.S.C. § 1418.

See 45 C.F.R. §§ 121a .550-.551 (1978).

The authors have identified whether a particular educational setting would be considered restrictive as follows:

In other words, an institutional setting or home for the handicapped is more restrictive than a segregated class or handicapped day school. Similarly, having a special education teacher come into the regular classroom at various times to help the handicapped child or segregating the child for certain periods is less restrictive than segregated classes for the handicapped only. The handicapped child must be placed in a program that is as close to a regular education as possible, without denying him the special assistance he needs to achieve an optimal education.

Miller & Miller, *The Handicapped Child's Civil Rights as It Relates to the "Least Restrictive Environment" and Appropriate Mainstreaming*, 54 IND. L. J. 1, 3 n.11 (1978).

It specifies that such a right demands public education in the "least restrictive environment."⁵ The child must be placed in an educational environment that is as close to the regular classroom setting as possible in order to maximize the child's individual learning ability.

It is the purpose of this Article to outline the progress of special education which has led to its present position of "mainstreaming"⁶ children into the regular classroom, despite their special needs. The influence of the courts and legislatures upon the development of special education will be examined. This Article will focus on Public Law 94-142, which represents the trend toward the "least restrictive environment." The Act's effectiveness in accomplishing the elimination of the dichotomous educational systems will be analyzed. Finally, the Article will explore the extent to which some of the state laws have eliminated or retained the problems inherent in Public Law 94-142.

The Least Restrictive Environment and the Retreat from the Separate Educational System for the Handicapped

Historically, the states have had primary control of public education.⁷ State funding of education for the handicapped followed logically from the precedent of spending state monies for general public education.⁸ The qual-

5. "Least restrictive environment" means "that to the maximum extent appropriate, handicapped children are educated with children who are not handicapped, and that removal of handicapped children from the regular education environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 41 Fed. Reg. 56,972 (1976).

6. Mainstreaming is the educational concept of putting the handicapped child back into the "mainstream" of regular education, *i.e.*, the handicapped child is put into the regular classroom with individual attention or supportive services. Mainstreaming is the appropriate method for putting a large number of handicapped students into the "least restrictive environment."

7. The states still have primary control of public education, but the trend is toward increased funding from the federal government for both general financing and special program financing, in particular. However, there is a trend toward more local control in the area of curriculum:

. . . Since education is a state function, the primary responsibility for financing the public schools rests with the state. The state may, if it sees fit, provide all or most of the funds itself, or it may delegate much or all of the responsibility for financing public schools to the local school districts.

The Federal Government and School Support. — While the federal government is not primarily responsible for the administration and support of public schools, its financial contribution to education is gradually increasing.

L. GARBER & E. REUTTER, JR., *THE YEARBOOK OF SCHOOL LAW—1969*, 151, 153 (1969). See generally R. REISCHAUER & R. HARTMAN, *REFORMING SCHOOL FINANCE 147-74* (1973) [hereinafter cited as *SCHOOL FINANCE*].

8. In 1971-72, "[s]tate governments provided 39 percent of the money used to support public elementary and secondary schools. . . ." *SCHOOL FINANCE*, *supra* note 7, at 7. State cases challenging the spending of portions of the state taxes on public education preceded the federal cases determining the constitutionality of such spending.

In *Leeper v. State*, 103 Tenn. 500, 53 S.W. 962 (1899), it was determined that schools were state agencies and that education was a state function. Thirteen years later the New

itative expansion to encompass education of the handicapped was consistent with longitudinal growth of education which raised the age of compulsory education and the latitudinal growth of education which expanded the curriculum.⁹

A separate delivery system was developed for handicapped children in response to society's belief that the child's failure to learn was not the fault of the educational program but of the deficiencies within the child. Early attempts to integrate special students into regular school programs and curriculum occurred in the 1950's. These efforts were termed "progressive in-

Hampshire Supreme Court in *Fogg v. Board of Educ.*, 76 N.H. 296, 82 A. 173 (1912), upheld the state government's right to tax to maintain a system of public schools. The state not only had the right, but also the duty, to provide public schools in order to develop intelligent citizens and to promote the social order and peace of society. *Id.* at 299, 82 A. at 174-75. *Cochran v. Louisiana State Bd. of Educ.*, 281 U.S. 370 (1930), was an action to restrain the Louisiana Board of Education from providing free textbooks to its students. The Louisiana legislature promulgated a law to provide for free textbooks, and the United States Supreme Court upheld it. Logically, textbooks provide access to or aid a free public education. Thereafter, the U.S. Supreme Court acknowledged federal power to use tax monies for public education.

The Court in *Helvering v. Davis*, 301 U.S. 619 (1937), upheld the Social Security Act, which provided funds for public programs in the same way that funds are provided for public education. The Court reasoned that although there was nothing explicit in the Constitution for public programs, Congress has the power to tax and spend for the general welfare under the general welfare clause, article one, section eight, of the United States Constitution. Implications from this case provide the basis for public educational spending. *United States v. Butler*, 297 U.S. 1 (1936), also referred to the fact that the Federal Constitution doesn't mention such taxing and spending power. In that case, the Court found the Agricultural Adjustment Act unconstitutional, and its discussion of Congress' taxation power has similar implications for education. Generally, however, Congress' power to tax and spend is limited in that it can only be exercised to provide for the general welfare. See L. GARBER & N. EDWARDS, *THE PUBLIC SCHOOL IN OUR GOVERNMENTAL STRUCTURE* 14-86 (1962).

Authority to Tax for School Purposes. — A state legislature, in the absence of some constitutional restriction, has plenary power with respect to the financing of the state's educational system. The state may act through direct legislative enactments or it may delegate its authority with respect to school finance to such local units of government as school districts, counties, or municipalities. . . .

School taxes are state taxes even though they have been levied and collected by a school district or a municipality. And since education is a state and not a local or municipal function, school districts, counties, or municipalities may be required without their consent to levy taxes for school purposes

L. GARBER & N. EDWARDS, *THE LAW GOVERNING THE FINANCING OF PUBLIC EDUCATION* 3 (1964).

9. "Longitudinal growth" refers to the increasing age span of compulsory education. The child today starts his public education earlier and ends it later. Public kindergartens, on the one hand, and the availability of publicly supported higher education (either college or vocational), on the other hand, are now quite common. The Act recognizes the importance of the increasing length of public education by referring to the public educational programs in some states for children 3 to 5 years of age. See 20 U.S.C. §§ 1411, 1412 (1976).

"Latitudinal growth" refers to the expansion of subjects and types of educational experiences which are to become a part of public education. Industrial arts, home economics, foreign languages, music, and physical education joined the three "R's" in the curriculum. This latitudinal growth appeared at the time special education classes were developed.

clusion," but it was not until 1962 that emphasis was placed on developing programs for the handicapped in settings either within or approximating the regular classroom.¹⁰ Several years later, in 1967, the United States Office of Education held a conference at the University of Maryland to discuss and appraise the "special education" system. As a result, attention was directed toward "the problems of categorization, the degrading effects of labeling, the fallacies of the placement system, the misuse of the traditional predictive model, and the rejection-oriented service delivery system of special education."¹¹

At the close of the 1960's, evidence accumulated which indicated segregated special class programs were not effective and that such programs could not be educationally justified.¹² Lawsuits arose which challenged the special education system to take a serious look at itself¹³ and resolve the handicapped child's right to education. A few notable cases, representative of early suits initiated to ensure handicapped children access to a public education, illustrate a lack of uniformity among the states in education of the handicapped. Several cases affirmed the obligation of school systems to provide spe-

10. Reynolds, *A Proposed Conceptual Framework for Special Education*, THE PROCESS OF SPECIAL EDUCATION ADMINISTRATION (1970). The framework has become known as the cascade of services—a delivery-of-services model for children with special needs. It is a system that is geared toward tailoring treatment to individual needs from the least restrictive educational environment, the regular classroom, to the most restrictive environment, the hospital or other domiciled setting. The system is flexible and fosters movement of the child with special needs toward less restrictive environments over time.

11. Meisgeier, *A Review of Critical Issues Underlying Mainstreaming*, THE THIRD REVIEW OF SPECIAL EDUCATION 247 (1976) [hereinafter cited as Meisgeier]. It was at that conference that Reynolds drew attention to the increasingly deteriorating dividing points between regular and special education. See generally Maryland Special Study Institute, stenographic transcript, Ace-Federal Reporters, Washington, D.C. (1967) (Reynolds segment).

12. See Dunn, *Special Education for the Mildly Retarded—Is Much of It Justifiable?*, 35 EXCEPTIONAL CHILDREN 5 (1968).

13. One of the earliest cases to question the appropriateness of the educational setting was *State ex rel. Beattie v. Board of Educ.*, 169 Wis. 231, 172 N.W. 153 (1919). The board of education precipitated the case by transferring the child from the public school to a school for the instruction of deaf persons and persons with speech impairments. The action was brought to force the board to return the child to the regular school because he had perfect hearing, no speech problem, and at least average intelligence. The Wisconsin Supreme Court upheld the board's transfer because of the child's other physical impairments. He had paralysis affecting his whole physical and nervous system, so use of his voice, hands, feet, and body were not normal. Thus, he could be characterized as having a speech impairment. Furthermore, he experienced uncontrollable facial contortions and drooped, which bothered the teacher and students. The court states that the board had the power to decide whether the disruption affecting the education of the other students was sufficient reason to deny the handicapped child's constitutional right. It concluded that the board did not exceed its discretion in doing so. See also *Watson v. City of Cambridge*, 157 Mass. 561, 32 N.E. 864 (1893); *West v. Board of Trustee*, 41 Ohio App. 367, 181 N.E. 144 (1931).

