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By Laura F. Rothstein*

Educational Rights of Severely and Profoundly Handicapped Children

A person who is severely impaired never knows his hidden sources of strength until he is treated like a normal human being and encouraged to shape his own life.

—Helen Keller

I. INTRODUCTION

Until recently, mentally and physically handicapped persons have been treated as second-class citizens and hidden from society. After educational theorists recognized that most handicapped persons could benefit from education,¹ the stage was set for opening the schoolhouse doors. Federal law now conditions the receipt of federal funds by state school systems on the institution of a system of education that includes all handicapped children.² Even today, however, it is estimated that of the approximately eight million handicapped children in the United States, about half are receiving little, if any, attention in the public schools.³ One of the most difficult problems in special education is educating profoundly retarded children. This is because it involves significant financial resource commitments for personnel, overhead, and

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1. See generally PRESIDENT'S COMM. ON MENTAL RETARDATION, MENTAL RETARDATION: PAST & PRESENT (1977); A. BLACKHURST & W. BERDINE, AN INTRODUCTION TO SPECIAL EDUCATION (1981); M. HUTT & R. GIBBY, THE MENTALLY RETARDED CHILD 386-91 (1976).
2. 20 U.S.C. § 1412 (1976) (conditions state's eligibility for federal assistance on availability of free appropriate public education for handicapped children).
3. Pub. L. No. 94-142, § 3(b)(1)-(4), 89 Stat. 774 (codified at 20 U.S.C. § 1400 (1976 & Supp. IV 1980)). See also OFFICE OF EDUCATION, U.S. DEPT. OF HEALTH, EDUCATION AND WELFARE, PROGRESS TOWARD A FREE APPROPRIATE PUBLIC EDUCATION: A REPORT TO CONGRESS ON THE IMPLEMENTATION OF PUBLIC LAW 94-142: THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT 16 (1979).

other costs. This Article evaluates the legal requirement to educate profoundly retarded children and discusses the implications of recent developments in this aspect of special education.

II. DEFINITION OF PROFOUNDLY RETARDED

The term profoundly handicapped is defined differently by legislators, courts, educators, and psychologists. In a symposium on the education of profoundly retarded children,⁴ extremely debilitated individuals were defined as those persons who function at the extreme lower levels of cognitive attainment and adaptive behavior and who exhibit at least several of the following primary characteristics:

- (1) They have not acquired basic self-care skills.
- (2) They are permanently nonambulatory.
- (3) They are not known to many of the normal residents of their communities.
- (4) They do not attend public schools unless the law explicitly requires their enrollment.
- (5) They would have survived only a short time a few generations ago but now have a life expectancy of decades due to modern medical intervention.
- (6) They have been considered to be "untrainable" or "custodial" cases until recently.
- (7) They show extremely little promise of becoming creative, productive citizens even with the most heroic efforts of today's most skilled behavior therapists.⁵

A more concise definition of severely or profoundly handicapped was developed by a psychologist, Baker, who found many of the traditional definitions to be inadequate because they applied only to persons of a particular age group or mental capacity.⁶ "The severely handicapped individual is one whose ability to provide for his or her own basic life-sustaining and safety needs is so limited, relative to the proficiency expected on the basis of chronological

4. SYMPOSIUM ON EDUCATING THE SEVERELY & PROFOUNDLY HANDICAPPED, 1 *Analysis and Intervention in Developmental Disabilities* (1981) [hereinafter referred to as SYMPOSIUM].

5. Kauffman, *Symposium Editor's Introduction*, SYMPOSIUM, *supra* note 4, at 1-2.

6. Baker, *Severely Handicapped: Toward An Inclusive Definition* 4 A.A.E.S.P.H. REV. 52 (1979). Probably the most frequently quoted traditional definition of the severely handicapped by a psychologist is the following:

[Severely handicapped persons are] those individuals age 21 and younger who are functioning at a general developmental level of half or less than the level which would be expected on the basis of chronological age and who manifest learning and/or behavior problems of such a magnitude and significance that they require extensive structure in learning situations if their education needs are to be well served.

Justen, *Who Are the Severely Handicapped?: A Problem in Definition*, 1 A.A.E.S.P.H. REV. 1, 5 (1976).

age, that it could pose a serious threat to his or her survival."⁷

Approximately one million children fall within the general category of profoundly handicapped.⁸ In enacting the Education for All Handicapped Children Act of 1975 (EHCA),⁹ Congress recognized that many of these children had never received any education through the public school system. This recognition caused Congress to give higher priority to the needs of this segment of the population.¹⁰

The EHCA's mandated inclusion of profoundly handicapped children in the public education system¹¹ was in response to litigation involving handicapped school children in the early seventies. The following section reviews the significant case law developments in education both before and after passage of the EHCA.

III. OVERVIEW OF SPECIAL EDUCATION LAW

A. Constitutional Protections in the Area of Education

In *Brown v. Board of Education*,¹² the Supreme Court stated that whenever a state undertakes to provide education to any of its citizens, it must do so on equal terms. In *Brown*, the Supreme Court did not conclude that there is a fundamental right to education, but it did underscore the significance of public education in modern American society.

[E]ducation is perhaps the most important function of state and local governments It is required in the performance of our most basic public responsibilities [I]t is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. . . . [I]t is doubtful that any child may reasonably be expected to succeed in life if he is de-

7. Baker, *supra* note 6, at 60. See also *infra* note 41 for the New Jersey statutory definition of profoundly retarded.

8. The number of children who fall under this classification varies depending on who is applying what definition. In 1974, it was estimated that between 450,000 and 4,000,000 children fell within the category of severely or profoundly handicapped. See Kirp, Buss, & Kuriloff, *Legal Reform of Special Education: Empirical Studies and Procedural Proposals*, 62 CAL. L. REV. 40, 42 n.7 (1974).

9. The Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 775 (1975) (codified as amended at 20 U.S.C. §§ 1411-1420 (1976)) [hereinafter cited as EHCA].

In this Article, all references to the Education of the Handicapped Act, 20 U.S.C. §§ 1400-1461 (1976 and supplements to date), will hereinafter be cited as EHCA, unless otherwise noted. It is the EHCA, rather than the entire Education of the Handicapped Act, which is the focus of this Article.

10. *Id.* at § 1412(3); 34 C.F.R. § 300.320(a)(2) (1981). See also *Hearings on the Education for All Handicapped Children Act Before the Senate Comm. on Labor & Public Welfare*, 94th Cong. 1st Sess. (1975).

11. See *supra* note 2.

12. 347 U.S. 483 (1954).

nied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.¹³

Later, in *San Antonio Independent School District v. Rodriguez*,¹⁴ the Court again had the opportunity to discuss equal protection in public education. The Court maintained its position that education is not a fundamental right,¹⁵ while holding that unequal expenditures of money in different school districts was not a denial of equal protection where the school finance allocation method bears a rational relationship to a legitimate state purpose.¹⁶

These two cases and other Supreme Court cases¹⁷ lead to the conclusion that children in the public school system now have broad constitutional protections, including the right to due process in disciplinary proceedings and the first amendment right of free speech.

B. Special Education

Two significant cases dealing specifically with the constitutional rights of handicapped children in the public schools are *Pennsylvania Association for Retarded Children (PARC) v. Pennsylvania*¹⁸ and *Mills v. Board of Education*.¹⁹

In *PARC*, a statute²⁰ absolving the State Board of Education from responsibility for educating untrainable or uneducable handicapped children was challenged by a class of parents and the Pennsylvania Association for Retarded Children. The parties had signed a consent agreement which outlined in great detail what

13. *Id.* at 493 (emphasis added). See also *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

14. 411 U.S. 1 (1973). In this case the public education was financed in part through revenues from local property taxes, resulting in different per-pupil expenditures in different school districts. The Court's holding that this was not a denial of equal protection included the requirement that greater opportunities do not amount to a denial of equal protection where the state provides *minimally adequate educational opportunities to all children*. *Id.* at 44-45. It should be noted that there is a difference between a minimally adequate education and *no* education.

15. *Id.* at 35.

16. *Id.* at 54-55.

17. See *Goss v. Lopez*, 419 U.S. 565 (1975), in which the Court outlined minimal due process requirements to protect children in disciplinary proceedings, and *Tinker v. Des Moines Ind. Community School Dist.*, 393 U.S. 503 (1969), which dealt with first amendment protections for students.

18. 334 F. Supp. 1257 (E.D. Pa. 1971), *aff'd and settlement approved*, 343 F. Supp. 279 (E.D. Pa. 1972).

