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EQUAL EDUCATIONAL OPPORTUNITY FOR SPECIAL PUPIL POPULATIONS AND THE FEDERAL ROLE*

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INTRODUCTION

The Reagan Administration's "new federalism" calls for a drastic reduction of the federal role in education. Before the impact of such a step can be truly evaluated, we must examine what the federal role has been in education, whether there should be a federal role in education, and if so, what that federal role should be. Those who have argued for a reduction in the federal role do not necessarily believe that the states are more efficient at accomplishing generally agreed-upon goals. They believe that there should not be national goals in the area of education at all or, at the least, that the federal role must be minimal.

Assuming that one wanted to reduce the federal role in education, isn't there some core federal role that should remain? Many people, and I am one of them, have argued that without a federal role, the guarantee of equal educational opportunity will be seriously weakened for certain categories of children. Should guaranteeing an equal educational opportunity for special pupil populations be the responsibility of the federal government? If the answer is yes, what is that equal educational opportunity it should guarantee? And how should it proceed to do it?

I. THE CURRENT FEDERAL ROLE

A. *Development of the Federal Role*

A useful first step in examining the questions raised above is to review what the federal role has been in education for the past 20 years. Since education is a state function that is generally delegated to local school districts, what basis is there in our system for a federal role at all? A very important aspect of

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the federal role is the fact that all three branches of the federal government have constitutional authority to play some part in ensuring equal educational opportunity. However, the actions of the various branches of the federal government often overlap and sometimes conflict. Any analysis of the current federal role in education must take this phenomenon into account.

1. The Congressional Role

Congress has had three goals in enacting legislation that touches upon education: (1) Congress has concerned itself with issues of national priority that might be shortchanged by the states with their more parochial interests. (2) Congress has been concerned with incentives for the improvement of education and for encouraging innovation and research. (3) Finally, Congress has taken a major role in the protection of civil rights as related to education. Examples of statutes designed to effect each of these goals follow.

Educational issues of national priority or concern. National priorities are determined by Congress, not by other branches. One of the earliest examples of an education law enacted to meet a perceived matter of national concern is the Federally Impacted Areas Aid law.¹ In the late 1930's, with the military build-up prior to World War II, large numbers of military and civilian employees working on military bases had children who needed to be educated. School districts either charged these children high fees or refused to admit them into their schools. The forerunner of the current Impacted Areas Aid law was thus enacted to help offset the impact on school districts due to the presence of military bases or other federal installations.

Another illustration is the National Defense Education Act,² enacted in 1958. This law was passed following the outcry that arose when the USSR first launched Sputnik in 1957. Questions were raised about the adequacy of the science and math training that our students were receiving compared to students in Russian schools. This occurred at the height of the Cold War, and the issue was seen as one of the adequacy of our national security. The purpose of the law, as stated by Congress, makes this clear: "[S]ecurity of the Nation requires the fullest development of the mental resources and technical skills of its young men and women."³ The federal government, through this Act, would provide assistance "to insure trained manpower of sufficient quality and quantity to meet the national defense needs of the United States."⁴

Title I of the Elementary and Secondary Education Act⁵ was enacted in 1965 also to address a matter of national concern — the permanent underclass of poor people. Compensatory education was seen as a way of breaking the poverty cycle, helping the individual, but also helping society by increasing the gross national product, lessening welfare costs and the costs of crime, etc.

¹ 20 U.S.C. §§ 236-246 (1976).

² 20 U.S.C. § 401 (1976).

³ *Id.*

⁴ *Id.*

⁵ 20 U.S.C. §§ 236, 241, 821 (1976).

While most people might agree that these issues are matters of national concern, and that leaving these matters to the states might not bring about the best results, it is unclear whether legislation enacted by Congress in subsequent years similarly addressed urgent needs of the nation. Indeed, any quick review of legislation enacted in the 1970's suggests that many of the laws are pet programs of individual congressmen rather than programs of national priority. For example, the need for the Arts in Education Act⁶ is explained as follows: "[A]rts should be an essential and vital component of every student's education; the arts provide students with useful insights to all other areas of learning; and a Federal program is necessary to foster and maintain the inter-relationship of arts and education."⁷ The statute encouraging the adoption of metric education programs in school districts throughout the nation is justified as follows: "[A] Federal program is vitally necessary if the American people are to adapt to the use of the metric system of weights and measures."⁸ In addition, there are countless programs of institutional assistance, such as the Law School Clinical Experience⁹ and the Higher Education Facilities Loans for Construction and Renovation.¹⁰ Although one might question whether any of these programs are of the same order of priority as the National Defense Education Act, they might still be appropriate matters of national educational policy.

Incentives for improvement of education. Congress has enacted a number of laws concerned with improvement and innovation in education. Such acts include the Improving Local Educational Practices Act¹¹ and the Strengthening State Education Agency Management Act.¹² Another example is the Educational Television Programming Act¹³ which produces *Sesame Street*. Again, questions can be raised about the appropriateness of, or at the least, the national necessity for the federal government's role in some of these areas. One area, however, is less questionable as an essential national role — the collection and analysis of educational statistics. The National Center for Educational Statistics and the National Assessment of Educational Progress make important contributions to our understanding of education and its effectiveness. Individual states do not have the same capacity to collect and analyze data as does the federal government. As a nation, we need to know where we are going educationally. Indeed, eliminating the federal role here would, if nothing else, leave us with no way to measure the impact of the proposed changes in the federal role.

Protection of civil rights. The most important function of the federal government is to protect the civil rights of minority and disadvantaged pupil populations. Congress has taken at least two approaches: through direct man-

⁶ Arts in Education Act of 1978, 20 U.S.C. §§ 2961-2963 (Supp. IV 1980).

⁷ 20 U.S.C. § 2961(b)(1) (Supp. IV 1980).

⁸ Metric Education Act of 1978, 20 U.S.C. § 2951(b)(1)(C) (Supp. IV 1980).

⁹ 20 U.S.C. § 1134n (Supp. IV 1980).

¹⁰ 20 U.S.C. §§ 1132d to d-4 (Supp. IV 1980).

¹¹ 20 U.S.C. §§ 3111-3112 (Supp. IV 1980).

¹² 20 U.S.C. §§ 3161-3163 (Supp. IV 1980).

¹³ 20 U.S.C. § 3201 (Supp. IV 1980).

dates — i.e., the civil rights statutes, and through grant-in-aid or program statutes.

Civil rights statutes are enacted by Congress in accordance with its authority under section 5 of the fourteenth amendment. Such statutes are usually brief and without much detail. The civil rights statutes relating to education direct the appropriate federal agencies to promulgate regulations to implement the statute's objectives, but there is usually not much guidance in the statute itself, nor is the legislative history very clear. Under these statutes, no federal funds are appropriated. However, the sanction for violating the statute or its implementing regulations is to withhold all federal money going to the program or activity in which the discrimination occurred.

The grant-in-aid or program statute, in the area of protections for special pupil populations, can be of several kinds. One type of program statute is premised on implementing notions of social justice beyond the constitutionally-required minimum of the Equal Protection Clause. Title I of the Elementary and Secondary Education Act, which provides compensatory education programs for economically disadvantaged children, is clearly of that type. Another type of program statute is designed to assist state educational agencies or local educational agencies in complying with constitutional or civil rights requirements, including those mandated by courts. The third type of program statute can mandate requirements that are not unlike those developed under civil rights statutes.

Grant-in-aid statutes are generally much more detailed than civil rights statutes so that the regulations, rather than defining the right to be protected and what constitutes violations of that right, merely fill in the interstices of the statute. Funds are appropriated under these statutes to both states and local school districts to encourage development of programs to assist special pupil populations. The authority for enacting these statutes comes from the taxing and spending clause of the Constitution,¹⁴ and the clause has been interpreted as permitting conditions to be attached to the receipt of the funds.¹⁵ Violation

¹⁴ U.S. CONST. art. I, § 8, cl. 1.

