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AUTHOR Turnbull, Ann; And Others
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ABSTRACT

This module (part of a series of 24 modules) is on judicial and legislative influences relevant to mainstreaming. The genesis of these materials is in the 10 "clusters of capabilities," outlined in the paper, "A Common Body of Practice for Teachers: The Challenge of Public Law 94-142 to Teacher Education." These clusters form the proposed core of professional knowledge needed by teachers in the future. The module is to be used by teacher educators to reexamine and enhance their current practice in preparing classroom teachers to work competently and comfortably with children who have a wide range of individual needs. The module includes objectives, scales for assessing the degree to which the identified knowledge and practices are prevalent in an existing teacher education program, and self-assessment test items. Bibliographic references and journal articles on judicial and legislative actions pertaining to Public Law 94-142 are included. (JD)

EDUCATING HANDICAPPED CHILDREN: JUDICIAL AND LEGISLATIVE INFLUENCES.

PREPARED BY
ANN TURNBULL
JUDITH LEONARD
H. RUTHERFORD TURNBULL

REVIEWED BY
ALAN ABESON

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Extending the Challenge:

Working Toward a Common Body of Practice for Teachers

Concerned educators have always wrestled with issues of excellence and professional development. It is argued, in the paper "A Common Body of Practice for Teachers: The Challenge of Public Law 94-142 to Teacher Education,"* that the Education for All Handicapped Children Act of 1975 provides the necessary impetus for a concerted reexamination of teacher education. Further, it is argued that this reexamination should enhance the process of establishing a body of knowledge common to the members of the teaching profession. The paper continues, then, by outlining clusters of capabilities that may be included in the common body of knowledge. These clusters of capabilities provide the basis for the following materials.

The materials are oriented toward assessment and development. First, the various components, rating scales, self-assessments, sets of objectives, and respective rationale and knowledge bases are designed to enable teacher educators to assess current practice relative to the knowledge, skills, and commitments outlined in the aforementioned paper. The assessment is conducted not necessarily to determine the worthiness of a program or practice, but rather to reexamine current practice in order to articulate essential common elements of teacher education. In effect then, the "challenge" paper and the ensuing materials incite further discussion regarding a common body of practice for teachers.

Second and closely aligned to assessment is the developmental perspective offered by these materials. The assessment process allows the user to view current practice on a developmental continuum. Therefore, desired or more appropriate practice is readily identifiable. On another,

*Published by the American Association of Colleges for Teacher Education, Washington, D.C., 1980 ($5.50).

perhaps more important dimension, the "challenge" paper and these materials focus discussion on preservice teacher education. In making decisions regarding a common body of practice it is essential that specific knowledge, skill and commitment be acquired at the preservice level. It is also essential that other additional specific knowledge, skill, and commitment be acquired as a teacher is inducted into the profession and matures with years of experience. Differentiating among these levels of professional development is paramount. These materials can be used in forums in which focused discussion will explicate better the necessary elements of preservice teacher education. This explication will then allow more productive discourse on the necessary capabilities of beginning teachers and the necessary capabilities of experienced teachers.

In brief, this work is an effort to capitalize on the creative ferment of the teaching profession in striving toward excellence and professional development. The work is to be viewed as evolutionary and formative. Contributions from our colleagues are heartily welcomed.

This paper presents one module in a series of resource materials which are designed for use by teacher educators. The genesis of these materials is in the ten "clusters of capabilities," outlined in the paper, "A Common Body of Practice for Teachers: The Challenge of Public Law 94-142 to Teacher Education," which form the proposed core of professional knowledge needed by professional teachers who will practice in the world of tomorrow. The resource materials are to be used by teacher educators to reexamine and enhance their current practice in preparing classroom teachers to work competently and comfortably with children who have a wide range of individual needs. Each module provides further elaboration of a specified "cluster of capabilities" - in this case, professional values: Judicial and legislative influences.

Contents

Within this module are the following components:

Objectives for Teacher Educators and for Incorporation into Teacher Education Curriculum

1. To define the purpose of P.L. 94-142.
2. To identify the six principles of P.L. 94-142 and to state the legislative regulations for implementing each principle.
3. To define the purpose of Section 504 of the Rehabilitation Act of 1973.
4. To compare Section 504 to P.L. 94-142.
5. To list policy implications of education laws for training.
6. To identify information and skills related to education law necessary for training teachers and to assess a teacher-training program with respect to them.
7. To state major requirements of Section 504.
8. To use regulations issued under Section 504.
9. To identify sources and methods of checking applicable laws.
10. To be aware of contribution of case law to the evolution of favorable legislation for education of the handicapped.
11. To identify the issues currently being litigated that have been raised by education legislation.
12. To evaluate the role of court decisions in securing appropriate education for handicapped persons.

Rating Scale for Teacher Preparation Program

____ Students are unaware of influence of law on educational practice as demonstrated by inability to identify educational implications of major legislation.

____ Students know that educational regulations, laws and decisions exist but are unaware of a) specific legislation, b) case law, c) regulations, and d) basic legal principles.

____ Students have participated in instruction consisting of isolated presentations on education law, but have not been presented with a coherent framework within which to conceptualize legal principles.

____ Students are well aware of contents of laws relating to education, but have no experience or ability to translate information into educational practice.

____ Students can apply knowledge and understanding of law to classroom and other educational practices including developing IEP's, communication with parents, placement committees, etc.

____ Students can evaluate educational practices according to legal requirements and intent or goals of the law.

Self Assessment

positive
court decisions
segregation
PARC v. Commonwealth of Pennsylvania
equal protection
Mills v. D.C. Board of Education
Brown v. Board of Education
integration

1. The Court first recognized that segregated educational facilities were inherently unequal in the famous case of _____ v. _____.

2. The two cases which first established the right of handicapped people to a free, appropriate public education were _____ v. _____ and _____ v. _____.

3. Section 504 has legislated the requirements of a preexisting constitutional principle. This principle is called _____.

4. _____ also interpret the law set out in the 504 legislation and regulations.

5. Recipients of federal funds have a _____ duty to be in compliance with Section 504, therefore they are required to take certain steps to adapt programs and remedy discrimination.

6. Unnecessarily separate programs are prohibited under Section 504 because _____ is prohibited and _____ favored.

7. To insure that evaluations of handicapped children are nondiscriminatory, P.L. 94-142 requires that;

   _____ a. standardized tests be administered
   _____ b. at least 3 different tests are administered
   _____ c. the evaluation is conducted by a certified psychologist
   _____ d. the test is validated for the purpose for which it is used
   _____ e. all of the above

8. The group of children in the top priority category for receiving P.L. 94-142 funds includes:

   _____ a. children mainstreamed in regular classes
   _____ b. the most severely handicapped children
   _____ c. multiply handicapped children
   _____ d. children previously excluded from schools

9. The percentage of the school population which may be counted as handicapped for the purpose of funding is:

   _____ a. 8%
   _____ b. 12%
   _____ c. 6%
   _____ d. 20%

10. The least restrictive principle requires that:

   _____ a. placement decisions be made on an annual basis
   _____ b. the child be educated in the same school he would attend if he were not handicapped
   _____ c. the child be provided with special services in the regular classroom
   _____ d. all of the above

11. One current issue that is not now being raised on behalf of handicapped students:

   _____ a. right to 12-month education
   _____ b. right to residential placement
   _____ c. right to interpreters and other aids
   _____ d. right to choose one's own hearing officer

12. The main focus of the nondiscrimination prohibition of Section 504 is children. T or F

13. Before bringing a suit under Section 504, a child and family must exhaust all available administrative remedies. T or F

14. Inclusion of handicapped people in evaluation and planning of Section 504 compliance is suggested but not mandatory. T or F

15. A child need <u>not</u> meet a categorial definition of handicapped to be considered handicapped for purposes of Section 504. T or F

16. If a public school contracts out to provide services, it has no duty to assure Section 504 compliance. T or F

17. Excessive cost of architectural modifications is a defense for noncompliance with Section 504. T or F

18. P.L. 94-142 and Section 504 preceeded any education litigation on behalf of the handicapped. T or F

19. A result based on a court decision on whether a handicapped person is entitled to a particular service may not be the same in another factual context. T or F

20. P.L. 94-142 requires institutions of higher education to collaborate with the state education agency to plan the Comprehensive System for Personnel Development. T or F

21. The principal is a required member of the IEP committee. T or F

22. Parental consent must be attained prior to evaluating or re-evaluating a child for a special education placement. T or F

23. The IEP is a legally binding document between the school system and the parents of a handicapped child. T or F

Introduction

The education of handicapped children has been substantially shaped and defined by judicial and legislative decisions. The decade of the seventies can be characterized as an active period of litigating cases and passing federal and state legislation outlining the principles and requirements for providing special education and related services to handicapped children. This module includes an overview of judicial and legislative influences covering the following topics:

1) Case law prior to the Education of All Handicapped Children Act (P.L. 94-142) and the Rehabilitative Act of 1973 (Sec. 504)
2) Sources of Law
3) P.L. 94-142: The Six Principles
4) P.L. 93-112: Section 504
5) Judicial and Administrative Interpretation of P.L. 94-142 and Section 504.

In this module reference is made to the Bureau of Education for the Handicapped (BEH) and the Department of Health, Education and Welfare (HEW). Due to recent governmental reorganization BEH has become the Office of Special Education and Rehabilitative Services and the Department of Health, Education and Welfare (HEW) has been divided into the Department of Health and Human Services and the Department of Education.

Case Law Prior to the Education of All Handicapped Children Act (P.L. 94-142) and The Rehabilitation Act of 1973 (Sec. 504).

The policy underlying recent educational case law, although less well-known than the legislative history of P.L. 94-142 and Section 504, was first articulated more than 50 years ago by the United States Supreme Court in Meyer v. Nebraska, the first right to education case, striking down a war-time statute which forbade schooling in German. In that case Mr. Justice McReynolds joined together themes of parental influence, integration, and an individualized appreciation, and pursuit of the competence of all people, based on a constitutionally protected liberty under the Fourteenth Amendment.

Thirty years later, in Brown v. Board of Education, the Supreme Court again articulated the themes of individualization and integration. In that famous case, the unanimous court said:

> "[Education] is required in the performance of our most basic responsibilities . . . today it is the principal instrument . . . in preparing [the child] for later . . . training, and in helping him adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity where the state has undertaken to provide it, is a right which must be made available to all on equal terms."

Prior to the Brown ruling, that separate schooling was inherently unequal, the Court had struck down segregation by race for reasons which are directly applicable to segregation of handicapped people in the cases such as Sweatt v. Painter and McLauren v. Oklahoma State Regents. That handicapped people are citizens of the United States and entitled to the protections extended to citizens is now established beyond doubt.

In the hearings on P.L. 94-142 and Section 504, the Congress frequently cited the court decisions in PARC v. Commonwealth of Pennsylvania, Mills v. D.C. Board of Education, Wyatt v. Stickney, N.Y. State Association for Retarded Children v. Rockefeller, Diana v. State Board of Education, and Larry P. v. Riles. The advocates of Section 504 and P.L. 94-142 expressly stated their intention to make the rules of those cases the positive law of the land.

In the PARC opinion, the Court noted that "plaintiffs do not challenge the separation of special classes for retarded children from regular classes or the proper assignment of children to special classes. The court-approved consent agreement provided that:

> "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.

Both PARC and Mills required access to schooling and established procedural due process intended to encourage placement in the most normalized setting and to discourage placement in the most stigmatized settings.

In Wyatt v. Stickney, the court applied the doctrine that when the state interferes with a person's liberty it must do so in the least intrusive, least restrictive manner. Addressing the issue of services provided to mentally retarded people then living at Partlow State School and Hospital, in Alabama, the Court held that "no person shall be admitted to the institution unless a prior determination shall have been made that

residence in the institutions is the least restrictive habilitation feasible for that person." (344 F. Supp. at 396).

Contrast the finding of the Wyatt v. Stickney case to the practice of removing handicapped children from regular classes in the public schools to place them in special classes.

In N.Y. State Association for Retarded Children v. Rockefeller, the court ordered that less restrictive settings be made available, and in particular ordered the creation of community-based services. The cases show that the least restrictive setting requirement means that plaintiff class members must be placed in the least restrictive setting required and appropriate for the individual needs, not merely the least restrictive setting currently available. Similarly nearly 20 state courts in Pennsylvania have denied petitions to commit children to institutions and have instead ordered state and county officials to create alternatives services in the community (e.g. Joyce Z).

Diana and Larry P. addressed the overrepresentation of racial, national origin and language minorities in classes for the educable mentally retarded and the assessment problems in using tests which discriminate against children on the basis of race, culture, or senory disability.

It is in the framework of these cases, many others which these generated and the issues they raised that P.L. 94-142 and Sec. 504 evolved.

Sources of Law

In order to understand and appreciate the laws which influence educational practices, one must not only have knowledge of the content of the law but of the origin as well. There are basically three major sources of law: statutes (legislation), regulations and court decisions.

Statutes enacted by Congress are published in the United States Code (U.S.C.). Section 504 is published at 29 U.S.C. Section 794: P.L. 94-142 is published at 20 U.S.C. Section 1401.

Rules and regulations issued by federal agencies are published in the Federal Register (Fed. Reg.) when they are first released and later permanently compiled in the Code of Federal Regulations (C.F.R.). The regulations for P.L. 94-142 can be found in the Federal Register for August 23, 1977 at pages 42474-42514 or in the Code of Federal Regulations at Title 45, Sections 121a.1 through 121a.754. HEW's Section 504 regulations can be found in the Federal Register for May 4, 1977 at pages 22676 through 22702 or in the Code of Federal Regulations at Title 45, Sections 84.1 through 84.61.

Court Decisions also interpret the rights of handicapped people and the duties of recipients in cases to enforce P.L. 94-142 and Section 504. Decisions of federal courts are cited by volume, reporter, and then page followed by the name of the court and the year of the decision. There are three levels of courts in the federal system. Decisions of district or trial courts are reported in the Federal Supplement (F. Supp.), recent appellate or circuit court decisions are found in the Federal Reporter Second (F.2d) and Supreme Court decisions are published in the United States Reports (U.S.).

"Case" law or judicial decisions represent an important type of law. Courts apply laws to given sets of facts in a specific context, thereby giving meaning to statutes, regulations or constitutional rights. They not only have a unique function in our legal system, but case law provided the decisions which are the forerunners of the right to education that handicapped children are entitled to today. Case law and judicial decisions must be considered an integral part of our legal system necessary to define, interpret and implement the intent of other sources of law, including statutes and regulations.

From time to time, federal agencies (i.e., HEW's Office of Civil Rights) issue policy determinations on P.L. 94-142, Section 504 and their regulation, in the Federal Register.

Statutes, regulations, and court decisions should be available at your city or county's Bar Association library, and possibly at the State Department of Public Instruction or Education.

P.L. 94-142: The Six Principles

P.L. 94-142, The Education of All Handicapped Children Act, establishes the right to an education for handicapped children and youth. Handicapped children are defined as those children needing special education and related services who fall into the categories of mental retardation, 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.

Enacted in Congress in November, 1975, the major purpose of P.L. 94-142 is as follows:

> It is the purpose of this Act 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, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children. [Sec. 601(c)]

The key phrase of P.L. 94-142 is <u>free appropriate public education</u> which is defined as:

> Special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 614(a)(5). [Sec. 602(18)]

The rules and regulations (<u>Federal Register</u>, 1977) for implementing P.L. 94-142 further operationally define appropriateness through the

specification of six major principles. These principles include: zero reject, nondiscriminatory evaluation, individualized education programs, least restrictive placement, due process, and parent participation.

In the following discussion, each of the principles is analyzed and the regulations for implementing the principles are discussed.

Zero Reject

The principle of zero reject requires schools to provide an appropriate education to all handicapped children. The age ranges of children specified for coverage include ages 3 to 21 to be served by September 1, 1980. Ages 3 to 18 should have been included since September 1, 1978. There is a stipulation, however, that states who do not provide education to nonhandicapped children in the age ranges of 3 to 5 and 18 to 21 because of conflicting state law or court order are excused from the requirement to provide educational services to handicapped children in the corresponding age ranges.

Two priorities for service have been specified in P.L. 94-142 as having top consideration for the expenditure of federal funds. These priorities include: 1) all handicapped children who have been previously excluded from school, and 2) handicapped children within each categorical area with the most severe handicaps who are receiving an inappropriate education. If federal funds are left over after the needs of these children have been met, the local agencies may establish their own priorities for the expenditure of funds.

In order to insure that all handicapped children are located in order to be provided with educational services, a child find program must be conducted on an annual basis. This identification process must

include all children residing in the jurisdiction, including children in all public and private schools, human resource institutions (mental health and mental retardation facilities) and corrections institutions. After children are identified, evaluated, and placed in special education, a child count must be made. A child count involves compilations of all handicapped children according to age and disability categories. This report is submitted to the state education agency, and, in turn, to the Commissioner of Education on an annual basis. The local agency becomes eligible to receive federal funds based on the number of children being served (e.g., as defined by the number of completed IEPs on file) in special education. For the purposes of funding, 12% of the school population may be counted as handicapped. In local agencies identifying more than 12% of the school population as handicapped, local and state sources of funds must be used to cover the program expenses.

When the local agency is unable to meet appropriately the needs of the handicapped student (e.g., low-incidence handicapping conditions, students requiring highly specialized services), the agency may place the student in a private agency or contract with another local agency to serve the child. The local agency having the jurisdiction to serve the child is responsible for insuring that the outside agency meets the requirements of P.L. 94-142 and is further responsible for monitoring the educational program provided to the child by the outside agency. A further requirement on the local agency is to assume full financial responsibility for the outside placement including room, board, and educational expenses of the handicapped student.

The educational program of handicapped students is defined broadly by P.L. 94-142 including nonacademic and extracurricular services, as well as the formal academic program. The definition of nonacademic and extracurricular services and activities is stated below:

> Nonacademic and extracurricular services and activities may include counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the public agency, referrals to agencies which provide assistance to handicapped persons, and employment of students, including both employment by the public agency and assistance in making outside employment available.
>
> [Sec. 121a.306(b)]

What types of barriers might exist for physically handicapped students in regard to transportation to and from school? What steps could be taken by the school to insure that transportation is accessible for physically handicapped students?

What type of barriers might exist for a blind student in participating in the school band? What steps could be taken by the school to insure that the band is accessible to blind students?

The zero reject principle insures that handicapped students are provided with enrollment in school and access to the programs which are offered. The zero reject principle, however, also insures that handicapped students be functionally included in a program that is tailored to their particular strengths and weaknesses. One method for insuring that the program is relevant to a handicapped student is the requirement to develop an individualized education program (IEP). Another method is the requirement that each state develop and implement a comprehensive System for Personnel Development (CSPD) to insure that all general and special education personnel necessary to accomplish the purposes of

P.L. 94-142 are indeed, qualified. The state agency is responsible for developing, reviewing, and revising the CSPD and must insure that all public and private institutions of higher education and other organizations interested in personnel preparation related to handicapped children have an opportunity to participate. The plan, itself, must specify needs assessment procedures, content areas in which training is needed, target groups[1] requiring training, geographical scope, staff training source, funding sources, time frame, and evaluation procedures.

The development and implementation of the CSPD provides the opportunity for systematically coordinating the delivery of inservice training among the state education agency and institutions of higher education.

Identify coordination problems which have existed in your state in the past and suggest how these problems might be ameliorated through the CSPD planning model.

Nondiscriminatory Evaluation

P.L. 94-142 defines evaluation as follows:

> procedures used . . . to determine whether a child is handicapped and the nature and extent of the special education and related services that the child needs. The term means procedures used selectively with an individual child and does not include basic tests administered to or procedures used with all children in a school, grade, or class. [Sec. 121a.500(c)]

[1] Target groups specified in the regulations include special teachers, regular teachers, administrators, psychologists, speech-language pathologists, audiologists, physical education teachers, therapeutic recreation specialists, physical therapists, occupational therapists, medical personnel, parents, volunteers, hearing officers, and surrogate parents.

Based on this definition, evaluation has two distinct purposes: 1) classification of handicapping conditions (e.g., ". . . to determine whether a child is handicapped . . . "), and 2) program planning (e.g., ". . . to determine . . . the nature and extent of the special education and related services that the child needs."). The major focus, however, of the nohdiscriminatory evaluation requirements are on the classification function. These requirements are as follows:

(a) Tests and other evaluation materials:

(1) Are provided and administered in the child's native language or other mode of communication, unless it is clearly not feasible to do so;

(2) Have been validated for the specific purpose for which they are used; and

(3) Are administered by trained personnel in conformance with the instructions provided by their producer;

(b) Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient;

(c) Tests are selected and administered so as best to insure that when a test is administered to a child with impaired sensory, manual, or speaking skills, the test results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills (except where those skills are the factors which the test purports

to measure);

(d) No single procedure is used as the sole criterion for determining an appropriate educational program for a child; and

(e) The evaluation is made by a multidisciplinary team or group of persons, including at least one teacher or other specialist with knowledge in the area of suspected disability.