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

20. PA. STAT. ANN. tit. 24, § 13-1375 (Purdon 1962). Other statutes challenged were PA. STAT. ANN. tit. 24, §§ 13-1326, 13-1330(2), 13-1371(1), 13-1372(3), 13-1376 (Purdon 1962).

the state would be required to do to fulfill its responsibilities.²¹ The court, in approving the consent agreement, decided that mentally retarded children have a right to education.²² Shortly after the *PARC* case, the *Mills* court decided that *all* handicapped children, not just retarded children, have a right to an individually appropriate education.²³ These two cases established that handicapped children have a right to due process before they can be excluded from a program of public education²⁴ and a right to equal protection which prevents placement or exclusion decisions from being made solely on the basis of their handicap.²⁵ Furthermore, the two cases, in part, provided the impetus for the adoption of two major federal statutes: the Rehabilitation Act of 1973²⁶ and the EHCA.²⁷

21. 343 F. Supp. at 306. The order approved by the three judge panel provided that the state and its educational agencies were enjoined from denying "to any mentally retarded child access to a free public program of education and training . . ." and the state and its agencies were ordered "to provide notice and the opportunity for a hearing prior to a change in the educational status of any child who is mentally retarded or thought to be mentally retarded . . ." *Id.* at 302-303.

22. *Id.* at 315.

23. 348 F. Supp. at 876.

24. 343 F. Supp. at 298; 348 F. Supp. at 876.

25. 343 F. Supp. at 299; 348 F. Supp. at 876.

26. 29 U.S.C. §§ 701-94 (1976) [hereinafter cited as Rehabilitation Act].

27. 20 U.S.C. §§ 1401-1461 (1976). *See also* Board of Educ. v. Rowley, 102 S. Ct. 3034, 3044-45 (1982).

For general discussions of the Education for All Handicapped Children Act, *see* H. TURNBULL & A. TURNBULL, *FREE APPROPRIATE PUBLIC EDUCATION: LAW AND IMPLEMENTATION* (2d ed. 1979); Alsehecler, *Education for the Handicapped*, 7 J.L. & EDUC. 523 (1978); Baugh, *The Federal Legislation on Equal Educational Opportunity for the Handicapped*, 15 IDAHO L. REV. 65 (1978); Benjamin & Blair, *Implementation of Education Laws Relating to Exceptional Children: The Maine Experience*, 11 CLEARINGHOUSE REV. 449 (1977); Blakely, *Judicial and Legislative Attitudes Towards the Right to an Equal Education for the Handicapped*, 14 OHIO S.L. & SOC. PROB. 389 (1979); Bulman & Moore, Jr., *Recent Changes in the Law Affecting Educational Hearing Procedures for Handicapped Children*, 7 U. BALT. L. REV. 41 (1977); Colley, *The Education for all Handicapped Children Act (EHA): A Statutory and Legal Analysis*, 10 J.L. & EDUC. 137 (1981); Dittmeier & Menninger, *Law and Handicapped Persons: Achieving Equality Through New Rights*, 47 J. KAN. B.A. 181 (1978); Finn, *Advocating for the Most Misunderstood Minority: Securing Compliance with Special Education Laws*, 14 SUFFOLK U.L. REV. 505 (1980); Hagerty & Sacks, *Education of the Handicapped: Toward a Definition of an Appropriate Education*, 50 TEMP. L.Q. 961 (1977); Hammond & Keenan, *The Institutionalized Child's Claim to Special Education: A Federal Codification of the Right to Treatment*, 56 U. DET. J. URB. L. 337 (1979); Handel, *The Role of the Advocate in Securing the Handicapped Child's Right to an Effective Minimal Education*, 36 OHIO S.L.J. 349 (1975); Krass, *The Right to Public Education for Handicapped Children: A Primer for the New Advocate*, 1976 U. ILL. L.F. 1016 (1976); Large, *Special Problems of the Deaf Under the Education for All Handicapped Children Act of 1975*, 58 WASH. U.L.Q. 213 (1980); Levinson, *The Right to a Minimally Adequate Education for Learning Dis-*

Section 504 of the Rehabilitation Act makes it unlawful for any federally funded program or activity to discriminate against individuals on the basis of a handicap.²⁸ Similarly, the EHCA conditions federal funding for certain state educational programs upon the state's grant of a free appropriate public education to all handicapped children of school age.²⁹

These federal laws have raised several issues, which have been litigated repeatedly.³⁰ These issues include the following:

abled Children, 12 VAL. U.L. REV. 253 (1978); Miller & Miller, *The Education for All Handicapped Act: How Well Does It Accomplish Its Goal of Promoting the Least Restrictive Environment for Education?* 28 DEPAUL L. REV. 321 (1979); Miller & Miller, *The Handicapped Child's Civil Right as It Relates to Appropriate Mainstreaming*, 54 IND. L.J. 1 (1978); McClung & Pullin, *Competency Testing and Handicapped Students*, 11 CLEARINGHOUSE REV. 922 (1978); Schoenfeld, *Survey of the Constitutional Rights of the Mentally Retarded*, 32 S.W. L.J. 605 (1978); Schroeder, *Education of Exceptional Children: Act of 754 of 1977*, 26 LA. B.J. 137 (1978); Shepherd, *The Repudiation of Plato: A Lawyer's Guide to the Educational Rights of Handicapped Children*, 13 U. RICH. L. REV. 783 (1979); Stafford, *Education for the Handicapped: A Senator's Perspective*, 3 VERMONT L. REV. 71 (1978); Weinstein, *Education of Exceptional Children*, 12 CREIGHTON L. REV. 987 (1979); Comment, *Educating New York's Handicapped Children*, 43 ALB. L. REV. 95 (1978).

28. 29 U.S.C. § 794 (1976).

29. 20 U.S.C. § 1416 (1976).

30. For a brief overview of the major areas of litigation, see generally Boundy, *Developments in Special Education*, 14 CLEARINGHOUSE REV. 1027-30 (1981); Wallack, *Recent Developments in Special Education Law*, 15 CLEARINGHOUSE REV. 819-24 (1982). In addition to these substantive questions of controversy, there are three major procedural questions under both the Rehabilitation Act of 1973 and the Education for All Handicapped Children Act of 1975. They are: 1) whether there is a private right of action under the Act, 2) whether there is a requirement to exhaust administrative remedies under the Act before bringing a private action in court, and 3) what remedies are available for a private litigant under the Act.

As to the private right of action issue, the generally applied analysis is a four-pronged test set out in *Cort v. Ash*, 422 U.S. 66 (1974). The four factors are: 1) whether the statute was enacted to protect the individual seeking relief under it, 2) whether allowing a private action would frustrate the statute's purpose, 3) whether a federal remedy is inappropriate because of pre-emption by the states, and 4) whether there is legislative intent regarding a private right of action. Although the Supreme Court has not yet ruled explicitly on this issue (see *University of Texas v. Camenisch*, 451 U.S. 390 (1981); *Southeastern Community College v. Davis*, 442 U.S. 397 (1979)), most jurisdictions have held that there is a private right of action under the Rehabilitation Act. *Camenisch v. University of Texas*, 616 F.2d 127 (5th Cir. 1980) *vacated and remanded as moot*, 101 S. Ct. 1830 (1981); *Kling v. County of Los Angeles*, 633 F.2d 876 (9th Cir. 1980); *Baker v. Bell*, 630 F.2d 1046 (5th Cir. 1980); *Doe v. Colautti*, 592 F.2d 704 (3d Cir. 1979); *Davis v. Southeastern Commun. College*, 574 F.2d 1158 (4th Cir. 1978), *rev'd on other grounds*, 442 U.S. 397 (1979); *Kampmeier v. Nyquist*, 553 F.2d 296 (2d Cir. 1977); *Lloyd v. Regional Transp. Auth.*, 548 F.2d 1277 (7th Cir. 1977); *United Handicapped Fed'n v. Andre*, 558 F.2d 413 (8th Cir. 1977). It would also appear that one need not exhaust ad-

(1) What accommodations and modifications³¹ are required under the definition of related services?³² (2) What procedures must be

ministrative remedies before bringing a private action under the Rehabilitation Act. See *Pushkin v. Regents of Univ. of Colorado*, 658 F.2d 1372 (10th Cir. 1981); *Swan v. Stoneman*, 635 F.2d 97 (2d Cir. 1980); *Kling v. County of Los Angeles*, 633 F.2d 876 (9th Cir. 1980).

There is a split of authority regarding whether there is a private right of action under the EHCA. It seems to be much more clear that one seeking relief in the courts under the EHCA must do so as a review of the decision of the state administrative agency. See, e.g. *Ezratty v. Commonwealth of Puerto Rico*, 648 F.2d 770 (1st Cir. 1981); *Lombardi v. Ambach*, 522 F. Supp. 867 (E.D.N.Y. 1981); *H.R. v. Hornbeck*, 524 F. Supp. 215 (D. Md. 1981); *Doe v. Anrig*, 500 F. Supp. 802 (D. Mass. 1980); *contra* *Association for Retarded Citizens in Colorado v. Frazier*, 517 F. Supp. 105 (D. Colo. 1981); *Riley v. Ambach*, 508 F. Supp. 1222 (E.D.N.Y. 1980). Courts also seem reluctant to provide an award of money damages under the EHCA. *Anderson v. Thompson*, 658 F.2d 1205 (7th Cir. 1981); *Lombardi v. Ambach*, 522 F. Supp. 867 (E.D.N.Y. 1981); *Campbell v. Talladega County Bd. of Educ.*, 518 F. Supp. 47 (N.D. Ala. 1981); *Hyatt, Litigating the Rights of Handicapped Children to an Appropriate Education: Procedures and Remedies*, 29 U.C.L.A. L. REV. 1 (1981); *Seng, Private Rights of Action*, 27 DEPAUL L. REV. 1117 (1978); *Comment, Implications of a Private Right of Action Under Title IX of the Education Amendments of 1972*, 73 N.W.U. L. REV. 772 (1978).

