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SPECIAL PROBLEMS OF THE DEAF UNDER THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT OF 1975

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I. INTRODUCTION

In 1975 Congress sought to alleviate the injustice then suffered by millions of handicapped children, who were receiving inadequate or nonexistent education,¹ by enacting the Education for All Handicapped Children Act.² This enactment cut short a growing judicial debate on the possible existence of a handicapped child's constitutional right to a public education³ by establishing such a right under federal law.

In the few years since its passage, the Act has been widely acclaimed and has received much comment. Most commentators have approved without qualification the Act's stated purpose of educating all handi-

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1. See S. REP. NO. 168, 94th Cong., 1st Sess. 8 (1975) (about 1.7 million handicapped children received no education at all; an additional 2.2 million received inadequate education).

2. Pub. L. No. 94-142, 89 Stat. 773 (codified in 20 U.S.C. §§ 1401-1461 (Supp. V 1975)).

3. See *Mills v. Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972); *Larry P. v. Riles*, 343 F. Supp. 1306 (N.D. Cal. 1972); *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972); notes 10-16 *infra* and accompanying text.

capped children, as nearly as possible, in "normal" or noninstitutional settings. Any criticism that has been voiced has centered either on the procedural aspects of the Act or on the burden it places on school systems unequipped to comply with its requirements.⁴ Analysis has been difficult because professional educators emphasize the Act's educational objectives while ignoring some of the legal problems contained within the Act,⁵ and legal writers have frequently displayed a lack of knowledge about special education. Typically, "the handicapped" have been treated as one class, with identical interests and problems, without recognition that the Act may have different impacts on a blind, deaf, retarded, or paraplegic child.⁶

Whatever else it has or has not accomplished, the 1975 Act has raised the consciousness of both handicapped persons and the parents of handicapped children. This, in turn, has created new expectations, with the children and parents shifting from the position of supplicants to that of complainants, who expect more appropriate education from the schools, more funds, and more influence in controlling the educa-

4. See generally Krass, *The Right to Public Education for Handicapped Children: A Primer for the New Advocate*, 1976 ILL. L.F. 1016; Miller & Miller, *The Handicapped Child's Civil Right as it Relates to the "Least Restrictive Environment" and Appropriate Mainstreaming*, 54 IND. L.J. 1 (1978); *Contemporary Studies Project, Special Education: The Struggle for Equal Educational Opportunity in Iowa*, 62 IOWA L. REV. 1283 (1977); Comment, *The Least Restrictive Environment Section of the Education for All Handicapped Children Act of 1975: A Legislative History and an Analysis*, 13 GONZAGA L. REV. 717 (1978); Note, *The Education for All Handicapped Children Act: Opening the Schoolhouse Door*, 6 N.Y.U. REV. L. & SOC. CHANGE 43 (1976) [hereinafter cited as N.Y.U. Note]; Note, *The Education of All Handicapped Children Act of 1975*, 10 U. MICH. J.L. REF. 110 (1976) [hereinafter cited as MICH. Note].

5. See, e.g., Harvey, *Legislative Intent and Progress*, 44 EXCEPTIONAL CHILDREN 234 (1978); Kidd, *Parents and Public Law 94-142*, 79 VOLTA REV. 275 (1977); Salem & Herward, *A Survey to Determine the Impact of P.L. 94-142 on Residential Schools for the Deaf*, 123 AM. ANNALS OF THE DEAF 524 (1978).

6. See, e.g., Comment, *The Handicapped Child Has a Right to an Appropriate Education*, 55 NEB. L. REV. 637, 673-74 (1976). The author broadly treats "the handicapped" as one class, opposing all special education classes by drawing an inapt analogy:

Just as educating black children in an all-black school denied them equal education 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. . . . 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 author's assertions are supportable as far as children confined to wheelchairs are concerned, but that is only one type of handicap. Such complete ignorance of distinctions between types of handicaps and differing needs for special education depending on the handicap are typical of the legal commentary in the field.

tion of their children. As school districts across the nation attempt to cope with the sudden impact the Act has had on their processes and budgets, certain aspects of its operation have become clearer than they were a few years ago. With the benefit of these years of hindsight, the purpose of this article is fourfold:

(1) To explore the anticipated problems of the Act's implementation and to show that several problems have been more severe than was predicted by most writers.

(2) To analyze the Act's basic assumption regarding placement of handicapped children as nearly as possible in a "normal" situation—commonly known as "mainstreaming"—and to show that, in many situations, that assumption has proven to be more harmful than helpful.

(3) To distinguish between types of handicaps, showing how the Act—by *not* distinguishing between types of handicaps—produces different effects for different groups of children.

(4) To explain the unique nature of deafness as a handicapping condition and to discuss the special problems of deaf children under the Act.

II. LEGAL HISTORY—EDUCATION OF THE HANDICAPPED

A brief review of the legal history of education of the handicapped aids understanding of the Act's context. There has never been a constitutionally guaranteed right to a public education. Despite early recognition of the value of education and state statutes mandating compulsory education, the early statutes, in conferring benefits upon some children, denied benefits to others.

Historically, handicapped people have been the object of fear, rejection, and abuse. Although gradual enlightenment in the nineteenth and twentieth centuries eventually removed the worst of the ill treatment of the handicapped, society still treats these impaired people as, at best, nonpersons. People commonly assumed that a handicapped person was uneducable and not trainable: while entitled to kindly treatment, he should be separated from society for his own and society's good. Thus, a malevolent form of repression was gradually replaced with a benign form of repression and misconception. The tendency to remove handicapped people from the social fabric, usually through placement in institutions, minimized public awareness of these persons

and their capabilities. That lack of awareness made it easy to demand the continued separation of those who were "different."

Educators thought that an educational system could not be maintained if it had to account for vast differences in children. One education would be offered, and a child who could not be educated without special help could not be tolerated. Moreover, even in the case of a child who could be educated despite a handicapping condition, the impact of the child's presence on other children was frequently cited as reason for excluding the child from the classroom. Thus, *Beattie v. City of Antigo*⁷ involved the exclusion from public school of a child who could function academically within the school but who was cerebral palsied, slow in speech, and unable to control his facial contortions and drooling. The court held that he could be excluded because of his "depressing" and "nauseating" effect on the other children and his teachers: "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."⁸ The implications of decisions like *Beattie* were clear—the right of an individual child to attend school was less important than the perceived overall good of the school system. Handicapped children were thus either to be placed in special (and isolated) classes, if available, or excluded entirely from the school system.

Until the early 1950's, handicapped children, as one of several disadvantaged groups, remained without any guaranteed right to a decent education. What education they might receive depended upon the absolute discretion of the local school board. The early part of that decade, however, marked the beginning of the legal revolution by disadvantaged classes to assert rights previously denied them. The early advances were made by black persons fighting racial discrimination not only in education but also in housing, employment, and public accommodations. Education, as it happened, was one of the early steps in the advance. Although courts guaranteed blacks, in theory at least, the right to an equal and nondiscriminatory education after 1954 in *Brown v. Board of Education*,⁹ it was almost twenty years more before

7. 169 Wis. 231, 172 N.W. 153 (1919). See also *Watson v. City of Cambridge*, 157 Mass. 561, 32 N.E. 864 (1893).

8. 169 Wis. at 233, 172 N.W. at 154.

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

courts moved beyond questions of the rights of racial or ethnic minorities to the rights of handicapped children to educational opportunity.

The reasons for this delay were more psychological than legal, and were rooted in the attitudes of society and the handicapped themselves. Although people began to accept that a person who could do the same work or recite the same lesson in class should not be disadvantaged because of color or religion, they still perceived handicapped persons as having demonstrable differences that impeded their education and employment. The notion underlying the *Brown* decision, acceptance of an individual as an individual, began only gradually to encompass persons with visible deficiencies. At the same time, parents of a handicapped child slowly began to realize that they had no reason to be ashamed of or hide an imperfect child. It required many years to change the attitudes of the handicapped themselves and their parents, and for them to come together and gain the strength of numbers needed to advocate their position.

Simultaneously, the heyday of public education, with its almost unquestionable reverence for professional educators, was passing. As educators appeared fallible in more and more areas, there gradually developed a shift in responsibility for the handicapped child from the educator, who used to "know best," to a more militant parent, and frequently to an attorney and the courtroom. The early achievements in educational equity came for the handicapped, as for other groups, through litigation. Although many earlier decisions loosely referred to the "distinctive and priceless function of education in our society,"¹⁰ the landmark cases involving special education of handicapped children did not occur until 1971-72, when courts decided both *Pennsylvania Association for Retarded Children (PARC) v. Pennsylvania*¹¹ and *Mills v. Board of Education*.¹²

PARC involved mentally retarded children excluded from the state's schools by a state law permitting exclusion of children deemed to be "uneducable or untrainable." The children were institutionalized at Pennhurst State School and Hospital, which, in essence, performed a custodial function and did not undertake to educate them. The plaintiffs, who argued that their exclusion under the state statutes violated

10. *Serrano v. Priest*, 5 Cal. 3d 584, 608-09, 487 P.2d 1241, 1258, 96 Cal. Rptr. 601, 618 (1971).

11. 343 F. Supp. 279 (E.D. Pa. 1972).

12. 348 F. Supp. 866 (D.D.C. 1972).

the equal protection clause of the Constitution, sought injunctive relief and an order requiring a public education for all retarded children in each school district. The key issue was plaintiffs' argument that there was no rational basis for the statutory assumption that some children are uneducable. They introduced massive expert testimony to show that children of various handicaps could learn and benefit from public education.

The court, by resolving the case through a pretrial consent decree, never reached the constitutional issues that plaintiffs raised. Defendants conceded the case and agreed to a decree that committed them to undertake the education of all mentally retarded children. Thus, the *PARC* decision lost some of its value as precedent for an asserted right to education because the district court never decided the constitutional issues presented. The court's decree enforcing the consent order, however, commented favorably on plaintiffs' case,¹³ and the decree itself became important in directing the shape of possible remedies in later cases.

Shortly after the *PARC* decision came *Mills*, the only case before the 1975 Act specifically holding that exclusion of handicapped children from publicly funded education was unconstitutional. *Mills* encompassed not only mentally retarded children, such as the plaintiffs in *PARC*, but also all children excluded because of mental, emotional, physical, or behavioral handicaps. The school system in *Mills* justified its exclusion in large part on an asserted lack of funds. The system argued that admitting all the previously excluded children, evaluating them, and hiring competent personnel to deal with the various handicapping conditions would require a tremendous amount of money that the district did not have. The court rejected this argument, noting that if funds were scarce, one category of children could not be singled out to bear the entire financial brunt. Rather, the available funds would have to be expended "equitably," without excluding any child from an education.

These two cases were the catalysts for an outpouring of commentary attempting to determine the constitutional basis of the right to an education, and to define the extent of that right.¹⁴ Although extended ar-

13. The court characterized the state's settlement negotiations as "an intelligent response to overwhelming evidence." 343 F. Supp. at 291.

14. See, e.g., Herr, *Retarded Children and the Law: Enforcing the Constitutional Rights of the Mentally Retarded*, 23 SYRACUSE L. REV. 995 (1972); Kirp, Buss & Kuriloff, *Legal Reform of*

guments were developed regarding potential equal protection and due process claims to an "appropriate" or "adequate" education,¹⁵ the Supreme Court's decision in *San Antonio Independent School District v. Rodriguez*¹⁶ was a set-back for the developing constitutional theories. By applying the traditional equal protection "rational basis" test to uphold Texas' system of financing schools from local property taxes despite the consequent inequality of funding between wealthy and poor districts, the Court clearly indicated that innovative constitutional theories in the field of education were unlikely to succeed. Surprisingly, however, *Rodriguez* neither stopped the rush of state legislatures to enact bills providing for the public education of the handicapped nor prevented Congress from considering and eventually passing the 1975 Act.

First *Rodriguez*, and later the 1975 Act, stunted the growth of the judicially created notion of education as a right of the handicapped child. This left many questions unanswered by the courts. Thus, there was no guidance offered about possible distinctions between handicaps that might require separate treatment. Also unanswered were questions of allocation of funds between competing children if the handicapped child needed extra funds to receive an adequate education. Similarly, the cases did not address the issue of the type of education appropriate for different children or of who should decide what constituted an appropriate education. Although constitutional issues might still be relevant in the case of a school district's refusing to provide any education to a particular child or class of children, or as a back-up cause of action to a statutory complaint, for all practical purposes the important issues have shifted to questions of the Act's intent, interpretation, and implementation.

Special Education: Empirical Studies and Procedural Proposals, 62 CALIF. L. REV. 40 (1974); Schwartz, *The Education of Handicapped Children: Emerging Legal Doctrines*, 7 CLEARINGHOUSE REV. 125 (1973); Shapp, *The Right to an Education for the Retarded in Pennsylvania*, 23 SYRACUSE L. REV. 1085 (1972); Weintraub & Abeson, *Appropriate Education for all Handicapped Children: A Growing Issue*, 23 SYRACUSE L. REV. 1037 (1972); Yudof, *Equal Educational Opportunity and the Courts*, 51 TEX. L. REV. 411 (1973); Comment, *The Right to Education for Mentally Retarded Children*, 43 U.M.K.C. L. REV. 79 (1974); Note, *The Right of Handicapped Children to an Education: The Phoenix of Rodriguez*, 59 CORNELL L. REV. 519 (1974); Comment, *Toward a Legal Theory of the Right to Education of the Mentally Retarded*, 34 OHIO ST. L.J. 554 (1973); Comment, *Public Instruction to the Learning Disabled: Higher Hurdles for the Handicapped*, 8 U.S.F. L. REV. 113 (1973); 77 DICK. L. REV. 577 (1973).

15. See, e.g., Krass, *supra* note 4.

16. 411 U.S. 1 (1973).

III. THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT OF 1975

A. *The Predecessors*

The statutory history of federal efforts to educate the handicapped is short. Congress first granted federal aid to educational programs for handicapped children in the Elementary and Secondary Education Act of 1965.¹⁷ This Act primarily aimed at economically disadvantaged youth as an aspect of the "War on Poverty." It involved little federal control over local programs. As the Senate Committee on Labor and Public Welfare noted: "the specific types of programs and projects . . . are left to the discretion and judgment of the local public educational agencies."¹⁸ Although this Act included special programs for the handicapped within its general review, it was not until the following year that Congress amended it¹⁹ to include a title specifically dealing with handicapped children. Although that title involved more federal control, the Act remained basically a grant of money to states to initiate or provide for the education of handicapped children. Further amendments in 1968,²⁰ 1970,²¹ and 1974²² greatly expanded the scope and purposes of the Act and increased the amount of funds available. Many handicapped children, however, were still receiving inadequate education or no education at all.²³ Congress, therefore, in creating the Education for All Handicapped Children Act of 1975, drew heavily on the *PARC* and *Mills* decisions by significantly increasing federal involvement in the field of special education.

17. Pub. L. 89-10, 79 Stat. 27.

18. S. REP. NO. 146, 89th Cong., 1st Sess. 9 (1965).

19. Elementary and Secondary Education Amendments of 1965, Pub. L. No. 89-750, 80 Stat. 1191 (1966).

20. Elementary and Secondary Education Amendments of 1967, Pub. L. No. 90-247, 81 Stat. 783 (1968).

21. Elementary and Secondary Education Amendments of 1970, Pub. L. No. 91-230, 84 Stat. 121.

22. Elementary and Secondary Education Amendments of 1974, Pub. L. No. 93-380, 88 Stat. 484.

23. See generally *Contemporary Studies Project*, *supra* note 4, at 1322-30 (1977), for an exhaustive study of the amendments that preceded passage of the 1975 Education for All Handicapped Children Act.

B. *Major Provisions of the Act*

The Act is very broad, both in vision and in scope. It opened with a "Statement of Findings and Purpose,"²⁴ which recited that over half of the estimated eight million handicapped children in the country did not receive adequate education, that over one million received no education at all in the public schools, that, in Congress' view, the educational needs of handicapped children could be met, and that local agencies had a responsibility to educate all handicapped children. The Act included as "handicapped children" those who were "mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, or children with specific learning disabilities."²⁵ The Act covers children between the ages of 5 and 17, although states are also encouraged to institute programs for children beginning at age 3 and continuing to age 21.²⁶ All children covered under the Act are supposed to receive a "free appropriate public education,"²⁷ defined as "specially designed instruction, at no cost to parents or guardians, to meet the unique needs of the handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions."²⁸ The right also includes provision of related services such as transportation and supportive services.²⁹

The core of the Act lies in its funding. The federal government provides funds to the states to use in accordance with provisions that describe the eligibility criteria and the necessary elements of both state and local plans.³⁰ The amount of funding a state receives is based on the number of handicapped children in the state, but the Act contains several safeguards to insure that states do not become overzealous in finding handicapped children to increase their allotments. Thus, no more than 12% of the state's population between the ages of 5-17 may be counted as handicapped for the purposes of the Act,³¹ and 75% of the funds allocated to a state are to be distributed directly to local agencies, with the state educational agency retaining control of only the re-

24. 20 U.S.C. § 1401 (Supp. V 1975).