(f) The child is assessed in all areas related to the suspected disability, including, where appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.

[Sec. 121a.532]

Further requirements are specified relating to the interpretation of evaluation data in making placement decisions for handicapped students. First, these decisions must be made by a group of persons knowledgeable about the child, the evaluation results, and the educational alternatives for the child. In making the placement decision the team should consider information from a variety of sources including test scores, teacher recommendations, physical condition, social or cultural background, and adaptive behavior.

To insure that current data is maintained and considered when planning educational programs for handicapped students, children should be re-evaluated every three years or more frequently at the request of the child's parents or teachers.

> Multi-disciplinary evaluation teams, frequently comprised of general and special education teachers, school psychologists, counselors, speech therapists, and administrators, are responsible for joint decision-making regarding the

classification and program planning for handicapped students. Suggest strategies which could be incorporated during pre-service training to prepare students to work with other adults in the multi-disciplinary evaluation process.

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Individualized Education Programs (IEP)

As stated in an earlier portion of this module, one component of the definition of free appropriate public education is that it is provided in conformity with the IEP. The IEP is a written statement which by law must contain the following components:

(a) A statement of the child's present levels of educational performance;
(b) A statement of annual goals, including short term instructional objectives;
(c) A statement of the specific special education and related services to be provided to the child, and the extent to which the child will be able to participate in regular educational programs;
(d) The projected dates for initiation of services and the anticipated duration of the services; and
(e) Appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether the short term instructional objectives are being achieved.
[Sec. 121a.346]

The IEP can be characterized as a comprehensive curriculum based on the individual needs of the handicapped student. Congress made the requirement pertaining to individualized education to redress the problems which surfaced in their findings of fact that the special educational needs of handicapped children were not being fully met. Furthermore, they found that more than half of the handicapped children in the U.S. were not

receiving appropriate educational services and thus were denied full equality of opportunity. [Sec. 601(b)(2) and (3)].

The IEP must be written by the beginning of each school year for every handicapped child who is receiving special education. Traditionally, special education has been thought of as a "place," e.g., the resource room or special class. An important basic concept of P.L. 94-142 is that special education is defined as:

> . . . specially 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. [Sec. 121a.14(a)]

Thus, IEPs must be written for any subject area in the general curriculum which requires adaptation in order to accommodate the achievement levels and learning styles of handicapped students.

IEPs are developed by committees of persons who are responsible for the child's education. The required participants include:

1. A representative of the public agency, other than the student's teacher, who has qualifications to provide or supervise the provision of special education.
2. The child's teacher.
3. One or both of the child's parents.
4. The child when appropriate.
5. Other individuals at the request of the parents or public agency.
6. For handicapped children evaluated for the first time, either a member of the evaluation team must be present at the meeting or another individual at the meeting (representative of the public

agency, the child's teacher) must be knowledgeable about the evaluation procedures used with the child and familiar with the results.

The sharing of decision-making authority among school personnel and parents is an important ingredient of the IEP. Responsibilities of the local agency in regard to encouraging parent participation include:

1. Notifying the parents of the purpose, time, location, and participants at the meeting early enough so that they will have an opportunity to attend.
2. Scheduling the meeting at a mutually agreed upon time and place.
3. Insuring that the parent understands the proceedings of the meeting, including arranging for an interpreter for parents who are deaf or whose native language is other than English.
4. Providing a copy of the child's IEP to the parent upon request.

If parents are unable or unwilling to attend the IEP conference, an individual or conference telephone call may be used to secure their participation. Only when all efforts have failed to involve the parents may IEP meetings be conducted without their participation. In these cases, local agencies are required to maintain documentation of their efforts to involve the parents.

There are many attitudinal and environmental barriers which may impede the active participation of parents in the IEP conferences. List three of these barriers and identify strategies which could be employed by educators to minimize each barrier.

_____

_____

_____

_____

A common misconception of educators is that the IEP is a legally binding document. This is, in fact, not the case. Local agencies and teachers are not bound to insure that the child masters all objectives on the IEP; however, they are responsible for making good faith efforts to assist the child to make educational progress commensurate with his abilities and rate of learning. If parents seriously question whether good faith efforts have been made by educators, they may initiate a due process hearing to bring a formal complaint against the public agency.

In including the requirement for IEPs in P.L. 94-142, Congress indicated that they believed this approach represented the major trend in the field of special education. According to a report of the House of Representatives,

> (t)he movement toward the individualization of instruction, involving the participation of the child and the parent, as well as all relevant educational professionals, is a trend gaining wider support in educational, parental, and political groups throughout the nation. [Report No. 94-332, Education of All Handicapped Children Act of 1975, June 26, 1975, p. 13]

Least Restrictive Environment

The least restrictive environment principle is defined as follows:

> (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. [Sec. 121a.550(b)(1),(2)]

Many educators erroneously interpret the least restrictive principle to mean that all handicapped children should be placed in regular classrooms. Rather, this principle requires that the regular classroom be chosen as the appropriate alternative for a child when, indeed, his needs can be met there. If the child's IEP cannot be successfully implemented in the regular classroom, then greater degrees of restrictiveness should be considered, such as the resource room, special class, or special school. According to law, factors to be considered in choosing among alternative placements include consistency with the IEP, proximity to the child's home (e.g., unless otherwise required by the IEP, the handicapped child should be educated in the school she would attend if not handicapped), and any potential harmful effect on a child regarding a particular placement. The determination of placement should be made on an annual basis. As stated previously, one required component of the IEP is the documentation of the extent of the child's participation in the regular educational program. Academic, as well as non-academic and extracurricular, services and activities should be considerations in making this determination.

Due Process

Due process procedures provide a system of checks and balances regarding the education of handicapped students by insuring that educators and parents are able to hold each other accountable. Through due process, the fairness of decisions can be examined and adjusted. There are five, major due process provisions of P.L. 94-142.

First, a due process hearing may be initiated by the local agency or parents if there are objections to each other's actions regarding the

identification, evaluation, and provision of services to handicapped students. This hearing provides an impartial forum to present complaints and supporting evidence in order for a third party (e.g., due process hearing officer) to reach an objective decision regarding the validity of the complaints. P.L. 94-142 includes numerous regulations governing the due process hearing including criteria for the selection of the hearing officer (e.g., may not be an employee of the agency); presentation of evidence (e.g., parties may be advised by counsel, witnesses may be cross-examined); attendance at hearings (e.g., may be open to the public at the request of the parents); and timelines (e.g., the local agency must reach a final decision within a 45-day period after receipt of the request for the hearing). If either party is dissatisfied with the decision of the hearing officer at the local level, they may appeal the case to the state agency. The state agency is responsible for conducting an impartial review of the hearing and making an independent decision. A further appeals process is available to parties dissatisfied with the state agency decision through bringing a civil action in either state or federal district court.

Teachers are frequently called as witnesses in due process hearings. List five suggestions which could be given to teachers to prepare them to participate effectively in the potentially adversarial forum of a due process hearing.

A second provision of due process is the right of parents to obtain an independent educational evaluation (e.g., an evaluation conducted by a licensed examiner not employed by the state or local educational agency and who does not routinely provide evaluations for these agencies) if they are dissatisfied with the evaluation administered by the local agency. This independent evaluation must be considered in making decisions regarding the appropriate education of the handicapped student.

Thirdly, parents must receive a written notice prior to the local agency's proposal or refusal to initiate or change the child's identification, evaluation, or placement. By law, each notice must contain the following elements:

a. A full listing of the due process safeguards available to the parent.
b. A description of the action taken by the agency including the rationale for choosing the particular action over other options.
c. A description of the basis of the decision including each evaluation procedure, test, record, or report the agency considered.
d. A description of any other factors which were considered in light of the agency's proposal or refusal.

In addition to written notice, a fourth due process provision is that parental consent must be obtained prior to conducting the initial evaluation to classify a student as handicapped. Further, consent must be obtained to place a student initially in a special education program.

The fifth and final due process provision is the appointment of surrogate parents. If the local agency is unable to identify or locate

the child's parents, they are required to assign an individual to serve as the surrogate for the parents according to criteria specified in the legislation. The surrogate's role involves representation of the child's interest regarding the provision of a free appropriate public education. The local agency is required to provide training to surrogate parents so they can adequately represent the child's interests.

Parent Participation

Parental participation in educational decision-making is a basic tenet of P.L. 94-142 that pervades every principle. For example, a key provision of the IEP process is that parents are involved in the committee meeting held to develop the IEP. There are parental participation requirements, however, that cannot be classified according to the other five principles. For this reason, parental participation is considered as a separate and sixth principle of P.L. 94-142. The two major areas of rights and responsibilities associated with this principle are involvement in the development of educational policy and access to educational records.

Regarding involvement in the development of educational policy, P.L. 94-142 requires that parents be provided with the opportunity to participate at public hearings conducted by the state education agency. The purpose of these hearings is to review the state's annual program plan prior to its adoption and submission to the Commissioner of Education. The copy of the plan which is submitted to the Commissioner of Education must include a summary of comments received at the hearing and a description of modifications made in the plan as a result of the comments.

State agencies are also required to establish a state advisory panel on the education of handicapped children and to involve at least one parent of a handicapped child as a member of this panel. The responsibilities of this panel involve both the development of policy and the monitoring of its implementation.

Parental participation is also secured through insuring that parents have full access to educational records. Within 45 days of the receipt of a parental request to review records, the opportunity must be afforded to parents to review any or all of the school records on their child. Parents also are extended the rights of having an explanation or interpretation of the records, having their representatives review the records, or requesting that records be amended because of inaccuracies or violations of privacy. If the local agency considers the parents request to amend the records to be a distortion of the facts, the parents must be informed of their right to initiate a due process hearing. The only exception to parental access to records is in cases in which the agency has been advised that the parent does not have authority under state law pertaining to matters such as guardianship, separation, and divorce.

Parents must also be brought into the decision-making process regarding the release of personally identifiable information on their child. This refers to the release of information for any purpose, including research. Stipulations regarding the confidentiality of personal information includes the following:

1. Each public agency shall appoint one official with overall

responsibility for insuring confidentiality.

2. Training must be provided to all persons collecting or using personally identifiable information.
3. A list must be compiled and made available for public inspection by each agency containing the names and positions of all employees within the agency who may have access to personally identifiable information.

Teacher education students should be provided with systematic training regarding the collection and use of personally identifiable information. If you were to plan a lecture on this topic for preservice students, list 5 major points which should be emphasized to insure that students are prepared for this responsibility.

Implementation and Enforcement

Congress implements P.L. 94-142 by appropriating funds to assist states that submit acceptable plans for educating handicapped children. BEH has the responsibility of reviewing and accepting, asking for modification of, or rejecting the states' applications and plans for Federal funds. Before BEH approves a state plan, it must be satisfied that the state itself and all local educational agencies and other state or local agencies with handicapped children in their custody (e.g., state departments of mental health, human resources, or corrections) will comply with the requirements of P.L. 94-142. If satisfied, BEH awards the state its share of the total Congressional

appropriation, and the state passes along to the local schools and other eligible state and local agencies their share of the state grant; the state must pass along at least 75% of the state grant. Both the state and local/institutional shares are based on a per capita ratio: the state to all other states, and the local/institutional to all other local/institutional agencies in the state.

Because they need the federal money to carry out their own duties to educate handicapped children (all states have constitution or legislation commanding them to educate handicapped children), all states except one have submitted acceptable plans to BEH and been awarded funds. Not every state plan has been unchallenged by BEH, and some states have had to modify their plans, regulations, or laws before receiving BEH approval. Only New Mexico refused to submit a plan, and recently a federal court found that it had violated Section 504; thus federal law reached even a nonapplying state.

P.L. 94-142 is enforceable in a variety of ways. Parents may call for due process hearings and appeal adverse rulings to court. They also can sue directly in federal or state court when they can convince a court it is futile to use the hearing process to vindicate their children's rights. And parents may file complaints with BEH or DHEW's Office for Civil Rights, seeking a cut-off of federal funds because of noncompliance. BEH and OCR visit state and local agencies to monitor their implementation of the law. And the state education agency may terminate its pass-through funding of noncomplying state and local agencies and institutions.

Overview

In Section 504 of the Rehabilitation Act of 1973, (P.L. 93-112) the Congress extended to handicapped persons, the protections extended to racial and national origin minorities by the Civil Rights Act of 1964, namely:

> "No otherwise qualified handicapped individual in the United States . . . shall soley by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." [Sec. 84.4(a)]

The immediate historical and professional context of P.L. 94-142 and Section 504 is the mid-twentieth century discovery (or rediscovery) of the capacities of handicapped people and of teaching and learning techniques to evoke these capacities . The recognition of appropriate educational methodology and of a broader definition of education stimulated increased challenges to the legality of denying public education to handicapped children. (Council for Exceptional Children Policies Commission, 1971; Weintraub, Abeson, Ballard & Lavor, 1976). Like the Civil Rights Act, Section 504 has legislated the requirements of the constitutional norms of equal protection. The Congress' choice of the same language suggests that integration is central to Section 504, as it has been to all other civil rights acts.

In the Rehabilitation Act of 1973, "handicapped individual" is defined as:

> "[A]ny person who (A) has a physical or mental impairment which substantially limits one or more of such person's major life activities [including learning 84.3(j)] (B) has a record of such an impairment, or (C) is regarded as having such an impairment." [Sec. 84.3(j)]

"Physical or mental impairment" means (1) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculo-skeletal; special sense organs; respiratory (including speech organs); cardio-vascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or (2) any mental or physiological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness (including addiction to alcohol or drugs), and specific learning disabilities.

"Major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

"Has a record of such impairment" means the person has a history of or has been misclassified as having a mental or physical impairment that substantially limits one or more major life activities.

"Is regarded as having an impairment" means the person (1) has a physical or mental impairment that does not substantially limit major life activities but is treated by a recipient of federal funds as constituting such a limitation, (2) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment, or (3) has none of the impairments listed above but is treated by a recipient of federal funds as having such an impairment.

Mastering Section 504

Section 504 requires that recipients act to provide effective integrated services to all handicapped people, and to remedy discrimination and overcome its effects. The Congress, HEW, and the courts each make clear that Section 504:

1. imposes a duty to adapt programs to provide handicapped people equally effective services,
2. prohibits against unnecessarily separate services,
3. imposes a duty to remedy discrimination and to overcome its effects, and
4. Section 504 duties are positive duties.

The introduction to the HEW 504 regulations states:

> "Ending discriminatory practices and providing equal access to programs may involve major burdens on some recipients. These burdens and costs, to be sure, provide no basis for exemption from Section 504 or this regulation: Congress' mandate to end discrimination is clear. From this statement, as well as court decisions, it is clear that cost is not a defense for noncompliance with Section 504 requirements. Consideration to burden and cost has already been allowed for in the HEW regulation (use of nonstructural changes where possible; three years from effective date to comply, special consideration to small agencies, affording recipients opportunity to show certain job accommodation would impose an "undue hardship" on the operation of its program). Cost remains a major issue, nonetheless; with some recipients. This often occurs because recipients overestimate what is actually required to make a program accessible and automatically assume that cost is prohibitive. Recipients often need information about the alternative means available for making programs accessible."

The late Senator Humphrey, the primary Senate sponsor of Section 504, with regard to the purpose of Section 504, stated:

> [T]his bill correctly emphasizes the need to serve more severely handicapped individuals, to make services responsive to individual needs, and to make every effort to enable handicapped persons to lead a productive and financially independent life."
> 118 Cong. Rec. 32310 (September 26, 1972)

> This bill responds to an awakening public interest in millions of handicapped children, youth, and adults who suffer the profound indignity and despair of isolation, discrimination and maltreatment. It is essential that the right of these forgotten Americans to equal protection under the laws be effectively enforced . . . [T]he fundamental fact that one confronts is...the segregation of millions of Americans from society . . . suggesting a disturbing viewpoint that these people are not only forgotten but perhaps expendable."
> 118 Cong. Rec. 9495 (March 22, 1972)

What similarities and differences can you identify between the purposes of P.L. 94-142 and Section 504?

The purpose of Section 504 as identified in the Congressional remarks set out above was affirmed by HEW in regulations issued by that agency. These regulations specify that Section 504 covers every public and private body which receives federal support. In terms of the definitions of recipient and federal financial assistance, recipients covered by the regulations nationwide include approximately:

16,000 school systems
2,600 institutions of higher education
7,000 hospitals
6,700 nursing homes and health care agencies

Thousands of:
libraries, daycare centers, educational broadcasting facilities, and medical laboratores.

Thousands of:
state, county and local government agencies

Identify one educational agency/setting that would be covered by Section 504 and one that would not be; and explain why.

Implementation

Recipients must consult with handicapped people and their organizations at each stage of compliance activities. These steps include developing transition plans for making a program accessible (December 3, 1977 deadline) and conducting a self-evaluation (June 2, 1978 deadline). The HEW regulations specify some very detailed steps which recipients must take in conducting a self-evaluation. Recipients with fifteen or more employees must record:

-the names of the people and organizations consulted,
-the areas examined,
-any problems identified,
-changes made in policies and practices, and
-any remedial action taken. [Sec. 84.6(e)(2)]

The record must be put in writing and kept on file for at least three years. A copy must be made available to anyone who requests it. Since the HEW regulation imposes upon recipients a duty to negotiate with consumers in good faith, there are some additional things which it makes good sense for consumers to insist on when conferring with recipients as a measure of good faith. Some of these measures are:

-including handicapped persons or organizations of all of the various disabilities;
-making the relationship a continuing and on-going one, not a one-shot deal or just an annual meeting;
-providing routine access to all reports, documents, financial data and other information bearing upon 504 compliance; and
-paying the organizations or their representatives for services just as any consultant so that people can give the time and make the commitment to conduct the needed analyses for implementation.

What things would you consider evidence that an agency has acted in good faith? not acted in good faith?

The major components of Section 504 are Employment, Program Accessibility, Education, Postsecondary Education and Social Services. In addition the regulations adopt enforcement procedures originally developed for the Civil Rights Act of 1964. The following sections are areas of importance under Section 504 which provide basic information for one or more of the major components, and relate directly to educational institutions.

Program Accessibility: Overcoming Architectural, Communication and Environmental Barriers

Subpart C of the HEW regulation prohibits recipients from excluding handicapped people from their programs or denying them services because a recipient's facilities are unaccessible to or unusable by handicapped persons. (Section 84.31, p. 81). This means that architectural, communications, and environmental barriers must be dealt with and eliminated.

1. New construction. New construction must be barrier free. (Sec. 84.23(a), p. 81)
2. Existing facilities. Recipients shall operate each program or

activity so that the program or activity, when viewed in its entirety, is readily accessible to handicapped persons. (Sec. 84.22(a), p. 21). This requirement is referred to as program accessibility. It does not necessarily require that each existing facility or every part of a facility be made accessible to and usable by handicapped people. Rather, it requires that in many cases at least, a part or percentage of each recipients' facilities must be accessible so that disabled people can participate in the program.

Three things to remember in applying HEW's accessibility standard are:

1. There are no prescribed numbers or percentages set by HEW for buildings or floors of buildings which must be accessible.
2. Alternatives to structural changes are permitted if they are equally effective.
3. The decision whether to use alternate means must be made with handicapped people and their organizations.

What would you find unacceptable because it is not "equally effective?" If a handicapped person could participate, but receive fewer benefits, would it be equally effective? What if the handicapped person could receive full benefits, but in a segregated facility? What if the building is considered "accessible" because there is someone who is willing to carry handicapped people up and down stairs? What if people in wheelchairs must use a freight elevator? a back door? What is an agency's responsibility regarding accessibility if no handicapped persons are seeking services from their agency?

Special exception for small service providers. A special exception to the program accessibility requirement is made in the regulations for small service providers which employ fewer than 15 people. In addition to the option of making home visits, if a small recipient cannot make its services available short of significant alterations in its existing facilities, it may, after consultation with the person seeking its services, refer the individual to another service provider whose facilities are accessible. [Sec. 84.22(c)] (This outside referral is a "last resort" measure).

Effective communications for blind and deaf. The duty to provide effective communication aids for blind or deaf people sometimes involves physical and structural modifications (e.g., telecommunication devices) and other times nonphysical or structural modifications like providing interpreters or making copies of printed material available in braille, cassette, and large print.