31. The major question in the area of accommodations and modifications involves administrative policies which limit instruction to a certain number of days or hours in the day. In the recent decision of *Battle v. Commonwealth*, 629 F.2d 269 (3d Cir. 1980), *cert. denied* 101 S. Ct. 3123 (1981), the Third Circuit held that a state administrative policy of refusing to fund education in excess of 180 days per year was invalid. The court held that the inflexible application of this policy was incompatible with the EHCA's purpose. *Accord*, *Georgia Ass'n of Retarded Citizens v. McDaniel*, 511 F. Supp. 1263, 1279 (N.D. Ga. 1981); *Anderson v. Thompson*, 495 F. Supp. 1256, 1266 (E.D. Wis. 1980).

Another case involving modifications under the EHCA involved a somewhat unique factual situation. In *Espino v. Besterro*, 520 F. Supp. 905 (S.D. Tex. 1981), a school age child who could not adequately regulate his body temperature sought to have the school provide an air-conditioned classroom in which he could interact fully with his classmates. The court granted a preliminary injunction and thereby required that the school district provide an air-conditioned environment wherein he could fully interact with his peers, and enjoined the school from segregating the boy by requiring him to attend class in an air-conditioned cubicle or in any other segregated environment. *Id.* at 914.

32. See *infra* note 81 and accompanying text. The EHCA defines related services as:

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).

followed in disciplining special education students?³³ (3) What remedies are available for failure to comply with the statutory requirements of the two acts?³⁴ (4) To what extent may testing be

For New Jersey's interpretation of related services, see *Levine v. Institution & Agencies Dept. of N.J.*, 84 N.J. 234, 264-65, 418 A.2d 229, 245 (1980).

The two most frequently litigated issues of related services seem to involve the provision of sign language interpreters to deaf students and the provision of catheterization.

In *Board of Educ. v. Rowley*, 102 S. Ct. 3034 (1982), the Supreme Court held that a deaf child did not have a right to a sign language interpreter where the child's existing support services permitted the child to benefit from the educational program. *Id.* at 3052. The holding in the case is limited to the particular facts presented to the Court.

A number of jurisdictions have dealt with the question of catheterization, and the courts appear to be fairly consistent in holding that catheterization is a related service required under the EHCA. It should be noted that catheterization can be performed by a professional nurse and without the service, some children would not be able to attend school in the regular classroom. *Tokarcik v. Forest Hills School Dist.*, 665 F.2d 443 (3d Cir. 1981); *Tatro v. State*, 516 F. Supp. 968 (N.D. Tex. 1981); *Hairston v. Drosick*, 423 F. Supp. 180 (S.D. W. Va. 1976).

33. Expulsion of a student or other removal of a child from the educational placement constitutes a change in placement and requires that appropriate due process procedures be applied. A due process hearing is required to determine whether the misconduct is a manifestation of the handicap as well as other issues. Expulsion for a few days may be permissible where there is a threat to health or safety or where there is a substantial disruption in the classroom, but due process procedures must be implemented as soon as possible. *S-1 v. Turlington*, 635 F.2d 343 (5th Cir. 1981); *Pratt v. Board of Educ. of Frederick County*, 501 F. Supp. 232 (D. Md. 1980); *Doe v. Koger*, 480 F. Supp. 225 (N.D. Ind. 1979); *Stuart v. Nappi*, 443 F. Supp. 1235 (D. Conn. 1978); *Howard S. v. Friendswood Independent School Dist.*, 454 F. Supp. 634 (S.D. Tex. 1978).
34. The question of liability for failure to comply with the mandates of the EHCA (sometimes referred to as educational malpractice) and of the remedies for persons aggrieved by the failure of a school system to provide appropriate education, is extremely complex and has been the subject of much debate. The issues which must be resolved within this question include whether there is a private right of action under state or federal law against public schools, whether sovereign immunity protects the schools against suit under state or federal law, and what kind of remedy is possible under either state or federal law (i.e. can a successful plaintiff obtain damages or compensatory education, or is relief only prospective). Some cases which have dealt with some of these issues include *Town of Burlington v. Department of Educ. of Mass.*, 655 F.2d 428 (1st Cir. 1981); *Jaworski v. Rhode Island Bd. of Regents*, 530 F. Supp. 60 (D.R.I. 1981); *Hines v. Pitt County Board of Educ.*, 497 F. Supp. 403 (E.D.N.C. 1980); *Hark v. School District of Philadelphia*, 505 F. Supp. 727 (E.D. Pa. 1980); *Miener v. State of Missouri*, 498 F. Supp. 949 (E.D. Mo. 1980); *Hoffman v. Board of Educ. of the City of New York*, 49 N.Y.2d 121, 424 N.Y.S.2d 376, 400 N.E.2d 317 (1979); *Hunter v. Montgomery County Board of Education*, 47 Md. App. 709, 425 A.2d 681 (Md. Ct. Spec. App. 1981); *D.S.W. v. Fairbanks North Star Borough School Dist.*, 628 P.2d 554 (Alas. 1981). For an excellent discussion of the problem of providing a remedy for those injured as a result of wrongful classification, see Comment, *Legal Remedies for the Misclassifica-*

used as a means of placing special students?³⁵ and (5) To what extent are the expenses from placement of special students in residential settings reimbursed to the parents of the children?³⁶

It is the last issue of these major areas of controversy which was the subject of a recent decision of the New Jersey Supreme Court. This case will be discussed in the following section.

tion or Wrongful Placement of Educationally Handicapped Children, 14 COLUM. J.L. & SOC. PROB. 389 (1979). See also Elson, *A Common Law Remedy for Educational Harms Caused by Incompetent or Careless Teaching*, 73 N.W. U.L. REV. 641, 693-768 (1978); Comment, *Damages Actions for Denial of Equal Educational Opportunities*, 45 MO. L. REV. 281 (1980).

35. The major case on the validity of testing, particularly IQ testing, as a means of placing children in special education classes is *Larry P. v. Riles*, 495 F. Supp. 926 (N.D. Cal. 1979). In that case the use of IQ tests was challenged as having a disproportionate impact on black children. Although only 10 percent of the general student population in California are black, approximately 25 percent of the students in the class for the educable mentally retarded are black. The present status of this class action by black students challenging the test as being in violation of the Rehabilitation Act, the Education for All Handicapped Children Act, Title VI of the Civil Rights Act of 1974, and the fourteenth amendment of the Constitution, is that the use of intelligence tests for placement purposes has been enjoined until it can be shown that a particular test is not discriminatory or administered in a discriminatory manner. *Id.* at 989-990. See also, *Parents in Action on Special Educ. (PASE) v. Hannon*, 506 F. Supp. 831 (N.D. Ill. 1980); Note, *Classification of the Educable Mentally Retarded by Intelligence Testing: A Discriminatory Effect*, 30 CATH. U.L. REV. 335 (1981).
36. See *infra* notes 45-46 & 78-85 and accompanying text. The issues which arise in regard to placement in residential facilities include: whether the entire residential placement must be paid for entirely at the expense of the school district (see *Kruelle v. New Castle County School Dist.*, 642 F.2d 687 (3d Cir. 1981); *North v. District of Columbia Board of Educ.*, 471 F. Supp. 136 (D.D.C. 1979)); which school district is financially responsible for a residential placement (see *Doe v. Kingery*, 157 W. Va. 667, 203 S.E.2d 358 (1974); *In re G.H.*, 218 N.W.2d 441 (N.D. 1974)); and how to determine the appropriate measure of compensation for education where residential placement is required for other than educational purposes (see *Levine v. Institution & Agencies Dept. of New Jersey*, 84 N.J. 234, 255, 280, 418 A.2d 229, 240, 254 (1980)).

Another complex issue currently being considered is the constitutionality of a state statutory ceiling on tuition reimbursement for private school placement. *Halderman v. Pittenger*, 391 F. Supp. 872 (E.D. Pa. 1975). The problem in the Pennsylvania statutory scheme is that a child could be placed in a private residential setting as the only appropriate placement, and if the cost of the private placement is more than the statutory ceiling, the parents could be obligated to pay the excess charges, which in the case of private schools might be extremely high.