25. *Id.* at § 1401(1).

26. 20 U.S.C. § 1412(2)(b) (Supp. V 1975).

27. *Id.* at §§ 1401, 1412(1).

28. *Id.* at § 1401(16).

29. *Id.*

30. *Id.* at § 1412.

31. *Id.* at § 1411(a)(5)(A)(i).

mainder.³² Thus, the basic thrust of the Act is to insure that handicapped children be educated at or near home whenever possible, and not be moved to regional centers or institutions for treatment. This purpose correlates with the strong congressional emphasis on "mainstreaming"³³ handicapped children in regular classrooms as much as possible.

To qualify for funds, each state must prepare a plan that follows the Act's guidelines.³⁴ First, the state must identify, locate, and evaluate all handicapped children within its borders.³⁵ Second, all handicapped children who have had no education must have first priority in receiving educational services, with those with the most severe handicaps coming next.³⁶ Third, the Act requires development of individualized programs for each child, which must be reviewed at least annually.³⁷ Fourth, to as great an extent as possible, the handicapped children must be educated with normal children in the least restrictive environment possible.³⁸ Finally, procedural safeguards require the states to give the handicapped and their parents some ability to control the child's education.³⁹ These rights include hearings before the state or local educational agency,⁴⁰ administrative appeal to the state agency⁴¹ (in the case of local hearings), as well as eventual action in state or federal court.⁴² These rights are triggered whenever a parent or handicapped person objects to a particular classification or to a change in classification or to a particular school program.⁴³

Law reviews and other commentaries provided a substantial amount of preliminary analysis.⁴⁴ After a few years of operation, the 1975 Act's strengths and weaknesses appear in three basic areas: (1) problems arising from the local emphasis in funding; (2) problems involving the "mainstreaming" concept; and (3) "procedural" problems, in particular

32. *Id.* at § 1411(b), (c).

33. *See* [1970] U.S. CODE CONG. & AD. NEWS 2768.

34. 20 U.S.C. §§ 1412, 1413 (Supp. V 1975).

35. *Id.* at § 1414(a)(1)(A).

36. *Id.* at § 1412(3).

37. *Id.* at §§ 1412(4), 1414(a)(5). *See id.* at § 1401(19).

38. 20 U.S.C. § 1412(5)(B).

39. *Id.* at §§ 1412(5)(A), (7)(A), 1415.

40. *Id.* at § 1415(b)(2).

41. *Id.* at § 1415(c).

42. *Id.* at § 1415(e)(2).

43. *Id.* at § 1415(C).

44. *See, e.g.*, sources cited in notes 4 & 5 *supra*.

those involving assertion by handicapped persons and their parents of opinions divergent from those of the local educators. Before analyzing these problems, however, we must discuss some of the special aspects of education of the deaf compared with education of persons with other handicaps. Each of the problem areas under the 1975 Act, while having aspects that pertain to all handicapped persons, also has unique implications for the education of deaf children.

IV. SPECIAL ASPECTS OF DEAF EDUCATION

An attempt to discuss deafness runs the risk of being too simplistic for the educator of the deaf yet too detailed or seemingly irrelevant for the lawyer trying to appreciate the present legal posture of deaf education. Nevertheless, some appreciation of the history of deaf education, the competing philosophies, and the unique qualities of deafness as a handicapping condition, must be obtained to fully understand the impact of federal law.

A. *History of Deaf Education*

Apart from early attempts to treat the deaf with compassion instead of cruelty,⁴⁵ the education of the deaf really began during the 16th century when the monastery of San Salvador, Spain established the first school to educate a few select and wealthy deaf pupils.⁴⁶ Previously, deaf persons were classified with mentally retarded persons. Few attempts were made to educate the members of either category, partly because of statements attributed to Aristotle that persons born deaf became senseless and incapable of reason. Although procedures and

45. The Hebrews, in the 5th-6th centuries B.C.E., were the first people to look with compassion on and provide for the welfare of the deaf. Although they classified the hearing impaired with the mentally retarded, they believed that deaf persons were under the special protection of God. During this time, the Greeks and Romans were destroying imperfect babies. During the later spread of Christianity, the deaf fared only slightly better than under the Romans, because it was thought that the birth of a deaf baby was a punishment for the parents' sins. See R. BENDER, *THE CONQUEST OF DEAFNESS* 18-19, 27 (1970).

46. Peter de Ponce, a monk of St. Benedict, established the school. The earliest contemporary writing referring to his teaching of deaf persons was by a lawyer, one Lasso of Ona. Writing around 1550, Lasso discussed the legal questions which arose as a result of the successful acquisition of speech by young deaf noblemen. It was his conclusion that the deaf who learn to speak are no longer 'dumb' and could then claim their inheritances and manage their own affairs. LASSO, *TRATADO LEGAL SOBRE LOS MUDOS* (copied from the original with English translation, 1899) discussed in R. BENDER, *THE CONQUEST OF DEAFNESS* 40 (1960).

techniques to educate the deaf were first publicized as early as 1620,⁴⁷ educators before this time and well into the 18th century guarded their teaching techniques by swearing students and fellow teachers to secrecy. This practice tended to preserve their incomes, but inhibited dissemination and development of educational techniques. The initial method advocated publicly involved the use of a one-handed manual alphabet taught in conjunction with the corresponding letters through speech.

By the middle 17th century, an increased interest in medical factors pertaining to deafness had some impact on education of the deaf. Teachers tried differing methods of deaf education, some emphasizing education by the use of manual signals and others emphasizing as much use of speech as possible. In 1661, George Delgarno published "The Art of Communication,"⁴⁸ which was the first attempt at a universal manual language. This was a methodical classification of ideas, each represented by written characteristics, with no reference to the words of any particular language. Delgarno advocated that this language be taught in the same manner that a hearing child learns language, by constant exposure, except that instead of speaking to the deaf child, he advised the parents to finger spell.⁴⁹

By the 18th and 19th century, the other European nations had begun to recognize an obligation to educate all children, including the hearing-impaired.⁵⁰ While Spain produced the first teachers of the deaf and the first book, France and Germany started public education of the deaf. In these countries the controversy developed between educators

47. Juan Bonet, a soldier and teacher, first publicized educational procedures and techniques in 1620. J. BONET, *REDUCTION DE LAS LETRAS Y ARTE PARA ENSEÑAR A HABLAR LOS MUDOS* (Simplification of Sounds and the Art of Teaching the Dumb to Speak) (1620).

48. G. DELGARNO, *ARS SIGNORUM VULGO CHARACTER PHILOSOPHICA* (1661).

49. In the same century Comenius, another great educator, presented a contrast. His basic philosophy was that symbols on paper or by hand were of little use until the child first had the experience which the symbols represented. Comenius' philosophy forms the basis of all major systems of deaf education today. He was so far ahead of his time that his ideas had very little influence on education during his life. At the time, teachers taught more to the subject than to the child; today, educators feel that a child needs to experience a situation in order to understand it.

50. See, e.g., J. AMANN, *SURDU LOQUENS* (The Speaking Deaf) (1692); J. AMANN, *DISERTATIO DE LOQUELA* (A Dissertation on Speech) (1700). Amann believed that speech was of divine origin, and so was not only the privilege of all, but could be achieved by all, with the hearing having a special obligation to educate the hearing-impaired. Speech was, therefore, the fundamental aim of his teaching, in which he stressed drill, lipreading, and voice control. See also E. SEQUIN, *EDUCATION DE LOS SORDOMUDOS*, JACOBO RODRIGUEZ PEREIRA (1939), dealing with the influence of Pereira in the 18th century. Pereira taught a one-handed manual alphabet, repre-

preferring manual emphasis and those preferring oral emphasis in deaf education, with educators usually joining one camp or the other wholeheartedly. The leading advocates of the two methods were the French cleric Charles Michel de l'Epee, and the German educator Samuel Heinicke. The German educators advocated oral methods of education, and taught language through reading and writing; the French educators, on the other hand, advocated the use of sign language. This polarization has persisted to the present day⁵¹ with only slight modification, and continues to divide deaf educators.

De l'Epee devoted his life to formulating the French, or manual, school of instruction. He founded the first public school for the deaf in Paris in 1755, and became convinced early in his career that signs were the natural language for deaf people, and that deaf education should be based on them. Although there is speculation that he did not actually invent sign language, but adopted a method of communication developed informally on the playgrounds and in the dormitories of schools for the deaf,⁵² commentators concede that it was de l'Epee who gave the method respectability. Interestingly, he also considered teaching speech to his deaf charges but abandoned the effort because of the large number of pupils in his classes.⁵³

Heinicke, in contrast, strongly discouraged the use of manual signs and emphasized the oral method of education. He believed that spoken language was the foundation of deaf education as well as of education of hearing persons, and thought manual communication was harmful to the educational progress of deaf persons. He emphasized that the deaf child should be taught language by constant use, in the same way that hearing children learn it. He taught speech reading first,

senting phonic qualities rather than letters. Mimetic signs were used only until a more oral means of communication could be established.

Regarding the gradual development of the obligation to educate the deaf, see generally T. ARNOLD, *EDUCATION OF THE DEAF: A MANUAL FOR TEACHERS* (1923).

51. See notes 64-79 *infra* and accompanying text.

52. L. FANT, *GALLAUDET TODAY* (1974).

53. De l'Epee seldom taught fewer than 60 pupils in each class. Clarke, *Total Communication*, 2 *CANADIAN TEACHER OF THE DEAF* 27 (1972). Even today, one of the major hindrances to oral education is that it must be taught to very small groups (5-7 students per teacher) while economic factors or state school regulations require much higher student-teacher ratios. In Wisconsin, for example, the current required minimum ratio is 9-1, making possible manual but not oral education. Conversation with D. Hayes, Supervisor of Rehabilitative Radiology, University of Wisconsin Department of Communicative Disorders, Madison, Wisconsin, July, 1978. See generally *Wis. ADMIN. CODE § PI 11.01* (1979).

with students learning to associate ideas with the movements of the teacher's lips. When students achieved that, he then taught them speech and eventually reading and writing.⁵⁴

Later in the same century, Abbe Silvestri, a trainee of de l'Epee, tried to bring together the finger-spelling and methodical signs of the French system with the speech teaching of Heinicke, but it was generally concluded after some experimentation that his method of teaching led to "haphazard learning and confusion."⁵⁵ Teachers abandoned this compromise method of education for over a century.

During the 19th century, the first attempts also were made to educate deaf children by encouraging more contact with hearing children and less placement in institutions. In 1821, Johann Graser, a Bavarian instructor, opened an experimental school for the deaf adjacent to a regular school.⁵⁶ He planned to give each child one to two years of special training, and then to place them in classes at the regular school. The regular school, however, gave deaf students insufficient time to compensate for their slower pace of learning. Their integration into the regular classes was unsuccessful and the program was eventually abandoned. The attempt at placement with hearing children, however, was the forerunner of the modern "mainstreaming" concept.

During this time, the attempt to educate the deaf, together with the various schisms existing in Europe, found its way to the United States. Thomas Gallaudet opened the first permanent school for the deaf in the United States in 1817, a manual school supported with funds from the Connecticut legislature.⁵⁷ Shortly thereafter, schools for the deaf spread rapidly from one state to another.⁵⁸ Some began as small private schools and were later taken over by state public school systems. The majority were created as state residential schools. Generally, the residential schools followed the manual system of education estab-

54. See also F. GREEN, *VOX OCVLIS SUBJECTA* (1783) cited in H. BEST, *DEAFNESS AND THE DEAF IN THE UNITED STATES* 386 (1943), describing the work of Thomas Braidwood. Braidwood, a Scot, advocated oralism and successfully operated a school despite a lack of public funding.

55. Clarke, *supra* note 53, at 23 (quoting L. DI CARLO, *THE DEAF* (1964)).

56. R. BENDER, *THE CONQUEST OF DEAFNESS* 130-31 (1960).

57. See E. GALLAUDET, *THE LIFE OF THOMAS HOPKINS GALLAUDET* 118 (1888). The \$5,000 given to Gallaudet for his school by the Connecticut legislature is believed to be the first American appropriation of public money for a benevolent institution. Interestingly, Gallaudet had tried to study the oral method under the younger Thomas Braidwood in Scotland, but when Braidwood objected to his plan to study both the oral and manual methods and combine them for use in America, he studied only the French method.

58. See H. BEST, *DEAFNESS AND THE DEAF IN THE UNITED STATES* 393-98 (1943).

lished by Gallaudet, while the private, noninstitutional schools preferred the oral method.

If Gallaudet gave the manual method a head start in America, later in the century Horace Mann gave the oral system a strong push toward intellectual parity. Mann visited several German schools for the deaf in 1843 and came away highly impressed with the progress German children were making with lip reading and speech. He returned to America an enthusiastic supporter of the oral method and published an influential report advocating the use of the oral system in America.⁵⁹ Although not all American educators who visited the German schools were similarly impressed, Mann's influence was so great that parents of deaf children, seeing a chance that their children could communicate orally and lead more normal lives, began to demand the teaching of speech to their children.

A series of efforts to establish oral schools under state auspices followed, leading to the organization of the Clarke School for the Deaf in Northampton, Massachusetts in 1867.⁶⁰ Two other oral schools in Boston and New York followed, and the stage was set for the same oral versus manual competition that had existed in Europe in the previous century. Alexander Graham Bell, originally a manualist, continued the efforts of Horace Mann, and did much to promote oralism and eventually established it on a parity with manual education.⁶¹ Bell undertook

59. *See id.* at 533.

60. In Boston in 1864, the families of 3 deaf girls who had learned to talk began encouraging the same type of teaching for other deaf children. That year the Massachusetts General Court was petitioned for an act to incorporate an oral school for the deaf in the state, but the petition was defeated through the influence of the manual school established by Gallaudet at Hartford. Governor Bullock was sympathetic to the need for an oral school, however, and when a philanthropist, John Clarke, offered to donate \$50,000 to establish an oral school in Massachusetts, the Governor persuaded the legislature to establish the Clarke School for the Deaf under state jurisdiction. *Id.* at 534-35.

61. *See generally* R. BRUCE, BELL: ALEXANDER GRAHAM BELL AND THE CONQUEST OF SOLITUDE (1973); C. MACKENZIE, ALEXANDER GRAHAM BELL: THE MAN WHO CONTRACTED SPACE (1928). In the course of his research to find some mechanical means of making speech visible, Bell began to experiment with electrical transmission of sound in an attempt to develop amplification. It was these experiments that led Bell to the essentially accidental invention of the telephone. *See* F. DELAND, DUMB NO LONGER: ROMANCE OF THE TELEPHONE (1908). Despite his subsequent fame as an inventor, Bell insisted that he be remembered as a teacher: "[R]ecognition of my work for and interest in the education of the deaf has always been more pleasing to me than even recognition of my work with the telephone." Bruce, *Excerpts from Bell: Alexander Graham Bell and the Conquest of Solitude*, 75 VOLTA REV. 146 (1973). It is the great irony of deaf education that the accidental invention of Alexander Graham Bell is more responsible for excluding deaf persons from white-collar employment ("but he can't answer the phone")

a series of studies which tended to show that deaf persons who could use only sign language became isolated and communicated only with themselves and those few hearing persons who could use sign language. This isolation encouraged intermarriage of deaf people and increases in the proportionate rate of hereditary deafness. While he had an impact on behalf of oral education that lasts to this day, Bell also attempted to change people's perceptions of deaf people in general. For example, he caused the substitution of the term 'deaf' for 'deaf-mute' in several state statutes.

As in Europe during the previous century, several American educators attempted to combine what they perceived as the best features of the oral and manual approaches to deaf education. With the support of members of the Gallaudet family, some schools combatted the spread of exclusively oral and manual approaches by adopting what was then called the combined method of education. Each school made its own decision as to what a combined method should include and in what proportions, but all taught lip reading, manual spelling, signs, reading, and writing. One particularly prominent method became known as the "Rochester Experiment," implemented at the Rochester, New York School for the Deaf in 1878. This method involved a simultaneous use of finger-spelling (as opposed to manual signs⁶²), coupled with oral speech. Although some residential schools supported the Rochester method, hoping that the oral emphasis would be reinforced by fingered cues to help students identify different words that looked similar on the lips of the speaker, most schools maintained either the oral or the manual method only. The oralists argued that it was difficult to develop speech unless the child was completely surrounded by an atmosphere of speech. The manualists thought that oral education was ineffective, and that the attempt to combine the two programs was therefore just a waste of time that could be more valuably used in manual education.

than any other factor. *See* A. CRAMMATTE, *DEAF PERSONS IN PROFESSIONAL EMPLOYMENT* 89-92 (1968).