In addition, the HEW regulations impose a duty to publicize the accessibility and usability of programs by requiring that the recipient adopt and implement procedures to ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of services, activities, and facilities that are accessible to and usable by handicapped persons. (Sec. 84.27(f), p. 81).

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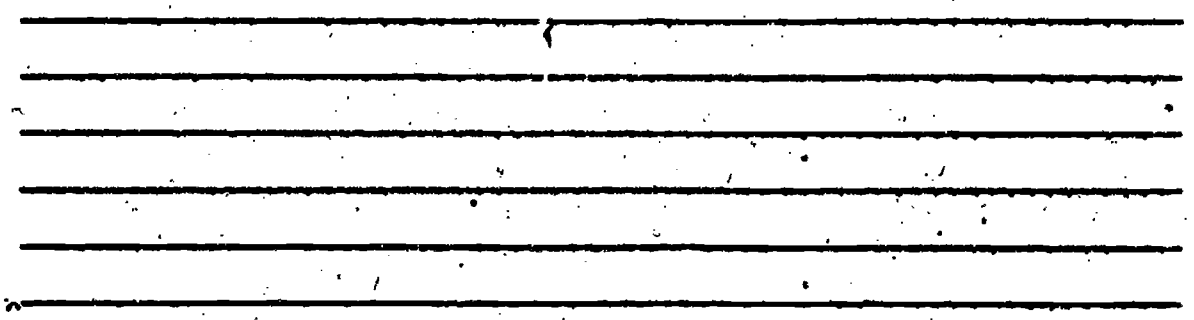

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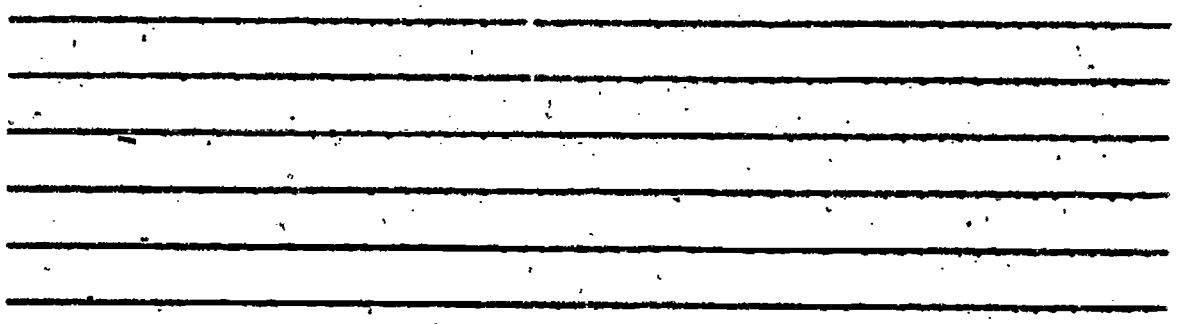

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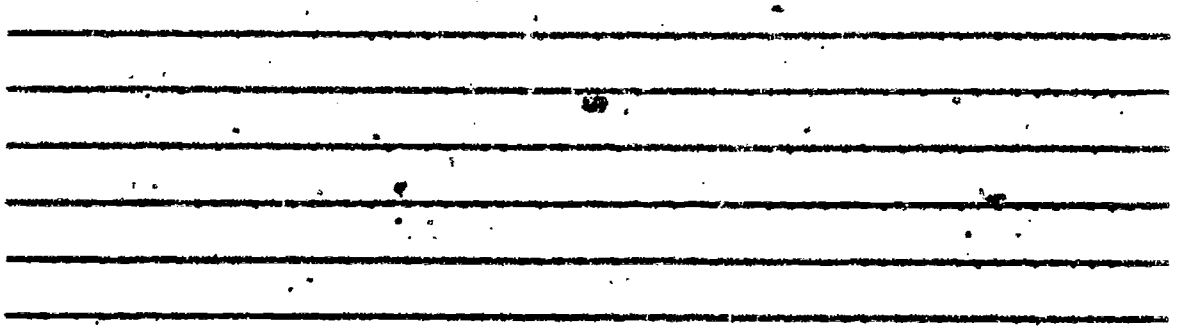

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3. The decision whether to use alternate means must be made with handicapped people and their organizations.

What would you find unacceptable because it is not "equally effective?" If a handicapped person could participate, but receive fewer benefits, would it be equally effective? What if the handicapped person could receive full benefits, but in a segregated facility? What if the building is considered "accessible" because there is someone who is willing to carry handicapped people up and down stairs? What if people in wheelchairs must use a freight elevator? a back door? What is an agency's responsibility regarding accessibility if no handicapped persons are seeking services from their agency?

Special exception for small service providers. A special exception to the program-accessibility requirement is made in the regulations for small service providers which employ fewer than 15 people. In addition to the option of making home visits, if a small recipient cannot make its services available short of significant alterations in its existing facilities, it may, after consultation with the person seeking its services, refer the individual to another service provider whose facilities are accessible. [Sec. 84.22(c)] (This outside referral is a "last resort" measure).

Effective communications for blind and deaf. The duty to provide effective communication aids for blind or deaf people sometimes involves physical and structural modifications (e.g., telecommunication devices) and other times nonphysical or structural modifications like providing interpreters or making copies of printed material available in braille, cassette, and large print.

In addition, the HEW regulations impose a duty to publicize the accessibility and usability of programs by requiring that the recipient adopt and implement procedures to ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of services, activities, and facilities that are accessible to and usable by handicapped persons. (Sec. 84.27(f), p. 81).

What are implications of the duty to publicize for training that you are responsible for?

Securing Free, Appropriate, and Integrated Education

Subpart D of the HEW regulation requires that each handicapped child be given a free, public program of education and training appropriate to his or her needs, in the most integrated setting. (Sections 84.31 to 84.39, pp. 82-83).

These requirements are essentially the same as those that have been established through the courts, and guaranteed by the Congress in the Education of All Handicapped Children Act (P.L. 94-142) as well as by many state legislatures. Section 504 and the HEW regulation provides an additional forum for implementing and enforcing these rights.

What are some of these rights?

How might knowledge of the law and negotiation skills be useful in securing education for handicapped persons?

Do you think a court decision, decision by hearing officer or negotiated settlement will be more suited to individual needs? why?

Private schools [Sec. 84.39] receiving federal funds and which offer special education programs for handicapped children must design their programs so that they are appropriate to handicapped students' individual needs and must educate handicapped students in the most integrated setting, just as public schools are required to do. The multi-disciplinary evaluation and due process procedures also apply to these private schools. A private school may charge more for educating handicapped students only if the additional charges can be justified as substantially increasing the overall costs of operating the school.

If a private school has no special education programs, it nonetheless can be required to admit a handicapped child if the student can be accommodated by minor adjustments to the program -- an example being that private schools cannot exclude a blind student.

School districts which operate daycare, preschool, or adult education programs must extend these services to handicapped individuals. This means that schools must make available educational activities and programs for handicapped children under the age of six and individuals after the age of 18, where such programs exist for the general public. As in the case of elementary and secondary education programs, preschool activities and adult education courses must be free for handicapped students if free

for everyone else, must include supplementary aids and services if required by a particular individual, and must take place in the most integrated setting.

Under the Education of All Handicapped Children Act, states will have to provide complete education programs for all handicapped children between ages 3 and 6 and handicapped people between 18-21 by 1980 in order to receive federal funds. Section 504 provides the means for presently accomplishing this objective where schools now offer programs for children in these age groups [Sec. 84.38].

The following two pages provide excerpts from Section 504 regulations issued by HEW and should be helpful in familiarizing yourself with their contents and in answering the following two questions.

Using the outline of the 504 Regulation, where would you look to determine whether the regulations require an IEP, as in P.L. 94-142?

What major section? _____

What subsection(s) might you check?

_____

_____

_____

What requirements under Sec. 84.35 might be met through the use of an IEP?

_____

_____

_____

_____

_____

Excerpt from Section 504 Regulation

Subpart A - General Provisions

Sec.
84.1 Purpose
84.2 Application
84.3 Definitions
84.4 Discrimination prohibited
84.5 Assurances required
84.6 Remedial action, voluntary action & self evaluation
84.7 Designation of responsible employee & adoption of grievance procedures
84.8 Notice
84.9 Administration requirements for small recipients
84.10 Effect of state or local law or other requirements & effect of employment opportunities

Subpart B - Employment Practices

84.11 Discrimination prohibited
84.12 Reasonable accommodation
84.13 Employment criteria
84.14 Preemployment inquiries
84.15-84.20 [Reserved]

Subpart C - Program Accessibility

84.21 Discrimination prohibited
84.22 Existing facilities
84.23 New construction
84.24-84.30 [Reserved]

Subpart D - Preschool, Elementary, & Secondary Education

84.31 Application of this subpart
84.32 Location & notification
84.33 Free appropriate public education
84.34 Educational setting
84.35 Evaluation & placement
84.36 Procedural safeguards
84.37 Nonacademic services
84.38 Preschool & adult education programs
84.39 Private education programs
84.40 [Reserved]

Subpart E - Postsecondary Education

Sec.
84.41 Application of this subpart
84.42 Admissions & recruitment
84.43 Treatment of students; general
84.44 Academic adjustments
84.45 Housing
84.46 Financial & employment assistance to students
84.47 Nonacademic services
84.48-84.50 [Reserved]

Subpart F - Health, Welfare & Social Services

84.51 Application of this subpart
84.52 Health, welfare & social services
84.53 Drug & alcohol addicts
84.54 Education if institutionalized persons
84.55-84.60 [Reserved]

Subpart G - Procedures

84.61 Procedures
84.62-99 [Reserved]

84.35 Evaluation and placement.

(a) Preplacement evaluation. A recipient that operates a public elementary or secondary education program shall conduct an evaluation in accordance with the requirements of paragraph (b) of this section of any person who, because of handicap, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in a regular or special education program and any subsequent significant change in placement.

(b) Evaluation procedures. A recipient to which this subpart applies shall establish standards and procedures for the evaluation and placement of persons who, because of handicap, need or are believed to need special education or related services which ensure that:

(1) Tests and other evaluation materials have been validated for the specific purpose for which they are used and are administered by trained personnel in conformance with the instructions provided by their producer;

(2) Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient; and

(3) Tests are selected and administered so as best to ensure that, when a test is administered to a student with impaired sensory, manual, or speaking skills, the test results accurately reflect the student's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).

(c) Placement procedures. In interpreting evaluation data and in making placement decision, a recipient shall (1) draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior, (2) establish procedures to ensure that information obtained from all such sources is documented and carefully considered, (3) ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and (4) ensure that the placement decision is made in conformity with Sec. 84.34.

(d) Reevaluation. A recipient to which this section applies shall establish procedures, in accordance with paragraph (b) of this section, for periodic reevaluation of students who have been provided special education and related services. A reevaluation procedure consistent with the Education for the Handicapped Act is one means of meeting this requirement.

Higher Education

Since virtually all colleges--community, state and private--receive funds from HEW, Subpart E of HEW's regulations prohibits them from discriminating against handicapped students in any of their programs or activities, identifies particular practices which have tended to exclude handicapped people from higher educational opportunities, and proscribes a number of actions to insure that handicapped students have an equal opportunity to obtain a degree and to share in benefits of college and graduate life. Some of the suggested actions include insuring that:

1. Handicapped students have an equal opportunity to participate in every aspect of higher education programs (academic, research, and professional programs; extracurricular activities, financial aid, housing, health care, employment including work study and student teaching assignments, career placement, counseling services, and insurance plans [Sec. 84.43(a)].
2. Tests and admissions procedures are valid for purposes used, and do not discriminate against students with visual, hearing, or manual impairments.
3. There are limits on inquiry about disabilities.
4. Facilities are accessible
5. Interpreters are provided (also readers and other aides)
6. Nonessential academic regulations are flexible and can be adjusted
7. Any outside housing, employment or transportation assisted by the school is available to handicapped students [Sec. 84.45(b) and 84.46(b)].

Enforcing Section 504

The Office for Civil Rights is responsible for seeing that each HEW funded program is in full compliance. Other federal agencies will designate responsible offices as they, in turn, issue regulations. The Office of Civil Rights can:

1. review applications for federal assistance,
2. act on complaints against recipients from handicapped people their organizations, and
3. conduct compliance reviews of a recipient's programs.

The courts are available for use by handicapped people and their organizations for enforcing Section 504 in order to get jobs, an education, accessible transportation, and other services created in the community.

P.L. 94-142 and Section 504

Under P.L. 94-142, SEA's and LEA's may receive federal funds to assist them in educating handicapped children. As a condition of receiving funds each SEA and LEA must comply with the provision of P.L. 94-142. Whether or not an SEA or LEA receives Part B funds, it must comply with Section 504 and its regulations which are consistent in concept and policy with P.L. 94-142 regulations. Section 504 prohibits any recipient of any federal financial assistance from discriminating against a handicapped person solely on the basis of his handicap.

Despite a similarity to P.L. 94-142, Section 504 and its regulations differ from P.L. 94-142 in several important respects:

1. Section 504 was effective upon enactment (1975) and required immediate full compliance; P.L. 94-142 permits schools to comply over an extended period of time.

2. Section 504 includes as handicapped those persons who are so defined by P.L. 94-142, but it also includes many others such as persons addicted to the use of drugs and alcohol. The two laws take different approaches to the issue of who is handicapped. P.L. 94-142 basically relies on a categorical approach and therefore anticipates the continuation of categorical labeling of children. Section 504, however, relies on both a categorical approach and an entirely different approach, best described as "functional." Under that approach, a child is handicapped if he functions as though he were handicapped, or if a state or local government receiving HEW funds acts as if the child were handicapped, there is an impairment in his major life activities, he has a record of impairment, or he is treated as having an impairment.

Section 504 prohibits discrimination not only in preschool, elementary, secondary and adult public education, but also in the employment of the handicapped and in social and health services. It is a nondiscrimination law, prohibiting discrimination based on handicaps. By contrast, P.L. 94-142 provides an entitlement or right to specific services with respect to preschool, elementary, secondary, and adult education based on classification as handicapped. Both laws, however, speak to the problems of architectural barriers and access to facilities and, in a limited sense, to the employment of the handicapped by the public schools.

Both P.L. 94-142 and Section 504 require appropriate education and an individualized evaluation. Section 504 does not, however, require an IEP as does P.L. 94-142.

P.L. 94-142 grants a private individual the right to bring suit after administrative due process appeals have been exhausted. Although Section 504 does not by its terms create a private right of action, cases brought under Section 504 have successfully challenged discrimination in public education. Therefore, under Section 504, an aggrieved, handicapped person may be entitled to file his lawsuit before exhausting any administrative remedies he might have available.

JUDICIAL AND ADMINISTRATIVE INTERPRETATION OF P.L. 94-142 and SECTION 504

The passage of P.L. 94-142 and Section 504 as well as other legislation related to the rights of the handicapped have significantly influenced educational practices. The following are a representative sample of the issues which have arisen since the passage of these laws and have been decided based on them and their underlying concepts.

Accessibility to public transportation. In Lloyd v. Regional Transportation Authority (1977), the Seventh Circuit Court of Appeals rejected Chicago's claim that the transportation system was accessible to the handicapped based on the availability of separate special buses. The court held that Section 504 creates a private right of action for handicapped individuals, imposes affirmative duties upon city and regional agencies and prohibits unnessarily separate services.

Preference for regular class placement over homebound instruction for physically handicapped child. In Hairston v. Drosick, (1976) a West Virginia federal district court applied Section 504's integration requirement to education. In that case, a child with spina bifida was offered homebound instruction, a special education class, or a regular class if her mother would come two or three times a day to attend to the child's toileting needs. The court wrote:

> "There are a great number of other spina bifida children throughout the State of West Virginia who are attending public schools in the regular classroom situation, the great majority of which have more severe disabilities than the plaintiff child Trina Evet Hairston including children having body braces, shunts, Cunningham clips and ostomies, and requiring the use of walkers and confinement to wheelchairs. The needless exclusion of these

children and other children who are able to function adequately from the regular classroom situation would be a great disservice to these children...A major goal of the educational process is the socialization process that takes place in the regular classroom, with the resulting capability to interact in a social way with one's peers. It is therefore imperative that every child receive an education with his or her peers insofar as it is all possible. This conclusion is further enforced by the critical importance of education in this society.

It is an educational fact that the maximum benefits to a child are received by placement in as normal environment as possible. The expert testimony established that placement of children in abnormal environments outside of peer situations imposes additional psychological and emotional handicaps upon children which, added to their existing handicaps, causes them greater difficulties in future life. A child has to learn to interact in a social way with its peers and the denial of this opportunity during his minor years imposes added lifetime burdens upon a handicapped individual." (423 F. Supp. at 183)

Interpreter for deaf college student. In Barnes v. Converse College (1977) the court found that Section 504 required a private college receiving federal financial assistance to provide an interpreter to a deaf school teacher who enrolled as a student in its summer session to earn additional college credits.

Least restrictive placement. The issue of least restrictive placement is one of the issues common to many of the educational cases. In one of the first cases to rely on federal statutes, including P.L. 94-142, Section 504, and the Elementary and Secondary Education Act of 1965, the focus was on the inadequacy of educational services to handicapped children placed in self-contained special education classes that isolated them from nonhandicapped children and allegedly failed to meet their educational needs. One result of that case was that in January of 1979, a consent degree was entered with the state level defendants, which was comprised

of a comprehensive plan to assure compliance in ensuring equal educational opportunity for all handicapped children, ages 0-20 years in Mississippi. Mattie T. v. Holladay, (1979).

In December, 1979, the Third Circuit Court of Appeals affirmed the Federal District Court's opinion in the much publicized case of Halderman vs. Pennhurst. In affirming the lower courts' order, the Court held that every retarded person has a right to education, training and care required to reach maximum development and that services must be provided in an environment that is least restrictive on the individual's personal liberties. The Pennhurst case and opinion are complex and must be analyzed within the context of a more detailed study of the history and factual basis of the case; however, at the minimum the Pennhurst opinion is additional evidence that institutionalization is judicially disfavored as an approach to habilitation, and that community living arrangements are the favored approach.

Twelve-month education. On June 21, 1979 the United States District Court in Pennsylvania issued an opinion in the case of Armstrong v. Kline. Armstrong is a class action challenging the refusal of various school districts to provide more than 180 days of schooling to handicapped children. The Court held that by creating program interruptions which can cause significant regression in skill levels, this categorical refusal denied members of the class their rights to an "appropriate education" as provided by Federal Law 94-142, the Education of All Handicapped Children Act of 1975. The plaintiffs in this case were five handicapped students enrolled in publicly-funded programs for the severely and profoundly retarded and for the emotionally disturbed. The Court's holding of

entitlement to more than 180 days of education did not include all severely and profoundly involved students nor exclude handicapped students of other categories. It is stated that "although the court is convinced that there are other handicapped children with similar needs, it cannot identify them by disability or characteristics" or establish specific guidelines. The "decision is one that must be made on an individual basis, by those familiar with the child. Furthermore, the nature and length of programming in excess of 180 days will depend on individual considerations." This case was decided on the basis of rights enumerated under P.L. 94-142 and did not address Section 504, equal protection or due process claims.

In Armstrong v. Kline, the court rejected that the defendents' claims that regression was the product of inappropriate programming, incompetent teaching or lack of parental reinforcement during interruptions. What implications does this finding have for appropriate expectations for parent involvement and parents as teachers?

Impartial hearing officer. In a recent suit challenging procedures in one state for selecting hearing officers, the court rules that permitting local Board of Education members or employees of the State Board of Education to act as hearing officers does not comply with the federal law requirement of impartiality for hearing officers.

Residential educational placement. The cost of private and residential school placements are often at issue in conflicts between parents and local educational agencies (LEA's) or between local and state educational agencies (SEA's). In a 1979 case, despite a hearing officer's ruling to the contrary, a school system had refused to pay for or provide placement for a sixteen year-old emotionally disturbed, learning disabled student with a history of epileptic seizures, who required a residential academic placement with psychiatric, psychological and medical care. The federal district court issued a preliminary injunction requiring the school district to provide educational services in a residential academic program with necessary psychiatric and other related services. (North v. District of Columbia Board of Education, 1979).

Another court held that Virginia's statute providing only partial education tuition grants to handicapped children is unconstitutional when children are forced to resort to private schools because of unavailability of an appropriate public educational placement. The court ordered that the defendants must provide an "appropriate private education" to plaintiffs equal to that available to more affluent students until public education is available." (Kruse v. Campbell, 1977).

