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Rosalie B. Levinson

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THE RIGHT TO A MINIMALLY ADEQUATE EDUCATION FOR LEARNING DISABLED CHILDREN

By Rosalie Levinson

INTRODUCTION

Over the past decade an increasing number of state educational agencies have incorporated the category "learning disabled" into their special education programs.¹ The emergence of this group and their fight for equal educational opportunity is part of a greater movement that has emerged on behalf of all handicapped children in this country. Although much has been written about the mentally retarded and the physically handicapped, the plight of the learning disabled has been largely ignored. The term—often misused in reference to educationally handicapped children generally—refers to a specific category of exceptional children who though of normal intelligence are unable to realize their potential in the average school setting.² Learning disabled children face especially difficult problems because of their low visibility in society (they are often classified as "slow-learners" or "behavior-problems") and because of the fact that their handicap has only recently received the attention of educators. This article will identify this group and inform the advocate of the constitutional rights which arguably may be asserted on their behalf. The analysis will then proceed to explore recent federal legislation which, although not devoid of significant gaps, does specifically recognize the learning disabled and offers much hope for their cause.

HISTORICAL BACKGROUND

Although the focus of this paper will be on the learning disabled, it is necessary to briefly examine the history of educationally handicapped children generally to better understand this new movement and to build upon the progress that has been made on behalf

1. Gillespie, Miller and Fielder, *Legislative Definitions of Learning Disabilities: Roadblocks to Effective Service*, 8 JOURNAL OF LEARNING DISABILITIES 660 (1975), notes that by 1969 two-thirds of the states had legislated some services to the learning disabled.

2. T. BYRAN AND J. BYRAN, UNDERSTANDING LEARNING DISABILITIES 89 (1975).

of other groups of handicapped children. Although the importance of education is not a novel concept in this country, it was only recently deemed necessary that educationally handicapped children participate in the educational system. It was not until the last decade that courts and legislatures began to reject the policy of excluding handicapped children from a public education. As recently as 1958 the Illinois Supreme Court held that existing legislation did not require the state to provide a free educational program as a part of the school system, for mentally deficient children.³ Until 1969 the state of North Carolina actually made it a misdemeanor for a parent to demand placement for a handicapped child.⁴ Rather than face the problem, early legislative solutions were simply to exclude the handicapped from compulsory education laws; and since they were not in the schools, educators were not faced with the task of developing special education techniques. As one authority described:

Educational programs for those persons with mental, emotional or psychological handicaps lagged far behind the significant advances made in general educational programming. For many years there were no educational strategies at all for teaching persons with mental handicaps. Educators had neither learned nor sought to learn the techniques of educating such persons.⁵

It was not until the fifties and sixties that special education programs began to grow. In 1948 only 1,500 school districts in the country reported that they were operating some type of special education program. Within ten years that number more than doubled to 3,600; and by 1963 it had increased to 5,600.⁶

3. Department of Pub. Welfare v. Haas, 15 Ill. 2d 204, 154 N.E.2d 265 (1958). See also Stick, *The Handicapped Child Has a Right to an Appropriate Education*, 55 NEB. L. REV. 637, 642-3 (1976).

4. See N.C. GEN. STAT. § 115-65 (1966), and N.C. GEN. STAT. § 115-65 (Supp. 1974).

Several states still have laws permitting the exclusion of handicapped children from full participation in school programs. For example, Nevada excludes a child whose "physical or mental condition or attitude is such as to prevent or render inadvisable his attendance at school or his application to study." NEV. REV. STAT. § 392.050 (1967). See also OHIO REV. CODE ANN. § 3321.04 (1972); NEB. REV. STAT. §§ 79-201, 79-202 (Reissue 1971); S. REP. NO. 168, 94th Cong., 1st Sess. 20-21 (1975).

5. Burgdorf, *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a 'Suspect Class' Under the Equal Protection Clause*, 15 SANTA CLARA LAW. 855, 871 (1972).

6. Murdock, *Civil Rights of the Mentally Retarded: Some Critical Issues*, 48 N.D. LAW. 133, 166 n.125 (1972).

The Supreme Court decision in *Brown v. Board of Education*⁷ provided the impetus for this dramatic growth, because from that decision emerged the right to an education for *all* children. Educators hailed the decision as having established the right to equal educational opportunity not only for blacks but for all disadvantaged children.⁸ By the late 1960's the trend requiring school districts to educate the handicapped had been firmly established. In 1971, 899 bills promoting the education of the handicapped were introduced in state legislatures—237 of these were enacted into law.⁹ By 1972 forty percent of the states had enacted laws mandating educational programs for the handicapped;¹⁰ by 1974, thirty-six right-to-education lawsuits had been filed and were either pending or concluded in twenty-five states.¹¹ Today, approximately thirty-five states have concluded either judicially or statutorily that educational programs for the mentally handicapped are required by law.¹²

This new wave of interest has been attributed to *Brown* and its progeny of desegregation cases. In addition, the sixties marked a shift in professional attitudes toward the handicapped and an increase in the number of advocates asserting their rights.¹³ The educator's emerging attitude, referred to as the "zero reject" concept, basically states that all handicapped persons can learn, develop, and benefit from appropriate educational programs.¹⁴ This meant that programs had to be developed for the estimated 1,750,000 handicapped individuals of school age who as of 1975 were totally excluded from public school educational programs. It also came to mean that something had to be done for the 2,200,000 handicapped pupils attending the schools, but not being provided with special programs suited to their needs.¹⁵

7. 347 U.S. 483 (1954).

8. Weintraub and Abeson, *Appropriate Education for All Handicapped Children*, 23 SYRACUSE U.L. REV. 1037 (1972).

9. Casey, *The Supreme Court and the Suspect Class*, 40 EXCEPTIONAL CHILDREN 119, 121 (1973).

10. Weintraub and Abeson, *Appropriate Education For All Handicapped Children*, 23 SYRACUSE U.L. REV. 1037, 1051 (1972).

11. Abeson, *Movement and Momentum: Government and the Education of Handicapped Children II*, 41 EXCEPTIONAL CHILDREN 114 (1974).

12. A list of key cases appear in Stick, *The Handicapped Child Has a Right to an Appropriate Education*, 55 NEB. L. REV. 637, 639 n.5 (1976). A survey of applicable state statutes appears in [1975] U.S. CODE CONG. & AD. NEWS 1444-45.

13. See Gilhool, *Education: An Inalienable Right*, 39 EXCEPTIONAL CHILDREN 597 (1973).

14. Burgdorf, *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a 'Suspect Class' Under the Equal Protection Clause*, 15 SANTA CLARA LAW. 855, 876 (1972). See also *Pennsylvania Ass'n for Retarded Children v. Pa.*, 343 F. Supp. 279, 357 (E.D. Pa. 1972).

15. S. REP. NO. 168, 94th Cong., 1st Sess. 8 (1975).

The majority of learning disabled children fit into this latter category. Although generally present in the classroom, without special help they are in effect constructively excluded from the educational process. Despite the growth of right-to-education laws, very little has been done to assure that learning disabled children receive an appropriate education.

WHO ARE THE LEARNING DISABLED?

Although the term "learning disability" is a new one in educational spheres, the problem is ancient. At least three thousand years ago the Egyptians demonstrated some awareness of the causal relationship between brain injury and impairments in speech and memory.¹⁶ The concept of learning disability dates back to the 1860's and 1870's, but it really was not until the 1960's that professional literature began to reflect concern for learning disabled children.¹⁷ This came as a result of two key events. First was the formation of a parent organization, the Association for Children with Learning Disabilities (ACLD) in 1963 which has exerted a great amount of pressure on the schools and legislatures. Second was the creation a few years later of a Division for Children with Learning Disabilities within the professional organization known as the Council for Exceptional Children.¹⁸ The latter step provided the formal confirmation of this new field of education.

Until 1963 professional literature spoke of dyslexia, reading disabilities, perceptual handicaps and minimal brain injury.¹⁹ But it was Samuel Kirk who at a 1963 conference for perceptually handicapped children gave birth to the ACLD and to the field of learning disabilities.²⁰ In the mid-sixties the National Society for Crippled Children and Adults organized three task forces to determine who these children are and what types of services they need. The task proved to be an extremely difficult one due to the lack of consensus among educators as to the composition of this group as well as the

16. G. GREGERSON, HISTORICAL AND FUTURE TRENDS IN LEARNING DISABILITIES CONFERENCE ON LEARNING DISABILITIES: A REVIEW OF INDIANA'S RULE S-1 4-7 (1975).

17. D. HALLAHAN AND S. KAUFFMAN, INTRODUCTION TO LEARNING DISABILITIES 20 (1976) [hereinafter cited as D. HALLAHAN]; T. BRYAN AND J. BRYAN, UNDERSTANDING LEARNING DISABILITIES 13-30 (1975).

18. L. MANN, L. GOODMAN AND J. WIEDERHOLT, TEACHING THE LEARNING DISABLED ADOLESCENT 15 (1978), notes that this division is now the largest in CEC.

19. In 1968 one authority found 43 terms in the literature to describe children exhibiting characteristics usually attributed to the learning disabled. See Gillespie, *supra* note 1, 660.

20. L. Mann, *supra* note 18, at 14.

proper diagnostic tools needed to identify learning disabled children.²¹ Unfortunately, identification of the learning disabled proved to be more difficult than identifying the blind, the deaf, the severely retarded, or the physically handicapped.

Despite disagreement as to who are the learning disabled at least four major aspects consistently emerge in all discussions.²² A learning disabled child generally has (1) academic retardation, (2) an uneven pattern of development, (3) oftentimes central nervous system dysfunctioning, although emphasis has shifted away from brain damage to behavioral characteristics²³ and (4) learning problems which cannot be attributed to either environmental disadvantage, mental retardation or emotional disturbance.²⁴ Although all suggested definitions make it clear that the term "learning disabled" encompasses more than one narrow type of problem, all learning disabled children share one predominant trait: a significant educational discrepancy between expected academic performance and actual academic achievement.²⁵ Though of normal or potentially normal intelligence, the learning disabled child simply cannot interpret what he hears or sees in the same way as a child of equal intellectual ability. He finds himself unable to understand, assimilate, interpret or retain the speech of others. He may develop language disorders or difficulties engaging in abstract thinking. In summary, he suffers from a gap in psychological processes which renders futile the methods used in the regular classroom.