See also *DENO, SPECIAL EDUCATION AS DEVELOPMENTAL CAPITAL* 229 (1971). Deno for many years has challenged the procedure of categorizing special children in order to provide programs for them. He believes that it has deterred appropriate educational programming for special children.

cial classes for the mentally¹⁴ and physically handicapped.¹⁵ Other cases established the state's responsibility to reimburse private institutions for services provided to exceptional children for whom no appropriate public school placements were available.¹⁶

14. For example, in *Hines v. Board of Educ.*, 170 Misc. 745, 10 N.Y.S.2d 840 (1939), the City of New York was challenged on whether it had met its statutory obligation to provide special classes adapted to education of the mentally handicapped. The court determined that the 170 special classes for the mentally handicapped met that obligation. In a later case, *Elgin v. Silver*, 15 Misc. 2d 864, 182 N.Y.S.2d 669 (1958), parents of a 17-year-old mentally handicapped child sought to compel the New York City Board of Education to provide education for mentally handicapped children until they reached age 21. The court construed a new 1957 statute to mean that the school board had to provide education for mentally handicapped children but only until age 17. Education until age 21 was only mandatory when a child could profit from education beyond age 17.

15. For example, in *Schutte v. Decker*, 164 Neb. 582, 83 N.W.2d 69 (1957), the Nebraska court addressed the obligations of a local school district to educate a physically handicapped child. A state statute required the board of education to budget for each handicapped child at least as much as was budgeted for non-handicapped children. The statute provided for excess cost reimbursement, to an extent, from state funds. The act guaranteeing the education of physically and mentally handicapped children was separate and independent from the other state acts dealing with education. The court decided that if a school district complied with the statute, then by definition it met its obligations.

Eposito v. Barber, 74 N.J. Super. 289, 181 A.2d 201 (1962), was grounded on a state statute providing for the education of mentally handicapped and physically handicapped children. The court ruled that the school board did have to provide the plaintiff child with speech therapy suited to his individual needs. See generally E. FULBRIGHT & E. BOLMEIER, COURTS AND THE CURRICULUM 33-36 (1964) (expanding the school to include provisions for the physically and mentally handicapped).

16. For example, *Butler v. United Cerebral Palsy*, 352 S.W.2d 203 (Ky. Ct. App. 1961), dealt with a state statute authorizing public aid to private institutions. Those institutions were reimbursed for educating "exceptional children," defined for statutory purposes as children who would be entitled to public education if appropriate programs and facilities were available, but who the State Board of Education determined should go to private institutions because of the inadequacy of the local school.

Butler stands in sharp contrast to an earlier Illinois case in which a father sued to collect for the costs of his son's education in a state mental institution. *Department of Public Welfare v. Haas*, 15 Ill. 2d 204, 154 N.E.2d 265 (1958), a case decided only 20 years ago, left the financial burden on the father. The Illinois Supreme Court did recognize public education as a constitutional right, but it limited that right to educable children, concluding that the son in question didn't meet that standard. See also *In re Peter H.*, 66 Misc. 2d 1097, 323 N.Y.S.2d 302 (1971). In this case the mother of a physically handicapped boy sought reimbursement for the tuition costs of sending him to a nonpublic special educational facility. The family court granted reimbursement.

The court in *In re Leitner*, 40 App. Div. 2d 38, 337 N.Y.S.2d 267 (1972), spoke critically of the state fiscal bureaucracy for special educational services:

The procedure by which the New York Family Court can order special educational services and allocate the cost of those services is "at best, cumbersome, and at worst, unclear and unnecessarily complex."

Id. at 42, 337 N.Y.S.2d at 272. The court went on to explain that the New York Constitution outlines the general jurisdiction of the Family Court and section 232 of the Family Court Act gives the court jurisdiction over special education training of mentally handicapped children. *Id.* Normally the state and county split the cost when it's not provided by parents, guardians, local authorities, or other sources. In addition, there is a New York voucher system providing for

Even though the trend in the case law acknowledged some form of state responsibility to the handicapped, the quality of this educational effort was not fully explored until *Pennsylvania Association for Retarded Children v. Pennsylvania (PARC)*¹⁷ and *Mills v. Board of Education*.¹⁸ Both cases re-

such payments. D. KIRP & M. YODOF, EDUCATIONAL POLICY AND THE LAW: CASES AND MATERIALS 714-17 (1974) [hereinafter cited as EDUCATIONAL POLICY].

A more recent case involving the education of the handicapped is *Levine v. New Jersey Dep't of Institutions & Agencies*, 4 Fed. L. Rep. 2650 (July 14, 1978). In *Levine* parents contended that the state was constitutionally obligated to provide for the cost of 24-hour custodial care for their severely brain-damaged child. Their theory was that the care would be "educational services." The New Jersey Superior Court, Appellate Division, rejected the theory. Although the state must provide a thorough and efficient education to all children, there was no denial of equal protection in *Levine*. There is a distinction between services that are educational in nature and those that involve total custodial care and maintenance in a state institution. The handicapped child in *Levine* needed custodial, not educational services.

17. 343 F. Supp. 279 (E.D. Pa. 1972). This decision upheld a stipulation and consent agreement which required a hearing before a retarded child could be removed from regular classes. It also provided that the excess instruction costs would be paid by the state. *Id.* at 301.

PARC sought public education for handicapped children in the categories that had been totally excluded from the schools. Those children categorized as "uneducable" or "unable to profit" from further education from the public school system had been totally excluded. *See* PA. STAT. ANN. tit. 24, §§ 13-1375, -1330 (1972). The Pennsylvania Code also allowed exclusion of handicapped children who had not reached the mental age of 5 years or who were not within the compulsory school age span of 8-17 years. *Id.* §§ 13-1304 to -1326. The final decision did touch on the concept of the least restrictive alternative:

It is the Commonwealth's obligation to place each mentally retarded child in a free, public program of education and training appropriate to the child's capacity, within the context of the general educational policy that among the alternative programs of education and training required by statute to be available, placement in a regular public school class is preferable to placement in a special public school class and placement in a special public school class is preferable to placement in any other type of program of education and training.

343 F. Supp. at 307.

18. 348 F. Supp. 866 (D.D.C. 1972). The court stated:

Each member of the plaintiff class is to be provided with a publicly-supported educational program suited to his needs, within the context of a presumption that among the alternative programs of education, placement in a regular public school class with appropriate ancillary services is preferable to placement in a special school class.

348 F. Supp. at 880.

The District of Columbia public schools even admitted that an estimated 12,340 handicapped children were not given a publicly supported special education. *Id.* at 869. The school system's scapegoat was the lack of adequate funding for special classes, but it was not acknowledged as a valid excuse. *Id.* at 876. Each child was considered entitled to a free public education.

See M. KINDRED, J. COHEN, D. PENROD & T. SHAFFER, THE MENTALLY RETARDED CITIZEN AND THE LAW 255-67 (1976); L. LIPPMAN & I. GOLDBERG, RIGHT TO EDUCATION; ANATOMY OF THE PENNSYLVANIA CASE AND ITS IMPLICATIONS FOR EXCEPTIONAL CHILDREN (1973); Comment, *Public Instruction to the Learning Disabled: Higher Hurdles for the Handicapped*, 8 U.S.F. L. REV. 113, 129-33 (1973).

The legal theory to support such decisions as *Mills* and *PARC* stems from the Equal Protection Clause. It was argued that each child should be allotted the same number of tax dollars. The objective was to equalize monies spent on children in the regular classrooms. The political

sponded to the developing criticism of separate delivery systems for special education by establishing the right of handicapped children to a free public education appropriate to the child's educational needs. Further, they pro-

and litigious pushes came from inequities between property-rich and property-poor school districts, between schools with different racial composition, and between urban and rural school districts.

The basic legal argument was equal protection of the law. Because public education subsists on public monies, the contention was that it was a violation of the equal protection clause of the United States Constitution and any comparable clause in state constitutions to favor financially one student or school group over another. "This means that no state may enforce legislation or authorize administrative agencies to enforce rules and regulations that discriminate in favor of one class of citizens as over against another." N. EDWARDS, *THE COURTS AND THE PUBLIC SCHOOLS: THE LEGAL BASES OF SCHOOL ORGANIZATION AND ADMINISTRATION* 11 (3d rev. ed. 1955).

Brown v. Board of Educ., 347 U.S. 483 (1954), denounced segregation on the basis of race as violative of the equal protection clause. It was reinforced by *Bolling v. Sharpe*, 347 U.S. 497 (1954), its companion case, which declared racial segregation also violative of the due process clause. See generally L. GARBER & N. EDWARDS, *THE PUBLIC SCHOOL IN OUR GOVERNMENTAL STRUCTURE* 63-68 (1962). Following from the premise that children of all races were entitled to the same schools and same education, the advocates argue that all children should be treated equally, at least financially. The question then becomes whether an equal tax dollar expenditure results in an equal educational opportunity. Certainly it would be an easy yardstick to look at objective statistics of expenditures and determine whether every student was being treated "equally." However, the real goal should be to provide the same actual education or same opportunity. Just as it costs more to provide a black child an education in an urban rather than primarily white suburban setting, it costs more to educate a handicapped child with more educational needs. See generally *SCHOOL FINANCE*, *supra* note 7.

Thus, one can follow the progress made in securing comparable funding and comparable educational opportunities for children of different races, geographical, and financial areas. One can then analogize to the progress that has been made on behalf of handicapped children in securing equal educational opportunities. Because the latter movement is not as far along, one might use the former movement for purposes of projection. There is an analogous increase in community control (the "communitarian impulse"). *EDUCATIONAL POLICY*, *supra* note 16, at 307-46 (equal educational opportunity and race; description of community control). Other analogies include sex-based discrimination as it applies to equal educational opportunities and educational resources. *Id.* at 490-643. The bottom-line analogy, though, is one of integration. It was determined that children of different races were entitled to education in the same schools and classrooms. The concept of mainstreaming similarly concludes that children of different learning capacities and physical abilities are entitled to education in the same schools and classrooms to the maximum extent possible. *Id.* at 717.