Use of standardized tests. Recently (October, 1979), the case of Larry P. v. Riles was decided by the federal district court in California. In that case, the court enjoined the use of standardized tests in California for the purpose of identifying black school children for placement into classes for the educable mentally retarded. The case was brought under the Civil Rights Act of 1964, Sec. 504 of the Rehabilitation Act of 1973, P.L. 94-142, and on the constitutional basis of equal protection. Based on the Civil Rights Act of 1964, the Court concluded that placement by students who

are not retarded, but are merely victims of a racially biased testing procedure wrongfully deprives them of a meaningful education. Under P.L. 94-142 and Section 504, the court found more specific guidance in regulations which require that tests used to determine educational placement be validated for purposes for which they are used. In addition the court found the intent to discriminate required for a practice to be violative of equal protection was present in the state's failure to urge the development of racially neutral tests.

As must be obvious, the implications of this decision and what happens to it on appeal are widespread, and too numerous to attempt to deal with thoroughly here. It is,however,the example of the type of controversial educational issues which are being decided by courts today, and of the limited options available to the courts to provide remedys and solutions to social problems.

Reasonable accommodation under Section 504. Recently, the United States Supreme Court rules on a case involving the denial of admission of a severely hearing-impaired woman, a licensed practical nurse, to a clinical program for training registered nurses. There is much to be learned from this case; however to do so, one must analyze the process, not simply become acquainted with the result. For instance, one must recognize that there are facts which would be useful to resolving and understanding this case which are absent from the record made at the trial court level, which is the record looked to by the Supreme Court for the statement of facts. These omissions include facts such as what specific accommodations would be required in this case and achievements of other hearing-impaired nurses. One must also recognize that the

trial court decision was reached prior to the promulgation of the HEW regulations on Section 504.

In light of the regulations, the appellate court disagreed with the trial courts' interpretation of "otherwise qualified" and therefore ruled that the plaintiff, Ms. Davis, should be admitted. The appellate court also recognized that nursing allows different career objectives and that Ms. Davis might choose a job which did not require all tasks that nurses do. Therefore, the appellate court ordered the college to reconsider the plaintiff's application--not necessarily to admit her.

At the Supreme Court level, there was no finding of illegal discrimination and no violation of Section 504. The court found that Section 504 doesn't limit the freedom of an educational institution to require reasonable physical qualifications for admission to a clinical training program and that it was not shown that anything short of a substantial change in Southeastern's program would render unreasonable the qualifications it imposed. In other words, none of the auxiliary aids or accommodations that are reasonable would have benefited this plaintiff. Thus the college did not have to reevaluate her application in light of the guidelines of the Court of Appeals or inquire into accommodations for her. This case leaves guidelines for reasonable accommodation unclear, at best and leaves many questions unanswered: what if the program is not a clinical one? What does constitute an illegal refusal to extend affirmative action? To what extent must a program investigate accommodations? (Southeastern Community College v. Davis, 1979)

What differences and similarities exist between educational cases prior to the passage of P.L. 94-142 and Section 504 and those cases being brought since the implementation of these laws?

It is obvious that legislative and judicial influences on the provision of educational services to handicapped children are pervasive. These influences will continue to have a tremendous impact on public schools, as well as preservice teacher education programs. The decade of the 80's will undoubtedly be a period of continued litigation aimed at operationalizing and refining the comprehensive requirements of P.L. 94-142 and Section 504. In the midst of the legal interpretations, it is important that educators do not lose sight of the utlimate goal of seeking to insure that handicapped children are, indeed, provided with a free appropriate public education.

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EDUCATION FOR ALL HANDICAPPED CHILDREN: PRESENT AND FUTURE

James R. Galloway, Michael E. Norman, and William V. Schipper

The authors of this article provide an overview of various provisions of the Education for All Handicapped Children Act, discuss the effects those provisions have had on federal, state, and local agencies, and provide some notions as to predicted future events and social forces which special educators believe will have major implications for the nature and structure of the delivery of special education services in the 80s and 90s.

The Education for All Handicapped Children Act has been called the most significant piece of federal legislation since Title 1 of the Elementary and Secondary Education Act of 1965. When Public Law 94-142 was signed into law November 28, 1975, it was met with widely differing reactions from various elements of the public sector. Obviously, the Congress, certain handicapped children's advocacy groups, and numerous educators saw it as the ushering in of a bright new era of hope, opportunity, and the right to a free and appropriate public education for thousands of citizens previously regarded as "second class." Indeed, the legislation meant that children who had traditionally been completely excluded from public education, or who were previously automatically placed in state residential institutions, would now be placed in public school programs, and all special education children and youth would be provided an appropriate education at public expense. Such a serious effort to educate all of a nation's handicapped individuals, is without precedent in other countries and in the history of mankind.

As part of its commitment toward these goals, the U.S. Congress has appropriated more than $1.5 billion to state and local education agencies during the 1977-1980 school years.

Though everyone can agree with the objective stated in the title of the Act, not everyone agreed that the objectives of the law could realistically be achieved. Indeed, President Ford attached this stinging message when he signed the bill on November 28, 1975:

> This bill promises more than the Federal Government can deliver and its good intentions could be thwarted by the many unwise provisions it contains. Everyone can agree with the objective stated in the title of this bill – educating all handicapped children in our nation. The key question is whether the bill will really accomplish that objective.
>
> Even the strongest supporters of this measure know as well as I that they are falsely raising the expectations of the groups affected by claiming authorization levels which are excessive and unrealistic . . .
>
> There are other features in the bill which I believe to be objectionable, and which should be changed.
>
> It contains a vast array of detailed, complex and costly administrative requirements which would unnecessarily assert Federal control over traditional State and local government functions. It establishes complex requirements under which tax dollars would be used to support administrative paperwork and not educational programs. Unfortunately, these requirements will remain in effect even though the Congress appropriates far less than the amounts contemplated in S.6. (White House Press Release, December 2, 1975)

During the first years of general "awareness building" regarding the law, many school board persons, state and local education agency administrators, teachers, fiscally frugal persons, "states' rights," and other members of society have voiced private and often public dissatisfaction with what they perceive to be an impossible if not inappropriate public policy position and federal role in special education. The specter of the realization of President Ford's early prophecy as to unrealistic promises and "unwise provisions" of 94-142 became, for a short period, a large potential reality. However, that reality for the most part has not materialized.

Though in effect for only 2 years, PL 94-142 appears to be alive and well and progressing satisfactorily – though unevenly – nationally. The implementation efforts have been studied, measured, documented, evaluated, litigated, and monitored perhaps more than any other education law in the history of this nation. The path from policy to practice has been uneven and not always smooth, and we still have a long way to go before the laws numerous provisions are completely realized. However, the preponderance of the data shows that truly tremendous advances have been made.

When PL 94-142 became a reality, all education agencies were charged with the design and initiation of new administrative practices. Simultaneously, new practices were initiated at the federal, state, and local agency levels.

The New Administrative Provisions

At the federal level, within the Bureau of Education for the Handicapped (BEH), new procedures included:

- The development of regulations which reflected maximum input from providers and recipients of services.
- The creation of a system to evaluate state plans which were necessary to allow the flow of Title VI-B funds to state agencies.

Such a serious effort to educate all handicapped individuals is without precedent . . . in the history of mankind.

- The creation of a monitoring system of state and local agencies
- The collection of information, historically not collected by BEH, to prepare the Commissioner's report to Congress as specified in the law
- The stimulation of interagency coordination of policies and procedures affecting the education of the handicapped
- The provision of technical assistance to the states in order to facilitate compliance with the provisions of PL 94-142

At the state educational agency (SEA) level new activities included -

- The development of state plans responsive to the new federal regulations
- The interpretation and dissemination of the new law and regulations to local education agencies (LEAs) and constituent groups throughout the state
- The establishment of state regulations and training programs
- The reorganization of state agency staffs to create new monitoring divisions
- The development of communication systems involving all service providers in the state to achieve better interagency cooperation
- The creation and effective use of parent advisory groups
- The development of communication links with institutions of higher education to achieve a state comprehensive plan for personnel development
- The responsibility for the general supervision of all education and related services provided to handicapped children including services provided by other public and private agencies

At the local level (LEA) the mandates of the law hit with full force. New procedures were initiated that were expected to be fully operational and failsafe immediately. Among the many new procedures required were the following

- The initiation of an ongoing system of child identification to seek-out and find all handicapped children ages 0 to 21
- The establishment of interdisciplinary diagnostic and evaluation systems which assured nondiscriminatory evaluation
- The training of staffs in the development of individual educational programs for all children being served
- The training of local boards, administrators, teachers, and support personnel in the requirements of the law and in their responsibilities
- The development of a local application for submission to the state educational agency.
- The initiation of procedures assuring:
  - Due process = communicating with parents in their native language
  - Confidentiality of personally identifiable information
  - Parental involvement in all decisions affecting the education of their children

Throughout this tooling up period, administrators were continually charged by their superordinates and by their own professional drive to be concerned with the quality of services provided to each handicapped child in their systems. Many state agencies and local agency administrators were placed in the position of initiating new procedures in the absence of additional staffing and without new federal dollars which had not as yet reached the local level.

The initial problems of implementing PL 94-142 were associated primarily with designing and putting in place new procedures and practices while maintaining existing programs, with little or no assistance from expanded staff capabilities. This total effort perhaps is reflected best in the following finding reported in Education Turnkey System's *Case Study of the Implementation of PL 94-142*.

> In all sites, major activities were initiated in response to the federal mandates. Indeed, never have so many local and state agencies done so much with so few federal dollars to implement a federal education mandate (p. 1)

Current Status of Implementation

Since the publication of the final regulations for the Act in August 1977, rapid and substantial changes have occurred at each administrative level. Initial, and to some extent continuous concerns have centered around compliance with the "letter of the law." These concerns, in effect, were issues of quantity.

The Bureau of Education for the Handicapped, in the first report to Congress on the implementation of PL 94-142 (1979) focused on six questions (pp. 1-5):

1. Are the intended beneficiaries being served?
2. In what settings are the beneficiaries being served?
3. What services are being provided?
4. What administrative mechanisms are in place?
5. What are the complications of implementing the Act?
6. To what extent is the intent of the Act being met?

The answers to these questions have implications for BEH, SEAs, and LEAs. Not only do they address quantity issues, but they also provide the opportunity to examine the quality of programs and services being provided to handicapped individuals nationally.

Each year since the passage of the legislation, more children have received service than in the preceding year. This number, however, has never matched the estimates on which the Act and funding formula are based. The discrepancy has caused BEH, SEAs, and LEAs to review child identification practices and procedures.

In relationship to the "least restrictive environment" (LRE) issue, the predominant placement for handicapped children is the regular classroom with support services. Although the concept of LRE remains a controversial area, the acceptance of handicapped children in the regular classroom has increased. In large part, this has been the result of inservice training provided to administrators, teachers, and parents by SEAs and LEAs. It is apparent, however, that more of such training will be necessary in order to assure increased options for the placement of handicapped children.

The types of services being provided vary among local agencies and are often dependent upon such factors as size and population organization and administration of services, types and intensity of services needed, availability of teachers, and types of services historically delivered.

The primary question in regard to services has to do with the LEA's ability to obtain appropriate services to meet the needs of an individual child. BEH estimates that states may need as many as 85,000 new special education teachers in the next two years, while colleges and universities are currently producing only 21,000 such teachers each year. This finding, of course, may have major significance particularly for rural districts.

A number of administrative mechanisms at the federal, state, and local levels have been put in place and refined. At the federal level, this has included the development of the regulations and a monitoring system. A great deal of activity at the federal level has involved interagency agreements and understandings between BEH and other federal human service agencies, both within and outside the U.S. Office of Education.

Similarly, states have developed monitoring systems and have begun the interagency agreement process. Many states have had to confront the legal requirement of monitoring educational programs provided by other state agencies.

Some obvious consequences related to implementation are also discussed in the BEH report. Of major consequence is the statement:

> Special and regular education teachers and administrators have devoted more time to identifying children's needs, developing individualized educational programs, and determining optimal placements for handicapped pupils (p. 4)

The report goes on to state:

> These actions have had two major impacts on school systems: first, they have led to the definition of new duties the staff is expected to perform, without any appreciable diminution of previous responsibilities; and . . . they have created the necessity for staff to make difficult choices between new and existing duties in the allocation of their time and attention (p. 89)

Of primary concern is the extent to which the intent of the Act is being met.

Major impacts on school systems: The staff is expected to perform new duties without appreciable diminution of previous responsibilities.

The achievement of legislative intent is frequently very difficult for implementers who often develop programs that attend to the letter of the law rather than its spirit or purpose. This may be so because laws by their very nature are precise and often are interpreted by implementers to require a specific response. This shortcoming historically has caused the courts to intervene and impose more specific and exacting standards for practitioners. Though PL 94-142 is indeed very precise in its requirements and in various specifications of procedures, many educators have realized that there is a great deal of freedom and flexibility within the law and have developed innovative responses based on sound educational principles.

Considering that the Law has been in effect for just two years, many indicators are that tremendous progress has been achieved regarding both the "spirit" and the "letter" of the law.

As previously mentioned, more children are reported as receiving service than prior to the legislation, and the number has indeed increased each year. Federal appropriations for assisting states and local education agencies in this implementation of the law have increased from $315 million in school year 77/78 to $862 million for fiscal year 80/81. Similarly, most states have greatly expanded special education expenditures. For example, in Massachusetts the cost of special education increased from $104 million in school year 73/74 to $274 million in school year 77/78 – an increase of 165%. The state share (reimbursements to locals) increased by over $100 million over this same period. These figures were also representative of the funding expansion in six other states.

Increases in the number of children served and dollars alone do not tell the whole story. Other issues remain and will continue to require indepth observation. A report of a longitudinal study of the implementation of PL 94-142 (1979) conducted by SRI (1978) identified four basic values that together define the "spirit of the law." Those are:

- Individual attention to each handicapped child
- Avoidance of erroneous classification
- Parental involvement
- Mutual exposure

The report goes on to state:

> In order to determine the two major decisions – what is most appropriate for a given child and which environment is least restrictive – these four values must be realized. The law presumes that what is 'appropriate' cannot be determined without treating the child individually, involving his/her parents, avoiding erroneous classification, and considering mutual exposure. The second decision is a balancing act in which the "mainstreaming" goal of the law is reconciled with the child's best interest as an individual (p. 44)

What is an appropriate education is a decision made at the local agency level which considers the child, his/her environment, evaluation data, and the amount of

time the child will spend with nonhandicapped peers. Several factors, however, may influence this decision. For example, if services needed by the child are not currently available, the school district may fail to recommend the services as required by PL 94-142.

A report from the Inspector General of the U.S. Office of Education (1979) indicates that there are a significant number of handicapped children eligible for special education services who are not in a program. The 16- to 21-year-old population is largely unserved by special education programs (p. 2). Three-fourths of the individuals responding to the survey also indicated that there were unidentified handicapped children in regular classrooms.

Such findings clearly show the need to review identification and screening systems. Though "child find" systems are in place often they are not systematic and work more as a campaign (once a year push) than an organized, ongoing part of the in-school find and refer process.

Diagnostic practices vary widely within and among states and can lead to under or overidentification of children (USOE 1979, p. 3). Often all children are given the same battery of tests which can be time consuming and cause backlogs. In many cases, lack of trained personnel presents overwhelming problems.

Questions also remain regarding the role of parents in the educational planning process which has not been clearly defined and has been interpreted variously by LEA educators. Even though it is clear that more parents are participating in IEP meetings (SRI, 1978), they are less frequently involved in the decision making. In fact, SRI (1978) found that "considerable preplacement planning preceded the formal (IEP) meeting." Frequently, what is attempted is parental "buy-off." It is also indicated that regular education teachers do not feel that they are qualified to participate in the meeting. Despite the emphasis on group involvement, psychologists and administrators tend to dominate actual placement and program decisions.

A very real need exists to begin to examine more closely the goals/objectives and programs and services provided to individual children and the needs of each child as indicated by the evaluation. Coupled with this is the need to coordinate the individual's program, particularly for those children served by more than one service provider during the day.

Assessments are . . . being conducted in . . . halls, noisy rooms, . . . showers, and coal bins.

The Turnkey report (1979) offers an observation:

> During the first year of implementation (1977-78), most changes were associated with the IEP process; few with least restrictive environment (LRE). While IEP related effects continued during the 1978-79 school year, a larger number of issues were directly related to due process and LRE provisions.

The implementation of PL 94-142 has been and will continue to be an evolving process. Beginning in 1975 with the passage of the Act and the initial development of management and administrative systems to meet its requirements, through the "growing pains" of the development of instructional systems, much progress has been made.

Looking Ahead

A brief glance toward the future indicates the probability that the concerns of the 1980s will include an increasing concern for quality of services. As regular education assumes an increasing role in the responsibility for and delivery of special education services, the following trends can be predicted:

- More emphasis will be placed on the education of the handicapped topic and inservice training programs of regular education teachers and administrators.
- LEA supervisors of special education will assume more complex monitoring functions as the responsibility for delivery of special education services moves toward the building level.
- Administrators, regular education teachers, support personnel and parents will become more involved with special education personnel in planning special education services and in establishing standards for these services.
- Monitoring systems which currently check the existence of certain practices will move toward checking the quality of services provided, i.e., from "Is there a parent signature on each IEP?" to "Can the objectives and the placement decision be supported by evaluations and other data?" or "To what extent were parents involved in the establishment of objectives and in the determination of the placement decision?"
- Standards will be developed for all elements of the delivery system against which current practices will be measured. Discrepancies noted in this process will become the basis for planning to improve services.

The following standard and finding abstracted from the report of one project of the National Association of State Directors of Special Education full service planning projects illustrates the type of planning activities designed to improve quality of services.

Standard
Assessments will be conducted in settings which allow the maximum performance of the person being assessed.

Finding
The settings in which assessments are being conducted are determined by the building principal. These settings often are not conducive to the maximum performance of the person being assessed and often challenged the reliability of any results. Assessments are currently being conducted in principals' offices, halls, noisy rooms, coal bins, band practice, showers, and coat rooms.

This finding, in a setting where assessment services are provided through a cooperative to 12 local education agencies, may be shocking but may be representative of the quality concerns of the future. If reliable evaluative information is the basis for sound individual educational planning, more attention may need to be directed toward the settings in which this information is obtained. Strategies will have to be developed to raise the importance of good assessment data in the hierarchy of values of those responsible for all aspects of the service.

A 1978 national conference on "Dimensions of the Future and the Challenge of Change" yielded a number of predictions which educators should consider in planning future programs. The following is a list of predictions anticipated to occur by 1990, which could have major implications for the future of special education.

For the Handicapped

- Greater use of individually prescriptive instructional systems and grouping children around common educational needs.
- Increased awareness of the use of the world well beyond the classroom for instructional purposes including the use of the handicapped persons themselves, parents, community resources and other social service agencies.
- State mandates to collect and store pupil data in computer banks to provide LEAs, SEAs and legislatures with discreet and composite information for evaluation, monitoring, and decision making.
- Development of model centers to provide health evaluative and educational services to severely handicapped preschool children with special emphasis on birth to three years.
- A "seamless curriculum" for all learners beginning when children reach the developmental age of 2 and continuing throughout life in a variety of educational settings.

Prediction: A "seamless" curriculum for all learners beginning when children reach the developmental age of 2.

- Human engineering advances ranging from scientific curiosity to prolonged life and genetic advances which will modify and prevent handicaps. Both will call for new service delivery modes for the changing population of handicapped children and youth.
- An increase in the number and type of disabled persons due to viral epidemics, increased industrialization/urbanization resulting in neurosis, alcoholism, drug abuse, psychological disorders, and environmental diseases), and malnutrition in developing nations.
- Movement away from material values to a simpler and more inwardly rich lifestyle calling for teaching the handicapped more productive use of leisure time and preparation for leisure-type occupations.

For the Parents

- Formation of coalition groups consisting of parent advocates and state agencies other than SEAs to demand services, increased power and influence, and cooperative decision making in special education programs.
- Increasing demands to bring vocational rehabilitation and special education services under one administrative umbrella to assure coordinate lifelong programing.
- Parent dominated school site management boards with considerable operating authority.
- The growth of voucher plans, and the re-emergence of private and independent schools.

Teachers and Administrators

- Negotiated agreements [illegible] teachers' organizations and unions to stipulate pupil-teacher ratios in the regular classroom in which handicapped students are "mainstreamed," and to provide paid time for conferencing and IEP development.
- Provisions for specialized training of regular education teachers prior to placement of handicapped students within the classroom and mandated preparatory segments for dealing with handicapped students in teacher training programs.
- Creation of procedures for the negotiation of admission, retention criteria, and standards for handicapped students into or out of the regular classroom.
- Administrator demands for a guaranteed administrative staff per set number of students.