The National Advisory Committee on Handicapped Children

21. Generally, the art of testing handicapped children remains in a nascent stage. See Kirp, *Schools as Sorters: The Constitutional and Policy Implications of Student Classification*, 121 U. PA. L. REV. 705, 711-12 (1973); Krass, *The Right to Public Education for Handicapped Children: A Primer for the New Advocate*, 1976 U. ILL. L.F. 1016, 1021-23 (1976); Gillespie, *supra* note 1.

22. D. HALLAHAN, *supra* note 17, at 20. See also T. BRYAN AND J. BRYAN, UNDERSTANDING LEARNING DISABILITIES 39-43 (1975).

23. Professionals infer brain injury because seventy to eighty per cent of all disabled children exhibit "soft signs"—behavioral indicators—of mild neurological impairment. Also, eighty to one hundred per cent of learning disabled children have abnormal electroencephalograms. One widely believed theory is that learning disabilities are caused by damage to the central nervous system before or during the birth process, or by disease during the child's early life. See L. FADELY AND G. DEBROTA, LEARNING DISABILITIES, CONFERENCE ON LEARNING DISABILITIES: A REVIEW OF INDIANA'S RULE S-1 36-41 (1975).

24. D. HALLAHAN, *supra* note 17.

25. T. BRYAN AND J. BRYAN, UNDERSTANDING LEARNING DISABILITIES 89 (1975). This trait becomes the cornerstone of the new federal regulations dealing with children with specific learning disabilities. 42 FED. REG. 65083 § 121a.541 (1977).

came up with the following definition of learning disabled children in 1968:

Children with special learning disabilities exhibit a disorder in one or more of the basic psychological processes involved in understanding or in using spoken or written language.

These may be manifested in disorders of listening, thinking, talking, reading, writing, spelling or arithmetic.

They include conditions which have been referred to as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, developmental aphasia, etc.

They do not include learning problems which are due primarily to visual, hearing, or motor handicaps, to mental retardation, emotional disturbance or to environmental deprivation.²⁶

Thus, the definition of learning disabled children proves to be more one of exclusion than inclusion. Yet despite its ambiguity and operational problems, this definition has been adopted in both state and federal laws as the only acceptable description in light of present knowledge regarding learning disabled children.

This lack of precision has resulted in prevalence estimates which are the most diverse of all of the categories of exceptional children. The National Advisory Committee in their 1968 report estimated that one to three per cent of all school age children are learning disabled.²⁷ Estimates made by specialists, however, range from ten to fifteen per cent or higher depending on the precise definition and method of assessment used.²⁸ Adopting the more conservative figures, the state and federal governments have generally assumed a one or two per cent incidence rate within the school age population for the purpose of providing guidelines for planning and funding educational programs for the learning disabled.

26. This definition was incorporated into the Children With Specific Learning Disabilities Act of 1969, and the Elementary and Secondary Educational Amendments of 1969. In addition the majority of state laws employ this NACHC definition either verbatim or with slight modifications. See Gillespie, *supra* note 1, at 662.

27. D. HALLAHAN, *supra* note 17.

28. R. BRUININKS, G. GLAMAN AND C. CLARK, PREVALENCE OF LEARNING DISABILITIES: FINDINGS AND RECOMMENDATIONS, RESEARCH REPORT #20 (U. Minn. 1971). See also [1970] U.S. CODE CONG. & AD. NEWS 2837-38 (noting a "conservative" three per cent incidence of learning disability); T. BRYAN AND J. BRYAN, UNDERSTANDING LEARNING DISABILITIES 8 (1975).

Today the education laws of practically every state include the category learning disabilities, focusing thus far on providing services to children with the most severe handicaps.²⁹ Yet even this group is clearly not receiving help. Despite the strides that have been made legislatively and judicially for handicapped children, fewer than one-half of the school districts in the United States have established programs for learning disabled children.³⁰ These children are left undiagnosed or misdiagnosed, despite all the landmark cases and laws establishing the school's legal duty to educate *all* handicapped children. The role of the advocate is still critical in seeing that the rights of these children are asserted so that programs will be developed and implemented to provide them with an appropriate education.

THE CONSTITUTIONAL RIGHT TO AN APPROPRIATE EDUCATION

The importance of an education has been asserted by numerous decisions handed down by the Supreme Court over the years.³¹ It has been argued that although not explicitly found in the Constitution, the right to an education is implicit and must be safeguarded in order to protect the enumerated rights of free speech and to participation in the electoral process.³² A holding that the right to an education is fundamental could easily be supported by prior case law. The rights to privacy,³³ to procreate,³⁴ to travel,³⁵ and to have access to the criminal justice system³⁶ are no more explicit in the

29. Gillespie, *supra* note 1, at 662.

30. G. GREGERSON, *supra* note 16. It has been shown statistically that as of the 1976-77 school year, 128 of the 305 school corporations in Indiana had no approved program for learning disabled children, despite a 1973 state deadline requiring such programs. See *Answers to Interrogatories* submitted in *Durbin v. Negley*, C.A. S-76-72 (N.D. Ind., Filed May 18, 1976).

31. See *Brown v. Board of Education*, 347 U.S. 483, 493 (1954); *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 230 (1963); *Illinois ex. rel. McCollum v. Board of Education*, 333 U.S. 203, 212 (1948); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923). See also Gammon, *Equal Protection of the Law and San Antonio Independent School District v. Rodriguez*, 11 VAL. U.L. REV. 435, 458-9 n.74 (1977); Handel, *The Role of the Advocate in Securing the Handicapped Child's Right to an Effective Minimal Education*, 36 OHIO ST. L.J. 349, 362-4 (1975).

32. Justice Brennan spoke of the inextricable link of education to these freedoms in his dissent to *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 62-3 (1973).

33. See *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 497 (1965).

34. See *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

35. See *Shapiro v. Thompson*, 394 U.S. 618 (1969).

36. See *Griffin v. Illinois*, 351 U.S. 12 (1956).

Constitution and yet the Supreme Court has accorded them great constitutional weight. As one authority recently noted, "A right to divorce or abort a fetus would not universally be accepted as more basic than the right to housing or an education, nor can either the former or latter be said to be expressly provided for in the Constitution."³⁷ Thus the absence of the words "right to education" in the Constitution does not negate the existence nor the fundamentality of such a right. The link between education and the first amendment is apparent. The right to free speech is meaningless unless a person can express himself intelligently. The corollary right to receive information "becomes little more than a hollow privilege" when a recipient can neither read nor assimilate the communication.³⁸ Yet this is precisely the situation in which many learning disabled children find themselves in the regular school setting, since they can only acquire basic communication skills if provided with special instruction tailored to their particular learning systems. The right to an education is also critical to full participation in the rights and duties of citizenship, including access to the political system.³⁹ These concepts are best articulated by the Supreme Court's famous words in *Brown*:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities . . . It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to 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.⁴⁰

37. Gammon, *supra* note 31, at 435, 457.

38. See arguments raised in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 35 (1973). See also *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 389-90 (1969), which generally discusses the right to receive information as an essential part of the first amendment's protection.

39. See *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943), and *Minersville School Dist. v. Gobitis*, 310 U.S. 586, 599 (1940), which link education with full participation in the rights and duties of citizenship.

40. 347 U.S. 483, 493 (1954).

This oft-cited quotation lends strong support to the arguments being made on behalf of learning disabled children.

Equal Educational Opportunity

Brown has been critical in establishing the fundamentality of education for purposes of equal protection analysis.⁴¹ *Brown* mandates that once a state undertakes to provide an education, it must do so "on equal terms."⁴² This concept of equal educational opportunity formed the basis of several lawsuits over the past decade. In the landmark decision of *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania*⁴³ (*P.A.R.C.*), the court found that children have a constitutionally protected right to an education, and that no child can be excluded from a free publicly supported education by reason of a handicapping condition. In October, 1971, after several court hearings, the suit was tentatively settled, with final ratification occurring in May, 1972. To provide judicial supervision, the court appointed a special educator and an attorney as special masters to oversee implementation of the identification and placement aspects of the agreement. The court also retained jurisdiction to assure compliance with all terms.⁴⁴ Although the case was brought on behalf of only retarded children, the decision was important in asserting a new role for the courts to play on behalf of handicapped children.⁴⁵

Inspired by the *P.A.R.C.* decision, three public interest legal organizations brought suit on behalf of all school age children denied their rights to "equal education opportunity" and due process.⁴⁶

41. Several post *Brown* cases, in both the state and federal courts, interpreted the decision as having established the fundamentality of the right to an education. See, e.g., *Van Dusartz v. Hatfield*, 334 F. Supp. 870 (D. Minn. 1971); *Serrano v. Priest*, 5 Cal. 3d 584, 96 Cal. Rptr. 601 (1971); *Millikin v. Green*, 389 Mich. 1, 203 N.W.2d 457 (1973); *Robinson v. Cahill*, 118 N.J. Super. 223, 287 A.2d 187 (1972).

42. 347 U.S. 483, 493 (1954).

43. 334 F. Supp. 1257 (E.D. Pa. 1971) (court's interim orders approving the original consent agreement of Oct. 7, 1971), and 343 F. Supp. 279 (E.D. Pa. 1972) (final consent agreement and stipulation).

44. 343 F. Supp. at 315.

45. For full discussion of the *P.A.R.C.* decision, see *Stick, The Handicapped Child Has a Right to an Appropriate Education*, 55 NEB. L. REV. 637, 646-50 (1976), and *Kuriloff, True, Kirp and Buss, Legal Reform and Educational Change: The Pennsylvania Case*, 41 EXCEPTIONAL CHILDREN 35 (1974).

