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The Handicapped Child Has a Right to an Appropriate Education

"Unlike many other animals, man does not abandon his handicapped offspring. Rather he shelters him, hopes for him, dreams for him, and loves him."¹

I. INTRODUCTION

During the 1970s proponents of the handicapped² child's right to a publicly funded education made progress in a series of landmark

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1. Roos, *Rights Litigation—A View from the Private Sector*, in U.S. DEPT OF HEALTH, EDUCATION AND WELFARE, *THE RIGHTS OF THE MENTALLY HANDICAPPED: PROCEEDINGS FROM A BI-REGIONAL CONFERENCE 33* (June 14-16, 1972).
 2. Although "handicapped" encompasses the physically, emotionally, and mentally disabled, in this comment the term will refer only to those children who are mentally handicapped because of cerebral lesions.

Throughout this discussion, the terms "handicapped" and "exceptional" are used interchangeably. In this context, an "exceptional" child is one whose learning ability is below normal. A child may also be referred to as "educationally handicapped," or as an "educable mental retardate" ("EMR"). The former category includes the child who is brain-damaged. For him, the learning processes that are influenced by the damaged area of the brain do not develop, while other skills apparently develop normally. Until his problem is properly assessed, this child cannot be educated appropriately. In today's educational jargon, he is "learning disabled." Often he is the handicapped child most neglected by the educational system, because his problem may remain forever undiagnosed or misunderstood, or both. In comparison, the EMR child learns progressively, but at a depressed rate.

The terms "mild," "moderate," "severe," and "profound," though not used in this comment, describe levels of mental retardation determined by considering both "measured intelligence" and "impairment in adaptive behavior."

Children who are classified as mildly retarded (frequently called "educable mentally retarded" by educators), although limited in their potentials for advanced academic achievement, can usually be brought by special education techniques to a state of self-sufficiency as adults. Moderately retarded children show a rate of mental development which is less than half of that normally expected, but can nevertheless learn to take care of their personal needs and perform many useful tasks in the home or in a sheltered working situation. The se-

cases.³ Despite this litigational achievement, however, the future promises increased efforts toward the goal of public education for the handicapped. These efforts may include lobbying for proper legislation⁴ to implement the court decrees and resorting to further

verely retarded can learn self-care, but their potential economic productivity is limited.

The profoundly retarded also respond to training in basic self-care, and they additionally profit from special training in such areas as behavior control, self-protection, language development, and physical mobility.

NAT'L ASS'N FOR RETARDED CHILDREN, FACTS ON MENTAL RETARDATION 4 (1971).

The following chart provides estimates of the number of retarded individuals in this country, based on age and degree of impairment. The statistics cast light on the enormity of the problem of providing services to handicapped, school-aged children.

1970 Census	All Ages	Under 21 Years
<i>General Population</i>	203.2 million	80.5 million
<i>Retarded</i>		
Profound (IQ 0-20)	92 thousand	36 thousand
About 1½ %		
Severe (IQ 20-35)	214 thousand	84 thousand
About 3½ %		
Moderate (IQ 36-52)	366 thousand	144 thousand
About 6 %		
Mild (IQ 53 +)	5.4 million +	2.1 million +
About 89% of the retarded		

Id. at 15.

3. *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971), and 343 F. Supp. 279 (E.D. Pa. 1972); *Mills v. Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972); *Diana v. State Bd. of Educ.*, Civil No. C-70 37 RFP (N.D. Cal., Jan. 7, 1970 and June 18, 1973); *Larry P. v. Riles*, 343 F. Supp. 1306 (N.D. Cal. 1972); *Stewart v. Phillips*, Civil No. 70-1199-F (D. Mass., filed Sept. 14, 1970); *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).
4. In 1971, 899 bills dealing with education for the handicapped were introduced in state legislatures; 237 were enacted into law. MENTAL HEALTH LAW PROJECT, BASIC RIGHTS OF THE MENTALLY HANDICAPPED 49 (1973).

The most notable achievement has been Tennessee's enactment of the major provisions of the Model Compulsory School Attendance Law:

It is the policy of this state to provide, and to require school districts to provide, as an integral part of free school education, special education services sufficient to meet the needs and maximize the capabilities of handicapped children. . . . This section applies to all handicapped children regardless of the schools, institutions or programs by which such children are served.

TENN. CODE ANNOT. § 49-2912 (Cum. Supp. 1975).

To the maximum extent practicable, handicapped children

litigation when judicial mandates are not implemented. However, the major challenge will lie in defining what is an appropriate education for such a child and in ensuring that he receive such an opportunity.

In focusing on what is an appropriate education, this comment discusses this newly evolving area of the law, first setting out its historical background, including the case law and statutes that in the past were interpreted as justifying the state's exclusion of handicapped children from the public school system. Next considered is the socio-legal milieu in which there has been judicial resolution of whether, under the Constitution, such exclusion could occur. Although this question has been answered, an examination of the prominent decisions is helpful in that should a state fail to bring its educational scheme for the handicapped into constitutional compliance, resort to the judiciary will be necessary and those legal arguments and analyses, which have proven successful, again will be utilized.⁵ Furthermore, lessons are to be

shall be educated along with children who do not have handicaps and shall attend regular classes. Impediments to learning and to the normal functioning of handicapped children in the regular school environment shall be overcome by the provision of special aids and services rather than by separate schooling for the handicapped [S]pecial classes, separate schooling or other removal of handicapped children from the regular educational environment, shall occur only when, and to the extent that the nature of severity of the handicap is such that education in regular classes, even with the use of supplementary aids and services, cannot be accomplished satisfactorily.

Id. § 49-2913B. This is a statutory embodiment of the concepts discussed in Section IV A *infra*.

5. Approximately 35 states have concluded, either judicially or statutorily, that educational programs for the mentally handicapped are necessary. MENTAL HEALTH LAW PROJECT, *supra* note 4, at 54. Cases in point are in various stages of litigation throughout most of the state court systems. See, e.g., *Lebanks v. Spears*, 60 F.R.D. 135 (E.D. La. 1973); *Reid v. Board of Educ.*, 453 F.2d 238 (2d Cir. 1971); *Harrison v. Michigan*, 350 F. Supp. 846 (E.D. Mich. 1972); *Case v. California*, Civil No. 101679 (Super. Ct. Riverside County, Cal., filed Jan. 7, 1972), *aff'd in part, rev'd in part*, 4 Civil 13127 (Ct. of Appeals, 4th Dist., filed July 16, 1974); *California Ass'n for the Retarded v. California State Bd. of Educ.*, Civil No. 237327 (Super. Ct., Sacramento County, Cal., filed July 27, 1973); *David P. v. State Dep't of Educ.*, Civil No. 658-826 (Super. Ct. San Francisco County, Cal., filed Apr. 9, 1973); *Uyeda v. Department of Educ.*, Civil No. 102602 (Super. Ct. Riverside County Cal., filed June 14, 1972); *Burnstein v. Board of Educ.*, Civil No. R-19266 (Super. Ct. Contra Costa County, Cal., filed Dec. 30, 1970); *Colorado Ass'n for Retarded Children v. Colorado*, Civil No. C-4620 (D. Colo., filed Dec. 22, 1972); *Florida Ass'n for Retarded Children v. State Bd. of Educ.*, Civil No. 73-250-Civ. PF (S.D. Fla., filed Feb. 5, 1973);

learned from the difficulties encountered in implementing the previous court decrees.

The major decisions in the area of education for the handicapped break down into three groupings. The first asserts the exceptional child's right to an education at public expense;⁶ the second deals with the right to treatment for the institutionalized retarded child;⁷ the last attacks improper evaluative testing procedures.⁸

The focus of the successful legal attack in the past has been on alleged violations of the equal protection and due process safeguards incorporated in federal and state constitutions. While this attack has opened the doors of the public schools to handicapped children, issues central to the definition of what is an appropriate education for them have yet to be resolved. Among these are establishing individualized testing procedures to assess children properly and thereby enable workable goals to be set for them; developing appropriate programs for these children; and providing public fund-

Kentucky Ass'n for Retarded Children v. Kentucky State Bd. of Educ., Civil No. 435 (E.D. Ky., filed Sept. 6, 1973); Marcombe v. Department of Educ., Federal No. 73-102 (M.D. La., filed 1974); Maryland Ass'n for Retarded Children v. Maryland, Equity No. 100-182-77676 (Cir. Ct., Baltimore City, Md., filed May 3, 1974); Barnett v. Goldman, Civil No. 71-3074 (S.D. Mass., filed July, 1974); Association for Mentally Ill Children v. Greenblatt, Civil No. 71-3074-J (D.C. Mass., filed Dec. 30, 1971); Donnelly v. Minnesota, Civil No. 3-72-141 (D. Minn., filed May 2, 1973); Brandt v. Nevada, Civil No. P-2779 (D. Nev., filed Dec. 22, 1972); Hamilton v. Riddle, Civil No. 72-86 (W.D.N.C., filed May 5, 1972); North Carolina Ass'n for Retarded Children, Inc. v. North Carolina, Civil No. 3050 (E.D.N.C., filed May 19, 1972); North Dakota Ass'n for Retarded Children v. Peterson, Civil No. 1196 (D.N.D., filed Nov. 28, 1972); Cuyahoga County Ass'n for Retarded Children & Adults v. Essex, Civil No. C74-587 (N.D. Ohio, filed June 28, 1974); Halderman v. Pittenger, Civil No. 74-2716 (E.D. Pa., filed Oct. 18, 1974); Rhode Island Soc'y for Autistic Children v. Board of Regents for Educ., Civil No. 5081 (D.R.I., Jan. 22, 1973); Tidewater Soc'y for Autistic Children v. Virginia, Civil No. 426-72-N (E.D. Va., Dec. 26, 1972); Panitch v. Wisconsin, Civil No. 72-C-461 (E.D. Wis., filed Aug. 14, 1972); Doe v. Board of School Directors, Civil No. 377-770 (Cir. Ct. Milwaukee County, Wis., filed Apr. 7, 1970).

6. See Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971), and 343 F. Supp. 279 (E.D. Pa. 1972); Mills v. Board of Educ., 348 F. Supp. 866 (D.D.C. 1972).
7. See Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971), and 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).
8. See Diana v. State Bd. of Educ., Civil No. C-70 37 RFP (N.D. Cal., Jan. 7, 1970 and June 18, 1973); Larry P. v. Riles, 343 F. Supp. 1306 (N.D. Cal. 1972); Stewart v. Phillips, Civil No. 70-1199-F (D. Mass., filed Sept. 14, 1970).

ing for these programs. These issues will be discussed in the final section of this comment. They are the challenge for the future.

Idealists will focus on the tremendous progress that has been made by judicial acknowledgement that handicapped children have a constitutional right to an education. Pragmatists will realize that, as in other educational litigation, the struggle has just begun. The case of *Brown v. Board of Education*⁹ serves as a beacon and a warning to advocates of the handicapped child's right to an education. Just as black children cannot be denied equal educational opportunity, so too must this right be afforded to handicapped children. Just as the mandate in *Brown* has met resistance and delay in implementation, and twenty-two years later the courts are still involved in bringing about effectuation of the *Brown* judicial concept, so too will this pattern recur as handicapped children assert their judicially acknowledged right to an education. The legal, social and educational theories discussed in this comment will figure prominently in this anticipated struggle.

II. HISTORICAL BACKGROUND

A. Justification for Exclusion

Early in our history, long before judicial acknowledgement of the importance of public education in the American democratic process, there was recognition that universal, publicly funded education would have a role in forging the national character. Accordingly, such a system was set up. Under our federalist scheme of government, education was to be regulated by state legislatures, with the only limitations on their authority to be those imposed by the Federal Constitution. In order for the system of education which evolved to function effectively and efficiently, it was thought that individual differences had to be submerged to group goals. The educator was revered and supreme in his position of authority, with no one questioning the method of instruction nor the manner in which it was carried out.

Down through the years as the value of education became increasingly more apparent, each state began to adopt constitutional provisions providing for the education of its citizenry,¹⁰ and to promulgate compulsory education statutes requiring children of certain prescribed ages to attend public school.¹¹ These same statutes

9. 347 U.S. 483 (1954).

10. See, e.g., NEB. CONST. art. I, § 4, which provides: "[I]t shall be the duty of the Legislature to pass suitable laws . . . to encourage schools and the means of instruction."

11. See, e.g., NEB. REV. STAT. §§ 79-201, -202 (Reissue 1971), which provide

which on their face conferred the benefits of education on all children, however, also explicitly denied it to some.¹² When such statutes were challenged, their validity was upheld, on the basis that the educational system could not function if it had to account for vast individual differences in children.