Government

- Redefinition by legislatures of basic programs and service levels which states will support.
- A less prescriptive federal role in implementing 94 142 offset by an increase in the role of states.
- Expanded role by intermediate and regional services units, particularly on high-cost delivery programs.
- A newly created Department of Education combining vocational rehabilitation and special education monies in an effort to (1) promote lifelong programing for the handicapped, (2) encourage interagency cooperative agreements, and (3) seek practical support for the handicapped through the use of funds from other service areas.
- Federal fiscal support frozen at

its current level because of (1) insufficient numbers in child-find data, (2) the trend toward fiscal frugality, (3) the call for more accountability, cost effectiveness and increased performance, and (4) the increased competition for funds with other social service agencies and educational programs such as Title 1 and bilingual education

advocacy groups, teacher unions, and other agencies, particularly in such areas as due process and funding Special educators will have the task of promoting the active participation of handicapped people and their families in education decision making and encouraging an environment of mutu innovation, and creativity among all groups concerned Then, the full realization of the spirit of PL 94 142 will have been achieved

Prediction: *A movement away from material values to a simpler and more inwardly rich lifestyle.*

Facing the Challenge of Change

The challenge of these changes is awesome It is a challenge that educators will choose to face or ignore Deciding to accept change as a fact of life and being prepared to manipulate, control, and use change to meet the needs of the handicapped will call for new roles skills and functions in SEAs and for all special educators

As efforts increase to improve educational opportunities for the handicapped SEAs will need to develop a much higher degree of sophistication in the arts of planning and effecting change Educators will have to see themselves as change agents and create the mechanisms which will allow for the processes of planning and change to function They will need to understand the nature of change what changes are likely to take place when they can be expected to occur and what the probable consequences might be To work effectively with those probable consequences educators will need to develop their business, management and interpersonal skills as they search for creative alternatives and work with a variety of concerned groups in achieving those objectives

As teachers parents adjunct professionals and legislators become more involved in the decision making processes SEAs and special educators will have to develop their negotiation skills and assume mediating roles among parents,

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James R Galloway is Executive Director and *Michael E Norman* and *William V Schipper* are Associate Directors of the National Association of State Directors of Special Education, Suite 610E, NEA, 1201 Sixteenth St N W Washington, DC 20036

CAREER EDUCATION FOR PRIMARY STUDENTS

James F. Baker

Career education is all of education—systematically coordinating all school, family, and community components together to facilitate each individual's potential for economic, social, and personal fulfillment. (Brolin, 1974, p. 5)

Career education under the above definition means preparation for all aspects of successful community living, including working. The Career Alternatives for Handicapped Children Project, a Title IV C project, was designed to develop career education for students served by the Special School District of St Louis County, Missouri The staff provided needs assessment, inservice, program development, and career education materials development.

In the three years of the project, 1976-1979, teachers of both handicapped and nonhandicapped students raised numerous issues during inservice programs or when project staff visited various schools, both special and regular The concerns raised varied only slightly from special school to regular school settings The following issues represent some of the concerns of primary teachers when approached with the suggestion that career education should be an integral part of their curriculum

Q. Why should career education be my concern? They do job training and career education at the high school.

A. "Womb to tomb twinkle to wrinkle" (Hoyt, Note 1) This was the answer given by Dr Kenneth Hoyt, Director of the U S Office of Career Education From birth, a child observes the environment, attitudes and values concerning work, play, and cooperation are formulated

Entry into school vastly expands the child's horizons Even if not directed by the teacher career education is taking place At the

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Reasonable Accommodation Under Section 504

Southeastern Community College v. Davis

By Kent Hull

Lawyers and journalists often use the term "landmark decision" in cases decided by the Supreme Court. In one sense, few cases can fairly be called landmarks. Sometimes a case does affect the daily lives of millions of people, such as the decision in *Brown v. Board of Education* outlawing segregated public schools. Or a case may affect fundamental rights essential to our liberties, such as the decision in *Gideon v. Wainwright* requiring court-appointed lawyers for indigent persons charged with certain crimes. These cases are indeed landmarks, because they change the structure and operation of our legal system.

But, in another sense, every case in which the Court hears arguments and makes decisions on the merits is a landmark. Of the 4,000 cases filed annually with the Supreme Court, fewer than 200 are granted a full hearing on the merits. Many of the cases filed in the Supreme Court can be disposed of without a hearing, and many others do not merit full review. In some cases, the Court, for any number of reasons, can decline to rule on the merits of the case.

Given the court's power to select cases, those relative few it accepts are unique. Generally, they involve disputes over basic rights and issues in our society, or questions upon which other courts have reached conflicting results, or new questions which the Court feels it should address so that authoritative answers can be provided.

There is little doubt that *Southeastern Community College v. Davis* is a landmark decision for handicapped people. But there is considerable question about the direction in which the landmark points. The decision is important for at least three distinct reasons. First, most narrowly, on the facts of the case it is an important holding on the rights of handicapped people in higher education, particularly in professional schooling. Second, it is significant as an indicator of the progress in public affairs of the handicapped rights movement so far. Third, it is important for the message it carries about how handicapped rights cases may be treated by lower courts, because not only does the Supreme Court rule on the technical points of a case, but it also sends signals to other courts. These messages may affect many other cases far removed from the drama of Ms. Davis and the nursing school.

The Background of the Case

Understanding the *Davis* decision requires an examination of the facts. Unfortunately, from the three court opinions and the statement of facts in Ms. Davis's brief to the Supreme Court, this basic information is not altogether clear.

It is established that she had a severe hearing impairment, but it is unclear how accurately her hearing loss had been measured and to what extent it could have been ameliorated by an improved hearing aid. It is also established that she had worked for some years as a licensed practical nurse and that an administrator from the hospital where she previously worked was quite willing to have her employed again as a registered nurse. The Supreme Court suggested, however, that her work experience as a practical nurse was somewhat limited and that there was not necessarily a correlation between that experience and her capacity to work as a registered nurse.

It is also established that she completed the one year associate nursing degree program successfully (the course prior to entering clinical training) and her statement of facts in her brief indicates there was no question about her academic competence. Nevertheless the appellate court (which held in her favor) directed that her application should be considered in light of her academic record and expressed some uncertainty about the strength of that record (which it acknowledged to be above average) in light of the strong competition for places in nursing school.

It does seem clear that the college refused to admit her because school officials believed that her physical handicap prevented her from meeting the curricular requirements and would present difficulties in her eventual licensing as a registered nurse. To some extent the college's action was influenced by an apparently informal opinion of the executive director of the North Carolina nurses licensing authority recommending that she not be admitted to the nursing program for safety reasons and further suggesting that she would have difficulty in securing her license.

Finally, it is clear that the college's actions, as well as the lower court decision, took place before the Department of Health, Education, and Welfare (HEW) promulgated its Section 504 regulations. Thus, the lower court did not consider such questions as feasibility of making accommodations for her handicap in the college's program, although it appears that college officials, in assessing her initial application had considered whether some modification might be made.

In addition to this information about the case, there are a number of facts, arguably quite useful to the Supreme Court in resolving this case, that are missing from the record. We do not know, for example, very much about the specific capabilities and achievements of Ms. Davis herself. Second, we do not know very much about the specific accommodations that might be required to enable her to participate in nurses' training. Third, we do not know very much (at least from the record made in the trial court, which is what the Supreme Court looked to primarily for a statement of the facts) about the achievements of other hearing-impaired nurses—how they accomplished their training and how they carry out their responsibilities. To the extent that these matters were not appropriately before the Court, we may regard the Supreme Court ruling in *Davis* as uninformed and, indeed, misguided. That view, however, does not change the legal impact of the decision, at least immediately.

The federal district court, which first heard the case, ruled in favor of the college, essentially on the ground that Ms. Davis was not "otherwise qualified" as required by Section 504 to participate in nurses' training. Subsequent to this ruling, two events occurred. First, attorneys from the National Center for Law and the Deaf entered the case as counsel for Ms. Davis. Second, HEW promulgated regulations to implement Section 504, parts of which apply directly to postsecondary institutions like the one Ms. Davis had sued.

Circuit Court Supported Davis

When the case reached the United States Court of Appeals for the Fourth Circuit, that court saw the HEW Section 504 regulations as a dominant factor in resolving the case. The appellate court ordered the college to take two actions.

First, it was to reconsider the plaintiff's application for admission to the nursing program without regard to her hearing disability:

> *The college may consider such other relevant subjective and objective factors as it deems appropriate, consonant of course with a fair and essentially uniform application of those same subjective and objective factors utilized in the consideration of other candidates for enrollment in the nursing program. For instance, past academic performance would undoubtedly be a highly relevant factor governing admissibility to the nursing program.*

In this respect, the appellate court viewed the district court's interpretation of the term "otherwise qualified" as erroneous. The focus of the inquiry on this issue, under the appellate court's rationale, was not to be primarily upon her handicap but upon academic and technical qualifications pertaining to the nursing program. In this part of the opinion the appellate court seems to view its task simply as enforcing the HEW regulations pertaining to qualifications imposed in higher education programs. These regulations do not require that a college *disregard* an applicant's physical disability, but rather, they provide that a handicap can be only one factor to be considered in those programs where physical standards and criteria are legitimately imposed.

The appellate court was willing to recognize that, even though Ms. Davis could not perform every task that a nurse might ordinarily be expected to do, she could do enough to make a useful career in the profession.

Secondly, the appellate court ordered that the lower court consider the possibility of requiring the college to make accommodations to enable the plaintiff to participate in the curriculum. It is suggested that close attention be given to that part of HEW's Section 504 regulations which requires recipients to make modifications to academic requirements as are necessary to ensure that the requirements do not discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student.

Underlying the appellate court holding was a view about the nursing profession that one does not find in either the district court opinion or the Supreme Court decision. This was that the profession allows different career objectives. Not all nurses do the same things, nor are all nurses qualified to do everything. They specialize.

The appellate court was willing to recognize that, even though Ms. Davis could not perform every task that a nurse might ordinarily be expected to do, she could do enough to make a useful career in the profession. This flexibility, rejecting stereotyped notions about nursing, indicates that the appellate court was quite concerned about getting to the question of what nurses really do. It was unwilling to accept, at face value, the assertions of college administrators or of the profession itself that nurses must meet broad requirements, particularly when those standards do not reflect the actual work of nurses

At the same time, it is important to note that the appellate court did not order the college to admit Ms. Davis to its nursing program. It simply directed that the college reevaluate her application in accordance with the court's opinion and that the district court consider the question of what accommodations could be made for her. At the time of the fourth circuit ruling, handicapped people and their advocates viewed it as a clear victory, particularly because it represented active judicial enforcement of the HEW's Section 504 regulations, and because the court was unwilling to accept stereotyped notions about either handicapped people or the real obligations of nurses.

No doubt the ruling was significant, but in retrospect one is struck by the very limited nature of the appellate court holding This is one reason why the Supreme Court reversal of the appellate court evoked such a sharp reaction from the handicapped community.

The Supreme Court Decision

After the appellate court issued its ruling, the college appealed to the United States Supreme Court. The Court, as noted earlier, has great discretion in deciding what cases to hear. However, if only four justices indicate that they want to hear a case on the merits, the Court will accept the case for review.

When the Court did issue a "writ for certiorari," the technical term for the order indicating that the Court will hear the case, attorneys for handicapped people were immediately concerned. First, in light of the limited holding of the fourth circuit (which did little more than enforce HEW's Section 504 regulations), it was difficult to understand why the Court thought that this particular case merited review. In issuing its order, the Court usually does not specify what issues it considers important in the case. Uncertain why the Court was concerned about the case, attorneys were unsure how to prepare the case.

The second reason that advocates were concerned was that, by now, it was clear that the trial court record should have been much more detailed and complete to support the kind of review which would be taking place. It is essential to have the significant facts in the trial court record, because that is what appellate courts and the Supreme Court look to in determining the factual background of the case. They generally do not permit additional factual evidence to come in at the appellate stage. A party before the Supreme Court is very much limited by the record made below. As noted earlier, there were a number of important issues and facts which were not, at least in retrospect, adequately developed in the trial court.

When the Supreme Court heard the oral arguments, Ms. Davis was again represented by attorneys for the National Center for Law and the Deaf. The college was represented by Eugene Gressman, a respected Supreme Court advocate and co-author of a well-known treatise on Supreme Court practice Some observers of the oral argument, listening to questions from the justices, were

pessimistic about the outcome, partially because some questions seemed to reflect stereotyped notions about handicapped people and their abilities.

The holding of the Court, without the subtleties, ambiguities, and uncertainties of the language of the opinion, is basically stated in these words:

> *In this case . . . it is clear that Southeastern's unwillingness to make major adjustments in its nursing program does not constitute [illegal] discrimination . . . [W]e hold that there is no violation of* §504 when Southeastern concluded that [she] did not qualify for admission to its program. Nothing in the language or history of §504 reflects any intention to limit the freedom of an educational institution to require reasonable physical qualifications for admission to a clinical training program. Nor has there been any showing in this case that any action short of a substantial change in Southeastern's program would render unreasonable the qualifications it imposed

Thus, the college did not have to reevaluate Ms. Davis along the lines established by the court of appeals, and the district court did not have to inquire into accommodations for her. The college's exclusion of Ms. Davis from its nursing program was upheld.

What Does It Mean?

Justice Brandeis once observed that in most cases it is more important that the legal principles involved be announced clearly and with certainty than that the case be decided correctly. By that he did not mean that justice was unimportant. Rather, he meant that it is the responsibility of courts, particularly the Supreme Court as our highest tribunal, to enunciate principles and guidelines so that its decision may indicate how similar disputes will be resolved in the future.

Another great authority, the late Professor Alexander M. Bickel of Yale Law School, described one of the functions of the Supreme Court as that of conducting a national seminar about certain questions in our public life. He saw court opinions as instructional tools by which officials and the public are educated about those important questions.

We may ask how clear the decision was in the *Davis* case and how adequately the important issues raised under Section 504 have been resolved. We may also ask what kind of instruction the Court has provided in the public discussion about national policy toward handicapped people. The answer to these questions, I believe, is that the Court has neither established clear guidelines for the enforcement of Section 504 nor contributed to a proper understanding of the situation of handicapped people in our society.

In at least two significant aspects the decision creates ambiguities about enforcement of Secton 504. First, while the Court approves of the physical criteria used by the college in this case, it also states that such standards must be legitimate and necessary. It does not, however, suggest guidelines for determining when the use of physical qualifications is permitted, nor does the opinion suggest what kinds of programs may properly impose the standards. *Davis* involved the somewhat unique problems of a clinical nursing program; it does not necessarily follow that a college would be granted such extraordinary discretion in, for example, a liberal arts program or a graduate program that is not similar to clinical training.

Second, while the Court stated that in this case the college did not have to make accommodations to enable Ms. Davis to participate, it did acknowledge that, in some cases, the refusal to make accommodations would constitute discrimination under §504. In the words of Justice Powell,

> *[W]e do not suggest that the line between a lawful refusal to extend affirmative action [i.e., accommodations and modifications] and illegal discrimination against handicapped persons always will be clear. It is impossible to envision situations where an insistance on continuing past requirements and practices might arbitrarily deprive genuinely qualified handicapped persons of the opportunity to participate in a covered program. Technological advances can be expected to enhance opportunities to rehabilitate the handicapped or otherwise to qualify them for some useful employment. Such advances also may enable attainment of these goals without imposing undue financial and administrative burdens upon a State. Thus situations may arise where a refusal to modify an existing program might become unreasonable and discriminatory. Identification of those instances where a refusal to accommodate the needs of a disabled person amounts to discrimination against the handicapped continues to be an important responsibility of HEW*

As he stated, the line between the refusal to make accommodations and the obligation to make changes is not clear. The Court opinion recognizes the principle, but offers little to guide colleges or

handicapped people in determining what their obligations and rights are.

The Results of Ambiguities

One ironic effect of this ruling, and its ambiguity on these two major points, is that the decision may provoke even more litigation by handicapped people against institutions of higher education. A number of institutions were in the process of coming into compliance with HEW's Section 504 regulations, albeit slowly and with some reluctance, but nevertheless were attempting to comply with the requirements of the regulation. Now there may be resistance to the demands of handicapped people for admission and modifications, at least partially because the postsecondary institutions are not sure of what they are required to do.

Moreover, there are other parts of the decision that handicapped people find disconcerting. One is the suggestion (*dictum*, because it was not necessary for the Court to say this) that should HEW attempt to enforce the Section 504 regulations too vigorously with respect to the accommodation in higher education, such action might go beyond the scape of the authority Congress granted HEW.

The Court stated this despite the fact that Congress has long been aware of HEW's Section 504 regulations, and in the process of considering the 1978 amendments to the Rehabilitation Act, commented in a committee report that it was aware of the regulations and understood them to express the intent of Congress. Implicit in this statement by the Court is a threat to vigourous enforcement by HEW, although the upshot of the opinion is to approve of the regulations and of the role which HEW must play in their enforcement.

Another difficulty is the implication that the requirement for accommodations might possibly be tied to congressional appropriations for such changes. The opinion does not state this explicitly, and certainly it should not be cited for this proposition. But it is clear that the justices were concerned about cost and the fact that the regulations, in this case, might be interpreted to require substantial modifications without there being corresponding congressional funding available.

To the extent that the enforcement of HEW's Section 504 regulations is tied to fiscal policies, handicapped people have reason for concern. It must be made clear that many of the accommodations do not require substantial expenditures, but simply require changes in old ways of doing things. But the civil rights mandate of Section 504 requiring such changes must be implemented without a prerequisite of congressional funding.

Related to this point is another theme implicit in the opinion, which is that Congress could have done a better job of specifying what it did and did not want in the enforcement of Section 504. The Court seemed to imply that if Congress had wanted the modification that might have been required in this case, it could have passed a statute much more explicit and detailed than the broadly worded Section 504.

Administrative agencies, handicapped people, and their advocates, have long argued that the nondiscrimination mandate of Section 504 implies an obligation to make accommodations and to take other action so that handicapped people can participate in society. The Court seems to question that rationale. To the extent that this assessment of the Court's opinion is correct, handicapped people in the future will have to insist that federal legislation be more explicit and detailed.

Conclusion

A final distressing aspect of the opinion is what some handicapped people consider to be its paternalistic tone. Justice Powell writes, "One may admire [her] desire and determination to overcome her handicap, and there well may be various other types of service for which she can qualify." At another point he writes that technological advances may eventually enhance the opportunity for handicapped individuals to participate in "some useful employment."

These words suggest that the justices still regard the primary responsibility of public policy as one of "taking care" of handicapped people. One may ask whether they truly understand the nature of the change that has occurred in the civil rights of handicapped individuals in this decade. Part of the shock of the *Davis* ruling was that many of us had thought this level of awareness about handicapped people had been surpassed. If they do not understand, it is one of the primary assignments of legal advocates to convey these new realities to them and to judges of lower courts.

Kent Hull is NCLH Director of Legal Services

H. Rutherford Turnbull III

The Past and Future Impact of Court Decisions in Special Education

Recent court decisions have had a profound effect on legislation for special education. But the central issues today have to do with finance and teacher training. Will there be money to make the new laws and court rulings meaningful? Will we be able to prepare teachers to act positively on the new rights of the handicapped?

The impact of court decisions on special education has been and will continue to be massive. Simply consider five principles of special education law that those decisions have established:

1. *Zero reject* – no handicapped child may be excluded from a free appropriate public education.
2. *Nondiscriminatory evaluation* – every handicapped child must be fairly assessed so that he may be properly placed and served in the public schools.
3. *Appropriate education* – every handicapped child must be given an education that is meaningful to him, taking his handicaps into account.
4. *Least restrictive placement* – a handicapped child may not be segregated inappropriately from his nonhandicapped schoolmates.
5. *Procedural due process* – each handicapped child has the right to protest a school's decisions about his education.

In the following discussion I will review briefly the decisions that have established these principles, demonstrate how they have affected federal legislation, and suggest some of the future litigation the courts will face in the advancement of each principle.

Zero Reject

Case law: Relying on the U.S. Supreme Court's decision in *Brown* v. *Board of Education* that when a state has undertaken to provide public education it must make education available to all students on equal terms, representatives of handicapped children have asserted that they have been denied equal protection when 1) some handicapped children have been excluded from school while others have been included and 2) some handicapped children have been excluded while all *non*handicapped children have been included. They have claimed that the remedy in both situations is to include all handicapped children in a system of public education.