¹⁵ See *Oklahoma v. United States Civil Serv. Comm'n*, 330 U.S. 127, 143 (1947). Is there any limit to the conditions that can be imposed under the taxing and spending clause? Under *National League of Cities v. Usery*, 426 U.S. 833 (1976), the Supreme Court limited Congress' regulatory power — i.e., the reach of the Commerce Power. *Fullilove v. Klutznick*, 448 U.S. 448 (1980), does indicate that in exercising its authority under the Spending Power, Congress may condition the provision of financial assistance on a recipient's compliance with statutory and administrative mandates, including the expenditure of the recipient's own resources. 448 U.S. at 473-75. The Court goes on to say that "the reach of the Spending Power is at least as broad as the regulatory powers of Congress," 448 U.S. at 475, but that merely brings us back to *National League of Cities*. In *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), Justice Rehnquist notes with regard to the Spending Power:

[O]ur cases have long recognized that Congress may fix the terms on which it shall disburse federal money to the States [L]egislation enacted pursuant to the Spending Power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the Spending Power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract." There can . . . be no knowing acceptance if a State

of the conditions included in the statute or regulations affects only the funds under that program. And, indeed, states or localities can refuse to take the money and not be obligated to comply with any of the conditions.

2. The Role of the Executive Branch

The executive branch plays a somewhat different role than do the other branches. Its ostensible role is to implement the congressional statutes. Again, however, there are a range of activities that are encompassed by this role. In drafting civil rights regulations, the agency has to determine what constitutes compliance. As noted earlier, Congress usually provides very little detail about what constitutes discrimination and the legislative history provides little help. Thus the agency, in fleshing out the rather cryptic civil rights statutes, actually makes policy. The agency is also responsible for enforcing the statute and regulations once they have been promulgated and thus it monitors and seeks to achieve compliance in specific cases. Thus, on the one hand, the agency determines what constitutes compliance generally, and then on the other, it decides in specific cases whether or not an educational institution has violated what it considers a protected right.

The executive branch also has to develop criteria for the distribution of funds appropriated under program statutes, particularly when criteria are not spelled out in any detail by the statute. Then the agency is responsible for monitoring compliance with the various conditions in program statutes, which can be substantive or fiscal.

Another role that the executive branch plays is the stimulation of research through grants and contracts, as well as other ways. In these cases, Congress, by and large, has charged the agency with supporting research but has not specified in any detail the nature of the research to be supported. The executive branch is also responsible for disseminating the results of the research that it encourages and supports.

Finally, the executive branch has played some role in providing technical assistance of various kinds to local school districts and to states. Again, this is the kind of role that would be difficult to duplicate at the state level if the federal government pulled back. My own view is that the federal government has not done enough in this area, and that more resources should be used for technical assistance.

3. The Role of the Courts

Turning to the third branch, the courts of course can intervene only in the

is unaware of the conditions or is able to ascertain what is expected of it. (citations omitted).

451 U.S. at 17-18.

In a footnote, Justice Rehnquist adds: "There are limits on the power of Congress to impose conditions on the states pursuant to its spending power" 451 U.S. at 17 n. 13. This was in connection, however, with the question whether Congress clearly articulated an intent to impose binding obligations on the states.

context of a specific case. Their role is to interpret and apply both the Constitution and the federal laws. In the past fifteen years, the bulk of judicial activity has been the interpretation of congressional statutes or regulations promulgated by the agency. During this period, courts, in the absence of federal statutes, rarely articulated new constitutional rights. As will be shown later, the courts do at times conflict with the agency's development of policy and often the policy itself is the result of or triggered by court action.

B. *The Core Role: Equal Educational Opportunity*

Turning now to what I argue is the core role of the federal government in education—the guarantee of equal educational opportunity—we still have the question of how equal educational opportunity is to be defined. From the perspective of today's complexity, the legal issue raised in *Brown v. Board of Education*¹⁶ seems relatively simple: whether state-imposed segregated schooling denies black children equal protection of the laws, even though the segregated schools are equal in terms of physical facilities, resources, and other tangible factors. In the context of that case, equal educational opportunity meant *at least* an education provided on a nonsegregated basis. But beyond this the meaning of "equal educational opportunity" has never been fully resolved. Questions arise such as, who should be ultimately responsible for defining it—local school districts, states, Congress, the courts? And finally, once it is defined, who is responsible for ensuring that each child is guaranteed an equal educational opportunity? And how is this to be done?

1. Federal Techniques for Ensuring the Right to an Equal Educational Opportunity

Once the rights are defined, Congress has several techniques for protecting those rights. These include: technical assistance to state and local educational agencies; fiscal incentives to encourage districts to cease discriminatory practices or affirmatively to assist special populations; conditions attached to grants to require districts to ensure equal educational opportunity; and sanctions for failure to comply with civil rights mandates or program conditions.

Technical assistance. There are a number of examples in which Congress has enacted statutes under which the federal government can provide technical assistance. For example, under the Education for All Handicapped Children Act,¹⁷ the Department of Education's Office for Special Education can provide technical assistance directly to the states or through regional centers with which it contracts. These centers help to develop materials and train teachers. Another example is the Emergency School Aid Act,¹⁸ under which school districts that were trying to desegregate either voluntarily or under court order could obtain technical assistance.¹⁹ Technical assistance is also available in the

¹⁶ 347 U.S. 483 (1954).

¹⁷ 20 U.S.C. §§ 1401-1461 (1976 & Supp. III 1979).

¹⁸ Emergency School Aid Act, 20 U.S.C. §§ 3191-3206 (Supp. IV 1980).

¹⁹ 20 U.S.C. § 3198(b) (Supp. IV 1980).

area of bilingual education under Title VII of the Elementary and Secondary Education Act.²⁰ General Assistance Centers were established under Title IV of the Civil Rights Act of 1964²¹ to provide advice and technical assistance in the areas of desegregation and sex discrimination.

Fiscal incentives. Another technique is to target funds in such a way that they act as incentives to school districts and the states to provide equal educational opportunity for special pupil populations. For example, under the Emergency School Aid Act, pre-award compliance reviews proved to be a strong incentive to school districts to eliminate racial imbalance in the assignment of teachers and to ensure that ability grouping was not used to segregate classes. The Bilingual Education Act provides funds for the training of bilingual teachers and for the establishment of pilot bilingual education programs. While school districts were not necessarily motivated by the money alone, the existence of the money acted as an incentive to develop the particular kinds of programs that were most likely to benefit the special pupil populations they were designed to help.

Conditioned grants. In order to obtain federal funds, conditions can be attached that will help protect the rights of special pupil populations. For example, state plans for treatment of the handicapped are not to be approved unless they meet the requirements of the Education for All Handicapped Children Act, including the due process safeguards incorporated in the Act. Similarly, before state plans can be funded under the Vocational Educational Act, provisions have to be made to set aside funds for programs for the handicapped, for the limited-English proficient, and to ensure sex equity.²² Thus, through conditions attached to vocational education funds, certain protections for special pupil populations are ensured.

Yet another example is the maintenance of effort²³ and the supplement-not-supplant²⁴ provisions in Title I of the Elementary and Secondary Educa-

²⁰ Bilingual Education Act, 20 U.S.C. §§ 3221-3223, 3231-3233, 3241-3242, 3251-3252, 3261 (Supp. IV 1980).

²¹ Civil Rights Act of 1964, 42 U.S.C. § 2000c-3 (1976).

²² Vocational Education Act of 1963, 20 U.S.C. §§ 2310(a) (handicapped), (b) (limited English-proficient) (Supp. IV 1980), and § 2304(b) (1976) (elimination of sexual bias in programs).

²³ Elementary and Secondary Education Act of 1965, 20 U.S.C. § 2736(a) (Supp. IV 1980).

(a) *Maintenance of effort.*—(1) Except as provided in paragraph (2), a local educational agency may receive funds under this subchapter for any fiscal year only if the State educational agency finds that the combined fiscal effort per student or the aggregate expenditures (as determined in accordance with regulations of the Secretary) of that agency and the State with respect to the provision of free public education by that agency for the preceding fiscal year was not less than such combined fiscal effort per student or the aggregate expenditures for that purpose for the second preceding fiscal year.

Id.

²⁴ 20 U.S.C. § 2736(c) (Supp. IV 1980).