*Watson v. City of Cambridge*¹³ and *Beattie v. Board of Education of City of Antigo*¹⁴ were representative of the early judicial philosophy toward exceptional children. With total disregard for notions of due process, the *Watson* court held that the local school district could expel a student who displayed continued disorderly conduct either voluntarily or by reason of imbecility.¹⁵ The determination as to what was disorderly conduct was to be made by school personnel. The *Beattie* decision dealt with a child who was academically and physically capable of functioning within the school, but who was also cerebral palsied and as a result drooled uncontrollably, was slow in his speech and could not control his facial contortions. The court held that he could be excluded from school because he had a depressing and nauseating effect on the teachers and school children, stating:

The right of a child of school age to attend the public schools of this state cannot be insisted upon when its presence therein is harmful to the *best interests of the school*. This, like other individual rights, must be subordinated to the general welfare.¹⁶

that children between the ages of seven and sixteen are subject to compulsory attendance requirements, and that compulsory attendance laws do not apply to children who are physically or mentally incapacitated for the work done in school.

12. *Id.*

13. 157 Mass. 561, 32 N.E. 864 (1893).

14. 169 Wis. 231, 172 N.W. 153 (1919). In 1967, the Wisconsin Attorney General reexamined *Beattie* and reaffirmed the power of local school authorities to exclude a student. He qualified this, however, by adding that "the [school district's] obligation to provide children with a free public education does not cease upon exclusion and that other means for their education must be provided." F. WEINTRAUB, A. ABE-SON & D. BRADDOCK, *STATE LAW & EDUCATION OF HANDICAPPED CHILDREN: ISSUES & RECOMMENDATIONS* 12 (1971).

15. The Massachusetts court said of this child: "[H]e is so weak in mind as not to derive any marked benefit from instruction, and, further . . . he is troublesome to other children He is also found unable to take ordinary, decent, physical care of himself." 157 Mass. at 561, 32 N.E. at 864.

16. 169 Wis. at 233, 172 N.W. at 155 (emphasis added). The dissenting judge pointed out that there was no evidence that the boy's presence did not have a harmful effect. *Id.* at 236, 172 N.W. at 155.

The implication was that the rights of individual children to attend school were of lesser importance than the overall good of the system. Therefore, handicapped children either could be placed in special education classes, if they were available, or excluded entirely from school, whichever was better for the system.¹⁷

In years past when the economy was essentially agrarian, when society was less mobile and the family was a stable multi-generational unit with all members helping and caring for each other, the devastating impact of excluding the handicapped child from school was mitigated. Although he would be deprived of the opportunity to develop his own potential, he could be assured that there would be someone to care for him. This is not generally the situation today. Fortunately, though, changes in the nature of our society have also caused an evolution in our thinking about the individual in relation to the system, providing an atmosphere where the rights of the handicapped children to a publicly funded education may be argued successfully.

B. Socio-Legal Milieu

In the 1950s and 1960s, after the ordeal of two world wars and the internal upheaval of the Communist "witch hunt" and after the nation had experienced a period of economic prosperity, Americans began to take stock of themselves as individuals and not just as components of a system designed to effectuate a single purpose. The results of this introspection were a growing awareness and appreciation of the individual as an individual, and a concomitant assertion of the individual's personal rights.

As part of this new awareness, the heretofore disadvantaged classes (the black, the poor, the aged, the Native American, and the woman) began to assert their rights. Where public pressure was not successful, they resorted to the courts. The year 1954 marked the real beginning of this continuing struggle to gain judicial, and thereby public acceptance, of individual rights in a variety of societal contexts. *Brown v. Board of Education*, wherein the Court acknowledged the important role education played in preparing the individual for full participation in the democratic process, held that "separate but equal" educational facilities were inherently unequal.

The *Brown* decision was a precursor of *Pennsylvania Ass'n for Retarded Children v. Pennsylvania* ("P.A.R.C.")¹⁸ and *Mills v. Board*

17. In 1919, the exceptional child was segregated for the general welfare; today, his separation from the normal classroom is justified as being for his own good. Involved in this philosophy is the issue of whether it is more advantageous to students to teach them in homogeneous or heterogeneous groupings. See Section IV A *infra*.

18. 334 F. Supp. 1257 (E.D. Pa. 1971), and 343 F. Supp. 279 (E.D. Pa. 1972).

of *Education*¹⁹ in which federal courts recognized the rights of another segregated, silent and disadvantaged minority to equal educational opportunity. This minority group was composed of handicapped children.²⁰

The explanation as to why proponents of the handicapped child's right to an equal educational opportunity were so long in asserting their position²¹ is rooted in the picture of American society that herein has been painted. Such a stance could not have taken place while the individual was sublimated in importance to the system. Only when there was acceptance of the individual as an individual and when a person's worth was not viewed as correlative with the color of his skin could there begin to be acceptance of people whose speech was slow or whose gait was halting. Because of this change in stance, parents, who previously had grieved alone because of an imperfect child and who had often hidden such a child away in the back room of their homes, now began to talk about their tragedy with other similarly situated parents. This helped them to change

19. 348 F. Supp. 866 (D.D.C. 1972).

20. Until the rights of individuals were brought into sharper focus by the civil rights activists, little concern was expressed within the educational establishment about the right of children *not* to be labeled, the right of due process, and the right of a child to challenge a system that purports to be operating in his interest.

Cohen & DeYoung, *The Role of Litigation in Improvement of Programming for the Handicapped*, in *THE FIRST REVIEW OF SPECIAL EDUCATION* VOL. 2, 262 (L. Mann & D. Sabatino eds. 1973).

Handicapped children are disadvantaged not only because of their disability, but also because of their age. The assertion of their rights closely parallels the assertion of normal children's rights. The handicapped child's claim to a hearing before exclusion from school applies to the normal child as well. The right to an appropriate education, geared to individual needs, and the concomitant right to valid testing and evaluative procedures also apply to both groups.

Society's acknowledgement of the constitutional rights of children evidences an erosion of the presumption that those in positions of authority (e.g., parents, educators, the juvenile court system) act infallibly in the child's best interests. See, e.g., *In re Gault*, 387 U.S. 1 (1966).

21. According to one author, litigation increased because consumers had gained strength; they were developing expertise and were becoming more knowledgeable (parents recognized that their children were being neglected academically); and they were losing their timidity and fear of retaliation. Roos, *supra* note 1, at 35. Roos discusses four methods by which the goals of the handicapped could be reached. The preferred method would be to try to cooperate with program administrators, and then with agency and state-level administrators responsible for the programs. Should this fail, the next avenue would be legislation, with litigation as the least effective method.

their attitudes toward their problem and gave them the strength in numbers to advocate their position.²²

As was previously alluded to,²³ the educator and the school system had always assumed awesome and venerable positions vis-a-vis the lay person. For the parent of the exceptional child, the educator was especially revered and feared, as he was the only one who could help the afflicted child. To question him or what he was doing might incur his wrath and foreclose any possibility of helping the child.²⁴ However, the decades that brought increased assertion of individuality were also a period of iconoclasm. Among the gods who were challenged were the educators. With the realization that these individuals were not infallible, parents began to question the manner in which their children were or were not being educated.

Thus, there occurred a shift in responsibility for the retarded child from the professional to the more militant parent and then ultimately to the attorney and the courtroom. During the years which have been described, there grew a new breed of publicly involved and committed attorneys who were eager to take up the fight for individual liberty,²⁵ aided by the public funding of legal aid offices.

As all these undercurrents and crosscurrents met, the time was propitious to seek judicial acknowledgement of the exceptional child's right to an education.²⁶

22. Comment, *Educational Equality for the Mentally Retarded*, 23 SYRACUSE L. REV. 1141, 1162 (1972).

23. See Section II A *supra*.

24. Gilhool, *Education: An Inalienable Right*, 39 EXCEPTIONAL CHILDREN 597, 599 (1973). Professionals, however, should welcome litigation as an opportunity to advance an agenda they share with parents. *Id.* at 600. Mr. Gilhool was the attorney for the plaintiffs in P.A.R.C.

It has been said, in regard to the inability of many well-intentioned parents to deal effectively with public and private institutions, that the parent of a child in a special education class within the public school system is likely to hesitate to question the quality of the program since the threat of exclusion weighs heavily in the parents' minds. The parent is realistically aware that the cost of a private program is prohibitive and that the public program is better than that which the parent could provide at home. Similarly, a parent of a child who has been voluntarily admitted to a state institution would hesitate to challenge the quality of the care provided because the child is constantly subject to the threat of subtle—and not so subtle—retaliation.

Murdock, *Civil Rights of the Mentally Retarded: Some Critical Issues*, 48 NOTRE DAME LAWYER 133, 143 (1972).

25. Gilhool, *supra* note 24, at 600.

26. Gilhool set out the four goals he saw the exceptional child achieving through litigation: the securing of the right to an education; the creation of a new forum to enforce rights or create new ones; the focusing

III. LITIGATIONAL ACHIEVEMENTS

A. The Right to an Education

*P.A.R.C.*²⁷ and *Mills*²⁸ have established that the exceptional child has a federal constitutional right to a publicly funded education.²⁹ Even though neither decision is of appellate level, each has had dramatic impact in other states. Federal and state courts confronted by similar litigation have resolved the issue in comparable manner, and legislatures, eager to avoid such litigation in their states, have adopted statutes which incorporate the provisions and suggestions of the court decrees.

P.A.R.C. was the seminal case in this area. The plaintiffs included not only mentally retarded children who had been excluded from Pennsylvania's public schools, but also a state-wide parents' organization.³⁰ In this suit, the plaintiffs alleged that the state's compulsory education statute violated the equal protection and due process safeguards embodied in the fourteenth amendment. Although the law in question said that the state would provide a proper education for all its exceptional children, it permitted the exclusion of children who were uneducable or untrainable, and, therefore, could not benefit from a public education.³¹

of public attention on certain facts not previously known; and the helping of each citizen to redefine his notion of himself. *Id.* at 601-08. The latter two goals are of critical importance to the disadvantaged. Improvement in the handicapped child's self-identity, and an increase in the public's awareness of his problem, would seem to be essential to a meaningful improvement in the handicapped child's legal rights.

27. 334 F. Supp. 1257 (E.D. Pa. 1971), and 343 F. Supp. 279 (E.D. Pa. 1972).

28. 348 F. Supp. 866 (D.D.C. 1972).

29. An earlier decision, *Wolf v. State Legislature*, Civil No. 182646 (3d Jud. Dist., Utah, 1968) involved the exclusion from school of two trainable, mentally retarded children. Basing its decision on state law, the court concluded that education is a fundamental right.

30. The plaintiffs brought the case as a class action, a common procedure in this area of litigation.

The existence of the Association and its involvement as a motivating force in the litigation bear out the theories expressed in the preceding section. The Association was not only important in instigating the action, but also in ensuring implementation of the court's orders. Its post-litigational role involved contacting parents of retarded children and apprising them of the decision and its ramifications for each child; mounting a state-wide publicity campaign to educate the public about handicapped children and their potential as valuable citizens; and serving as a watchdog to ensure that all levels of the state educational bureaucracy were complying with the dictates of the court.

31. The statutes challenged were:

1. 24 PA. STAT. ANN. § 13-1375 (1962), which relieved the state

The equal protection argument centered on the fact that Pennsylvania was already providing a public education to most of the children in the state. Denial of such a state-conferred benefit to handicapped children was shown to have no rational basis in fact, because they were capable of being educated, albeit with a somewhat different expectation level than that of normals.³² This was established by a massive amount of incontrovertible expert testimony showing that the handicapped child can learn and benefit from a publicly funded education,³³ and that formalized education is even more critical to his learning progress than to that of a normal child.³⁴

board of education of any obligation to educate a child whom the public school psychologist certified as uneducable and untrainable. Upon such certification, the burden of caring for the child shifted to the state department of welfare, which was under no obligation to provide educational services;

2. 24 PA. STAT. ANN. § 13-1304 (1962), which allowed an indefinite postponement of admission to public schools of any child who had not attained a mental age of five;

3. 24 PA. STAT. ANN. § 13-1330 (1962), which excused from compulsory school attendance any child whom a psychologist found unable to profit therefrom;

4. 24 PA. STAT. ANN. § 13-1326 (1962), which defined the compulsory school age as eight to seventeen, and which had been used to postpone the admission of the retardate until age eight, or to eliminate him at age seventeen.

32. The court acknowledged the different achievement levels of children:

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

334 F. Supp. at 1260.

33. The consent agreement incorporated a summary of expert opinion which concluded that

all mentally retarded persons are capable of benefitting from a program of education and training; that the greatest number of retarded persons, given such education and training, are capable of achieving self-sufficiency and the remaining few, with such education and training are capable of achieving some degree of self-care; that the earlier such education and training begins, the more thoroughly and the more efficiently a mentally retarded person will benefit from it and, whether begun early or not, that a mentally retarded person can benefit at any point in his life and development from a program of education.

