

# What's "Appropriate"?: Finding a Voice for Deaf Children and Their Parents in the Education for All Handicapped Children Act

## I. INTRODUCTION

Since its passage in 1975, the Education for All Handicapped Children Act (EAHCA or the Act)<sup>1</sup> has given rise to substantial litigation between the parents of handicapped children and local and state school authorities.<sup>2</sup> Some of the most difficult EAHCA cases have involved the education of deaf children.<sup>3</sup> In fact, certain underlying premises of the Act, such as the protection of civil rights of handicapped students, have caused an implementation often at odds with the needs of individual children.<sup>4</sup> In addition to its avowed purpose of provid-

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1. 20 U.S.C. § 1400 et. seq. (1982)

It is the purpose of this Act to assure that all handicapped children have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children.

*Id.* at § 1400(c).

2. Hill, *Legal Conflicts in Special Education: How Competing Paradigms in the Education for All Handicapped Children Act Create Litigation*, 64 U. DET. L. REV. 129 (1986). In addition, such litigation has spawned a topical reporter, the EDUCATION FOR THE HANDICAPPED LAW REPORT (EHLR). Hill, *supra*, at 129 n.2.

3. The leading case interpreting the EAHCA is *Bd. of Educ. of the Hendrick Hudson Cent. School Dist. v. Rowley*, 458 U.S. 175 (1982). The *Rowley* court considered the educational resources to which an eight-year-old deaf child was entitled under the EAHCA. See *infra* notes 43-56 and accompanying text.

4. In part, the EAHCA was intended to preclude segregation for its own sake. Congress found that a significant number of handicapped students were excluded from public schools and separated from their peers throughout the educational process. 20 U.S.C. § 1400 (b)(4).

An implicit assumption of the EAHCA seems to be that segregated settings are inherently unfair. See C. Ramsey, *The Political, Cultural and Ideological Context of Mainstreaming Since PL 94-142*, UNITED STATES/SPAIN JOINT SEMINAR ON DEAF CHILDREN IN INTEGRATED EDUCATIONAL SETTINGS, GALLAUDET U. RES. INST. at 11 (1988) (in press).

[T]he broadness of the law, by necessity, left many crucial issues unaddressed. The most serious result is that the civil and educational rights of handicapped people . . . get confused with specific educational needs. Various groups of

ing a free appropriate public education, the Act requires that "to the maximum extent appropriate, handicapped children . . . are educated with children who are not handicapped. . . ." <sup>5</sup> This desire for integration has been labeled "least restrictive environment" by the U.S. Department of Education, the agency responsible for implementing the EAHCA, <sup>6</sup> and is often referred to as "mainstreaming." <sup>7</sup> The attempt to balance the competing notions of "appropriate" and "least restrictive" is the source of much of the conflict between litigants in EAHCA cases.

In the case of deaf children, whose needs are both unique and varied, the consequences are particularly acute. <sup>8</sup> Under the EAHCA as it has been implemented by the states and interpreted by the courts, deaf children are often denied what the EAHCA was intended to give them—a free appropriate public education. <sup>9</sup> Parents of deaf students are anguished and frustrated with a system that, however well-intentioned, fails to provide an adequate learning environment for their children. <sup>10</sup>

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handicapped children are collapsed into one class of person on the grounds that they have an identical need for civil rights protections. . . .

*Id.* at 8.

5. 20 U.S.C. at § 1412(5)(B).

6. See 34 C.F.R. § § 300.550—556 (1988).

7. See Bd. of Educ. of the Hendrick Hudson Cent. School Dist. v. Rowley, 458 U.S. 176 at 216 (1982); DuBow, "Into the Turbulent Mainstream"—A Legal Perspective on the Weight to be Given to the Least Restrictive Environment in Placement Decisions for Deaf Children, 18 J.L. & EDUC. 215 (1989) [hereinafter Dubow, *Turbulent Mainstream*].

8. In order to foster improved educational opportunities for deaf individuals, Congress created the Commission on Education of the Deaf in 1986. 20 U.S.C. § 4301. Among the findings in its report to Congress, the Commission noted that, in spite of an increased preference for educating deaf students in regular classes, only about half of the students placed in local public schools are academically integrated. COMMISSION ON EDUCATION OF THE DEAF, TOWARD EQUALITY: EDUCATION OF THE DEAF 12-13 (1988) [hereinafter COMMISSION].

The Commission sets forth factors that distinguish deaf students from other handicapped students seeking a free and appropriate public education, including:

(1) Many deaf children enter school without a competent language base, making the acquisition of language very difficult. *Id.* at 16-17.

(2) Many deaf children are isolated from the social discourse of the classroom, which is another major obstacle in acquiring language. *Id.* at 16.

9. COMMISSION, *supra* note 8; DuBow, *Turbulent Mainstream*, *supra* note 7.

10. Some parents expressed their frustrations to the Commission by describing their children's classroom experiences:

We found that 'appropriate' meant, at best, 'adequate.' 'Good enough.' Not too costly, and not too troublesome. We found that, for our children who could not hear, 'appropriate' meant placement in a classroom with children who

In applying the Act to educational placements of deaf children, courts have deferred consistently to educators as experts, even when they are not required to do so and even when it is unclear that the school has made an effort to meet an individual child's educational needs.<sup>11</sup> Although courts may be well-intentioned, such an approach fails to afford deaf children and their parents the "free appropriate public education" that Congress intended. When parents and teachers cannot agree, rather than defer to the expertise of school officials, courts must make some independent assessment of a child's procedural rights under the Act in light of that child's *need*. Otherwise, school officials may freely assess the child's need in light of their own resources, a result not intended by Congress.<sup>12</sup>

This Comment will present some of the impacts that previous court decisions have had on deaf children and will provide background on the educational, cultural, and social implications to deaf children of the choice of communication methodology<sup>13</sup>— language. This background is essential to an understanding of deaf education, for nothing is more central to learning than language. Likewise, language is central to acculturation and to socialization.<sup>14</sup> A decision that imposes a particular communication methodology on a child and her family cannot be made lightly, because that decision has an impact that reaches beyond her daily life into her future. To be sure, schools have limited resources and cannot provide unlimited choices. However, schools should not be allowed to choose the

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could hear. 'Appropriate' meant a few hours a day with a teacher minimally qualified to teach deaf children. 'Appropriate' meant depending on a poorly qualified sign language interpreter six hours a day. 'Appropriate' meant being the only kid in your class with your very own grown-up hanging on your heels all day long . . . . 'Appropriate' meant growing up not knowing you were part of a community of deaf people. Growing up thinking that upon graduation you would somehow become hearing—after all, you'd never seen a deaf adult. . . . 'Appropriate' meant not expecting too much. . . . Not trying things that teachers 'knew' deaf kids couldn't do. Not making waves. Not disrupting the system. In short, we found that appropriate meant letting our kids in the schoolhouse door. But not assuring they learned *anything* once inside.

Statement to the Commission on Education of the Deaf by M. Cassidy and S. Harvey (March 17, 1987), COMMISSION, *supra* note 8, at 19 (emphasis in original).

11. See Hill, *supra* note 2, at 164-5. This procedural approach may address equality of treatment, but leaves aside questions of effect.

12. See *id.* at 139-140.

13. "Communication methodology" as used in this Comment refers to the means that teachers and deaf students use to communicate in the classroom.

14. See, e.g., C. CAZDEN, CLASSROOM DISCOURSE: THE LANGUAGE OF TEACHING AND LEARNING (1988).

communication method used for teaching a deaf child or deaf children solely for their own convenience. When a deaf child and her parents are disturbed enough to challenge such a decision, courts should respond by *at least* satisfying themselves that the child's individual needs are met.

This Comment explores a significant impact of the EAHCA on deaf children, the inability of such children and their parents to have an effective voice in identifying their own educational needs. This Comment argues that the courts should defend the rights of deaf children and their parents to play a meaningful role in defining and effecting an appropriate education for their children and ensuring that the children's educational needs are met. The Supreme Court has in fact recognized that Congress intended parents to play such a role.<sup>15</sup>

Initially, the Comment briefly reviews the EAHCA's purpose and its legislative history, and describes the workings of its administrative procedures.<sup>16</sup> The Comment then examines the seminal case interpreting the EAHCA, *Board of Education v. Rowley*,<sup>17</sup> as it applies to the parents' role in a deaf child's education.<sup>18</sup> This section of the Comment also explores the meaning currently given to "free appropriate education" and "least restrictive environment" (LRE), as well as the natural, and possibly irresolvable, tension between these requirements.

Against this background, Section III of this Comment then sets out the Act's unique impact on deaf children. This impact is caused not only by the characteristics of the children themselves, but by factors such as the small population of deaf children and limitations on public resources. In addition, the Comment identifies, at least partially, the potential signifi-

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15. *Honig v. Doe*, 484 U.S. 305, 324 (1987).