See also P. ADAMS, *CHILDREN'S RIGHTS: TOWARDS THE LIBERATION OF THE CHILD* (1971); W. BUCKLEY, *FOUR REFORMS — A GUIDE FOR THE SEVENTIES* (1973); G. COLLINS, *THE CONSTITUTIONAL AND LEGAL BASES FOR STATE ACTION IN EDUCATION* (1968); J. COONS, W. CLUNE & S. SUGARMAN, *PRIVATE WEALTH AND PUBLIC EDUCATION* (1970); L. GARBER, *CURRENT LEGAL CONCEPTS IN EDUCATION* (1966) (Symposium on School Law); N. NAG, W. AYERS, N. SULLIVAN, H. KOHL & M. FANTINI, *IMPLEMENTING EQUAL EDUCATIONAL OPPORTUNITY* 138 (1968); J. GUTHRIE, *SCHOOLS AND INEQUALITY* (1971); M. LOUGHERY, *PARENTAL RIGHTS IN AMERICAN EDUCATIONAL LAW: THEIR BASES AND IMPLEMENTATION* (1952); P. MERANTO, *THE POLITICS OF FEDERAL AID TO EDUCATION IN 1965: A STUDY IN POLITICAL INNOVATION* (1967); J. SLY, *FINANCING EDUCATION IN THE PUBLIC SCHOOLS* (1956) (Symposium Conducted by the Tax Institute, Nov. 3-4, 1955); STATE COMM'N ON THE QUALITY, COST & FINANCING OF ELEMENTARY & SECONDARY EDUCATION, *THE FLEISCHMANN REPORT ON THE QUALITY, COST, AND FINANCING OF ELEMENTARY AND SECONDARY EDUCATION IN*

moted this right to an appropriate education in the least restrictive environment. These cases not only were the impetus for similar lawsuits in other states,¹⁹ but ultimately formed the foundation for Public Law 94-142, which mandates uniform implementation of these principles throughout the states.

Although the Act requires that an appropriate education be delivered in the least restrictive environment,²⁰ it contains features which tend to perpetuate the dual approach to the distribution of educational services. Some of the most significant deterrents to collaborative programming by the special and regular education systems are: control of resources by special education, categorical labels for the handicapped, traditional essentialist curriculum in regular education, and teacher preparation. A delineation of each of these barriers follows.

PROBLEMS RELATED TO THE CONTROL OF RESOURCES BY SPECIAL EDUCATION

Perhaps one of the most significant barriers to promotion of the least restrictive environment and collaborative programming, especially with respect to services provided by the regular classroom, is the method by which state and federal funds are appropriated for educating the handicapped. At the state level, legislatures distribute educational funds for the handicapped through special education bureaus or divisions. At the federal level, Con-

NEW YORK STATE (1973); NATIONAL ORGANIZATION ON LEGAL PROBLEMS OF EDUCATION, CRITICAL ISSUES IN SCHOOL LAW (1970); R. ORTMAN, THE RIGHT TO BE EDUCATED: STUDIES TO COMMEMORATE THE TWENTIETH ANNIVERSARY OF THE ADOPTION BY THE UNITED NATIONS OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS, DECEMBER 10, 1948 (1968).

Beyond pure analogy, it should be noted that gaining larger fiscal shares not only benefited students of particular races or poor geographic areas, but there also was an automatic benefit to the "harder to educate," such as the handicapped, by virtue of the higher incidence of these students in those categories. See SCHOOL FINANCE, *supra* note 7, at 65 (Table 4-3 and accompanying text).

19. *PARC* was cited as support in the following cases: *Larionoff v. United States*, 553 F.2d 1167 (D.C. Cir. 1976); *Muskegon Theatres, Inc. v. City of Muskegon*, 507 F.2d 199 (6th Cir. 1974); *Nickerson v. Thomson*, 504 F.2d 813 (7th Cir. 1974); *Halderman v. Pennhurst State School & Hospital*, 446 F. Supp. 1295 (E.D. Pa. 1977); *Taylor v. Maryland School for the Blind*, 409 F. Supp. 148 (D. Md. 1976). *Mills v. Board of Educ.* was cited as support in the following cases: *Panitch v. State of Wisconsin*, 444 F. Supp. 320 (E.D. Wis. 1977); *Cuyahoga County Ass'n for Retarded Children & Adults v. Essex*, 411 F. Supp. 46 (N.D. Ohio 1976); *Frederick v. Thomas*, 408 F. Supp. 832 (E.D. Pa. 1976); *Snowden v. Birmingham-Jefferson County Transit Authority*, 407 F. Supp. 394 (N.D. Ala. 1975); *Robinson v. Cahill*, 67 N.J. 333, 339 A.2d 193 (1975).

20.

(1) That to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and

(2) That special classes, separate schooling or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

45 C.F.R. § 121a.550(b)(1), (2) (1978).

gress allows the Bureau of Education for the Handicapped within the Department of Health, Education, and Welfare to oversee the appropriations. In both cases, the resources provided are designated largely for the special education delivery system, which generally controls its own distribution of funds. As a result, less funds are available to the regular education system, despite the fact that it is required to provide services to handicapped children as well.

Since Public Law 94-142 requires that collaborative programming be provided for handicapped children, regular and special education must therefore share resources in order to provide all children with an educational environment which is appropriate to their individual needs. The regular educational system must request funds from special education whenever it undertakes to cooperate in the education of the handicapped. Unfortunately, special education usually utilizes its funds and resources in its own system first with the balance left to regular education. Thus, the present distribution of resources does not facilitate the desired fluidity between special education and regular education programs.

The net result of this practice is that the regular education system must attempt to meet the mandate of the law without adequate funds. Therefore, regular education is unable to provide the necessary and costly facilities for education of the handicapped. The cost of providing smaller classes, teachers aides, teaching machines, and equipment is in excess of amounts allotted for regular education. The inability of regular education to obtain these necessary teaching aids is an impediment to the handicapped child's progress. Thus, while ostensibly fulfilling the goal of the least restrictive environment, the Act does not, in fact, ensure the resources necessary to fulfill its additional goal of an appropriate and free public education for handicapped children.²¹ This is the result of the legislation's lack of a requirement that educational facilities provide an individualized program of education.²²

21. The regulations accompanying the Act are intended:

(1) to assure that all handicapped children have available to them a free appropriate public education; (2) to assure that the rights of handicapped children and their parents are protected; (3) to assist States and localities to provide for the education of handicapped children; and (4) to assess and assure the effectiveness of efforts to educate such children.

42 Fed. Reg. 42,474 (1977) (Summary). The goals have aspects of both quality and quantity. The quality of education means that it must be appropriate, in the least restrictive environment (*i.e.*, mainstreaming if possible), and free. The quantity refers to the objective of reaching every child who can benefit from educational services. See 45 C.F.R. § 121a.1 (1978).

22. Under the Act, the providers of educational services are "not held accountable if a child does not achieve the growth projected in the annual goals and objectives." 45 C.F.R. § 121a.349 (1977).

The individualized education program (IEP) is a written statement prepared by the local educational agency representative, the parents, the handicapped child's teacher, and possibly other professionals, such as a state agency representative. It sets forth the child's level of functioning, instructional objectives, services needed to educate the child, and an evaluation at a later time to determine whether the instructional goals have been met. It should also contain a

One area in which funds are available to regular education is in retraining regular teachers to work with handicapped children. Again, however, the special education delivery system has control as to how these funds can best be utilized. Therefore, at a time when regular education is experiencing a limitation of its budget because of decreasing enrollments and conservative local taxation measures, it is being asked to serve a new clientele (i.e., handicapped children) without any provision for additional resources.²³ The Education for All Handicapped Act affects the educational programs in every state and indirectly the character of the education of each handicapped child in the United States.²⁴ Thus, minor revisions could have major effects toward the resolution of this financing problem.

Unfortunately, the funding mechanism of Public Law 94-142 continues to distribute funds in the same rigid manner. Federal funds are given to the state educational agencies²⁵ which continue to earmark some funds for spe-

statement indicating the degree to which the child can be educated in the regular classroom. See 45 C.F.R. §§ 121a.220-.227 (1978).

The IEP must provide a solid rationale for removing the child from regular education. Because of typical bureaucratic inertia, it is easier for the representatives of the educational agency (most likely the local school district) to leave the child in the regular classroom. The school district can then nominally characterize the child as being "mainstreamed" into the "least restrictive environment." The reviewing authority can easily determine on paper whether the child is in a regular or special class; however, it cannot really determine whether a handicapped child in a regular class is receiving appropriate individualized instruction and supportive services. Yet the school district can collect monies from the federal and state governments for its mainstreaming, regardless of its quality and educational effectiveness.

23. See BRENTON, MAINSTREAMING THE EDUCABLE MENTALLY RETARDED 13 (1975).

24. See 45 C.F.R. § 121a.2 (1978). It is feasible that a state may choose not to seek federal funds under the Act. Yet the Act speaks in generalities, so its broad applicability is implied. This optional characteristic of the Act's applicability suggests another crucial reason why the federal funding under it must be great enough to induce states to voluntarily make themselves subject to the terms of the Act.

Once a state falls under the purview of the Act, the education of each handicapped child must meet its standards, at least in theory. The amount of money spent on the child's education is controlled, the child becomes entitled to an individualized education program (IEP), and the parent and child automatically acquire due process rights. 45 C.F.R. §§ 121a.130, 131, .500-.534 (1978). One might also argue that because the flow of monies to education of the handicapped is controlled, the money spent on the education of the "regular" child, whether derived from state or federal sources, is also affected indirectly. Assuming that the state has a finite number of tax dollars to distribute, if the federal government requires an increased number be spent on education of the handicapped, necessarily a decreased number will be spent on education of nonhandicapped children.