(c) *Federal funds to supplement, not supplant regular non-Federal funds.*—A local educational agency may use funds received under this subchapter only so as to supplement and, to the extent practical, increase the level of funds that would, in the absence of such Federal funds, be made available from regular non-Federal sources and from non-Federal sources for State phase-in programs described in section 2751(b) of this title

tion Act. These provisions ensure that the federal funds are used for *compensatory* programs for the economically disadvantaged, rather than to free up state and local funds which can then be funneled elsewhere.

Sanctions. The final technique that the federal government has is to apply the sanctions included in the statutes. Although most attention is generally given to the issue of sanctions, this technique is rarely used. Indeed, if the other techniques outlined above are properly used, the draconian sanctions included in the civil rights statutes probably will not be necessary. The available sanctions have little flexibility and the federal government under any administration has been reluctant to use them. Under the civil rights statutes, a school district found not in compliance and which refuses to come into compliance voluntarily within a certain period of time can be taken before an administrative law judge. The sanction, assuming the administrative law judge and the Secretary of the Department agree that the school district remains out of compliance, is to cut off all federal funds going to the program or activity in which the discrimination has been found to occur.

Program statutes have less clearly defined procedures or sanctions but, for example, under both the Education for All Handicapped Children Act and the Vocational Education Act, state plans could be disapproved if the state remained out of compliance and then the funds would not be forthcoming. In addition, for a violation of requirements in Title I of the Elementary and Secondary Education Act, the Education Appeal Board could issue a cease and desist order against a particular practice.²⁵

The use or nonuse of sanctions can pose a critical dilemma for the federal government. For example, assume that a state is providing little in the way of services for the handicapped other than through the federal funds it receives. Nevertheless, assume that it is quite evident that in administering the federal funds, the state or school district is failing to comply with very important requirements that Congress has enacted into law and thus is in clear violation of the law. If sanctions are not imposed, the federal government permits handicapped children to remain unserved or inadequately served under the law, while the withholding of funds could eliminate the services already being provided to the handicapped. The problem is that the only sanction, the cut-off of funds, further penalizes the children whom the programs are designed to help. Neither the agency (HEW, then ED) nor Congress has really developed guidelines or strategies for when sanctions should be used, and which sanctions should be employed in which circumstances.

2. Equal Educational Opportunity Programs and Mandates

In the last 15 years, Congress has greatly expanded equal educational op-

for the education of pupils participating in programs and projects assisted under this subchapter, and in no case may such funds be so used as to supplant such funds from such non-Federal sources.

Id.

²⁵ 20 U.S.C. § 1234(a)(3) (Supp. IV 1980).

portunity programs and mandates that impact on state and local educational agencies. Some examples of the programs and mandates that deal with civil rights include the following:

- The protection of black children or Native American children or other racial or ethnic minorities, in segregated systems or formerly segregated systems.
- The protection of physically and mentally handicapped children.
- Special assistance for economically disadvantaged children.
- The protection of and special assistance for language minority children (who suffer both from segregation and language problems).
- The elimination of gender discrimination.
- The protection of and special assistance for migrant workers' children.

In expanding the categories of students to be given special protection and special treatment, Congress has used both grant-in-aid statutes (as conditioned incentives) and civil rights requirements. Moreover, in expanding the categories of students to be given special protection, Congress has gone beyond merely prohibiting discriminatory action by officials against certain groups. In some cases, it has required that certain categories of children be provided special assistance, whether or not there has been deliberate prior discrimination by governmental officials. The theory, of course, is that certain groups of students are unable to take advantage of the education offered them, because of barriers created by national origin, disease, genetic defect, or economic circumstances, rather than government-imposed barriers. Thus school officials should provide them with the assistance needed to bring them to the same starting line as other children. The difficulty lies in determining what kinds of services and in what amounts are needed for various types of children. It is also unclear when these services should be mandated — i.e., when they are a civil right, and when the school district should be encouraged to provide such services, but not penalized for failing to provide them.

This paper will focus on only two of the special categories listed above: handicapped and language minority students. Both areas include grant-in-aid statutes with significant conditions tied to the receipt of federal funds, as well as the unfunded mandates of civil rights statutes. This paper will also outline the role that courts have played in these areas.

3. Federal Programs and Protections for Handicapped Students

The Education for All Handicapped Children Act (EHA)²⁶ was enacted in 1975 as a very comprehensive, prescriptive statute. Prior to the passage of the federal law, society in general and school systems in particular had not treated handicapped children very well. For example, until recently it was a misdemeanor in North Carolina for parents to persist in seeking education for their handicapped child once a school official had decided that the child was uneducable.²⁷ Another example is the often cited case involving the child who, al-

²⁶ 20 U.S.C. §§ 1401-61 (1976 Supp. IV 1980).

²⁷ Under a former North Carolina law, if the child were unlikely to "profit by instruction given in the public schools," he was to be excluded and parents who persisted in seeking the at-

though of normal intelligence, was excluded from school because his physical defects were upsetting to other children in the class.²⁸ And, not too many years ago, the Illinois Supreme Court held that a handicapped child had no right to an education.²⁹

Interestingly, in this area, the courts acted as the impetus for the federal legislation. The first major legal breakthrough for education for handicapped students came in *Pennsylvania Association for Retarded Children (PARC) v. Pennsylvania*.³⁰ Under Pennsylvania state law, retarded children could be excluded from the public schools if they had been certified as "uneducable and untrainable" or had not attained the mental age of a normal five-year-old child. The plaintiffs introduced evidence that all mentally retarded persons are capable of benefitting from a program of education and training. Without deciding whether mentally handicapped children were a suspect class or whether education was a fundamental right, the court concluded that the policy of providing education to normal children while denying it entirely to a substantial number of children with mental handicaps "established a colorable constitutional claim even under the less stringent rational basis test"³¹ The parties then entered into a consent agreement whereby the state recognized its "obligation to place each mentally retarded child in a free, public program of education and training appropriate to the child's capacity"³²

This case was followed by the *Mills* case,³³ and then by consent agreements in Tennessee,³⁴ Maryland,³⁵ North Carolina,³⁶ Louisiana,³⁷ and other

tendance of such children were guilty of a misdemeanor. 1955 N.C. Sess. Laws 1599-600 (*repealed* by 1975 N.C. Sess. Laws 899).

²⁸ *State ex rel. Beattie v. Board of Educ.*, 169 Wis. 231, 172 N.W. 153 (1919). His presence in the school was deemed detrimental to the welfare of the other pupils because of his having a peculiarly high, rasping, and disturbing tone of voice, accompanied with uncontrollable facial contortions, making it difficult for him to make himself understood . . . [and] an uncontrollable flow of saliva which drools from his mouth onto his clothing and books causing him to present an unclean appearance." *Id.* at 232, 172 N.W. at 154.

²⁹ *Department of Pub. Welfare v. Haas*, 15 Ill. 2d 204, 154 N.E.2d 265 (1958). There the court stated:

While this constitutional guarantee [that "the general assembly shall provide a thorough and efficient system of free schools," Ill. CONST. art. VIII, § 1] applies to all children in the State, it cannot assure that all children are educable. The term "common school education" implies the capacity, as well as the rights, to receive the common training, otherwise the educational process cannot function Existing legislation does not require the State to provide a free educational program as a part of the common school system, for the feeble minded or mentally deficient children who, because of limited intelligence, are unable to receive a good common school education. Under the circumstances, this constitutional mandate has no application.

Id. at 213, 154 N.E.2d at 270.

³⁰ 343 F. Supp. 279 (E.D. Pa. 1972) (consent decree).

³¹ *Id.* at 283 n. 8.

³² *Id.* at 307.

³³ *Mills v. Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972).

³⁴ *Rainey v. Tennessee Dep't of Educ.*, No. A-3100 [Ch., Davidson County, Tenn., July 29, 1974] (consent decree).

³⁵ *Maryland Ass'n for Retarded Children v. Maryland*, No. 100-182-77676 (Baltimore County Cir. Ct., filed Apr. 6, 1974) (cited in *Alschuler, Education for the Handicapped*, 7 J. L. & Educ.

states. Many of these cases resulted in detailed court decrees that included extensive due process safeguards. The law finally enacted by Congress reflected and paralleled many of these detailed court decrees. Basically, and very simply, the federal law authorizes federal funds to assist the states in providing a free public education to handicapped children appropriate to their individual needs. As a condition for funding, the Act imposes a number of substantive requirements guaranteeing an appropriate education for handicapped children and certain procedural requirements in order to protect the substantive guarantees. One of the difficulties has been that the conditions imposed are costly to implement; unfortunately Congress defaulted on its commitment to appropriate large sums of money to assist state and local educational agencies.