Not surprisingly, the courts have been highly responsive. In the frontier-breaking cases, *Pennsylvania Association for Retarded Children* v. *Commonwealth* and *Mills* v. *D.C. Board of Education*, federal district courts ordered that the public schools of those jurisdictions must furnish a free appropriate education to all handicapped children. With only a few exceptions,[1] federal and state courts have continued to order the public schools to follow the principle of zero reject.

That principle means more, however, than simply that handicapped children have a right to be admitted to the schoolhouse. One of its logical extensions is that handicapped children have a right to an appropriate education, one suited to their conditions and needs.[2] Other logical extensions result in decisions that an appropriate education consists of timely and sufficient evaluations of handicapped children, individual programs, and review of those programs[3] and in court orders that programs must be intended and likely to benefit a child.[4] Still another extension of the zero-reject rule comes from cases holding that the education given to handicapped children must be free to them, since education is provided free to nonhandicapped children.[5] And a final extension of the principle grants the right of handicapped children to be transported to appropriate public school programs.[6]

Claims have been made (but not yet adjudicated) that tuition subsidies are required for private school or technical institute education when appropriate public programs are not available,[7] and issues have been raised (but also not yet adjudicated) whether programs for handicapped children must be equal in quality to those for nonhandicapped children.[8]

Federal legislation: Both P.L. 94-142, the Education for All Handicapped Children Act, and Section 504 of the Rehabilitation Act of 1973 assure handicapped children that they may not be excluded from federally funded school programs. Among other things, these statutes 1) require schools to plan to serve all handicapped children, adopt policies that serve all handicapped children, and conduct searches to locate all handicapped children; 2) apply not only to public schools but also to other public agencies that provide education to handicapped children (e.g., mental health, human resources, corrections, and youth training agencies) and to private schools into whose programs handicapped children are placed by public schools; 3) require schools to give handicapped children an appropriate education; 4) require schools to hire handicapped persons to help operate federally funded programs of special education; 5) place responsibility on a single state agency for assuring that all state and local agencies comply with these acts, and 6) forbid architectural barriers in school facilities.

Looking to the future: Predictably, the zero-reject principle will involve courts in deciding such recurring

H. RUTHERFORD TURNBULL, III is associate professor of public law and government, Institute of Government, University of North Carolina, Chapel Hill

1) claims of handicapped children to have early intervention or compensatory or extended-school programs; to participate in vocational education programs and extracurricular or other nonclassroom activities; and to be granted access to school health, counseling, and job- and college-placement programs; 2) the effect on handicapped children of laws requiring competency testing and prohibiting a student from being graduated unless he has satisfied certain minimum standards; 3) claims of handicapped persons to barrier-free facilities; 4) issues surrounding the schools' duties to furnish handicapped children with special equipment, translators, or other related services;[9] 5) the extent to which handicapped students in private schools must be given a "genuine opportunity" to participate in public school programs or to receive tuition or other assistance (e.g., loan of equipment) from public schools; and 6) ultimately, the extent to which the interests of handicapped children to a free appropriate public education require nonhandicapped students and "regular" school programs to be inconvenienced or burdened so that handicapped students' claims may be satisfied -- a "competing equities" issue.

Nondiscriminatory Evaluation

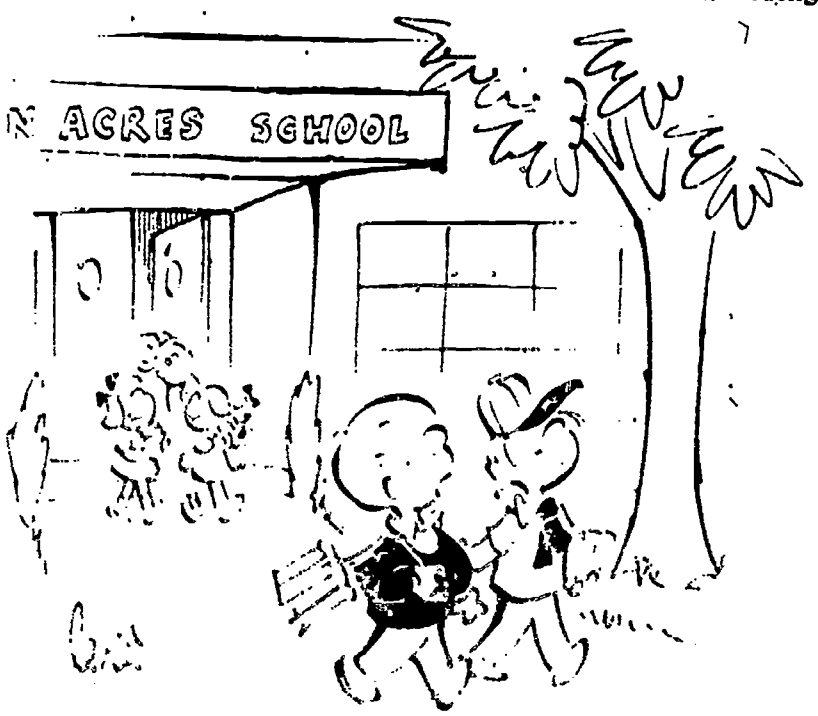
Case law: The Fifth and Fourteenth Amendments are the bulwarks that safeguard children against certain types of educational evaluations and resulting classifications. These amendments provide that a person may not be denied liberty or property except by due process of law. Denying an appropriate education, it is argued, is tantamount to denying a person an opportunity to acquire property. Thus, if children are classified as handicapped when in fact they are not, or if they are inaccurately classified, they are denied an opportunity to an appropriate education.[10] It follows, it is argued, that a due process violation occurs when pupils are misclassified, because invalid criteria have been used to determine which "track" they will follow in school. Moreover, when evaluation or test results are the primary basis for assigning a disproportionate number of minority students to special education programs, there is a risk of perpetuating or reestablishing dual systems of education based on race. Nor are these the only criticisms of evaluations.[11]

In responding to claims that children have been unconstitutionally misclassified and segregated as a result of evaluation procedures, courts have ordered an almost wholesale change in school psychology practices. They have accepted the argument that intelligence tests bear a scant relationship to intelligence if they are administered in a language that is not the child's native language or in a culture with which he is unfamiliar. In one case a court ordered that IQ tests may no longer be used for placement purposes.[12] Other courts have forbidden schools to use tests that do not properly account for the cultural background of the children tested[13] and from placing minority students in classes for the educable mentally retarded on the basis of tests that rely primarily on intelligence testing if the result of the placement is to create racial imbalance in those classes. They have ordered testing and retesting in the children's native language[14] and placement decisions that take into account children's socioeconomic backgrounds, social adaptation, and adaptive abilities.[15] And they have required schools to justify their reliance on tests that cause disproportionate racial imbalance in special education classes.[16]

Federal legislation: Like the courts, Congress has taken into account the fact that a school's failure to detect a child's handicaps or to assess him adequately can result in his being denied an appropriate education. Accordingly, it has required that procedures for classifying children be selected and administered so as not to discriminate on the basis of race or culture, that no single procedure may be the sole criterion for placement decisions, and that tests generally must be administered in the child's native language or method of communication.[17]

Regulations add requirements that tests be validated for the specific purpose for which they are used; be administered by trained personnel in conformance with the producer's instructions; be designed to assess specific areas of educational need (not just general intelligence quotients); be administered so as not to discriminate on account of a child's impaired sensory, manual, or speaking skills; be administered by a multidisciplinary evaluation team; and take into account all areas related to the child's disability, including health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities, where appropriate. Schools also must draw on information from aptitude and achievement tests and teacher recommendations and take into account the child's social and cultural background and adaptive behavior;[18] document the sources of this information and carefully consider it;[19] reevaluate a child every three years or more often if conditions warrant;[20] and not count as handicapped (for purposes of receiving money under P.L. 94-142) more than 12% of all the children in a district, of whom only one-sixth (or 2%) may be counted as "specific learning disabilities" children.[21]

Looking to the future. Laws aimed at eliminating bias in evaluation and placement procedures are particularly fertile grounds for future litigation. Given the relative paucity of evaluation procedures that are validated so as not to discriminate against all the racial and cultural minorities that comprise the nation's school districts and the almost total absence of tests that have been validated for the specific purpose for which they are used, it is safe to assume that the tests themselves will come under attack in court and that collateral battles will be fought over how they are administered and interpreted. The norming of some adaptive behavior tests on institutional populations makes



"I don't think my I.Q. will be able to handle the metric system. He's still [illegible]"

those tests, too, amenable to challenge. If the producer of a test represents that it has been validated for a specific purpose and the validation later is shown to be wanting, attempts will be made to hold the producer liable along with any user of the test. Finally, placement decisions that continue to depend heavily on "soft" data (such as teacher recommendations and assessments that take into account cultural background and adaptive behavior) seem likely to be challenged.

Appropriate Education

Case law: The handicapped child's right to an appropriate education led the courts to hold that alternatives to "regular" education placement (placement in special self-contained classes, homebound instruction, instruction of children who are residents of institutions, and placement in private programs at public expense) must be furnished to handicapped children.[22]

A new line of appropriate education cases is heralded by one alleging that handicapped children are not given an appropriate education where the separate programs in which they are enrolled experience a decrease in the number of teachers and other staff and where an exception to mandatory class size rules is made.[23] This case proceeds on at least these theories: An appropriate education depends on a minimum staff-to-student ratio, and handicapped children are denied an appropriate education when they, but not nonhandicapped children, suffer from decreased staff and increased class size.

Another route for attacking inappropriate placement may be the so-called education "malpractice" cases, typified by the decision of the Illinois Court of Appeals that a local school board could be sued where a student with learning disabilities alleged that his placement in a regular education program forced him to compete with students who were not learning disabled, as a result of which he sustained severe and permanent emotional and psychic injury requiring hospitalization and treatment for his injuries.[24]

Federal legislation: The principal method under P.L. 94-142 for furnishing an appropriate education to a handicapped child is the Individualized Education Program (IEP). The IEP is a statement developed by a group of persons, including the child's parents and the child himself when appropriate, to identify the child's present levels of educational performance, short- and long-term objectives for him, and the special and regular educational services he is to receive, when he should receive them, and for how long.

Preliminary regulations implementing P.L. 94-142 required the IEP to state the child's need for specific educational services, determined without regard to the availability of those services. The final regulations do not require the need for services to be determined "without regard to [their] availability." The Department of Health, Education, and Welfare, acting through the Bureau for the Education and Training of Handicapped Children, cautions, however, that the omission of those key words does not mean that a school must provide only the available services. Instead, the department construes the IEP requirement, the intent of P.L. 94-142 (a free appropriate public education), and the effect of Section 504 and its regulations to mean that the school must provide each handicapped child with all the services he needs, not just available ones.[25]

The IEP is not the only method for determining what constitutes an appropriate education. A second looks to the process for dealing with a handicapped child. Is he provided with a free (publicly paid for) education? Has he been fairly evaluated? Is he in the restrictive placement appropriate to him? Has he been assured of due process safeguards? Have his parents been given full opportunities to participate in decisions affecting his education?

A third method is suggested by the Section 504 regulations. They require a school to provide the child with special education and related aids and services designed to meet his educational needs as adequately as the needs of nonhandicapped children are met. This special education must be based on the least restrictive placement principle, it must consist of preplacement evaluation and nondiscriminatory testing, it must provide for annual reevaluation of the student's special education placement, and it must assure him of procedural safeguards.

Looking forward: Although the regulations under P.L. 94-142 make it clear that no school employee is to be held liable for the child's failure to achieve the progress that his IEP projects for him, it is certain that liability will be at issue if school personnel 1) fail to furnish a handicapped child with an IEP, do not require the IEP to be developed by the required group of persons, or make no good faith efforts to involve the child's parents; 2) exclude a handicapped child from the IEP conference when he could contribute to the development of his IEP, 3) write IEPs that assure only minimum projections of short-term goals and long-term objectives; or 4) fail to furnish or do not make good faith efforts to secure all the services necessary for the child to receive an appropriate education.

The equivalency standards under Section 504 regulations make it likely that litigation will center on placement of handicapped children in special education programs that are understaffed in comparison to regular education programs, instruction by uncertified or otherwise unqualified teachers, and the absence of appropriate materials and equipment (e.g., Braille books or hearing aids).

Least Restrictive Placement

Case law: Just as misclassification and denial of appropriate education have resulted in a form of exclusion of handicapped children from an education, so too did unnecessary placement in self-contained or segregated special education programs. In each of these three circumstances handicapped children were denied opportunity to receive an education – they were functionally excluded.

In *PARC, LeBanks* v. *Spears*, and *Maryland Association for Retarded Children* v. *Maryland* there was ample evidence of misclassification with resulting inappropriate placement, denial of meaningful educational opportunities, and general inadequacy of special education programs (inadequate financing, programs, personnel, and facilities). To overcome these deficits, one of the more effective remedies – effective because it could be implemented almost immediately and was supported by sound educational research and theory – was for a court to require that, as a rule, whenever a handicapped student is to be placed, he is to be included in a regular program in preference to a special program and that he is to be educated in the regular school environment rather than in the special school. The principle of "least restrictive placement" does not necessarily apply, however, if a state statute authorizes a state school superintendent to place children in private or out-of-state programs if appropriate public local programs do not exist.[26] On the other hand, a pending case challenges practices of placing socially maladjusted and emotionally disturbed children in programs that segregate by sex and race, the challenge relies on equal protection grounds and raises issues of the least restrictive placement.[27]

"Laws aimed at eliminating bias in evaluation and placement procedures are particularly fertile grounds for future litigation."

Federal legislation: Having found that handicapped children have been inappropriately educated, denied the opportunity to be educated with their peers, and not given adequate services in the school, Congress followed the courts' preference for least restrictive placement by requiring schools to develop procedures to assure that, to the maximum extent appropriate, a handicapped child will be educated with nonhandicapped children and will not be removed from regular education programs and placed in special classes, separate schools, or other separate activities unless the nature or severity of the child's handicap is such that his education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

"Procedural due process — the right to protest and challenge school decisions — is a necessary prerequisite to putting [the handicapped child's] other claims into effect."

The least restrictive placement regulations make it clear that "appropriate" is determined by the child's needs and IEP; that placement usually should be in the same school the child would attend if he were not handicapped; that, if his placement with nonhandicapped children in the regular classroom significantly impairs their education, the placement is not appropriate for the handicapped child; that a handicapped child should be given a chance to participate in nonacademic and extracurricular services and activities; that a child placed in a private school retains his rights to placement in the least restrictive setting; that the burden is on the school to justify the child's placement outside regular programs, including nonacademic programs and services; that schools that are identifiable as being for handicapped students must be comparable to the school district's other facilities, services, and activities; that a handicapped child ordinarily should be placed as close to his home as possible; and that an orthopedically handicapped child may not be placed in a classroom or school that is "primarily" for other handicapped children (such a placement violates not only the least restrictive placement rules but is unnecessary if the school district complies with the requirements to remove architectural barriers).

Looking to the future: One case already has successfully challenged the nonmainstream placement of handicapped children on the ground that placement in self-contained classes isolates the children from nonhandicapped pupils and fails to meet their educational needs.[28] Another raises the same claims of deprivation of appropriate education because of nonmainstream placement.[29] Both rely not only on the constitutional claims of functional exclusion but also on P.L. 94-142, Section 504, and the respective regulations.

It seems clear that the broad-based challenges to self-contained special education (i.e., programs that are not in the mainstream or do not meet every aspect of least restrictive placement) inevitably will have to answer those parents and educators who remain unconvinced of the educational value of the principle, who can adduce research and expert testimony to indicate that placement in the least restrictive program is not an automatic assurance of an appropriate education, and who assert that the least restrictive placement principle hinges on what is most enhancing or most habilitating for the handicapped person, not what is closest to "normal."

The risk is great that judicial and administrative interpretations of the principle will not depend on two indispensable factors: 1) The principle has its recent history in the massive denial of an adequate education for the many handicapped children who were placed in self-contained and separate programs (a history that is not necessarily doomed to be repeated, given the other rights and access to resources that handicapped children have under case and statutory law); and 2) the principle is best understood and applied in terms of what is appropriate for the child himself where "appropriate" is defined not only by the IEP content but also by concepts of enhancement: What is enhancing is sometimes necessarily more restrictive than "normal" (e.g., a classroom for seriously emotionally disturbed children or severely retarded children may be highly "restrictive" and separated from "regular" programs but also highly enhancing of their abilities to learn). The future issue, then, is whether courts and agencies will apply the least restrictive principle by taking into account the relative "richness" or "poverty" of educational services in separate programs and the likelihood that such programs will be more enhancing for the handicapped child than not.

Procedural Due Process

Case law: The handicapped child's claims to zero-reject, nondiscriminatory evaluation, appropriate education, and least restrictive/most enhancing placement have only a hollow ring unless he has a right to challenge school decisions that affect these claims. Procedural due process — the right to protest and challenge school decisions — is a necessary prerequisite to putting his other claims into effect. That is the ultimate lesson to be learned from *PARC*, *Mills*, *Le Banks*, and *MARC*: A handicapped child and his parents have the right to be notified in advance before the school takes or refuses to take action with respect to his other educational claims: a right to be heard by an impartial tribunal, a right to have his case presented by counsel and expert witnesses, a right to confront and cross-examine witnesses, a right of access to school records that are the basis for the school decision that he challenges, a right to have the tribunal's decision based on the evidence presented, and a right to appeal. He also is entitled to challenge the contents of school records so that incorrect decisions will not be based on incorrect, outdated, or irrelevant information in them.

Federal legislation: The procedural (due process) safeguards of P.L. 94-142 and Section 504 mirror almost exactly the right-to-education cases. These safeguards include access to school records; independent evaluations; surrogate parents or other means of representation if a child's parents are unknown or unavailable or he is a ward of the state; prior notice before a school proposes or refuses to initiate or change the child's identification, evaluation, placement, or provision of a free appropriate public education; an opportunity for a hearing before an impartial hearing officer; and the right to be assisted by counsel and expert witnesses, present evidence, cross-examine witnesses, subpoena witnesses, make oral or written argument, receive a copy of the officer's decision, and appeal.

Looking to the future: It is important that the schools themselves may call for a due process hearing when the child's representatives object to or decline to give necessary consent for proposed school action (such as initial evaluation). Educators thus are given a technique that will enable them to do what they believe they should do and what the laws require them to do: provide a handicapped child with a free appropriate public education. The history of school-parent confrontations in special education has been written by reason of parent initiative; it is not at all likely, however, that this history will repeat itself. School-initiated due process hearings could become the order of the future.

Conclusion

Court decisions have had a profound effect on special education practices and

special education legislation. That they will continue to do so is beyond cavil. The central issues in special education, however, are not able to be resolved by litigation alone. This is because those issues are 1) the willingness of federal, state, and local funding sources to put money into special education so that constitutional and statutory rights can be made meaningful, and 2) the ability of institutions of higher education to prepare future generations of regular and special educators do know, appreciate, and be able to act positively on the rights of handicapped children. Law reform through the courts and legislatures can only partially satisfy the claims of handicapped children to a free, appropriate public education; political action, appropriations, and adequate preservice training are necessary companions. The extent to which those companions will be forthcoming will determine to a large measure the need and probability of success of future law reform, whether in court or in legislatures.

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1. *Cuyahoga County Association for Retarded Children and Adults* v. *Essex*, 411 F.Supp. 46 (N.D. Ohio 1976), and *Taylor* v. *Maryland School for the Blind*, 409 F.Supp. 148 (D. Md. 1976).

2. *LeBanks* v. *Spears* 60 F.R.D. 135 (E.D. La. 1973), and 417 F.Supp. 169 (E.D. La. 1976); *Fialkowski* v. *Shapp*, 406 F. Supp. 946 (E.D. Pa. 1975); and *Wilson* v. *Redmond*, No. 75-C-383 (N.D. Ill., August 19, 1975).

3. *Allen* v. *McDonough*, No. 14,948, Mass. Super. Ct., Suffolk County, consent decree, June 23, 1976, supplemental decree, September 17, 1976.

4. *Frederick L.* v. *Thomas*, 557 F.2d 373 (3d. Cir. 1977).

5. See *Mills* v. *D.C. Bd. of Education*, 348 F. Supp. 866 (D.D.C. 1972) and *LeBanks*, fn. 2, on right to compensatory education for time excluded unlawfully, and *Maryland Association for Retarded Children* v. *Maryland*, Equity No. 160/182/77676 (Cir. Ct., Baltimore County, April 9, 1974) on right to homebound and other out-of-school education.