16. The procedures themselves have substantial significance for achieving individual goals under the Act. For a thorough analysis of the implications of the Act's procedural provisions, see Guernsey, *When the Teachers and Parents Can't Agree, Who Really Decides? Burdens of Proof and Standards of Review Under the Education for All Handicapped Children Act*, 36 CLEV. ST. L. REV. 67 (1988).

17. 458 U.S. 176 (1982).

18. *Rowley* has been widely examined in the literature. See, e.g., DuBow, *Special Education Law Since Rowley*, 17 CLEARINGHOUSE REV. 1001 (1984); Note, *Rowley and Educational Opportunities for the Handicapped*, 8 J. JUV. L. 95 (1984); C. Broadwell & J. Walden, "Free Appropriate Public Education" after *Rowley*: An Analysis of Recent Court Decisions, 17 J.L. & EDUC. 35 (1988); Comment, *The Meaning of Appropriate Education to Handicapped Children Under The EHCA: The Impact of Rowley*, 14 SW. U. L. REV. 521 (1984); Note, *Attack on the EHA: The Education for All Handicapped Children Act After Board of Education v. Rowley*, 7 U. PUGET SOUND L. REV. 183 (1983) [hereinafter *Attack on the EHA*].

cance of choices of educational and communication methodology for deaf students and their parents.

Finally, Section IV examines how recent federal court decisions, by substantially deferring to school authorities, have effectively disenfranchised deaf children and their parents as both participants and beneficiaries of the EAHCA.

## II. BACKGROUND OF THE EAHCA

### A. Purpose of the Act

#### 1. Legislative History

Several factors played key roles in the enactment of the EAHCA. Among these were developing trends in special education, pressure from parents and educators, and two landmark decisions in 1972. From the late sixties, segregated education of moderately or mildly handicapped children began to fall into disfavor, and experts began supporting the education of handicapped and nonhandicapped children in the same classroom. The popular term for this concept, "mainstreaming," came into wide use at about this time.<sup>19</sup>

Parents of handicapped children provided additional impetus for the enactment of the EAHCA. Parents organized themselves and questioned the need for segregation, as well as methods then used for evaluating and placing children. Parents also sought more funding for meeting the educational needs of their children.<sup>20</sup>

Pursuing their efforts in the courts, parents and organizations supporting them were successful in two 1972 class actions involving placement and educational services for handicapped children. The first of these cases, *Pennsylvania Association for Retarded Children v. Commonwealth*<sup>21</sup> (*P.A.R.C.*), was brought on behalf of mentally retarded children excluded from education or training in Pennsylvania public schools. Approving a consent decree in *P.A.R.C.*, the court required Pennsylvania to provide members of the class with a free public education appropriate to individual learning capacity.<sup>22</sup> The court's consent decree also required the state to provide each

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19. D. MOORES, *EDUCATING THE DEAF: PSYCHOLOGY, PRINCIPLES, AND PRACTICES* 14 (3d ed. 1987). At the time, the mainstreaming of handicapped children was sometimes seen as an end rather than a means. See also Ramsey, *supra* note 4.

20. Hill, *supra* note 2, at 132-3.

21. 343 F. Supp. 279 (E.D. Pa. 1972).

22. *Id.* at 302.

child with a written educational strategy and to review that strategy annually. Furthermore, the state agreed to provide parents with notice and an opportunity to be heard before causing any change in a child's educational status.<sup>23</sup>

The second case, *Mills v. Board of Education*,<sup>24</sup> involved a much broader class. In *Mills*, seven children sued the District of Columbia Board of Education on behalf of all mentally, emotionally, or physically handicapped children excluded from publicly supported education.<sup>25</sup> Relying on *Brown v. Board of Education*,<sup>26</sup> the *Mills* court held that the District of Columbia's treatment of handicapped children violated the due process clause.<sup>27</sup> In addition, both *P.A.R.C.* and *Mills* established a preference for educating handicapped children in mainstream settings whenever possible.<sup>28</sup>

A number of right-to-education cases followed the *P.A.R.C.* and *Mills* decisions.<sup>29</sup> School officials responded to these cases by joining the lobbying efforts of parents and special education experts.<sup>30</sup> Partly as a result of such efforts, Congress passed the EAHCA in 1975.

As enacted, the EAHCA is broad in scope. In varying degrees, it attempts to meet the interests of all those who lobbied for its passage.<sup>31</sup> The Act provides financial assistance to any state that "has in effect a policy that assures all handicapped children the right to a free appropriate public education."<sup>32</sup>

23. *Id.* at 303.

24. 348 F. Supp. 866 (D.D.C. 1972).

25. *Id.* at 868-70.

26. 347 U.S. 483 (1954) The Supreme Court's landmark decision in *Brown* required racial integration of public schools.

27. *Mills*, 348 F. Supp. at 875.

Not only are plaintiffs and their class denied the publicly supported education to which they are entitled many [sic] are suspended or expelled from regular schooling or specialized instruction or reassigned without any prior hearing and are given no periodic review thereafter. Due process of law requires a hearing prior to exclusion, termination of [sic] classification into a special program. (Citations omitted).

*Id.*

28. *P.A.R.C.*, 343 F. Supp. at 307; *Mills*, 348 F. Supp. at 878.

29. See Hill, *supra* note 2, at 134 n. 28.

30. At this point, school officials began to realize the coming need for increased funding. *Id.*

31. *Id.* at 134-36.

32. 20 U.S.C. § 1412(1) (1982). "[H]andicapped child means mentally retarded, hard of hearing, deaf, speech or language impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, or

At the time of the Act's passage, there were approximately eight million handicapped children in the United States; Congress found that as many as half of these children were "not receiv[ing] appropriate educational benefits which would enable them to have full equality of opportunity."<sup>33</sup> In response to concerns about lack of opportunity, the EAHCA mandated that, to the maximum extent possible, handicapped children should be educated with children who are not handicapped.<sup>34</sup>

## 2. How the Act Works

In order to identify children who are in need of special education and related services, schools often rely in the first instance on referrals from parents and teachers.<sup>35</sup> A multidisciplinary team, including at least one specialist in the area of the child's disability, then conducts an evaluation to determine the child's needs. Following this evaluation, the multidisciplinary team recommends an appropriate placement.<sup>36</sup>

Before a student can be placed, however, school authorities, in consultation with parents, must develop an individualized education program (IEP) for that student.<sup>37</sup> In terms of implementation, the IEP is the cornerstone of the EAHCA.<sup>38</sup> It recognizes the individualized needs of a specific handicapped child; however, because of its central role in identifying and implementing the educational needs of handicapped children, the IEP has become the primary area of conflict between schools and parents.<sup>39</sup> A parent dissatisfied with the decision

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children with specific learning disabilities, who by reason thereof require special education and related services." 20 U.S.C. § 1401(a)(1).

33. 20 U.S.C. § 1400(b)(3).

34. 20 U.S.C. § 1412(5)(B); 34 C.F.R. § 300.550(b).

35. Hill, *supra* note 2, at 138.

36. 34 C.F.R. § 300.532. However, no single procedure is to be used to determine a child's placement. § 300.532(d).

37. "The term 'individualized education program' means a written statement for each handicapped child developed in any meeting by a representative of the local educational agency or an intermediate educational unit . . . , the teacher, the parents or guardian of such child, and, whenever appropriate, such child . . . ." 20 U.S.C. § 1401(a)(19)(1982).

38. The IEP is to include a statement of the child's current educational performance, annual goals, specific educational services to be provided, the extent to which the child can participate in regular educational programs, dates for initiation and completion, and provisions for annual evaluation. *Id*; see also 34 C.F.R. §§ 300.340-349.

39. Hill, *supra* note 2, at 143.

of school officials may seek administrative review by an educational agency,<sup>40</sup> and appeal the agency's decision for de novo review in an action in state or federal court.<sup>41</sup> The first such action to reach the Supreme Court was *Board of Education v. Rowley*.<sup>42</sup>

### 3. Board of Education v. Rowley

Amy Rowley was an intelligent eight year old with minimal residual hearing and an ability to lip read. With an FM hearing aid, Amy completed kindergarten.<sup>43</sup> Nevertheless, without the assistance of a sign language interpreter, Amy was able to comprehend less than half of what was said in the classroom.<sup>44</sup> Amy's parents sought the services of a classroom interpreter through the IEP process. School officials disapproved of the use of an interpreter for Amy. Upholding the decision of the school officials, the hearing examiner also ruled against the parents. The hearing examiner's decision was, in turn, upheld by the New York Commissioner of Education.<sup>45</sup>

On appeal to the U.S. District Court for the Southern District of New York, the court affirmed the decision of the New York Commissioner of Education and found that the disparity between Amy's achievement and her potential meant that she was not receiving a "free appropriate public education."<sup>46</sup> This opinion was later reversed by the Second Circuit Court of Appeals.<sup>47</sup>

The United States Supreme Court, however, reversed. The Court held that, as long as personalized instruction was provided along with sufficient support services to permit the child to *benefit* from the instruction, the child was receiving a "free appropriate public education" within the meaning contemplated by the Act.<sup>48</sup> Besides interpreting the concept of

40. 20 U.S.C. § 1415(c).