It is important to note that the Education for All Handicapped Children Act (EHA) is a grant-in-aid statute, but certain of its provisions mandate civil rights types of protections. The statute is extremely prescriptive, but it appears that a careful analysis of some of its implications was not made. For example, who should bear the burden of increased costs — the regular or the handicapped child? By allowing fiscally strapped school districts to absorb most of the costs, Congress in effect, with its stringent conditions, opted for redistribution of resources from the non-handicapped to the handicapped, even in the case of the most profoundly retarded who could not be educated in a normal school setting. Was this an appropriate accommodation of potentially conflicting interest? Other issues were resolved by assuming there could be only one educationally valid approach. For example, Congress opted for a policy of deinstitutionalization — the least restrictive environment requirement.³⁸ Thus the burden was shifted to school districts to show that “mainstreaming” a handicapped child was less appropriate than other alternatives that had been used in the past — e.g., state schools for the blind, homebound instruction, or special classes.

The civil rights statute that protects the handicapped student from discrimination is Section 504 of the Rehabilitation Act (Section 504).³⁹ That act prohibits discrimination against an otherwise qualified individual solely by reason of his handicap in any program or activity receiving federal funds. The federal agency then developed very prescriptive, detailed regulations for this one-sentence statute that are similar to the regulations promulgated for the Education for All Handicapped Children Act.

The federal role in the handicapped area has been complicated by enforcement problems in administering two similar statutes. There are two separate offices in the U.S. Department of Education responsible for these statutes. The Office for Special Education administers the Education for All Handicapped Children Act and the Office for Civil Rights administers Section 504. School

523, 523 n. 2, 526 (1978)).

³⁸ North Carolina Ass'n for Retarded Children v. North Carolina, Civil No. 3050 (E.D.N.C., filed July 31, 1978) (unreported consent agreement).

³⁷ LeBanks v. Spears, 60 F.R.D. 135 (E.D. La. 1973)(consent decree).

³⁸ 20 U.S.C. § 1412(5) (1976).

³⁹ 29 U.S.C. § 794 (Supp. IV 1980).

districts often get conflicting signals from the two offices. In addition, there are other factors as well. The Inspector General has authority to audit the expenditure of federal funds, and in the process of determining whether funds have been misspent, the auditors clearly must make a determination as to what the law and the regulations require. Also, the Department of Justice has independent authority to bring cases in the federal courts. Finally, private plaintiffs have frequently resorted to the courts for interpretation of these two laws or their implementing regulations.

Problems arise not only as to which office or agency should make the appropriate determination as to compliance with the statutes, but also as to which office should interpret the statute or regulations. The federal agency can resolve some matters informally, through letters in response to inquiries or through the circulation of somewhat more formal policy clarifications. Often, however, this results in unresolved policy issues. However, this may not necessarily be bad since, in certain circumstances, it may be appropriate for the agency to refrain from decision making in order to gain better insight into the possible effects of implementing regulations before trying in advance to define precisely all the possible issues that could arise. But before the fermenting process really can take place so that the agency can decide — in consultation with various affected groups — whether an interpretive guideline, an amended regulation, or even a change in the legislation is necessary, private plaintiffs will go to court and get a decision that will “lock in” the area. This is what happened in the “related services” area.

Under the law, a handicapped child is entitled to a “free appropriate public education,” which includes those “related services” necessary to enable the handicapped child to benefit from special education.⁴⁰ However, neither the law, nor the regulation as finally promulgated, is totally clear about the definition of the related services that must be provided. Questions have been raised regarding catheterization and psychotherapy, though Congress has limited “medical services” to only those necessary for diagnostic and evaluative purposes.⁴¹

These questions were taken to the courts, including two circuit courts,⁴² which then held that catheterization is a related service that must be provided by the school. Several courts have also said that psychotherapy can be a “related service.”⁴³ This development illustrates how before the Department has

⁴⁰ 20 U.S.C. § 1401(17) (1976).

⁴¹ (17) The term “related services” means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, *except that such medical services shall be for diagnostic and evaluation purposes only*) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.

20 U.S.C. § 1401(17)(1976) (emphasis added).

⁴² Tokarcik v. Forest Hills School Dist., 665 F.2d 443 (3rd Cir. 1981) *cert. denied*, 102 S. Ct. 3508 (1982); Tatro v. Texas, 625 F.2d 557 (5th Cir. 1980).

⁴³ Papacoda v. Connecticut, 528 F. Supp. 68 (D. Conn. 1981); *In re Claudia K.*, 3 E.H.L.R.

thought through an issue or what its position should be on that issue, and before the adoption of a considered policy that will apply nationally, the courts can constrict the area in which policy is made.

Another issue which exemplifies the interaction of court and agency is that of the extended school year. Both Pennsylvania and Georgia had an administrative rule limiting the provision of education to *any* child to no more than 180 days a year. A district court in Georgia⁴⁴ and the Third Circuit in a case originating in Philadelphia,⁴⁵ found this inflexible rule to violate both EHA and Section 504 if an "appropriate" education for a particular child was determined to be year-round schooling. Thus an inflexible 180-day maximum has been found by the courts to be a civil rights violation as well as a violation of a condition of financial assistance under EHA, while the agency was still debating its position on this matter.

The area of suspension and expulsion, when it involves a handicapped child, is even more complicated. Neither statute nor regulations deal explicitly with the question whether, consistent with EHA's requirement that all handicapped children be provided with a free appropriate education, the schools may suspend or expel a handicapped child for misconduct. At the least, it was unclear whether such an action would be a change of placement requiring a full hearing under EHA.⁴⁶ But cases on these issues were litigated before the Department could analyze and resolve the issues. In *S-1 v. Turlington*,⁴⁷ the Fifth Circuit held that under EHA, expulsion of a handicapped child is a change in educational placement that can only be done in accordance with procedures in EHA.⁴⁸ Moreover, the court held that EHA bars a complete cessation of education during an expulsion period. And under Section 504, before expelling a handicapped child, the school district must determine whether the student's misconduct is related to his handicapping condition. These cases raise a question: could a non-handicapped student expelled for similar misconduct then challenge his expulsion as a denial of equal protection?

4. Federal Programs and Protections for Limited English Proficient (LEP) Students

This area also includes both a grant-in-aid statute and a civil rights statute. In 1968, Congress passed the Bilingual Education Act,⁴⁹ under which a small amount of funds was to be made available to school districts that applied. The programs to be funded under this Act included bilingual education programs and programs designed to impart to students a knowledge of the his-

552:501 (Cir. Ct. Ill. 1981); *In re "A" Family*, 602 P.2d 157 (Mont. 1979).

⁴⁴ *Georgia Ass'n of Retarded Citizens v. McDaniel*, 511 F. Supp. 1263 (N.D. Ga. 1981) (appeal pending).

⁴⁵ *Battle v. Pennsylvania*, 629 F.2d 269 (3rd Cir. 1980), *cert. denied sub nom.*, Scanlon v. Battle, 452 U.S. 968 (1981).

⁴⁶ 20 U.S.C. §§ 1412(2)(B), 1412(5) (1976).

⁴⁷ 635 F.2d 342 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 566 (1982).

⁴⁸ 635 F.2d at 350.

⁴⁹ 20 U.S.C. §§ 3221-23, 3231-33, 3241-42, 3251-52, 3261 (Supp. IV 1980).

tory and culture associated with their languages.⁵⁰ In 1974, Congress amended the Act, stating that the purpose of the Act was "to encourage the establishment and operation, where appropriate, of educational programs using bilingual educational practices, techniques, and methods"⁵¹

The House, in reporting out the 1974 bill, articulated its understanding of what bilingual education involves:

The use of two languages, one of which is English as the media of instruction in a comprehensive school program. There is evidence that use of the child's mother tongue as a medium of instruction concurrent with an effort to strengthen his command of English acts to prevent retardation in academic skill and performance. The program is also intended to develop the child's self esteem and a legitimate pride in both cultures. Accordingly, bilingual education normally includes a study of the history and cultures associated with the mother tongue.⁵²

Thus, Congress not only encouraged bilingual educational programs, but indicated that such programs were preferred over others such as English As a Second Language programs. And conditions to facilitate that objective were attached to the receipt of federal funds under the Act.