46. Although due process procedures have been an important issue in the fight for a minimally adequate education, a separate discussion of those procedures is beyond the intended scope of this article. For more on due process and the right to minimally adequate education, see *Krass, The Right to Public Education for Handicapped Children: A Primer for the New Advocate*, 1976 U. ILL. L.F. 1016, 1027-33 (1976);

Noting that lack of funds was no excuse for the denial of constitutional rights, the court in *Mills v. Board of Education of the Dist. of Columbia*,⁴⁷ ordered the defendant to provide each child "a free and suitable publicly supported education regardless of the degree of the child's mental, physical, or emotional disability or impairment."⁴⁸ The decision was important in its rejection of the state's lack of funding argument, and also in its expansion of the *P.A.R.C.* ruling to include all children excluded from school because of mental, behavioral, emotional or physical handicaps. The court refused initially to appoint a special master, but it did promise to intervene in the event of delay or inaction in implementing the judgment or decree.⁴⁹ In 1975 a special master was appointed and on August 5, 1977, the judge, still dissatisfied with any implementation plan, ordered the school district to submit a plan to the U.S. Commissioner of Education, which, if approved, would finally terminate the five year old suit.⁵⁰

Strengthened by these two critical decisions, several lawsuits were initiated to challenge state funding schemes that failed to provide "equal educational opportunity" to children in poor school districts. In *Serrano v. Priest*,⁵¹ *Robinson v. Cahill*,⁵² and *Van Duzart v. Hatfield*,⁵³ both state and federal lower courts concluded that education was a fundamental interest and that disparities in educational expenditures did violate the equal protection clause of the fourteenth amendment.

The Fundamental Right to a Minimally Adequate Education

This line of cases came to an abrupt halt with the Supreme Court's 5-4 decision in *San Antonio Independent School District v.*

Abeson, *A Primer of Due Process: Education Decisions for Exceptional Children*, 42 EXCEPTIONAL CHILDREN 68 (1975); Diamond, *The Constitutional Right to Education: The Quiet Revolution*, 24 HASTINGS L.J. 1087 (1973). Note too that many due process questions have been settled by recent federal legislation. See, e.g., 20 U.S.C. § 1415 (1977) (The Education for All Handicapped Children Act); 45 C.F.R. § 84.36 (1977) (regulations promulgated under § 504 of the Rehabilitation Act). See also *Children Requiring Special Education: New Federal Requirements*, CLEARINGHOUSE REVIEW 462 (1977).

47. 348 F. Supp. 866 (D.D.C. 1972).

48. *Id.* at 878.

49. *Id.* at 877.

50. For a study of the implementation problems in *P.A.R.C.* and *Mills*, see Kirp, Buss and Kuriloff, *Legal Reform of Special Education, Empirical Studies and Procedural Proposals*, 62 CAL. L. REV. 40 (1974).

51. 5 Cal. 3d 584, 98 Cal. Rptr. 601 (1971).

52. 118 N.J. Super. 223, 287 A.2d 187 (1972).

53. 334 F. Supp. 870 (D. Minn. 1971).

Rodriguez.⁵⁴ *Rodriguez* held that education is not a fundamental right protected by the Constitution, and thus a legislative classification which allegedly interferes with this interest need not satisfy the "strict scrutiny" test.⁵⁵

The plaintiffs in *Rodriguez* attacked the constitutionality of Texas' school financing scheme, alleging that it discriminated against students from poor school districts. Plaintiffs argued that because the school districts were financed partly from local property taxes, poor school districts were not receiving the same amount of funds per pupil as the wealthier districts and, therefore, children in poor districts were not being provided with an education equal to that of children in wealthier districts. However, the problem of whether there is a right to the equal opportunity to obtain an adequate education was not at issue in *Rodriguez* because the parties agreed that all children in Texas were already receiving an adequate education pursuant to Texas' Minimum Foundation Program of Education.⁵⁶ Rather, the question presented in *Rodriguez* was whether the state had the duty to insure the equal opportunity to obtain something over and above an adequate education. The Court refused to engage in the task of measuring the comparative "adequacy" of an education based simply on per capita expenditures.⁵⁷ The Court also was reluctant to strictly scrutinize a system of financing public education which the Court noted was then in existence in virtually every state⁵⁸ and which involved a tax revenue question "traditionally deferred to state legislatures."⁵⁹

Soon after the decision was handed down, experts were quick to warn that *Rodriguez* should not be viewed as an obstacle to the movement for handicapped children.⁶⁰ Justice Powell was merely unable and unwilling to find that any fundamental right was being abridged where plaintiffs were already being given the opportunity to acquire "the basic minimal skills necessary for the enjoyment of the rights of free speech and of full participation in the political process."⁶¹ Justice Powell specifically left open the question of whether

54. 411 U.S. 1 (1973).

55. For a critical review of the Court's two-tier approach to equal protection, see Gammon, *Equal Protection of the Law and San Antonio Independent School District v. Rodriguez*, 11 VAL. U.L. REV. 435 (1977).

56. 411 U.S. at 24, 37.

57. *Id.* at 43.

58. *Id.* at 17.

59. *Id.* at 40.

60. See Casey, *The Supreme Court and the Suspect Class*, 40 EXCEPTIONAL CHILDREN 119 (1973); Comment *Lau v. Nichols*, 62 CAL. L. REV. 157 (1974).

61. 411 U.S. at 37.

children deprived of a *minimally adequate* educational program are being denied a fundamental right:

Whatever merit appellee's argument might have if a state's financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with *fundamental* rights where only relative differences in spending levels are involved and where—as is true in the present case—no charge fairly could be made that the *system fails to provide each child with an opportunity to acquire the basic minimal skills* necessary for the enjoyment of the rights of speech and of full participation in the political process. [Emphasis added.]⁶²

Rodriguez does not totally undermine *Brown's* promise of equal educational opportunity. The Court held that there is no *fundamental* right to equal per pupil expenditures and that Texas' financing scheme did satisfy the less demanding rational basis test. The Court did not decide the question of whether the opportunity to acquire a minimally adequate education is so fundamental as to warrant imposition of the strict scrutiny standard. Under the latter test the state would bear the burden of proving that its educational program which denied opportunity to learning disabled children furthered some compelling state interest which could not be accomplished in any less drastic manner. As the Court noted in *Rodriguez*, under the strict scrutiny test "the state must demonstrate that its educational system has been structured with 'precision,' and is 'tailored' narrowly to serve legitimate objectives and that it has selected the 'less drastic means' for effectuating its objectives."⁶³

Thus despite the Court's refusal to certify education as a fundamental right, subsequent cases have been successful in distinguishing the decision and denying its application to handicapped children asserting lack of the opportunity to acquire a *minimally adequate* education.

The question of what constitutes a *minimally adequate* education is a difficult one. Handicapped children are arguing that the system fails to provide them with *basic minimal skills*. And although most learning disabled children are not actually barred from attending school, they are being *constructively excluded* from a public education. The regular education they receive is often worthless and

62. *Id.*

63. *Id.* at 16-17.

even detrimental to their psychological and emotional well-being. The Supreme Court in a post-*Rodriguez* decision suggests that the question of whether a state is providing a minimally adequate educational opportunity must be measured from the viewpoint of the recipient. In *Lau v. Nichols*,⁶⁴ non-English speaking Chinese students, who were being taught solely in English, claimed they were being denied a meaningful opportunity to participate in the State's educational program in violation of § 601 of the Civil Rights Act of 1964 and the Constitution.⁶⁵ Although not reaching the constitutional issue, the Court recognized that: "there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education."⁶⁶

Thus, the Supreme Court found that equality in educational opportunity must be measured in terms of the effect on the student *based on his needs*. Just as a child who is blind or deaf or unable to speak English is being constructively excluded from a state's educational system by being placed in a regular classroom setting, similarly the child who is learning disabled and incapable of decoding incoming messages cannot be expected to derive even a minimally adequate education without special assistance. The *Lau* decision suggests that simply providing the same facilities to children who have widely varying needs does not guarantee the *equal opportunity* to acquire a minimally adequate education. Unless the adequacy of a state's educational program is measured from the student's viewpoint, that is, in terms of his ability to derive a basic education, equality of educational opportunity will only be meaningful to normal children.

A few courts have already adopted this concept of constructive exclusion from a minimally adequate education to distinguish *Rodriguez*. In *Frederick L. v. Thomas*,⁶⁷ children with specific learning disabilities claimed the right to a minimally adequate educational opportunity and the equal right to an educational program adapted to their needs, since normal and mentally retarded children were being provided with such programs. In denying defendants' motion to dismiss for failure to state a claim, the court noted that *Rodriguez* "left open the possibility that the denial of a *minimally adequate educational opportunity* may entrench upon a fundamental interest

64. 414 U.S. 563 (1974).

65. See 42 U.S.C. § 2000d (1970).

66. 414 U.S. at 566.

67. 408 F. Supp. 832 (E.D. Pa. 1976).

if the state has undertaken to provide a free public education,"⁶⁸ and that defendants' policies may have to be subjected to strict scrutiny. In reaching the merits of the case in a subsequent proceeding, the court held that the district had failed to meet its obligation under state law. It granted relief in the form of both mandatory screening of all pupils performing in the lowest percentiles on certain standardized achievement tests and appropriate learning disability programs for all school age children.⁶⁹ After further proceedings a remedial order was issued appointing a master to oversee implementation of the plan and to submit final reports to the court. This landmark decision for learning disabled children was affirmed by the Third Circuit, the court rejecting defendants' arguments that the district court should have abstained and that the screening relief was too broad.⁷⁰ Noting that only 1,300 of a estimated 8,000 learning disabled students in the school system had been identified, the court held that screening was necessary to "isolate the entire population of learning disabled students and to evaluate the need of these pupils for special education services."⁷¹

In a related special education case, *Fialkowski v. Shapp*,⁷² *Rodriguez* was again held not to foreclose plaintiffs' constitutional claims. The *Fialkowski* court found three key differences: (1) since plaintiffs alleged a complete denial of educational opportunity, it was "not inconsistent with *Rodriguez* to hold that there exists a constitutional right to a certain *minimum level* of education as opposed to a constitutional right to a particular level of education;"⁷³ (2) retarded children may be a suspect class and "depriving retarded children of all educational benefits would appear to warrant greater judicial scrutiny than that applied in *Rodriguez*;"⁷⁴ and (3) *Rodriguez* dealt only with equal educational opportunity measured in terms of equal financial expenditures, which was not the situation in the case before the court.⁷⁵

68. *Id.* at 835.