62. Manual signs are single symbols or motions for whole words. In conjunction with manual signing, finger-spelling a word letter by letter is always used to express words for which there are no general signs. *See* H. SCHUNHOFF, *THE TEACHING OF SPEECH BY SPEECH IN PUBLIC RESIDENTIAL SCHOOLS FOR THE DEAF IN THE UNITED STATES, 1815-1955* (1957). The Rochester Method uses finger-spelling but no signs with the hand doing the spelling held by the face while the oral speech was given at the same time.

B. *Methods of Deaf Education*

As deaf education has reached the 20th century, it has been marked by continuation of the centuries-old battles between methods of education.⁶³ The subject remains highly controversial because no method has ever worked sufficiently well to receive uncritical acceptance from educators. Comparative studies are confusing and inconclusive, with most published research tending to prove what the researcher set out to find.

The two most popular methods today for educating deaf children are the oral method, and the "total communication" method, the successor to the older "combined" method. There are, however, four basic communication philosophies in use that draw support from various deaf educators. These are: (a) manual instruction; (b) oral and aural instruction; (c) total communication; and (d) cued speech. Of these, as we have seen, manual instruction was the first method to be used. One may view each of the others as a response to the perceived inadequacies of an earlier method.

1. *Manual Instruction*

Manual instruction comprises both the use of signs (one hand signal for an entire word or concept) and finger-spelling (spelling a word letter by letter with a different signal for each letter). The absence of attempted oral expression is the significant feature of manual education. Head movements and facial expressions are a part of every method of manual education.

Although there are several major systems of manual communication, all share the same basic feature—nonreliance on oral speech. Most well known is American Sign Language, or Ameslan, the method of manual communication used by the typical deaf adult.⁶⁴ Ameslan is a spatial language, which does not use tense markers, plurals, or articles. Negation is expressed by head movements; question forms are usually shown by facial expressions and head movements. The verb 'to be'

63. See generally M. GOLDSTEIN, PROBLEMS OF THE DEAF 205-19 (1933); Clarke, *supra* note 53, at 22-29.

64. The 'typical' deaf adult graduated from a residential school, and reads and writes at an eighth-grade level. Five-sixths of deaf adults work at manual jobs. See U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, EDUCATION OF THE DEAF, A REPORT TO THE SECRETARY OF HEALTH, EDUCATION, AND WELFARE BY HIS ADVISORY COMMITTEE ON THE EDUCATION OF THE DEAF 22-23 (1965) [hereinafter referred to as EDUCATION OF THE DEAF].

does not exist in Ameslan. The word order in a sentence follows the sequence of events and importance. Thus, in structure, Ameslan is closer to the Chinese language than it is to English.⁶⁵

Ameslan, and manual communication methods in general have been criticized for isolating their users and limiting the concepts their users are able to form by restricting what they can express and how they express it.⁶⁶ In response to this criticism, manual educators have developed several variants adapting the Ameslan vocabulary to English syntax, and also including tenses, plurals, prepositions, articles, and the verb 'to be.'⁶⁷ Nonetheless, oral proponents assert that manual communication isolates the deaf in a small world of their own, depriving them of the ability to communicate with the vast majority of humanity. Oral advocates also assert that the scarcity of concepts that can be expressed without tedious finger-spelling limits the ability of the manual-only person to form more diverse concepts. For support, oralists point

65. Clarke, *supra* note 53, at 23.

66. See G. ORWELL, NINETEEN EIGHTY-FOUR 46-47 (1949). Syme, who worked in the Research Department of the Ministry of Truth, was describing to Winston Smith the effect of destroying words in the course of preparing the newest edition of the Newspeak Dictionary:

Don't you see that the whole aim of Newspeak is to narrow the range of thought? In the end we shall make thought-crime literally impossible, because there will be no words in which to express it. Every concept that can ever be needed will be expressed by exactly *one* word, with its meaning rigidly defined and all its subsidiary meanings rubbed out and forgotten Every year fewer and fewer words, and the range of consciousness always a little smaller.

. . . .
 . . . The whole climate of thought will be different. In fact there will *be* no thought, as we understand it now. Orthodoxy means not thinking—not needing to think. Orthodoxy is unconsciousness.

See also H. KELLER, THE STORY OF MY LIFE 59 (1902): "One who is entirely dependent upon the manual alphabet has always a sense of restraint of narrowness."

67. See Clarke, *supra* note 53, at 22-29. There are three major variants of Ameslan:

(1) Signed English ("Siglish") adapts the Ameslan vocabulary to English syntax, but tenses, plurals, and articles are usually deleted. Thus, if one were to directly translate the signs to Siglish, the Ameslan "Shirt my beautiful yellow" would become "I have beautiful yellow shirt"; the Ameslan "Me store go tomorrow" would become "I go to store tomorrow"; and the Ameslan "girl good" would become "girl is good."

(2) Signing Exact English (S.E.E.), developed by Gustason between 1969-72, uses basic Ameslan signs and finger-spelling, and follows English syntax and grammar. It also incorporates tense, plurals, and articles, and includes the verb "to be." Thus, the Ameslan "Shirt my beautiful yellow" is "I have a beautiful yellow shirt"; the Ameslan "Me store go tomorrow" is "I will go to the store tomorrow"; and the Ameslan "girl good" is "she is a good girl."

(3) Seeing Essential English (SEE) was developed in Michigan under the direction of David Anthony, a Gallaudet graduate. SEE is similar to S.E.E. except that it has developed many new signs, has a standard vocabulary based on word meaning and uses contextual clues. SEE does not use finger-spelling, which makes it unique among the manual systems.

to the fact that the average manual-only deaf adult reads and writes at an eighth grade level, performs jobs consistent with that level of education, and associates primarily with other deaf and manual-only people.⁶⁸

Manual proponents, including those who believe in "pure" manual education and those who prefer manual education as a component of total communication, usually reply that proponents of oral education ignore the fact that the child is deaf and do not come to grips with reality because they emphasize the child's weakest skill.⁶⁹ A manual advocate also argues that, despite the minority of deaf children who learn to communicate orally with sufficient clarity to be understood by

68. See EDUCATION OF THE DEAF, *supra* note 64, at XV. Oralists argue that manual education—both 'pure' manualism and the partially manual variations including total communication—unduly limit children's aspirations by confining them from the very start of their lives to those jobs in which they do not have to communicate with other persons. Cf. MALCOLM X, THE AUTOBIOGRAPHY OF MALCOLM X 36-37 (1964):

I was one of his top students, one of the school's top students—but all he could see for me was the kind of future "in your place" that almost all white people see for black people.

He told me, "Malcolm, you ought to be thinking about a career. Have you been giving it thought?"

The truth is, I hadn't. I never have figured out why I told him, "Well, yes, sir, I've been thinking I'd like to be a lawyer."

.....

Mr. Ostrowski looked surprised . . . and said, "Malcolm, one of life's first needs is for us to be realistic. Don't misunderstand me, now. We all like you, you know that. But you've got to be realistic about being a nigger. A lawyer—that's no realistic goal for a nigger. You need to think about something you *can* be. You're good with your hands—making things. Everybody admires your carpentry shop work. Why don't you plan on carpentry? People like you as a person—you'd get all kinds of work."

To an oralist, this divergence between aspirations and "reality" also reflects the difference between oralism and manualism. Oralism tells deaf children they can be doctors or lawyers if they want it badly enough; manualism tells them they have to be "realistic" about being deaf. A main source of criticism of the oral approach, however, is young, well educated deaf adults who, despite becoming orally competent as well as well educated, still find some occupational doors closed to them. Such persons criticize the oral philosophy for raising their aspirations and then disappointing them. See Reeves, *Scope for Oralism*, 79 VOLTA REV. 43, 51 (1977).

69. The major issues raised by manualists are (1) the degree to which it is possible to develop speech and speech reading in the absence of extensive residual hearing in a child whose loss is prelingual; (2) the extent to which early and continued manual communication aids rather than interferes with the development of oral and written communication skills; (3) the psychological and educational effects of the intense frustration felt by the child who has to learn academic materials primarily through the medium of speech reading; and (4) the fact that many of the successful oral students in the past were adventitiously deafened youths with established speech and language patterns. See H. BEST, DEAFNESS AND THE DEAF IN THE UNITED STATES 526-31 (1943); McClure, *Current Problems and Trends in Education of the Deaf*, 18 DEAF AMERICAN 8 (1966); Vernon & Mindel, *Psychological and Psychiatric Aspects of Profound Hearing Loss*, in AUDIOLOGICAL ASSESSMENT 99 (D. Rose ed. 1978).

hearing persons, many others are only frustrated by their inability to communicate and lose valuable educational time in oral programs that could be devoted to a method they could use.⁷⁰

2. *Oral and Aural Instruction*

Historically, oral instruction has been the main alternative to manualism. Oralism generally entails not just some oral work with the child, but the *total* absence of sign language from the child's education. Emphasis is on stimulating and using the residual hearing that almost all deaf children have⁷¹ to improve language acquisition and speech pro-

70. See Montgomery, *The Relationship of Oral Skills to Manual Communication in Profoundly Deaf Adolescents*, 111 AM. ANNALS OF THE DEAF 557 (1966):

The popularity of manual communication is probably accountable in terms of its relative ease of acquisition but the distribution data revealed in this study shows another feature, namely that the deaf child who wishes to communicate with school mates (almost all of whom are segregated in schools attended solely by profoundly deaf children) by lip-reading and speaking must belong to the 7% minority in order to do so. . . . It is true that such a child could more easily converse with hearing people and with teachers but it is not surprising that they all acquire some proficiency in the manual methods favored by 71% of their own school-fellows.

Id. at 561. See also Craig, *Effects of Preschool Training on the Development of Reading and Lip-reading Skills of Deaf Children*, 109 AM. ANNALS OF THE DEAF 280 (1964); Nix, *Total Communication: A Review of the Studies Offered in its Support*, 77 VOLTA REV. 470 (1975); Vernon, *Current Etiological Factors in Deafness*, 113 AM. ANNALS OF THE DEAF 106 (1968). See generally Caccamise, Hartfield & Brewer, *Manual/Simultaneous Communication (M/SC) Research: Results and Implications*, 123 AM. ANNALS OF THE DEAF 803 (1978):

Research has consistently shown that hearing-impaired persons receive information better under simultaneous communication (SC) conditions than under either manual communication (MC) alone or speechreading with sound alone conditions.

Id. at 804;

Manual/simultaneous communication (M/SC) not only are not detrimental to the development of oral-aural communication skills (speech, speech-reading, and listening), but they may in fact facilitate the development of these skills.

Id. at 807.

71. The term "deafness" is used loosely to refer to any amount of hearing loss. In the mind of the lay person, "deaf" means "completely without hearing." Actually, there are very few people whose auditory mechanism is completely dead. Most persons who are classified as deaf do have some level of hearing that is demonstrable on an audio-metric test. It is the usefulness of this residual hearing that determines whether a person is deaf or hard of hearing. The Committee on Nomenclature of the Conference of Executives of American Schools for the Deaf proposed the following definitions in 1937:

1. The Deaf. Those in whom the sense of hearing is nonfunctional for the ordinary purposes of life. This general group is made up of two distinct classes based on the time of loss of hearing: (a) the congenitally deaf: (those who were born deaf). (b) The adventitiously deaf: (those who were born with normal hearing but in whom the sense of hearing later became nonfunctional through illness or accident).
2. The Hard of Hearing. Those in whom the sense of hearing, although defective, is functional with or without a hearing aid.

S. SILVERMAN & H. LANE, *Deaf Children*, in HEARING AND DEAFNESS 386 (1970). The Commit-

duction.⁷² Oralists give their students extensive training in audition and strongly feel that the natural way to acquire language is through hearing. Stressing the fact that less than five percent of the deaf population is totally deaf,⁷³ oralists believe that even the profoundly deaf can receive hearing perceptions when properly aided. Consequently, oral education is highly dependent on proper and continuous amplification.

Just as manual education has been modified in response to criticism from proponents of other methods, so has oral education been modified. Oralists have traditionally emphasized lip reading as one of the major methods of communication. Non-oralists, however, have argued that many words look the same on the lips, thus making lip reading an ineffective means of reliable communication. As a result, one branch of oral education, auralism, or oral/aural, has greatly decreased the amount of lip reading allowed in the classroom. The teacher in an aural program will frequently teach with his or her mouth covered by a hand or other object to prevent overdependence on lip reading.⁷⁴ The child is not forbidden to obtain some information from the teacher's face, but the emphasis is on hearing. The aural variation of oralism is thus a true unisensory approach and has become a more realistic possibility as electronic advances enable the creation of stronger and more

tee on Nomenclature definitions are somewhat oversimplified today due to the improvement in effective strength of hearing aids. Many persons whose auditory sense was previously thought nonfunctional can now utilize their residual hearing to some extent. A more recent classification based on pure-tone hearing levels through the speech frequencies, is a better guide to the degree of severity of hearing loss:

- 30-40 dB loss - Mild
- 50-70 dB loss - Moderate
- 70-85 dB loss - Severe
- 85-110 dB loss - Profound

H. NEWBY, *AUDIOLOGY* 306-07 (3d ed. 1972). Thus, a person whom a layman might think of as "totally deaf" will usually be *profoundly* deaf, and may still receive residual benefit from the use of hearing aids.

72. See R. BENDER, *THE CONQUEST OF DEAFNESS* 199 (1970); Calvert, *Communication Practices: Aural/Oral and Visual/Oral*, 78 *VOLTA REV.* 76 (1976).

73. H. NEWBY, *supra* note 71, at 306.

74. This method of instruction was initiated by Doreen Pollack in Denver, Colorado in 1952. The emphasis of the program is on early detection of hearing loss and prompt fitting of hearing aids. Teaching is done by the unisensory method; the teacher limits the number of visual clues available to the child in order to enforce the development of audition as the child's primary receptive sense. See Pollack, *Acoupedics: A Uni-Sensory Approach to Auditory Training*, 66 *VOLTA REV.* 400 (1964); Stambler & Guercia, *Applying the Auditory Approach: A Parent's Report*, 75 *VOLTA REV.* 368 (1971).

effective hearing aids.⁷⁵

Oral education has its critics among deaf educators. One basic criticism is the philosophical attack that the method ignores the reality of being deaf and, in effect, pretends that the child is not deaf. Another argument is that over emphasis on oral expression prevents the child from acquiring educational concepts at an early age, resulting in a child who can say things intelligibly, but may not have anything to say.⁷⁶ Oral educators reply that oral education does not take so much time that the child cannot also learn academic subjects, and that deaf children who begin their education by relying on sign language develop usable language far less frequently than deaf children who are forced to speak. Oralists also argue that the ability to speak is an important goal in itself, for without it the deaf adult is isolated in a very small section of humanity and cannot perform simple tasks without an interpreter or a notepad.⁷⁷

As we have noted, the research comparing different methods is at best inconclusive. Proponents of each method can point to particular instances of success or failure. The majority of the deaf adults in the United States, however, would probably side with some form of manualism.⁷⁸ Nevertheless, an oralist can reply that the majority of deaf

75. See Lybarger, *Personal Hearing Aids*, 78 VOLTA REV. 113 (1976).

76. See, e.g., Caccamise, Hatfield & Brewer, *Manual/Simultaneous Communication Research: Results and Implications*, 123 AM. ANNALS OF THE DEAF 803 (1978).

77. See note 68 *supra* and accompanying text. The basic philosophical difference between the oral and manual advocates is similar to differences expressed in current political and legal debate regarding whether Spanish-speaking students should be taught and tested in their own language or compelled to use English. See *Diana v. State Board of Educ.*, Civil No. C-70 37 RFP (N.D. Cal., Jan. 7, 1970 and June 18, 1973). Oralists, in effect, argue that deaf persons should adjust to society as much as possible, by using society's means of communication. Manualists, in effect, argue that society should adjust to deaf persons, by facilitating the use of sign language and interpreters. For example, in July, 1978 several manual deaf adults argued to the Wahner Committee, investigating problems of the deaf in Wisconsin, that all Wisconsin school children should be educated in manual communication in order to communicate with deaf persons.

Oralists would argue that the comparison to the possible rights of Spanish-speaking students to education in their own language is both irrelevant and harmful to the deaf. They reason that a Spanish-speaking person, located in a community of other Spanish-speaking people, can survive quite nicely without any use of English. A manual deaf adult, however, does not have a similar community and must constantly be making contact with members of the hearing world. One might also argue, of course, that any encouragement of any minority, whether deaf, Spanish-speaking, or black, to use only its "own" language increases its isolation as a group, and diminishes opportunities for education and employment.