IV. EDUCATION OF PROFOUNDLY RETARDED CHILDREN

A. Recent Cases

1. *The Levine and Guempel Cases*a. *Background*

In *Levine v. Institution & Agencies Department of New Jersey*,³⁷ the New Jersey Supreme Court held that under state law certain profoundly retarded children may be uneducable and therefore the state education system is not required to pay the costs of institutional care and maintenance.³⁸ The court did not decide whether the EHCA or the Rehabilitation Act provides remedial relief; the court remanded this issue for decision by the appropriate administrative agencies.³⁹

Nine year old Maxwell Levine was apparently brain damaged from birth, and had been placed in the nursery unit of North Jersey Training School, a state institution for mentally retarded persons who are at least five years old. Maxwell was confined to a crib and was classified as profoundly retarded with an IQ of approximately one.⁴⁰

The other plaintiff, Linda Guempel, was a nineteen year old retarded woman, who resided at Hunterdon State School. After a short period at home as an infant, Linda was placed in a residential school for the mentally impaired and five years later was placed in Hunterdon. At that time she was evaluated as being profoundly retarded based on cognitive and adaptive skills tests.⁴¹ Linda also

37. 84 N.J. 234, 418 A.2d 229 (1980) (consolidated case of *Levine v. State Dept. of Institutions & Agencies*, 160 N.J. Super. 591, 390 A.2d 699 (App. Div. 1978) and *Guempel v. State*, 159 N.J. Super. 166, 387 A.2d 399 (Super. Ct. Law Div. 1978)). For other cases in which courts have dealt with the allocation of costs in residential placement situations, see *Matthews v. Campbell*, 3 EDUC. FOR THE HANDICAPPED L. REP. (CCR) 551:264 (E.D. Va. July 16, 1979); *Kruse v. Campbell*, 431 F. Supp. 180 (E.D. Va. 1977); *Cuyahoga County Ass'n for Retarded Children & Adults v. Essex*, 411 F. Supp. 46 (E.D. Ohio 1976); *Halderman v. Pittenger*, 391 F. Supp. 872 (E.D. Pa. 1975); *In re Richard G.*, 52 A.D.2d 924, 383 N.Y.S.2d 403 (N.Y. App. Div. 1976); *In re Saberg*, 87 Misc. 2d 848, 386 N.Y.S.2d 592 (Family Ct. 1976). *Matthews v. Campbell*, *supra*, is somewhat similar to *Levine*, *supra*, in that *Matthews* involved a severely retarded child who was placed by the court in a residential setting at public expense. The court in so doing expressed concern that it was not optimistic about the ability of the child to be trained under any circumstances. 3 EDUC. FOR THE HANDICAPPED L. REP. (CRR) 551: at 266.

38. 84 N.J. at 255, 418 A.2d at 240.

39. *Id.* at 264, 418 A.2d at 245.

40. *Id.* at 241, 418 A.2d at 232.

41. *Id.* at 240, 418 A.2d at 232. In defining severely and profoundly retarded, the New Jersey statutes use a functional definition, i.e., a definition as to what these children can *do* rather than what they are. "[These subtrainable children] are . . . so severely mentally retarded as to be incapable of giving evi-

exhibited severe behavioral problems. Against this backdrop, the court found that her school curriculum "emphasize[d] development of body awareness, sensorimotor skills and rudimentary self-care skills such as eating, toileting, grooming and dressing."⁴²

The parents of both Levine and Guempel claimed that the state statutory scheme denied their children the right to a free public education, as guaranteed by the state constitution, by not allowing certain maintenance expenses to be included as education expenses.⁴³ But the supreme court said that persons like Levine and Guempel who are placed in state institutions must be supported by certain designated relatives with sufficient financial ability.⁴⁴ Only those expenses that fall under the classification, "educational expenses," are to be paid for by the state education system.⁴⁵ For Linda Guempel's parents, this amounted to \$309.68 in 1978; the Levines received a comparable credit.⁴⁶

b. *The Levine Decision*

(i.) *New Jersey Constitutional Requirements*

The New Jersey Constitution guarantees a right to an education by requiring that the legislature provide a "thorough and efficient system of free public schools."⁴⁷ In *Levine*, the court concluded

dence of understanding and responding in a positive manner to simple directions expressed in the child's primary mode of communication and who cannot in some manner express basic wants and needs." *Id.* at 253, 418 A.2d at 239 (quoting N.J. STAT. ANN. § 18A:46-9(c) (West 1981)).

42. 84 N.J. at 240, 418 A.2d at 232.

43. *Id.* at 244, 418 A.2d at 234.

44. *Id.* at 242-43, 418 A.2d at 233-34.

45. *Id.* at 242-43, 418 A.2d at 233.

46. *Id.* at 266 n.19, 418 A.2d at 246 n.19.

47. *Id.* at 244, 418 A.2d at 234-35 (citing N.J. CONST. art. VIII, § 4, par. 1 (1947)). If the EHCA were to be repealed such that state constitutional and statutory rights to education were to be the sole consideration, it would be important to know what each state provides. State constitutions similar to the New Jersey provision requiring a "thorough and efficient" school system are the following: ARK. CONST. art. XIV, § 1; DEL. CONST. art. X, § 1; ILL. CONST. art. X, § 1; KY. CONST. § 183; MD. CONST. art. VIII, § 1; OHIO CONST. art. VI, § 2; PA. CONST. art. III, § 14; TEX. CONST. art. VII, § 1; W. VA. CONST. art. XII, § 1. State constitutions providing for "thorough and uniform" or "general and uniform" types of school systems are the following: ARIZ. CONST. art. XI, § 1; COLO. CONST. art. IX, § 2; FLA. CONST. art. IX, § 1; IDAHO CONST. art. IX, § 1; IND. CONST. art. 8, § 1; KAN. CONST. art. 6, § 2; MINN. CONST. art. XIII, § 1; NEV. CONST. art. 11, § 2; N.M. CONST. art. XII, § 1; N.C. CONST. art. IX, § 2; N.D. CONST. art. VIII, § 2; ORE. CONST. art. VIII, § 3; S.D. CONST. art. VIII, § 1; UTAH CONST. art. 10, § 1; WASH. CONST. art. IX, § 2; WISC. CONST. art. X, § 3; WYO. CONST. art. VII, § 1. State constitutions whose provisions include language such as requiring a "general diffusion of knowledge as essential to the preservation of rights and liberties" are the following: CAL. CONST. art. IX, § 1; MAINE CONST. art. VIII, § 1; MASS. CONST. pt. 2, ch. 5, § 2, art. 2; MICH. CONST. art. VIII, § 1; MO. CONST.

that the purpose of education is "to equip a child for his role as a citizen and as a competitor in the labor market,"⁴⁸ and to prepare a child to "function politically, economically and socially in a democratic society."⁴⁹ The court then used this standard in interpreting the free education clause to not guarantee payment of the residential costs of total habilitation programs for profoundly retarded institutionalized children because habilitation is not education.⁵⁰ The court seemed to go even further, however, and implicitly held that certain children may be so severely mentally impaired or retarded that they are unable to benefit from education, and therefore some children might conceivably not be entitled to *any* reimbursement for educational expenses.⁵¹

(ii.) *New Jersey Statutory Requirements*

The New Jersey statutes relating to residential placement of profoundly retarded children require the maintenance costs to be borne by close relatives who are financially able.⁵² Conversely, families of children receiving non-residential day care are not required to pay anything for the day care program.⁵³ The parents of Levine and Guempel challenged this differential treatment on state and federal equal protection grounds, arguing that the disparate treatment between institutionalized and non-institutionalized mentally retarded children was invidious discrimination.⁵⁴

The New Jersey Supreme Court concluded that the disparate

art. IX, § 1(a); N.H. CONST. pt. II, art. 83; R.I. CONST. art. XII, § 1. State constitutions requiring education to be provided with "openness," "equality," or "liberty" are the following: ALA. CONST. art. XIV, § 256; ALASKA CONST. art. VII, § 1; CONN. CONST. art. 8, § 1; IOWA CONST. art. IX, § 12; MONT. CONST. art. X, § 1; NEB. CONST. art. VII, § 1; N.Y. CONST. art. XI, § 1; OKLA. CONST. art. I, § 5; S.C. CONST. art. XI, § 3; VA. CONST. art. VIII, § 1. Other state constitutions require as follows: GA. CONST. art. VIII, § 1 ("adequate education for the citizens"); HAWAII CONST. art. IX, § 1 ("statewide system of public schools"); LA. CONST. art. VIII, § 1 ("education of the people"); MISS. CONST. art. 8, § 201 ("legislature may . . . provide for . . . schools for all children . . ."); TENN. CONST. art. XI, § 12 ("recognizes the inherent value of education and encourages its support"); VT. CONST. ch. II, § 68 ("a competent number of schools ought to be maintained").