334 F. Supp. at 1259.

34. Gilhool, *supra* note 24, at 602. Education is essential for the exceptional child, because without it he has a higher probability of being insti-

The defendants could not and did not try to counter these arguments. The court acknowledged that there was a constitutionally colorable claim,³⁵ but did not actually get to the equal protection issue, because the case was resolved with a consent decree agreed to by the parties and approved by the court.³⁶

In regard to the due process argument advanced by the plaintiffs, the focus was on the right of parents and children to speak out on the appropriateness of educational assignments before they were made. Labelling a child as handicapped and in need of special education was analogized to stigmatization, with the school acting as a labeller.³⁷ There were two reasons advanced for this conceptualization. The first was the deprecation with which the general community looks on the handicapped person. It would have been doubly tragic for an individual to endure the scorn and disdain heaped on the handicapped if he were not really mentally debilitated but had been incorrectly labelled as such. The second reason

tutionalized than a handicapped child who has received a public education. Moreover, he also faces the possibility of early death. The figures show that there is a high death rate at institutions among children who have not been educated in self-help skills. For example, the dangers of scalding water may be foreign to such children. *Id.* at 603.

35. 343 F. Supp. at 296. It was necessary for the court to find such a claim in order for it to assume jurisdiction and enter a consent decree.

Plaintiffs do not challenge the separation of special classes for retarded children from regular classes or the proper assignment of retarded children to special classes. Rather plaintiffs question whether the state, having undertaken to provide public education to some children, . . . may deny it to plaintiffs entirely. We are satisfied that the evidence raises serious doubts (and hence a colorable claim) as to the existence of a rational basis for such exclusions.

Id. at 297.

Though the plaintiffs in *P.A.R.C.* did not challenge the segregation of handicapped children from normals, separate special education classes, like the pre-1954 schools maintained for black children, are, arguably, inherently unequal. See Section IV A *infra*.

36. A consent agreement that binds members of a class must be judicially approved. Fed. R. Civ. P. 23(e). Many subsequent similar cases have also terminated in consent decrees.
37. Experts agree that it is primarily the school which imposes the mentally retarded label and concomitant stigmatization upon children, either initially or later on through a change in educational assignment. This follows from the fact that the school constitutes the first social institution with which the child . . . comes into contact. . . .

. . . "The stigma of bearing the label 'retarded' is bad enough, but to bear the label when the placement is questionable or outright erroneous is an intolerable situation."

- 343 F. Supp. at 295 (footnotes omitted), quoting from Garrison & Hammill, *Who Are the Retarded*, EXCEPTIONAL CHILDREN, Oct. 9, 1971, at 20.

was that the very nature of the programs led to a stigmatization. While the regular public school system was built on a scheme of progressive educational achievement, special education classes were not, and thereby prevented crossover. Therefore, if a child had been incorrectly labelled, there would have been little opportunity to rectify the error.

As was the case with the equal protection argument, the *P.A.R.C.* court³⁸ did not rule on the due process issue because of the consent decree.³⁹ However, the court did find a colorable constitutional claim, relying on *Wisconsin v. Constantineau*,⁴⁰ which had successfully challenged the validity of a statute permitting the local sheriff to post the names of known drunkards at places where alcoholic beverages were sold in order to prevent further sales to these individuals. The posting was done without notice to the parties and without affording them the opportunity for a hearing. The *Constantineau* Court considered this labelling process to be a stigmatization, and as such it required procedural due process protections.⁴¹ In *Constantineau*, the individual was deprived of access to liquor. This was comparable to the pre-*P.A.R.C.* labelling of children as retarded, depriving them of needed special education. Therefore, the *P.A.R.C.* court held that these children, just as Mrs. Constantineau, required the protection afforded by a hearing which comported with due process standards so as to ensure that the label being affixed was as accurate as possible.

38. *Id.*

39. The consent decree was signed in June, 1971. Several authors, noting that the agreement on the due process issue was signed before that dealing with the equal protection claim, dated October, 1971, have concluded that the due process issue will be of more precedential importance. See Weintraub & Abeson, *Appropriate Education for all Handicapped Children: A Growing Issue*, 23 SYRACUSE L. REV. 1037, 1056 (1972); Comment, *Right to Education for Mentally Retarded Children*, 43 U.M.K.C.L. REV. 79, 94 (1974). But there is another possible explanation for the order in which the agreements were signed. Had there not been concurrence on the due process issue, the court could have abstained from ruling on the equal protection argument, either for the purpose of allowing the state courts to interpret the arguably ambiguous statute or on the basis that a clause in the state constitution could be interpreted to afford the plaintiffs the relief they sought.

40. 400 U.S. 433 (1971).

41. The only issue present here is whether the label or characterization given a person by "posting," though a mark of serious illness to some, is to others such a stigma or badge of disgrace that procedural due process requires notice and an opportunity to be heard. We agree with the district court that the private interest is such that those requirements . . . must be met.

Id. at 436.

Despite the ostensible unanimity of feeling between the parties, as evidenced by the consent decrees, the *P.A.R.C.* court took a further step, appointing two masters, a special educator,⁴² and an attorney,⁴³ to ensure the defendant's compliance with the agreement. Such action, rather than expressing unwarranted judicial cynicism, was an acknowledgement that the wrongs of many years could not be righted overnight. Reference already has been made to the fact that educators had come to revere their positions, making the orderliness and structure in their world into its own self-generating reward. To admit the previously excluded handicapped child into the public schools in large numbers and with alacrity required rapid reshuffling of facilities⁴⁴ and an equally dramatic revamping of the educator's thinking. The court was obviously concerned that the progress in effectuating the consent decree would be nonexistent without some form of court supervision.

Mills stands in contrast to *P.A.R.C.* in several ways. First, from the point of view of the legal theorist it is the more significant case because it established by court decision what had merely been agreed to by the parties in *P.A.R.C.*, namely that to exclude the exceptional child from publicly funded education, while affording such a benefit to all other children, is a denial of due process.⁴⁵ Secondly, whereas in *P.A.R.C.* the plaintiffs included only handicapped children, in *Mills* the category was broadened to encompass all children excluded from school because of mental, behavioral, emotional, or physical handicaps.⁴⁶ The result of the *Mills* widening was that

42. Herbert Goldstein, Chairman of the Special Education Department at Yeshiva University.

43. Dennis Haggerty, a Philadelphia lawyer, consultant to the President's Committee on Mental Retardation, and Co-Chairman of the ABA Subcommittee on Law and the Mentally Retarded.

44. In *P.A.R.C.*, the defendants were given 90 days to identify all mentally retarded children; instruction was to begin no later than September, 1972.

45. 348 F. Supp. at 875.

46. The plaintiffs in the class action suit were the parents and guardians of District of Columbia children who had been excluded under the following statutes:

1. D.C. CODE ANN. § 31-201 (1973), which required every person residing in the District of Columbia who had custody of a child between the ages of seven and sixteen to cause such a child to be instructed in public, private, or parochial school, or to be instructed privately;

2. D.C. CODE ANN. § 31-203 (1973), which excused a child from attending school only when, upon examination, the child was found to be unable mentally or physically to profit from attendance; provided, however, that if such examination were to show that such child could benefit from specialized instruction adapted to his needs, he would be required to attend such instruction; and

3. D.C. CODE ANN. § 31-207 (1973), which made it a criminal of-

thereafter in the District of Columbia no child could be denied his right to be educated at public expense without being assured of certain due process procedural safeguards.⁴⁷ The *Mills* court also dealt directly with a problem area that P.A.R.C. did not have to consider. Admitting the previously excluded children into the public school system, properly evaluating or reevaluating them, hiring competent personnel and finding appropriate facilities to handle this influx required a tremendous expenditure of public funds. The Pennsylvania defendants did not put forth insufficient funding as a defense, but the *Mills* defendants did, along with an allegation that because of such funding problems, the system would be unable to furnish services to *both* normal and exceptional children. The court found this argument less than persuasive,⁴⁸ and held that because funds

fense for a parent to fail to comply with § 31-201.

After referring to the statutes, the court said:

The Court need not belabor the fact that requiring parents to see that their children attend school under pain of criminal penalties presupposes that an educational opportunity will be made available to the children. The Board of Education is required to make such opportunity available. . . .

Thus the Board of Education has an obligation to provide whatever specialized instruction that will benefit the child. By failing to provide plaintiffs and their class the publicly supported specialized education to which they are entitled, the Board of Education violates the above statutes and its own regulations.

348 F. Supp. at 874.

47. See *Goss v. Lopez*, 419 U.S. 565 (1975); *Wood v. Strickland*, 420 U.S. 308 (1975). In *Goss* and *Wood*, the Supreme Court took additional steps to protect children threatened with imminent exclusion from public school, and to punish school administrators and personnel who exceeded their authority and violated the civil rights of students in exclusion procedures against them.

48. The defendants are required . . . to provide a publicly-supported education for these "exceptional" children. Their failure to fulfill this clear duty to include and retain these children in the public school system, or otherwise provide them with publicly-supported education, . . . cannot be excused by the claim that there are insufficient funds. In *Goldberg v. Kelly* . . . the Supreme Court . . . held that *Constitutional rights must be afforded citizens despite the greater expense involved*. . . . Similarly the District of Columbia's interest in educating the excluded children clearly must outweigh its interest in preserving its financial resources. If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system then the *available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly-supported education consistent with his needs and abilities to benefit therefrom*. 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.

were available to educate normal children, they had to be spent equitably, so as not to exclude any child from an education.⁴⁹

Despite its legal significance, the *Mills* situation presented implementation problems. Unlike *P.A.R.C.*, in which a state-wide organization of parents acted as the moving force for the litigation and as the overseer of subsequent compliance, in *Mills* the prime movers for the action were Legal Aid attorneys in Washington, D.C. After the litigational success in *Mills*, there was no strong parental force to ensure compliance with the court's judgment. To compound the problem further, the *Mills* court, unlike the one in *P.A.R.C.*, did not order the appointment of court masters. However, it did indicate that it would take such action if the district delayed in implementing the decree.⁵⁰ Arguably, the court followed this procedure be-

348 F. Supp. at 876 (emphasis added).

One author has argued that in rejecting the defense of insufficient funds, the *Mills* court seemed to consider education to be a fundamental right—that had no fundamental right or suspect class been involved, an insufficiency of funds would have been a valid defense. He suggests that the *Mills* court might reach a different conclusion today in view of *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1 (1973). See Comment, *supra* note 39, at 85-86. But see notes 51-62 *infra* and accompanying text.

A court decree may be ineffective if funds for the program it orders are not appropriated. In *Maryland Ass'n for Retarded Children v. Maryland*, Equity No. 77676 (Baltimore County Cir. Ct. 1974), a case tried in state court on issues of state law (unlike *Mills* and *P.A.R.C.*), a Maryland court held that each child was entitled to a free public education to be provided either inside the public school system or in a nonpublic facility. Implementation of the *P.A.R.C.* decree, however, was entirely dependent upon funding of the special education program by the Maryland Legislature in 1975. Comment, *A Procedural Guide-line for Implementing the Right to Free Public Education for Handicapped Children*, 4 BALTIMORE L. REV. 136, 141 (1974).

49. The school board persuaded the *Mills* court not to appoint a master, by submitting to the court a plan to identify exceptional children and to provide for their publicly supported education. The court said:

Despite the defendants' failure to abide by the provisions of the Court's previous orders in this case and despite the defendants' continuing failure to provide an education for these children, the Court is reluctant to arrogate to itself the responsibility of administering this or any other aspect of the Public School System of the District of Columbia through the vehicle of a special master. Nevertheless, inaction or delay on the part of the defendants, or failure by the defendants to implement the judgment and decree herein within the time specified therein will result in the immediate appointment of a special master to oversee and direct such implementation under direction of this Court.

348 F. Supp. at 877.

50. For an extensive examination of the problems in implementing the *P.A.R.C.* decree and the *Mills* decision see Kirp, Kuriloff & Buss, *Legal*

cause the school system involved was confined to a small area, whereas the Pennsylvania system spanned an entire state. Whether court masters would have made a difference in effectuating *Mills* is problematic. It is sufficient to note that promulgating the new educational mandates and ensuring compliance with them was not accomplished with any great degree of finesse.

Despite the seeming resolution of the issue of the handicapped child's right to a publicly funded education, the recent Supreme Court case, *San Antonio Independent School District v. Rodriguez*,⁵¹ has injected some uncertainty into the area.⁵² There has been com-

Mandates and Organizational Change, in ISSUES IN THE CLASSIFICATION OF CHILDREN VOL. II (N. Hobbs ed. 1975); Kirp, Buss & Kuriloff, *Legal Reform of Special Education, Empirical Studies and Procedural Proposals*, 62 CALIF. L. REV. 40 (1974). Based on their study, the authors arrived at the following conclusions: Legal mandates are not self-fulfilling, but must rely on others for implementation; the mandates most readily implemented are those requiring a minimal amount of organizational change; resistance to such mandates comes not so much from resentfulness and malevolence as from a perceived threat to current institutional and social structure and to people functioning comfortably within the structure.