There is an important distinction, however, between the Bilingual Education Act and what the Department of Education proposed to do under the Civil Rights Language Minority Regulations. The Bilingual Education Act provides fiscal incentives to willing school districts that are already committed to assisting limited English-proficient children, while under the Department of Education's interpretation of Title VI of the Civil Rights Act as applied to language minority children, school officials have an affirmative duty to provide special assistance to limited English-proficient children. The sanction for non-compliance is the cutoff of *all* federal funds received by the school district. A further distinction is that Title VII (Bilingual Education Act) projects were, at their maximum, serving approximately 400,000 limited English-proficient students, whereas the Department of Education estimated that there were three and one-half million limited English-proficient students in this country.⁵³

The important issues, then, are who determines the nature of that special assistance that must be provided as the federally-protected minimum and how this federal minimum standard for the treatment of limited English-proficient (LEP) children derived. In defining the nature and extent of the rights that LEP students have, if any, Congress, HEW (later the Department of Education), and the courts have all played an active role.

In 1964, Congress passed an extraordinary Civil Rights Act. Title VI of that act provides as follows: "No person in the United States shall, on the

⁵⁰ *Id.*

⁵¹ 20 U.S.C. § 880b(a)(1976) (current version at 20 U.S.C. § 3222 (Supp. IV 1980)).

⁵² H.R. REP. No. 805, 93rd Cong. 2d Sess., reprinted in 1974 U.S. CODE CONG. & AD. NEWS 4148.

⁵³ Department of Education, *Preliminary Cost Estimates of Title VI Language Minority Rulemaking 16* (August 11, 1980) (unpublished report).

ground of race, color, or *national origin*, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”⁵⁴ The statute authorizes and indeed, directs, the federal agencies to implement the act by promulgating regulations. Thus Congress delegated to the agency the power to regulate. There was little legislative history, however, illuminating what Congress meant by the phrase “national origin.”

In 1970, the Department of Health, Education, and Welfare (HEW), in accordance with its responsibility to implement Title VI in the education and health areas, issued a memorandum that said that local school districts must take affirmative steps to rectify English language deficiencies which have the effect of excluding national origin minority children from participation in the educational program offered.⁵⁵ The memorandum noted that Title VI compliance reviews conducted in school districts with large Spanish-surnamed populations had revealed a number of practices which had the effect of denying equality of educational opportunity to these children. Interpretive guidelines detailing actions that would be deemed violations of Title VI were published in the *Federal Register*.⁵⁶ These new guidelines did not, however, spell out what the “affirmative steps” were to be, and said nothing about instructing LEP students in their native language.

In 1974, in *Lau v. Nichols*,⁵⁷ a case brought by private plaintiffs rather than by the government, the Supreme Court found that the San Francisco school system had violated Title VI by failing to provide approximately 1,800 non-English-speaking students of Chinese ancestry with special instruction designed to overcome or compensate for their English language deficiency. In reaching this conclusion, the Court relied on HEW’s 1970 memorandum, holding that it was a proper interpretation of Title VI and that recipients of federal aid were obligated to comply with it. The Court’s decision responded in the terms in which the plaintiffs had framed the case. No specific remedy had been requested of the Court, the plaintiffs asked only that the Board of Education rectify the situation. Thus the Court said: “No specific remedy is urged upon us. Teaching English to the students of Chinese ancestry who do not speak the language is one choice. Giving instructions to this group in Chinese is another. There may be others.”⁵⁸ The case was remanded to the district court and a consent decree was entered that required the San Francisco Unified School District to provide not only bilingual but also *bicultural* education to LEP students.

⁵⁴ 42 U.S.C. § 2000(d) (1976) (emphasis added).

⁵⁵ 35 Fed. Reg. 11,595 (1970).

⁵⁶ *Id.*

⁵⁷ 414 U.S. 563 (1974). The Ninth Circuit, in deciding against the plaintiffs, was sharply divided as to whether or not the lack of an educational program for non-English speaking students constituted a violation of the fourteenth amendment’s equal protection clause. 483 F.2d 791 (9th Cir. 1973). The Supreme Court did not address the constitutional issue, deciding the case solely on statutory grounds. 414 U.S. at 566.

⁵⁸ 414 U.S. at 564-65.

In 1974, Congress incorporated the HEW guidelines and the *Lau* decision into legislation. "The failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs" was an unlawful denial of equal educational opportunity.⁶⁹

Following the *Lau* decision, HEW appointed a task force, consisting mostly of professional educators who were strong proponents of bilingual education, to advise the agency on implementing the *Lau* decision. The result of this process was the "*Lau Remedies*" or guidelines, issued in 1975. They were poorly drafted and ambiguous, and were applied in piecemeal fashion across the country, since they were remedies for districts found not in compliance with Title VI. Between 1975 and 1980, however, nearly 500 compliance agreements were negotiated on the basis of the "*Lau Remedies*"—and these agreements included most of the districts with a sizeable language minority population. Although there were no formal, uniform standards for districts to follow that would ensure that they were in compliance with Title VI, HEW's Office for Civil Rights (OCR) had begun to treat the "*Lau Remedies*" as if they were regulations, which meant that school districts had a heavy burden to overcome if they were not in full compliance with the requirements of the "*Lau Remedies*."

Then, in a suit filed by the State of Alaska and several of its school districts to prevent enforcement of the "*Lau Remedies*," the plaintiffs alleged that HEW was in violation of the Administrative Procedure Act for not publishing the "regulations" for public comment.⁶⁰ Thus, in September, 1978, the court approved a consent decree under which HEW agreed to publish the "*Lau Remedies*" as proposed regulations in the *Federal Register*. This served as the impetus to HEW to issue the Notice of Proposed Rulemaking (NPRM) that was finally published by the Department of Education in August 1980.⁶¹

The Problem. Current estimates are that there are three and one-half million school-aged limited English-proficient children. The majority were born in the United States and many are second and third generation. The largest group of LEP children are Hispanic. The dropout rate among Hispanics is extremely high nationwide compared to Anglo children. The real question is how to break the cycle of limited-English proficiency which leads to poor progress in school and often to an early dropout from school—doomed to be repeated in the next generation because so many Hispanics are concentrated in barrios where the primary language is continually reinforced. The Official for Civil Rights had evidence that most school districts either failed to address this problem or failed to address it adequately. This perceived failure to address the problem, coupled with affirmative actions taken by school districts that tended to segregate LEP children from other students, was seen as a civil rights issue.

⁶⁹ The Equal Educational Opportunities Act of 1974, 20 U.S.C. § 1703(f) (1976).

⁶⁰ Northwest Arctic School Dist. v. Califano, No. A-77-216 (D. Alas. Sept. 29, 1978).

⁶¹ 45 Fed. Reg. 52,052 (1980).

Before the NPRM could be redrafted as a final rule, however, the new Administration withdrew the NPRM. The result was been to leave in place the enforcement system under the old "*Lau Remedies*," which, in most aspects, was far more restrictive than the proposed regulations, as well as being more ambiguous, conflicting and open to court interpretation.

C. *Problems with the Federal Role as it has Developed*

This section of the article will outline a number of problems arising from federal intervention in education that have become apparent in the last decade. Also outlined is the extent to which "deregulation" and the "new federalism" correct these problems or create new ones.