48. 84 N.J. at 247, 418 A.2d at 235-36 (citing *Robinson v. Cahill*, 62 N.J. 473, 515, 303 A.2d 273, 295 (1973)).

49. 84 N.J. at 247, 418 A.2d at 235-36, (citing N.J. STAT. ANN. § 18A:7A-4 (West 1981)).

50. *Id.* at 248-49, 418 A.2d at 236.

51. *Id.* at 250-55, 418 A.2d at 237-40. *See also* *Cuyahoga County Ass'n for Retarded Children & Adults v. Essex*, 411 F. Supp. 46, 52 (N.D. Ohio 1976).

52. 84 N.J. at 242, 263, 418 A.2d at 233, 244 (citing N.J. STAT. ANN. § 30:4-66 (West 1981)).

53. *Id.* at 255, 418 A.2d at 240.

54. *Id.*

treatment was constitutionally permissible.⁵⁵ The underpinning of the court's conclusion was that no fundamental right was involved⁵⁶ and persons afflicted with mental impairments do not constitute a suspect class. Thus, the differentiation between institutionalized and non-institutionalized mentally retarded children could be upheld if there was a rational relationship between the discriminatory funding of educational services and the purpose of the state policy restricting educational funding for institutionalized children.⁵⁷ One of the goals of the state's statutory scheme was to enable children "to become responsible and effectively functioning adults."⁵⁸ The court held that the funding program bore a rational relationship to that goal.⁵⁹

(iii.) *Federal Requirements*

The state funding scheme in *Levine* withstood attack on federal constitutional grounds because the scheme was rationally related to a legitimate state objective. However, the New Jersey Supreme Court did not decide the right to relief under any of the relevant federal statutes. A determination as to compliance with the Rehabilitation Act⁶⁰ was left to the appropriate administrative agencies.⁶¹ The court did indicate that the existing state statutory scheme for funding the education of institutionalized mentally impaired students may not be in compliance with requirements imposed by the EHCA. But the court did not go so far as to hold that compliance with federal statutory and regulatory requirements required the payment of the entire cost of institutionalization, including room and board for institutionalized mentally impaired children.⁶²

55. *Id.* at 263, 418 A.2d at 244.

56. *Id.* at 258, 418 A.2d at 241-42. The court noted that education is not a fundamental right under the federal constitution (citing *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973)) and that although the New Jersey Constitution guarantees a right to a free education, habilitation is not included within that constitutional guarantee. *See also* *New Jersey Ass'n for Retarded Citizens v. Dept. of Human Services*, 89 N.J. 234, 445 A.2d 704 (1982).

57. 84 N.J. at 261, 418 A.2d at 243.

58. *Id.*

59. *Id.* at 263, 418 A.2d at 244. This same rationale was used by the New York Court of Appeals in upholding the constitutionality of section 234 of the New York Family Court Act which requires parents of handicapped children (other than blind and deaf children) to pay some of the maintenance cost at residential facilities, while blind and deaf children were not required to pay maintenance costs. *In re Levy*, 38 N.Y.2d 653, 382 N.Y.S.2d 13, 345 N.E.2d 556 (1976).

60. 29 U.S.C. §§ 701-94 (1976). *See supra* note 26 and accompanying text.

61. 84 N.J. at 263-68, 418 A.2d at 245-47.

62. *Id.*

c. *Analysis of the Levine Decision*

(i.) *New Jersey Constitutional Requirements*

Although the New Jersey Constitution guarantees a free education,⁶³ it does not define the word education. In *Levine*, the New Jersey Supreme Court said that the meaning of "education" in the state constitution could not be determined by an historical explanation⁶⁴ and instead, relied primarily on judicial interpretations and state legislative definitions.⁶⁵ From these sources the court determined that citizenship and the importance of carrying out the duties of citizenship were the purposes of free public education.⁶⁶ This would imply that to have a constitutional right to free public education in New Jersey, the person must have the potential of learning to vote, or at least, of learning to function with some degree of independence in society.

There are several problems with this standard. First, it is difficult to predict whether a particular child has the ability to carry out the ordinary duties of citizenship, such as voting. The court does not state the age at which such a prediction should be made. Second, the court does not enumerate those safeguards which should be required to ensure that the prediction is valid, or those safeguards which should be required to monitor changes in the potential of a particular child. This is the problem of the self-fulfilling prophecy. If a child is determined to be "uneducable" within the court's view, the child will probably be placed in a program where any hidden potential will never be realized.⁶⁷ Third, the court does not take into account the potential for changes in teaching technology which might permit the education of children previously determined to be uneducable. A final problem with the *Levine* court's definition of education is that it fails to recognize any definitions or functions of education beyond those which prepare a person to vote or to become economically self-sufficient. On the other hand, educators and psychologists generally include within the functions of education the development of skills, such as, learning self-care; not detracting from the health, well being, and comfort of others; making positive economic and social contributions, and similar goals.⁶⁸

63. N.J. CONST. art. VIII, § 4, par. 1 (1947).

64. 84 N.J. at 244-45, 418 A.2d at 234-35.

65. *Id.* at 245-48, 418 A.2d at 235-36.

66. *Id.* at 245-54, 418 A.2d at 235-40.

67. See generally, G. RIVERA, WILLOWBROOK: A REPORT ON HOW IT IS & WHY IT DOESN'T HAVE TO BE THAT WAY (1972); W. WOLFENBERGER, THE ORIGIN & NATURE OF OUR INSTITUTIONAL MODELS (1975).

68. Hawkins & Hawkins, *Parental Observations on the Education of Severely Retarded Children: Can It Be Done In the Classroom?*, SYMPOSIUM, *supra* note 4,

(ii.) New Jersey Statutory Requirements

As previously discussed,⁶⁹ the New Jersey statute which requires relatives of an institutionalized profoundly retarded child to bear the costs of habilitation,⁷⁰ withstood constitutional attack on equal protection grounds in *Levine*.⁷¹ The major problem with this result is, again,⁷² the failure of the court to take into consideration all of the functions and purposes of a free public education when determining the rights thereto.

(iii.) Federal Requirements

The premise of the EHCA is that all children are educable⁷³ and that a state must provide free appropriate public education to all children of school age in order to receive funds under the Act.⁷⁴ New Jersey was receiving EHCA funds when the *Levine* case was

at 13, 15. See discussion in text at sections IV(B)(1), (2) *infra* for the definition of "education." See generally, H. GROSSMAN, MANUAL ON TERMINOLOGY & CLASSIFICATION IN MENTAL RETARDATION (1977); Luckey & Addison, *Profoundly Retarded: A New Challenge For Public Education*, 9 EDUC. & TRAINING OF THE MENTALLY RETARDED 123-30 (1974).

69. See *supra* notes 55-57 and accompanying text. 84 N.J. 258, 418 A.2d at 242. For a discussion of the constitutional right to education, see Dimond, *The Quiet Revolution*, 24 HASTINGS L.J. 1087 (1973). For a discussion of the equal protection clause as applied in the *Levine* case, see Note, *Mentally Retarded Children*, 17 J. FAMILY L. 598 (1979).

70. 84 N.J. at 259, 418 A.2d at 242. See *supra* note 52.

71. The decision in this case can be compared to that in *In Re Levy*, 38 N.Y.2d 653, 382 N.Y.S.2d 13, 345 N.E.2d 556 (1976), which upheld a New York City provision requiring parents of handicapped children, other than children who are blind or deaf, to assist in payment for residential placement. The court found that the distinction did not reflect invidious discrimination and the class of non-blind/non-deaf handicapped children did not constitute a suspect classification.

Advocates for education for the handicapped should consider carefully the benefits of arguing that unequal expenditures for different groups of handicapped children is a violation of constitutional equal protection guarantees. Such an argument may fail to recognize the different costs involved in educating children with different handicaps. For example, should it be argued that the amount spent on educating a child with a learning disability should equal in dollars what is spent on educating a child with a hearing impairment. A second strategic problem with this argument is that the courts might respond by disallowing the maintenance costs to the blind and deaf children in *Levy*, certainly an undesirable result. See generally, *Frederick L. v. Thomas*, 408 F. Supp. 832 (E.D. Pa. 1976).

72. See *supra* notes 66-68 and accompanying text.

73. 20 U.S.C. § 1400(c) (Supp. IV 1980).

74. See *supra* note 2. "In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate . . . that . . . the State has in effect a policy that assures all handicapped children the right to a free appropriate public education." 20 U.S.C. § 1412(1) (1976).

decided⁷⁵ and thus, was required to provide an education to all children, even those who were profoundly retarded. The question then becomes what must the state actually provide in its educational program in order to comply with federal law.