They further concluded that the following elements are necessary to achieve the goals of legal change and full implementation: Intense and lasting pressure on the appropriate agencies and departments together with systematic incentives for them to comply; court-appointed overseers to help direct and encourage implementation through to completion; provision of the resources called for by the mandate, i.e., money and personnel; strong commitment by institutional administrators—a commitment made generally only when administrators are assured that the needs of their institutions have not been overlooked or underestimated, but have been taken into consideration in the creation of the orders they must implement.

51. 411 U.S. 1 (1973). For an extensive analysis of the holding in *Rodriguez* see Comment, *San Antonio Independent School District v. Rodriguez: A Study of Alternatives Open to State Courts*, 8 U. SAN FRANCISCO L. REV. 90 (1973).

In *Rodriguez*, the residents of the Edgewood district of San Antonio challenged the constitutionality of Texas's public school financing system, which, relying heavily on local property taxation, resulted in unequal per-pupil expenditures. Under this scheme, the Edgewood district, taxing itself at a rate of \$1.05 per \$100 of assessed valuation, could raise only \$356 per pupil, whereas Alamo Heights, a more affluent section of the city, could tax itself at \$.85 per \$100 of valuation, and raise \$594. 411 U.S. at 12-13.

52. The defendants in a recent right to education case, *Colorado Ass'n for Retarded Children v. Colorado*, Civil No. C-4620 (D. Colo., filed Dec. 22, 1972), moved to dismiss on the grounds that *Rodriguez* held that there is no right to education protected by the Constitution. The court denied the motion, distinguishing *Rodriguez* as follows:

1. The discrimination in *Rodriguez* was only relative, since all those children received some program of education; in this case, how-

mentary⁵³ speculating on the impact *Rodriguez* will have on future litigation in which exceptional children assert that their exclusion from a public school system is a denial of equal protection.⁵⁴

The consternation generated by *Rodriguez* centers around the Court's holding that education, though important to the individual's ability to function effectively in a democratic society, does not rise to the level of a fundamental interest, and, therefore, will not trigger the strict scrutiny test. Such concern seems groundless because *P.A.R.C.* and *Mills*, while not containing an extensive equal protection analysis, appear to have relied on the rational basis test.⁵⁵ In these cases, the two possible justifications for denying the exceptional child a public education were the factual assertion that they were uneducable (*P.A.R.C.*) and the legal defense that there were insufficient funds to support such an expansive program of education (*Mills*). Both were rejected by their respective courts and there is nothing to indicate that other courts would not reach similar conclusions. In addition, because the basis for the substantive claim to education usually lies in a state law right, as well as the equal protection clause, and because the procedural claim relies on the due process clause, plaintiffs do not have to be concerned with

ever, the plaintiffs experienced a total deprivation under the defendant's policies;

2. The handicapped possess special characteristics that warrant strict inspection of the exclusionary practices that were not present in *Rodriguez*;

3. Recent data demonstrate that all children can benefit from educational programs, and, therefore, defendants can show no rational relationship between their state constitutional purpose to educate all children and their policy of excluding the handicapped.

53. See Diamond & Reed, *Rodriguez and Retarded Children*, 2 J.L. & EDUC. 476 (1973); Casey, *The Supreme Court and the Suspect Class*, 40 EXCEPTIONAL CHILDREN 119 (1973).

54. Some originally feared that *Rodriguez* evidenced a conservative Court's intention to cease judicial intervention in public schooling. Such has not proved to be the case. See *Goss v. Lopez*, 419 U.S. 565 (1975); *Wood v. Strickland*, 420 U.S. 308 (1975). Based on Justice Powell's dictum in *Rodriguez*, however, there is reason to believe that the Court will not allow itself to become embroiled in more complex educational problems:

[D]ifficult questions of educational policy . . . [lie in an] area in which this court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels.

411 U.S. at 42. Often, state conduct is so grossly improper that deferral to educational expertise is unnecessary.

55. Under the rational basis test, the plaintiff has the burden of showing that the classification created by the state is totally arbitrary. See generally *Dandridge v. Williams*, 397 U.S. 471 (1970); *McGowan v. Maryland*, 366 U.S. 420 (1961).

which federal equal protection test a court will apply. The issue instead can be resolved on a state-by-state basis relying on the equal protection clause found in most state constitutions.⁵⁶

Concern over *Rodriguez's* effect on future litigation in the mold of *P.A.R.C.* and *Mills* is further minimized because close inspection shows that the *Rodriguez* Court's reasoning is inapplicable to the problem presented by retarded children excluded from the public school system. The facts in *Rodriguez* show that a basic education was furnished to all children. The controversy centered around the fact that the per pupil amount of money spent for this education varied from school district to school district because the Texas method of school financing was based on the local property tax.⁵⁷

56. The issue in *Rodriguez*, school financing, could be decided on state grounds with a different result. Prior to *Rodriguez*, in *Serrano v. Priest*, 5 Cal. 3d 584, 96 Cal. Rptr. 601, 487 P.2d 1241 (1971), the California Supreme Court had ruled that California's system of school financing, similar to Texas's, was unconstitutional. Arguably, *Rodriguez* did not overrule *Serrano*, since the allegations in *Serrano* were based on both state and federal constitutional rights. Thus, the court said, "[O]ur analysis of plaintiffs' federal equal protection contention is also applicable to their claim under these state constitutional provisions." *Id.* at 596 n.11, 96 Cal. Rptr. at 609 n.11, 487 P.2d at 1249 n.11. The state constitutional provision that the California Supreme Court relied on in *Serrano* was the privileges and immunities section, which had in previous cases been determined to be the equivalent of the federal equal protection clause.

Subsequent cases, most notably *Robinson v. Cahill*, 62 N.J. 473, 303 A.2d 273 (1973), and *Milliken v. Green*, 389 Mich. 1, 203 N.W.2d 457 (1973), have held such financing systems to be unconstitutional under state constitutional provisions. In *Robinson*, the court, found in a constitutional provision for a "thorough and efficient" system of free public schools, a requirement that all children receive a qualitatively comparable education. 62 N.J. at 496, 303 A.2d at 285. Furthermore, the court approved dollar input as the criterion for measuring constitutional compliance. Whereas the *Rodriguez* court wanted the plaintiffs to make an affirmative showing of the direct correlation between financial input and educational results, *Robinson* put the burden on the defendants to show another "viable criterion for measuring compliance with the constitutional mandate." *Id.* at 515-16, 303 A.2d at 295. Barring such a showing, the dollar input scale would be retained, and the state's responsibility to provide education for all its citizens would require equal appropriation of funds. Such a scheme can work against the handicapped child who requires a greater appropriation for his education.

57. The plaintiffs failed to show any correlation between the amount of money spent and the quality of the education received. The *Rodriguez* Court noted:

On even the most basic questions in this area, the scholars and educational experts are divided. Indeed, one of the hottest sources of controversy concerns the extent to which there is

Because a fundamental interest was not involved, the Court used the rational basis test and found that such a financing scheme was rationally related to a legitimate state interest in local control and involvement in the public education process.⁵⁸ The situation confronting handicapped children is different because education is being *totally* denied to a certain class of children. Such total denial is not founded on any rational basis once it has been shown that such a child can benefit from an education.⁵⁹

In *Rodriguez*, the plaintiffs tried to invoke the strict scrutiny test by arguing that wealth was a suspect class. The Court rejected this allegation because the plaintiffs had not proven that a definable class based on wealth, or lack thereof, existed.⁶⁰ Furthermore, even assuming the existence of such a class, there was no equal protection violation unless the class was totally excluded from the important benefit in question. In this case, the poor did not suffer total exclusion but were treated with less than exact equality.⁶¹

a demonstrable correlation between educational expenditures and the quality of education

411 U.S. at 42-43 (footnote omitted).

58. The Court also considered the pervasiveness of the method it was being asked to overturn. With the exception of Hawaii, which had only one state-wide district, and, therefore, no interdistrict inequities, every state used the Texas system. The Court was reluctant to discard such a pervasive system in favor of an untried method that might also prove to be discriminatory. Further influencing the Court was the tradition of deferring to state legislatures on matters of local taxation.
59. If the schooling provided is completely inappropriate to the child's needs, it may be argued that an education has been denied him.
60. However described, it is clear that appellee's suit asks this Court to extend its most exacting scrutiny to review a system that allegedly discriminates against a large, diverse, and amorphous class, unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts. The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.

411 U.S. at 28 (footnote omitted).

With handicapped children who are totally excluded from school, wealth may define a suspect class, since it may determine whether or not the child will receive any education at all. Wealthy parents will be able to afford private schools, while handicapped children of poor families will be denied schooling.

61. The Court referred to *Griffin v. Illinois*, 351 U.S. 12 (1956), and *Douglas v. California*, 372 U.S. 353 (1963), wherein the poor, unable to afford a transcript or a lawyer, were totally denied a criminal appeal.

The retarded, unlike the poor in *Rodriguez*, do constitute a clearly definable class, one which has been saddled with disabilities, subjected to a history of purposeful unequal treatment and relegated to a position of political powerlessness which calls for protection. For this reason, if it were necessary, the strict scrutiny test could be invoked. It could also be called upon because, with the exceptional child, the issue is not the quality or adequacy of the education but the total lack of it. The denial of education could determine whether education rises to the level of a fundamental interest.⁶² Access to education may be a fundamental right but the *Rodriguez* Court did not have to decide this because it was not faced with the situation in which there was total deprivation of an education.

The Court indicated that it had never been concerned with the relative qualities of appointed and retained counsel; all that was constitutionally required was that the poor be given the minimum benefit necessary.

This emphasis on "minimal" may indicate that even if the plaintiffs had shown a correlation between funding and educational quality, the Court would not have invalidated the financing system. Language in the opinion, however, seems to imply the contrary:

Neither appellees nor the District Court addressed the fact that, unlike each of the foregoing cases, lack of personal resources has not occasioned an absolute deprivation of the desired benefit. The argument here is not that children in districts having relatively low assessable values are receiving no public education; rather, it is that they are receiving a poorer quality education than that available to children in districts having more assessable wealth. . . . [A] sufficient answer to appellees' argument is that, at least when wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages. . . . The State repeatedly asserted in its briefs . . . that . . . it now assures "every child in every school district an adequate education." No proof was offered at trial persuasively discrediting or refuting the State's assertion.

411 U.S. at 23-24 (emphasis added) (footnotes omitted).

62. Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to a meaningful exercise of either right [the rights to vote and to enjoy first amendment freedoms], we have no indication that the present levels of educational expenditure in Texas provide an education that falls short. Whatever merit appellees' argument might have if a State 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.

411 U.S. at 36-37.

B. The Right to Treatment

P.A.R.C., Mills and the state cases⁶³ currently being litigated have established and are affirming that the exceptional child has a right to be educated at public expense. The educational process usually takes place in the public schools; however, they are not and need not be the exclusive locus for educating. Some states have legislative schemes which permit use of public funds to educate the handicapped in private schools, offering programs suited to the child's needs when such programs are not offered in public school settings.⁶⁴ But, there is still a large number of children, the institutionalized handicapped children, who are receiving no form of publicly funded education. They have been placed in state facilities because of the profoundness of their handicap or the degree of care they require, or because in the pre-*P.A.R.C.-Mills* situation there was often no other place where such children could get even a semblance of training. Conditions in the institutions for the retarded have been deplorable and the training the children have received has been minimal. Therefore, such facilities cannot be conceptualized as an alternative educational setting.⁶⁵ Placement in such a location was custodial and comparable to incarceration, often of life-long duration.

*Wyatt v. Stickney*⁶⁶ was the initial case to establish that an in-

63. See cases cited note 5 *supra*.

64. See note 149 and accompanying text *infra*.

65. If community-based educational facilities existed, resort to state institutions would not be necessary. Such state facilities can be viewed as society's warehouses for its defective products. Usually located in rural areas, they often leave inmates far away from educational facilities.

The *Wyatt* court has been criticized for its failure to consider community resources as an alternative to residential care. Burt, *Judicial Action to Aid the Retarded*, in *ISSUES IN THE CLASSIFICATION OF CHILDREN* VOL. II, 312 (N. Hobbs ed. 1975).

66. 325 F. Supp. 781 (M.D. Ala. 1971), and 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).

In addition to being the first right to treatment case in the area of mental retardation, *Wyatt* is unique in that the court awarded the plaintiffs \$36,754 in attorneys' fees under the private attorney general concept. In so doing, the court said,

Veritably, it is no overstatement to assert that all of Alabama's citizens have profited and will continue to profit from this litigation. So prevalent are mental disorders in our society that no family is immune from their perilous incursion. Consequently, the availability of institutions capable of dealing successfully with such disorders is essential, and, of course, in the best interests of all Alabamians.