1. Increasing Number of Federal Requirements

Congress first took a significant role in ensuring equal educational opportunity in 1964 with the passage of Title VI of the Civil Rights Act. The focus of that Act was primarily on discrimination based on race and it authorized HEW to determine which practices constituted discrimination or noncompliance with Title VI. HEW's regulations, as eventually promulgated, addressed issues of segregated pupil assignments (including the use of ability grouping that tended to resegregate), racially imbalanced teacher assignments, and inequitably distributed resources. Although Title VI is a civil rights statute, some program statutes were later enacted that also focused on segregated schools.⁶²

Congress concerned itself with economically disadvantaged children when it enacted Title I of the Elementary and Secondary Education Act (ESEA) in 1965. This grant-in-aid statute was amended in later years, and new conditions were added to ensure that the funds went solely for such children and not for the school district as a whole. Aid was also conditioned to ensure that the target children were provided with special or compensatory education that *supplemented*, not substituted for the regular program that every child in a particular district should have received. The statute and the regulations grew increasingly lengthy in an attempt to clarify areas that were causing problems because of their ambiguity. As experience with the law increased, both school districts and the federal agency recognized areas that needed to be elaborated. In response to the experience gained in the early years of implementation, a more mature law was brought about due to changes desired by the recipients, as well as by Congress and the agency. In 1968, as described in the previous section, ESEA was amended to include a grant-in-aid provision for programs for language minority children, which was again amended in 1974. The most dramatic impact on school districts, however, has occurred from laws or regulations promulgated after 1975. Four major sets of requirements have appeared on the scene since then.

1. Regulations prohibiting discrimination based on gender.⁶³

⁶² 20 U.S.C. §§ 3191-3207 (Supp. IV 1980).

⁶³ 20 U.S.C. §§ 1681-1682 (Supp. IV 1980); 45 C.F.R. pt. 86 (1982).

2. Regulations prohibiting discrimination against handicapped students.⁶⁴
3. Conditions — both procedural and substantive — attached to aid for the handicapped.⁶⁵
4. Guidelines⁶⁶ or regulations⁶⁷ requiring affirmative language assistance for limited-English proficient students.

Of the four major areas listed above, all, with the exception of the Education for All Handicapped Children Act, are unfunded mandates — that is, civil rights requirements.

2. Disadvantages of Current Federal Approach

Each new federal program or mandate is established and administered separately from all previous programs and requirements. School districts and states, therefore, tend to create separate administrative structures for the various programs. But at the school level, the combined effects of these requirements are felt. Also many requirements must be financed from local revenues.⁶⁸ This increase in the number of federal requirements and the increased reliance on unfunded mandates has come in a period when school districts are under severe financial constraints.

In enacting federal educational programs for special pupil populations, the assumption was that these programs would confer benefits on the particular target group in question without reducing services or benefits for students in other programs. In addition, many categorical programs were specifically designed to be supplementary, *i.e.*, in addition to an adequate base that all students would receive. However, state and local school officials have often had to “rob” a target group’s programs in order to serve another target group, rather than disrupt the regular curriculum.⁶⁹ Finally, many of these federal programs have placed considerable administrative burdens on teachers that take time away from actual classroom instruction.

3. Questions Raised in the Equal Educational Opportunity Area

A review of some of the problems resulting from the federal programs and mandates developed between 1965 and 1980 to aid pupils with various disadvantages suggests some questions that must be answered before changes are proposed. Should special programs and special protections — each with a separate administrative structure — have been enacted for each special category of

⁶⁴ 29 U.S.C. § 794 (Supp. IV 1980); 45 C.F.R. §§ 84.1-.39 (1982).

⁶⁵ Education of the Handicapped Children Act of 1975, 20 U.S.C. § 1401-1461 (Supp. IV 1980); 45 C.F.R. § 121a.1 to 121a.754 (1981).

⁶⁶ Office For Civil Rights, U.S. Dept. of Health, Education and Welfare, *Task Force Finding Specifying Remedies for Eliminating Past Educational Practices Ruled Unlawful Under Lau v. Nichols* (1975) (the “Lau Remedies”).

⁶⁷ Nondiscrimination Under Programs Receiving Federal Assistance Through the Department of Education, Effectuation of Title VI of the Civil Rights Act of 1964, 34 C.F.R. pt. 100 (1981).

⁶⁸ See, *e.g.*, Title VI, Civil Rights Act of 1964, 42 U.S.C. § 2000d (1976); Rehabilitation Act § 504, 29 U.S.C. § 794 (Supp. II 1978).

⁶⁹ Rand has recently done a study documenting this.

pupil? Are the problems of the handicapped, the language minority, migrant workers' children, the economically disadvantaged, and women sufficiently different to require separate programs? What happens to an economically disadvantaged, mentally retarded, Hispanic child when there are multiple programs, each addressing only one aspect of his or her learning problems?

And what problems are raised by new claimants who seek to become a separate category entitled to special treatment? Certain groups are now pressing to make the "gifted and talented" a protected class, thus *requiring* special treatment.⁷⁰ Should they be?⁷¹ What are the features that characterize a protected class? What constitutes discrimination against such a class? Is the failure to affirmatively provide a special program an element of discrimination? Who decides this? Should it vary by region of the country or area of the state?

Should Congress, once it has targeted a group for special protection, act through a grant-in-aid statute — providing limited funds but with restrictive conditions? Or should it act through a civil rights statute — mandating the minimum level of protection to which each child is entitled, with sanctions rather than incentives as the mechanism? If Congress chooses the latter, should Congress define in some detail what constitutes discrimination or unlawful denial of a benefit, or should the statute be left to the executive branch and the courts to flesh out? If Congress does have both kinds of statutes applying to the same areas, is it appropriate to incorporate grant-in-aid requirements as the minimum for civil rights mandates? Should the nature and extent of the program and its requirements vary according to whether the class is or is not clearly protected by the Constitution — *e.g.*, the difference between blacks and women on one hand and the economically disadvantaged on the other? Should school officials be equally obligated to remove barriers imposed by the

⁷⁰ Congress enacted a grant-in-aid program to provide federal funds to state and local education agencies to encourage development of programs designed to meet the educational needs of gifted and talented pupils. Gifted and Talented Childrens Education Act of 1978, 20 U.S.C. §§ 3311-3318 (Supp. II 1978).

In the preamble to the statute, Congress indicated that developing the potential of gifted and talented children was a matter of national concern.

The Congress hereby finds and declares that—

(1) the Nation's greatest resource for solving critical national problems in areas of national concern is its gifted and talented children.

(2) unless the special abilities of gifted and talented children are developed during their elementary and secondary school years, their special potentials for assisting the Nation may be lost

20 U.S.C. § 3311(b) (Supp. II 1978).

⁷¹ One commentator has argued that gifted and talented children have a constitutional right to an "appropriate" education, defined as an educational program suitable to their special needs or an opportunity to be educated to their full potential. See Comment, *Equal Educational Opportunity for the Gifted and Talented: Is it Illusory Without the Right to a Free Appropriate Public Education*, 1980 DER. C.L. REV. 957. *But cf.* Board of Educ. v. Rowley, 102 S. Ct. 3034 (1982), on the question of whether EHA requires that a handicapped child be educated to his or her maximum potential.

At the least, the author argues, Congress should legislate to ensure that the gifted and talented are provided an equal educational opportunity, *i.e.*, a "meaningful" education. 1980 DER. C.L. REV., *supra*.

government — that is, to end affirmative governmental discrimination and to remove barriers not of the government's making, such as language, poverty, and mental or physical handicaps?

Do the current civil rights statutes — such as Title VI of the Civil Rights Act of 1964 — establish individual rights or only group rights? For example, a provision of the proposed federal rule on the civil rights of language minority children waives the requirement of bilingual teachers for high school-aged children. Moreover, there must be twenty-five children of the same group within two grades of each other within the same school before the full panoply of requirements applies. If Title VI establishes an individual right, could these waivers withstand scrutiny?

On the other hand, it is not clear that the *Lau* decision requires any affirmative action on the part of school districts to correct English-language deficiencies where the number of LEP students is very small. While the majority opinion did not discuss whether any particular number of LEP students triggered a school district's obligation, Justice Blackmun, joined by the Chief Justice, stressed that he concurred in the *Lau* opinion *solely* because of the size of the affected group.