69. 419 F. Supp. 960 (E.D. Pa. 1976).

70. 557 F.2d 373, 381-4 (3d Cir. 1977).

71. A discussion of abstention as it relates to education suits appears in Gordon, *Public Instruction to the Learning Disabled: Higher Hurdles for the Handicapped*, 8 U.S.F.L. REV. 113, 124-26 (1973). Note also that the court in *P.A.R.C.*, 343 F. Supp. 279, 298 (E.D. Pa. 1972), specifically rejected an abstention argument. See also *Nickerson v. Thomson*, 504 F.2d 813, 816 (7th Cir. 1974); *Usen v. Sepprell*, 41 App. Div. 2d 251, 342 N.Y.S.2d 599 (1973) (no need to exhaust administrative remedies where no adequate facilities were available).

72. 405 F. Supp. 946 (E.D. Pa. 1975).

73. *Id.* at 958.

74. *Id.* at 958-9.

75. *Id.* at 958.

The application of one and three to learning disabled children is clear. They too are alleging the denial of a minimally adequate education and the right to equal educational opportunity in the context of this minimum standard. The second distinguishing feature recognized above merits further discussion, since either the finding of a fundamental right or of a suspect class subjects a state system to strict scrutiny.

One basis for the Court's denial of relief in *Rodriguez* was the lack of an identifiable class of injured plaintiffs. The arguments used by the *Rodriguez* Court for denying plaintiffs suspect class status are not applicable to learning disabled children, as they can be identified through appropriate testing procedures and screened in accordance with the statutory definition for learning disabilities provided by both state and federal statutes. Moreover, several recent cases support the theory that children with certain disabilities may constitute a suspect class. In *Fialkowski*, the court said that the criteria set out in *Rodriguez* for determining a suspect class "could certainly be said to include retarded children," and that, in any event, depriving retarded children of educational benefits "would appear to warrant greater judicial scrutiny than that applied in *Rodriguez*."⁷⁶ Similarly, the North Dakota Supreme Court, in granting relief to a handicapped child, noted that deprivation of a meaningful education "would be just the sort of denial of equal protection which has been held unconstitutional in cases involving discrimination based on race and illegitimacy."⁷⁷ Looking back to the history of learning disabled children—the fact that they have historically received unequal treatment in the public education system and that they have branded with the stigma of being stupid or slow—the suspect classification theory merits attention. In addition, unlike the children in *Rodriguez*, the learning disabled are claiming the total deprivation of a constitutionally protected fundamental right to a minimally adequate education.

76. *Id.* at 959. The indicia of suspectness were identified by Justice Powell in *Rodriguez*: A class "saddled with disabilities," or "subject to a history of purposeful unequal treatment," or "relegated to a position of political powerlessness." 411 U.S. 1, 28 (1973). All of these indicia describe learning disabled children. See also Burgdorf, *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a 'Suspect Class' Under the Equal Protection Clause*, 15 SANTA CLARA LAW. 855, 902 (1972); Casey, *The Supreme Court and the Suspect Class*, 40 EXCEPTIONAL CHILDREN 119 (1973); Handel, *The role of the Advocate in Securing the Handicapped Child's Rights to an Effective Minimal Education*, 36 OHIO ST. L.J. 349, 364-5 (1975); Richards, *Comment: Toward a Legal Theory of the Right to Education of the Mentally Retarded*, 34 OHIO ST. L.J. 554, 568-9 (1973).

77. Ex. Rel. G.H., 218 N.W.2d 441, 447 (N.D. 1974).

Finally it should be noted that the Supreme Court's usage in *Rodriguez* of a very traditional undemanding rational basis test is not binding on future courts dealing with the educationally handicapped. Members of the Supreme Court have, over the past decade, expressed disillusionment with a strict two-tier approach to equal protection analysis, and decisions both before and after *Rodriguez* illustrate the Court's adoption of an intermediate test.⁷⁸ Justice Marshall explained in his dissent to *Rodriguez* that the Court has in reality applied a spectrum of standards depending "on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn."⁷⁹ Marshall stressed the importance of education and its inextricable link to the rights of free speech and association and to participation in the electoral process. Marshall said that as the nexus between specific constitutional guarantees and a nonconstitutional interest draws closer, "the non-constitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly."⁸⁰ Further, in the recent case of *Zablocki v. Redhail*,⁸¹ Justice Marshall, writing for the majority, said that evaluations under the equal protection clause must be based on "the nature of the classification and the individual interests affected."⁸² Marshall explained that since the right involved [the right to marry] was of fundamental importance and the interference with the exercise of that right was significant, "critical examination of the state interests" was required.⁸³ Conceding that not *all* interferences with the right to marry must be subjected to rigorous scrutiny, Marshall stressed the fact that the interference in that case was both direct and substantial.⁸⁴ Similarly, while *Rodriguez* made it clear that not all interferences with the right to an education must be subjected to strict scrutiny, the denial of a minimally adequate education for learning disabled children constitutes a direct substantial interference "sufficient to warrant critical examination" of a state's educational program.

78. See Gammon, *supra* note 31, at 463; Gunther, *The Supreme Court, 1971 Term, Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a New Equal Protection*, 86 HARV. L. REV. 1, 18-19 (1972); Comment, *Lau v. Nichols*, 62 CALIF. L. REV. 157, 167 (1974).

79. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 99 (1973).

80. *Id.* at 102-3.

81. *Zablocki v. Redhail*, ___ U.S. ___, 98 S. Ct. 673 (1978).

82. *Id.* at 679.

83. *Id.*

84. *Id.* at 681.

Other Supreme Court decisions illustrate that the Court is rejecting application of a rigid two-tier approach and that it is adding new bite to the traditional equal protection standard.⁸⁵ There is no reason to view *Rodriguez* as anything more than an exception to this trend, which can be explained by the Court's traditional reluctance to intervene in a state revenue matter or to overhaul a school financing system firmly established in practically all the states.⁸⁶ In one post-*Rodriguez* decision, *Weinberger v. Wesenfeld*,⁸⁷ the Supreme Court, without finding a suspect class or fundamental right, noted that even if legislative discrimination could be rationally explained, it must nevertheless withstand scrutiny in light of the primary purposes of the legislative scheme.⁸⁸

In *Frederick L. v. Thomas*⁸⁹ the court rejected application of the traditional rationality standard to learning disabled children. It did so both because the case involved education, a "quasi-fundamental right," and because it involved learning disabled children, a group which exhibits several of the essential characteristics of a suspect class. The court, therefore, felt that a strict rationality or intermediate test of equal protection was required. At the very least, the defendants had to show "that their actions have a basis in fact which rationally advances an actual purpose of the legislative scheme."⁹⁰

Indeed, even using "minimal scrutiny," it is difficult to see any rational basis for a state denying equal educational opportunity to the learning disabled.⁹¹ The traditional rational basis test still mandates that a state classification have a rational relationship to a legitimate state interest. If no rational basis exists or if the state in-

85. See, e.g., *Weinberger v. Wesenfeld*, 420 U.S. 636 (1975) (striking down a section of the Social Security Act as sexually discriminatory); *Sosna v. Iowa*, 419 U.S. 393 (1975) (striking down state residency requirements for divorce); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 173-5 (1972) (striking down the denial of workmen's compensation to dependent, unacknowledged, illegitimate children); *Reed v. Reed*, 404 U.S. 71 (1971) (striking down a probate statute giving mandatory preference to males, in letters of administration). The Court found the classification in each of these cases unconstitutional without finding a suspect class or a fundamental right.

86. See p. ____ of this text.

87. 420 U.S. 636 (1975).

88. *Id.* at 648-653, 648 n.16 (1975). See also *Craig v. Boren*, 429 U.S. 190 (1976); *Jimenez v. Weinberger*, 417 U.S. 628 (1974) (in which the "purpose" of the challenged legislation was carefully examined by the Court).

89. 408 F. Supp. 832 (E.D. Pa. 1976).

90. *Id.* at 835.

91. See *Falkowski v. Shapp*, 405 F. Supp. 946, 959 (E.D. Pa. 1975).

terest is not legitimate, the classification is violative of the equal protection clause.⁹²

Fiscal Concerns Do Not Justify the Denial of the Right to a Minimally Adequate Education

The reason most often given for unequal access to educational opportunity for learning disabled and for other handicapped children is the higher cost of special education.⁹³ Costs are greater for salaries and equipment and per child costs increase due to smaller class size and the need for ancillary personnel, including psychometrists, speech clinicians, and certified learning disabilities teachers. It is estimated that the \$700 a year needed to educate a non-handicapped child jumps to \$1,500 to educate the handicapped child in a school setting.⁹⁴ Although federal funding is starting to offset the cost of educating learning disabled children, the state still bears the primary burden.⁹⁵

Fiscal concern, however, is not a legitimate reason for denying a substantial portion of the nation's school age the right to participate in the educational process in a meaningful way. First, as the court noted in *Mills v. Board of Education*,⁹⁶ if funding is a problem there must be restructuring of the budget and school finances must be equitably distributed so that no child is denied a minimally adequate education. As the court noted, "The inadequacies of the District of Columbia Public School System whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the 'exceptional' or handicapped child than on the normal child."⁹⁷ Another authority characterized the funding problem as one of improper priorities, noting that many noncritical items in a school budget such as music and art, which although obviously worthwhile, should not take priority over reading, writing and other basic education for handicapped children.⁹⁸ The irrationality of this system of priorities is further il-

92. See, e.g., *Jefferson v. Hackney*, 406 U.S. 535 (1972); *Dandridge v. Williams* 397 U.S. 471 (1970).

93. Thomas, *Finance: Without Which There is No Special Education*, 40 EXCEPTIONAL CHILDREN 475 (1973).

94. Benjamin, *Implementation of Education Laws Relating to Exceptional Children: The Maine Experience*, CLEARINGHOUSE REVIEW 449, 454 (1977).