78. See Schreiber, *Total Communication—As the Adults See It*, 27 DEAF AMERICANS 28, 29 (1975): "Most deaf adults use American Sign Language. Anyone who wants to reach them socially, educationally and psychologically should at the very least respect and accept this lan-

adults is exclusively manual and require special assistance in a number of forms. As manualists they can predictably be expected to support "their" method and their group. In contrast, successful graduates of oral education join the hearing community, are no longer in need of special help, and therefore do not form a visible pressure group.⁷⁹

3. *Total Communication*

As in past centuries, some deaf educators have attempted to defuse the manual/oral conflict by adopting combined methods of education. Of these, the most popular today is "total communication" (TC). TC requires the combined use of aural, oral, and manual modes of commu-

guage." See also Caccamise, Ayers, Finch, & Mitchell, *Signs and Manual Communication Systems: Selection, Standardization and Development*, 123 AM. ANNALS OF THE DEAF 877 (1978). But see Reeves, *Scope for Oralism*, 79 VOLTA REV. 43, 50-51 (1977):

Some reference has been made already to the views of some who work with deaf adults, and it has been suggested that these are often unfavorable to oralism. It seems, however, that social workers do not necessarily deal with a true cross-section of deaf people. They are likely to be confronted with a group in which there is a high proportion of failures and, consequently their opinions are biased according to this experience. . . . The opinions of deaf adults . . . are varied. . . . The group most critical of the educational system seems to be the younger, well-educated category. . . . They have achieved a good standard of general education; orally they are very competent; most have experienced higher education or undergone specialized training and are engaged in skilled occupations. But still they are critical of the oral system. . . . Can it be that they do not fully appreciate the nature of deafness? It is both a handicap and a disability. The former can be ameliorated by educational techniques, but the latter remains. The deaf cannot be made to hear normally. . . . Oralism cannot enable the deaf to command the same range of occupations as the hearing, nor can it enable complete social integration into a hearing community, neither can manualism.

These young people seem to be attributing the fundamental disabilities of deafness to oralism instead of appreciating the degree to which oralism has helped them overcome the extent of their handicaps.

79. The most prominent organization for deaf adults is the National Association for the Deaf, consisting of over 15,000 members. The group is actively interested in federal and state legislation for the benefit of deaf persons, including captioned television systems. By way of contrast, the Oral Deaf Adult Section is a subgroup of the Alexander Graham Bell Association, and consists of about 150 members. This group emphasizes the teaching of speech and speech-reading to deaf children. See generally H. BEST, *supra* note 71, at 351-68; Breunig, *Bell Revisited*, 79 VOLTA REV. 428 (1977); Vernon & Mindel, *supra* note 71, at 116. Organizations of oral deaf persons do not oppose concepts like captioned television, because there are many manual-only adults who require that assistance, but they are concerned that the emphasis on such goals will foster the hearing world's stereotype of deaf persons as unable to speak.

The problem in trying to count noses in the deaf community is similar to the "crossover" phenomenon noted in black communities in the south and elsewhere before the force of the civil rights movement was felt in the 1950's. Many black persons whose skin was light enough to pass for white did "cross over," leaving behind those who could not. In comparison, although oral deaf persons do not "cross over" to avoid political repression, still a deaf person who has achieved usable speech and satisfactory employment has little reason to identify with a group whose needs he no longer shares.

nication in the classroom. Most often, the type of manual education used is Signing Exact English, one of the methods that follows English syntax in conjunction with speech and finger-spelling.⁸⁰

Total communication is a new name, but not a new philosophy. Educators three centuries ago tried to do the same thing. The critiques and results are as mixed today as they were in earlier times. A TC advocate can note that the child is exposed to all manner of communication and is not limited to just one method that might not be right for the child. Because all deaf educators agree that deaf children must begin their training as early as possible,⁸¹ the TC advocate can argue that it is impossible to say what method is "right" for a child twelve to eighteen months old. Therefore, no method should be excluded because of the prejudice of the educator.

Total communication comes under attack from both manualists and oralists. Manual advocates note that a multiplicity of languages thrown at a child can completely confuse him. They would limit the educational process to what they see as the most effective method. Oralists agree that education in several different methods can be highly confusing: it is roughly comparable to an English-speaking person trying to learn both French and German at the same time. Oralists would further assert that there is no continuity between TC programs. One teacher may emphasize the one aspect with which he or she is most comfortable and another will emphasize another. Finally, from an oral perspective TC contains the same weakness as manual education. The child, able to grasp manual communication more easily and located in an environment of only deaf persons plus a teacher, will tend to use his

80. See note 67 *supra*.

81. See, e.g., D. MCCONNELL & K. HORTON, A HOME TEACHING PROGRAM FOR PARENTS OF VERY YOUNG DEAF CHILDREN (1970); Whorton, *The Hard of Hearing Child: A Challenge to Educators*, 68 VOLTA REV. 351 (1966). The accepted philosophy is that a child's hearing impairment should be discovered as early as possible. The child should then be kept in a constant environment of oral language in the most efficient and meaningful manner. Infant vocalization and babbling are common characteristics of both hearing and deaf babies. Auditory stimulation encourages the hearing baby to keep babbling, but in the deaf child this stimulation is depressed or distorted. Without the interest in spontaneous vocalization, auditory stimulation for the deaf child begins to lag at age six or seven months. It is thought, therefore, that training should begin no later than this age, since "nature's sensitive age for these particular learning processes lies here." *Id.* at 73. Needless to say, this need to begin training a deaf child as early as six months of age conflicts with the advice often dispensed by pediatricians to parents "not to worry" if their child is not talking on time because "he'll catch up." See Lloyd & Dahle, *Detection and Diagnosis of a Hearing Impairment in a Child*, 78 VOLTA REV. 12 (1976).

manual skills to the exclusion of oral skills that might have been developed.⁸²

Although the latest fascination with total communication is of too recent origin to produce conclusive results, TC has the advantage of being a method that appears to provide something for everyone. A private school might fix its own approach at some point on the continuum between "pure" manualism and "strict" oralism. A public school district, with limited resources, usually can afford to provide only one program for its deaf children. Because it has many other handicapping conditions to treat, it is generally impracticable to establish two, three, or four different programs to satisfy one small segment of the community. An attempt to establish a purely manual program usually sparks opposition from parents who want their children to have at least some oral exposure. On the other hand, an attempt to have only an oral program may cause opposition from parents or deaf children who cannot succeed in a strictly oral environment.⁸³ A total communication program may resolve the dilemma: not only is it cheaper than two or three competing programs, but it offers some aspect for any parent who inquires.

4. Cued Speech

The cued speech method, which has some similarity to the Rochester approach,⁸⁴ was developed at Gallaudet College in 1965. The basic approach of cued speech is to present first-letter signals or cues with voiced speech to distinguish vowel sounds that look alike on the lips and consonants that have little or no contrast for speech reading, such as the letters *b*, *m*, and *p*. Basically, cued speech is a modification of oralism, designed to adjust a primarily oral program to overcome the objection that too many words look alike when lip-read. Oralists avoid

82. See, e.g., Birch & Johnstone, *Mainstreaming: A New Public Policy in Education* (1975) (unpublished paper on file at University of Pittsburgh). Given the great emphasis placed on mainstreaming under federal law, auditory and communicative skills become even more important as key factors for a successful mainstreaming. Yet studies indicate that these skills are not as strongly stressed for children in TC programs. *Id.* at 14. See also J. ROSENSTEIN, *THE PHILOSOPHY OF ORAL EDUCATION* (1967); Miller, *Oralism*, 72 *VOLTA REV.* 211 (1970).

83. Unlike deaf adults, who tend to prefer manual education or total communication, hearing parents of deaf children usually prefer to start their children in oral programs. This may be because, as manualists assert, they are unable to appreciate deafness and unwilling to admit that their children are deaf; or because, as oralists assert, they are more aware of the importance of speech in society and realize that oral programs produce more children who can join that society. See Reeves, *Scope for Oralism*, 79 *VOLTA REV.* 43 (1977).

84. See note 62 *supra* and accompanying text.

this method because of the reliance on hand signals for clues; aural advocates also note that it over-emphasizes lip reading, which they are trying to minimize. TC proponents also avoid the cued speech method because it does not deal with the problem of the child understanding what the word expresses. And manualists note that the cued speech method is only a slightly modified oralism, and is thus incompatible with any of the major signing systems.⁸⁵

C. *Deafness versus Other Handicaps*

Given the neglect by public school systems of all handicapped children until very recently, it has been important for the handicapped and their parents to work together for the education of all handicapped children and to avoid interhandicap arguments. Still, the fact remains that the deaf child, whatever the method of education, has unique obstacles to overcome that are not shared by persons with other handicaps.

First, deafness is a hidden handicap. A deaf person does not *appear* handicapped as does a blind or paraplegic person. While this may help a deaf adult to "bluff" in certain social situations, it also conditions most of society not to think of the deaf when they think of handicapped persons and their special needs. Adults, for example, commonly think that blindness is a more difficult handicap to overcome than deafness, overlooking the fact that for most white-collar employment the ability to communicate verbally is more important than the ability to see. A deaf person might be more readily employable as a gardener or printer than a blind person, but the blind person can become an accountant or lawyer, while the deaf person is almost totally excluded from the professions.⁸⁶ While many committees on hiring the handicapped deal with the problems of vehicular access for wheelchair people and access with seeing-eye dogs for the blind, little effort has gone into the problem of access to jobs from which the deaf are excluded by their inability to use a telephone.

85. See Clark & Ling, *The Effects of Using Cued Speech*, 78 *VOLTA REV.* 23 (1976).

86. The American Bar Association membership lists indicate that there are about 400 practicing attorneys in the United States who are blind; many of these were blinded before attending law school. There is, apparently, only one lawyer in the country who was deaf before attending law school. See A. CRAMMATTE, *DEAF PERSONS IN PROFESSIONAL EMPLOYMENT* 74 (1968). Crammatte also notes that most professional deaf persons are employed in laboratory positions where communication by telephone and group conference are less important.

In the context of education, because the hearing impaired have no outward physical signs of their handicap, "normal" children are more likely to ridicule the deaf child than they would a visibly handicapped child.⁸⁷ The hearing-impaired child is much more likely to be left out when children divide into teams or groups for activities, perhaps because of the child's inability to follow instructions as clearly and quickly as a hearing child.

With regard to the classroom educational process, it must be emphasized that loss of hearing is a different handicap from any other. Almost all analyses of recent federal legislation speak only generally of "the handicapped" and discuss either the mentally retarded or children in wheelchairs.⁸⁸ The one law review article that attempts to distinguish between types of handicaps compares handicaps that impede the learning process, such as mental retardation, with those that only place threshold hurdles before the child, such as blindness, but does not even include deafness in its list of handicaps.⁸⁹

Simply stated, the special problem of deafness is that the deaf child will have to overcome a communication problem that does not impede most other handicapped children. The wheelchair child needs access to the classroom; his problem is primarily political and economic. Once there, he can learn at the same pace as "normal" children. The blind child cannot visualize concrete things and will need special materials, but he can communicate, be communicated with, comprehend abstract concepts, and participate in the learning process.⁹⁰ The learning-dis-

87. See, e.g., Ford, *Reactions of the Hearing-Impaired Child to School Situations*, 46 PEABODY J. OF ED. 177 (1968).

88. See note 6 *supra*.

89. See Krass, *supra* note 4, at 1025 n.50. Krass divides handicapping conditions into two classes: those that directly impede the learning processes, such as mental retardation and learning disabilities, and those that leave the learning process intact but place threshold hurdles before the child, such as blindness and orthopedic impairments. Within this category, however, the grouping is too simple. Orthopedic impairments are literally "threshold" handicaps: once the child wheels or is carried over the physical threshold, and excepting subjects such as gym that stress the skill the child lacks, the impaired child can learn as effectively as any other child in the classroom. The threshold is higher for a blind child, who will not be able to read regular texts but will still be able to receive verbal communication and use special texts. And the threshold is highest of all for the deaf child, whose lack of verbal communication will be a persistent impairment to the learning process.

90. Without in any way minimizing the hurdles a blind child has to overcome, contrary to lay opinion deafness is a much more difficult handicap to overcome educationally than is blindness. See, e.g., R. BRUCE, *supra* note 61, at 407:

But Helen was more realistic about the limits put upon her direct apprehension of the

abled child, while possessed of an often-mysterious factor that will impede the learning process at certain times, can also participate in most of the process, and can ask for help when she does not understand.

The deaf and mentally retarded children are often the ones who cannot participate in the learning process, but a further distinction must be made between these categories. While one should no longer be stigmatized for being mentally retarded any more than for being deaf, the mentally retarded child's problems stem from a disability built into the learning process itself. The child's learning ability is faulty for one reason or another, with a consequent lowering of the child's capacity to absorb instruction, depending on the severity of the retardation. The deaf child, however, has the same learning capability as the nonhandicapped child; the defect is in the ability to communicate and absorb information. If the child is assumed to be "slow" because of a simplified language structure,⁹¹ instructors will have lowered expectations of what the child can accomplish. In the case of the deaf child, those expectations will usually be inconsistent with the child's actual abilities.

For all these reasons, deaf children present special problems, even compared with children with other handicaps, before they can be integrated into a classroom with non-deaf children. If these problems are not recognized, and if deaf persons remain the ignored handicapped, the present efforts to place handicapped children in regular classrooms will not have a beneficial effect on deaf children. Instead it will retard their progress, depriving them of what little they have gained to date from the public schools.

world, about her inescapable dependence on the words of others for learning what eyes and ears tell most people. She knew also that to the public her blindness was her foremost characteristic, though she agreed with Mabel that deafness was the heavier cross.

See H. KELLER, *THE STORY OF MY LIFE* (1902). Despite the views of Ms. Keller and other persons both deaf and blind, most hearing and sighted adults, if they were faced with losing a sense, would rather lose their hearing than sight. In so choosing, they overlook the fact that they already have a knowledge of language and communication that an infant lacks. Hence, they could cope with a sudden loss of hearing better than an infant. See *EDUCATION OF THE DEAF*, *supra* note 64, at xxv: "Language is the indispensable tool of learning."

91. A deaf child of eight years of age may be thinking at an eight-year-old level, but may have the speech structure of a four-year-old. Lay persons hearing him talk may, therefore, assume his intellectual ability parallels his speech and consequently treat the child inappropriately. See Quigley, Power & Steinkamp, *The Language Structure of Deaf Children*, 79 *VOLTA REV.* 73, 79 (1977): "[S]yntactic structures develop similarly in deaf and hearing children, but at a greatly retarded rate in deaf children." *Id.*

V. THE 1975 ACT—FUNDING AND MAINSTREAMING

A. *The Funding Dilemma*

The basic funding problem presented by both the 1975 Act, and the judicial decisions that preceded it, is that it is one thing for Congress or the courts to tell school districts to educate all handicapped children and quite another for the district to find the money with which to do the job. Suddenly, a school district must educate, say, four blind children, six paraplegic children, eight mentally retarded children with varying degrees of retardation, five emotionally disturbed children, three children with different learning disabilities, and six deaf children with varying degrees of hearing loss, whose parents desire three different methods of education. At the outset the district will lack any specially trained teachers for the various handicaps, and the medical, audiological, and diagnostic services necessary to evaluate, place, and support the students.⁹² From where will they secure the necessary teachers and equipment for each handicapping condition? With thousands of local school districts faced with the same need, there are simply not enough teachers of the deaf, blind, or retarded to be allocated even one to a district.⁹³

In addition to the problem of competing with other districts for a very scarce teaching resource, the district has the problem of finding the funds to hire those people and to buy equipment. The money argument may be legally irrelevant, but the question still remains: how do you divide what money there is? Handicapped children have special needs, and their education, as a result, costs far more than that of non-handicapped children. Deaf children, for example, cannot be taught under any of the major methods in ratios of more than seven or eight students to one teacher, because of the need for constant eye contact

92. See Ling, Ling & Pfister, *Individualized Educational Programming for Hearing-Impaired Children*, 79 VOLTA REV. 204, 218-19 (1977). These commentators conclude that of 119 people working in parent-infant programs for the hearing impaired in the United States in 1971, only three had specialist certification for teaching hearing-impaired children 0 to 3 years of age. See also EDUCATION OF THE DEAF, *supra* note 64, at xviii.

93. See Maile, *Certification Requirements for Teachers of the Deaf*, 123 AM. ANNALS OF THE DEAF 949 (1978). The author reviews the standards for certification as a teacher of the deaf and concludes that only 7 of 50 states meet three of the six EDUCATION OF THE DEAF certification standards; 25 states meet none of the standards.

and observation.⁹⁴ Most districts have regular pupil-teacher ratios three to five times higher. If the funds available are divided equally among all children, the result is to short-change the child with special needs. Just placing many types of handicapped children into a classroom with "normal" children will not educate the handicapped children and may seriously disrupt the education of the other children.

Providing special funds for children with handicaps presents both practical and legal problems. Discrimination against nonhandicapped children in entitlement to funds is a legal problem. Practically, however, the often angry response of parents of nonhandicapped children may be more important than any possible legal implications. Many parents, already concerned with a perceived decline in quality of public education, will view attempts to provide "special education" for handicapped children as another threat to the education of their "normal" children.

To a certain degree, the federal government anticipated the financial problems that the 1975 Act would entail and attempted to alleviate them by providing federal funds specially earmarked for handicapped children.⁹⁵ Such additional funding may defuse much of the local re-

94. Regarding the need for small class sizes and low teacher-grade ratios, see *EDUCATION OF THE DEAF*, *supra* note 64, at 13-14.