25. In regard to the broad applicability of the Act, one should note that its definition of "State" includes the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virginia (*sic*) Islands, and the Trust Territory of the Pacific Islands. 42 Fed. Reg. at 42,480, § 121a.15.

The money comes from the federal government and goes through the state agency to the local agency. Before the local agency can have and use funds from the federal source, it must meet the "excess cost requirement." 45 C.F.R. § 121a.182-.183 (1978). Briefly, the excess cost requirement means that federal funds can only be used for costs in excess of what the local agency normally spends on the education of a handicapped child. See 45 C.F.R. §§ 121a.184-.193 (1978) (detailed methods of computation for excess costs—minimum amount and

cial education²⁶ and other funds for regular education, reinstating a funding dichotomy between the two systems. Nothing in the Act compels a transfer of funds from special education to regular education. Once again regular education is left with inadequate resources to provide an appropriate education for the handicapped children it is required to service.²⁷

Subpart B of the Act, which outlines state annual program plans and local applications,²⁸ is the most logical portion to revise. The Act should be re-

consolidated application amount). Under no circumstances may federal funds under the statute be used to replace state funds. However, in the calculation of what constitutes a replacement, consideration of a lower enrollment of handicapped children and prior, major, long-term expenditures is allowable. 45 C.F.R. § 121a.230 (1978).

The nonsupplanting rule results in at least minor impact on regular education. First, as the amount of federal funding increases each year, the amount of state funding for education of the handicapped must increase or at least remain constant. If state educational funds decrease, for example, in the aftermath of conservative taxpayer voting, regular education funds would be logically reduced before special education funds. Then federal funds could be retained and the cumulative loss would be reduced.

Second, if the nonsupplanting rule is strictly construed, funding could not be used to pay part of the salary of a regular education teacher who teaches handicapped children. The "Comment" to § 121a.230 only states:

Whether a local educational agency supplants with respect to a particular cost would depend on the circumstances of the expenditure. For example, if a teacher's salary has been switched from local funding to Part B funding, this would appear to be supplanting. However, if that teacher was taking over a different position (such as a resource room teacher), it would not be supplanting.

Id. A liberal construction would take the statement further and conclude that if a regular education teacher received in-service training and taught handicapped children in the regular classroom, part of the teacher's salary could correctly come from the Act's funding as provided by 20 U.S.C. § 1411-20 (1976). However, the strict construction is more likely to be adopted. The above quotation suggests that a teacher's salary source only changes when the teacher switches to a new position; a modification of a present position would not be a sufficient basis for a change in funding source. Yet it is the teacher with the new handicapped students who bears a major portion of the burden and responsibility of mainstreamed students.

26. With regard to public agencies within the state, the state educational agency submits an annual program on behalf of the entire state:

Therefore, the provisions of this part apply to all political subdivisions of the State that are involved in the education of handicapped children. These would include:

(1) The State educational agency, (2) local educational agencies and intermediate educational units, (3) other State agencies and schools (such as Departments of Mental Health and Welfare and State schools for the deaf or blind), and (4) State correctional facilities.

45 C.F.R. § 121a.2(b) (1978). The state schools in particular are grounded in the other theory of segregation of the handicapped for educational purposes. Special education is far more likely to get funding from a general "Department of Public Instruction" than regular education is to get funding from a "Department of Mental Health and Welfare."

27. This statement is derived from the official Comment to § 121a.2:

The requirements of this part are binding on each public agency that has direct or delegated authority to provide special education and related services in a State that receives funds under Part B of the Act, regardless of whether that agency is receiving funds under Part B.

45 C.F.R. § 121a.2 (1978).

28. A state's annual program plan outlines the present program for educating handicapped children and the plan for the upcoming year, complete with anticipated state expenditures and

written to require a state to include a description of how funds would be distributed to regular education services for handicapped children.²⁹ For example, if the state's plan failed to provide for funding to regular education, the Commissioner would have the power to disapprove it.³⁰ At present, the Act requires that a state's annual program plan need only provide statistics as to the number of special class teachers, resource room teachers, and consultant teachers which will be needed.³¹ The plan also must state how many additional ancillary noninstructional personnel are presently employed by the state and how many more are needed.³² But there is no provision for assessing how many regular education teachers serve handicapped children's educational needs nor how many of these regular education teachers are needed.³³ The only reference to regular classes concerns the physical facilities used for the education of the handicapped.³⁴

The most direct method of revising Public Law 94-142, would be to draft appropriate provisions in the funding segment of the Act. Currently,

anticipated federal expenditures or contributions. It is submitted by the state educational agency and must be certified by that agency and the state attorney general. 45 C.F.R. §§ 121a.110-.112 (1978). Local applications are a component of the overall state plan and are directed from the local educational agency to the state educational agency, which in turn directs it to the federal government. *See generally* 45 C.F.R. §§ 121a.180-.194 (1978).

29. First, the Act could require the state to give a breakdown of where handicapped children are placed — particularly how many are placed in regular classes. That datum would fall into the data requirement in regard to the Act's full educational opportunity goal. 45 C.F.R. § 121a.124 (1978).

Second, the Act could require a statistical description of the number of regular education teachers that are teaching handicapped children. *See* notes 31-33 *infra* and accompanying text.

Third, one of the criteria that could be considered in the plan's annual evaluation could be whether appropriate funding is reaching regular education. *See* 45 C.F.R. § 121a.146 (1978).

Fourth, and most crucial, would be revision of § 121a.149, which requires a description of how the Part B funds are used. 45 C.F.R. § 121a.149 (1978). Both subsection a and subsection b could have additional requirements to indicate how the state educational agency and the local educational agency, respectively, allocated money to regular education to help cover the increased costs due to education of the handicapped.

30. The Commissioner can disapprove any plan that does not meet the stated requirements. 45 C.F.R. § 121a.113(b) (1978). The Commissioner is the responsible agent of the Department of Health, Education, and Welfare, Office of Education.

31. 45 C.F.R. § 121a.126(b)(1) (1978).

32. 45 C.F.R. § 121a.126(b)(2) (1978). The list of personnel seems to point to specialists only, although theoretically additional regular class teachers with some training in education of mainstreamed children could be fairly cast as "additional personnel."

Another problem created by the extensive list of special education specialists and their respective departments is the impression that the federal funds will go only to them. No mention is made of regular education, creating the parallel implication that no funds will go toward that delivery system.

33. This omission strongly suggests that the number of regular classes and classroom teachers serving handicapped children is not considered by either the state educational agencies or the Commissioner on behalf of the federal government in determining the practical and financial needs of the state. Needs of the regular class and classroom teacher are not taken into consideration and therefore appropriations cannot be made for their needs.

34. 45 C.F.R. § 121a.126(b)(4) (1978).

the state educational agency shoulders the main responsibility for the education of the state's handicapped children. The state, however, merely acts in a supervisory capacity because it delegates its authority to the local educational agencies.³⁵ Accompanying the delegated responsibility is the bulk of the federal funding.³⁶ The Act should be revised to require a local educational agency to transfer funds to regular education when it has been delegated the responsibility for education of the handicapped.³⁷ Furthermore, primary control of financial resources should be shifted from special education to either a *joint* funding and distribution program or a method of *shared* funding based on an objective ratio or other established criteria.³⁸

35. The regulation provides that:

(a) The State educational agency is responsible for insuring:

(1) That the requirements of this part are carried out; and

(2) That each educational program for handicapped children administered within the State, including each program administered by any other public agency:

(i) Is under the general supervision of the persons responsible for educational programs for handicapped children in the State educational agency, and

(ii) Meets education standards of the State educational agency (including the requirements of this part).

(b) The State must comply with paragraph (a) of this section through State statute, State regulation, signed agreement between respective agency officials, or other documents.

45 C.F.R. § 121a.600 (1978). See 45 C.F.R. §§ 121a.601-.602 (1978).

The official Comment to § 121a.600 explains:

This provision is included specifically to assure a single line of responsibility with regard to the education of handicapped children, and to assure that in the implementation of all provisions of this Act and in carrying out the right to education for handicapped children, the State educational agency shall be the responsible agency. . . .

Without this requirement, there is an abdication of responsibility for the education of handicapped children. Presently, in many States, responsibility is divided, depending upon the age of the handicapped child, sources of funding, and type of services delivered. . . .

45 C.F.R. § 121a.600 (1978). As the sources of funding now stand under the Act, responsibility for handicapped children will probably depend upon where they are placed and whether special education funds or regular education funds are used for their education.

36. The state is limited to the greater amount of either 5% or \$200,000 of the total state allotment for administrative costs, subject to a maximum of the amount designated in §§ 121a.704 or 121a.705, the hold harmless provision and the within-state distribution for fiscal year 1978, respectively. 45 C.F.R. §§ 121a.620, 704, 705 (1978). It is likely that §§ 121a.705 and 121a.706 were intended to limit each state's allotted amount. They are comparable sections on within-state distribution, but the former applies to fiscal year 1978 and the latter to fiscal year 1979 and thereafter. *Id.* Under § 121a.705, the state can use up to half of the state's total allocation for named purposes. Section 121a.706 limits the state's potential share to 25%. *Id.*

37. A legal duty and a legal right are, most often, reciprocals. Here regular education's duty to educate certain handicapped students must be supported by the right to a share of federal funding. Otherwise the handicapped, mainstreamed child's right to a free appropriate public education (FAPE) will be hollow, indeed. See 45 C.F.R. § 121a.360 (1978).