95. Questions of federal funding discussed *infra* ____.

96. 348 F. Supp. 866 (D.D.C. 1972).

97. *Id.* at 876. See also *Serna v. Portales Mun. Schools*, 351 F. Supp. 1279, 1283 (D.N.M. 1972).

98. See Handel, *The Role of the Advocate in Securing the Handicapped Child's Right to an Effective Minimal Education*, 38 OHIO ST. L.J. 349, 366-7 (1975).

lustrated by the fact that the school is in effect wasting \$700 a year or more on learning disabled children left in the regular classroom, when many of these children, if taught to compensate for their disability, could be achieving at the same or nearly the same level as normal children.⁹⁹ A comment made about the *Lau* decision is equally applicable to learning disabled children: [i]t is a travesty that a school system which denies thousands of children an education because of the unavailability of funding, continues to squander its budget on classes in which students cannot understand the language of instruction."¹⁰⁰ Further, in viewing the cost to society from a broader perspective, fiscal concerns become less critical. In the case of *In re Downey*¹⁰¹ a father was awarded \$6,496 to pay the extra cost of tuition and transportation to and from a special school since there was no adequate public facility available. The court noted:

[W]hile at first blush this may seem like a substantial outlay of funds for one child, when compared with the dollar cost of maintaining a child in an institution all his life or on public assistance the cost is minimal; not to speak of the incalculable cost to society of losing a potentially productive adult.¹⁰²

Although the likelihood of a learning disabled child ending up in an institution is not great, such a child may very well drop out of school and join the ranks of the unemployed and the recipients of public aid. Studies have already begun to show a high correlation between learning disabled children and school drop-outs. They have also found a disproportionately high number of the learning disabled among juvenile delinquents and criminals. For example, a 1965 survey of 277,649 juvenile arrests in California, found over 55,000 children evidencing symptoms of learning disabilities.¹⁰³ The study

99. See Benjamin, *supra* note 94.

100. Gordon, *Public Instruction to the Learning Disabled: Higher Hurdles for the Handicapped*, 8 U.S.F. L. REV. 113, 145 (1973).

101. 72 Misc. 2d 772, 340 N.Y.S.2d 687 (1973).

102. *Id.* at 690. The same argument has been made for years with regard to mentally retarded children. That is, it costs society more *not* to educate such children as the cost of institutionalization far exceeds the cost of education. The 1972 Report of the President's Committee on Mental Retardation estimates that three-fourths of all non-institutionalized mentally retarded persons dependent on public assistance could be fully self-supporting if educated and trained. See Murdock, *Civil Rights of the Mentally Retarded: Some Critical Issues*, 48 N.D. LAW. 133, 164-5 (1972); Richards, *Comment: Toward a Legal Theory of the Right to Education of the Mentally Retarded*, 34 OHIO ST. L.J. 554, 559-60 (1973).

103. L. TARNOPOL, *Delinquency and Learning Disabilities in LEARNING DISABILITIES, INTRODUCTION TO EDUCATIONAL AND MEDICAL MANAGEMENT* (1967).

revealed that such children are often unable to read by fourth or fifth grade and, consequently, drop out of school. Their lack of education, coupled with their emotional problems, often leads them to juvenile delinquency.¹⁰⁴

Experts similarly testified in the *Frederick L.* case that learning disabled children who are forced to sit in classrooms without being able to understand the lessons taught suffer grave injury to their emotional and psychological conditions. Failure causes frustration, loss of self-esteem and antagonism towards adults. Such testimony led the court to conclude that "inappropriate educational placements predictably lead to severe frustration and to other emotional disturbances which impede the learning process and erupt into anti-social behavior."¹⁰⁵ In addition, studies indicate that the learning disabled child is likely to be rejected or in conflict with parents, teachers and peers.¹⁰⁶

Such results are not at all surprising in light of the fact that learning disabled children typically have average or above average I.Q.'s and thus are acutely aware of and frustrated by the fact that they cannot compete with their peers.¹⁰⁷ Similar to the stigma associated with racial separation recognized in *Brown*,¹⁰⁸ the early effects of peer and parental rejection and failure in school will not soon dissipate. Psychological harm, which was presumed in *Brown*, is arguably no less certain to occur to the learning disabled child who remains unhelped. Thus, the cost of educating the learning disabled becomes *de minimus* when balanced against the cost to society of permitting these children to grow up frustrated, disillusioned and hostile.

One final aspect to the cost question merits consideration. As has already been suggested, special expenditures increase substantially for the learning disabled child to reach the same or near achievement level as the normal child. If equality in education were to be measured in terms of per capita expenditures, normal children could then sue for equal rights. The Supreme Court in *Rodriguez*

104. See L. MANN, L. GOODMAN, J. WEIDERHOLT, *TEACHING THE LEARNING DISABLED ADOLESCENT* 61 (1978); F. JACOBSON, *Learning Disabilities and Juvenile Delinquency: A Demonstrated Relationship*, *HANDBOOK ON LEARNING DISABILITIES* (1974).

105. See 419 F. Supp. 960, 962-5 (E.D. Pa. 1976), *aff'd*, 557 F.2d 373, 375 (3d Cir. 1977).

106. See L. MANN, L. GOODMAN, J. WEIDERHOLT, *TEACHING THE LEARNING DISABLED ADOLESCENT* 59-65 (1978).

107. T. BRYAN & J. BRYAN, *UNDERSTANDING LEARNING DISABILITIES* 121 (1975).

108. 347 U.S. 483, 494 (1954).

fortunately rejected the notion that equality should be measured by per pupil expenditures. When the issue is framed in terms of the minimally adequate education that is granted to normal children and denied to the learning disabled, the true victims of discrimination become apparent. What is required is neither dollar equality nor even outcome equality. As one authority noted, "Since the school is providing or attempting to provide a minimally adequate education for regular children, equal protection requires that they do the same for handicapped children, even though the definition of minimally adequate education will differ for these children."¹⁰⁹

Several lower court decisions have rejected this fiscal argument as insufficient to sustain an equal protection challenge. In *Kruse v. Cambell*,¹¹⁰ the court held unconstitutional a *partial* tuition grant program for handicapped children attending private schools where no public educational programs were available. Since children whose parents could not afford the proportioned costs were denied "the opportunity to obtain the benefits of an appropriate education," the program was struck down as "violative of equal protection," the court holding that such a denial "is irrational and fails to further any legitimate state interest."¹¹¹

The same result has been reached in state courts in cases specifically involving learning disabled children. In *Kivel v. Nemoitin*,¹¹² the court, finding that the defendant failed to offer an appropriate program for a twelve-year-old perceptually handicapped child with learning disabilities, awarded the boy's mother \$13,400 to pay for the out-of-state private education he received for two years. In another case, *In re Held*,¹¹³ a Family Court judge in New York similarly awarded plaintiffs the costs of private special education. In the case a child suffering from organic brain syndrome had spent five years in the public schools—three and one-half of them in special education classes—making virtually no progress. At the age

109. McClung, *Do Handicapped Children Have a Legal Right to Minimum Adequate Education*, 3 J.L. EDUC. 153, 160 (1974).

110. 431 F. Supp. 180 (E.D. Va.), *remanded* 98 S. Ct. 38 (1977) (directions to decide the claim based on § 504 of the Federal Rehabilitation Act of 1973).

111. 431 F. Supp. at 187.

112. No. 143913 (Super. Ct., Fairfield Co., Conn. 1972), discussed in Wientraub & Abeson, *Appropriate Education for All Handicapped Children*, 23 SYRACUSE U.L. REV. 1037, 1050 (1972).

113. 66 Misc. 2d 1097, 323 N.Y.S.2d 302 (1971). The court also rejected the school's allegation that the following year a proper program would be initiated, noting that it would not permit the child's future "to be further jeopardized by gambling on a special education system that has yet to prove itself." *Id.* at 305.

of eleven years-one month, his reading level was that of an average first-grade pupil. Yet after one year at a private school, the child raised his reading level by two grades' thus proving that the child was not provided with a minimally adequate education in the public school system. The case acknowledges that it is insufficient for a school to provide an education, if such does not achieve tangible results.

New York has been one of the more progressive states in recognizing the rights of learning disabled children. In addition to *In re Held*, another case, *In re Kirkpatrick*,¹¹⁴ held that an adolescent suffering from learning disabilities was entitled to special education at an approved private facility due to the inadequacy of any public program. Finally in *Matter of Lofft*,¹¹⁵ a New York Family Court recently held that a special program held to be developed for a brain damaged child suffering from neurological dysfunction. The court specifically noted that the interests of the child and family "must not be subordinated to agency claims of insufficient time, staff, or funds,"¹¹⁶ because "failing to provide an educational opportunity for such children would constitute a violation of both state and federal constitutions."¹¹⁷ As to the latter, the court said that it violates the equal protection clause of the fourteenth amendment to deny equal educational opportunity to handicapped children.

Thus courts in a few states are starting to recognize that failure to provide learning disabled children with an appropriate education violates fundamental federal constitutional rights, and often violates state constitutional guarantees of a free public education for all children.¹¹⁸ One major effect of these right-to-education lawsuits and court decisions has been the dynamic increase in congressional attention to and support of education of the handicapped. As a result of recently enacted federal law and regulations, handicapped children can now point to detailed state statutory obligations and duties to support their claim to a minimally adequate education. In addition, federal funds have been appropriated to help the states meet their new obligations. The next section will explore the impact of these laws on the learning disabled.