95. See notes 30-43 *supra* and accompanying text. The "extra" federal funds are limited, however, to \$300.00 per handicapped child. 20 U.S.C. § 1419 (Supp. V 1975). Because a special education costs the state about twice as much as normal education, this fund amounts to about one-fourth of the extra expense. See Miller & Miller, *supra* note 4, at 17 n.56. In the case of deaf children, for whom the cost of education is even higher, the federal supplement will usually be less than one-sixth to one-eighth the additional cost. As early as 1964, the average cost per student of educating deaf children was \$2,400. *EDUCATION OF THE DEAF*, *supra* note 64, at 12. Present per-pupil costs range between \$6,000 and \$12,000 per year. Conversation with Patrick Stone, Director, Tucker-Maxon Oral School, Portland, Oregon, December, 1979.

Let it also be noted that, just as the author stopped believing in the Easter Bunny some years ago, similarly he is under no illusions regarding the efficacy of "federal funds." Special education is still more expensive, even when California school districts are seduced into believing they are getting New York tax dollars, while New York districts think they are spending California dollars. See generally M. FRIEDMAN, *THERE'S NO SUCH THING AS A FREE LUNCH* (1975); R. HEINLEIN, *THE MOON IS A HARSH MISTRESS* 129 (1966):

"Gospodin," he said presently, "you used an odd word earlier—odd to me, I mean. It was when you insisted that Tish must pay, too. 'Tone-stapple,' or something like it."

"Oh, 'tanstaafi.' Means 'There ain't no such thing as a free lunch.'" "And isn't," I added, pointing to a FREE LUNCH sign across the room, "or those drinks would cost half as much. Was reminding her that anything free costs twice as much in the long run or turns out worthless."

"An interesting philosophy."

"Not philosophy, fact. One way or other, what you get, you pay for; what you pay for, you get"

sponse against spending extra sums for handicapped children. The federal approach to funding, however, contains its own drawbacks. The funds are primarily directed to the local levels of government;⁹⁶ this choice was not accidental, but was supported by two complementary lines of reasoning. First, local funding was part of the attempt to combat the traditional method of shunting handicapped children into a remote institution out of the mainstream of life. It is a way to emphasize that handicapped children have the right to the same normal home and community life as do other children. Second, observers thought that it was primarily in rural areas, far from central facilities, that handicapped children failed to receive any education at all. This pattern may be caused by lack of available information about educational opportunities, or by survival of traditional attitudes of shame for an "abnormal" child, or by lack of awareness that the child was handicapped.⁹⁷ For whatever reason, educators of the deaf all can tell of deaf children whose first contact with any evaluative service was when they were five years old or older.

Congress was probably correct when it recognized that previously-ignored children would have to be educated locally if they were to be educated at all. The practical impact, however, is that a small rural school district will have a few highcost children, and each of several districts in one area of the state must duplicate the efforts of the adjoining districts. Because, for example, there may be only one or two deaf children in a rural district, the cost of educating each child soars far beyond the already high cost of concentrating those children in regional facilities. The 1975 Act thus causes duplication of expense, and also undercuts regional facilities where they exist.

The Act, it should be noted, does not prohibit the concentration of children with a particular handicap in a regional facility. There is recognition that education in such an institution may be appropriate, but

96. See 20 U.S.C. § 1420(a) (Supp. V 1975).

97. Informal study by the author and several deaf educators with whom he is acquainted, indicate that almost half the parents of deaf children have experienced at least one doctor who discouraged them from seeking further auditory testing of a child they thought to be deaf, usually because either (1) "the child is just a slow talker," or (2) "mother, you're worrying about nothing," or (3) "you can't tell if he's deaf until he's three years old." Conversations with D. Hayes, Supervisor of Rehabilitative Audiology, University of Wisconsin Department of Communicative Disorders, Madison, Wisconsin, July, 1978; Ms. L. Knox, Bill Wilkerson Hearing and Speech Center, Nashville, Tennessee, May, 1977. Regarding early diagnosis of hearing impairment, see Lloyd & Dahle, *Detection and Diagnosis of a Hearing Impairment in a Child*, 78 VOLTA REV. 12 (1976).

that recognition is inconsistent with the basic thrust toward local education. Because the federal funds are directed to the local districts, they have an incentive to set up their own programs, rather than pay the regional facility to educate the child.⁹⁸ This incentive may be exactly what Congress intended, but it remains true that regional facilities contain an adequate number of children to offer specialized teaching and supportive services. They can usually deliver far superior education than a local district that hires a teacher and establishes a "program" for its two deaf children.

In the final analysis, funding is not really a legal or educational problem but a political problem. It exacerbates other problems, however. As many school districts face a period of declining per capita funds, the education of handicapped children may, at best, be given treatment equal with the education of their children, thus leaving many special needs unfilled. A district will simply not be able to hire a new teacher for each sub-category of handicapped children. Even if the funds are available, the supply of teachers is not. Because the Act also places heavy emphasis on mainstreaming,⁹⁹ it is inviting any overburdened school district to take the cheapest way out of the problem. By placing all its handicapped children into a few rooms with normal children, the district can label the process "mainstreaming" and avoid the worst of the financial problems.

B. *Mainstreaming*

The concept of "mainstreaming" demands that handicapped children be placed in regular classrooms as much as possible,¹⁰⁰ in other words, that they be brought into the mainstream of education. It is the symbolic core of the Act and the clearest expression of departure from the old "hide them at home" concept. To put it bluntly, mainstreaming has become the sacred cow of special education. Yet despite the symbolic or psychological purpose behind the concept, the strong push toward mainstreaming provided by the Act has to be viewed carefully.

98. Transportation to and from the supportive services that are part of the child's special education is among the responsibilities of the local district. 45 C.F.R. § 121a.306 (1979). Educators report that rural districts that had previously sent children to regional facilities are, in some cases, attempting to provide at-home services to those children. Conversation with Dr. W. Richardson, Assistant Director, Southern Oregon Regional Facility for the Deaf, Medford, Oregon, March, 1978.

99. 20 U.S.C. § 1412(5) (Supp. V 1975).

100. *Id.*

There are several practical problems with the mainstreaming process in general and special problems for the hearing-impaired child.

Mainstreaming is a response to decades of isolating handicapped children in institutions. As compulsory school attendance laws developed in the 19th century, a rough distinction was drawn between severely handicapped children, who were placed in institutions, and mildly handicapped children, who were left in public schools but without any special assistance. Without help, most mildly handicapped children could not keep up in the mainstream; consequently, schools developed special classes for the noninstitutionalized. Although these classes provided more effective education, they resulted in increased isolation of handicapped children from their peers. Schools were happy to have children generally considered "slow" or "difficult" removed from the regular classrooms. Therefore, despite the educational benefits to the children, special education came to be seen as supporting the traditional notion of the handicapped child as "different" and somehow to blame for his problem.¹⁰¹ Part of the reaction in the 1960's and 70's to this treatment was a strong reaffirmance of the mainstreaming concept.

Theoretically, mainstreaming involves far more than just transferring a handicapped child to a regular classroom. Even strong proponents of mainstreaming recognize that placement, without more, usually leaves the child unable to compete under the traditional classroom teaching methodology.¹⁰² Educators argue that mainstreaming can be made to work by a combination of: (1) effective systems of placement of children; (2) uses of resource rooms and special education teachers as a part-time supplement for the integrated children; and (3) use of the concept of the individualized education program (IEP), a written agreement between all affected parties to insure the handicapped child will receive an appropriate education.¹⁰³

The practice of mainstreaming under the 1975 Act, however, does not bear out the hopes of its proponents. For whatever good social purposes that may be served, the basic result is that a lot of previously

101. Miller & Miller, *supra* note 4, at 7.

102. *Id.*, at 4. Birch & Johnstone, *supra* note 82, at 11: "Putting hearing children with hearing-impaired children is not enough; proximity is not the same as integration. Nowhere is that more true than for hearing-impaired pupils."

103. See Miller & Miller, *supra* note 4, at 3 n.11, for a detailed description of the "cascade system" of placement of handicapped children.

difficult-to-educate children are returning to the regular classrooms. Typically, there will not be just one deaf or blind child in a class, but three or four handicapped children, each with a different handicap. Commonly, the classroom teacher is not trained to deal with any, let alone all, of the newcomers. The National Educational Association, mindful of this problem, has become critical of mainstreaming. The Association notes that the concept is supportable only with teacher preparation, alterations of class size and curricula, and provision of appropriate educational materials and support services.¹⁰⁴ While the 1975 Act provides some special funding for personnel development,¹⁰⁵ the other aspects noted by the NEA are not specifically covered.

Mainstreaming under the Act is not the same as the mainstreaming practiced by many private schools for certain categories of the handicapped. There are no articulated standards to determine when a child is ready for further mainstreaming.¹⁰⁶ Instead, the process is left to the IEP, and case-by-case negotiation or litigation between the school district and the parents. The parents may have unreasonable expectations while the district may have a strong interest in finding its present program to be "appropriate,"¹⁰⁷ particularly in areas such as deaf education with several types of programs possible. Additionally, the child may be too young to allow any but the most sheer speculation about what programs will prove most appropriate for him. The results of such a process are often little better than random. Careless preparation may impair the education of all children in the classroom. An emotionally disturbed or learning-disabled child, for example, can be very disruptive if not in a situation with a teacher trained for the particular handicap. The very breadth of the Act also hurts its effectiveness. It

104. National Education Association, Policy Resolution # 26 (Mainstreaming) in Resolutions, Business and Other Actions (1975) at 21-22.

105. 20 U.S.C. §§ 1431-34 (Supp. V 1975).

106. By way of contrast, see W. Bruce, Academic Mainstreaming: How to Determine When, a paper presented at the National Convention of the Alexander Graham Bell Association for the Deaf, Boston, 1976, and discussed in Nix, *The Least Restrictive Environment*, 79 VOLTA REV. 287, 290 (1977). Dr. Bruce described the Mainstream Quotient that was developed and is used at Tucker-Maxon Oral School in Portland, Oregon. The scale is divided into eight sections with 200 possible points. The quotient evaluates a number of factors, including degree of hearing loss, academic achievement, intelligence, linguistic ability, auditory/oral communication, and social maturity. The student is evaluated in each section, and the Quotient received by the child, when compared with a standardized scale, provides a recommendation as to the level of mainstreaming likely to be successful, from partial to full-day placement, or a recommendation against mainstreaming. See also Nix, *Mainstream Placement Question/Check List*, 79 VOLTA REV. 345 (1977).

107. See notes 127-29, 162-64 *infra* and accompanying text.

may be easy to mainstream a paraplegic child once physical barriers are modified, but the special problems of (for example) a blind, a deaf, a learning disabled, and a retarded child are unique. The Act, however, does not distinguish between their handicaps; all are thrust upon the schools. Because the emphasis of the Act is against isolation, under the concept of placing the child in the "least restrictive environment," the school district will generally not be able to place all deaf children in one room or school and all blind children in another. They will usually be mainstreamed together, which may diminish the ability of each to learn.

The schools retain some flexibility regarding the practice of mainstreaming. "Resource rooms" with the regular school programs remain a possible compromise between the "sink or swim" approach of throwing the children into regular classrooms and the social isolation of entirely separate education.¹⁰⁸ Depending on how the program is established, however, a child can be just as isolated in his own room in the regular school as he was previously in his own school. A handicapped child, for example, frequently takes all academic subjects in the resource room and is placed with the rest of the school population only in gym or art classes. That child is not receiving even the "social" benefit proclaimed for mainstreaming.¹⁰⁹

Another general problem with mainstreaming is the heavy emphasis placed on the IEP. Although most IEP problems are discussed later, one should note that the concept's application is also a limiting factor on mainstreaming effectiveness. While the IEP is supposed to stress the uniqueness of each child, the producer of the IEP—whether the teacher, administrator, or professional team—has an existing program to justify and an abundance of paperwork. The school, in addition to coping with mainstreaming, must also cope with detailed and often

108. See Miller & Miller, *supra* note 4, at 7: "special education is faced with redefining its role of being a resource to these children in the mainstream without excessive categorization and 'pull-out' programs."

109. See G. BITTER & K. JOHNSTONE, REVIEW OF LITERATURE: INTEGRATION OF EXCEPTIONAL CHILDREN INTO REGULAR SCHOOL CLASSES (1973). Questionnaires sent to elementary school teachers regarding their opinions of the benefits and dangers of having handicapped children in regular classrooms have produced generally negative results. Teachers in schools with special education programs were no more positive than teachers in schools without such programs. *Id.* at 7. These results suggest that special education programs in the schools do not necessarily increase awareness or understanding of the handicapped child. Indeed, in many cases, the "problems" of integration are solved by having special education classes isolated from regular classes.

nebulous paperwork as part of the child's placement. Although careful planning is necessary if there is to be any chance of successful mainstreaming, the paperwork threatens to become more important than the subject under consideration.

C. *Special Problems for Deaf Children*

From the perspective of deaf children, there are some additional problems with mainstreaming not entirely applicable to children with other handicapping conditions. First, the deaf child, living in a world of silence, is generally quieter than other handicapped children and does not appear handicapped. With the development of ear-level hearing aids, the oral deaf child as well as the manual child will look like any other "normal" child. Although that may be socially helpful to the child in some situations, it reinforces the attitude that deafness is not a physical handicap. Also, if the teacher has to divide his time between twenty nonhandicapped children and four with different handicaps, the deaf child is the one most likely to be neglected. He can bluff in the early grades, when classwork is primarily visual and not demanding. He also will not appear to need as much help and will not be able to communicate his need for help. Finally, around the fourth to fifth grades, he can no longer keep up, and it is then discovered that the child is writing and reading at a first-grade level. It is at this point that long waiting lists for entry to private schools for the deaf occur,¹¹⁰ and the child has lost several valuable years of education that may never be recovered.

A second unique problem facing the deaf child is his need for language. Language is the key to successful education. The ability to communicate is more important than the ability to see, touch, or walk. The blind child and the paraplegic child have the language they need to succeed in the classroom; their infirmities are less crucial to the learning process. The emotional and behavioral problem children also have language; their problems may impede the learning process, but they can receive the basic input. Deaf children without pre-existing language skills cannot get the basic input, and are in the class only as mystified onlookers. If they are sub-categorized at all, it is usually to be combined with retarded children. This treatment is inefficient be-

110. Conversation with Sr. J. Buckler, Director, St. Joseph's Institute for the Deaf, St. Louis, Mo., December, 1978.

cause of the basic difference between a child with an intact learning process but an informational disorder, and a child who can receive information but has an impaired learning process. Failure to treat deaf children according to their unique handicap generally results in a lowered expectation of what each child can accomplish and lowered performance from the child.

Educators have argued in support of the mainstreaming thrust of the federal Act that any supposed gain in academic instruction in special, self-contained education is more than outweighed by the socialization gain to a handicapped child of being in a regular classroom with "normal" peers:

Later court decisions have ignored the academic facet of education and stressed the socialization aspect. Closer analysis of even the *Brown* statement . . . shows that the Court there essentially ascribed to the philosophy that education is a socializing process. . . .

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 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

. . . .¹¹¹

However fashionable this argument may seem to lawyers, most deaf educators and the parents of deaf children strenuously reject it. Whatever sense the argument may make with regard to children with other handicaps, it is simply not applicable to deaf children. Parents, given the choice, would rather see the school system produce an intelligent deaf child, somewhat lacking in social graces, than a highly sociable child who reads and writes at a fourth-grade level. Deaf educators unanimously note that if a deaf child is placed in a regular classroom without the language necessary to compete, the child will not only be deprived of the academic stimulus, but may also lose the supposed social and emotional gains of interrelating with hearing children. Is a child really mainstreamed, for example, by being on the staff of a student newspaper if the child cannot participate in the discussion or contribute to the development of the publication?¹¹² Merely placing the child in the room does not insure acceptance of the child into the social

111. Comment, *supra* note 6, at 669 (1976).

112. See Birch & Johnstone, *supra* note 82.

structure of the class. The deaf child is less likely to successfully integrate than other handicapped children because of the inability to talk to the hearing children. Their response to the child is likely to mirror the teacher's response, and teachers responses to deaf children in their rooms have been less favorable.¹¹³ In the case of deaf children, the communicative skills they have to acquire *before* they can successfully mainstream into a regular classroom can only be learned in the now-maligned special education systems.

In addition to miscategorization, the federal Act discourages categorization at all.¹¹⁴ Somehow, it has become unfair or demeaning to "label" a deaf child as "deaf." Although it may be argued that more subjective categories, such as retardation and learning disability, are subject to possible abuse and should be carefully circumscribed,¹¹⁵ deafness and blindness are demonstrable physical facts. No child should have to wear a sign saying "deaf" or "blind," but the rejection of categorization entails the rejection of special needs of the handicapped child. Fast and careless mainstreaming places them in situations for which they are not yet equipped to cope. Although Congress

113. D. DALE, *DEAF CHILDREN AT HOME AND SCHOOL* 105-08 (1976). See also Ross, *Mainstreaming: Some Social Considerations*, 80 *VOLTA REV.* 21, 29 (1978):

The fully mainstreamed hearing-impaired child does not have this opportunity [to make a realistic adjustment to his hearing problem.] His communication skills have to be sufficiently advanced for him to engage in relatively effortless conversation with his classmates and teachers, and his personality has to be sufficiently resilient to withstand occasional frustrations. . . .