41. 20 U.S.C. § 1415(e)(2).

42. 458 U.S. 176.

43. *Id.* at 184.

44. *Id.* at 215 (White, J., dissenting).

45. *Id.* at 184-85.

46. *Rowley v. Bd. of Educ. of the Hendrick Hudson School Dist.*, 483 F. Supp. 528, 534 (S.D.N.Y. 1980), *quoted in* 458 U.S. at 185.

47. *Rowley v. Bd. of Educ. of the Hendrick Hudson School Dist.*, 632 F.2d 945 (2nd Cir. 1980).

48. *Board of Educ. v. Rowley*, 458 U.S. at 189. In determining whether a child is receiving a benefit, courts could consider, as one factor, whether a child was awarded passing marks and progressed from grade to grade. *Id.* at 204, 207 n.28. For an



"free appropriate public education," *Rowley* established a two-part test for examining the procedural safeguards embodied in the EAHCA. The test asks, first, whether the state has complied with the procedures set forth in the Act,<sup>49</sup> and second, whether the individualized education program developed through the Act's procedures is reasonably calculated to enable the child to receive educational benefits. If these requirements are met, the state has complied with the obligations imposed by Congress and the courts can require no more.<sup>50</sup>

Thus, the focus of the inquiry was shifted from defining what is "appropriate" to what is "a benefit" or what is "meaningful."<sup>51</sup> Because each of these terms is ambiguous, courts continue to grapple with these issues in attempting to mete out justice under the EAHCA.<sup>52</sup> At the same time, the Court noted that the procedural safeguards in the Act "cannot be gainsaid."<sup>53</sup> Compliance with the established procedures, the Court went on to say, will assure most if not all of what Congress wished in the way of substantive content in an IEP.<sup>54</sup> However, the Court admonished reviewing courts from imposing their preferences for educational methodology on state authorities, noting that such courts lack the expertise necessary to resolve such issues.<sup>55</sup> Finally, although the *Rowley* court did not directly address the issue of mainstreaming, it noted that the Act established a preference for mainstreaming by requiring that handicapped children be educated with non-handicapped children whenever possible.<sup>56</sup>

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examination of the effectiveness of "educational benefit" as a standard *see* Broadwell, *supra* note 18, and Note, *Attack on the EHA, supra* note 18.

49. The state must have adopted the policies and procedures required by the Act and must have created an IEP that conforms with 20 U.S.C. § 1401(19). Board of Educ. v. Rowley, 458 U.S. at 206 n.27.

50. *Id.* at 206-07.

51. *Id.* at 192, dissent at 214. *See also* Broadwell, *supra* note 18, at 36 (quoting Tucker, *Board of Education of the Hendrick Hudson Central School District v. Rowley: Utter Chaos*, 12 J.L. & EDUC. 235, 241 (1983)) and Hill, *supra* note 2, at 159-60, n. 145.

52. *See, e.g.*, Lachman v. Illinois State Bd. of Educ., 852 F.2d 290 (7th Cir. 1988), *cert. denied*, 488 U.S. 925 (1988); Kerkam v. McKenzie, 862 F.2d 884 (D.C. Cir. 1988); Roncker ex rel. Roncker v. Walter, 700 F.2d 1058 (6th Cir. 1983), *cert. denied*, 464 U.S. 864 (1983).

53. *Rowley*, 458 U.S. at 205.

54. *Id.* at 206.

55. *Id.* at 207-08. *See also infra* notes 138-146 and accompanying text.

56. *Id.* at 202.

B. *What Is a "Free Appropriate Public Education" Under the Act?*

In order to meet the definition of "free appropriate public education" under the Act, programs must emphasize special education and related services designed to meet unique needs:

The term "free appropriate public education" means special education<sup>57</sup> and related services<sup>58</sup> which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the [IEP]. . . .<sup>59</sup>

In *Rowley*, the Supreme Court equated "free appropriate public education" with an IEP that would allow a child to receive educational benefit.<sup>60</sup> In practice, however, "appropriate" is often determined by placement rather than by educational and related services designed to meet an individual child's needs, as required by the Act.<sup>61</sup> Educators often assume that whatever services they have available for deaf students will be sufficient to meet an individual deaf child's needs and then incorporate such services into the plan.<sup>62</sup> This focus on available services may influence educators to place substantial emphasis on the other major concept embodied in the Act, least restrictive environment.

C. *What Is the "Least Restrictive Environment"?*

The Commission on Education of the Deaf identified the question of what constitutes an "appropriate" education in the least restrictive environment as the most explosive and prob-

57. "Special education" means "specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child. . . ." 20 U.S.C. § 1401(16).

58. Related services include transportation and developmental, corrective and other supportive services as required to allow a child to benefit from special education. *Id.* § 1401(17). Whether related services include sign language interpretation remains a matter for debate. See Broadwell, *supra* note 18, at 46-48.

59. 20 U.S.C. § 1401 (18).

60. Board of Educ. v. Rowley, 458 U.S. at 189, 207. See *supra* notes 43 to 48 and accompanying text; also see generally Hill, *supra* note 2.

61. 20 U.S.C. § 1413(a)(4)(B)(i). See generally, Hill, *supra* note 2, and DuBow, *Turbulent Mainstream*, *supra* note 7.

62. COMMISSION, *supra* note 8, at 20.

lematic issue encountered in its study.<sup>63</sup> Mainstreaming is a laudable goal of the EAHCA. Neither students nor society will benefit by returning to the days of segregating handicapped students merely to keep them separate from non-handicapped students. However, mainstream placements fail to meet the educational needs of at least some handicapped children. There is no reason to establish a goal of mainstreaming as an end in itself.<sup>64</sup>

The Act itself speaks rather obliquely to the issue of mainstreaming when it requires states to establish procedures assuring that, "to the maximum extent appropriate, handicapped children . . . are educated with children who are not handicapped."<sup>65</sup> Further, the Act provides that "special classes, separate schooling, or other removal of handicapped children from the regular educational environment [should] occur only when the nature or severity of the handicap is such that education in regular classes . . . cannot be achieved satisfactorily. . . ."<sup>66</sup>

The U.S. Department of Education's Office of Special Education has incorporated this language in the regulations implementing the EAHCA.<sup>67</sup> The regulations require that a continuum of alternative placements be available to meet educational needs, including regular classes, special classes, and special schools.<sup>68</sup> Beyond these regulations, determining the LRE is a placement decision made in the context of the IEP developed for each child.<sup>69</sup> The LRE is widely interpreted to mean "mainstreaming," or the integration of handicapped students into a regular setting.<sup>70</sup> Moreover, the underlying purpose of mainstreaming is to enable such students to better cope with the world at large, as well as to expose "normal" students to individual differences.<sup>71</sup>

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63. *Id.* at 25.

64. See Hill, *supra* note 2; COMMISSION, *supra* note 8, at 25-26; and DuBow, *Turbulent Mainstream*, *supra* note 7. For a justification of mainstreaming on social, educational, and, especially, moral grounds, see P. HIGGINS, *THE CHALLENGE OF EDUCATING TOGETHER DEAF AND HEARING YOUTH: MAKING MAINSTREAMING WORK* 52-53 (1990) [hereinafter HIGGINS, *MAKING MAINSTREAMING WORK*].

65. 20 U.S.C. § 1412(5).

66. *Id.*

67. 34 C.F.R. § 300.550(b).

68. § 300.551.

69. COMMISSION, *supra* note 8 at 25-6.

70. See DuBow, *Turbulent Mainstream*, *supra* note 7.

71. Hill, *supra* note 2, at 140. See also Ramsey, *supra* note 4, at 14. Mainstreaming has also been supported because the educational process for handicapped children is

*D. The Tension Between "Free Appropriate Public Education" and Least Restrictive Environment*

One of the primary obstacles to achieving an appropriate public education for deaf children stems from the inherent conflict between an "appropriate" education and the mainstreaming principle of least restrictive environment. In addition, application of the LRE requirement is fraught with difficulty. Noting that it had received more input on this issue than any other, the Commission reported:

Parents, deaf consumers, and professional personnel of all persuasions have, with almost total unanimity, cited LRE as the issue that most thwarts their attempts to provide an appropriate education for children who are deaf. They reported that many placement decisions were made with no regard for the potentially harmful effects on the child or the quality of education to be provided. As a consequence, these decisions were so detrimental that the resulting education was not appropriate to the child's needs.<sup>72</sup>

In fact, in determining the LRE, school administrators are required to take into account potentially harmful effects on the child.<sup>73</sup> In addition, though the *Rowley* Court also recognized the Act's preference for mainstreaming,<sup>74</sup> this preference is not a mandate.