6. *In re Young*, 377 N.Y.S.2d. 429, (Family Ct., St. Lawrence County, 1975).

7. *Crowder* v. *Riles*, No. CA000384 (Cal. Super. Ct., Los Angeles County, filed December 20, 1976), and *Davis* v. *Wynne*, No. CV-176-44 (S.D. Ga., filed May 21, 1976).

8. *Rockafellow* v. *Brouillet*, No. 787938 (Wash. Super. Ct., King County, stipulations signed September, 1976), and *McWilliams* v. *New York City Board of Education*, No. 21350-75 (N.Y. Sup. Ct., App. Div., filed January 21, 1976).

9. Sec. 121a. 13 of the P.L. 94-142 regulations defines "related services" as transportation and such developmental, corrective, and other supportive services as are necessary to assist a handicapped child to benefit from special education. They include speech pathology and audiology, psychological services, physical and occupational therapy, recreation, early identification and assessment of disabilities, counseling services, medical services for evaluation purposes, school health services, social work services in schools, and parent counseling and training. See *Barnes* v. *Converse College*, ... F. Supp. ... 46 USLW 2065 (August 2, 1977) and *Crawford* v. *Western Carolina University*, ... F.Supp. ... (W.D.N.C., 1977), for cases holding colleges responsible for providing interpreters to otherwise qualified deaf students under 504 regulations comparable to the "related-services" regulations under P.L. 94-142.

10. *Larry P.* v. *Riles*, 343 F.Supp. 1306, *aff'd.* 502 F.2d 963 (9th Cir. 1974); now in trial on merits.

11. H. R. Turnbull and A. P. Turnbull, *Free Appropriate Public Education: Law and Implementation* (Denver: Love Publishing Co., forthcoming), Chapter 2.

12. *Hobson* v. *Hanson*, 369 F.Supp. 401, 514 (D.D.C. 1967), *aff'd. sub nom. Smuck* v. *Hobson*, 408 F.2d 1975 (D.C. Cir. 1969).

13. *Larry P.* v. *Riles*, fn. 10; *Diana* v. *State Board of Education*, Cir. No. C-70-37, R.F.P. (N.D. Cal., January 7, 1970, and June 18, 1973); and *Mattie T.* v. *Holladay*, Civ. No. DC-75-31-S (N.D. Miss., filed April 25, 1975).

14. *Diana* v. *Bd.*, fn. 13; *Guadalupe Org.* v. *Tempe*, Civ. Act. No. 71-435 (D. Ariz. 1972); and *Serna* v. *Portales*, 449 F.2d 1147 (10th Cir. 1974).

15. *LeBanks* v. *Spears*, fn. 2.

16. *Larry P.* v. *Riles*, fn. 13.

17. Sec. 612 (5) (C) and Sec. 614 (a) (7), P.L. 94-142, and Reg. Sec. 121a.530.

18. Reg. Sec. 121a.533.

19. Ibid.

20. Reg. Sec. 121a.534.

21. Sec. 611 (a) (5) and Sec. 602 (15).

22. *PARC* v. *Commonwealth*, 334 F. Supp. 1257 (E.D.Pa. 1971) and 343 F. Supp. 279 (E.D.Pa. 1972); *Mills*, fn. 5; and *MARC* v. *Maryland*, fn. 5.

23. *McWilliams* v. *New York City Board of Education*, No. 21350-75 (N.Y. Sup. Ct., App. Div., filed January 21, 1976).

24. *Pierce* v. *Board of Education of City of Chicago*, 358 N.E.2d 67 (Ill. Ct. App. 1976).

25. Letter from Deputy Commissioner Edwin W. Martin, Nov. 17, 1977, cited in *Insight*, December 19, 1977.

26. State ex rel. *Warren* v. *Nussbaum*, 64 Wisc. 2d 314, 219 N.W. 2d 577 (1974).

27. *McWilliams*, fn. 23.

28. *Mattie T.* v. *Holladay*, fn. 13.

29. *California Association for Retarded Children* v. *Riles*, No. 77-0341-ACW (N.D. Cal., filed February 15, 1977). □

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PROCEDURAL DUE PROCESS: THE TWO-EDGED SWORD THAT THE UNTRAINED SHOULD NOT UNSHEATH

H. Rutherford Turnbull III
Ann P. Turnbull
Bonnie Strickland
University of North Carolina at Chapel Hill

The issue of procedural due process is examined in this article by first analyzing the associated legal requirements of P.L. 94-142 and then identifying the "triggers" which professionals and parents can use to initiate a due process hearing. Problems and unresolved issues associated with interpreting and applying due process safeguards in terms of initiating, conducting, and governing the hearing and hearing officer are discussed. The concluding section of the article identifies specific training implications and creeds of due process hearing officers.

Procedural due process rests on a fundamental notion of fairness: that is, the citizen has a right to protest before the government takes any action that may adversely affect him. In the case of the handicapped child, the right is to protest actions of the state education agency (SEA) or the local education agency (LEA). Without a right to challenge the school's potentially discriminatory practices, children would find that their substantive right to receive a free appropriate education would be depressingly empty.

Procedural due process is also a constitutional requirement under the Fifth and Fourteenth Amendments to the Constitution, which forbid the government to deprive a person of his life, liberty, or property without due process of law. As applied to the education of handicapped children, this means that no handicapped child can be deprived of an education (the means for acquiring property as well as life and liberty in the sense of self-development) without being entitled to exercise his right to protest what happens to him.

The success of the right-to-education laws reflects a belief commonly held by lawyers and educators alike: fair procedures will tend to produce acceptable, correct, and fair results.

The purpose of this paper is (a) to examine the legal requirements, including the ambiguous ones, of due process as set forth in PL 94-142, identifying the triggers that professionals or parents may pull to force each other to comply with the law by initiating a due process hearing, and (b) to highlight the training implications of due process procedures for various affected people, particularly hearing officers.

Legal Requirements

There are five major components of the due process requirements of PL 94-142. These are

1. due process hearings
2. independent educational evaluations
3. written notice to parents
4. parental consent
5. surrogate parents

Each of these components will be discussed separately.

Due Process Hearings

It is a common misconception of procedural due process under PL 94-142 that only parents or guardians of handicapped children may initiate a due process hearing against the child's local education agency (LEA). In fact, however, the LEA itself is empowered to call for due process hearings. It is convenient to deal first with the parents' rights and then the LEA's.

The LEA must give the parents, guardian, or surrogate of a handicapped child an opportunity to present complaints relating to any matter concerning the child's identification, evaluation, or placement or his right to a free, appropriate public education (Sec. 615[b] [1] [E])[1]. A parent or guardian who files a complaint with an LEA is entitled to an opportunity for an impartial hearing. The LEA must inform the parents about any available low-cost or free legal aid in the geographical area (Sec. 121a.506 of the regulations).

As noted above, the right to a due process hearing is not limited to the child's parents or other representatives. Under Sec. 121a.504 and Sec. 121a.506, an LEA may also initiate a due process hearing on its proposal or refusal to initiate or change the identification, evaluation, or placement of a handicapped child or the free, appropriate public education provided to him. For example, a classroom teacher who suspects that a child is handicapped may refer him to the LEA's special services committee for a multidisciplinary evaluation. The parent, however, must give consent when a child is being evaluated for initial placement in a special education program. If parents refuse to consent to evaluation, and the LEA's staff believes that an evaluation should be obtained, the LEA may initiate a due process hearing to challenge the parents' decision to withhold consent to a multidisciplinary evaluation. Thus, due process hearings allow all parties involved — parents and professionals — to hold each other accountable.

Once a complaint is presented, the public agency must appoint an impartial hearing officer to conduct the hearing. The officer may not be an employee of the agency and may not have any personal or professional interest that would conflict with his objectivity (Sec. 121a.507). A person who otherwise qualifies to conduct a hearing is *not* considered an employee of the agency solely because he is paid by the agency to serve as a hearing officer. The local school board and employees of the state school board are not impartial hearing officers under PL 94-142 (*Composchiaro v. Califano* (Civ. No. H-78-64, D. Conn., May 18, 1978)).

At the hearing, both parties may be advised by counsel or by experts in the education of handicapped students; present evidence, examine and cross-examine witnesses; subpoena witnesses and documents; make arguments; receive a written or electronic verbatim of the hearing; and receive a written account of the hearing officer's findings of fact.

An appeal from the initial decision to the state agency and then to state or federal district court may be taken by the child's representatives, by the LEA, or by any other aggrieved party.

[1]References to sections of PL 94-142 are cited in the text: e.g. (Sec. 615 [b] [1] [E]). All such references to sections begin with a 6. References to the regulations implementing PL 94-142 are also cited: e.g. (Sec. 121a.506) All sections of the regulations begin with 121.

Independent Educational Evaluations

The child's parents or other representatives are entitled to an independent (nonagency) educational evaluation of the child. The law stipulates that evaluation consists of "procedures used to determine whether a child is handicapped and the nature and extent of the special education and related services that the child needs." The procedures are to be used selectively with an individual child and exclude basic tests administered to or procedures used with all children in a school, grade, or class. A qualified examiner not employed by the public agency responsible for educating the child is entitled to do the evaluation. A qualified person is one who has met certification, licensing, registration, or other such requirements of the SEA in the area in which he provides special education or related services (Sec. 121a.12).

LEAs must, upon request, tell parents where they may have independent educational evaluations made. Under some circumstances, the evaluation is to be made at public expense, the LEA either paying the full cost of the evaluation or insuring that the evaluation is otherwise provided free to the parent. A parent has the right to a free, independent evaluation if the hearing officer requests one for use in a due process hearing or if the parent disagrees with the evaluation made by the public agency. However, if the agency, in a hearing that it initiates, can prove that its evaluation was appropriate, the parent may be required to pay for the new evaluation. When a parent obtains an independent evaluation at his own expense, the agency must take it into consideration as a basis for providing the child with an appropriate education or as evidence in a due process hearing, or both (sec. 121a.503).

Written Notice

The LEA must give the child's parents or other representatives prior written notice whenever it proposes or refuses to initiate or change the child's identification, evaluation, or placement. The notice must include the following components (Sec. 121a.505):

1. a full explanation of all the procedural safeguards available to the parents
2. a description of the action proposed or refused by the agency, an explanation of why the agency proposes or refuses to take the action, and a description of any options the agency considered and the reasons why those options were rejected
3. a description of each evaluation procedure, test, record, or report the agency uses as a basis for the proposal or refusal
4. a description of any other factors that are relevant to the agency's proposal or refusal

It also requires that the notice be

1. written in language understandable to the general public
2. provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so

If the native language or other mode of communication of the parent is not a written language, the SEA and LEA must take steps to insure

1. that the notice is translated orally or by other means to the parent in his or her native language or other mode of communication
2. that the parent understands the content of the notice
3. that there is written evidence that the requirements (of oral translation and the parent's understanding) have been met

Parental Consent

Parental consent must be granted voluntarily and in writing before an agency conducts the preplacement evaluation of the handicapped child or initially places a child in a program that provides special education and related services (Sec. 121a.504).

Consent, in this context and in all others, means that (a) the parent has been fully informed in his native language, or in another suitable

manner of communication, of all information relevant to the activity (such as evaluation) for which consent was sought; (b) the parent understands and agrees in writing that the activity may be carried out; (c) the consent describes the activity and lists the records (if any) that will be released and to whom; and (d) the parent understands that he gives his consent voluntarily and may revoke it any any time.

If a parent refuses to consent when his consent is required, the parties must first attempt to resolve the conflict by complying with any applicable state law. If there is none, then the agency may initiate a due process hearing. Should the hearing officer rule in favor of the agency, the parent's refusal will be overruled, and the agency may evaluate or place the child, notifying the parents of its actions so that they may appeal (Turnbull & Turnbull, 1978, p. 177).

Parent Surrogates

If a child's parents are unknown or unavailable, or if the child is a ward of the state, the LEA must appoint a surrogate to represent the child in all matters related to the provision of a free, appropriate public education (Sec. 121a.514). The surrogate must have the skill to represent the child and may have no conflict of interest that would interfere with this capability.

Triggers for a Due Process Hearing

As stated previously, the due process safeguards of PL 94-142 extend significantly beyond the specific due process hearing. The hearing, however, is the primary device for insuring the fairness of decisions and the accountability of all parties. A key issue in effectively implementing the procedures for due process hearings is identifying the circumstances under which hearings may be initiated by parents and LEAs.

One way of analyzing PL 94-142 and its accompanying regulations is in terms of the rights that handicapped children have in their dealings with the SEA and LEA and the concomitant duties that those agencies have to the children. The rights-duties analysis identifies the occasions when either a student or his representatives or an LEA may claim that his or its rights have been denied and that he or it is entitled to a due process hearing. The rights-duties analysis also clarifies the manner in which PL 94-142 and its regulations work to insure that handicapped children and LEAs have both rights and duties. For example, five of the six major legal principles of PL 94-142 insure that certain procedures will occur: *zero reject* assures that the child will be included in a free appropriate public educational program; *nondiscriminatory evaluation* assures that he will

be fairly assessed; *appropriate education* insures that he will be educated in an individualized and meaningful way; *least restrictive placement* assures that he will not be unjustifiably segregated; and *parental participation* insures that the parent will be given a voice in the child's education. All these procedures involve both rights and duties.

PL 94-142 addresses each of these five principles by setting out the procedure or process by which the LEA must educate a handicapped child. The law also states that if the agency does not comply with the required procedure or process, the child may have an opportunity to challenge the school by requesting a due process hearing. Likewise, if the child's parents do not conform to certain procedures or processes so that the LEA may educate the child in the manner the law requires, the agency itself may have an opportunity to challenge the parent by requesting a due process hearing. The specific triggers of due process — organized according to the five principles of zero reject, nondiscriminatory evaluation, individualized instruction, least restrictive environment, and parental participation — are presented below. Unless otherwise indicated, the child's parents or other representatives may file a due process hearing with respect to all of the following triggers.

Zero Reject

1. Sec. 121a.300: SEA failure to insure compliance with dates-certain and ages-certain requirement
2. Sec. 121a.302: SEA and LEA failure to comply with free residential placement requirement
3. Sec. 121a.303: SEA and LEA failure to provide for proper functioning of hearing aids
4. Sec. 121a.305: SEA and LEA failure to provide for program options, including art, music, home economics, and vocational education
5. Sec. 121a.306: SEA and LEA failure to provide nonacademic services
6. Sec. 121a.307: SEA and LEA failure to provide physical education
7. Sec. 121a.320, 321, 323, and 324: SEA and LEA failure to comply with service priorities requirement
8. Sec. 121a.401: SEA failure to insure that children placed by LEA in private schools (a) receive special education and related services and (b) have all the rights of handicapped children served by the public schools
9. Sec. 121a.403: If parents place the child in private school, SEA or LEA failure to provide services to the child according to Sec. 121a.450-.460, but either the SEA or the LEA may initiate a due process hearing on the appropriateness of an LEA program or the question of financial responsibility

10. Sec. 121a.451: If a child is in private school by parent placement, SEA failure to provide for the child's participation in federally funded programs (failure to assure special education or related services) or SEA failure to insure that LEAs comply with Sec. 121a.452-.460
11. Sec. 121a.452, .453, and .455: LEA failure to (a) provide special education and related services to handicapped children in private school, (b) provide such children a genuine opportunity to participate in public programs, (c) provide them with special education and related services comparable in quality, scope, and participation to those for handicapped children in public programs, and (d) use funds consistent with requirements for nondiscrimination in public programs (per Sec. 121a.456, .457, .458, .459, and .460)

Nondiscriminatory Evalutation

1. Sec. 121a.530: SEA or LEA failure to select and administer testing and evaluation materials and procedures that are not racially or culturally discriminatory
2. Sec. 121a.531: SEA or LEA failure to do individualized evaluation (per Sec. 121a.532) before initial placement
3. Sec. 121a.532: SEA or LEA failure to comply with evaluation procedures before initial placement
4. Sec. 121a.533: SEA or LEA failure to comply with placement procedures, including interpreting evaluations
5. Sec. 121a.534: SEA or LEA failure to review the child's individualized education program (IEP) and perform reevaluation every three years or more often if warranted or requested by parent

Individualized Education Programs

1. Sec. 121a.341: SEA failure to provide for IEPs for handicapped children in private schools
2. Sec. 121a.342: SEA or LEA failure to comply with deadline for IEP development (at the beginning of the school year)
3. Sec. 121a.343: SEA or LEA failure to initiate the meeting, have the conference when required, or review the IEP annually
4. Sec. 121a.344: SEA or LEA failure to have all required parties at the IEP meeting
5. Sec. 121a.345: SEA or LEA failure to provide for p nt's participation at the IEP meeting
6. Sec. 121a.346: SEA or LEA failure to write an IEP with proper content
7. Sec. 121a.347: SEA or LEA failure with respect to handicapped children in private school to initiate or conduct an IEP meeting, have

private school participation at the meeting, or review IEPs annually
8. Sec. 121a.348: SEA or LEA failure with respect to children enrolled in both public and private schools to have an IEP meeting or have private school participation at the meeting
9. Sec. 121a.349: SEA or LEA failure to provide special education and related services as required by the child's IEP

Least Restrictive Environment

1. Sec. 121a.550(b): SEA or LEA failure to comply with the LRE requirement
2. Sec. 121a.551: SEA or LEA failure to insure a continuum of alternative placements, including separate education and resource or itinerant teachers
3. Sec. 121a.552: SEA or LEA failure to make an annual determination of placement, based on the child's IEP, as close as possible to the child's home; make program alternatives available to the extent necessary to implement the child's IEP; place the child in the school he would attend if he were not handicapped, unless his IEP calls for a different placement; or consider any potential harmful effect of placement on the child or the quality of services he needs
4. Sec. 121a.553: SEA or LEA failure to provide or arrange for nonacademic and extracurricular services and activities in the LRE
5. Sec. 121a.554: SEA failure to implement the LRE for handicapped children in public and private institutions (other than schools)

Parent Participation

1. Sec. 121a.561: SEA failure to notify parents concerning the adoption of the state plan and amendments and major identification, location, and evaluation activities
2. Sec. 121a.562: SEA or LEA failure to grant parents access to records concerning their children, upon request, and before the IEP meeting or due process hearing at which the issue is the child's identification, evaluation, or placement, and to comply with the required elements of parent access
3. Sec. 121a.563: SEA or LEA failure to keep record of parental access
4. Sec. 121a.566: SEA or LEA failure to charge reasonable fees for copying of records (not excessively high fees)
5. Sec. 121a.567, .568, .569, and .570: SEA or LEA failure to amend records at parent's request
6. Sec. 121a.573: SEA or LEA failure to destroy information not needed to serve the child, at parent's request

INTERPRETING AND APPLYING THE DUE PROCESS SAFEGUARDS

When the senior author of this article was a member of the Procedural Safeguards Committee of the Regulation Input Conference that developed most of the concept papers and many of the draft regulations that became the foundation for the final regulations adopted by the Department of Health, Education and Welfare on August 23, 1977, he was struck by several facts that may help explain why the procedural safeguard's regulations are so difficult to interpret and apply and, thus, why training hearing officers and others is so important.

First, the conference was broadly representative of many affected constituencies. These were regular educators, special educators, SEA and LEA administrators, advocates for handicapped children, advocates for children whether or not handicapped, university faculty from a wide range of disciplines (school and educational psychology, special education, school administration, and law), teacher union representatives, private consultants, and others. Many delegates also came prepared to make a case for the regulations to set out one rule but not another. It was predictable that the final regulations would represent a sort of vegetable soup — a little of this, a little of that, and plenty of broth.

Second, almost every racial or ethnic minority group was represented. So, too, were all geographic regions of the country. Thus, Anglo-Americans from the rural Midwest were grouped with Spanish-Americans from the nation's most populous cities. Again, compromise was predictable.

Finally, there were precious few attorneys, particularly in the group that drafted the procedural safeguards regulations. Although lawyers' concerns with procedures often complicate the regulatory process and impede the swift (as well as capricious) administration of statutes, those concerns nevertheless are particularly important when drafting regulations that call for administrative or quasijudicial hearings such as the due process hearings under PL 94-142.

It is regrettable, in retrospect, that there were not more attorneys involved in drafting the due process regulations and that they and the Department's Office of General Counsel's and Office of Civil Rights' attorneys did not spell out in greater detail the elements of the due process hearing. Although this failure may be explained and perhaps excused in light of who was invited to participate in the conference, the failure nevertheless is causing a great number of problems in understanding and applying the due process regulations.

Initiating the Hearing

Is there a time when it is too late to file a hearing request? The act and the regulations contain no statute of limitations.