. . . .
 . . . [The hard of hearing child] is frequently accused of "hearing when he wants to," or deliberately misunderstanding or ignoring the teacher. His apparently erratic behavior makes the hard-of-hearing child the recipient of behavioral pressures and expectations completely beyond his ability to comprehend or respond to. Adults assume that he does understand because he quite evidently "hears," and children tend to find him a confusing playmate for reasons neither really understand.

114. See, e.g., Comment, *supra* note 6, at 673 (1976):

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.

115. See, e.g., *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967), which, in dealing with the legal implications of ability grouping, considered the validity of standardized I.Q. tests: "they produce inaccurate and misleading test scores when given to lower class and Negro students. As a result, rather than being classified according to ability to learn, these students are in reality being classified according to their socio-economic or racial status . . ." *Id.* at 514.

disclaimed any intent of dumping children into unworkable problems under the guise of mainstreaming,¹¹⁶ deaf children are being taken from known situations, with teachers specially trained to deal with their handicap, and are being placed in uncertain and constantly changing programs with regular classroom teachers ill-equipped to handle the unique demands of a deaf child. Special education teachers regularly score higher than regular teachers in their knowledge of disabilities, and in many cases regular classroom teachers are not aware of even very elementary aspects of dealing with a deaf child.¹¹⁷ The level of expertise usually found in the public school systems is reflected by a request for help recently received by a prominent educator of the deaf:

116. See *Extension of Education of the Handicapped Act: Hearings on Education and Training of the Handicapped and H.R.7217 Before the Subcomm. on Select Education of the House Comm. on Education and Labor, 94th Cong., 1st Sess. 44 (1975)* (Statement of Frederick J. Weintraub, Assistant Executive Director, Governmental Relations, The Council for Exceptional Children):

Everybody is interested in something called "mainstreaming" today, and a lot of the assumption is that we are going to take all of the handicapped children, who are in handicap programs, and we are going to dump them into programs that do not work.

That is not mainstreaming, and that is not appropriate education. What is appropriate is dealing with children in the environments in which they need an education.

117. Ford, *Reactions of the Hearing Impaired Child to School Situations*, 46 PEABODY J. OF ED. 177 (1968); Skinner, *Some Pros and Cons for Integrating Deaf Children into Hearing Schools*, in REHABILITATION IN AUSTRALIA 3-7 (1971); Soldwedel & Terrill, *Sociometric Aspects of Physically Handicapped and Non-handicapped Children in the Same Elementary School*, 23 EXCEPTIONAL CHILDREN 371 (1957). The articles point out that a deaf child who is not a good speech reader, or who has limited oral skills, could be overwhelmed by the pressures of communication and feel unequal to even social interaction with his peers. The constant strain of concentrating on what is occurring in the classroom can be extremely fatiguing for the hearing-impaired child. As a result, he may become inattentive, and may fall behind academically. The teacher will have to be aware of the reason for the lack of attention, and may also have to repeat or rephrase what is being said, both by the teacher and by classmates. In addition to loss of attention, the hearing-impaired child may adopt over-compensating or attention-getting behaviors, or may imitate the inappropriate behavior of his peers. The teacher with an integrated deaf child will also have to make many structural changes in the method of teaching. He must remember that auditorily presented assignments requiring a long memory span will have to be visually reinforced, if the deaf child is to absorb it all. Gildston, *The Hard of Hearing Child in the Classroom: A Guide for the Classroom Teacher*, 64 VOLTA REV. 239, 240 (1962). The teacher must be aware of classroom seating, placing the deaf child in a position where he can see the face not only of the teacher, but of his classmates as well; he should also be allowed to change seats whenever necessary. Bothwell, *What the Classroom Teacher Can Do for the Child with Impaired Hearing*, 56 J. OF NAT. ED. A. 44 (1967). The teacher should not speak while writing on the blackboard, or with his back to the class. His articulation should be clear, of moderate speed, and not exaggerated. Engh, *They Can't Hear*, 69 VOLTA REV. 268 (1967); Gildston, *supra*. The teacher must remember that the child cannot speechread and take notes at the same time. Finally, the teacher will have to control the background noise level in the room, since hearing aids are not selective in the sounds they amplify, Gildston, *supra* at 243; he will also have to be aware of room lighting, so that the deaf child is not trying to speechread a person who is standing in front of a glaring light.

I am a teacher of primary special education. Recently a ten-year-old deaf girl was placed in my class. I am not trained to work with the deaf, however I do know the hand alphabet [sic].

I am wondering if you would have any literature which would help me in teaching this little girl. She is not retarded but very bright, however this is the first time she has attended public school [sic].

I would appreciate your prompt attention to this matter. I need any literature that might be helpful.¹¹⁸

D. *Special Problems of Oral Deaf Children*

A further distinction must be made to account for the mainstreaming problems of the deaf child in an oral program, as opposed to the deaf child in a manual or total communication program. The division in the ranks of deaf educators on the relative merits of the different programs frequently reaches intense emotional pitch. A parent with a young deaf child, unsure of what to do for the child's education, may be told by a manualist or TC advocate that turning to oralism is an unrealistic attempt to pretend the child is "normal," with attendant adverse educational consequences. The same parent will then be told by an oralist that using the manual or TC methods will shut the child off forever from the hearing world. This often bitter split not only confuses and angers parents, but also carries over into the supposedly objective evaluations of the IEP. Deaf educators partial to one system of education or another will usually find that their favorite method of education is the "appropriate" one.¹¹⁹

Parents desiring an oral education for their child face an uphill battle not faced by parents preferring another method. For many deaf educators and educators without special training "oralism" means mainstreaming without special help. The manual child receives more attention and supporting services because he is more visibly handicapped than the oral child. The oral child is often assumed to *be* oral, rather than engaged in a process to *become* oral. He is left to either

118. Simmons-Martin, *The Central Institute for the Deaf Demonstration Home Program*, in MAINSTREAM EDUCATION FOR HEARING IMPAIRED CHILDREN AND YOUTH 218-19 (G. Nix ed. 1976).

119. Research discloses that in the five years since passage of the Education for All Handicapped Children Act in only one case was the decision of an "impartial" hearings officer at the state level for the method of education other than the one already in use in the local district. See *In re Leslie G.* (Little Lake School District, Calif., 1978), reported and discussed in Gilb, *Placement in an Oral Program: A Due Process Procedure in California*, 81 VOLTA REV. 160 (1979).

sink or swim, and when his parents protest the response is usually to insist that the child shift to a wholly or partially manual method.¹²⁰

That programs are not obligatory for children under age five and are not even funded as optional for children under age three also bears more heavily on the parents desiring oral education for their child. Most studies show that the earlier instances of deafness are diagnosed and educational processes begun, the more likely the child will develop usable speech.¹²¹ It is not uncommon today to diagnose deafness in a child as young as nine months of age and to begin training that child with hearing aids by twelve months. Under the present law there is no way to compel a public program to locate and provide any services to deaf children younger than three years of age. At that time, a child who might have been able to succeed in an oral program had he begun earlier in life has much less chance of success.

The school district's lack of funds is a chief cause of the reluctance to create services for children under age three or five. That same shortage of funds will also have other ramifications for the oral deaf child. A school district will establish a program for deaf education, as required, but it will be financially impracticable to have a manual program, an oral lip-reading program, an oral auditory program, a cued-speech program, and a total-communication program. Deaf children are only a small part of the public the district must serve and the deaf represent only one of several different handicapping conditions. To maintain multiple programs for just eight or ten children becomes economically prohibitive. One program must thus be chosen for the deaf.

The economic imperatives usually cause school administrators to opt for total-communication programs. Strictly manual programs engender strong opposition from many parents who prefer at least some oral component to their child's education. Conversely, the strictly oral al-

120. Conversation with D. Hayes, Supervisor of Rehabilitative Audiology, University of Wisconsin Department of Communicative Disorders, Madison, Wisconsin, December, 1979. The uncertainty of trying to ascertain what will be the best approach for a particular deaf child buttresses the local "expert's" assertion that the child needs to receive some manual education. Parents have to be very perseverant or stubborn to insist that the child be maintained in an oral program when the educators demonstrate their reluctance for that placement.

121. See D. McCONNELL & K. HORTON, *supra* note 81, reporting on a study of a small number of graduates of the Mama Lere Parent Teaching Program. The children were in the program from infancy until three years of age, and follow-up study indicated that the group remained above normal hearing children in total reading percentile and language competence. See also Pollack & Ernst, *Don't Set Limits: Learning to Listen in an Integrated Preschool*, 75 VOLTA REV. 359 (1973); Whorton, note 81 *supra*.

ternatives, as even their proponents concede, cannot serve all deaf children; a decision to maintain an oral program necessarily becomes a decision to maintain at least a two-track system.

The answer to the problem is usually total communication, for several reasons. First, in common with manual programs, TC may be less expensive than oralism. Oralism, by virtue of its dependence on amplification of sound, is more dependent on expensive and sophisticated auditory and electronic equipment. Oralism may also require lower student-teacher ratios because of the increased need for eye contact. Second, TC is more consistent than oralism with the concept of early mainstreaming because the manual or TC child can at least sit in the regular classroom with an interpreter, while the oral child is still self-contained developing oral skills. Third, TC, whatever its actual merits, is superficially the most appealing method to people unfamiliar with deaf education. If each method has some good aspects, the thought of trying to combine the best of all of them is both logical and understandable. Finally, in the context of school district politics, TC offers something for everyone. To the parent who wants an oral education, the oral component can be emphasized; to the parent who prefers manualism, the manual aspect is highlighted.

The point to be made is not that school districts are always wrong in instituting TC programs. TC will adequately serve some but not all deaf children, as will any of the other methods.¹²² The point is that the 1975 Act effectively compels the use of TC to exclusion of oral programs in all but the wealthiest districts. A parent whose child is succeeding with TC will have no problem with this trend. A parent who wants to use one of the other methods, oralism in particular, finds his choice foreclosed.

VI. THE 1975 ACT—PROCEDURAL PROBLEMS

The operative principle of the 1975 Act is simple to state: the handicapped child has the right to a free and "appropriate" public education in the least restrictive environment.¹²³ The primary vehicle for describing and then ensuring an appropriate education for a particular child is the child's individualized education program (IEP). The IEP is analo-

122. Birch & Johnstone, *supra* note 82, at 18: "To assume that a single type of program will best suit a group of hearing-impaired children is to deny a high percentage of children in that group the most appropriate educational environment."

123. 20 U.S.C. § 1401 (Supp. V 1975).

gous to a contract between the parents and the school system, but without a contract's binding effect.¹²⁴ It is a written statement developed after evaluation of the child that sets forth the child's present level of functioning, the objectives to be attained, and the educational services that will be necessary to educate the child. The process also includes subsequent evaluation to determine if the objectives have been met. The IEP, in addition to establishing the "appropriate" education, also delineates the "least restrictive environment" by showing the extent to which the child can be educated with nonhandicapped children and explaining how to meet the educational goals in the context of the regular classroom.¹²⁵

In theory, the process is easy to apply, and the parents, children, and school board should live happily ever after. In practice, however, the process is nebulous, often unworkable, and always structured in favor of the school district and against the parents. The problems with the process can be divided into four areas: (1) preparing and implementing a meaningful IEP; (2) the procedure for effectively presenting and proving one's objections; (3) defining an "appropriate" education; and (4) determining the "least restrictive environment."

A. *Preparing the IEP*

The basic assumptions of the IEP requirement are that the school district can effectively determine what the child's goals should be and how to achieve them, and can then deliver the services necessary to reach those goals. For several reasons these assumptions find little basis in reality.

First, to effectively use what residual hearing they possess, deaf children have to begin their training and education at a very early age—ideally as young as twelve months. During their early years, it is difficult if not impossible to say what type of deaf education is "best" or "appropriate" for a particular child. It cannot even be safely assumed that, the greater the degree of hearing loss, the more likely the child will need some component of manual education. There are many cases of profoundly deaf children succeeding in strictly oral programs, while moderate-to-severely deaf children failed and required manualism.¹²⁶

124. 45 C.F.R. §§ 121a.200-.226 (1979).

125. See Miller & Miller, *supra* note 4, at 5.

126. Profoundly deaf children are those with a hearing loss of between 85-110 dB. See note 71 *supra*.

Also, just as deafness involves different degrees of hearing loss, measured in decibels, the degree of loss is but one aspect of assessing deafness. Some hearing losses may involve distortion of sound while others do not. Some may be worse in certain ranges of sound than others. Some may involve certain hard or soft consonants, others certain vowels.¹²⁷ Determining the precise nature of the hearing loss of a small child is itself a difficult task; predicting from that data what type of education will be appropriate for that child is little more than guesswork.

Second, even if the personnel are available in the district to make a thorough assessment of the particular child, the district does not have available all possible educational alternatives that a deaf child might require. As we have seen, there will be one or, at best, two deaf programs, without much flexibility. The administrator's assessment of the child will tend to be based on the district's existing resources, rather than on the specific needs of the child without regard for the availability of the services needed.¹²⁸ Given the difficulty of trying to decide what best suits a particular young deaf child, and the vagueness inherent in the statutory term "appropriate,"¹²⁹ the assessing educator can tailor the program to what the district can offer, rather than the other way around. The parents are then faced with an IEP prepared by the "experts" with whom they are ill-equipped to disagree. If the evaluator and the teacher have similar philosophies, the parent will be opposed by two specialists who will use their "expertise" to good advantage to encourage agreement. Despite the available guarantees of independent evaluations at public expense, the parents will usually accept what the district and its experts propose.¹³⁰

Finally, the IEP, once prepared, is not binding on the district in any practical way. While the parents could compel the continued provision of a promised service, the educational agency does not violate the provisions of the Act "if the child does not achieve growth projected in the

127. See EDUCATION OF THE DEAF, *supra* note 64, at xxvi-xxxii. Among the other variables that may interact with each other to varying degrees are (1) the degree of hearing loss; (2) the age of onset of the loss; (3) the part of the hearing apparatus that is damaged; and (4) the deaf person's attitude toward his deafness.

128. Miller & Miller, *supra* note 4, at 5.

129. "Appropriate" is not defined in the Education for All Handicapped Children Act. See Comment, *supra* note 4, at 739-40 (1978). See notes 151-67 *infra* and accompanying text.

130. Miller & Miller, *supra* note 4, at 6, 21.

annual goals and objectives.”¹³¹ The Act contains no requirement that a child’s progress be judged in relation to the school’s curriculum. A child might eventually gain the listed skills, but be far behind his classmates. Given the difficulty of specific evaluations, existing IEPs tend to be generally phrased, ignoring the school’s curriculum and just listing theoretical “objectives” for the child. The burden, thus, is placed on the parent to determine if the child is being accorded an “appropriate” education. With this burden, and attempts to sustain it, come several further problems.

B. *Procedural Problems*

Suppose that, after an IEP is prepared for their child, the parents object because the school district recommends the partial use of sign language in its existing TC program, and the parents wish the child to receive an oral education. How do the parents proceed to vindicate their desires? The steps, as outlined by the 1975 Act, are clear and contain numerous procedural protections.

First, the parents have the right to review all relevant records pertaining to their child,¹³² and if desired, to obtain an independent evaluation of the child at public expense.¹³³ Second, after the district gives the parents written notice of a change or a refusal to make a change in the child’s evaluation or placement, the parents have the opportunity to present their complaints regarding identification, evaluation, or placement of their child.¹³⁴ If they make such a complaint, they must be given the opportunity to present their objections at an “impartial due process” hearing.¹³⁵ Although the educational agency may suggest hearing officers, an entity apart from the state education agency must conduct the hearing. When the hearing officer renders a decision, either party may appeal to the state education agency.¹³⁶ During both levels of this process, the parents are accorded the typical due-process safeguards, including the right to be represented by an attorney, the right to present and cross-examine witnesses, the right to introduce evidence, and the right to a written record and written findings of fact and

131. 45 C.F.R. §§ 121a.220-.226 (1977).

132. 20 U.S.C. § 1415(b)(1)(A) (Supp. V 1975).

133. *Id.*

134. *Id.* at § 1415(b)(1)(C)-(E).

135. *Id.* at § 1415(b)(2).

136. *Id.* at § 1415(c).

decision.¹³⁷ Then, if they remain unsatisfied, the parents may sue in state or federal court.¹³⁸

Despite this panoply of rights, the process places serious burdens on the objecting parents. First, the local educators will usually think they are the "experts" being challenged by well-meaning parents who do not know any better. A district with two programs for the deaf may allow parents to take their choice because that is politically easier than arguing about placement.¹³⁹ A district with only one program, and which has decided its existing program is appropriate for the child, will not willingly reverse itself at the request of parents without formal training in special education.