344 F. Supp. at 409. The prospect of further fee awards has, however,

voluntarily committed⁶⁷ mentally retarded individual is constitutionally entitled to adequate habilitation. Although it was a class action dealing with handicapped children in a state facility, its theoretical basis was grounded in a right to treatment case that arose in a criminal setting and dealt with a single individual. In *Rouse v. Cameron*,⁶⁸ the plaintiff had been charged with carrying a dangerous weapon, a misdemeanor punishable by a one year maximum sentence. He was found not guilty because of insanity and was committed to a mental hospital. At the time the habeas corpus petition was filed, he had been institutionalized for more than four years. The court said that:

The principal issues raised by this appeal are whether a person involuntarily committed to a mental hospital on being acquitted of an offense by reason of insanity has a right to treatment that is cognizable in habeas corpus and if so, how violation of the right may be established.

*The purpose of involuntary hospitalization is treatment, not punishment. . . . Absent treatment, the hospital is "transform[ed] . . . into a penitentiary where one could be held indefinitely for no convicted offense, and this even though the offense of which he was previously acquitted because of doubt as to his sanity might not have been one of the more serious felonies" or might have been, as it was here, a misdemeanor.*⁶⁹

been foreclosed by the recent Supreme Court decision in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975).

67. The children at Partlow had been involuntarily committed under Alabama law. 344 F. Supp. at 390 n.5. It may be argued that, in the usual situation, retarded children are not involuntarily committed, and that institutionalization is chosen in order to ensure proper care of the child. Realistically, however, the choice is often an involuntary one, made often when there is no other way for the parents to provide the child with any meaningful care.

Inherent in the concept of voluntary action is a free choice between alternatives—at least the *opportunity* to consider alternate courses of action. If there is only one place to go—if real treatment and placement alternatives do not exist for the mentally handicapped—then we are only pretending that there can be "voluntary" patients.

Bazelon, *The Judicial Process—A Tool for Reform*, in *THE RIGHTS OF THE MENTALLY HANDICAPPED*, *supra* note 1, at 11.

But see Burt, *supra* note 65, in which the author gives little credence to this position, criticizes the *Wyatt* decision, and questions *Wyatt's* precedential value. Burt notes that the right to treatment for adults has been recognized in cases of active detention by the state. See *Rouse v. Cameron*, 372 F.2d 451 (1966). The institutionalization of the child, however, is not analogous where he has not actually been involuntarily committed, as was the case in *Wyatt*.

68. 373 F.2d 451 (D.C. Cir. 1966).

69. *Id.* at 452-53 (emphasis added) (footnotes omitted), quoting from *Ragsdale v. Overholser*, 281 F.2d 943, 950 (D.C. Cir. 1960) (Fahy, J., concurring).

Because the rationale for confinement in a hospital was the need for treatment, failure to provide it raised the constitutional issues of due process, equal protection, and cruel and unusual punishment. However, the court did not deal with these but instead based its holding on existing statutory law.⁷⁰

In *Wyatt*, however, deprivation of treatment rose to the level of a constitutional violation,⁷¹ because without habilitation there was no constitutional justification for committing such a person. Habilitation, as defined by this court, was:

[T]he process by which the staff of the institution assists the resident to acquire and maintain those life skills which enable him to cope more effectively with the demands of his own person and of his environment and to raise the level of his physical, mental, and social efficiency. Habilitation includes but is not limited to programs of formal, structured education and treatment.⁷²

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70. "A person hospitalized in a public hospital for mental illness shall, during his hospitalization, be entitled to medical and psychiatric care and treatment." D.C. CODE ANN. § 21-562 (1967).

The District of Columbia's statutory right to treatment may be summarized as follows:

1. The hospital need not show that the treatment will cure or improve him but only that there is a bona fide effort to do so. 2. The effort must be to provide treatment which is adequate in light of present knowledge, although the possibility of better treatment does not necessarily prove that the one provided is unsuitable or inadequate. 3. Initial and periodic inquiries must be made into the needs and conditions of the patient with a view to providing suitable treatment for him, and to insuring that the program provided is suited to his particular needs.

When, in the statutory summary, "school" is substituted for "hospital," "education" for "treatment," and "student" for "patient," a comprehensive definition of the right to an effective education is formulated.

71. [A]bsent treatment, the hospital is transformed "into a penitentiary where one could be held indefinitely for no convicted offense." . . . The purpose of involuntary hospitalization for treatment purposes is *treatment* and not mere custodial care or punishment. This is the only justification, from a constitutional standpoint, that allows civil commitments to mental institutions. . . .

. . . . To deprive any citizen of his or her liberty upon the altruistic theory that confinement is for human therapeutic reasons and then fail to provide adequate treatment violates the very fundamentals of due process.

325 F. Supp. at 784-85 quoting from *Ragsdale v. Overholser*, 281 F.2d 943, 950 (1960) (Fahy, J., concurring).

72. 344 F. Supp. at 395. By so defining "habilitation" the court facilitated the argument that the state must afford to handicapped children opportunities for cognitive as well as social growth, because it offers these opportunities (called "education") to other children. See Burt, *supra* note 65, at 300.

By conceiving of "habilitation" as training to enable the individual to cope with his environment,⁷³ the court was closely approximating the definition of "education" as adopted by the courts in *Brown* and *P.A.R.C.* When *Wyatt* is read with the right to education cases, it is established that the state is responsible for the educational care of all retarded children, no matter what their degree of retardation or physical debility, and no matter where they are living, whether at home or in an institution.

In future years, as more and more exceptional children are educated within the public school system, the need for facilities like *Wyatt's* Partlow will diminish. Militating against the facilities' continued existence in their present state are the judicial and educational mandates that children must be treated in the least restrictive setting.⁷⁴ This approach is therapeutically valid,⁷⁵ because even good institutionalization leads to deterioration and makes it more difficult for the individual to cope with the outside world.⁷⁶ Perhaps in recognition of this trend, *Wyatt* set standards⁷⁷ which required formulation of post-institutional plans for each resident of a state facility. The plans were to be based on individual diagnostic evaluations and were to embody professionally approved principles of normalization and the constitutional principle of the least restrictive alternative.⁷⁸ In addition, the court objectively set measurable and judicially enforceable standards for what constituted adequate treatment. However, as in *Mills* and *P.A.R.C.*, the changes required by the *Wyatt* court in order to make conditions at Partlow constitutionally acceptable involved enormous fiscal and personnel demands, among them being the hiring of 300 additional personnel within thirty days. Adding to the difficulty in implementing *Wyatt*

73. Emphasis upon this aspect of education will have an impact on evaluative techniques used to measure the child's intellectual ability. See Section IV A *infra*.

74. Residents shall have a right to the least restrictive conditions necessary to achieve the purposes of habilitation. To this end, the institution shall make every attempt to move residents from (1) more to less structured living; (2) larger to smaller facilities; (3) larger to smaller living units; (4) group to individual residence; (5) segregated from the community to integrated into the community living; (6) dependent to independent living.

344 F. Supp. at 396. This scheme is comparable to the Cascade System described in Section IV A *infra*. See also note 32 *supra*.

75. It is also fiscally prudent. See Section IV C *infra*.

76. COUNCIL FOR EXCEPTIONAL CHILDREN, *LEGAL CHANGE FOR THE HANDICAPPED THROUGH LITIGATION* (A. Abeson ed. 1973).

77. The court considered the right to treatment to be sufficiently important to permit it to inquire into the issue of adequacy of treatment.

78. 344 F. Supp. at 396.

was the potential bureaucratic bickering between the Department of Welfare, which operated Partlow, and the Department of Education, the agency most familiar with proper programs to be used at the state facility.

As *Wyatt* demonstrated, there are no easy answers to the problems in this or other cases. However, exposure of the difficulties serves to keep lay and professional advocates alert. Courts may rule on legal theory, but implementation is a slow process, requiring constant vigilance by lay people and experts to ensure compliance.

C. Challenge to Testing Procedures

The court in *P.A.R.C.* evidenced its concern with the due process problems that confront handicapped children,⁷⁹ such as providing notice and a hearing before a child is placed in a special education class or designated as being in need of specialized training. Due process also requires periodic reevaluations and additional notice and hearing requirements before the child is transferred into or out of special education placement. All these intricate protections are designed to keep the system "honest" and insure that placement has a valid basis in fact.

Once it is conceded that handicapped children are educable, and, therefore, do have a right to a public education already afforded to other children, the primary concern of educators, parents and the courts should be that these children receive an appropriate education. In the long run, appropriateness is dependent upon development of meaningful educational programs, but initially it is predicated upon proper evaluative techniques. Developing such procedures is the task for the psychologist, with encouragement from the courts.

A common psychologist's and educator's tool in the past has been the I.Q. test. However, I.Q. tests increasingly have been under attack in the courts⁸⁰ by children of ethnic, cultural, or socio-economic

79. See notes 37-41 and accompanying text *supra*.

80. I.Q. tests, as the determining tools for placement in special education, have been challenged as being violative of the due process and equal protection clauses of the fourteenth amendment. The due process argument is similar to that put forth in *P.A.R.C.*: Children who may be placed in special education classes are entitled to notice, a hearing, and educationally valid evaluative procedures. Equal protection, the argument goes, is denied when children placed in special education classes are not provided with educational opportunities comparable to those afforded to all other children. This argument seems particularly cogent if one subscribes to the beliefs that handicapped children learn better in the regular than in the special classroom, and that they do

minorities who allege that the tests have improperly labelled them as in need of special education. There is an increasing amount of case law in this area, with each new case adding to a patchwork of judicial determinations as to what is an invalid I.Q. test. It remains for the psychologist to develop a new testing procedure which will correct the faults in the I.Q. test and reasonably evaluate student ability.⁸¹

*Hobson v. Hansen*⁸² was the first case to consider the validity of standardized tests, although ostensibly dealing with the legal implications of ability grouping.⁸³ Judge Skelly Wright struck down a "tracking" system used in the District of Columbia public schools, and criticized the system itself for locking children into the track in which they had been placed. In addition, he focused his attention on the manner in which children were sorted—teacher observation and standardized testing. As to the former, the court said that the whole system was predicated on the assumption ". . . that school personnel can with reasonable accuracy ascertain the maximum potential of each student and fix the content and pace of his education accordingly. If this premise proves false, the theory of the track system collapses. . . ."⁸⁴ As for using the standardized aptitude test to categorize students, expert testimony showed that such tests created a "substantial risk of [the student's] being wrongly labelled."⁸⁵ For this reason, the court concluded that such tests were

completely inappropriate for use with a large segment of the student body. Because these tests are standardized primarily on and are relevant to a white middle class group of students, they produce inaccurate and misleading test scores when given to lower class and Negro students. As a result, rather than being classified according to their ability to learn, these students are in reality being classified according to their socio-economic or racial status, or—more precisely—according to environmental and psychological factors which have nothing to do with innate ability.⁸⁶

not hinder the academic progress of normal children. See Section IV A *infra*. Furthermore, improper testing devices tend to create overinclusive classifications, in that when students are miscategorized, the normal may be grouped with the handicapped.

81. The critical question is, "Ability to do what?" Before this question can be satisfactorily answered, the goals of education must be defined. Only then can tests be devised that will fairly evaluate the child's potential. See Sections IV A and B *infra*.
82. 269 F. Supp. 401 (D.D.C. 1967).
83. The educational opportunity cases that followed *Brown* had all dealt with racial segregation. *Hobson* was also unique in intimating that the *Brown* holding could be extended to encompass non-black poor children who are denied equal educational opportunities.
84. 269 F. Supp. at 474.
85. *Id.* at 489.
86. *Id.* at 514.

Because most of the students adversely affected by the tracking system were black, the court stressed the discriminatory effects of the system and the resultant de facto segregation. Due to this physical segregation into different tracks,⁸⁷ the system brought a disparity of educational opportunity, with students in lower tracks receiving a watered-down curriculum.⁸⁸

Despite language regarding equal educational opportunity in *Hobson*, the primary focus of this decision was on the testing procedure, not the tracking system as such. Tracking as practiced in the District of Columbia was to be abolished, but only because of the type of evaluative scheme used to channel students into the system. A later court of appeals decision limited the applicability of the *Hobson* court order to the existing tracking system while permitting "full scope . . . ability grouping."⁸⁹ Therefore, according to this court, segregation because of ability grouping was proper provided that valid evaluative tools were used.

Whereas *Hobson* stressed the socio-economic and racial bias of I.Q. tests, the next case focused on test bias against ethnic minorities. The plaintiffs in *Diana v. State Board of Education*⁹⁰ were Mexican-Americans who alleged that they had been improperly placed in classes for the educable mentally retarded ("EMR"). They contended that I.Q. tests used for placement had an inherent cultural bias because they focused on English verbal skills and had been standardized on a population comprised entirely of white, native-born Americans. Statistical evidence was introduced to show the disparate effect the tests had on Mexican-Americans. For example, although children of this heritage made up only 13 per cent of the school population in Monterey County, California, they comprised almost 30 per cent of the children enrolled in the EMR program.⁹¹ The defendant school board brought the case to a conclu-

87. This differs from the pre-*Brown* educational systems that, it was contended, provided separate, but equal educational opportunities.