The Commission finds that undue emphasis on LRE by the U.S. Department of Education, given the low incidence and unique ramifications of deafness, has resulted in a lack of appropriate education for deaf children.<sup>75</sup> The Commission sees the LRE as a placement issue, secondary to appropriateness.<sup>76</sup> In contrast, the Department of Education has identified LRE as a "core value" of the Act.<sup>77</sup> Citing the benefits of mainstreaming, the Department's Office of Special Education noted in a 1988 Policy Letter purporting to explain the LRE requirement:

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seen at least in part as a socialization process for which "normal" models are needed. *Id.*; see also *supra* notes 19-34 and accompanying text.

72. COMMISSION, *supra* note 8, at 25; see also *supra* note 10.

73. 34 C.F.R. § 300.552(d). The comment to this section notes that placement decisions must be made on an individual basis.

74. Board of Educ. v. Rowley, 458 U.S. 176, 202-03.

75. COMMISSION, *supra* note 8, at 20.

76. *Id.* at 26.

77. 34 C.F.R. § 300.550-556. COMMISSION, *supra* note 8, at 26. See also DuBow, *Turbulent Mainstream*, *supra* note 7, at 216.

Our experience is that both students with disabilities *and their non handicapped peers* benefit from integrated education. *Only through frequent and prolonged contact with students with disabilities can nondisabled children begin to focus on the individual strengths, determination, and independence exhibited by individuals with disabilities.* Integrated education and community-based programming establishes the expectation that individuals with disabilities are an important and typical part of community and neighborhood activities.<sup>78</sup>

Thus, the Department of Education's explanation for the LRE policy appears to value generalized benefits to society over educational benefits to individual handicapped children. It is difficult to see how such a policy serves the avowed congressional purpose of the EAHCA to provide a free appropriate public education for handicapped children.<sup>79</sup>

In practice, a wide and somewhat disturbing range of factors and characteristics can affect placement decisions for individual deaf students. Three of these factors—academic skills, communication skills, and perceived level of social development—are skills that mainstreaming is ironically supposed to foster. The others include ethnicity and less tangible personal characteristics such as “above average intelligence” or an “‘outgoing’ or ‘aggressive’ personality.”<sup>80</sup> Perhaps the most disquieting factor considered in making placement decisions, however, is the level of the classroom teacher's willingness to accept a deaf student.<sup>81</sup> In part, the IEP provides a mechanism for dealing with this divergent range of factors and characteristics.

#### *E. The Role of the Individualized Education Program*

Congress recognized the Individualized Educational Program<sup>82</sup> as a significant component in achieving an appropriate education for a handicapped child under the Act.<sup>83</sup> The Act mandates that the IEP include the following information:

- 1) the child's present levels of educational performance;

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78. EHA Rulings/Policy Letters, EHLR 213:216 (1989) (emphasis added).

79. 20 U.S.C. § 1400(c).

80. Ramsey, *supra* note 4, at 28-29 (quoting R. BRILL, MAINSTREAMING THE PRELINGUALLY DEAF CHILD (1978)).

81. *Id.* at 29-30.

82. See *supra* notes 37-38 and accompanying text.

83. 1975 U.S. CODE & AD. NEWS 1425, 1434-8.

- 2) annual goals, including short-term instructional objectives;
- 3) specific educational services to be provided;
- 4) the extent to which the child can participated in regular educational programs;
- 5) the projected date for initiation and anticipated duration of such services;
- 6) appropriate objective criteria and evaluation procedures for use on at least an annual basis.<sup>84</sup>

Beyond its content, the IEP is intended to provide a vehicle for parental participation.<sup>85</sup> Theoretically, parents are on an equal footing with school administrators in the IEP development process.<sup>86</sup> In actuality, this is very seldom the case. First, unlike school administrators who may view the IEP process as bureaucratic routine, parents see their children as individuals with unique needs, talents and problems.<sup>87</sup> Parents are arguably best suited to customizing the IEP, so that it does not become a fill-in-the-blanks format for the convenience of school officials.<sup>88</sup> Second, no required or uniform mechanism exists to resolve disputes short of administrative review and adjudication.<sup>89</sup>

The Commission on Education of the Deaf has apparently determined that the IEP, as a vehicle for achieving appropriate education, does not have content requirements sufficiently geared to the needs of deaf children.<sup>90</sup> The Commission has recommended to Congress that, because many educational personnel are unaware of the needs of deaf children, additional criteria be added to IEP's in the case of deaf students.<sup>91</sup>

84. 20 U.S.C. § 1401(19).

85. 34 C.F.R. § § 300.344, 345.

86. Hill, *supra* note 2, at 139-40. "The IEP meeting serves as a communication vehicle between parents and school personnel, and enables them, as equal participants, to jointly decide what the child's needs are, what services will be provided to meet those needs, and what the anticipated outcomes may be." 34 C.F.R. § 300 app. C(I)(a)(1986) (quoted in *id.* at 140 n.60).

87. Hill, *supra* note 2, at 148.

88. *Id.*

89. Hill points out that, in general, school officials seldom find themselves in a cooperative posture with parents in determining educational needs. One result is an increased number of IEPs, which become the focus of adversity. *Id.* at 140.

90. COMMISSION, *supra* note 8, at 20-21. The Commission has recommended the inclusion of ten additional criteria, indicating that existing criteria are not adequate. The Commission also noted that it "regards this recommendation as our most important." *Id.*

91. *Id.* at 20. The recommended criteria for inclusion in a deaf child's IEP are:

- 1) communicative needs and the preferred mode of communication

In *Briggs v. Board of Education*, a recent Second Circuit opinion involving the education of a deaf child under the EAHCA, the parties' positions fully exposed the conflict between the development and implementation of an IEP.<sup>92</sup> In that case, the child's parents interestingly argued for a mainstream placement, while the school district proposed an IEP that would allow mainstreaming only after the child had acquired an additional language base.<sup>93</sup> The positions of the parties in *Briggs* are in a sense unexpected: The school resists mainstreaming; the parents resist segregation with personalized instruction.<sup>94</sup> Perhaps for that very reason the case affords a useful backdrop for exploring the issues surrounding the role of parents in determining the type of education their deaf child will receive under the Act.<sup>95</sup> These issues become clear, however, only after a description of the Act's effect on deaf students.

### III. THE EAHCA'S UNIQUE IMPACTS ON DEAF CHILDREN

The Act's effects on deaf students fall into two broad categories. First, because the incidence of deaf children among the population of handicapped students is relatively small,<sup>96</sup> deaf students are unlikely to do well in competition for scarce public resources.<sup>97</sup> Second, deaf students are isolated by their disa-

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- 2) linguistic needs
  - 3) severity of hearing loss and the potential for using residual hearing
  - 4) the child's academic level and style of learning
  - 5) social needs
  - 6) placement preference
  - 7) emotional needs
  - 8) individual motivation
  - 9) cultural needs, and
  - 10) family support

*Id.* at 20-21. The Commission notes that "[t]his list should not be considered an exhaustive summary of all relevant factors which warrant examination; neither does the order in which these factors are listed reflect the relative importance of each component. These factors are often interrelated." *Id.* at 48 n.24.

92. *Briggs v. Bd. of Educ. of Connecticut*, 882 F.2d 688 (2d Cir. 1989).

93. *Id.* at 690.

94. These positions are somewhat unexpected because schools often favor mainstream placements because they are more cost effective.

95. See *infra* notes 151-167 and accompanying text.

96. See *infra* note 100, 101 and accompanying text.

97. At least one court has recognized that cost is a legitimate factor that schools can weigh in making placement decisions. *A.W. v. Northwest R-1 School Dist.*, 813 F.2d 158 (8th Cir. 1987), *cert. denied*, 484 U.S. 847 (1987). However, another court held that a school district cannot plead cost if the district has failed to provide "a proper continuum of alternative placements," *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir.

bility in a way unlike any other disabled population. Communication is part and parcel of education, and, historically, the deaf were considered uneducable.<sup>98</sup> However, while we may now be more enlightened as a nation, we have still failed to recognize the unique needs of the deaf in gaining access to a meaningful education.