The *Levine* court reserved ruling and remanded the question of whether the plaintiffs were entitled to relief under the Rehabilitation Act or the EHCA.⁷⁶ The court said "this issue necessarily implicates the threshold question of whether plaintiffs are entitled to [a] greater [educational credit] from the State under the applicable state laws."⁷⁷

The educational credit determined by the trial court was calculated by adding together the costs of salaries paid to certified teachers, teacher fringe benefits, and educational supplies and equipment used at the institution, and dividing that amount by the number of students in the institution to arrive at the per capita educational cost.⁷⁸ The *Levine* court questioned whether this calculation included all of the pertinent educational expenses which the state was required by law to pay.⁷⁹ Indeed, no provision had been made for such common public education expenses as building cost and overhead, and salaries paid to other professional and non-professional personnel at the institution, *e.g.*, secretaries, and speech and hearing therapists.⁸⁰ These sorts of expenses are commonly paid by the state as costs associated with public education. Moreover, the cost of "related services" which must be provided to handicapped children as part of their "free appropriate public education" was not included.⁸¹

75. 84 N.J. at 263-66; 418 A.2d at 245-46.

76. *Id.* at 264; 418 A.2d at 245.

77. *Id.*

78. *Id.* at 243 n.3; 418 A.2d at 233 n.3.

79. *Id.* at 266; 418 A.2d at 245-46.

80. *Id.* at 278; 418 A.2d at 252. See also Brief for Amicus Curiae New Jersey Association for Retarded Citizens at 14-19, *Levine v. Institution & Agencies Dept. of New Jersey*, 84 N.J. 234, 418 A.2d 229 (1980).

81. See *supra* note 32 and accompanying text. The EHCA specifically provides that special education paid for at public expense to all school age children shall include related services such as necessary developmental, corrective and supportive services, speech pathology, psychological services, physical and occupational therapy, counseling, and diagnostic medical services. 20 U.S.C. § 1401(17) (1976); 34 C.F.R. § 300.13 (1981). Therefore, in calculating the cost of "education" for students in residential institutions, the court did not include these "related services" costs which are statutorily included within the "free appropriate public education" to be provided to all school age children. 20 U.S.C. § 1401(18) (1976); 34 C.F.R. § 300.4 (1981).

At least one advocate in the *Levine* supreme court proceedings argued that the amount allocated to education in computing the parents' liability should be determined by setting the per capita cost of day training programs operated by the New Jersey Division of Mental Retardation as being the pre-

The regulations promulgated pursuant to the EHCA provide that "[i]f placement in a public or private residential program is necessary to provide special education and related services to a handicapped child, the program, including non-medical care and room and board, must be at no cost to the parents of the child."⁸² Cases interpreting this requirement have differentiated between residential placement which is necessary for educational purposes and that which is in response to medical, social, or emotional problems that can be separated from the learning process.⁸³ In at least one case,⁸⁴ the court, unable to distinguish between placement necessary for educational purposes and placement necessary for medical, social, or emotional reasons, held that it was impossible to separate the emotional and educational needs in complex cases and ordered residential placement, "with necessary psychiatric, psychological and medical support and supervision . . ."⁸⁵

After having been requested by the child's representatives, the burden of proving that residential placement is *not* necessary for

sumptive value of an education at either of the residential institutions involved. Brief and Appendix of Amicus Curiae Public Advocate at 41-48, *Levine v. Institution & Agencies Dept. of New Jersey*, 84 N.J. 234, 418 A.2d 229 (1980). The Public Advocate's arguments are based on considerations of public policy and fairness whereby the party with the means of disproving the presumed fact should be placed in the position of rebutting the presumption. *Id.*

Although this proposal may be an inappropriate means of determining the proper amount of money which should be allocated to education, it seems clear that the method of allocation used by the Division of Mental Retardation (whereby only about \$310 was allocated per capita in residential placements) does not provide an appropriate measure when compared to the educational costs being paid for day programs (approximately \$5500 per capita).

82. 34 C.F.R. § 300.302 (1981); 20 U.S.C. § 1413(a)(4)(B) (1976).
83. *Kruelle v. New Castle County School Dist.*, 642 F.2d 687 (3d Cir. 1981). This case involved a retarded 13 year old with almost no self-help skills, whose parents sought placement in a residential program. The court concluded that a full-time residential program was required to provide the necessary degree of consistency for the child to receive a "free appropriate public education" under the EHCA. The court noted that the language and legislative history of the EHCA support the premise that *all* children are subject to the Act. The Third Circuit used the term "trainable" in noting that the EHCA requires residential placement for "training." *Id.* at 695. See also *Tatro v. Texas*, 625 F.2d 557 (5th Cir. 1980); *Gladys J. v. Pearland Independent School Dist.*, 520 F. Supp. 869 (S.D. Tex. 1981); *In re G.H.*, 218 N.W.2d 441 (N.D. 1974); *Doe v. Kingery*, 157 W. Va. 667, 203 S.E.2d 358 (1974).
84. *North v. District of Columbia Bd. of Educ.*, 471 F. Supp. 136 (D.D.C. 1979). The *North* case involved a 16 year old epileptic child whose residential placement was directed to be paid for by the school district because the social, emotional, medical, and educational problems were so intertwined that the court could not separate them.
85. *Id.* at 141-42.

educational purposes will rest on the public agency.⁸⁶ For example, in the *Levine* case, the parents of both Levine and Guempel could have requested that the school district place their children in a residential program, rather than doing so on their own initiative and later seeking reimbursement for the habilitation costs. This strategy has at least two distinct advantages. First, if the school district determines that residential placement is necessary for educational purposes, the total cost of the residential placement should be paid at public expense through the education budget.⁸⁷ Conversely, if it is determined that residential placement is not necessary for educational purposes, the school system will still be obligated to pay educational costs, including the costs of related services.⁸⁸ Second, in the event that the request to have the children placed in the residential program is denied, procedural requirements must be followed.⁸⁹

In summary, the *Levine* case illustrates judicial hesitancy to set social policy in an area of the law where Congress and many state legislatures have already spoken. The New Jersey Supreme Court was unwilling to expand the right to a free appropriate public education without the benefit of the considered opinions of the administrative agencies most familiar with the education of handicapped children. Thus, a decisive issue in the case was remanded for appropriate action.

2. *The Matthews and Cuyahoga County Cases*

In *Matthews v. Campbell*,⁹⁰ the problem of residential placement of a profoundly handicapped child was again before a court. The child had initially been placed in an elementary school but little meaningful progress in the child's education resulted. Reluctantly, the court then ordered residential placement without cost to the plaintiff.⁹¹ The opinion said that "[n]either the language of the [EHCA] nor the legislative history appears to contemplate the possibility that certain children may simply be untrainable. Should the Court ultimately conclude that . . . [the] plaintiff is not

86. *Laura M. v. Special School District*, 3 EDUC. FOR THE HANDICAPPED L. REP. (CRR) 552: 152, 155 (D. Minn. Jan. 21, 1980); see also *Board of Education v. Rowley*, 102 S. Ct. 3034, 3044-45 (1982); *Mills v. Board of Education*, 348 F. Supp. 866, 881, (D.D.C. 1972); but see, *Rowley v. Board of Education*, 632 F.2d 945, 948 n.6 (2d Cir. 1980), *rev'd*, 102 S. Ct. 3034 (1982).

87. See 300 C.F.R. § 300.302 (1981).

88. 20 U.S.C. § 1401(18) (1976).

89. 20 U.S.C. § 1415 (1976). See *infra* notes 139-45 and accompanying text. See also 84 N.J. at 268 n.20, 418 A.2d at 247 n.20.

90. 3 EDUC. FOR THE HANDICAPPED L. REP. (CRR) 551:264 (E.D. Va. July 16, 1979).

91. *Id.* at 266, slip op. at 5-6.

trainable, what options are then available."⁹²

In *Cuyahoga County Association for Retarded Children & Adults v. Essex*,⁹³ the federal district court for the Northern District of Ohio determined the constitutionality of Ohio statutes which classify children for purposes of access to public education. The court said that the classification was rationally related to a legitimate state purpose⁹⁴ but, nevertheless, held that the regulations governing the procedure for classification and placement were unconstitutional because they lacked adequate safeguards.⁹⁵ Implicitly, the court also held that mentally retarded children who through appropriate procedures were found to be incapable of benefiting from education, had no constitutional right to education.⁹⁶

In regard to funding, the court said:

While the Court may well agree with plaintiffs that sufficient funding should be procured so all persons suffering from mental disability can be given as much training as would be of benefit to them, or that the resources available should be used in whatever proportions necessary to reach all persons in need of training, this Court cannot substitute its judgment for that of the Ohio legislature in determining the manner in which this social welfare program is best administered.⁹⁷

Apparently this case was commenced prior to the enactment of the EHCA, and therefore the court did not address the issue of the right to education under the federal statute.

3. *Implications of the Recent Cases*

The three cases highlighted in sub-section A all illustrate the difficult decisions courts are facing in regard to the education of profoundly handicapped children. Rights exist under both federal and state law. The EHCA requires that profoundly retarded children be provided with a free appropriate public education, even if it requires residential placement.⁹⁸ For example, on remand in *Le-*

92. *Id.*

93. 411 F. Supp. 46 (N.D. Ohio 1976).