88. 269 F. Supp. at 449.

89. *Smuck v. Hobson*, 408 F.2d 175, 189 (D.C. Cir. 1969).

90. Civil No. C-70 37 RFP (N.D. Cal. Jan. 7, 1970 and June 18, 1973). The plaintiffs, nine Mexican-American children, came from homes in which Spanish was the chief language spoken. On their initial attempt, their I.Q. test scores were low. When they were retested in Spanish, seven of the nine scored higher than the I.Q. level used to determine mental retardation.

91. Studies by the California State Department of Education showed that in 1966-67, of the 85,000 children in classes for the EMR in California, Spanish-surnamed children comprised 26% while accounting for only 13% of the total school population. Weintraub & Abeson, *Appropriate Education for all Handicapped Children: A Growing Issue*, 23 SYRACUSE L. REV. 1037, 1052 (1972).

sion out of court in a stipulated settlement. It agreed to test all children in their primary language, to re-test those currently enrolled in EMR classes, to submit a written report explaining the percentage disparity between Mexican-Americans in the total school, population and in EMR classes,⁹² and to undertake immediate efforts to develop and standardize an appropriate I.Q. test.

Covarrubias v. San Diego Unified School District,⁹³ although similar to *Diana* in legal arguments, was significantly different in two other respects. First, it sought money damages as a possible remedy under the Civil Rights Act of 1871.⁹⁴ Second, its plaintiffs were black. As a result of the finding that the tests were racially biased, revised tests to be used within California were to have not only adjustments for language differences, but also recognition of the cultural influence of the black ghetto.

In subsequent, similar litigation, black Californians in *Larry P. v. Riles*⁹⁵ went one step further and demanded that black psychologists and psychometrists be hired, attacking the tests per se as well as the tests as administered.⁹⁶ Here, as in *Diana*, it was shown that the I.Q. tests had the effect of classifying a disproportionate number of black children as retarded. In this manner, the existence of de

92. An annual report was required showing the ethnic breakdown of children in special education classes. The proportion of minority children in these classes could vary up to 15% from their proportion in the general school population.

93. Civil No. 70-394-T (S.D. Cal., Feb. 1971).

94. 42 U.S.C. § 1983 (1970).

95. 343 F. Supp. 1306 (N.D. Cal. 1972). In this case, statistical information showed that a disproportionate number of black children were enrolled in programs for the retarded in San Francisco Unified School District: 25.5% of the school population were black, while 66% of the children in the EMR programs were black.

The claim that the tests were culturally biased and the request for more empathetic testers were made with evidence showing that when they were given the same I.Q. tests but with special attempts by the psychologists to establish rapport with the test-takers . . . to reword items in terms more consistent with plaintiffs' cultural background, and to give credit for non-standard answers which nevertheless showed an intelligent approach to problems in the context of that background, plaintiffs scored significantly higher than the mental retardation cut-off point.

Id. at 1308.

96. A recently filed case, *Strickland v. Deerfield Pub. School Dist. No. 109*, Civil No. 73 L 284 (Cir. Ct., Lake County, Ill., filed 1974) presages litigation concerning the examiner's duty of reasonable care. The case involved allegations that professionals had failed to diagnose properly a perceptually handicapped child's problem, and that they would have been able to do so had they exercised reasonable care.

facto racial discrimination was established,⁹⁷ and the burden of proof shifted to the defendants to show that the tests were rationally related to the purpose of evaluating the student's ability to learn.⁹⁸

The defendants could not meet this burden in spite of the assertion of several defenses. The first was that the school district did not rely solely on the test in classifying children. The court, in response, held that it was sufficient that "substantial emphasis" was placed on the test results.⁹⁹ The court also rejected the defendant's second contention that the parental consent required before a child could be placed in a special class barred the parent from complaining. In so doing it acknowledged that such consent tends to be pro forma because of parental awe of the educational process.¹⁰⁰ The defendants' last assertion was that "... since black people tend to be poor, and poor pregnant women tend to suffer from inadequate nutrition, it is possible that the brain development of many black children had been retarded by their mothers' poor diet during pregnancy,"¹⁰¹ and that this would explain the disproportionate number of black children in classes for the EMR. The court dismissed this by refusing to assume "otherwise than that the ability to learn is randomly spread about the population."¹⁰²

The result of this litigation was that the San Francisco School District was enjoined

from placing black students in classes for the educable mentally retarded on the basis of criteria which rely primarily on the results of I.Q. tests as they are currently administered, if the consequence of use of such criteria is racial imbalance in the composition of such classes.¹⁰³

97. 343 F. Supp. at 1311.

98. By using this approach, the court was not adhering to either the strict scrutiny or the rational basis test. Under the strict scrutiny test, the burden at this point would have shifted to the defendant to show a compelling state interest justifying the classification. Under the rational basis test, the burden would have been on the plaintiff to show that the classification was irrational. *Id.* at 1308-09.

99. *Id.* at 1312.

100. [P]arents are likely to be overawed by scientific-sounding pronouncements about I.Q.; and if their decisions whether to provide their consent are so colored by I.Q. results, then the I.Q. tests again appear as prime determinants of EMR [Educable Mentally Retarded] placement. Furthermore, if the I.Q. tests are found in fact to be biased against the culture and experience of black children, any consent which is obtained from the parents of such children absent communication of full information to that effect is not effective consent.

Id. at 1313.

101. *Id.* at 1310.

102. *Id.* at 1311.

103. *Id.* at 1315. As a result of a supplementary order approved on De-

Stewart v. Phillips,¹⁰⁴ though in the mold of *Covarrubias*, also followed in the path of *Hobson* by including among its plaintiffs¹⁰⁵ racially and socio-economically disadvantaged children. By so structuring the plaintiff class, an attempt was made to seek acknowledgement of black culture and poverty as determinants of test performance. In addition to asking for a damage remedy,¹⁰⁶ the plaintiffs also sought the establishment of a State Commission of Individual and Educational Needs to devise new tests and programs. Such a request would have caused the court to take positive corrective measures and not merely act in a punitive role. In this case, the basic issues were made moot by the Department of Education's issuance of new regulations providing for detailed evaluation before placement.

In reflecting on the litigation concerning test procedures, several patterns emerge that are similar to those found in the right to education and right to treatment areas. First, in both areas the number of new cases being brought before the courts¹⁰⁷ is indicative of the tedious process that must be followed before full and meaningful educational rights for the retarded can be achieved. Second, the cases show the necessity for interested parties to maintain constant vigilance to assure compliance with court orders and party agreements. Third, the courts have essentially functioned in a punitive rather than a remedial capacity. They have ordered past injustices to cease, but generally are unable or unwilling to involve themselves in long-range remediation, deferring to those with expertise in given areas. Last, implementation of the decisions in both areas requires a vast expenditure of finances and human energy. For ex-

cember 13, 1974,

...the California State Board of Education disapproved its list of verbal and nonverbal standardized individual intelligence tests for placement of children into classes for the educable mentally retarded. Thus, the state discontinued using tests for such placement for *all* children, even though the court order applied only to black children.

U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, MENTAL RETARDATION AND THE LAW 9 (June 1975).

104. Civil No. 70-1199-F (D. Mass. 1970). The formulation of new state regulations for placement in special education program may have mooted the issue presented in this case.
105. The plaintiffs had been placed in classes for the mentally retarded. After litigation was initiated, and upon subsequent testing by independent psychologists, they were found not to be retarded.
106. As in *Covarrubias*, punitive damages were requested.
107. See also *Guadalupe Organization, Inc. v. Tempe Elementary School Dist. No. 3*, Civil No. 71-435 PHX (D. Ariz., May 9, 1972); *Ruiz v. State Bd. of Educ.*, Civil No. 218294 (Super. Ct., Sacramento County, Cal., filed Dec. 16, 1971).

ample, in the placement process alone, new tests will have to be devised to take into account cultural or socio-economic variables and old tests need to be restandardized over more representative populations, demanding large expenditures of time and money.

IV. AN APPROPRIATE EDUCATION

Once it has been established that the exceptional child can learn, and, therefore, is entitled to a publicly funded education, proponents of this child's educational right need to concentrate on ensuring that he receives an appropriate education. Because the educational system was so long in responding to the needs of the exceptional child, doing so only with judicial prompting, it is reasonable to assume that development of qualitative programs will also be slow and that resort to the judiciary may again be necessary. However, it is uncertain whether the courts will be willing or able to respond to allegations of inappropriate educational opportunity. But before any qualitative assessment of programs developed for the handicapped child can be attempted, courts must first examine the judicial conception of education.

A. The Court's View of Education

Modern courts first became embroiled in educational conflicts in the context of racial discrimination. The *Brown* pronouncement on education is often quoted:

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, even service in the armed forces. It is the very foundation of good citizenship. Today, it is a principle 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.¹⁰⁸

This statement ostensibly views education as both a socialization process to train the child so that he will adjust normally to his environment and an academic experience to prepare him for a profession and future success in life. Within this conceptualization, we again see the group-individual dichotomy in our educational structure which was alluded to earlier.¹⁰⁹

108. 347 U.S. at 493 (emphasis added).

109. See Section IIA *supra*.

Socialization involves what is good for the system while academic achievement is primarily concerned with what is best for the individual, although it does have the tangential effect of aiding society. In this context, "system" refers not only to the educational system but also to our whole way of life. The socialization facet of education best serves the educational system and our governmental needs; however, the academic aspect, with its maximizing of individual potential, can be disruptive to the system. It is costly because it involves hiring additional personnel, developing innovative programs, and purchasing varied supplies; and it is threatening—or challenging—because it necessitates a change in educational philosophy and teaching methods.

Later court decisions have ignored the academic facet of education and stressed the socialization aspect. Closer analysis of even the *Brown* statement within the factual context of that particular case shows that the Court there essentially ascribed to the philosophy that education is a socializing process. The focus of the Court's inquiry was on access to education. The issue was not whether black children had been given a quality education or whether the same amount of money was spent to educate black students as was expended on the education of white pupils. Instead, it was concerned solely with ensuring that all children had an equal educational opportunity, and, therefore, it held that children could not learn to cope with a complex environment in a segregated setting.¹¹⁰

Defining education in terms of coping with the environment has been a boon to proponents of the handicapped child's right to receive an education. If education were to be conceived of as an academic experience, then such a child might be able to be excluded from school because the level of his potential academic achievement is often low. However, this is not the case. Rather, the theme of education as a socializing experience has been endorsed by the right to education and right to treatment cases referred to in this comment and by the Supreme Court as well. So it is that *Wyatt* talks of habilitation treatment as

the process by which the staff of the institution assists the resident to acquire and maintain those life skills which enable him to cope more effectively with the demands of his own person and his environment and to raise the level of his physical, mental, and social efficiency. Habilitation includes but is not limited to programs of formal, structured education and treatment.¹¹¹

and expert witnesses in *P.A.R.C.* testified that all mentally retarded

110. Using this approach, one could as easily have argued that white children were being deprived of equal educational opportunities.

111. 344 F. Supp. at 395 (emphasis added).

persons are capable of benefiting from a program of education and training.¹¹²

In *Wisconsin v. Yoder*¹¹³ the Court also endorsed a similar definition of education by stating in dictum that "the value of all education must be assessed in terms of its capacity to prepare the child for life."¹¹⁴ This is consistent with the Court's holding that an Amish child could withdraw from school after having completed the eighth grade, while all other children in Wisconsin had to attend school until the age of sixteen. This diverse treatment was justified because the training an Amish child received at home would parallel the skills he would have learned at school.

Although education has been defined in general terms as training the individual to cope with his environment, some qualitative standards of appropriateness need to be set up to evaluate educational programs and see if they are achieving their goals. Based on *Rodriguez*, it is uncertain whether the courts will be willing or able to respond to allegations that an inappropriate education is being afforded to an exceptional child. In that case the Court would not concern itself with an investigation into the qualitative inequities in the education being afforded to different children within the same school district. It halted its inquiry once it was assured that there was no denial of education and that the education being provided was "minimal" and "adequate."¹¹⁵ Arguably, "minimal" and "ade-

112. 334 F. Supp. at 1359.

113. 406 U.S. 205 (1972).

114. *Id.* at 222 (dictum).

115. Similarly, if in a criminal law case the defendant argues that his counsel was ineffective, a court will not second guess counsel's judgment, nor will it require that his judgment have been errorless; rather, counsel's representation need only have put the defendant in a better position than he would have been in had he not had counsel. It may be argued, however, that, just as a defendant should have counsel that actually represents his interests, the right to an education should mean the right to an education that actually educates.