114. 77 Misc. 2d 646, 345 N.Y.S.2d 499 (1972).

115. 86 Misc. 2d 431, 383 N.Y.S.2d 142 (1976).

116. *Id.* at 145.

117. *Id.* at 146.

118. Several state constitutions contain "free education for all" provisions. For example, the Indiana Constitution, Art. 8, § 1, provides that a public education system must be equally open to all students. Several states also have laws mandating special education for the handicapped. See note 29 *supra* and accompanying text.

THE STATUTORY RIGHT TO AN APPROPRIATE EDUCATION

One of the key arguments opposing legal interference in the educational sphere is that it is allegedly impossible for a court of law to delineate the level of education a state must provide to a handicapped child in order to satisfy the equal protection clause.¹¹⁹ In addition, it is argued that education is a matter best left up to state and local governments, which must work out their own financing problems.¹²⁰ Congress in the past few years has provided answers to these arguments and has established as a *national* goal the education of all handicapped children. New federal legislation has gone far in providing a detailed description of what constitutes an appropriate education for a handicapped child. In addition, the legislation demonstrates a serious national interest in the rights of this group which removes this sphere from abstention or comity arguments. Finally, federal legislation is starting to provide needed funding to states which adopt the policy of providing special education to all handicapped children, including the learning disabled.

The federal government's interest in special education did not surface until 1965 when the Elementary and Secondary Education Act¹²¹ established a federal commitment to develop and improve level educational programs for educationally deprived children. Title I of the Act was amended in that year to provide financial assistance to state programs or schools for the handicapped. Five years later the Children With Learning Disabilities Act was passed, creating grants for research and training centers to study the problems of learning disabled children.¹²² In addition, the centers were to train educational personnel and develop new teaching methods

119. This type of argument has not stopped the courts from deciding other difficult questions outside their supposed area of expertise. For example, courts have been willing to decide what constitutes appropriate treatment for institutionalized persons. See *Wyatt v. Stickney*, 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd in part, remanded in part, rev'd in part sub nom*, *Wyatt v. Aderholt* 503 F.2d 1305 (5th Cir. 1974). For a discussion of the similarities between the right to medical treatment suits and the right to education suits, see Gordon, *Public Instruction to the Learning Disabled: Higher Hurdles for the Handicapped*, 8 U.S.F. L. REV. 113, 122-23 (1973); Handel, *The Role of the Advocate in Securing the Handicapped Child's Right to an Effective Minimal Education*, 36 OHIO ST. L.J. 349, 368-70 (1975); McClung, *Do Handicapped Children Have a Legal Right to Minimum Adequate Education*, 3 J.L. EDUC. 153, 162 (1974); Stick, *The Handicapped Child has a Right to an Appropriate Education*, 55 NEB. L. REV. 637, 658, 670 (1976).

120. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 42-44 (1973).

121. Pub. L. No. 89-10, 79 Stat. 27; Pub. L. No. 89-313, 79 Stat. 1158.

122. See 20 U.S.C. § 1461 (1971).

and techniques. The grants were inspired by a 1968 survey showing that only twenty colleges in the United States offered any courses on the education of learning disabled children.¹²³ Since that time congressional attention has escalated dramatically, culminating in detailed laws and regulations designed to protect the rights of the handicapped. The Education of All Handicapped Children Act of 1975¹²⁴ and the Rehabilitation Act of 1973¹²⁵ promise to be effective tools for vindicating the rights of these children. Basically they assure that every state receiving federal money must guarantee equal protection of the law to handicapped persons.

The Education for All Handicapped Children Act

The Education for All Handicapped Children Act (E.A.H.C.A.)¹²⁶ was signed into law on November 29, 1975. This legislation amends and expands on Part B of Public Law 93-380¹²⁷ which provides financial assistance to states to identify, locate and evaluate all handicapped children, to establish full educational opportunity for all handicapped children, and to establish timetables for achieving these goals. The Conference Report on the Act acknowledged that there are more than eight million handicapped children in the United States, more than half of whom are not receiving full equality of educational opportunity.¹²⁸ In addition to the one million children totally excluded from the education system, the Act is aimed at identifying and helping handicapped children presently in the classroom. Recognizing the various types of handicapping conditions, the Act requires that special education meet "the unique needs of a handicapped child"¹²⁹ and that "individualized education programs" be developed and reviewed for each child.¹³⁰ The law specifically acknowledges the learning disabled in its definition of "handicapped child."¹³¹ In addition, § 620b of the Act required the U.S. Commis-

123. [1970] U.S. CODE CONG. & AD. NEWS 2837-38.

124. 20 U.S.C. §§ 1401-1461 (1978). This title was first introduced on May 16, 1972. See S. REP. NO. 168, 94th Cong., 1st Sess. 6 (1975). Parts took effect in 1975; the remainder became effective on October 1, 1977.

125. 29 U.S.C. § 701 *et seq.* (1975).

126. Pub. L. No. 94-142, 89 Stat. 773.

127. 88 Stat. 484.

128. S. REP. NO. 168, 94th Cong., 1st Sess. 8 (1975).

129. 20 U.S.C. § 1401(16) (1978).

130. 20 U.S.C. §§ 1412(4), 1414(a)(5) (1978). As argued in earlier cases, see *supra* pp. ___ to ___, an appropriate education is to be measured from the viewpoint of the child.

131. See 20 U.S.C. § 1401(1) (1978); 45 C.F.R. § 121a.5 (1976). Also, 20 U.S.C. § 1401(15) (1978), defines "children with specific learning disabilities."

sioner of Education to set down criteria to identify specific learning disabilities as well as regulations to establish diagnostic and monitoring procedures. To comply with this mandate, proposed rules dealing exclusively with the learning disabled were issued on November 29, 1976,¹³² and amended regulations were finalized on December 29, 1977.¹³³

Before discussing the latter regulations, it should be noted that the learning disabled will benefit generally by the Act's mandate that by September 1, 1978, a participating state must assure that all handicapped children between the ages of three and eighteen are provided "a free appropriate public education."¹³⁴ Since practically all states have submitted state plans to the United States Commissioner of Education, evidencing their intent to participate in the program, the ramifications of such a mandate are clear.¹³⁵ To achieve this monumental task, the Act establishes a massive federal aid to education program which will provide reimbursement for up to five per cent of the excess costs for special education in the 1977-1978 school year and will gradually increase the amount of reimbursement until the 1981-1982 school year when a maximum of forty per cent of excess costs will be provided.¹³⁶

The quid pro quo for the monetary aid is that the state educational agency (1) provide each child with a free appropriate education suited to his individual needs¹³⁷ (2) that certain procedural safeguards be observed before, during, and after placement decisions are made,¹³⁸ and (3) that a method be developed for finding and

132. 41 Fed. Reg. 52404-7 (1976). The regulations mentioned supplemented the regulations dealing with the new Act in general. See 42 Fed. Reg. 42473 (1977).

133. 42 Fed. Reg. 65082-5 (1977).

134. 20 U.S.C. § 1412(2)(b) (1978).

135. As of February 1, 1978, only New Mexico had failed to submit a state plan. The requirements for a state plan are set forth at 20 U.S.C. § 1413(a) (1978), and 45 C.F.R. § 121a.10 (1977).

136. 20 U.S.C. § 1411(a)(1) (1978).

137. 20 U.S.C. §§ 1401(18), 1412(1) (1978). The keynote of the Act is that an individualized educational program (IEP) be prepared for each handicapped child, based on a conference, and that the program be reviewed annually. 20 U.S.C. §§ 1412(4), 1414(a)(5), 1401(19) (1978); 45 C.F.R. § 121a.342-46 (1977).

138. 20 U.S.C. § 1415 (1978). This section includes the important right to file a complaint with the state or local educational agency regarding "any matter relating to . . . the provision of a free appropriated public education." 20 U.S.C. § 1415(b)(1)(E) (1978). For elaboration on the grant of procedural rights under the Act, see Krass, *The Right to Public Education for Handicapped Children: A Primer for the New Advocate*, 1976 U. ILL. L.F. 1016, 1067-71 (1976). See also 45 C.F.R. § 121a.503-12 (1977).

identifying handicapped children.¹³⁹ The state plan must set forth in detail how and when goals will be met, including a complete description of the kind and number of facilities, personnel and services necessary throughout the state.¹⁴⁰

Of special importance to the learning disabled child are the requirements regarding testing. As mentioned earlier, the learning disabled child is of average or above-average intelligence. However, since most well-known and widely used intelligence tests measure a child's present achievement rather than potential, a child with learning disabilities who has never received help will probably score low.¹⁴¹ Recognizing these difficulties, the Act requires that tests be administered by trained personnel, that they be tailored "to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient," and that "no single procedure is used as the sole criterion for determining an appropriate educational program for a child."¹⁴²

In addition to these safeguards which apply to all handicapped children, the learning disabled are protected by special regulations drafted solely for their benefit. Criteria are set out for use by a multi-disciplinary team, which includes the child's regular teacher, qualified diagnosticians and specialists,¹⁴³ to be used in determining the existence of a specific learning disability. Rejecting the original proposal of using a set formula,¹⁴⁴ the regulations require a determination be based on (1) whether a child does not achieve commensurate with his age and ability when provided with appropriate educational experiences and (2) whether the child has a severe discrepancy between achievement and intellectual ability in one or more of the seven areas relating to communication skills and mathematical abilities set forth in the regulation.¹⁴⁵ After much heated debate, it was decided to delete the originally proposed "fifty per cent" figure for determining "severe discrepancy." Abandonment of the formula was due largely to the psychometric and statistical inadequacy of the procedure, the fear of abuse of the for-

139. 20 U.S.C. § 1412(2)(C) (1978); 45 C.F.R. § 121a.10g (1976).