#### A. *Limited Resources and Small Populations*

An annual survey conducted by the Gallaudet Research Institute<sup>99</sup> reported 36,017 deaf students in 1986-87.<sup>100</sup> In spite of a 22 percent decrease in school-age deaf students from 1978 to 1986, placement of the deaf in public school settings increased 16 percent.<sup>101</sup> During this period, local mainstream programs for deaf students doubled. Although in the abstract mainstream programs may provide less costly placements for more students, one half of these programs served only one student, and an additional 16 percent of the programs served only two.<sup>102</sup>

As a result of these changes in the school placements of deaf students, funding for public residential deaf schools has been decreased. At the same time, school districts have required additional support for their programs. And, while the number of deaf children in public schools has increased overall, any one school is likely to have only a small number of deaf students. Public schools often find it more economical to

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1983), *cert. denied*, 464 U.S. 864 (1983). See DuBow, *Turbulent Mainstream*, *supra* note 7, at 225.

The Act provides financial assistance to the states based on compliance with the Act's procedural requirements. See 20 U.S.C. § 1412 (1988).

98. O. SACKS, *SEEING VOICES: A JOURNEY INTO THE WORLD OF THE DEAF* 9 (1989) [hereinafter SACKS]. For a history of educating handicapped children in the United States, see Comment, *The Education for All Handicapped Children Act: Trends and Problems with the "Related Services" Provision*, 18 GOLDEN GATE U. L. REV. 427, 429-432 (1988).

99. The Gallaudet Research Institute is a division of Gallaudet University in Washington, D.C. Sometimes referred to as the national university for the deaf, Gallaudet offers undergraduate degrees in 26 major fields and graduate degrees in audiology, education, counseling, linguistics and administration of special programs. The institute is a center for research on hearing impairment and related subjects. See 1 GALLAUDET ENCYCLOPEDIA OF DEAF PEOPLE AND DEAFNESS 447-454 (J. Van Cleave ed., 1987).

100. Quoted in COMMISSION, *supra* note 8, at 10.

101. COMMISSION, *supra* note 8, at 9-10; Schildroth, *Recent Changes in the Educational Placement of Deaf Students*, 33 AMERICAN ANNALS OF THE DEAF 61, 62 (1988).

102. C. Ramsey, Dissertation Proposal at 6 (1989) (on file with the author).



adapt their existing resources, for example, by training existing staff to meet their increased needs rather than hiring additional, specialized staff.<sup>103</sup>

Hearing-impaired children who receive special education are placed in a variety of public and private settings such as day classes, day schools, and residential schools. About 60 percent are in public day classes; over 40 percent are mainstreamed to some degree. Children in mainstream settings are more likely to be from white, middle-class families with hearing parents, to have less severe hearing losses, and to have more understandable speech capabilities than those placed in other settings.<sup>104</sup>

Urban centers can provide the alternative of private day schools for deaf students only, or public magnet schools with special programs for deaf students only.<sup>105</sup> Day schools for the deaf have existed in the United States since the 19th century. The number of day schools dramatically increased during the seventies because of the increased population of deaf students caused by the 1963-65 rubella epidemic. However, an overall decline in birth rate coincided with the passing of the "rubella bulge," and the number of day schools once again declined.<sup>106</sup> Special programs in public schools for deaf students only allow school districts to economically provide specialized services that may be missing in neighborhood schools. However, children who are placed in these special programs may spend a significant amount of time travelling to and from school.<sup>107</sup> The low incidence of deafness, coupled with limited resources, requires schools and towns to collaborate in creating programs for deaf students. Few school districts are able to offer every possible option, not only because of restricted funds but because of the administrative problems of developing adequate staff and curricula.<sup>108</sup>

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103. C. PADDEN & T. HUMPHRIES, *DEAF IN AMERICA* 115-16 (1988); see also HIGGINS, *MAKING MAINSTREAMING WORK*, *supra* note 64, at 52-53.

104. P. HIGGINS & J. NASH, *UNDERSTANDING DEAFNESS SOCIALLY* 125-26 (1987) [hereinafter HIGGINS & NASH].

105. See 1 *ENCYCLOPEDIA OF DEAF PEOPLE AND DEAFNESS*, *supra* note 99, at 395, 398.

106. *Id.* at 395. See DuBow, *Turbulent Mainstream*, *supra* note 7 at 218-21 for a more detailed discussion of alternative placement settings.

107. 1 *ENCYCLOPEDIA OF DEAF PEOPLE AND DEAFNESS*, *supra* note 99, at 350-51. The extent to which additional travel time is a disadvantage will not be the same in every case, but rather depend upon an individual child's circumstances.

108. 1 *ENCYCLOPEDIA OF DEAF PEOPLE AND DEAFNESS*, *supra* note 99, at 379.

Compared to day programs or day schools, residential schools have played a unique role in the education of the deaf. A number of writers, deaf educators, and the deaf themselves recognize residential schools as vehicles for socialization and cultural identity in addition to education.<sup>109</sup> Forty-seven states, Puerto Rico, and the District of Columbia have at least one residential school for the deaf.<sup>110</sup> There are over 70 public residential schools and nine private residential schools for the deaf in the United States. Overall, about 65 percent of the pupils reside at such schools, and the remaining students are day students.<sup>111</sup>

In addition, the unique role that residential schools play in the education of the deaf stems partly from the schools' diverse composition of students, equality of instruction, and wide range of benefits available. Beginning in the 1970s, residential schools have increasingly served older students. In contrast to students who are mainstreamed, residential students are more likely to be members of minority groups or to have multiple handicaps and are more likely to be taught by a hearing-impaired adult.<sup>112</sup> Larger student populations allow residential schools to achieve certain benefits for their students. For example, students who are alike in their impairments can be grouped together more easily; the school can provide more specialized equipment, as well as staff specialists such as psychologists and guidance counselors; deaf teachers are available as role models for students; students can participate in extracurricular activities and athletics led by staff who can communicate with them.<sup>113</sup>

Even though residential schools tend to serve different segments of the deaf population, they must often compete for funding with other publicly-funded programs.<sup>114</sup> Thus, to some extent, the public policy preference for mainstreaming many deaf students has threatened the quality of educational oppor-

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109. See generally, SACKS, *supra* note 98; PADDEN, *supra* note 103; and J. VAN CLEVE AND B. CROUCH, A PLACE OF THEIR OWN: CREATING THE DEAR COMMUNITY IN AMERICA 171 (1989) [hereinafter CROUCH].

110. 1 ENCYCLOPEDIA OF DEAF PEOPLE AND DEAFNESS, *supra* note 99, at 397. Rhode Island can effectively use day schools because of its size, while New Hampshire has some day schools, but also pays tuition for its students attending out-of-state residential schools. Nevada has a day school program in Las Vegas.

111. *Id.* at 396.

112. HIGGINS & NASH, *supra* note 104, at 125.

113. 1 ENCYCLOPEDIA OF DEAF PEOPLE AND DEAFNESS, *supra* note 99, at 396-97.

114. PADDEN, *supra* note 103, at 115.

tunities for others.<sup>115</sup> Though the competition for resources will continue, placement determinations based on individual need will derive better results than determinations based upon a generalized preference for one type of placement. In addition to individual need, however, placement decisions must also take into account the range and methods available for teaching and communicating with deaf children.

## B. Implications of Educating the Deaf

### 1. Introduction

Deafness occurs in varying degrees, and it is not only "the degree of deafness that matters but—crucially—the age, or stage at which it occurs."<sup>116</sup> Those who become deaf before language is acquired, the prelingually deaf, "are in a category qualitatively different from all others. For these people, who have never heard, who have no possible auditory memories, images, or associations, there can never be even the illusion of sound."<sup>117</sup>

Ninety-five percent of deaf children are either congenitally deaf or prelingually deaf,<sup>118</sup> and many enter school without a competent language base.<sup>119</sup> For such students, placement in a local public school may equal a more, not less, restrictive environment. Indeed, a child who is limited in the number of people with whom she can interact is highly restricted in an environment that fails to meet her particular linguistic, cultural, and educational needs.<sup>120</sup>

A major obstacle such a child faces is isolation. One commentator has argued that "[I]solation from one's own linguistic

115. CROUCH, *supra* note 109, at 171.

116. SACKS, *supra* note 98, at 5.

The term "deaf" is vague, or rather is so general that it impedes consideration of the vastly differing degrees of deafness, degrees that are of qualitative, and even of "existential" significance. There are the "hard of hearing," . . . who can manage to hear some speech using hearing aids . . .

There are also the "severely deaf," many as a result of ear disease or injury in early life; but with them, as with the hard of hearing, the hearing of speech is still possible. . . .