Another approach that can be adopted to prod the courts into ruling on "appropriateness" is the use of the *quid pro quo* analysis of the right to treatment cases: Children who give up their freedom should in return receive an appropriate education. Education has already been recognized as being similar to treatment. See notes 72 & 73 *supra* and accompanying text. Compulsory education statutes can be construed as subjecting the child to involuntary confinement. Furthermore, when schools fail to provide an adequate education, they may be compared to other institutions that infringe on constitutionally protected freedoms. McClung, "Do Handicapped Children Have a Legal Right to a Minimally Adequate Education?," 3 J.L. & Educ. 153, 162 (1974). If a court were willing to adopt this approach, it could, like the *Wyatt* court, consider itself empowered to make qualitative inquiries regarding treatment, and to set up governing standards.

quate" are basal standards and indicate the Court's willingness to make some kind of a determination regarding quality. However, militating against the Court's undertaking even this minimal inquiry is its indicated reluctance to become embroiled in questions of educational policy and its preference for deferring to the wisdom of experts.¹¹⁶

Another qualitative attack that can be made on the appropriateness of educational programs that are available to handicapped children centers on the allegation that the program is so inappropriate that it is the equivalent of total denial of education. Though this is seemingly an onerous burden, the *Rodriguez* Court did imply that it would scrutinize situations where there was a denial of education.

An additional tactic is available in those states having constitutional provisions that mandate a free public education in qualitative terms, such as the "thorough and efficient" standard in the New Jersey Constitution.¹¹⁷ In this situation, courts, like the one in *Robinson v. Cahill*,¹¹⁸ could interpret such terms as imposing qualitative standards to be used in judging the calibre of the public education being afforded to the handicapped child.

Two recent decisions indicate that by relying on certain statutes, courts can determine that a particular child is not receiving an effective education. In *Lau v. Nichols*,¹¹⁹ the Supreme Court held that the failure of the San Francisco School District to provide English language instruction to non-English-speaking Chinese students violated section 601 of the Civil Rights Act of 1964.¹²⁰ By so doing, it implied that a child's mere presence in the classroom is not enough to constitute an "education." If he cannot benefit from the regular program of instruction, then the necessary special services must be made available to him. In arriving at this position, the Court stressed that equality of treatment did *not* mean precise equality, but rather could encompass special treatment for children who were unequal.¹²¹ The second case, *Kivell v. Nemoitin*,¹²² in-

116. See note 54 *supra*.

117. Similar language appears in the constitutions of 25 states: Arizona, Arkansas, Colorado, Delaware, Idaho, Illinois, Indiana, Kentucky, Maryland, Minnesota, Montana, Nevada, New Jersey, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, Texas, Utah, Washington, West Virginia, Wisconsin, and Wyoming. Comment, *supra* note 51, at 107 n.113.

118. 62 N.J. 473, 303 A.2d 273 (1973).

119. 414 U.S. 563 (1974).

120. 42 U.S.C. § 2000d (1970).

121. [T]here is no equality of treatment merely by providing students with the same facilities, textbooks, teachers and curricu-

volved an interpretation of Connecticut's special education law which provided for a program suited to the child's "needs." By strictly construing this "needs" language, the judge was able to hold that the defendant Board of Education had not offered an appropriate special education program for a twelve year old perceptually handicapped child.¹²³

Despite the various legal attacks that can be made, the outcome of such litigation is uncertain. Therefore, it appears that the best method for achieving qualitative and appropriate educational programs for the handicapped child is through the continued vigilance and lobbying efforts of parents and concerned educators.

B. An Educational Program for the Handicapped Child

In *Rodriguez* the Court indicated its reluctance to interject itself as the final authority in disputes dealing with controversial and divergent educational theories. Nowhere is controversy more prevalent than among educators of the handicapped child who espouse the merits of different educational settings. At one end of the spectrum are those who ascribe to the normalization-mainstreaming principle,¹²⁴ while on the other are the educators who favor the self-contained special education classroom.

lum: for students who do not understand English are effectively foreclosed from any meaningful education.

414 U.S. at 566.

122. Civil No. 143913 (Super. Ct. Fairfield County, Conn., filed July 18, 1972).

123. The judge awarded the boy's mother \$13,400 to pay for the out-of-state private education that the child had received for the previous two years.

124. Under this concept, children are educated in the "least restrictive setting." One part of mainstreaming is the Cascade System. The flow of services to the handicapped child increases as the educational setting becomes more restrictive:

Less Severe	Regular Classroom	Return as soon as possible
	I. Regular classroom with specialist consultation	
	II. Regular classroom with itinerant teachers	
	III. Regular classroom plus a resource room	
	Part Time Special Class	
	Full Time Special Class	
	Special Day School	
	Residential School	Move only as far as necessary
More Severe	Hospital	

In Modification I, the classroom teacher herself seeks improved techniques to aid the student; in II, itinerant specialists work with the child. Modification III places the child in the regular classroom, but provides time for him to receive specific remedial instruction. Weintraub & Abeson, *supra* note 39, at 1040-41.

The proponents of mainstreaming advocate educating the handicapped child in a regular school program because it is undesirable to segregate children if one wishes them to develop as normally as possible. It is theorized that placing the exceptional child in an environment where he is totally surrounded by other abnormal children will further hinder whatever potential for normalcy that he has in terms of social, emotional, cognitive and language development. In mainstreaming, provision is made for the child to receive appropriate supportive services for up to half of his school day, with the other half of the day spent in a regular classroom situation. The scheme is important not only to the exceptional child but also to the normal child because interacting on a daily basis with non-normals will prepare him for later years when he will have to cope with an environment in which there are individuals of varied and varying abilities. Ostensibly, this system allows for every child to develop to his maximum potential by treating all children "equally."

The language used by the educator to justify mainstreaming closely parallels legal theory, particularly in alluding to the undesirability of segregating children. The analogy between handicapped children and pre-*Brown* black children has been made. Both are disadvantaged minorities and both have been excluded from the regular public school classroom. If the purpose of the educational process is to help the individual adapt to his environment, then this goal will be undermined by attempting to train the child in a one-dimensional segregated setting. Just as educating black children in an all-black school denied them equal educational opportunity, so too can segregating a handicapped child in a special education classroom with other handicapped children be considered as denying him an opportunity to adjust to his environment.

After *Brown*, segregation of black children could not be tolerated even if it were shown to be in their best interest.¹²⁵ In the case of the handicapped child, it is even uncertain whether a self-contained special education class is advantageous. Its existence rests on the assumption that it provides a more individualized curriculum¹²⁶ and shelters the handicapped child from possible emotional

125. In *Stell v. Savannah-Chatham Co. Bd. of Educ.*, 318 F.2d 425 (5th Cir. 1963), *cert. denied*, *Gibson v. Harris*, 376 U.S. 908 (1964), psychological and educational evidence was offered to show that segregation had a more beneficial effect on black children than did integration. The court, however, said that *Brown* established as a matter of law that segregation is inherently unequal, and that segregated programs cannot be justified even if they provide a more adequate education and a better psychological experience for students. See Section IVC *infra*.

126. Cohen & DeYoung, *supra*. note 20, at 261.

trauma.¹²⁷ Furthermore, teaching a homogeneous group is thought to be desirable because in theory each child is challenged according to his ability. However, the justification for the special education-homogeneous grouping is completely undermined by "[e]ducational efficacy studies [that] generally find either no effect or marginal adverse effects on achievement and attitude for students who are classified, when these students are compared with non-grouped peers."¹²⁸ In addition, it has been shown that though "programs for the severely handicapped do benefit children, . . . classes for the mildly retarded and mildly emotionally disturbed do not serve those children better than regular class placement."¹²⁹

The dispute over the relative merits of the segregated homogeneous learning situation and the integrated heterogeneous classroom is really a replay of the conflict between what is good for a smoothly functioning system and what is beneficial for the individual. Ostensibly, homogeneous groupings are best for the individual, but as was shown,¹³⁰ in reality they are not. They exist because they best serve the orderliness of the system. Heterogeneous groups are denounced because the level of the class is adjusted to the normal learner, and therefore, children who deviate from the norm suffer. Such a scheme, according to its opponents neither helps the individual nor the system. In actuality, such a method potentially affords the individual great opportunity for social growth by exposing him to all kinds of people while at the same time not causing him any intellectual harm. However, this environment, though good for the individual, is threatening to the system. It challenges existing teaching methods which focus on the lecture presentation geared to one ability level and demands new techniques, such as open classrooms, programmed learning, and pupil-to-pupil tutoring.¹³¹

Special education classes are an inappropriate learning setting not only because they hinder the individual's socialization skills, while affording little compensatory academic benefit, but also because of the concept of the self-fulfilling prophecy. The court in *Hobson v. Hansen* described this phenomenon in the following way:

127. "Those favoring segregation speak of the special psychological vulnerabilities of the retarded, the deleterious effect on their self-esteem that direct comparison and competition with others would bring, and the greater efficiency in separate service delivery and consequent individualized attention." Burt, *supra* note 65, at 314.

128. Kirp, *Schools as Sorters: The Constitutional and Policy Implications of Student Classification*, 121 U. PENN. L. REV. 705, 718 (1973).

129. *Id.* at 728.

130. See notes 128 and 129 *supra* and accompanying text.

131. Comment, *Toward a Legal Theory of the Right to Education of the Mentally Retarded*, 34 OHIO ST. L.J. 554, 576 (1973).

When a child is "treated as if he is uneducable because he has a low test score, he becomes uneducable and the low test score is thereby reinforced."¹³² A child who is designated as being in need of special education placement understands the implications of this and acts according to what is expected of him. He is surrounded by children who deviate from the norm in terms of development, and, therefore, he has no role model to pattern himself after. In the special education class he is also not being challenged by his peers. Compounding this unfortunate situation is the fact that special education courses, in contrast to regular classes, are nonsequential.¹³³ Because of the difference in teaching methods, even if a child in a special education class is retested, he remains locked into his place because he will be compared with children of his own chronological age who continue to advance more rapidly than he because of the progressive education they are receiving.

While the segregation cases may furnish the legal support to justify abandonment of the special education class as an educational setting (except for the more severely retarded child) and adoption of the concept of mainstreaming, there is a potential danger in this approach. It arises from too literal reliance on the concept of "equal educational opportunity"¹³⁴ as applied to the handicapped child. In most cases he can never be equal (identical) to other chil-

132. 269 F. Supp. at 484.

133. Comment, *supra* note 131, at 579.

134. [M]any judicial decisions . . . still define equality on a "sameness" doctrine, equal resources to "children whose needs are unequal." Such a philosophy may have been appropriate for a society that was based on family economic production that could absorb those who could not compete equally in the nation's economic system. Today, however, the education of a child is a community concern, for if he is not given skills sufficient for economic participation, then he will become dependent upon the community.

Weintraub & Abeson, *supra* note 39, at 1055. See also note 121 and accompanying text *supra*.

"Equality" in the context of education for the handicapped child has different implications than "equality" in other surroundings.

The concept of equality is often interpreted to imply that the government should treat everyone in a like manner. While this approach should certainly apply to due process considerations, the question becomes more complicated when applied to government sponsored services, since no two individuals are exactly alike. It may be argued that in certain circumstances equality should be measured in terms of providing equal access to appropriate services, rather than in terms of providing only an equal distribution of resources. This might mean providing additional or more intensive educational training for mentally retarded persons.

Comment, *Educational Equality for the Mentally Retarded*, 23 SYRACUSE L. REV. 141, 1162 (1972).

dren, yet the financial and time costs of educating him will be disproportionately higher than those of training a normal child.¹³⁵ However, it must be remembered that the amount of money being spent on education does not affect the concept of "equality." In pre-*Brown* Topeka, equal expenditures were made to educate black and white children; this did not ensure equality. And in *Rodriguez*, unequal amounts of money were being spent to educate children; this did not result in inequality. Equality also cannot be defined in terms of the amount of output that results from the educational process. The reason for this is the obvious difference in achievement level from individual to individual. Furthermore, it would be societally disastrous if everyone had the same achievement potential.

"Equal" in the phrase "equal educational opportunity" is not the key word. The emphasis instead should be on "opportunity."¹³⁶ The purpose of the educational system then becomes furnishing each child with an equal opportunity to develop as far as his innate

135. There may also be inequality as to the age at which a handicapped child should begin his public education:

[M]ost states do not accept children into the public school system until age five or six. Yet by the time retarded children reach this age, they are already behind normal children in terms of learning ability. Whereas normal children have been able to develop at home the basic tools necessary for formal school education, the families of the retarded usually cannot provide the more specialized teaching in the home that their children require in order to develop those same tools.

Comment, *supra* note 134, at 1163.