38. For example, the distribution of funding could be according to where the handicapped children were being educated; if 25% were being educated in the regular classroom, regular

PROBLEMS IN THE ACT ASSOCIATED WITH
CATEGORICAL LABELS FOR THE HANDICAPPED

Historically, labeling of the handicapped has had an adverse effect on the quality and appropriateness of education. Special education has received financial support on the basis of traditional categorical labels for handicapped children.³⁹ Each category of learning disabilities has prompted the emergence of separate citizen and professional organizations, different professional preparations and certifications, unique definitions and standards for treatment, particular theoretical and applied educational procedures, and special lobbyists for congressional support of favored bills. When a child is identified for individual program planning as a handicapped pupil, he must fit one of the categories in order to obtain these extra services. As a result, many children who fail to meet the specific criteria outlined in the categories fall into the gaps between the categories.

The application of labels stigmatizes the children and interferes with their education.⁴⁰ The use of categories directs attention to the child as the root of the problem, rather than encouraging individual student instruction. Labels are often used to justify academic failure and thus restrict the exploration of methods and materials which could be used more effectively to teach a child. They perpetuate stereotypes and myths concerning various types of exceptionalities, not only in the eyes of the public, but also in the perceptions of regular classroom teachers. Furthermore, labels discourage discussion between regular and special educators concerning the unique learning capacities and needs of each child. Thus, regular and special educators are prevented from pooling their resources and expertise to provide more acceptable programs that meet the specific needs of handicapped children.⁴¹

education would be entitled to at least 25% of the federal funds. It should be noted that a strict split would not be equitable. Initially, the regular classroom education would require a higher share of funds than it would normally need. Like any new business or enterprise, education of the handicapped in the regular classroom would entail certain start-up costs. Those costs would include expenditures (capital outlay) for new physical items and materials, retraining for the regular class teacher (personnel cost), and lower productivity (decreased profits and production) and efficiency during the trial period of adjustment.

On the other hand, special education would need more per child for its educational services, because its physical facilities would be more expensive. In addition, special education would have the students with the more severe handicaps, who necessarily require more educational funding.

39. The Act defines "special education" as:

. . . [S]pecially designed instruction, at no cost to the parent, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.

45 C.F.R. § 121a.14 (1978).

40. See generally Goldstein, Arkell, Ashcroft, Hurley & Lilly, *Schools, ISSUES IN THE CLASSIFICATION OF CHILDREN* (1975).

41. See Klein, *Least Restrictive Alternative: An Educational Analysis*, 13 *EDUCATION & TRAINING OF THE MENTALLY RETARDED* 102, 106 (1978) [hereinafter cited as Klein].

Unfortunately, the Act perpetuates these problems by its own listings of categorical handicaps. Again, the impression arises that the federal funds will go only to the enumerated handicaps. This impression is verified by an analysis of the Act itself.⁴² For example, outside the physically handicapped classification, the category of "seriously emotionally disturbed"⁴³ is not broad enough to encompass all children with learning disabilities.⁴⁴ There is a strong possibility that the existing categorical definition will not encompass all children with physical disabilities.⁴⁵

Instead Public Law 94-142 should define "handicapped children" according to their needs, or at least their learning problems, rather than by traditional labels of physical or psychological problems.⁴⁶ These labels do not

42. The definition of "handicapped children" is finite in its parameters. Only the children that meet the definition get the benefits and protection of the Act. The definition of "handicapped children" includes only "those children evaluated in accordance with §§ 121a.530-121a.534 as being mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, other health impaired, deaf-blind, multi-handicapped, or as having specific learning disabilities, who because of those impairments need special education and related services." 45 C.F.R. § 121a.5(a) (1978).

43. "Seriously emotionally disturbed" is defined 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; or

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

(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.

45 C.F.R. § 121a.5(b)(8) (1978). It should be noted that not even the terms "schizophrenic" and "autistic" have certain definitions.

44. "Learning disability" connotes any problem that hinders the child's ability to learn. 45 C.F.R. § 121a.5(b)(9) (1978). Under the present definition it commonly has a characteristic of uneven learning; a child may be learning normally only in certain areas or in certain ways (e.g., visual memory but not aural memory). It is not uncommon to have an overlap between the categories of "learning disability" and "emotional disturbance." However, between the two definitions of "specific learning disability" and "seriously emotionally disturbed," not all conditions are named.

The only potential loophole for expanding the definition of "handicapped children" is the definition of "include": "as used in this part, the term 'include' means that the items named are not all of the possible items that are covered, whether like or unlike the ones named." 45 C.F.R. § 121a.6 (1978). See generally 45 C.F.R. §§121a.5(b)(8), 121a.5(b)(8)-5(b)(9) (1978).

45. 45 C.F.R. §§ 121a.5(b)(1)-5(b)(7), 5(b)(10), 5(b)(11) (1978).

46. The needs of the handicapped children could be categorized, if necessary, according to the type of special education needed, the anticipated tenure of the special instruction, and the physical materials needed to provide an appropriate education. If a child needed help in a particular aspect of the learning process, that could be specified also (e.g., aural cognition).

accurately reflect the state's success in educating all handicapped children. Although the Act requires states to submit statistics for each disability category,⁴⁷ these statistics can render an incomplete picture. For example, when the Office of Education evaluates a state in regard to its attainment of the full educational opportunity goal, the statistics are based upon the children who fall within the categories. The children who do not fall within these categories may have needs which are never recognized.⁴⁸ Therefore, the Act should broaden the definition of "handicapped children"⁴⁹ by using the term "impairment" as the basis of a common definition. Any child who has an impairment that necessitates special education or individualized instruction should be considered a "handicapped child" for the purposes of Public Law 94-142.

PROBLEMS RELATED TO THE TRADITIONAL ESSENTIALIST
CURRICULUM IN REGULAR EDUCATION

Regular education's traditional essentialist curriculum and teaching perspective, which emphasizes content, is also a barrier to successful mainstreaming of handicapped children. One spokesman for the essentialist position suggests that schools are for cognitive competence, a goal to be accomplished through a pupil's own willing efforts.⁵⁰ The implication of this position "is that integration of handicapped children with non-handicapped peers is unessential and thus unrelated to the primary purpose of schooling. Special education classes, then, become the mechanism for separating unwilling learners or children who may be perceived as interfering with general education's goal of cognitive competence."⁵¹ The essentialist's curriculum, methods, and administrative approach deter the handicapped child's smooth transition from special classes to regular classes. Special education teachers are expected to prepare the children for traditional academic tasks in the regular classroom while regular education teachers do little to adapt their curriculum and methods to increase the educational success of these children.

The potential success of Public Law 94-142 is diminished by its use of the essentialist curriculum as the criteria to measure the performance of the

47. See, e.g., 45 C.F.R. §§ 121a.124(e)(1), 125(b)(2)(i), 127(b)(1), 132(b)(1), 184 (Comment), 121a.227(b)(2), 751(a)(2) (1978).

48. See 45 C.F.R. § 121a.124-.126 (1978).

49. See note 42 *supra*. The definition should be as direct as the Act's intention as expressed in the Comment to section 121a.124:

In Part B of the Act, the term "disability" is used interchangeably with "handicapping condition." For consistency in this regulation, a child with a "disability" means a child with one of the impairments listed in the definition of "handicapped children" in § 121a.5, if the child needs special education because of the impairment. In essence, there is a continuum of impairments. *When an impairment is of such a nature that the child needs special education, it is referred to as a disability, in these regulations, and the child is a "handicapped" child [emphasis added].*

50. 45 C.F.R. § 121a.124 (1978) (Comment); Ebel, *What Are Schools For?*, 54 *PHI DELTA KAPPAN* 3, 3-7 (1972).

51. Klein, *supra* note 41, at 104.

handicapped child in the regular classroom. Nonacademic services which are particularly crucial to the development of the handicapped child are subordinate to the essentialist curriculum in the Act's organization.⁵² To its credit, the Act does order each public agency to provide nonacademic services and extracurricular experiences for handicapped children,⁵³ particularly in the area of physical education.⁵⁴

The necessary revision requires specific language stating that a mainstreamed child must receive a curriculum appropriate to his or her needs. The individualized education program may contain specific competency goals, but the three "R's" should not be the only goals nor should they be the only criteria applied to determine achievement.⁵⁵ Furthermore, most children, especially those with handicaps, do not learn different subjects at the same rate. Therefore, the child should have individualized goals, allowing for faster achievement in particular instructional areas. In sum, Public Law 94-142 should discourage the requirement that the mainstreamed child follow the traditional instructional and achievement pattern.

PROBLEMS INHERENT IN THE ACT RELATED TO TEACHER PREPARATION

Another barrier to collaborative functioning in the implementation of programs in the least restrictive environment is that of inadequate prepara-

52. 45 C.F.R. § 121a.13 (1978). The nonacademic services are termed "related services." Recreational services are given a relatively low priority in the Act's scheme. "Recreation" includes: (i) Assessment of leisure function; (ii) Therapeutic recreation services; (iii) Recreation programs in schools and community agencies; and (iv) Leisure education." 45 C.F.R. § 121a.13(9) (1978). 45 C.F.R. §§ 121a.304-.307 (1978).

53. "Each public agency shall take steps to provide nonacademic and extra-curricular services and activities in such manner as is necessary to afford handicapped children an equal opportunity for participation in those services and activities." 45 C.F.R. § 306(a) (1978).

54. 45 C.F.R. § 121a.307 (1978). The Comment to § 121a.307 cites H.R. REP. NO. 332, 94th Cong., 1st Sess. 9 (1975):

The Committee expects the Commissioner of Education to take whatever action is necessary to assure that physical education services are available to all handicapped children, and has specifically included physical education within the definition of special education to make clear that the Committee expects such services, specifically designed where necessary, to be provided as an integral part of the educational program of every handicapped child.