Then there are the "profoundly deaf" . . . who have no hope at all of hearing any speech . . . Profoundly deaf people cannot converse in the usual way—they must either lip-read . . . or use sign language, or both.

*Id.* at 4-5.

117. *Id.* at 7.

118. COMMISSION, *supra* note 8, at 15.

119. *Id.* at 16.

120. Ramsey, *supra* note 4, at 21-22.

and intellectual potential is much more serious than physical isolation from able bodied peers."<sup>121</sup> Such isolation has also troubled the Commission on Education of the Deaf, which considers isolation a barrier to the acquisition of language.<sup>122</sup> Significantly, the Commission considers the acquisition of English language as a primary goal of deaf education,<sup>123</sup> and beyond this, recognizes the existence and importance of a distinct deaf culture.<sup>124</sup>

## 2. Means of Communication

Residential schools have served as the vehicle for the transmission of deaf culture and have enhanced the development of a self-identified deaf community.<sup>125</sup> The means of communication in residential schools is unique to the deaf—a manual language called American Sign Language (ASL).<sup>126</sup> It is important to note that ASL is not a version of English, but an independent language. ASL has thus played pivotal dual roles in the development of deaf community and culture:

ASL has a unifying function, since deaf people are unified by their common language. But the use of ASL simultaneously separates deaf people from the hearing world. So the two functions are different perspectives on the same reality—one from inside the group which is unified, and the other from outside.<sup>127</sup>

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121. Ramsey, *supra* note 4, at 22.

122. COMMISSION, *supra* note 8, at 16.

123. *Id.* at 19.

The Congress and the Department of Education should ensure that facilitating English language acquisition in students who are deaf (including vocal, visual, and written language) is a paramount concern. . . . Language acquisition should be a top priority in federally funded research. *Id.*

124. *Id.* at xv. See generally SACKS, *supra* note 98, and PADDEN, *supra* note 103.

125. MOORES, *supra* note 19 at 27; 1 ENCYCLOPEDIA OF DEAF PEOPLE AND DEAFNESS, *supra* note 99, at 261; DuBow, *Turbulent Mainstream*, *supra* note 7, at 219.

The deaf world, like all subcultures, is formed partly by exclusion (from the hearing world) and partly by the formation of a community and a world around a different center—its own center. To the extent that the deaf feel excluded, they may feel isolated, set apart, discriminated against. To the extent that they form a deaf world, voluntarily, for themselves, they are at home in it . . . . In this aspect the deaf world feels self-sufficient, not isolated—it has no wish to assimilate or be assimilated; on the contrary, it cherishes its own language and images, and wishes to protect them.

SACKS, *supra* note 98, at 128.

126. MOORES, *supra* note 19, at 27. ASL is neither a coded version of English or a collection of gestures, but a fully developed and distinct language. See generally MOORES; SACKS, *supra* note 98; and PADDEN, *supra* note 103.

127. SACKS, *supra* note 98, at 130 (quoting B. Kannapell, *Personal Awareness and*

In spite of its role in the culture and community of the deaf, however, ASL is not the only method by which the deaf communicate and, surprisingly, is seldom the method by which deaf children are taught.<sup>128</sup> As the deaf school-age population has increased in local schools and decreased in residential schools, deaf children are educated using a variety of communication methodologies.<sup>129</sup> Indeed, oral and manual education methods have been the subject of a controversy literally centuries old.<sup>130</sup> Although a thorough discussion of the different education methods is beyond the scope of this Comment, a brief description will help to clarify the application of the EAHCA to deaf students.

### 3. Methods of Instruction

In his pre-*Rowley* article exploring potential impacts of EAHCA on the deaf, Donald Large identified four philosophies underlying the methods used to educate deaf children: manual instruction, oral and aural instruction, total communication, and cued speech.<sup>131</sup>

Manual instruction comprises both the use of signs (one hand signal for an entire word or concept) and finger-spell-

*Advocacy in the Deaf Community*, SIGN LANGUAGE AND THE DEAF COMMUNITY (1980)). ASL is often identified as a primary unifying feature of the deaf community. PADDEEN, *supra* note 103, at 7-9; MOORES, *supra* note 19, at 180.

128. MOORES, *supra* note 19, at 13.

Likewise, the self-identified deaf community which uses ASL does not encompass the entire deaf population of the United States. Some argue that the use of sign language or separate educational, recreational, and other facilities tends to isolate deaf people from society. ENCYCLOPEDIA OF DEAF PEOPLE AND DEAFNESS, *supra* note 99, at 261. One organization supporting this view is the Alexander Graham Bell Association for the Deaf, which exists to promote the use of speech, speech reading, and residual hearing by hearing impaired persons. *Id.* at 12-13.

129. MOORES, *supra* note 19, at 10-11.

Because these methodologies determine how students and teachers communicate, one group of authors argues that they are more properly viewed as educational policies. R. JOHNSON, S. LIDDELL & C. ERTING, UNLOCKING THE CURRICULUM: PRINCIPLES FOR ACHIEVING ACCESS IN DEAF EDUCATION 2, (Gallaudet Research Institute Working Paper 89-3, 1989) [hereinafter JOHNSON].

130. Large, *Special Problems of the Deaf Under the Education for All Handicapped Children Act of 1975*, 58 WASH. U.L.Q. 213, 229 (1980); MOORES, *supra* note 19, at 218. Moores finds the "oral/manual" controversy technically incorrect; rather, the controversy is whether oral-alone methods should be used for all children. The alternative is "total communication," a combination of oral methods plus signing or finger-spelling.

The variations on methodology are extensive and complex. For more complete treatment, see Large at 229-238; and MOORES, *supra* note 19, at 10-13 and 181-218.

131. Large, *supra* note 130, at 229.

ing (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.<sup>132</sup>

A school program using a manual approach would permit the use of sign in the classroom—Signed English, Signing Exact English (SEE 1), Seeing Essential English (SEE 2), or, more rarely, ASL. All approaches, except for SEE 2, include some elements of finger-spelling.<sup>133</sup>

Conversely, oral methods completely exclude sign language and rely on utilizing residual hearing to foster language and speech skills. This method also has a number of variants. Auralism, for example, discourages any reliance on lip reading in the classroom.<sup>134</sup>

A third method, total communication, is one of the most frequently used in the education of the deaf. This method combines the oral method with signs and finger-spelling. It also has practical appeal for school districts because it appears to offer something for everyone at the cost of only one program.<sup>135</sup> Whether the method is effective, however, remains to be proven.<sup>136</sup>

Finally, cued speech, which was developed at Gallaudet in 1965, is a modified oral program designed to meet the objection that too many words look alike when lip-read. Cued speech uses first-letter signals with speech to help distinguish sounds that look alike.<sup>137</sup>

132. *Id.*

133. *Id.* at 229-32.

134. *Id.* at 232-33.

135. *Id.* at 235-37.

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 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.

*Id.* at 237.

Total communication also refers to a philosophy that "endorses the right of every hearing-impaired child to communicate by whatever means are to be found beneficial." MOORES, *supra* note 19, at 11.

136. JOHNSON, *supra* note 129, at 2.

137. Large, *supra* note 130, at 237-38. Proponents of all other methods criticize cued speech. Oralists object to the use of hand signals, auralists to the emphasis on lip

Each of these methods has, in one fashion or another, had substantial impact on the education of the deaf. Recent studies show that, while methods combining sign and speech prevail in both special and local schools, about 30 percent of integrated students in local schools are taught using auditory/oral methods.<sup>138</sup>

Conflicts between educators and parents of deaf children tend to center on the type of English deaf children will use and how to foster its development.<sup>139</sup> While practical considerations such as resource limitations impact school district decisions,<sup>140</sup> parents are more likely to be motivated by norms and values, such as how they want their children to be socialized.<sup>141</sup> Nevertheless, the Commission on Education of the Deaf found that "little weight is given to the value of using the method of communication the child has been accustomed to as part of his or her total program,"<sup>142</sup> and has proposed that the child's preferred method of communication be included in the IEP. That method may be preferable because it is one to which the child is most accustomed, or because it is one the parents select and support.<sup>143</sup>

However, no one method is likely to be appropriate for all hearing impaired children. For example, the deaf child of deaf parents may already communicate well in ASL. Her parents may also view an oral program or even a total communication program that utilizes a manual language other than ASL as completely inappropriate. They may feel that she is being offered an education in an alien culture.<sup>144</sup>

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reading. Those who favor total communication find that cued speech fails to deal with the child's understanding of what is communicated. Finally, proponents of manual systems see cued speech as "slightly modified oralism, and . . . thus incompatible with any of the major signing systems." *Id.*

138. Schildroth, *supra* note 101, at 64.

139. C. Ramsey, *Signing Exact English: The Meaning of English in Deaf Education 2* (January, 1989) (unpublished manuscript).