140. 20 U.S.C. § 1412(2)(A) (1978); 45 C.F.R. § 121a.125-26 (1977).

141. The relationship of intelligence tests to learning disabilities is discussed in T. BRYAN AND J. BRYAN, UNDERSTANDING LEARNING DISABILITIES 91-106 (1975).

142. 20 U.S.C. § 1412(5)(C) (1978); 45 C.F.R. § 121a.530-34 (1977). *See also* 45 C.F.R. § 84.35(b)(1) & (C) (1977).

143. 42 Fed. Reg. 65083 (1977) (to be codified as 45 C.F.R. § 121a.540).

144. *See* 41 Fed. Reg. 52406-7 (1976).

145. 42 Fed. Reg. 65083 (1977) (to be codified as 45 C.F.R. § 121a.541(a)).

mula, and the inappropriateness of using a single formula for children of all ages.¹⁴⁶

After ascertaining that the aforementioned criteria are met, the team must then conclude that the discrepancy is not the result of a visual, hearing or motor handicap, mental retardation, emotional disturbance or environmental, cultural or economic disadvantage.¹⁴⁷ The use of this type of procedural approach is the best way of dealing with the evaluation problem due to the variety of symptoms that may be manifested by the learning disabled child.¹⁴⁸ The final safeguard is the requirement of a detailed written report which must include findings, reasons for findings, relevant behavioral observations, medical findings (if any), and whether there is a need for special education and related services.¹⁴⁹ Finally, each team member must certify in writing "whether the report reflects his or her conclusion," and if it does not, a separate statement of conclusions must be submitted.¹⁵⁰ These procedural provisions coupled with those required generally under the Act for evaluating handicapped children should go far in eliminating problems of misdiagnosis and mislabeling.

Perhaps the key relevance of the passage of these final regulations is that their effective date marks the end of the federal government's two per cent limit on the number of children with specific learning disabilities who could be counted as handicapped children for allocation purposes.¹⁵¹ The original Act prohibited states in their funding requests from alleging that more than twelve per cent of their student population was handicapped, and not more than one-sixth of this group could be labeled "learning disabled." The basis for the statutory cap for learning disabled children was to preclude mislabeling and overcounting in this area where a universally accepted definition is yet to be created. Despite suggestions that the "cap" be extended, it was correctly decided that it would be "inequitable" to single out learning disabled children when other categories of handicapping conditions (similarly imprecise) have no cap. Obviously it would be a travesty to set an arbitrary two per

146. 42 Fed. Reg. 65084 (1977). See also objection voiced in L. MANN, L. GOODMAN, J. WEIDERHOLT, *TEACHING THE LEARNING DISABLED ADOLESCENT* 298 (1978).

147. 42 Fed. Reg. 65083 (1977) (to be codified as 45 C.F.R. § 121a.541(b)).

148. See note 24 *supra* and accompanying text.

149. 42 Fed. Reg. 65083 (1977) (to be codified as 45 C.F.R. § 121a. 543(a), (b), and (c) (1977)). A written report is required by the general provision of the Act as well. 20 U.S.C. § 1415(d) (1978).

150. 45 C.F.R. § 121a.543(c) (1977).

151. 45 C.F.R. § 121a.702 (1977), amended by deleting paragraph (a)(2).

cent limit when prevalent statistics among school age children indicate the correct percentage might be substantially higher.

These provisions then potentially offer a substantial breakthrough for learning disabled children. They define the composition and task of the evaluation team and then require a certified report. In addition, the Act generally permits parents to get an independent evaluation and to request a hearing at which parents or their counsel may challenge an evaluation or placement decision.¹⁵² Finally, it requires the development of a special program, which must be "of sufficient size, scope, and quality to give reasonable promise of substantial progress."¹⁵³

Questions remain as to the enforceability of the Act and its impact on litigation in this field. Although the rights created for the individual complainant under the new Act are obvious, none of the provisions deals with the question of general attacks on the adequacy of a state's program or class-action-type litigation.¹⁵⁴ Section 1415(e) does give an aggrieved party the right to bring a civil action in state or federal court, but this relief is apparently limited to a single individual challenging an administrative decision. Despite recommended changes,¹⁵⁵ Congress refused to comment on class action suits or the need to exhaust administrative remedies. Obviously, simple passage of the Act, and the Congressional Declaration of Purpose that federal assistance was necessary "to assure equal protection of the law,"¹⁵⁶ lend support to any constitutional litigation brought in this area. Furthermore, one key lawsuit alleging violations of the 1974 Education for the Handicapped Act, the predecessor of the present law, illustrates the law's potential value.

In *Mattie T. et al. v. Holladay*,¹⁵⁷ a district court, in granting summary judgment to a group of handicapped students, found that Mississippi state officials had denied plaintiffs their rights under (a) 20 U.S.C. § 1413(a)(13)(A), which provides the handicapped and their parents procedural safeguards in the evaluation and placement pro-

152. See 20 U.S.C. § 1415(b)(1)(A), 1415 (b)(2), 1415 (d) (1978). 45 C.F.R. §§ 121a.503, 508 (1977).

153. 45 C.F.R. § 121a.9 (1977).

154. Comments in the regulations indicate that questions of direct appeal to the courts, and exhaustion of remedies, will be left to the courts. 42 Fed. Reg. 42512, 65083 (1977).

155. *Id.*

156. 20 U.S.C. § 1401(b)(9) (1978).

157. C.A. No. DC 75-31-S (N.D. Miss. July 28, 1977), Commerce Clearing House ¶ 24,799 (Sept. 1977).

cess; (b) 20 U.S.C. § 1413(b)(1)(A), which requires the participating state to locate and identify all handicapped children in the state in need of special education services; (c) 20 U.S.C. § 1413(a)(13)(C), which requires that racially and culturally non-discriminatory tests and procedures be used in classifying and placing the handicapped; and (d) 20 U.S.C. § 1413(a)(13)(B), which requires that special educational programs be integrated into the normal school setting to the maximum extent appropriate. The court ordered the state defendants to file with the court and plaintiffs their Annual Program Plan for Fiscal Year 1978, recently submitted to the federal government under the Education for the Handicapped Act. Plaintiffs were then given thirty days to make suggestions or objections to the Plan "related to the relief to be granted by the court as a result of its ruling on the summary judgment motion."¹⁵⁸ The court further ruled that it would give defendants thirty days to respond to plaintiffs' suggestions or objections and then it would issue any further orders necessary for relief in the case.

Mattie establishes not only that an individual has a federal cause of action under the Education of the Handicapped Act, but also that state departments of education have the responsibility to adopt policies, monitor local school districts and effectively enforce compliance with the Act's requirements. In light of the subsequent passage of the even more stringent Education of All Handicapped Children's Act of 1975 as well as the promulgation of detailed regulations, the importance of *Mattie* should not be overlooked. The duties of the state department of education have been spelled out explicitly in these new pieces of legislation, and *Mattie* establishes that violation of these duties may be challenged in the federal courts.

The Rehabilitation Act of 1973

The Rehabilitation Act of 1973¹⁵⁹ prohibits discrimination against the handicapped in any program receiving federal assistance. Section 794, entitled "Nondiscrimination Under Federal Grants" states:

No otherwise qualified handicapped individual in the United States, as defined in section 706(6) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be sub-

158. *Id.*

159. 29 U.S.C. § 701 *et seq.* (1975).

jected to discrimination under any program or activity receiving Federal financial assistance.¹⁶⁰

In a key case interpreting the Act, *Lloyd v. Regional Transportation*,¹⁶¹ the Seventh Circuit held that § 794 created both affirmative rights to equal treatment for the handicapped and a private cause of action to sue any federally funded entity which denied them their rights. Of particular importance to this court was the fact that § 601 of the Civil Rights Act of 1964 which was held to provide a private cause of action in *Lau v. Nichols*.¹⁶² The court in *Lloyd* noted that the legislative history of § 794,¹⁶³ demonstrated that there was a conscious attempt by Congress to pattern § 794 after § 601. Congress hoped thereby to establish a governmental policy that would prohibit discrimination on the basis of handicap in federally funded programs. At least two other circuits have already followed *Lloyd* in holding that § 794 creates a private cause of action.¹⁶⁴

The plaintiffs in *Lloyd* asserted that their handicaps prohibited them from utilizing the federally financed Regional Transportation Authority in Northeastern Illinois. The law has proved to be equally successful in challenging the denial of access to a public education. In granting relief to a child suffering from spina bifida, the court in *Hairston v. Droscick*¹⁶⁵ noted:

The Federal statute (§794) proscribed discrimination against individuals in any program receiving federal financial assistance. To deny a handicapped child access to a regular public school classroom in receipt of federal financial assistance without compelling educational justification constitutes discrimination and a denial of the benefits of such program in violation of the statute.¹⁶⁶

The court went on to note that financial expense was not a sufficient justification.

And in *Mattie*,¹⁶⁷ in addition to the state-wide violations of the Education of the Handicapped Act, the court also found that two of

160. 29 U.S.C. § 794 (1975).

161. 548 F.2d 1277 (7th Cir. 1977).

162. See note 64 *supra* and accompanying text.

163. See [1974] U.S. CODE CONG. & AD. NEWS 6390.

164. Cf. *United Handicapped Fed'n v. Andre*, 558 F.2d 413 (8th Cir. 1977) (§ 794 creates affirmative duties and gives rise to a private cause of action); *Kampmeier v. Nyquest*, 553 F.2d 296 (2d Cir. 1977) (§ 794 creates standing to sue).

165. 423 F. Supp. 180 (S.D.W. V. 1976).

166. *Id.* at 184.