94. *Id.* at 52. This classification disqualified a child from the public education system if determined to be "incapable of profiting substantially from further instruction." OHIO REV. CODE ANN. § 3321.05 (Page 1972) (repealed 1976). The current statute provides that "[t]he State Board of Education shall establish standards for special education and related services for all handicapped children in the state, regardless of the severity of their handicap." OHIO REV. CODE ANN. § 3323.02 (Page 1980).

95. 411 F. Supp. at 57-58. The invalid regulations were promulgated by the Ohio Department of Education and the Ohio Department of Mental Health and governed placement of students in special education classes, exclusion of students from the compulsory public school system, and exclusion of individuals from training programs.

96. *Id.* at 59.

97. *Id.* at 57.

98. *See supra* note 82 and accompanying text.

vine, the administrative agencies will probably determine that a \$310 education credit is insufficient, which means more tax dollars will have to be spent. This raises the truly significant issues underlying these cases: How can limited financial resources be fairly apportioned when the cost of a profoundly handicapped student's education is so much more expensive to provide on a per capita basis? Are these children really educable or has a category of governmental expenditures been misclassified for political expediency? Politicians realize that taxpayers are generally more receptive to having their money spent on education rather than social programs. Can we legally, and morally, ignore the educational rights of this class of citizens?

Presently, the EHCA protects a practically helpless class. It is premised on the notion that all children are educable and defines those services which properly fall under the rubric, "free appropriate public education."⁹⁹ And although it is unlikely that the EHCA will be completely repealed in the near future or that the federal funding of state education will be altered so significantly that state law will be the only applicable consideration, the current political climate certainly does not foreclose such a result. Indeed, if the EHCA is repealed, or if the federal financial aid of state primary and secondary education is shifted to block grants under the Rehabilitation Act,¹⁰⁰ interpretations of state constitutions¹⁰¹ and statutes as to the right of a profoundly handicapped child to an education would be decisive. It is unclear how these issues would be decided if only state law were applied, although *Levine* may give an indication.

In the following sections the ramifications of these issues will be discussed and analyzed.

99. See *supra* note 73 and accompanying text. See also 20 U.S.C. § 1401(18).

100. Federal financial support for special education is currently provided through the EHCA via a formula which bases each state's allocation on the number of school age children times a percent of the average per pupil expenditure. 20 U.S.C. § 1411 (1976). For a criticism of the formula, see Colley, *The Education for All Handicapped Children Act (EHA): A Statutory and Legal Analysis*, 10 J.L. & EDUC. 137, 144-46 (1981).

If federal financial support for special education were to be provided through Department of Education block grants, then the regulations under section 504 of the Rehabilitation Act of 1973 would be applicable. 45 C.F.R. § 84.1-84.99 (1981). The regulations are much less detailed about education requirements (45 C.F.R. at § 84.31-84.40), and therefore may possibly provide less protection.

Those who are attuned to federal government activity note that the elimination of federal education rights for handicapped children through repeal of the EHCA or its crucial provisions is a clear possibility. R. Martin, *HANDICAP EDUCATION LAW NEWS* (July, 1982).

101. See listing of state constitutional provisions *supra* note 47.

B. Questions Raised Regarding the Education of Profoundly Retarded Children

1. Definition of "Education"

a. *The Education for All Handicapped Children Act*¹⁰²

Under the EHCA, special education is "specially designed instruction . . . to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions."¹⁰³ The related services which have been determined to be necessary to an appropriate education are "transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and [diagnostic and evaluative] medical and counseling services. . . . as may be required to assist a handicapped child to benefit from special education"¹⁰⁴

The EHCA does not contain any more explicit definition of education, but it does presume that all handicapped children are "educable."¹⁰⁵ This indicates that the type of educational programming appropriate to meet the needs of profoundly retarded children must also be included within the definition of "education."

b. *Judicial Decisions*

In *Levine*, the New Jersey Supreme Court did not find a definition of "education" in the New Jersey Constitution, but rather defined it by finding that the *purpose* of education is to prepare a child for citizenship and competition in the labor market.¹⁰⁶ The court, however, clearly did state what education is *not*—it is not the "care and habilitation which children require for their health and survival."¹⁰⁷ In so holding, the court noted that while care and habilitation may be education in a philosophical sense, it is not education in a constitutional and legislative sense under the law of New Jersey.¹⁰⁸ Notwithstanding, the *Levine* court's definition is

102. *See supra* note 9.

103. 20 U.S.C. § 1401(16) (1976).

104. *Id.* at § 1401(17), (18). *See also* 34 C.F.R. § 300.13 (1981).

105. 20 U.S.C. § 1401 note (1976) (Congressional Declaration of Purpose § 3(c)).

106. 84 N.J. at 244-49, 418 A.2d at 234-36.

107. *Id.* at 250, 418 A.2d at 237.

108. *Id.* It should be noted that the New Jersey Standards on Public Institutions for the Division of Mental Retardation provide that educational services are "deliberate attempts to facilitate the intellectual sensorimotor, and effective development of the individual, . . ." and that these services should be "available to all residents, regardless of . . . degree of retardation . . ." New

vague inasmuch as the court states that, under state law, trainable mentally retarded children, who are not considered to be educable but who can be trained to achieve a degree of independence and usefulness in society, are constitutionally entitled to "education."¹⁰⁹ Thus, the court seems to say that trainable mentally retarded children are not educable, but that they are entitled to education. The court implicitly defines education as that which equips a child to be a citizen. "Training" is included within that definition, but exactly what training qualifies as "education" is not specified.

A case illustrating the philosophical disagreement surrounding the definition of educational rights of profoundly handicapped children is *Fialkowski v. Shapp*.¹¹⁰ *Fialkowski*, a case brought under the United States Constitution rather than the EHCA, defined education functionally, being "assessed in terms of its capacity to equip a child with the tools needed in life."¹¹¹ While the court did not specifically describe what is included within the definition of education, it did require the public school system to provide "education" to children with the intelligence of two year olds, *i.e.*, children with abilities at the level of a profoundly retarded child.¹¹² This illustrates the potentially broad meaning of the word, "education."

Finally, in *Halderman v. Pennhurst State School & Hospital*,¹¹³ education was defined to include habilitation. "[Habilitation is] the term of art used to refer to that education, training and care required by retarded individuals to reach their maximum development."¹¹⁴

c. Definitions by Educators and Psychologists

Roos, a noted psychologist, has defined education:

Jersey Standards on Public Institutions, Division of Mental Retardation. It is noteworthy that the head of the Adaptive Learning Center at Hunterdon School considered the following activities to fall within the "education program": increasing body control through motor skill development, increasing awareness through multisensory stimulation, developing self-help skills, developing social and emotional growth, developing receptive and expressive language, and developing visual and auditory skills. Brief for Plaintiff-Respondent, Robert G. Guempel at 13-17, *Levine v. State of New Jersey*, 84 N.J. 234, 418 A.2d 229 (D.N.J. 1980).

109. 84 N.J. at 252-53, 418 A.2d at 238-39 (citing Public School Education Act of 1973, N.J. STAT. ANN. § 18A:7A-1 *et seq.* (West 1981)).

110. 405 F. Supp. 946 (E.D. Pa. 1975).

111. *Id.* at 959. See also *Wisconsin v. Yoder*, 406 U.S. 205, 222 (1972).

112. 405 F. Supp. at 959.

113. 446 F. Supp. 1295 (E.D. Pa. 1977).

114. *Id.* at 1298. See also *Wyatt v. Stickney*, 344 F. Supp. 387, 395 (M.D. Ala. 1972), *aff'd sub nom*, *Wyatt v. Anderholt*, 503 F.2d 1305 (5th Cir. 1974).

[T]he process whereby an individual is helped to develop new behavior or to apply existing behavior, so as to equip him to cope more effectively with his total environment [is education]. It should be clear, therefore, that when we speak of education we do not limit ourselves to the so-called academics. We certainly include the development of basic self-help skills. Indeed, we include those very complex bits of behavior which help to define an individual as human. We include such skills as toilet training, dressing, grooming, communicating and so on.¹¹⁵

Like Roos, other experts have included the following self-help skills within the meaning of education: the ability to appropriately posture and position one's body, self-feeding, dressing, toilet training, grooming, motor skills, language development, and socialization.¹¹⁶ This kind of education—skill training—is clearly more expansive than the New Jersey Supreme Court definition of education. The New Jersey Supreme Court rigidly defined education so as not to include programs other than traditional academic training for citizenship.