The handicapped have a special need for an education that begins at an early age and continues into early adulthood, since they are not governed by the same developmental rules as normal children. THE MENTAL HEALTH LAW PROJECT, PRACTISING LAW INSTITUTE, LEGAL RIGHTS OF THE MENTALLY HANDICAPPED VOL. 2, 835 (B. Ennis & P. Friedman, eds. 1973). Since most compulsory education statutes have upper and lower age limits within which the state will provide education, it may be necessary to amend them to permit education for the handicapped to begin earlier and end later.

136. "Opportunity" means access. One author has argued that equal educational opportunity, as a constitutional standard, should include both equal access to *appropriate* services and to equal *minimal* results. If this "minimal" education is seen as the minimum amount necessary to the meaningful exercise of first amendment rights, . . . one's right is not the right to the "meaningful exercise of first amendment rights" actualized, but, rather, one's right is the right to *approach* such an exercise, i.e., the right to get as far as one is able toward the minimum.

Handel, *The Role of the Advocate in Securing the Handicapped Child's Right to an Effective Minimal Education*, 36 OHIO ST. L.J. 349, 355 (1975).

capabilities will permit.¹³⁷ This is the concept now being utilized by the courts in the right to education cases.¹³⁸

So it is that educational and legal theory both seem to indicate that for the handicapped child an "equal educational opportunity" can best occur in a regular classroom setting¹³⁹ with support personnel to be made available when necessary.

C. Valid Placement Tests

Before the handicapped child can have an appropriate educational program developed for him, he must be objectively tested to measure his educational potential. The cases challenging testing procedures have established that specific I.Q. tests are invalid as evaluative tools to be used on children belonging to racial, cultural, or socio-economic minorities because they do not measure such child's ability to cope with his *own* environment. The mandate for psychologists is to develop new tests. Focus for this task is provided by the definition of what is education; therefore, the tests must be designed to assess the child's realized and potential ability to learn to cope with his environment. This emphasis comports with the definition of mental retardation which has been adopted by the American Association of Mental Deficiency, namely, that "[m]ental retardation refers to sub-average general intellectual functioning which originates during the developmental period and is associated with impairment in adaptive behavior."¹⁴⁰

The results of a twelve year study of mental retardation conducted in Riverside, California¹⁴¹ substantiated the validity of this approach. It concluded that currently used assessment procedures violate certain basic rights of children,¹⁴² and that a system of

137. Comment, *supra* note 131, at 572. "Educational equality should be defined as equality of access to different resources to attain different individual goals." Weintraub & Abeson, *supra* note 39, at 1056.

138. In *P.A.R.C.*, the court ordered Pennsylvania to provide every retarded person between the ages of six and twenty-one with "access to a free public program of education and training appropriate to his learning capacities." 334 F. Supp. at 1258-66 (emphasis added). And in *Mills*, the District of Columbia had to provide plaintiffs with a publicly supported education suited to their needs. 348 F. Supp. at 878.

139. See note 4 *supra*.

140. Mercer, *A Policy Statement on Assessment Procedures and the Rights of Children*, in *ANNUAL PROGRESS IN CHILD PSYCHIATRY AND CHILD DEVELOPMENT* 1975, 23 (S. Chess & A. Thomas eds. 1975).

141. See Mercer, *supra* note 140.

142. These included the right to be evaluated within a culturally appropriate normative framework, the right to be assessed as a multi-dimensional human being, the right to be fully educated, the right to be free of stigmatizing labels, and the right to ethnic identity and respect.

"pluralistic, multi-cultural assessment" is needed.¹⁴³ Such an approach would have to consider adaptive behavior and socio-cultural background, as well as intelligence, when interpreting the meaning of scores on standardized tests. These conclusions correlate with the judicial decisions in this area which have not only attacked tests as being Anglocentric, but have also criticized rigid testing techniques.¹⁴⁴

The tests currently being used are valid insofar as they accomplish what they were designed to do, namely, predict performance in an Anglocentric public school system. They are modelled after a test developed by Alfred Binet and Theodore Simon to identify French children who would not benefit from a regular school program. Items for their test were selected from aspects of French culture which they believed that all French children would have had an opportunity to learn about. The test was a selection device and not a measure of intelligence per se. The mistake made in adapting the test for use in America was twofold. First, America, unlike France, is a nation inhabited by people of diverse racial, cultural and ethnic backgrounds; therefore, it is difficult to select test items with which all American children will have had an opportunity to become familiar. Second, in the adaptation, the original purpose of the test was overlooked. In France, education was not made available to all and a screening device was necessary to decide who would and would not benefit from schooling, whereas in America education is universal. The Binet measures present academic achievement, while American educators should be more interested in potential for growth. The fault of the test is that it is essentially retrospective rather than prospective.

143. Mercer, *supra* note 140, at 21.

144. The following examples illustrate some of the pitfalls that attend rigid adherence to testing procedures, and point out how test scores can rise when examiners are flexible.

When a tester administers the Wechsler Pre-school Primary Scale of Intelligence Sentence Repetition Subtest and asks a child to repeat "It is raining outside," the traditionalist would credit the child with successfully completing the task only if the sentence were repeated verbatim. But what of the child who says, "It's raining," or, "It rains out?" In the first response, he is repeating the essence of the sentence, but has used a contraction for "It is," a more sophisticated grammatical construction, for which credit could be given. In the second response, if it is not presently raining out, the child may also be evidencing intelligence in indicating that it does rain outside, though it is not now raining. Here, too, a better view would be to consider that the sentence has been repeated.

Examiners need to become more sophisticated in assessment procedures and interpretation, because qualitative interpretation may be more important than quantitative scoring.

In view of the definition of education that we are using, a better test should include some assessment procedure that would consider the child's ability to perform nonacademic tasks in his home and neighborhood. This would force the school to appreciate the child as a human being and would aid it in building a program based on individual assets and accomplishments rather than one structured around the child's defects.¹⁴⁵ Until such tests are devised, the tester should at least be aware of the limitations of the evaluative tool he is using. Also, he should collect a variety of inputs from family, neighbors, the family physician, teachers and from personal observations of the child in a nonstructured setting before making placement decisions.

D. Funding

Three factors are involved in ensuring that the handicapped child receives an appropriate education: a proper educational setting with available support personnel; valid evaluative testing procedures; and adequate funding¹⁴⁶ for the classes and tests. Budgetary increases to cover the costs of educational services to the handicapped are not easily won. There is significant feeling that providing educational services for the exceptional child is a wasteful expenditure of public funds.¹⁴⁷ Proponents of this position stress that it is more expensive to educate an exceptional than a normal child, and that even after he has been educated, his capabilities still do not approximate those of normal children. There are two fallacies in this argument. First, it takes a short-range economic view. Sec-

145. Calif. Legis. Senate Bill No. 33 (1971), provides a legal framework for multicultural pluralistic assessment in the public schools:

Before any minor is admitted to a special education program for mentally retarded minors . . . the minor shall be given verbal or nonverbal individual intelligence tests in the primary home language in which the minor is most fluent and has the best speaking ability and capacity to understand.

. . . No minor shall be placed in a special education class for the mentally retarded if he scores higher than two standard deviations below the norm. . . .

No minor may be placed in a special education program for the mentally retarded unless a complete psychological examination by a credentialed school psychologist investigating such factors as developmental history, cultural background, and school achievement substantiates the retarded intellectual development indicated by the individual test scores. This examination shall include estimates of adaptive behavior. . . . Such adaptability testing shall include but is not limited to, a visit, with the consent of the parent or guardian, to the minor's home by the school psychologist or a person designated by the chief administrator of the district. . . .

146. See note 48 *supra*.

147. One author has said:

ond, it takes into account neither the purposes of education nor the disparity among individuals.

Over the long term it will cost the state more money if these children are *not* educated. If, instead, they learn how to cope with and function in their environment, then many will be able to be employed in some capacity, and, depending on their degree of intellectual impairment, they will either live independently or in a group-hostel situation with other retarded individuals and supervising house parents. Those mentally retarded adults who were independent and self-supporting would contribute to the economy. Those who were living in a minimal care setting would require some state financial support, but less than would be necessary to maintain them in an institution. Without education, many retarded individuals will be doomed to spend their lives languishing in institutions. Such facilities are costly to maintain and costly in terms of wasted human potential.

Not only is it in the state's best interest financially to furnish an appropriate education for the handicapped child, but it is also their moral duty to maximize each individual's potential for happiness and human dignity. This latter approach focuses on the true meaning of education: to help the child adjust to his environment as best he can.¹⁴⁸ By embracing such a philosophy, attention is diverted

Education is more difficult and more expensive for so-called "ineducable" children, and the possible educational attainments are more modest than for others. On this ground it may be rational to exclude these children from public education. If public commitment to educational funding is limited, and if public agencies choose to pursue the "excellence of the few" rather than developing individual capacities for their own sake, then educational exclusion of the "retarded" might be justified.

Burt, *supra* note 65, at 297. He found justification for his position in *Jefferson v. Hackney*, 406 U.S. 535 (1972), which involved a state decision to reduce federal welfare funds given to families with dependent children in order to provide greater benefits to the aged and the physically disabled. *But see* note 48 and accompanying text *supra*.

148. Education should not be viewed solely in terms of economic benefits.

The protestant work ethic long used to justify educational and vocational training efforts on behalf of handicapped persons may soon give way to a humanistic ethic. As the sanctity of work loses its potency, as the work week continues to shrink, as more and more time and energy are devoted to recreational and aesthetic pursuits, it may become increasingly irrelevant to justify services to retarded persons on the basis that they will be more productive economically. Heroic efforts to obtain some semblance of work from the very severely handicapped may no longer seem justified. Instead, services might be justified on the basis that they will increase the client's happiness or allow him to participate more fully in the human experience.

Weintraub & Abeson, *supra* note 39, at 1061.

from the economic input and instead is concerned with what is the output of the educational process, the development of the individual.

Thus far the focus has been on theories that may be used to thwart appropriations. Difficulties also present themselves when money for special education has been budgeted, but the school district in which the child resides does not have a suitable program for him. Many states solve this problem by contracting with other school districts or with public or private agencies in other parts of their state to provide the necessary services.¹⁴⁹ However, in states having constitutional provisions prohibiting payment of state funds to private schools, such an approach is foreclosed unless there is a constitutional amendment.¹⁵⁰

Regardless of whether funding problems center around inadequate appropriations or unavailability of programs on which to spend appropriated money, the solution will not be found in the courts.¹⁵¹ This is an area where improvements can *only* occur through concerted and continuous lobbying efforts by concerned individuals.

149. Typifying such a statute is L.B. 403, passed in 1973 by the 83d Nebraska Legislature, 1st Session. It decreed that every school district provide or *contract for* special education programs for all resident children who could benefit from such programs.

150. L.B. 666, 84th Neb. Legis., 2d Sess. (1976). This bill submits to the voters a proposal to amend NEB. CONST. art. VII, § 11 to permit the state or one of its political subdivisions to contract with nonpublic institutions to provide nonsectarian, educational services for handicapped children under the age of twenty-one.

151. The arguments over appropriations for special education will probably soon be moot. Many of the states' financial problems will be solved by Pub. L. No. 94-142, the Education for All Handicapped Children Act of 1975. The Act offers a formula according to which the Government must pay an escalating percentage of the national average expenditure per public school child, multiplied by the number of handicapped children being served in the school districts of each state.

The new law attempts to preclude the mislabelling and over-counting of children as handicapped in order to obtain the largest possible federal contribution by permitting the labelling as handicapped of no more than 12% of a state's children between the ages of five and seventeen.

In fiscal 1978, 50% of each state's entitlement will remain under the control of the state education agency, with the remaining 50% "passing through" to the state's local education agencies. Thereafter, the amount "passing through" will increase to 75%. In 1976 and 1977, the state agency will control all monies received.

Additionally, the Act authorizes special grants to encourage states to provide special education services to preschool handicapped children.

V. CONCLUSION

The courts have held that the handicapped child has a right to be educated within the public school system. He is capable of learning, and, therefore, there is no rational basis for denying him a publicly funded education when such an opportunity is being afforded to all other children. So it is that the schools which previously excluded him because he was disruptive to an orderly scheme must now include him. However, inclusion alone is not sufficient. For the handicapped child, a meaningful education is one which is appropriate for his individual needs. Herein lies the challenge. Educators must cease being preoccupied with having a smoothly functioning system, and instead, must refocus their attention on the individual student. In the process of doing this, new teaching philosophies will have to be formulated to take into consideration the purpose of education: to train the individual to cope with his environment. These, together with placement and evaluative tools that more accurately reflect the child's ability to function within his *own* environment, will do much to ensure that each child receives an appropriate education. In addition, concerted and continuing lobbying efforts by parents and interested persons are necessary to guarantee that there is adequate funding for such endeavors and that the program devised for each child does, in truth, serve his needs.

If this occurs, then we will be doing far more than sheltering the handicapped child, hoping for him, dreaming for him, and loving him. We will be helping him maximize his potential as a human being.

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