140. Large, *supra* note 130, at 237.

141. *Id.* at 237 n.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 . . . they are unable to appreciate deafness and unwilling to admit that their children are deaf; or because . . . they are more aware of the importance of speech in society and realize that oral programs produce more children who can join that society.

*Id.*

142. COMMISSION, *supra* note 8, at 9.

143. *Id.* at 20-21.

144. Another type of problem may arise when a school must make an appropriate

From a practical standpoint, however, a school district will likely find it impossible to offer two programs for two deaf students. Thus, the potential arises for dissension between parents and schools. As previously noted, the *Rowley* decision defers to educators as experts on methodology.<sup>145</sup> However, to the extent that school districts can use methodology to manipulate students' needs to fit within the school's resources, the EAHCA's promise of an appropriate education for each handicapped child will remain a hollow victory. The courts can ensure that schools fulfill this promise by enforcing the Act's requirement that schools use EAHCA funding to provide an appropriate education for each child based on that child's individual need. This requires the courts to independently assess the IEP under the EAHCA to ensure its adequacy in light of the Act's procedural requirements.<sup>146</sup>

#### IV. A RECENT DECISION UNDER THE EAHCA: *BRIGGS V. BOARD OF EDUCATION*

The 1982 decision of *Board of Education v. Rowley* requires courts to defer to school authorities on matters of educational theory or policy, including methods of instruction.<sup>147</sup> On the other hand, the Act and its implementing regulations recognize parents as equal participants in developing a child's IEP.<sup>148</sup> Thus, while this recognition affords parents procedural safeguards in the event of a dispute over an IEP's components, parents are no longer on an equal footing with school officials if they chose to appeal an administrative decision.<sup>149</sup>

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placement for a hearing-impaired child with additional disabilities, such as blindness, developmental disability or severe behavior problems.

145. *Board of Education v. Rowley*, 458 U.S. 176, 207-08.

146. See *supra* notes 84-85 and accompanying text.

147. *Rowley*, 458 U.S. at 207-08. As a practical matter, the expertise of school administrators in educating the handicapped is a matter of some debate. For example, the Commission on the Education of the Deaf, asserts that "[t]he low incidence of deafness coupled with its unique ramifications means the needs of children who are deaf are easily and frequently neglected. . . . [M]any educational personnel are simply unaware of the unique needs of children who are deaf, and thus fail to identify and meet these needs." COMMISSION, *supra* note 8, at 20.

148. 34 C.F.R. § § 300.344, .345. See *supra* notes 84-89.

149. For an analysis of the burdens facing parents in such disputes, see Hill, *supra* note 2 and Guernsey, *supra* note 16. One court addressing standards for deference to school administrators declined to adopt any formula, but required a challenging party to "at least take on the burden of persuading the court that the hearing officer was wrong . . ." and required a court overturning the hearing officer to explain its basis for doing so. *Kerkam v. McKenzie*, 862 F.2d 884, 887 (D.C. Cir. 1988).



While the *Rowley* decision requires deference to administrative decisions on methodology it certainly does not prohibit courts from applying the requirements of the Act to the facts of each individual case. Specifically, courts can and should determine whether school officials have recognized the individual needs of a child.<sup>150</sup>

#### A. Background of *Briggs*

Some recent court decisions under the EAHCA have demonstrated a limited understanding of the educational needs of deaf children.<sup>151</sup> The decision in *Briggs v. Board of Education* illustrates the issues that commonly arise when the parents of a deaf child disagree with school authorities over an IEP.

In May 1986 James Briggs, a three-year-old with moderate to severe hearing loss and mild to moderate speech delays, was evaluated by the Planning and Placement Team of the New Haven, Connecticut school board. The team recommended placement in a public preschool program for hearing-impaired children. The program then included seven children and used auditory trainers and materials to develop speech and language for the hearing impaired.<sup>152</sup>

James's parents, however, thought he should interact with non-handicapped children and wanted him to be mainstreamed. Instead of following the team's recommendation, they placed James in a private summer program, The Soundings, which included about 20 students, most of whom were not hearing-impaired. There, James received speech and language therapy, and at the end of the summer he had improved in speech and language abilities.<sup>153</sup>

At a second meeting, the placement team renewed its recommendation that James receive special education in New Haven's segregated preschool program. The team justified its decision on the basis of James's hearing impairment and speech and language delays. James's IEP called for a less restrictive placement "when the intelligibility of [James's] speech and language no longer interfere with his communica-

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150. 20 U.S.C. § 1401(a).

151. See, e.g., *Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290 (7th Cir. 1988); *Briggs v. Bd. of Educ. of Connecticut*, 882 F.2d 688 (2nd Cir. 1989).

152. *Briggs v. Bd. of Educ. of Connecticut*, 707 F. Supp. 623, 624-25 (D. Conn. 1988).

153. *Briggs*, 882 F.2d at 689-90; 707 F. Supp. at 624-25.

tion" in a learning environment.<sup>154</sup>

The Briggses returned James to The Soundings and requested an administrative review. According to the opinion of the Second Circuit Court of Appeals, the hearing officer received evidence comparing the two programs:

The Board's program was held in an elementary school in New Haven. The program met five days a week, five hours a day during the 180 day school year. The teacher in charge of the pre-school program for the hearing-impaired held a Masters degree in education of the deaf and was a certified teacher of the hearing-impaired. She was assisted by two aids with experience working with hearing-impaired children. Seven children were enrolled in the program. The Board's program 'stress[ed] language and vocabulary concentration.' Specialized equipment such as auditory trainers, which are FM receivers that amplify the sound that is transmitted by the teacher who wears a microphone, was used for part of the day. Students typically spend one or two years in the program and then are placed in non-specialized or mainstream kindergarten programs.

The program at The Soundings met three days a week for four hours a day. The director . . . was a speech and language pathologist with a background in psychology and social work. She was not certified as a teacher of the hearing-impaired. None of the staff members at The Soundings had any special education training. Eighteen to twenty children were enrolled in The Soundings. . . . [T]wo or three besides James had speech and language problems.<sup>155</sup>

The hearing officer decided that the New Haven program was appropriate and reasonably designed to meet James's educational needs.<sup>156</sup> The hearing officer also determined that the Briggses had failed to support their contention that James's needs could only be met in "a social milieu of predominantly non-handicapped children."<sup>157</sup>

The Briggses then appealed the hearing officer's decision to the U.S. District Court for the District of Connecticut,

154. *Briggs*, 882 F.2d at 690. It is not evident from the record whether or when the placement team predicted that a less restrictive placement would ever be appropriate for James given this requirement. Neither does the record reflect whether the IEP set out objective criteria for measuring the adequacy of James's communication abilities.

155. *Id.* at 690.

156. *Id.* at 690-92; *Briggs*, 707 F. Supp. at 625.

157. *Briggs*, 882 F.2d at 691. Surprisingly, neither the district court nor the court of appeals included in its opinion any finding of James's educational needs.

which, under the act, reviewed the appeal de novo.<sup>158</sup> In its review, the district court recognized the admonishment in *Rowley* not to substitute its own educational policy preferences for the decision of the school authorities.<sup>159</sup> However, finding that the Act provided substantive guidance on issues of mainstreaming, the court overturned the hearing officer's ruling.<sup>160</sup> Thus, the court held that the second inquiry under *Rowley*—whether the IEP is reasonably calculated to enable the child to receive educational benefits—“must be adjusted to account for the strong congressional preference for mainstreaming.”<sup>161</sup> The court proceeded to adopt a standard that, in cases where a segregated facility was deemed superior, required a determination of

whether the services which make the placement superior could feasibly be provided in a non-segregated setting. If they can, the placement in the segregated school would be inappropriate under the Act. Framing the issue in this manner accords the proper respect for the strong preference in favor of mainstreaming while still realizing the possibility that some handicapped children simply must be educated in segregated facilities. . . .<sup>162</sup>

Under this standard, the court found the proper inquiry to be “whether or not the services offered could feasibly be provided in a mainstream program.”<sup>163</sup> At the same time, the court recognized that services would not necessarily be identical in mainstream and segregated programs<sup>164</sup> and proceeded to adopt a balancing test which weighed the benefits of a mainstream program with those of a segregated setting.<sup>165</sup> Applying this balancing test, the district court found that the benefits James would receive in a mainstream program would outweigh

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158. 20 U.S.C. § 1415(e)(2) provides that “the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on a preponderance of the evidence, shall grant such relief as the court determines is appropriate.”

159. *Briggs*, 707 F. Supp. at 625.

160. *Id.* at 627.

161. *Id.* at 626. The first inquiry under *Rowley*—whether the State complied with the Act's procedural requirements—was not relevant because there was no procedural dispute.