167. See note 157 *supra* and accompanying text.

the school districts had violated § 794 of the Rehabilitation Act by failing to provide necessary educational services to handicapped students. Granting plaintiffs' motion for summary judgment, the court found the students were "otherwise qualified handicapped individuals" within the definition of § 794, that the school districts received federal financial assistance, and that school officials discriminated against the students solely because of their respective handicaps. The court ordered school officials to individually test and evaluate the students within twenty days to determine the educational needs of each and to provide within thirty days of the completion of the evaluation appropriate educational services.

The court in *Mattie* based its decision in part on newly promulgated regulations that clarify the applicability of the Act to handicapped children, including the learning disabled.¹⁶⁸ Subpart D of the regulations deals explicitly with elementary and secondary education. Section 84.3 defines a handicapped person as one suffering from a physical or mental impairment, "including specific learning disabilities." Section 84.4 defines discrimination as the "failure to provide a qualified handicapped person with an aid, benefit or service that is not as effective as that provided to others." More specifically, the regulations require a recipient of federal funds to undertake to identify and locate every qualified handicapped person residing in its jurisdiction who is not receiving an education¹⁶⁹ and to provide each with an appropriate education designed to meet his needs "as adequately as the needs of non-handicapped persons are met."¹⁷⁰ The regulations took effect June 3, 1977, and the judge in *Mattie* viewed this as the deadline for providing equal educational opportunity. The decision probably went too far in applying this deadline to handicapped children presently in school challenging the lack or inadequacy of special education programs since the regulations provide that the September, 1978 deadline of the E.A.H.C. Act controls except with regard to individuals *totally* excluded from all educational services.¹⁷¹ In any event the Act is critical for three reasons: (1) at least some circuits have already found that the Act creates affirmative rights and a private cause of action; (2) it provides a liberal definition of what constitutes an appropriate education and (3) it applies mandatorily to all school agencies receiving

168. 42 Fed. Reg. 22676 *et seq.* (1977) (to be codified as 45 C.F.R. Part 84). See *Section 504 and the New Civil Rights Mandates*, AMICUS Vol. 2, no. 5, p. 21 (1977).

169. 42 Fed. Reg. 22682 (1977) (to be codified as 45 C.F.R. § 84.32).

170. *Id.* at § 84.33 (1977).

171. *Id.* at § 84.33(d) (1977).

federal funding of any kind (unlike the E.A.H.C.A. which is limited to states "desiring to participate in the program").¹⁷² In light of the fact that practically all school districts receive funding in the form of school lunch programs or other types of grants, the reach of this Act is obvious.

THE FUTURE ROLE OF THE COURTS

Both the E.A.H.C.A. and the Rehabilitation Act, together with their regulations, spell out in detail what is encompassed in the right to a minimally adequate education for the handicapped child. Guidelines are now available both to the advocate and to the courts in fashioning an appropriate relief for these children. The major role of the courts will be to assure that state recipients of federal funds are indeed meeting their part of the bargain by providing all handicapped children with an appropriate education. The fact that new progressive laws are on the books, and that a September, 1978 deadline is fast approaching, unfortunately does not assure compliance. Despite the passage of literally dozens of state special education acts over the past decade, four million handicapped children still remained unserved in 1975.¹⁷³ As several federal courts have noted, the creation of a statute does not moot a lawsuit unless there is good faith implementation.¹⁷⁴ Thus, for example, a recent study in Maine noted that despite progressive state and federal legislation, the number of unserved physically and emotionally handicapped children remains at one to ten per cent in several counties.¹⁷⁵ Similarly in Indiana, despite the existence of a 1969 Special Education Act mandating that each county develop a program serving all handicapped children by 1973,¹⁷⁶ 128 of the state's 305 school corporations had no approved program for learning disabled children as of the 1976-1977 school year.¹⁷⁷ In the 1976 Plan submitted to the U.S. Commissioner of Education to secure federal funding, Indiana represented that by the 1977-1978 school year, 100 per cent of all learning disabled children would be served.¹⁷⁸ Then in its 1977

172. 20 U.S.C. § 1413 (1978). The E.A.H.C. Act probably will soon encompass all states. See note 135 *supra*.

173. See [1975] U.S. CODE CONG. & AD. NEWS 1432.

174. *Federick L. v. Thomas*, 408 F. Supp. 832, 837 (E.D. Pa. 1976); *Panitch v. Wisconsin*, 371 F. Supp. 955, 959 (E.D. Wis. 1974).

175. Benjamin and Blair, *Implementation of Education Laws Relating to Exceptional Children: The Maine Experience*, 11 CLEARINGHOUSE REVIEW 449 (1977).

176. IND. CODE § 20-1-6-14 (1975).

177. *Answers to Interrogatories*, *supra* note 30.

178. Indiana State Plan for Fiscal Year 1976 under Part B of the Handicapped Act.

Plan, the state reduced its figure to a promise that fifty per cent of all learning disabled children would be accommodated.¹⁷⁹ In reality, using the state's very conservative one per cent incidence rate, only twenty-eight per cent of all learning disabled children were served during the 1975-1976 school year¹⁸⁰ and that increased to only about thirty-three per cent during the 1976-1977 school year. The role of the court will be to see that promises are kept and that delays do not become inordinate.

The September, 1978 deadline is fast approaching, but it is clearly unlikely that the date will really mark the end of the struggle. Several loopholes remain in the Education for All Handicapped Children Act. Although it is perhaps unrealistic to demand that every learning disabled child be located, evaluated and placed by September, timetables for interim goals should be set and a court could order recalcitrant school districts to initiate programs for these children. Unfortunately, history has shown that schools faced with an individual complaint but no program are first, unlikely to classify a child as learning disabled, and second, are highly likely to drag their feet as much as possible. Although the Act does create an administrative appeal process as well as judicial remedies,¹⁸¹ both time and cost factors as well as lack of knowledge on the part of the parents militate against the effectiveness of these forms of relief. The Act does not provide for the appointment of counsel, litigation expenses or the costs of procuring outside evaluations to contest the school's action. Nor is there a damage provision anywhere in the Act. Furthermore, the Act provides that in the interim, the child remains in his current educational placement.¹⁸² Although designed to guarantee that no child is removed from the classroom and "labeled" before a full hearing is conducted, the provision constitutes a major stumbling block for the parent of the learning disabled child seeking placement in a special class or other related services. Since learning disabilities are difficult to detect, it is often concluded that these children are slow, immature and undisciplined and that their problems can be cured by holding them back a year in school. In the meantime, a child may suffer irreparable harm awaiting resolution of a complaint. What is even more likely is that few complaints will be initiated and even fewer pursued. Again the best guarantee for

179. Indiana State Plan for Fiscal Year 1977 under Part B of the Handicapped Act.

180. *Answers to Interrogatories*, *supra* note 30.

181. 20 U.S.C. § 1415(d)(i) and (b)(1)(A) (1978).

182. 20 U.S.C. § 1415(e)(3) (1978).

these children would be the assurance that each school district offers a complete learning disabilities program.

Another problem with the Act is the lack of guidelines as to how a state is to satisfy its guarantee that the handicapped are identified and located.¹⁸³ The problems of the learning disabled will remain unsolved unless methods are developed to detect this long-ignored group of children. Despite the use of teacher and parent referrals of potentially learning disabled children, the court in *Frederick L.* concluded that the only effective way to locate learning disabled children would be through mandatory screening and testing of all students performing poorly on standardized achievement tests.¹⁸⁴ Neither the Act nor any of the regulations requires this type of approach.

In addition to these loopholes, the big problem with the Act is enforcement. The Act does contain some provisions to permit public input and to oversee a state agency's compliance. In addition to requiring public hearings before a state plan is submitted or state programs and policies are adopted,¹⁸⁵ an advisory panel consisting of handicapped individuals, parents, educators and administrators appointed by the governor is to be delegated the tasks of gathering data, proposing needed changes, and keeping the public informed.¹⁸⁶ The panel, however, has no enforcement authority.¹⁸⁷ And the only other sanction—the termination of federal funds either to the state agency or to a non-complying local school district—is both a drastic and unrealistic sanction.¹⁸⁸

Similarly with regard to the Rehabilitation Act, the basic problem will be enforcement. The responsibility for enforcing § 504 and its regulations lies with the HEW Office for Civil Rights. This office is also charged with the task of enforcing nondiscrimination laws, and it already has three court orders issued against it to fulfill its responsibility in other civil rights areas as well as a backlog of approximately 3,025 civil rights complaints.¹⁸⁹ Thus there is concern

183. 20 U.S.C. § 1412(2)(A)-(C) (1978).

184. See note 69 *supra*.

185. 20 U.S.C. §§ 1412 (2)(E), 1412(7) (1978).

186. 20 U.S.C. § 1413(a)(12) (1978).

187. See Krass, *The Right to Public Education for Handicapped Children: A Primer for the New Advocate*, 1976 U. ILL. L.F. 1016, 1072, 1077 (1976).

188. H.E.W. can terminate funding to non-complying states, 20 U.S.C. § 1416 (1978), and both the United States Commissioner of Education and the state educational agency have the power to terminate funding to local school districts. 20 U.S.C. § 1414(b)(2) (1978).

189. See Carroll, *NCLH Point of View*, AMICUS vol. 2, No. 5, 36-7 (1977).

that even with the long awaited promulgation of regulations, enforcement will not soon follow. The individual complainant, at least in some circuits, now has access to the federal courts via § 504; but still the effectiveness of this type of piecemeal litigation is questionable.

No doubt the greatest immediate impact of this legislation will be to bolster the dozens of right-to-education lawsuits presently pending in state and federal courts across the country. Courts added under these acts lend strong support to the claims for an adequate education for handicapped children. Much of the uncertainty as to the scope and meaning of this right has been eliminated. The states now have clearly delineated duties as far as the types of services and the procedural safeguards that they must provide to learning disabled children and their parents. If a state is in fact complying with federal law, it will have a detailed plan for the identification, evaluation and placement of learning disabled children. If it is not acting with sufficient speed and efficiency in implementing its plan, the courts should step in and mandate that it does. Only in this way can the gap between the legislative promise and the present dismal reality of these children be bridged.