In such a district, the first effective chance the parents have to modify the local determination is before the hearing officer. Minor modifications of proposed programs occur with some regularity, but significant reversals—such as from TC to oral education—are extremely rare.¹⁴⁰ The officer may be personally impartial, but he is also an educator, not a parent of a deaf child. This status will color his evaluations and judgment; the situation is analogous to defending a soldier charged with striking a Master Sergeant before a court-martial jury composed of other Master Sergeants.

Also, the list of proposed hearing officers offered to the parents is promulgated by the school district. In cases in which the parents and district are split along the common "oralism vs. TC" battle line, the "outside" educators who compromise the list of possible hearing officers will usually display the same bias as the local district because they will have trained in the same program as the local district's educators. As in other areas of human endeavor, expertise does not imply impartiality.¹⁴¹ Rather, it usually implies a decision made after years

137. *Id.* at § 1415(d).

138. *Id.* at § 1415(e)(2).

139. In addition to possible political expediency, it should be stressed that freedom of choice on the part of parents and child in the selection of the most appropriate environment is one of the major principles emphasized by Gallaudet College as governing the establishing of the appropriate educational environment for a deaf child. Birch & Johnstone, *supra* note 82, at 20. The other important factors, according to Gallaudet, are availability of a wide variety of educational environments, no diminution in the level of educational services needed by deaf children in any of the available environments, and realization that education of the deaf is expensive.

140. See *In re Leslie G.* (Little Lake School District, Calif., 1978), reported and discussed in Gilb, *supra* note 119.

141. See generally Sive, *Securing, Examining, and Cross-Examining Expert Witnesses in Environmental Cases*, 68 MICH. L. REV. 1175 (1970). As every trial attorney knows, expertise does not

of study and work in the field that one form of education is generally best.

Thus, the parents are required to make a case for a totally different, and perhaps unavailable, type of program to a hearing officer who: (1) after years in the field, sincerely believes the district's proposed program is a better alternative; (2) realizes the parents are not "expert" and the local evaluators are; and (3) is aware of the tremendous cost of requiring the district to implement another entire program for one or a few children. Such a hearing is "impartial" in form only.

The subject-matter of the hearing is sufficiently complex to pose an additional burden for the parents. Although the hearings at both local and state levels are to determine what education is appropriate for the child, if the disagreement is that the district wants her to be placed in its TC program and the parents desire an oral education, the respective cases cannot be made without analysis of the TC and oral programs and philosophies as well as analysis of the child.¹⁴² This will involve a significant amount of expert testimony. Although the parents may try to defray the cost of litigation by presenting their own case at the lowest level, they run the risk that the appeal to the state agency may be on the record, with no new hearing required.¹⁴³ One chance, therefore, may be all they get. More than one parent has walked into what was characterized as an "informal" hearing only to be advised that he had the burden of producing enough evidence to disprove the school district's case.¹⁴⁴

The parents have further recourse by appealing to the state educa-

imply objectivity; it merely implies superior knowledge for one's opinions. In the environmental cases that the author has litigated, both conservation groups and resource users have chosen their experts in part because of their known preference for or against the conservation cause. The opposing side's experts would then disagree with each other as flatly as two pedestrians arguing whether a traffic light was red or green. What is interesting about the hearing process under the Education for All Handicapped Children Act is that the experts are placed in a decision-making role.

142. See, e.g., *In re* Eric K. (Evergreen School District, Vancouver, Wash., Oct. 16, 1978), discussed in notes 128-135 *supra* and accompanying text; *In re* Eduardo A. (Battle Ground School District, Battle Ground, Wash., April 17, 1979).

143. See 45 C.F.R. § 121a.510(b)(4) (1979), indicating that oral or written argument is discretionary with the reviewing officer. 20 U.S.C. § 1415(c)-(d) (Supp. V 1975), from which the regulations in question were drawn, do not guarantee the parents a new hearing at the state level. Instead, they are accorded the right to an impartial "review," and the listed due process rights when there is a "hearing conducted pursuant to" the review.

144. Conversation with Eduardo Azcarate, December, 1979 (referring to *In re* Eduardo A. (Battle Ground School District, Battle Ground, Wash., April 17, 1979).

tional agency (usually to the state superintendent), and ultimately taking the district to court. The problems of increased cost and time, however, begin to enter into consideration. The state superintendent may be expected to be less committed than the deaf-education experts to one method of education. On the other hand, the state superintendent will also have less expertise, thus increasing the cost and length of a hearing before him, if the parents can get another hearing at all. Furthermore, if the state agency is likely to be less committed to one form of deaf education, it is still likely to be cost conscious, and aware of the "non expert" versus "expert" nature of the dispute.

The parents' final recourse, the courts, exacerbates some of the problems of the administrative process while alleviating others. The educational system bias and cost consciousness likely to be encountered within the school system will probably be avoided. On the other hand, the judge will have even less knowledge of the various schisms in deaf education than the state agency, and the trial will become a costly process. Because the parents are fighting for an intangible gain, very few will be able to bear the financial burden of following the process through all its necessary steps. Those who are able to bear that burden would usually also be able to afford tuition at a private school for the deaf that accords with their own philosophy and that achieves their desires without years of litigation in various tribunals. Those who are not able to send their deaf child to private school will often be impelled to yield and hope the school district "knows best" after all.

In addition to the problem of cost, there is also the problem of time, which weighs more heavily on the deaf child than on children with other handicaps. School districts, perhaps reasoning that they can outwait most parents, have not expedited the local "impartial" hearings; waits of six months to a year are commonplace. The state level hearing can also involve another six months to a year's delay. Then, if the parents decide to go to court, the delay inherent in the particular docket is added on.

Of course, during all this time the child is growing. Unlike an action for a money judgment, in the case of a child's education there is no interest to be earned by delay. The hearings process can easily consume two to four years. While this would be unfortunate for any handicapped child, it is particularly so for the deaf child, especially if that child's parents desire an oral education. Studies show that of children with equivalent hearing losses, every year the child loses before begin-

ning oral training seriously impairs the child's ability to develop effective oral communication.¹⁴⁵ Thus, the deaf child not only loses the benefits that could have been gained during the period of litigation, but he may be affected for the rest of his education and the rest of his life. The lost ability to speak can never be recaptured by an accelerated program later in the child's education.

Moreover, because the Act provides for no change in a placement while the issue is being taken through the educational process, the child may spend two to four years in the school's program.¹⁴⁶ This will make it even more likely that the child, who might have successfully started in another program, cannot now shift programs. In legalese, the merits of the dispute cannot be preserved during the pendency of the case, because the merits are growing up all the time.

Along with the purely "procedural" problems of the established system of review are several problems of proof which burden the objecting parents more than the district. Once the local agency has prepared its IEP, the burden of proving that another form of education will be more appropriate is on the parents. The school district can marshal its evidence with ease; the same people who produced the IEP will testify. The parents are at a severe tactical disadvantage if they are challenging established orthodoxy by desiring an oral program in a pro-TC system. It is, in general, very difficult to secure education specialists to appear as witnesses against other educators.¹⁴⁷ The problem is made more dif-

145. See articles cited in note 81 *supra*.

146. Specifically, a child already in the district's program cannot be removed to a new program while the administrative processes are underway. 20 U.S.C. § 1415(e)(3) (Supp. V 1975). The Act is ambiguous as to the situation of a child not yet placed in the public school program. Such a child can be placed in the existing program if the parents consent; if the parents do not consent, there is no provision in the Act regarding interim placement. Presumably, the district is not required to set up an alternative interim program before it is determined whether the existing program is appropriate. Therefore, either the child will receive no special education in the interim, or the parents will send the child to private school, at least temporarily. In such a case, local districts disagree regarding whether they will reimburse the parents the cost of tuition at private school. Compare *In re Eric K.* (Evergreen School District, Vancouver, Wash., Oct. 16, 1968) and *In re Eduardo A.* (Battle Ground School District, Battle Ground, Wash., April 17, 1979), (both denying tuition reimbursement), with a letter from D. G. Russell (Superintendent, Beaverton School Dist. No. 48, Beaverton, Oregon) to the author, August 3, 1979: "the Beaverton School District will provide tuition assistance for qualified children to attend private oral schools. . . . The amount of assistance will be based on that which the County School Fund pays to the regional facility providing similar services."

147. See Miller & Miller, *supra* note 4, at 24:

In a section at the state conference of the Wisconsin Association for Children with Learning Disabilities, held in Milwaukee, Wisconsin, on October 7-8, 1977, parents of

ficult by the fact that the parents will have to provide both their own evaluations of the child and testimony regarding the efficacy of oral programs in general.¹⁴⁸ In many places, there will be no locally available source of experts of a persuasion different from the school district, and the parents will have to bear the expense of transporting their witnesses to as many as three different hearings.

Even if the parents manage to secure their own experts to evaluate their child and to testify regarding alternative programs in general, the nebulosity of trying to predict what education is "appropriate" for a young deaf child impinges heavily on the side with the burden of proof. The child, for example, is three years old. He has no past history of success or failure with one type of program or another because of his youth. The local agency may have evaluated him, but if all they had to offer was one type of program, they were not equipped to evaluate the child for all possible alternatives. The parents can try to use their own witnesses, but it will be difficult for any witness to say with certainty that the child will do better in a different type of program. Moreover, as most school districts have interpreted the Act, it is not enough even for parents to show that their proposal is "better"; they must show that the district's proposal will *not* work.¹⁴⁹

At this stage of the child's life, no one knows what will prove to be the best for the child. While parents desiring an oral education will marshal arguments that the oral-starting child can shift to TC more readily than the TC-starting child can shift to oralism, those arguments are not proof that is in any way relevant to the particular child. No one knows why one deaf child succeeds in one program, and another in a second program. Therefore, it is almost impossible for the parents of a

handicapped children shared their legal problems. The most common complaint was that one educator would not testify against another. This unified front of educators is common to the unified front of medical doctors in malpractice cases.

As a veteran of many a parents' conference, the author would add that, because of the often bitter oralism vs. TC split in their ranks, it is easier to obtain educators of the deaf to testify against each other than it is in the case of other handicaps. However, the division is so pronounced that frequently a witness for either viewpoint will be easily impeachable for bias, and therefore of little use.

148. The Children's Rights Section of the Alexander Graham Bell Association was created to assist parents in presenting arguments for oral education of their children. Although the Section can help locate sympathetic attorneys and educators, it remains true that effective cases can be presented cheaply only near urban areas that contain strong oral schools, such as St. Louis, Missouri or Portland, Oregon, or in states that have oral as well as TC systems, such as Utah, Michigan, and Tennessee.

149. See notes 157-64 *infra* and accompanying text.

young deaf child to prove that their desired program will be better or more "appropriate" than that offered by the district.¹⁵⁰

C. *Appropriate Education*

In addition to the requirement that each handicapped child receive a free appropriate public education in the least restrictive environment,¹⁵¹ the concept of an "appropriate" education is repeated elsewhere in the Act. For example, the Act conditions a state's eligibility for federal financial assistance upon the state proving that it has established "procedures to assure that, to the maximum extent appropriate, handicapped children . . . are educated with children who are not handicapped . . ." ¹⁵²

The Act does not define the word "appropriate," and several issues related to its meaning have become prominent in the Act's application. In addition to the basic problem of attempting to determine what type of educational program will be best for a particular deaf child, the following issues revolve around the meaning of the term "appropriate":

(1) Is the "best" educational program for a particular child the only "appropriate" program, even if that program is not available in the local school system?

(2) If an appropriate program is something less than the best possible program for the particular child, does the district's limited ability to

150. The one reported case in which the parents sustained the burden of proof was *In re Leslie G.* (Little Lake School District, Calif., 1978), reported and discussed in Gilb, *supra* note 119, at 165:

The turning point of the hearing, we learned later, was a statement made by Linda Rowe [director of educational services, John Tracy Clinic, Los Angeles] that Leslie is very easily distracted. She related several examples of minor occurrences that had disrupted Leslie's concentration during a session. She said that if such things divert Leslie's attention two sources of communication would surely be a problem for her.

Subsequently, the state hearing officer decided in favor of the parents' request for oral education:

Because a total communication program for the deaf and hard-of-hearing pupils involves simultaneous oral speech and fingerspelling and signing, Leslie's ability to continue her language and speech development would be retarded due to her visual distractability.

Id. at 166. The decision further stated:

The findings in this case do not establish a precedent for other children who have highly developed oral skills. Were it not for the visual distraction, the program at Little Lake School District would appear to be an equally appropriate setting for Leslie.

Id.

151. 20 U.S.C. §§ 1401(16), 1412(1) (Supp. V 1975); see text accompanying notes 27-28 *supra*.

152. 20 U.S.C. § 1412(5)(B) (Supp. V 1975).

provide a varied number of programs enter into the determination of what is "appropriate"?

(3) Does "appropriate" mean what is appropriate for all concerned, including the school system and handicapped children in general, as opposed to what is uniquely appropriate for the individual under consideration?

A strong case can be made from the language of the Act itself that Congress intended the concept to relate to what was best for each individual child. However, application of the concept in local disputes between parents and school systems indicates that local agencies are defining the term to suit their own needs and existing programs rather than to fit the individual children.

As all of the early analyses of the Act noted, its entire thrust was to demand individualized attention to the needs of each handicapped child. In establishing the basic requirement of a "free appropriate public education," it seemed plain that the concept of appropriateness was included because what was appropriate for one handicapped child might not be appropriate for another. A mildly retarded child, for example, could be able to integrate into a regular class more completely and with less special assistance than a severely retarded child. A blind child might be more able to integrate into a cognitive activity such as spelling than a visual or physical activity such as art or gym; for a deaf child, the reverse might be true. Because Congress did not desire that handicapped children just be dumped into a room in the public school system, it intended the statutory language to assure that each child receive the type of education that he needed.

Section 1412(5)(B) dealing with state eligibility for federal funding also supported this view of "appropriate" education.¹⁵³ This section required that the state create procedures to insure that handicapped children would be educated with nonhandicapped children "to the maximum extent appropriate." The section also provided that special services, another undefined term, must be supplied "to the maximum extent practicable." It seems clear that Congress intended appropriate to mean something more than practicable; otherwise, it would not have created a different standard for the provision of special services, which could be extremely expensive for a district with only a few handicapped children.

153. *Id.*

If a district had only one or two deaf children, for example, complicated audiological equipment might not be practicable, because the high cost would not be justified by the minimal use. Thus, the "practicable" concept would be related to the economic feasibility to the district of providing the service. But the basic issue of the education to be provided to each handicapped child would remain to be resolved by determining what is "appropriate" for the child, not for the district's pocketbook.

This argument is supported by the *Mills v. Board of Education*¹⁵⁴ decision's explicit rejection of the argument that lack of funds could be used to deny a handicapped child's right to an education, a rejection that was reaffirmed by Congress in passing the Act.¹⁵⁵ Moreover, the Act defines "special education" as instruction designed to meet the "unique" needs of the handicapped child wherever that child has been placed.¹⁵⁶ When these various provisions are combined with the individualized education program required for *each* child, it is abundantly clear that the concept of an appropriate education was geared to the child's requirements, not the district's.

In practice, however, what local districts have offered as "appropriate" education, at least for deaf children, has been the pre-existing programs that the districts have already settled upon. Typical is the case of *In re Eric K.*¹⁵⁷ Eric was the three-year-old deaf son of parents who moved from Spokane to Vancouver, Washington for employment purposes. Eric's early education in Spokane was under an oral method. When his parents moved to Vancouver, the local district had only a TC program in which it wished to place Eric. His parents placed him at a nearby private oral school in Portland, Oregon, and argued that the district should bear the cost of Eric's tuition at private school because it was not affording him an "appropriate" education in the public system.

The parents' argument was two-fold. First, they asserted that they thought oralism was a preferable method of education, because it produced more children who were able to communicate with hearing persons and, therefore, participate more fully in the hearing world:

154. *Mills v. Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972).

155. *See, e.g.*, the comments of the Senate Labor and Public Welfare Committee, S. REP. NO. 168, 94th Cong., 1st Sess. 22-23, reprinted in [1975] U.S. CODE CONG. & AD. NEWS 1425, 1446-67.

156. 20 U.S.C. § 1401(16) (Supp. V 1975).

157. Evergreen School District, Vancouver, Wash., Oct. 16, 1978, *aff'd*, *In re Eric K.*, Special Education Cause No. 78-5 (Superintendent of Public Instruction, Washington), January 18, 1979.