55. *Id.* See 45 C.F.R. § 121a.340-.349 (1977). To achieve the full educational opportunity goal, subjects other than the traditional basics should be considered as ends in themselves; at present, "side" subjects are considered a means to an end:

The use of the arts as a teaching tool for the handicapped has long been recognized as a viable, effective way not only of teaching special skills, but also of reaching youngsters who had otherwise been unteachable. The Committee envisions that programs under this bill could well include an arts component and, indeed, urges that local educational agencies include the arts in programs for the handicapped funded under this Act. Such a program could cover both appreciation of the arts by the handicapped youngsters, and the utilization of the arts as a teaching tool per se.

45 C.F.R. § 121a.304 (1978) (Comment).

tion of teachers. The regular classroom teacher often has been characterized as not having appropriate attitudes, knowledge, or skills to work with handicapped children in the mainstream of the regular classroom. However, a similar problem has been attributed to special education teachers. They have limited their practical experience to special classrooms or resource rooms so that they have an inadequate understanding and skill of how to serve the handicapped child in a team approach or as a consultant to the regular classroom teacher. Therefore, the key to successful mainstreaming is the combined efforts of regular class teachers, special educators, and auxiliary personnel both within the school setting and within the pre- and post-service university setting.⁵⁶ Teachers who are not trained for the new roles and functions required under the Act are barriers to fulfilling the mandate of the Act.

Public Law 94-142 anticipates personnel development by requiring the state educational agency to describe its method for personnel development in its annual program plan.⁵⁷ The Act intends to fund these development programs,⁵⁸ but almost exclusive emphasis is placed on in-service training.⁵⁹ The Act therefore encourages only a short, one-time program of preparation for a regular education teacher.⁶⁰ Ongoing assistance from support personnel with emphasis on the particular needs and programs of the handicapped children in the regular teacher's classroom is needed. Public Law 94-142 should provide for such continued assistance and suggest innovation in the area of teacher preparation on both the state and local level.

THE RELATIONSHIP BETWEEN PRESENT BARRIERS AND STATE LAW

Because Public Law 94-142 operates to finance special education programs already operative in the states, it is important to investigate state statutes dealing with the distribution of educational services to the handicapped. Perhaps the three most progressive state programs for the education of the handicapped are in Illinois, Wisconsin, and California. Although these pro-

56. Alberto, Castricane & Cohen, *Mainstreaming: Implications for Training Regular Class Teachers*, 13 EDUCATION & TRAINING OF THE MENTALLY RETARDED 90 (1978).

57. 45 C.F.R. § 121a.139 (1978).

58. "Each application must include procedures for the implementation and use of the comprehensive system of personnel development established by the State educational agency under § 121a.140." 45 C.F.R. § 121a.224 (1978). *See also* 45 C.F.R. § 121a.223 (1978). *See generally* 45 C.F.R. §§ 121a.620-.754 (1978) (use of federal funds).

59. "Each annual program plan must include a description of programs and procedures for the development and implementation of a comprehensive system of personnel development which includes: (a) The inservice [*sic*] training of general and special educational instructional, related services, and support personnel . . ." 45 C.F.R. § 121a.380 (1978). The common definition of in-service training is local or in-state instruction lasting no more than a few days and covering a topic or a few topics. Fortunately, Public Law No. 94-142 uses a broader definition: "As used in this section, 'inservice training' [*sic*] means any training other than that received by an individual in a full-time program which leads to a degree." 45 C.F.R. § 121a.382(a) (1978).

60. *Id.*

grams partially eliminate some of the barriers to an appropriate education in the least restrictive environment, many of the problems inherent in Public Law 94-142 are also incorporated in the laws of these states.

Education of the Handicapped in Illinois

Illinois was one of the first states to declare a right to free appropriate public education for each of its citizens, including the handicapped.⁶¹ Yet there is some question whether Illinois statutes actually provide a meaningful education.⁶²

First, Article 14 still subscribes to the segregationist theory of educating the handicapped⁶³ by allowing special education to control resources to be

61. In 1973, the Illinois special education statutes contained all the basics for ensuring handicapped children public education:

In the field of special education, the General Assembly, during the past few years, has created a statutory scheme which is unparalleled in the nation. Articles 14, 14A and 14B of the School Code secure to all exceptional children in Illinois free public educational services appropriate to the needs of each. With these statutes in effect, there now exist the laws needed to realize the goal expressed in the Illinois Constitution: ". . . the educational development of all persons to the limits of their capacities."

Keenan, *Current Issues in Illinois School Law: The Consumer's Perspective*, 23 DEPAUL L. REV. 402, 448 (1973) (footnotes omitted).

62. E.g., *Nickerson v. Thomson*, 504 F.2d 813 (7th Cir. 1974). *Nickerson* was a civil rights action alleging that the superintendent of the school district and the president and members of the school board allocated special education resources inequitably. The United States District Court for the Northern District of Illinois dismissed the complaint, which sought declaratory and mandatory relief, abstaining from deciding the federal issue until the state issue was decided. The Seventh Circuit Court reversed and remanded on the rationale that decision of the state issue would not resolve or affect decision of the federal issue.

Plaintiffs objected to the following problems, described in *Nickerson*:

The amended complaint asserts that the plaintiffs' rights have been violated because defendants fail to fulfill the mandate of the state statutes to provide adequate special education to physically handicapped children, maladjusted children, children with specific learning disabilities, educable mentally handicapped children, trainable mentally handicapped children, speech defective children, and multiply handicapped children. According to the complaint, ten additional teachers and other workers in various categories should have been hired in the 1972-1973 school year for special education purposes at a cost of \$50,000 per year (after state reimbursement) in order to meet the requirements of Illinois law, whereas the Superintendent proposed to hire only two additional personnel for these programs.

The complaint further asserts that plaintiffs' Fifth and Fourteen [sic] Amendment rights are violated by defendants' allocation of the resources of the special education programs that do exist. The programs are allegedly administered in a way that divides the children in need of special education into three groups: those who receive adequate special education, those who receive some, but not adequate, special education and those who receive no special education at all. Plaintiffs contend that no rational basis is used so to divide the children.

Id. at 815 (footnote omitted).

63. ILL. ANN. STAT. ch. 122, §§ 14-1.01 to 14-14.01 (Smith-Hurd 1978) (Article 14). Article 14 creates a special education Advisory Council on Education of Handicapped Children, ap-

used for handicapped children. Regular education receives no additional funds for educating the handicapped except to the extent that it provides extraordinary services or facilities.⁶⁴ Article 14 fosters the impression that class size, special equipment, and other specifications delineated are for special education only.⁶⁵ To insure adequate resources for the regular classroom which cooperates with special education, these specifications should be delineated for mainstreaming programs as well.

Second, the Article defines different types of handicapped children.⁶⁶ Just as the distinctions are unnecessary under Public Law 94-142, they are unnecessary under Illinois' Article 14.⁶⁷ In addition, there is no discussion of what curricula should be used in teaching handicapped children in either the regular or special classroom. It is thus assumed that the traditional essentialist curricula will be followed.

Finally, accompanying the segregationist approach is the continued practice of maintaining completely separate delivery systems.⁶⁸ Generally, the

pointed by the Superintendent of Public Instruction. *Id.* at § 14-3.01. The Superintendent and Council cooperate in developing appropriate rules and regulations.

School boards are encouraged to maintain special educational facilities for handicapped children. *Id.* at §§ 14-4.01 to -6.01. There is no comparable provision encouraging mainstreaming. In fact, a school district gains reimbursement for special education building purposes if it presents the proper vouchers. *Id.* at §§ 14-13.02 to -14.01. There is also reimbursement for the costs of special education, which could have a liberal construction inclusive of supportive services for mainstreamed children. *Id.* at § 14-12.01. *See also id.* at §§ 14-13.01 (reimbursement for furnishing special educational facilities in a recognized school).

64. The use of the word "extraordinary" is particularly interesting. There is no statutory explanation of the method for determining what is "extraordinary." *Id.* at § 14-7.02a.

A school district providing for a child requiring extraordinary special education services because of the nature of his handicap is eligible for reimbursement from the State for the per capita cost of educating that child in excess of the district per capita tuition charge for the prior year or \$2,000, whichever is less. Per capita costs shall be expenditures minus State reimbursement under Section 14-13.01.

Id. A school district maintaining special education classes for children in orphanages, foster family homes, children's homes, or state housing units gets reimbursement, too. *Id.* at § 14-7.03.

65. *See note 70 infra.*

The Superintendent of Public Instruction with the advice of the Advisory Council shall prescribe the standards and make the necessary rules and regulations including but not limited to establishment of classes, training requirements of teachers and other personnel, eligibility and admission of pupils, the curriculum, class size limitation, building programs, housing, transportation, special equipment and instructional supplies, and the applications for claims for reimbursements.

ILL. ANN. STAT. ch. 122, § 14-8.01 (Smith-Hurd 1978). This provision is the most adaptable for promoting the concept of mainstreaming. The Superintendent has sufficient power under this provision to make standards pushing state educational practices in the right direction.

66. *See, e.g., id.* at §§ 14-1.01 to -1.04 (physically handicapped children, maladjusted children, children with specific learning disabilities, and educable mentally handicapped children). Because the categories of handicapped children are established at the beginning of the Article, the rest of Article 14 relates back to those categories. *See id.* at § 14-7.01. *See also id.* at § 14-13.01 (distinction in reimbursement for an apparent practical purpose).

67. *See notes 46-49 and accompanying text supra.*

68. *See note 65 supra* (ILL. ANN. STAT. ch. 122, § 14-8.01 is sufficiently adaptable). Continual reference is made to special education programs. *See, e.g., id.* at §§ 14-3.01. -6.01,

Article emphasizes extraordinary special education services and de-emphasizes the new concept and requirement of mainstreaming.⁶⁹ Moreover, the Illinois Superintendent of Public Instruction can prescribe the requirements needed by teachers of handicapped children.⁷⁰ The Superintendent should require stricter qualifications and specialized training in addition to the in-service training mentioned in Public Law 94-142.⁷¹

Education of the Handicapped in Wisconsin

Wisconsin is another state which has traditionally led the country in educational reforms. Its exemplar Chapter 115 contains guarantees of free appropriate public education for the handicapped, those with special educational needs due to social and economic factors, and those making a transition between two languages and cultures.⁷² The Chapter does contain some problem areas, however, which indicate present barriers in implementation.