I merely wish to make plain that when, in another case, we are concerned with a very few youngsters, or with just a single child who speaks only German or Polish or Spanish or any other language other than English, I would not regard today's decision, or the separate concurrence, as conclusive upon the issue whether the statute and the guidelines require the funded school district to provide special instruction. For me, numbers are at the heart of this case and my concurrence is to be understood accordingly.⁷²

What number of unserved children triggers the violation? As noted above, the proposed regulation indicated that *some* services (even if not the full panoply) must be provided *every* LEP child. But the concurring opinion in *Lau* suggests that Title VI may not impose such stringent requirements. Also, does Title VI require a finding of "intent" rather than merely "effect" before a violation can be found? *Lau v. Nichols* suggests that an "effect" standard is appropriate. However, in the *Bakke* case,⁷³ some justices found that Title VI merely restates the fourteenth amendment requirements, including the intent requirement of *Washington v. Davis*.⁷⁴ Doesn't this mean quite a bit more than merely shifting the burden from the defendant to the plaintiff? The district judge in *United States v. Texas*⁷⁵ held that Title VI did require a finding of intentional discrimination. In that case, he found de jure action by officials against Mexican-American students. While this holding did not prevail in this particular case,⁷⁶ if a finding of de jure discrimination is a necessary element of a Title VI violation, could the language minority regulation promulgated by the Educational Department in 1980 apply to Hungarians, Vietnamese, or

⁷² *Lau v. Nichols*, 414 U.S. 563, 572 (1974).

⁷³ *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978).

⁷⁴ 426 U.S. 229 (1976).

⁷⁵ 506 F. Supp. 405 (E.D. Tex. 1981) *rev'd*, 680 F.2d 356 (5th Cir. 1982).

⁷⁶ *See* 680 F.2d 356 (5th Cir. 1982).

other groups where there has not been a history of intentional discriminatory acts of isolation?

D. Conclusion

I have tried to suggest that not all of the problems are in the laws or regulations: a distinction must be drawn between problems inherent in the laws themselves and problems that arise from the ways in which the statutes are enforced. For example, the federal bureaucracy has received little guidance from Congress regarding the scope of the civil rights statutes and hence regulations and guidelines must be written in light of the agency's own expertise. As has been shown, the enforcement of civil rights statutes has been complicated by the fact that the principal remedy for persistent noncompliance is the termination of federal funds, a draconian measure that the government is reluctant to use. Also, the system depends on a large number of government employees, not all of whom have the appropriate training and skills. To manage this kind of system and ensure some degree of uniformity so as not to appear arbitrary, detailed manuals and guidelines have to be developed. Often they appear to be excessively detailed, trivial, and overly mechanical.

Thus not only are problems the result of the laws but also of the ineffective and inefficient administrative enforcement systems. Some of these problems can be corrected without major changes in legislation or in governmental roles. After over fifteen years of experience with an expanded federal role in guaranteeing an equal educational opportunity for all, we should make changes in light of the experience gained, rather than abandon the federal role entirely.

II. THE LEGAL AND EDUCATIONAL EFFECTS OF FEDERAL DEREGULATION

As we move into the 1980's, what strategies and approaches should be taken for dealing with special pupil populations? In many cases we are applying 1960's solutions to today's problems. But solutions to the problems of special pupil populations may not be achieved by turning these issues entirely back to the states. That might be a 1950's solution, tantamount to dumping some of these problems on the courts.

If the goal of the current Administration is not to eliminate the federal role in equal educational opportunity, but to alter the way in which the federal government intervenes so that states and localities can better provide for equal educational opportunity without being impeded by legalistic, overprescriptive mandates and technical requirements that limit flexibility, how effective is the Administration's current approach? The Administration has totally eliminated many of the federal categorical programs or has collapsed them into block grants. Others may be eliminated in the near future. Some programs clearly were appropriate targets for folding into block grants. Pet programs of Congress, such as Arts in Education and Metric Education, needed an expanded bureaucracy for their administration. But the plan is to turn back responsibility to the states for implementing not only these programs, but programs for the disadvantaged — those long left out by states and localities — without

including any federal enforcement mechanisms or even mandates. The block grants indicate several purposes for which the money can be spent, but there are no real restrictions on the use of the federal money. In addition, the amount of federal funding has been cut significantly. How effective will these approaches be and what impact will they have on equal educational opportunity for special pupil populations?

A. *Some Advantages of the Proposed Changes*

Moving to a block grant, rather than having so many proliferating categorical programs, may diminish the possibility that schools will take an uncoordinated approach to the child who falls in more than one category — for example, the handicapped, indigent Hispanic student referred to earlier. Eliminating some federal programs or consolidating them may mean that the educational problems of such children can be addressed in their totality rather than compartmentalizing them in response to federal audit requirements. In other words, the delivery of educational services to special pupil populations might be able to be organized along functional lines rather than in accordance with federal funding categories.

Local school districts might be able to focus on *their* most significant problems rather than having to respond to all of the national mandates that might not fit their particular community. Yet another advantage would be the lessening of the possibility that institutions become so overwhelmed with competing and conflicting requirements that they do not act at all or act in such a way that the objectives of the statutes are frustrated.

B. *Likely Impacts of the Proposed Changes*

What would the likely effects of federal “deregulation” mean for special pupil populations? In education, that means the elimination of categorical programs and the substitution of “no strings” block grants, as well as the weakening of unfunded civil rights mandates and turning over enforcement of civil rights to states. This section describes some of the effects.

1. Changes in the Current Federal Role

With the decrease in funds and the cutback of staff, technical assistance that has been provided by the federal government in the past will all but cease. This will severely affect districts under court orders and districts that are voluntarily seeking to provide benefits for special pupil populations.

As noted in the previous section, many grant-in-aid statutes have conditioned the receipt of federal funds with provisions that would ensure that national objectives are being carried out. Once these conditions have been eliminated, the reasons for federal aid — targeting to insure national priorities (to improve the status of minorities and to educate those who have long been left out of the mainstream) — have been eliminated. There is no reason why the next step cannot be taken — elimination of federal funds for education altogether. There is no real justification for federal funds for education if the states and localities have the same priorities and would spend their money in

the same way.

The federal role in funding education is likely to change substantially. With the impaired fiscal position of most states and localities, and the elimination of maintenance-of-effort provisions and other federal spending constraints, federal funds are likely to be merely substituted for state and local funds, resulting in a decrease in existing funds for education generally and certainly a decrease for special pupil populations.

The impact will be even greater in urban and rural school districts. Although the federal share of the educational dollar nationally has only been about 8%, the federal contribution to many of the major urban school districts, with high concentrations of more difficult-to-educate pupils, has been much larger — 15 to 25%. Rural areas, which are often low income, also have benefited disproportionately from federal aid. The federal share of the education dollar to these areas is not likely to be picked up by the states. Four-fifths of the states have fiscal problems today. In addition, many states have tax and expenditure limitations on state funding,⁷⁷ and have enacted such limitations on local tax revenues as Proposition 13 in California⁷⁸ and Proposition 2½ in Massachusetts.⁷⁹ Thus the prospects for funding education in most states are grim.

One area likely to be severely affected is the area of the development and dissemination of new knowledge about learning and about the effectiveness of education on different populations. A great deal of duplication and inefficiency in this area is likely if the federal government no longer plays a major role. The states certainly cannot perform this role adequately on their own.

2. Increase in Competition Between Regular Pupils and Special Pupils and Among Various Categories of Special Pupil Populations

One of the objections made to the current federal programs is that they impose costly restrictions on school districts above and beyond any amount of federal funds received for the program. The concern is that the more expensive education needed for the handicapped, for language minority children, or economically disadvantaged children will divert scarce resources from the regular education program. The special pupil populations who have historically been underserved or denied access to education altogether are not likely to come out well when categorical grants are eliminated in favor of "no strings" block grants. We are asking the very states and localities that have long discriminated against these groups to redistribute resources to them.

In addition, we are likely to see various disadvantaged groups fighting over nonexistent crumbs — and that fight will no longer be at the federal level, but at the state and, more probably, at the local level. In most states, the commitment to compensatory and bilingual education is much weaker than the commitment to handicapped education. In part, that is because handicapped

⁷⁷ COLO. REV. STAT. § 24-75-201.1 (Supp. 1981).

⁷⁸ CAL. CONST. art. XIII A., §§ 1 to 6.