Our concern is that Eric become part of the world, not a part of those who are only capable of signing; that he can communicate in a world that is basically hearing. We were at one time told that Eric should only learn to sign and could never speak. Thus he would be restricted to a tiny portion of our population that can sign. And we in no way want to hinder his ability to speak and communicate in the world.¹⁵⁸

Second, they argued that, whatever the merits of the different types of programs in general, Eric had been making significant progress for two years under oral programs. Thus, continued oral programming was more appropriate *for Eric*. They introduced testimony from Eric's teachers and audiologists at his private school to this effect:

Eric began playing with sounds. He played with them more and more, taking turns with the different vowels. As he listened to what we were saying and tried to match what we said, his vowels became clearer. Then he began using inflection patterns and making his voice go up and down; he began using duration, making the sounds long and short. . . . He has come a long way since I first saw him We focus on audition and speech and language and listening skills, and I think Eric needs that. I don't think he needs the added signing.¹⁵⁹

The school district conceded that it had never evaluated Eric for placement in anything other than the TC program it already had.¹⁶⁰ It argued that it considered TC to be the better approach for a larger number of deaf children, although the district's personnel conceded it was not the best approach for all children.¹⁶¹ The district then argued that, even if Eric's parents could prove that an oral program was a better program or the best program for Eric, that did not mean the district's preferred program was not appropriate:

We do not know what our total communications program will do for Eric. We cannot say that the district program is appropriate for other children and not appropriate for Eric. . . . It is appropriate for other children, and they are learning. The public school does offer an appropri-

158. *In re Eric K.* (Evergreen School District, Vancouver, Wash.), Hearing Transcript at 34 (Oct. 16, 1978).

159. *Id.* at 41-42.

160. *Id.* at 20 (questions put to Director of Special Services, Evergreen School District):

Q—Did you ever meet Eric before you made the assessment and recommendation?

A—No.

Q—So you made an evaluation of Eric without seeing him?

A—I didn't make an evaluation. I took the data that was available, and from my research, and knowing the experiences we have had with youngsters with similar deficit areas, I looked at the total communication program which Evergreen has and I recommended that.

161. *Id.* at 22.

ate program. I have asked repeatedly "why is it inappropriate?" And the response comes back to me, "because of how he is succeeding in [private school]." We do not know if he would do as well in total communication, but it is not the responsibility of the district to pay for Eric's education at [private] school; it is the responsibility of the district to see that he receives an appropriate education.¹⁶²

In the district's view, it did not have to provide the best program or *the* appropriate program for the particular child; it just had to have *an* appropriate program. Since the burden was on the parents once the district had made its proposal, it was not enough for them to show that another program was more likely to produce successful results. They had to prove, somehow, that the district's program would not succeed.

Both the local hearing officer and the state superintendent sustained the district's position despite the district's startling concessions that they never considered Eric for any program other than the one they already had and that there was no "appropriate" program for Eric anywhere in the state.¹⁶³ The state superintendent reasoned as follows:

Undoubtedly, there are differences between the two programs. . . . It may even be that the auditory/oral program is a superior program and the best of the two programs for Eric. However, the standard of review in cases involving a challenge to the appropriateness of a program placement offered by a school district is not "superior" or "best."

A school district is required to provide a quality program which reasonably addresses the unique needs, abilities and limitations of Eric, but not necessarily the best money can buy or one that measures up to the standards and objectives of any particular school. It was incumbent upon the applicants to prove in what particular respects the program placement challenged would fail to reasonably address the unique needs, abilities and limitations of their son. Applicants failed to prove such. The evidence established at best that the auditory/oral program is more "suitable" for Eric.¹⁶⁴

Local analyses such as that of *In re Eric K.* are not uncommon. School systems, impelled by the financial difficulty of providing a separate program for every deaf child, have consistently read "appropriate"

162. *Id.* at 54-55.

163. *Id.* at 19 (Testimony of the Director of Special Services):

[T]here is nothing appropriate for Eric in the State of Washington. At this point there is not much that I see that can be done other than a placement in the public school program whereby we work out goals and objectives on an individualized basis for Eric.

164. *In re Eric K.*, Special Education Cause No. 78-5 (Superintendent of Public Instruction, Wash., February, 1979), at 7.

to include any program that can not be proven to be unworkable by the objecting parents.¹⁶⁵ In only one publicized case had a hearings officer, state or local, decided in favor of a parent's choice of education and against a district's proposed manual or TC program. In that case, the officer emphasized that the child was extremely distracted by hand signals. The state hearing officer expressly stated that the decision would not establish a general precedent for other deaf children whose parents wanted an oral education.¹⁶⁶

It is arguable that a district should not have to provide the best possible education for each handicapped child. Most districts cannot provide the best possible education for *any* of their children, but have to do what they can with their available resources. Even conceding this, the inversion of the "appropriate" concept by local districts deprives parents of deaf children of much of their supposed gains under the 1975 Act. It comes dangerously close to the "dumping" practice that Congress was determined to eliminate.

Essentially, the school district has one program which it offers to all deaf children—take it or leave it—except in very rare instances. The district may sincerely try to use the program that will do the best for the most deaf children, but one area of agreement among all deaf educators, whatever their preference in method, is that no one program works well for all deaf children.¹⁶⁷ While the parents' desires should not automatically determine what is appropriate for their child, still the hearings are converted from a search for what is best for the individual child to a contest to see if the parents can somehow prove an almost impossible fact: that a particular program will not produce results for a particular child. Thus, the local districts have managed to insulate themselves to a substantial degree from the individualized approach demanded by the 1975 Act.

165. See also *In re Eduardo A.* (Battle Ground School District, Battle Ground, Wash., April 17, 1979); *In re Marty S.*, Special Education Cause No. 78-1 (Superintendent of Public Instruction, Wash., December, 1978).

166. *In re Leslie G.* (Little Lake School District, Calif., 1978), reported and discussed in Gilb, *supra* note 95.

167. See *Council on Education of the Deaf*, Resolution on Individualized Educational Programming for the Hearing Impaired (Deaf and Hard of Hearing): "no single method of instruction and/or communication (oral or total communication), or educational setting can best serve the needs of all hearing impaired children (deaf and hard of hearing) of school age." Similarly, the Spokane Public School District, in a letter dated Oct. 11, 1978, stated that "it is our philosophy that both techniques should be available. One system alone does not fit all children regardless of the degree of hearing loss . . ." See also articles cited in note 71 *supra*.

D. *The Least Restrictive Environment*

By mandating that the handicapped child's education be provided in the least restrictive environment possible, Congress attempted to move public programs away from the institutionalization and isolation prevalent in earlier treatment of the handicapped. The Act is not intentionally designed to dump handicapped children into regular classes without regard for their ability to absorb the education provided there. Extensive regulations insist that public agencies "shall ensure" placement in the "least restrictive environment,"¹⁶⁸ although a range of alternative placements, from total integration in the regular classroom to institutionalization, remain available for use when necessary.¹⁶⁹

It is possible, however, that the Act established a presumption in favor of placement in regular classrooms. Removal from regular classrooms occurs under the Act only when it can be proved that normal classroom placement is unsatisfactory. The Act's legislative history supports this presumption by indicating that in place of the usual presumption of agency expertise which parents must normally overcome the burden of proof should rest on whomever seeks to remove a child from a regular class.¹⁷⁰

This aspect of the Act, however, has not yet worked in the manner expected because of its interrelation with the other burdens placed on the local districts. The assumption behind the "least restrictive environment" phrase was that schools would prefer to exclude handicapped children or at least isolate them in special classes or buildings. For cases in which the agency recommends a more "restrictive" alternative, therefore, Congress established the presumption in favor of regular placement, replacing the usual presumption in favor of the agency recommendation.

Actually, school districts have more economic incentive to place handicapped children directly into regular classes than to keep them separate. Instead of the "restrictive environment" issue involving parents persuading balky administrators to place their children in regular settings, the issue has arisen with parents attempting to preserve special

168. 45 C.F.R. § 121a.550(b) (1979).

169. 45 C.F.R. § 121a.551 (1979).

170. 121 CONG. REC. 25,539-40 (1975). See generally Comment, *supra* note 4, at 740-41, 772-73.

educational programs, while administrators have tried to move the children into regular classrooms over their parents' objections.

Congress and the commentators may have blithely assumed that regular placements were always more beneficial. Parents and teachers, who have to deal with the practical aspects of handicaps after the theoreticians finish congratulating themselves, are not so sure. Teachers fear the attention needed by severely handicapped children, which they are often not prepared to give, will disrupt the normal classroom procedures.¹⁷¹ Parents fear that their children will lose an effective education to be part of an ill-advised experiment in socialization. As the Act is written, the "least restrictive environment" provision places a heavy burden on parents trying to prevent dumping of their children into uncertain situations. In addition to having to overcome the agency's usual presumption of expertise, they have to overcome the misguided congressional assumption that placement in a regular classroom is always less "restrictive."

In the case of deaf children, the uniqueness of their handicap again comes into play. A deaf child, without the language necessary to participate in the class, is only a nonparticipating observer. If an oral deaf child is integrated into a hearing classroom before he has the language and speech capability necessary to keep up with the class, the purpose of the 1975 Act is totally lost. The child might socialize with hearing children, although that is doubtful because he still cannot speak to them, but he cannot learn. Yet, it will be cheaper for local districts to place these children in normal classes as much as possible, than to continue expensive special classes and services.

More importantly, given the expense of educating deaf children, many states before the 1975 Act established regional facilities, both residential and day schools that offered certain advantages to deaf children. First, they bring together a large enough group of deaf children to justify the acquisition of specialized auditory and training equipment. Second, the larger size of such facilities makes a larger, more diversified faculty feasible, with a consequent ability to offer a wide range of subjects. Third, such a facility has its own director or superintendent whose sole objective is the education of deaf children. And fourth, either a residential or day school offers more around-the-clock

171. Kidd, *supra* note 5, at 279.

support for the learning of language by deaf children.¹⁷²

Despite these possible advantages, the 1975 Act instead emphasized the principal disadvantage of residential schools—the isolation and segregation of handicapped children. The Act's local-oriented funding mechanisms create an incentive for local districts to attempt to educate their deaf children at home rather than send them to the nearest regional facility. Theoretically, it is less "restrictive" for the child to be integrated part or all of the time into a local classroom than to be attending either a residential or day-only separate facility for children with the same handicap.

In the case of the deaf, however, it can be argued that it is more "restrictive" for the child to be in a room where he cannot effectively communicate with anyone, than to be in a setting where he can develop necessary communication skills and be educated. Unfortunately, no language in the Act supports this interpretation. Several unreported decisions of local hearing officers involve parents presenting this argument in trying to continue placement in special schools, but in all cases thus far the parents have lost the argument.

VII. CONCLUSION

The Education for All Handicapped Children Act, viewed from the perspective of deaf children, is highly flawed. It creates practical hardship as the price of theoretical gains.

The theoretical gains are real enough and are important to deaf children as well as other handicapped children. By emphatically asserting that handicapped children have a right to an education, the Act crystallizes a complete change in society's attitude toward the handicapped. Whatever issues remain are at least less extreme than having to modify a previous system in which children could be totally excluded from public schools because they were hard to educate or repellent to the "normal" children.

On the other hand, amidst the favorable reaction to the Act's purposes, the Act has created some real problems for handicapped children in general and deaf children in particular. First, by placing too

172. By way of contrast, for example, in *In re* Eduardo A. (Battle Ground School District, Battle Ground, Wash., April 17, 1979), the school district's proposed program envisioned just thirty minutes of language work three days a week with a qualified teacher of the deaf. See also EDUCATION OF THE DEAF, *supra* note 64, at 32-33.

much emphasis on education in regular classrooms, the Act undercuts the quality of education deaf children will receive. It places form over substance, causing the disruption of successful regional facilities and replacing them with a series of uncertain local programs. The theoretical bias for local education is buttressed by the practical problem of the costs of such education; there is simply not enough money and there are not enough specialists for every local district to educate its deaf children in the local schools. To attempt to do so may make lawyers and educators feel they are being benevolent and progressive toward handicapped children, but the price for those benevolent feelings, in many cases, will be the quality of the education the handicapped children receive. The Act may eliminate a temporary isolation during the educational process, but it replaces it with the risk of a permanent intellectual isolation for the life of the handicapped person.

Second, the Act completely fails to distinguish between handicaps. The underlying assumption of the Act seems to be that every handicap is the same as a "wheelchair" handicap, that if economic objections to restructuring buildings are put aside, there is no reason why the child cannot be educated in a regular classroom. And, if one keeps the "wheelchair" child in mind, most of the Act's provisions make sense. They make progressively less sense, however, as we shift the focus to other handicaps. Deafness, historically the "hidden" handicap, is once again the neglected problem. Moving a deaf child into a regular classroom before the child has the necessary language is a kindness to no one, especially the deaf child. Yet, by pretending that all handicaps are alike, that is precisely what the Act does. An unprepared deaf child in a class in which he cannot communicate will only buttress society's old stereotypes about deaf persons as "dumb" or "slow" and will justify constant discrimination against that deaf person later in life.

Third, although the Act purports to increase the role of the handicapped and their parents in their own education, the gain is frequently an illusion. Parents of handicapped children gain some influence, but no control, over their child's education. This is not necessarily bad, because parents can certainly have unrealistic opinions regarding their child's capabilities. Except in the case of parents refusing to educate a handicapped child, however, most educators note that an important aspect of a successful placement is a placement of which the parents approve.

For some, the new system will work: after consultation, the local

agency and the parents may agree on a placement with the parent then lucky enough to receive a trained and supportive classroom teacher plus necessary ancillary services for the child. For others, education of a deaf child will remain a year-by-year battle to overcome a disagreeable recommendation or to avoid a disagreeable teacher. Unlike the case of a hearing child, who can still make some progress in a year with a poor teacher, a deaf child may lose the entire year plus some of the progress made in earlier years.

The problem from the parental perspective is that the Act raises their expectations, and purports to give them a voice in the process, but then takes the expectations and the voice away. The law is, at best, a tactical lever. The local school system can no longer flatly refuse to educate a handicapped child. They must at least try to educate him, and the law gives the parents some opportunity to be a nuisance to the local bureaucrats. The law only starts a process, however, and does not guarantee a conclusion. If the local educators think the child is untrainable, and communicate their low expectations to the teacher, there is no way the parents can raise those expectations. The school will just "go through the motions" of educating the child. If, in the context of deaf education, the disagreement is over the basic method of instruction to be used, the parents face an almost impossible struggle to try to change the district's mind.

Although there is no way, given the high cost of educating handicapped children, to assure the "best" education for every handicapped child in the country, a number of basic changes in the Act would significantly ease the problems presently experienced by deaf children and their parents. First, the preference in favor of local education, while justifiable to avoid unnecessary institutionalization, should be modified to clearly state that placement in regular classes should occur only when the child is capable of benefitting from the instruction. There should be a clear provision supporting the use of regional facilities to provide education to those children who do not yet have the speech or language skills to integrate into regular classrooms. In addition to theoretical support of such facilities, the funding provisions of the Act would have to be modified so that a district with only a few deaf children is not penalized by agreeing to send its deaf children to the regional facility for education.

Second, several terms used in the Act need to be more precisely defined. The concept of "appropriate" education is the most glaring defi-

ciency. It should be clearly defined to indicate that the concept refers to what is best for the individual child. There are two necessary parts to this redefinition: (1) that the term refers to the individual's needs, not the district's capabilities; and (2) that the term refers to the "best" education for the individual, not just "any useful" education.

Also in need of definition is the "least restrictive environment" concept. The Act should recognize that it is not necessarily more restrictive for a child to be placed only with other children with the same handicap; or, conversely, that a child can be more restricted by being placed in a classroom setting with which he cannot yet cope.

Third, several procedural changes should be made to strengthen the role of persons objecting to a local placement. Because the local school system has the greater expertise, the burden of persuasion should always be on the school system as to all aspects of a placement. If it has made a correct decision, it should have an easy time proving the determinations that went into the decision. If it is incorrect, it should not be able to hide behind the fact that the parents will have a difficult time finding educators with whom to disprove the school's decision.

As part of the proposed redefinition of terms, it should be made clear that the purpose of the hearing is to determine what is "best" for the child, not what is adequate or acceptable. Additionally, the local and state-level determinations by the school system should have specific time limits, with the parents clearly having the right to by-pass administrative hearings and go directly to state or federal court if they choose. As the system now stands, the school district can delay a case long enough to moot most disputes on the method of educating a deaf child. After three years in the school's proposed program, the child's parents will have a much harder time proving that the child will benefit by shifting to another program than they would have had showing the usefulness of their proposed placement in the first place.

Fourth, the Act should require special education from birth once a child's need for it is determined. Given the crucial nature of early education if deaf children are to progress in their later educational years at a normal or near normal rate, the omission of required special education before age five limits the effectiveness of all the other provisions of the Act.

Even with all possible changes of the Act, education will not become an easy process for the deaf and their parents. In addition to the need to organize to fight for educational justice, another thing the handi-

capped are learning from the struggles of black people is that the educational system has an amazing capacity for delay. Deaf people, as the forgotten handicapped, also face the additional struggle to create awareness of their special needs. For them, the Education for All Handicapped Children Act is even less of a beginning than it is for other handicapped persons.