First, there are specific financial grants for educational facilities and resources to benefit the handicapped.⁷³ Theoretically, those grants would

-7.02a, -7.03, -9.01. There is no indication that the special education programs include those performed in regular education settings.

The deaf/blind individuals are entitled to use of the service center operated by the Illinois Office of Education. *Id.* at § 14-11.02. Special educational materials are provided for handicapped students. *Id.* at § 14.11.01. The tenure of the handicapped individual's right to special educational services is generally 3-21 years of age throughout Article 14. *See, e.g., id.* at §§ 14-1.04, -11.02. One can argue that there is an equal protection problem, because regular education rights generally run from 5-18 years of age.

69. *See* note 66 *supra*.

70. ILL. ANN. STAT. ch. 122, §§ 14-8.01, -9.01 (Smith-Hurd 1978). "No person shall be employed to teach any class or program authorized by this Article who does not hold a valid teacher's certificate as provided by law and unless he has had such special training as the Superintendent of Public Instruction may require." *Id.* at § 14-9.01.

71. *Id.* at § 3-11 (institutes or inservice training workshops). *See also id.* at § 14-10.01 (traineeship and fellowship program).

72. *See generally* WIS. STAT. ANN. §§ 115.76-.895 (Children with Exceptional Educational Needs), 90-.94 (Special Educational Needs), 95-.996 (Bilingual-Bicultural Education) (West 1978).

73. The State Superintendent of Public Instruction collects any federal aid as an agent. *Id.* at § 115.28(9). The federal aid then can be distributed to various school boards. All blind and deaf residents are entitled to education free of charge. *Id.* at § 115.52. There is a special circulating collection of books available to the visually handicapped. *Id.* at § 115.55.

Perhaps most obvious are the responsibilities of the Division of Handicapped Children — limited to supervising the special education expenditures and programs. *Id.* at § 115.77. The Division "[s]hall audit expenditures incurred for children with exceptional educational needs." *Id.* at § 115.77(2)(b). The Division also helps develop special education programs, approves programs, and approves plans to discontinue special education programs. *Id.* at § 115.77 (4). "Any federal aid which is made available for special education programs shall be granted the division for carrying out plans approved by the federal agency having supervision of the aid program." *Id.* at § 115.77(5). That might well include all of the Public Law 94-142 funding. *See* 20 U.S.C. §§ 1401, 1402, 1411-20 (1976).

It is also notable that the State Superintendent must make a state annual plan for state as well as federal purposes. *Id.* at § 115.78. That plan must include: "[a] listing of all public and private special education programs available in this state, the number of children attending each

benefit handicapped children in regular education environments; yet that is not at all clear. In practice, monies go directly to the Division for Handicapped Children,⁷⁴ which then distributes the funds to special education programs and personnel who specialize in this field.⁷⁵ Significantly, the funds are earmarked "special education," which minimizes the possibility that they might be shared with regular education.

Second, Chapter 115 defines even more categories of handicapped students than Illinois' Article 14.⁷⁶ Like most statutes, Chapter 115 carries those definitions throughout, which determines the construction and application of the Chapter.⁷⁷ Further, the definition of "regular education" excludes children with exceptional educational needs.⁷⁸ Therefore, when a handicapped child is mainstreamed, any assistance or special education rendered by the regular classroom teacher would have to be characterized

special education program pursuant to s. 115.85(2) or supervised under s. 115.77(3)(d) and the state aid given to each program so attended or supervised." *Id.* at § 115.78(2). It is unclear whether and to what extent a mainstreamed child is a participant in a special education program. *But see id.* at §§ 115.83(1)(b), (2).

74. *See* note 73 *supra*.

75. The board for the school district has the power to employ, for a special education program: "either full- or part-time certified teachers, certified coordinators of special education, certified school social workers, certified school psychologists, paraprofessionals, certified consulting teachers to work with any teacher of regular education programs who has a child with exceptional educational needs in a class . . ." *Id.* at § 115.83(1)(b).

76. *See* note 66 *supra*. Section 115.76(3) of the Wisconsin Statutes lists:

- (a) Physical * * * or orthopedic disability.
- (b) Mental retardation or other developmental disabilities.
- (c) Hearing impairment.
- (d) Visual disability.
- (e) Speech or language disability.
- (f) Emotional disturbance.
- (g) Learning disability.
- (h) Pregnancy, including up to 2 months after the birth of the child or other termination of the pregnancy.
- (i) Any combination of conditions named by the state superintendent or enumerated in pars. (a) to (h).

77. *See, e.g., id.* at § 115.85(3):

Annually, on or before August 15, each school board shall report to the department such information as it requires, including the following:

- (a) The total number of children who reside in the district and who have been placed in special education programs under s. 115.85(2), *the exceptional educational needs of each such child* and the school attended or special education received by each such child. The report shall also specify the number of children with exceptional educational needs who are known to the school district and who are under the age of 3 years and *the exceptional educational needs of each such child* (emphasis added). Naming the exceptional education needs of the child is direct and could avoid unnecessary labels. However, it is more than likely that the school boards revert to the method of describing the needs of the child with the traditional labels, thus describing the child's handicaps rather than the resulting exceptional education needs.

78. "'Regular education' means the educational program provided by a public or private school for children who do not have exceptional educational needs." WIS. STAT. § 115.76(9) (1977). *But see id.* at § 115.76(10) ("supportive or related service").

either as regular or special education before the source of funding could be determined.⁷⁹ By definition, there is bound to be bureaucratic confusion and potential disagreement.

Another problem is that various entities, including the Division for Handicapped Children, the Council on Exceptional Education, and other special education programs, all concentrate on special education without reference to mainstreaming.⁸⁰ Their ability to coordinate special education programs with regular classroom activities or to assume responsibility for mainstream-

79. *See id.* (overlapping definitions of "special education" and "regular education"). In regard to the content of the education, the definition of "educational assessment" refers to "fundamental course areas" for the evaluation of the success of the educational services. The Wisconsin Superintendent of Public Instruction has the duty to:

Develop an educational assessment program to measure objectively the adequacy and efficiency of educational programs offered by public schools in this state. The program shall include, without limitation because of enumeration, methods by which pupil achievement in fundamental course areas, as set forth in s. 188.01(1), and other areas of instruction commonly offered by public schools, will be objectively measured each year. Assessment shall be undertaken at several grade levels on a uniform, state-wide basis.

Id. at § 115.28(10). The Superintendent could use this provision for expansive and progressive regulations and educational evaluation criteria.

80. The Superintendent of Public Instruction has multiple duties, but none of them speak to insuring mainstreaming. *Id.* at §§ 115.28(1)-(15). *See also id.* at §§ 115.29-30. "The state superintendent may: (1) Provide for the education of deaf-blind children of suitable capacity to receive instruction . . . in a special class for that purpose . . ." *Id.* at § 115.53. There are also special Wisconsin schools for the visually handicapped and the deaf. *Id.* at § 115.52.

The Division for Handicapped Children operates under the Superintendent. *Id.* at §§ 115.77(1), (2).

The division shall be responsible for:

(a) Services for children with exceptional educational needs who are under the jurisdiction of the state superintendent and for the Wisconsin school for the deaf and the Wisconsin school for the visually handicapped. . . .

(c) Services provided to children with exceptional educational needs by special education programs under s. 115.85(2). . . .

Id. at § 115.77(3). *See generally id.* at § 115.77(4). The discussion of the Division's responsibility in the administration of special education programs does not explicitly or implicitly refer to public education in the regular classroom.

The Superintendent is also responsible for the state educational plan. *See id.* at § 115.78. Here, again, the emphasis lies in special educational programs; however, the Superintendent could construe them to include regular class programs involving one or more children with exceptional educational needs. *See id.* at § 115.78(2). The Council on Exceptional Education advises the Superintendent on those same special education programs. *Id.* at § 115.79. The most directly affected entity, though, is the child with exceptional educational needs. That child must be identified and recommended for a special education program. *Id.* at § 115.80(3). *See also id.* at §§ 115.82 (compulsory attendance) .83 (authorization of special education programs and services). *But see id.* at §§ 115.83(2) (definition of "special education program" includes a program that allows a child to attend "regular education programs"); 1973 Wis. LAWS, ch. 258, § 1. Section 1 of chapter 258 of the 1973 Wisconsin Laws stated:

It is the intent of the legislature in this act to ensure that preference is given, whenever appropriate, to education of a child with exceptional educational needs in classes along with children who do not have such needs. Furthermore, the legislature recognizes that it is frequently in the best interest of a child with exceptional

ing will depend upon a full exercise of authority. The supervision of present programs, however, could involve a great deal of time, to the detriment of the adaptation and development of those programs. To achieve mainstreaming, either the laws or the regulations must place it as a central goal to insure that it is not overlooked.

Finally, there are vague requirements for teacher preparation in the statute.⁸¹ But there are no particular provisions which give guidance for the preparation of the regular classroom teacher.⁸² Therefore, appropriate methods of regular teacher training must still be devised and supported by the Superintendent and associated boards.

Education of the Handicapped in California

California is a third state that recently overhauled its special educational statutes.⁸³ Unfortunately, the new statutes contain most of the old problems. First, the provisions governing special education programs are encumbered by the traditional funding barrier which assumes that money will go directly to special education programs.⁸⁴ Second, the provisions refer to general categories of "handicapped children" needing special education programs, defining them according to their handicaps rather than their resulting educational needs.⁸⁵ Third, the measurement of successful education efforts by the state follows the traditional essentialist curriculum, regardless of whether the child is taught in the regular or special classroom.⁸⁶ Fourth, the problems inherent in the funding barrier are compounded by the separate regu-

educational needs to be educated in an environment as similar as possible to the educational environment surrounding his siblings and neighbors who do not have such needs.