⁷⁹ MASS. ANN. LAWS ch. 59, § 21 C (Michie/Law Co-op Supp. 1981).

groups are generally better organized than other groups. Also parents of handicapped children are often middle-class and largely nonminority. Politically, a clear difference exists between activist groups composed of these types of people and poor or minority parents or parents migrant children.

Handicapped education is not only in a better position because of its greater political support, but also because of the civil rights guarantees in Section 504, the judicial decisions mandating services for the handicapped, and state laws passed in response to EHA requirements. Where compensatory and bilingual education programs are concerned, there are fewer relevant civil rights guarantees and judicial decisions. Thus in the absence of programs for targeting requirements, the allocation of resources among special populations is likely to shift, resulting in proportionately more support for handicapped education and less for compensatory and bilingual education.

3. Variation Among States

The nature and quality of the protections afforded special pupil populations are likely to vary not only among states but also within states (e.g., between rural and urban areas). For example, Illinois,⁸⁰ Massachusetts,⁸¹ and California⁸² have strong laws favoring handicapped students. Other states, however, have not had such strong laws. Often, the only real programs for the handicapped have developed as a result of federal laws. Thus, weakening the federal laws will have a different impact in California than it will in Mississippi. In addition, even in those states where laws for the education of the handicapped are strong, variations still may exist between the rural and urban areas as to the nature and quality of the "right" to an equal educational opportunity.

Whether states pick up some programs for special need students once the federal government sloughs them off will depend in large part on the strength and influence of various special interest groups at both state and local levels. Some states have well-organized groups representing certain constituencies and others do not. In states where a consensus or a commitment to serving the disadvantaged does not exist, there may be little in the way of programs for these children.

Even where the political will is present, however, the capacity of states to act may differ. Some states have developed strong monitoring and support systems, while others have very weak systems. Even in those states with clearly defined *state* standards, not all have the capacity to enforce them. There are clear differences among states in the role that they play *vis-a-vis* their local districts. Some state agencies are funding conduits only and maintain a passive relationship toward their local school districts. These states have no trained personnel available either to provide technical assistance or to monitor and enforce the implementation of state standards. Other states, however, have

⁸⁰ ILL. ANN. STAT. ch. 122, §§ 14-1.01 to 14.01 (Smith-Hurd Supp. 1981).

⁸¹ MASS. ANN. LAWS ch. 71B, §§ 1 to 14 (Michie/Law Co-op 1978 Supp. 1981).

⁸² CAL. EDUC. CODE §§ 56000-56885 (West Supp. 1981).

taken a strong regulatory role *vis-a-vis* their local districts by setting priorities and standards, such as in the areas of student competency and teacher certification, which are monitored and enforced by the state itself. These states at least have some capacity for taking on a role comparable to the federal regulatory role in equity areas.⁶³

In sum, whether states will continue a federal-type of role in ensuring benefits and protections for special pupil populations may depend upon the role the state agency has played in the past and the kind of staff and management style that has existed in that state. However, in view of the mobility of our population throughout the United States, there are serious implications of such variations among states.

4. Lack of Commitment to Equity for the Minority and Poor

Education today is increasingly seen as a private, not a public, good. The change in demographic trends, in light of today's climate, may well affect the extent to which the middle class, non-minority taxpayers will support education at all. For example, enrollments are generally declining; in the cities the non-minority public school enrollment is declining even more rapidly than the decline in the school-age population, but at the same time, however, the number of minority children in the public schools is increasing. In addition, we now have an increasingly large senior citizen population with interests in health care, housing, and other issues related to their own concerns, rather than in the education of the younger generation.

Moreover, we should remember that the general mood is not an anti-federal one but an anti-government one. Clearly, California's Proposition 13 and Massachusetts' Proposition 2½ reflect a concern for less taxes and for less government overall, rather than a concern that the state and local governments take over the role of the federal government.

5. Competition With Higher Education

Increasingly, higher education is competing with elementary and secondary education at the state level for the limited resources available for education overall. Higher education used to fare much better at the federal level, but now the states are being asked to provide greater funding just at a time when federal funding for elementary and secondary education is being cut back. Substantial progress has been made in the last fifteen years to provide equal access to post-secondary education. Although this article deals with elementary and secondary education concerns, it should be noted that the Administration's proposed cutbacks in student financial aid at a time when the costs of higher education are rapidly increasing, means that access to higher education will be sharply reduced for economically disadvantaged students (and even middle-class students). Since the states are not likely to be able to pick up the federal role, a significant impact on the quality and heterogeneity of the stu-

⁶³ See McDONNELL & McLAUGHLIN, *EDUCATION POLICY AND THE ROLE OF THE STATES* (1982).

dent bodies of colleges and universities will be seen. Moreover, the lack of access to higher education may sharply affect the view that the disadvantaged and minority take toward their secondary education.

6. The Role of the Courts

Finally, when standards for determining the obligations of school officials are unclear, conflicts between the officials and the parents of children in the special pupil categories will increase and, more often than not, these conflicts will be taken to the courts for resolution. To the extent that the courts are forced to resolve these conflicts, the result may be less input by educators than when there was federal executive and legislative involvement. In addition, legislative and executive decisions are often the result of negotiations and compromises between all affected parties. Court decisions are not similarly constituted.

Only recently, in a hearing before a Congressional committee, school officials testified about the lack of detail in the new consolidated education law and implementing regulations.⁸⁴ The officials are concerned that "too little regulation" will leave too many unanswered questions and that consequently the courts will be asked to play a greater role in education policy-making. Thus, the fear is that the courts will be even more intrusive if Congress and the federal agency default in their respective roles. In addition to the fact that the courts will be forced to resolve various issues once definitions and standards are removed from the statute, or at least from the regulations, the Administration's proposal for altering the authority of the Office for Civil Rights is likely to further increase court involvement. For example, the Administration has proposed to weaken the Office for Civil Rights by eliminating its authority to cut off federal funds to schools and colleges that violate civil rights laws. OCR would only be able to investigate and resolve complaints voluntarily. Any school district or university that refused to settle the dispute voluntarily would be referred to the Justice Department. However, administrative hearings provide greater flexibility than do court proceedings, and furthermore, the staff of OCR is more familiar with education issues than is the Justice Department. The result is likely to be confusion and delay. After all, Congress gave major responsibility for the enforcement of Title VI, Title IX, and Section 504 to HEW and not to the Justice Department. There was a conscious decision to use the administrative process rather than the courts for achieving the objectives of the law. The more effective and efficient administrative channels were not intended to be supplanted by the courts unless necessary, as when the administrative process had failed.

⁸⁴ *Oversight on Title I, ESEA and the Chapter 2 Education Block Grant: Hearings on Title I of the Elementary and Secondary Education Act and Chapter 2 of the Education Consolidation and Improvement Act Before the Subcomm. on Elementary, Secondary, and Vocational Education of the House Comm. on Education and Labor, 97th Cong., 1st Sess. (1981)* (see statements of Daniel Foster and Steve Sauls).

C. Conclusion

I do not have the answers to many of the questions that I have raised, but the time is ripe for some creative rethinking about what is meant by equal educational opportunity for various kinds of children, and how these rights can be protected. In addition, these rights must be protected without undermining the institutions (local schools) upon which we must ultimately rely to provide equal educational opportunity, and without setting the various special populations into competition with each other or with the needs of the regular child.

While there certainly is a need for simplification and clarification of existing requirements in federal categorical school aid programs, the problems which were created by the complexity and lack of clarity of current programs, and by multiple separate categorical programs, do not call for the total elimination of a categorical approach. Block grants without strings undermine the attempt to focus on a national priority for educational opportunity for all. We need to rekindle a national debate on educational priorities for this country, especially in the area of equal educational opportunity. Such concerns are not solely state concerns — considering our mobile population and the needs of the nation as a whole, they are also national. Certainly to the extent that economic productivity is important to the nation, and education is related to improved productivity, the federal government should have some role in education. Particularly in light of expanding technology and communications, not only across state and even national lines, but reaching into outer space, it is hard to say that education is exclusively the concern of the states. The “new federalism” may be correcting some serious problems, but it is correcting them with an ax, rather than a scalpel; such an approach may be creating an entirely different set of problems. We should not lose sight — in the flurry of rhetoric about budget cuts and anti-federalism — of what it is that is important about education to us as a *nation*.