Sec. 121a.506 provides that a parent or LEA may initiate a due process hearing; but the regulation does not provide for a mechanism to initiate the hearing. How may one be requested — orally or in writing? To whom should the request be addressed — the LEA's superintendent, school board chairman, or other person? And what should the recipient do with the request — notify the hearing officer or others, in writing or orally, and confirm to the petitioner that he has taken that action?

Conducting the Hearing

There are, as well, a host of questions concerning the hearing itself. What procedures should be followed? Which party presents its case first? Is there a right to make an opening statement? Is there a right of the petitioner to make a reply to the other side's final statement? Is there even a right to a final statement? In short, how will the hearing officer conduct the hearing so that it will be orderly, time efficient, and informative?

What rules of evidence apply? Those that federal or state courts in that jurisdiction follow? Or a more relaxed set of rules, one that allows for the admission of evidence and the examination of witnesses under rules that deviate from those of the ordinary civil or administrative hearing?

Although counsel clearly is permitted to every party at the hearing, and counsel's role normally is understood by everybody in administrative or civil hearings (it is to advise, to present the client's case, to attack the other side's case, and to argue), it is not at all clear from the regulations what the role is of "individuals with special knowledge or training with respect to the problems of handicapped children." Is it to serve as expert witnesses? As advisers to counsel for the purposes of helping present the client's case and impeaching the evidence of the other side (especially the other side's expert witnesses)? To argue the case for the party if there is no counsel to do so?

What about errors made by the hearing officer, such as accepting inadmissible evidence (once one decides which rules of evidence, if any, apply), making prejudicial statements (those that indicate that the hearing officer has made up his mind before hearing the case), failing to allow a party to present its whole case (even if part of it is redundant and cumulative of evidence he already has admitted), or seemingly assisting one party in presenting its case (as by questioning one party's witnesses

in a friendly manner but obviously cross-examining another party's witnesses)? Will the rule of "harmless error" be applied by the SEA appeal hearing officer? (The rule of harmless error prohibits a decision from being reversed or modified on appeal if the error did not or could not have had an impact on the decision.)

Sec. 121a.508 of the regulations forbid evidence from being admitted if it has not been disclosed to one of the parties by the other at least five days before the hearing. What, then, constitutes disclosure — telling the other side who the witnesses are and what they will say and informing the other side which documents will be offered as evidence and what those documents contain? Or simply listing the witnesses and documents? Is the hearing officer, prior to the hearing, entitled to discover the evidence that each party proposes to use? Would that be potentially prejudicial? What should he do if one party discloses its case to him but the other does not and later objects to the prior disclosure? What if the other party does not know of the disclosure?

Do the rules of trial discovery apply? The regulations are silent and imply that they do not. But the state may have an Administrative Procedures Act that authorizes discovery. What law applies if federal and state law are in conflict?

Although the regulations (Sec. 121a.508) require the LEA to transmit the hearing officer's findings and decisions to the state advisory council on special education after deleting personally identifiable information, it is unclear under the regulations whether those records are accessible to the general public or even to the child's parents.

The regulations have serious shortcomings with respect to another very important matter: the authority of the hearing officer to enter orders and enforce his decisions. While providing for a hearing, for an impartial hearing officer, and for decisional finality, they do not address the nature of the decision.

For example, is the hearing officer restricted only to considering the issue as presented to him by the party filing the appeal? Take the case of a parent who seeks a hearing and then alleges that the LEA failed to perform a proper evaluation of his child, offering evidence that indicates in what respects the evaluation was improper, inadequate, or incorrect. Does the hearing officer decide only whether the evaluation was not proper, adequate, or correct? Or does he particularize his findings, stating the deficiencies in detail? May he order the LEA to perform an evaluation that corrects the deficiencies, or may he order only a proper, adequate, or correct evaluation? What power does he have to enforce his decision (or decision plus recommendation in the form of a particularized decision)? Assume the LEA reevaluates the child without fully satisfying the hearing officer's particularized findings (and recommendation). What power

does he have to prevent further inadequacies? Clearly, he has no statutory or regulatory enforcement power; he cannot resort to such familiar judicial remedies as injunctions, civil penalties for contempt, or assessment of damages.

The problem of defining the scope of the hearing officer's decision-making and enforcement powers is aggravated in the case of the child's individual education plan, or IEP, which requires at least annual review (whereas evaluation is required only every three years), placement, and entitlement to "related services," both of which are likely to change from time to time as the child's condition and age change.

It becomes even more important to have specific and enforceable orders when the issue is the appropriateness of the child's education. While PL 94-142 defines and guarantees *an* appropriate education, it does not guarantee that the child will receive the *most* appropriate education. Accordingly, a narrowly drawn finding of fact and decision by a hearing officer on the issue of appropriate education may serve little purpose except to instruct the parties that, on the evidence presented, the child is or is not receiving an appropriate education. Unless the hearing officer also enters a decision setting forth what appears to him to be an appropriate education, the LEA or the parents are likely to have subsequent hearings on the issue of appropriateness.

Clearly, there is a potential for a truculent LEA to abide by a perhaps unenforceable decision by making only the barest defensible effort at compliance while simultaneously avoiding taking action to satisfy the spirit of the decision and forestall any future due process hearings by the same parent on similar or the same grounds. The LEA that chooses to take such an approach may find that it wears the parents down, sapping them of their will and ability (including economic and physical ability) to resist. On the other hand, it may encourage parents and child advocates to organize a well-financed wholesale attack.

To forestall the costly, inefficient, and minimally productive repetitious hearings about the same child and his evaluation, IEP, placement, or appropriate education, it is useful for the parents and LEA to stipulate in advance of the hearing the issues, facts, and acceptable remedies and to inform the hearing officer thereof. Although the doctrine of *res judicata* does not apply (to prevent the same issue involving the same parties from being tried again), there will be a common sense of estoppel — that is, the parties will be reluctant to bring up the same issues again and again.

In addition to setting forth the facts regarding possible denial of a child's legal rights, the party requesting the hearing may also seek particular and general relief. In his allegations, he would be well advised to allege violations that cover the broadest provable grounds — for example,

that the child was improperly diagnosed and therefore, his IEP is inappropriate, his placement is erroneous, and he is, by reason of all the above, being denied an appropriate education. In his prayers for relief, he then should seek specific relief for each complaint and, to be on the safe side, seek other legal and equitable relief as may be appropriate and warranted. In short, a broad-based challenge and a petition for relief are devices that might assure that the hearing officer hears and decides upon all or most of the relevant issues surrounding the child's rights to a free, appropriate public education, thereby reducing the likelihood that there will be multiple hearings involving the same parties.

Governing the Due Process Hearing Officer

Two obvious due process safeguard issues surround the hearing officer himself. One concerns his impartiality and qualifications to serve. The regulations (Sec. 121a.507) provide that the hearing officer shall be impartial: he may not be employed by the LEA or other agency involved in the education or care of the child, and he may not have a personal or professional interest that conflicts with his objectivity.

It is a rather easy thing to prove partiality if the hearing officer is an employee of the agency. It is quite another to prove it if the party believes that the hearing officer has conflicting personal or professional interests. And it is still another matter to attempt to avoid having a case heard by a hearing officer whose record of decisions indicates that he is pro-LEA or pro-student. (Like lawyers who practice regularly before civil or criminal courts, parties in due process hearings will come to know who the friendly hearing officers are, and they will legitimately seek to have their cases heard by those officers and no others.) Finally, it is by no means clear what the regulations mean when they require an LEA or SEA to keep a list of hearing officers that includes a statement concerning the qualifications of each of them. The term "qualifications" could refer solely to their being qualified by reason of being impartial. It also could mean that the hearing officer is professionally qualified by reason of professional training and expertise, having attended training programs for due process hearing officers, or other qualifying characteristics.

The regulations clearly are deficient with respect to characterizing impartial and qualified hearing officers. They do not permit any party to file a motion or any more informal challenge to the impartiality or qualifications of the hearing officer; they do not say whether a hearing officer may refuse to hear a case or even remove himself from a case after it begins if he discovers that he may no longer be fairly said to have no personal or professional interest that would interfere with his impartiality; and they leave completely open the question of whether a party at the

hearing may appeal solely on the grounds that the hearing officer was not impartial or qualified.

There are several good rules of thumb for selecting unbiased hearing officers: (a) the SEA or LEA might ask consumer organizations to nominate persons; (b) the SEA and LEA could give those organizations the right to approve or object to hearing officers; (c) hearing officers should be professionally unaffiliated with the agency involved in the due process hearing or with a consumer agency (for example, present or former school employees from one LEA should not serve as officers for LEA hearings although they may preside in hearings involving state or local mental health services or institutions in other jurisdictions); and (d) hearing officers should not reside or work in the jurisdiction involved in the hearing. These guidelines are designed to insure that, in general, the list of hearing officers will be prepared in a way that will eliminate the more obvious objections to impartiality. One procedure that might be even more effective is to direct the SEA and consumer organizations to the state or local bar association's young lawyers' section as a source for names of lawyers who could serve. In addition, labor arbitrators or other persons experienced in hearing procedures could be hired; the services of post-secondary education faculty could be enlisted; or distinguished local citizens could be asked to hear cases in jurisdictions where they have no professional or personal interests. Of course, the agency that appoints a hearing officer may always remove him from its approved list.

A second issue concerning both the LEA and the hearing officer focuses on the regulation (Sec. 121a.512) that requires the LEA to insure that a final decision is reached in the hearing within forty-five days after the agency receives a request for a hearing. As noted above, it is unclear who is authorized to receive a request on an agency's behalf. Assume that the request is received by someone not in a position to call the hearing and that the person does not immediately notify the authorized person (whoever that might be, and arguably it could be the hearing officer himself or some other LEA employee). It is clear that there has already been an infringement of the forty-five-day rule. Assume further that the hearing officer hears the case on the thirtieth day after the request has been received (thereby allowing about three weeks for the parties to prepare their cases and comply with the five-day disclosure rule), but he does not render his decision within the next fifteen days, and neither party has requested and received an extension of the forty-five-day period. Must there then be a hearing on the extension of the period, or will a conference of the parties suffice? Usually, hearing officers and judges may not act *ex parte*, that is, without giving both sides an opportunity to be heard. In addition, what can be done to require the hearing officer to comply with the regulation? There are no procedures in the regulations that

enable any party to require a hearing officer to do his duty in a timely manner. Apparently, the only recourse with respect to such an officer is to remove him, the question then being whether he should be removed after hearing the case, in which event another hearing before another officer would be required, or after finally reaching his decision. And what happens to the child while the hearing officer dallies with the parties?

In addition, because hearing officers usually have other obligations, LEAs and SEAs must pay careful attention to the problem of when to hold hearings and how to keep a backlog of cases from developing. Judicial administration techniques that help process cases rapidly through the trial courts may be useful. These include regularly scheduled hearing dates, prehearing conferences between the parties and the hearing officer, easy access to school records and evaluations by LEA and consumer expert witnesses before hearings, prehearing stipulations of facts and issues of law, flexibility in granting a limited number of postponements, and the willingness of the parties to use affidavits in lieu of live testimony.

Additional Issues

There are other issues involving due process hearings that, for the purposes of this paper at least, do not bear as directly on the training of due process hearing officers and the adequacy of the regulations as the issues discussed above. They deal, for example, with the possibility that LEAs may keep a double set of records on the child: one that the parents and other monitoring agents have access to and another informal set for school use only. Likewise, they involve the right of a litigant in federal court to have access to records of all children in an LEA. Such a right has been granted in *Mattie T. v. Holladay* [F. Supp., N.D., Miss., 1978], a class action against an LEA in which the court ordered that the plaintiffs may discover those records as long as the personally identifying information in them is deleted.

There are, as well, a host of issues concerning the suspension or expulsion of handicapped children. Does the federal law mean that an LEA may not suspend or expel handicapped children who violate student conduct regulations? If the effect or purpose of the suspension or expulsion is to change a student's placement [rather than doing so by IEP and placement decisions], the school may be enjoined from suspending or expelling the student until the placement decision is made in the ordinary course of complying with PL 94-142 [*Stuart v. Nappi*, 433 F. Supp. 1239 [D. Conn., 1978], decision on order granting preliminary injunction, *accord*, *Howard S. v. Friendswood Independent School District*, 454 F. Supp. 634 [S.D. Tex., 1978]]. Where the suspension or expulsion has resulted in a child's being denied free, appropriate public education as guaranteed by PL 94-142, two school districts have entered into consent agreements providing for the child to be readmitted or given compensatory education [in a community college] at the school's expense [*Donnie R. v. Wood* [No. 77-1360, D.S.C., consent decree entered August 22, 1977] and *Lopez v. Salida School District* [C.A. No. C-73078, Dist. Ct., Denver Cty., Colo., Jan. 20, 1978]]. Finally, emotionally disturbed children are claiming that they must be treated in the same way as mentally retarded children in due process hearings on issues of discipline [*J. v. Klein* [No. 77-2257, E.D. Pa., filed June 28, 1977]].

There are two obvious points to the foregoing discussion of the procedural safeguards. The first is that the federal regulations are inadequate in themselves to answer many of the questions that have been raised. Whether state education or administrative procedures laws furnish answers is hard to say at this time.

The second is that there is no substitute for well-trained hearing officers. When thoroughly schooled on the procedures to be followed in the hearings, the substance of case law, the applicable federal and state statutes and regulations, the nature and organization of the LEA involved in the hearing, the general characteristics of various handicapping conditions, and the general abilities of educators to respond to those disabilities, hearing officers will be likely to make more informed and more correct [less reversible or objectionable] decisions with less deliberation. The implications of the due process regulations for training hearing officers is the subject of the next section.

TRAINING IMPLICATIONS

The full implementation of due process safeguards requires significant new knowledge and the development of new skills by many affected people. They include LEA and SEA personnel, school board attorneys and members, parents of handicapped students, preservice educators, faculty in departments of education at colleges and universities, attorneys, and hearing officers. Their needs are likely to depend on the extent of their background knowledge about handicapped children and special education practices and law and on their future involvement in due process proceedings. Thus, training models need to be individually designed for the specific target audience that will receive the training.

One of the most important audiences [in terms of assuring that due process hearings lead to fair decisions] consists of the hearing officers. It is noteworthy that the regulations for implementing PL 94-142 require only that the hearing officer be impartial, that is, that he be free from conflict of interest and that he not be an employee of the agency [Sec.

121a.507]. There is no requirement that the hearing officer be knowledgeable in legal proceedings or in educational issues associated with providing appropriate instruction to handicapped students. Thus, it is likely that a hearing officer could clearly meet the requirement of impartiality yet be ill prepared to execute his duties because he lacks important knowledge.

Training Issues

Three pertinent issues that must be resolved before training the hearing officers include sponsorship, method of delivery, and cost. Since the SEA has the ultimate responsibility of insuring that officers are qualified, decisions pertaining to these issues should be made or orchestrated at the SEA level.

Sponsorship. A variety of alternatives exists for sponsoring training of due process hearing officers. Frequently, the training is done by the SEA. In these instances, a potential conflict could exist since the officers are being prepared to hear grievances that could be filed against the SEA. An example of such a conflict was reported to the authors by a hearing officer trainee who attended an SEA-conducted training program. This officer reported that the simulated activities all involved decisions made in favor of the LEA or SEA and against the parent. The extent of this type of bias may be infrequent and certainly cannot be generalized to all LEAs; however, the potential conflict of interest on the part of the SEA in delivering training should not be overlooked.

The SEA can contract with outside agencies and individuals to provide training. A necessary consideration is: What skills should a trainer possess in order to prepare hearing officers adequately to execute their responsibilities? Essentially, trainers need expertise in both the education of handicapped students (in determining characteristics, evaluation, and program alternatives) and in legal requirements and procedures (PL 94-142, other applicable state law, state legislation, court cases, and trial advocacy and process). Because of this dual set of skills and knowledge, interdisciplinary training by both educators and lawyers is appropriate. Thus, the SEA might contract with universities that could combine the resources of schools of education and law to provide interdisciplinary training. Another possibility is to contract with private consultants who combine expertise in both education and law.

Method of Delivery. In considering the method of delivering training to hearing officers, issues such as timing, location, and scope of training should be considered. In regard to timing, it is a common practice for states to provide training to hearing officers on an annual basis. Certainly, SEAs and LEAs are well advised to have hearing officers appointed by the beginning of the school year, if at all possible. If training is provided on only one occasion each year, some already appointed hearing officers will undoubtedly be unable to attend because of scheduling conflicts. Also, if new hearing officers are appointed throughout the school year as a result of resignments of hearing officers or heavy case loads, they will have missed the training session and will have to wait until the next annual program. SEAs might consider sponsoring two training sessions, one at the beginning of each school semester. Furthermore, packets of written information and self-instructional materials could be developed and made available to hearing officers who are unable to attend training sessions.

Ideally, training should be an ongoing rather than an isolated event that occurs only at the beginning of a hearing officer's term of service. A preliminary knowledge base is essential; however, it may be just as important for hearing officers to reconvene periodically to share their experiences in actual hearings and to engage in problem-solving related to troublesome issues on which they have questions. These sessions can contribute to systematic planning in resolving knotty problems associated with due process procedures.

The location of training is a practical consideration that could significantly influence the attendance at a training session. In large states, it is likely that training will need to be delivered on a regional basis in order to make it more convenient and thus more accessible to hearing officers.

In regard to the scope of training, variation in training needs will exist in light of the hearing officer's professional background. Table 1, which is based on a survey of North Carolina hearing officers conducted by the authors, provides a breakdown of occupations of the hearing officers according to the percentage of the total group of officers that falls into each occupation.

It is obvious that the lawyers as a group will have more expertise in legal proceedings and the rights of parties (such as rules of evidence and trial procedures) than the officers with nonlegal backgrounds. On the other hand, the educators will likely have greater expertise in educational areas, such as the characteristics of handicapped students and the organization of schools. Some hearing officers in miscellaneous occupations, such as the postmaster and the agricultural extension agent, may have a strong interest in the education of handicapped students and clearly meet the criteria of impartiality; however, they may need intensive training in all areas related to due process and appropriate education. It is dangerous, however, to make assumptions of individual needs based on

Table 1

PERCENTAGE OF NORTH CAROLINA HEARING OFFICERS BY OCCUPATION

Occupation	Percent of Total Group
Lawyers	31.8
Retired Educators (mostly superintendents and assistant superintendents)	34.1
Special Services Directors	9.9
College Professors	6.8
Superintendents and Assistant Superintendents	4.5
Other (housewife, postmaster, research microbiologist, attendance counselor, Navy officer, agricultural extension agent)	13.0

occupational groups. In order to plan systematically the scope of training needed by hearing officers, an assessment of their training needs and professional backgrounds should be made in advance.

Cost. The third training issue to be considered is cost. The training of due process hearing officers is an expensive operation. In addition to paying for the time of trainers (especially if the SEA chooses to subcontract with outside agencies or individuals), the travel and per diem subsistence expenses and an honorarium represent additional costs and should be provided to the hearing officers in order to encourage them to attend training programs. Depending upon the professional status of the hearing officer, expectations for the amount of the honorarium will vary. For example, lawyers in private practice are likely to have a set rate per hour for their time; on the other hand, hearing officers who are unemployed and thus do not have to take time away from work probably will not have an established honorarium fee. In the survey of North Carolina hearing officers, the question was posed as to what they believed to be fair compensation for serving as a hearing officer. The responses ranged from $50 per day to $100 per hour. The mean response was $32 per hour. Although this question was asked in regard to serving as a hearing officer and not specifically in regard to training, the expectations for compensation are still illuminating. Despite the fact that expec-

tations will vary, the SEA would likely create more problems than it would solve by paying officers at different honorarium rates. Thus, a common rate needs to be established. If the SEA wants to encourage and support the participation of lawyers as due process hearing officers, the honorarium for training will need to be roughly competitive with their private practice rates.

CONCLUSION

Even those special educators and others most familiar with the procedural safeguards under PL 94-142 may have tended to assume that due process is a relatively simple matter. In fact, it is not. There are numerous events that may trigger a due process hearing, providing issues over which LEAs, SEAs, and other public agencies and parents may engage in battle. Moreover, the due process regulations are, for arguably sufficient reasons, hardly a model of procedural comprehensiveness and clarity. Finally, they can become unwieldy and universally hazardous when administered by untrained people. The content and logistics of the training are suggested by this article. But even more is suggested: namely, that the Department of Health, Education and Welfare revise at least the due process hearing regulations before state practices and decisional precedents encumber them with inconsistent and potentially cumbersome interpretations.

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