81. *See, e.g., id.* at §§ 115.28(7) (licensing and certification), .77(3)(d)(3) Division for Handicapped Children recommendations for certification standards, .77(4)(f) (Division for Handicapped Children duty to develop program for preparation, recruitment, and in-service training of personnel), .78(3) (state plan description of personnel and facilities available), .83(1)(b) (school board authority to employ specially trained personnel), .83(1)(c) (school board authority to provide in-service training).

82. It can be deduced that regular classroom teachers could learn from the in-service training. There is question as to whether in-service training is adequate or the only appropriate method of training regular education teachers.

83. California revised and reorganized its entire Education Code. Its history is outlined in E. KUNZI, *THE CALIFORNIA EDUCATION CODE* 11, 13, 18, 22 (1978) (references to the improved provision of public education for the handicapped). [hereinafter cited as KUNZI].

84. *See generally* CAL. [EDUC.] CODE §§ 56000-56160 (West 1977).

85. The Education Code defines "physically handicapped pupils," "mentally retarded pupils," "severely mentally retarded pupils," "educationally handicapped pupils," and "multi-handicapped pupils." *Id.* at § 56000. The California voucher system relies on similar definitions. *See* EDUCATIONAL POLICY, *supra* note 16, at 717 (under prior reimbursement scheme).

86. *But see* CAL. [EDUC.] CODE §§ 56020-56042 (West 1977). Section 56020 on experimental programs is particularly progressive, because it explicitly encourages innovation throughout the state.

lar and special education delivery systems.⁸⁷ And last, there is extensive discussion of teacher preparation, but it is geared to funding practices for teachers of children with specific handicaps.⁸⁸ Thus, the evolution of the California Education Code is not yet complete.⁸⁹

An examination of these state laws reveals that, despite the federal legislation which purports to provide a free and appropriate public school education to all handicapped children, such a commitment will not itself insure the desired outcome. The state laws and the Federal Act have not provided the mechanisms which will encourage and reinforce efforts in collaborative programming for the handicapped by special educators and the regular classroom teachers.

RESOLUTION OF THE PROBLEM

In an attempt to remove or at least limit the effects of the barriers to collaborative programming in the least restrictive environment between regular and special education, the following suggestions are made.

First, Congress and state legislatures should provide resources for the education of handicapped children on a proportionate basis in order to limit the control exerted by special education systems over excess funds. To achieve this basis, a suggested approach is the use of a weighted index which would accommodate the needs of exceptional children.⁹⁰ It must be noted that adjustments of the index must be made to avoid the traditional categories for exceptional children since the present "weighted index systems may not be appropriate given the philosophy and stated intent under the federal law of serving handicapped populations in the 'least restrictive

87. The statutes draw obvious lines between various special education programs, including occupational training for physically handicapped and mentally retarded pupils and sheltered workshops. See *id.* at §§ 56070-56076. See generally EDUCATIONAL POLICY, *supra* note 16, at 715, 717.

88. See, e.g., CAL. [EDUC.] CODE §§ 56050-56064 (West 1977) (grants to teachers of physically handicapped or mentally retarded pupils; loans to educationally handicapped pupils).

89. The California Education Code has continually changed and expanded for over a century. See generally KUNZI, *supra* note 83. In the area of education of the handicapped, at least, the needed changes are not complete.

Those changes are needed generally across the United States. See T. VAN GEEL, AUTHORITY TO CONTROL THE SCHOOL PROGRAM (1976); Herr, *Rights into Action: Protecting Human Rights of the Mentally Handicapped*, 26 CATH. U.L. REV. 203 (1977); Jackson, *The Little Red Schoolhouse is No More: Due Process Comes to Public Education*, 13 IDAHO L. REV. 325 (1977); Letwin, *After Goss v. Lopez: Student Status as Suspect Classification?*, in Symposium, *Perspectives on the Post-Civil War Amendments*, 29 STAN. L. REV. 627 (1977); Comment, *Special Education: The Struggle for Equal Education Opportunity in Iowa*, 62 IOWA L. REV. 1283 (1977). See also P. MANN, SHARED RESPONSIBILITY FOR HANDICAPPED STUDENTS (1978).

90. See generally R. ROSSMILLER, J. HALE & L. FROHREICH, EDUCATIONAL PROGRAMS FOR EXCEPTIONAL CHILDREN: RESOURCE CONFIGURATIONS AND COSTS, NATIONAL EDUCATIONAL FINANCE PROJECT, Madison, Wis. (Special Study No. 2, 1970). These authors have documented the excess cost of special education delivery. Their study used a weighted index approach (1.0 = regular program cost) and found special education costs across ten categorical areas to vary from 1.14 to 3.64 in terms of weighted costs.

alternative' placement."⁹¹ Once the resources were available, they could then be allocated to either delivery system based on the requirements of the children. If both delivery systems simultaneously required funds, the finance committee of the appropriate school district could develop a formula to equitably allocate the funds. This would foster full participation of both regular and special education in the multidisciplinary team process. The team would have the requisite freedom to make recommendations for programming based on the children's needs, irrespective of the biases of one delivery system over the other.

Second, the harmful effect of "labeling" a handicapped child could be easily eliminated if congressional and legislative bodies would provide alternate methods of funding handicapped education without the use of categories. Categories should be retained only if they could be directly useful in educational programming. Other than this exception, handicapped children should be identified and programmed for on the basis of assessed learning and treatment needs.

Third, regular education should adopt a more moderate curricular position so that different options in meeting academic objectives would be available. Schools that want to implement the provision of curricular alternatives for least restrictive environment programming, should include choices of: life science, creative arts, vocational preparation, practical living skills, and experiential cultural studies. Basic skill development and general content knowledge also should be incorporated in these curricular areas. Further, depending upon the learning model utilized, areas such as inductive reasoning, symbolic language development, and problem-solving could be added. The aptitudes, interests, and specific needs of the pupils would guide the teacher in selecting the most appropriate model or process.⁹²

Thus, as a part of the resolution of this barrier, regular education needs to apply the "ecology of education" to both its curriculum and its classrooms. One educator recommends that "relationships between the characteristics of learners and the surroundings in which they live . . . [and] the relationships and inter-connections that exist between these environments" should be studied in the classroom arena.⁹³ This would be a move away from, and would go beyond, a concern for just the skills and knowledge of particular subject areas. The teacher's attention would be drawn to the manner in which children interact in the process of learning. From this, the discovery of

91. Yates, *Financing of Public Law 94-142*, 12 EDUCATION & TRAINING OF THE MENTALLY RETARDED 396, 398 (1977).

92. See Klein, *supra* note 41, at 111.

93. Bronfenbrenner, *The Experimental Ecology of Education*, 5 EDUCATIONAL RESEARCHER 5 (1976). This author is a widely recognized general educator who writes with great breadth regarding general education, and views learners as interactors with their environments in the process of learning. This is a less limited view than that of the essentialists, who are bent on the learning of primary skills.

elements for learning which effectively mesh in the educational setting could result in achievement for both handicapped and nonhandicapped children in the regular classroom.

Fourth, to provide integrative programming to meet the least restrictive environment mandate of Public Law 94-142, a unified administrative structure is required to function collaboratively between the two delivery systems. Also needed is an "integrated system plan" that demands adaptation of all main and supporting systems. "[T]he burden for adaptation, which previously had rested unproportionately upon the child, now shifts to the system. The child is responsible only as one aspect of the environment comprising the system."⁹⁴ The modification of mainstream education, plus a support system that provides leadership, expertise, mechanisms, and resources is necessary to create a new kind of regular education program that is more responsive to the individual needs of all children. This will demand a responsive unified administrative structure that relates to the needs of both handicapped and nonhandicapped children.

It may be that, in time, the walls between regular and special education will diminish as larger numbers of children move into less restrictive environments. Special education will become more significant in regular education as it assumes a greater consultative team-teaching role in the regular classroom, where the largest share of direct teaching will occur.⁹⁵

Fifth, the one area in which aggressive measures are being taken to resolve the problem and remove the barrier is in teacher preparation. The Bureau of Education for the Handicapped has been allocating sizeable amounts of funds since fiscal year 1974 for the training and retraining of teachers. Training teachers to deal with a collaborative system is imperative since each child's least restrictive environment is dependent upon successful implementation of his or her individualized education program.⁹⁶ Significance has been placed on this area by teachers' and citizens' organizations. The National Education Association has said that "[a]ll staff should be adequately prepared for their roles through in-service training and retraining."⁹⁷ In light of the task at hand, all educators need to refine and expand current teaching methods. Improvements in both pre-service and in-service instruction is occurring in many quarters, and these programs are providing the greatest innovation for teachers in the field.

Some of the slowest progress toward interfacing regular and special education teacher preparation is seen on university and college campuses where the programs are separated by departments or schools. This is a sad commentary on higher educational institutions which ought to be leading the way with models of integrated programming. To resolve this problem, in-

94. MEISGEIER, *supra* note 11, at 137.

95. See Hasazi & York, *Changing Concepts of Special Education*, 95 TEACHER 99, 100 (1977).

96. Harvey, *Legislative Intent and Progress*, 44 EXCEPTIONAL CHILDREN 234, 261 (1978).

97. Ryor, *Integrating the Handicapped*, 66 TODAY'S EDUCATION 24, 25 (1977).

stitutional leadership should provide resource incentives to those campuses that become more aggressive in unifying their curricula and faculties. This should be achieved through the preparation of teachers who will obtain the competencies and skills necessary to function effectively in their roles with both nonhandicapped and handicapped children in today's classrooms.