162. *Id.* at 626 (quoting *Roncker* on behalf of *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir.), *cert. denied*, 464 U.S. 864 (1983)).

163. *Id.* (quoting *Roncker* at 1062-3).

164. *Id.* at 627.

165. *Id.* at 626.

the effectiveness of a segregated program.<sup>166</sup> The court specifically found that, in a mainstream program, James would benefit from the opportunity to learn and interact with non-handicapped children, to develop social skills, and to use non-handicapped children as language models.<sup>167</sup>

On review, the Court of Appeals for the Second Circuit declined to adopt the standard utilized by the district court. Instead, it implicitly implemented a different balancing test. The court held that the presumption in favor of mainstreaming must be weighed against the importance of providing an appropriate education.<sup>168</sup> It reasoned that if an appropriate education could not be achieved in a regular classroom, then a mainstream placement is inappropriate.<sup>169</sup>

In applying this test, the court confined its scope of review to the two-pronged inquiry under *Rowley*: First, did the state comply with the procedural requirements of the Act? And second, was the IEP reasonably calculated to enable the child to receive educational benefits?<sup>170</sup> Furthermore, the court recognized that the *Rowley* decision required deference to the expertise of school authorities on questions of methodology. Thus, it assumed the appropriateness of the placement recommended by the school authorities. The court also noted that neither the district court nor the *Briggses* had identified any support in the administrative record to substantiate the claim that James's needs could be met in a mainstream setting; however, the court did not specify what showing would substantiate such a claim.

In spite of the court of appeals' recognition that the Act expressed a preference for mainstreaming and that the hearing officer had properly applied the Act's mainstreaming presumption, the court found that the placement team had thoroughly evaluated James's needs.<sup>171</sup> Furthermore, the court found that the state officials reached their conclusion "after careful consideration by experts in the field [of] teaching the hearing-impaired."<sup>172</sup> Therefore, the court of appeals held that the district court erred in substituting its judgment for that of the

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166. *Id.*

167. *Id.* at 627.

168. *Briggs*, 882 F.2d at 692.

169. *Id.* at 692.

170. *Id.* at 693. Once again, the procedural aspects of the case were not at issue.

171. *Id.*

172. *Id.*

experts and the hearing officer. Though the court purported to recognize the Act's preference for mainstreaming, the court's holding appears to have completely disregarded the Act's desire for parental input in the development of the child's educational programs.

### B. Questions and Issues Raised by Briggs

The court of appeals holding in *Briggs* failed to recognize the role that Congress envisioned parents would have in developing a child's educational plan. For example, the Act provides that both schools and parents are to participate in developing the IEP.<sup>173</sup> Instead, the court mechanically applied a test established by *Rowley* to decide an issue to which that test was not necessarily intended to apply, namely, issues involving placement decisions. Although the *Rowley* court noted that the Act establishes a preference for mainstreaming, it did not directly address the issue.<sup>174</sup> Thus, any preference for mainstreaming is not clear.

Citing *Rowley*, the court of appeals in *Briggs* deferred to the school board's expertise on methodology and educational policy and opted not to decide the question of mainstream placement. In *Rowley*, the Supreme Court admonished courts not to impose their own views of preferable educational methods upon the states.<sup>175</sup> In the Supreme Court's view, courts lack the expertise necessary to resolve educational policy issues.<sup>176</sup> By its deference in this instance, the court of appeals in *Briggs* seems to have equated the school's choice of placement with a policy decision. Leaving aside the question of whether public school administrators are experts in educating the deaf, the court of appeals' reluctance to disturb a school's placement decision for fear of interfering with policy allows it to sidestep the issue of whether the school's choice of placement is likely to meet a child's needs.

It is not mandatory that the deference requirement established by the *Rowley* decision be applied to issues involving placement.<sup>177</sup> However, perhaps courts find themselves on

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173. See *supra* notes 34-40 and accompanying text.

174. *Board of Education v. Rowley*, 458 U.S. 176, 202-03.

175. *Id.* at 207.

176. *Id.* at 208.

177. In *Roncker*, the Court of Appeals for the Sixth Circuit adopted a standard that inquired whether services that made a segregated facility superior could feasibly be provided in a non-segregated setting. *Roncker on behalf of Roncker v. Walter*, 700

more comfortable ground when they focus on the civil rights aspects of the Act rather than its educational goals. Moreover, oddly neither the district court nor the court of appeals in *Briggs* ever made any findings with respect to James's educational needs. Only the district court explained the manner in which its decision was expected to impact James Briggs.<sup>178</sup>

The court of appeals also stated that the Briggses failed to substantiate their claim that James's needs could be met in a mainstream setting.<sup>179</sup> The court was silent, however, as to the manner in which it might weigh evidence in order to find such a claim valid. Similarly, the court failed to indicate how parents can overcome the deference the court gives to school authorities. Moreover, that deference was stated so broadly that it could be read to encompass virtually any course of action that a school authority decides to take.<sup>180</sup>

Even when applying the analysis adopted by the Second Circuit, however, it is not necessary to defer to school officials on matters of placement. Indeed, too much deference may tempt educators to manipulate a child's IEP to fit available resources. If the EAHCA's mandate for free appropriate education means anything at all, school authorities must be held to a greater standard of accountability than they were in *Briggs*. Pro forma compliance by school authorities with the procedural requirements of the Act is not enough to ensure that deaf students will receive an appropriate education.

## V. CONCLUSION

The proper roles of parents and the state in the education of children have been debated and litigated in this country for over 60 years.<sup>181</sup> Application of the Education for All Handi-

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F.2d 1058, 1063 (6th Cir.), *cert. denied*, 464 U.S. 864 (1983). It is the only circuit that has tackled the tension between LRE and "free appropriate public education" head on. To date, the Supreme Court has denied certiorari in cases demonstrating conflict among the circuits.

178. *Briggs v. Board of Education of Connecticut*, 707 F. Supp. 623, 627 (D. Conn. 1988). The court expected that James "would benefit from the opportunity to learn with nonhandicapped children in several ways, including developing social skills and using nonhandicapped children as language models."

Although the court did not make any findings as to James's needs, the benefits the court foresaw reflected his parents' desire that he interact with non-handicapped children.

179. *Briggs v. Board of Education of Connecticut*, 882 F.2d 688, 692.

180. *Id.* at 693.

181. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

capped Children Act is but one aspect of this conflict. In the case of the EAHCA, however, Congress clearly intended parents to have a meaningful role in the education of their children with special needs. To that end, Congress created the mechanism of the IEP.

The needs of deaf children are unique. To ensure that their needs are met under the EAHCA, courts must do more than defer to school personnel as experts. Although since *Rowley*, lower courts do not have a free hand in interpreting the Act, there is still considerable opportunity for courts to guarantee that the needs of individual students are met.

First, parents appealing an administrative decision under the EAHCA should take advantage of their right to supplement the record on appeal. Congress wisely provided that both federal and state courts were to hear EAHCA appeals de novo.<sup>182</sup> Courts, for their part, should take care to decide each case on its facts. To that end, a reviewing court should make specific findings as to the child's needs and the ways in which each proposed program would meet those needs.

Next, courts should provide guidance on how handicapped students and their parents may overcome any deference the court will grant to school officials' expertise. The sweeping scope of deference used by the court of appeals in *Briggs*, for example, seems insurmountable: Not only do the odds favor the school authorities because of the degree of deference granted them, but, in addition, that deference is granted on matters of both policy and methodology. When placement is equated to policy, as in *Briggs*, there is virtually no area of contention left in which deference will not be granted. In the future, parents may have to field their own experts to show why the placement they are contesting is inappropriate. If so, litigation will be simplified if appellate courts can provide specific criteria as to how they will regard such evidence.

Furthermore, given the conservative composition of the current Supreme Court, it is not likely that *Rowley* will be overturned, no matter how controversial its impacts on the EAHCA. Parents of deaf children and groups such as the Commission on Education of the Deaf will undoubtedly con-

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182. 20 U.S.C. § 1415(e)(2). In *Briggs*, the parents did not present additional evidence on appeal. Moreover, because neither reviewing court made findings of fact, it is far from clear how much weight was given on appeal to the administrative record.

tinue to lobby Congress for legislation which helps meet the specific educational needs of deaf children.

A deaf child facing public school enrollment in this country is no more than a small, still voice. Congress sought to empower that voice when it enacted the EAHCA in 1975; it intended that deaf and other handicapped children, and their parents, would have some say in how those children were educated. Whether through lack of understanding or lack of resources, some schools have failed to provide such children and their parents a meaningful role in planning an educational program. The courts can and must see that they do.

*Suzanne J. Shaw*