2. Definition of "Educability"

The terms "education" and "educability" are related, yet not synonymous. To define "education" does not necessarily resolve the question of whether a particular individual is "educable." Educable, by dictionary definition, is the capability of being educated.¹¹⁷ Education, on the other hand, is the process of educating.¹¹⁸ It is the problem of determining those children who are or are not educable that is the subject of this section.¹¹⁹

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115. Roos, *Current Issues in the Education of Mentally Retarded Persons*, PROCEEDINGS: CONFERENCE ON THE EDUCATION OF MENTALLY RETARDED PERSONS, 2 (W. Cegelka ed., 1971).
 116. Luckey & Addison, *The Profoundly Retarded: A New Challenge for Public Education*, 9 EDUC. & TRAINING OF THE MENTALLY RETARDED 123 (1974).
 117. FUNK & WAGNALLS DICTIONARY 790 (1947). See also *Cuyahoga County Ass'n for Retarded Children and Adults v. Essex*, 411 F. Supp. 46, 53; *Levine v. Institution & Agencies Dep't of New Jersey*, 84 N.J. 234, 254, 418 A.2d 229, 239-40.
 118. FUNK & WAGNALLS DICTIONARY 790 (1947).
 119. The courts in *Levine* and *Cuyahoga County* found that mentally retarded children who fall within the statutory definition of "subtrainable" are uneducable. 84 N.J. at 254, 418 A.2d at 239-40; 411 F. Supp. at 53. N.J. STAT. ANN. § 18A:46-9(c) (West 1981) defines subtrainable children as those who "are so severely mentally retarded as to be incapable of giving evidence of understanding and responding in a positive manner to simple directions expressed in the child's primary mode of communication and who cannot in some manner express basic wants and needs."

While the court found these children to be uneducable, they did provide approximately \$310 for them as an educational expense. This raises the curious situation that education is being provided to children who are uneducable. Perhaps what the court intended was that the \$310 was being provided for instruction that is not considered to be "education"; in which case the question then becomes, why is the school system obligated to pay anything.

A recent symposium¹²⁰ evaluated, *inter alia*, the question of whether all children are educable. It concluded that when the functions of education are defined to include such things as the ability to care for oneself, the ability to avoid detracting from the health and well being of others, and the ability to make positive economic and social contributions, rather than being confined to skills aimed at "jobs, voting, balancing a checkbook, and the like,"¹²¹ the term, educable, encompasses more than those students who can profit from the fixed school environment.¹²² Nevertheless, one group of prominent professionals have recently challenged the assumption that all handicapped persons are educable. This group, the Partlow Review Committee,¹²³ testified for the State of Alabama in *Wyatt v. Hardin*,¹²⁴ arguing that existing scientific data does not prove conclusively that all retarded individuals can be significantly habilitated.¹²⁵ The Partlow Committee further stated that the fact that some residents of institutions had not made significant progress even after several years of training, indicated that current habilitation technology is not beneficial to those persons.¹²⁶

Critics of the Partlow Committee Report note that while current research does not prove that all retarded individuals can be habilitated, neither does current research prove that certain individuals cannot be habilitated.¹²⁷ The committee report is also criticized for using the lack of significant progress as the basis for its argument that certain individuals are not able to be habilitated, when the reason for lack of progress may be poorly trained personnel or other factors.¹²⁸

This sort of disagreement among professionals concerning the

120. SYMPOSIUM, *supra* note 4.

121. Hawkins & Hawkins, SYMPOSIUM, *supra* note 68, at 15.

122. *Id.* at 14-15.

123. The Partlow Review Committee consisted of authorities in the mental retardation field and was formed for the purpose of reviewing care, treatment, and training programs in Partlow State School and Hospital and in other State of Alabama facilities for the mentally retarded. Motion for Modification, No. 3195-N (M.D. Ala. filed Nov. 20, 1978).

124. *Id.*

125. Favell, Risley, Wolfe, Riddle, & Rasmussen, *The Limits of Habilitation: How Can We Identify Them and How Can We Change Them?*, SYMPOSIUM, *supra* note 4, at 37-38.

It could be argued that it may even be harrassment to continue to train unresponsive profoundly retarded persons, and that at some point lack of response should be the basis for discontinuing heroic and expensive efforts to "train" these individuals.

126. *Id.*

127. *Id.* at 38.

128. *Id.* at 39. See also, Kirp, Buss & Kuriloff, *Legal Reforms of Special Education: Empirical Studies and Procedural Proposals*, 62 CAL. L. REV. 40 (1974).

definition of educability is not surprising considering that there is no currently available program which can produce significant improvement in the behavior of all profoundly retarded children.¹²⁹ Some argue that whether or not a child can benefit from currently available programs, *i.e.*, whether a child is presently educable, is determined by evaluating whether there was reasonable progress after a reasonable period of time in the program.¹³⁰ This, of course, assumes that the programs are operated and administered by highly trained behavior therapists.¹³¹ The determination of educability would also be based upon the public's conception of what constitutes an education, what skills are meaningful, and what cost-benefit ratios are acceptable.¹³² To reiterate, the determination of the educability of a child would first require that the child be given an opportunity to participate in a program and have his progress assessed. If no reasonable progress is made, an alternative course of action would become necessary. Succinctly, "educable" would be defined as the ability to learn and maintain meaningful skills after having been given a reasonable opportunity to do so.¹³³

129. Kauffman & Krouse, *The Cult of Educability: Searching for the Substance of Things Hoped for; the Evidence of Things Not Seen*, SYMPOSIUM, *supra* note 4, at 53, 55. The high cost of this programming has also been discussed. The following brings home the economic problem:

Anyone who has worked in the area of mental retardation knows that resources are severely limited. . . . In a tight economy such as ours, priorities must be set; and before long I believe that the taxpayers will want to know what the costs vs. benefits are for 'training' the unresponsive profoundly retarded. They may well demand that such scarce resources be spent on clients more likely to benefit. What will they say if we report that it costs \$5,000 to produce 10-sec of eye-contact or \$25,000 to teach a client to raise his arm? Basic *custodial* care in state run facilities is costing \$15-20,000 per client per year (1980 dollars). Any kind of sophisticated training is likely to triple this figure, and we still do not know what the benefits will be.

Bailey, *Wanted: A Rational Search for the Limiting Conditions of Habilitation in the Retarded*, SYMPOSIUM, *supra* note 4, at 50. See also Baumeister, *The Right to Habilitation: What Does It Mean?* SYMPOSIUM, *supra* note 4, at 61, 69-70.

130. Kauffman & Krouse, *supra* note 129, at 55.

131. Kauffman & Krouse, *supra* note 129. The proponents of this determination believe that all of those terms (appropriate effort, highly trained, reasonable period, significant progress, and meaningful skill) could be operationally defined. *Id.* This approach is mentioned by others. Baumeister, *The Right to Habilitation: What Does It Mean?* SYMPOSIUM, *supra* note 4, at 61, 67-68. Periodic reevaluations of these "untrainable" individuals would be the safeguard for those determined to be untrainable. *Id.*

132. Kauffman & Krouse, *supra* note 129, at 56.

133. *Id.*

a. *The Policy Question*

One psychologist, Ellis, argues that the question to be answered is not whether an individual is "trainable," but whether the skill that is to be taught is useful, and whether the individual can "learn [the] skills well enough to use it . . . in a reasonable amount of time [with reasonable] effort."¹³⁴ It is highly doubtful that current teaching techniques are adequate to meet the training needs of profoundly retarded children. Most elementary and secondary teachers are trained to "present material"; they are not generally asked to determine how and why people learn. The average child and even the mildly mentally retarded child can learn from having material "presented," but the profoundly retarded child is extremely unlikely to do so. The problem, then, is cyclical: Appropriate teaching techniques for the profoundly retarded will not be developed until much more effort is put into learning how to teach the profoundly retarded, and more effort to learn how to teach these children will not be made until their worth, needs, and abilities are fully appreciated. Indeed, even if the previously mentioned standard for determining educability is adopted, *i.e.*, if after reasonable effort through an appropriate program there is no significant progress,¹³⁵ it is possible that appropriate training programs would never be developed. As a result, profoundly retarded children will be labeled as uneducable based upon currently *available* techniques rather than on *appropriate* techniques.

Unless the law creates the pressure to provide education or training to severely and profoundly retarded children, it is quite likely that appropriate teaching techniques will not be developed. This point is made by Flexer and Martin who note that until the attitude toward the severely retarded child changed, there was a lack of motivation to invest substantial time or money in developing effective training strategies.¹³⁶

There is evolving from recent research a training technology specifically aimed at those persons who not very long ago were classified as "too severely handicapped to have any rehabilitation potential." One of the factors which has facilitated this growth is an attitude change, which . . . [in part] means that instead of saying, "These people (the severely handicapped) cannot learn and cannot be trained," we are now saying, "We have not been competent enough to teach. The failing is not with the severely handicapped, but with us."¹³⁷

Likewise, it would be undesirable for the progress which has

134. Ellis, *On Training the Mentally Retarded*, SYMPOSIUM, *supra* note 4, at 99, 107.

135. See *supra* note 130 and accompanying text.

136. Flexer & Martin, *Sheltered Workshops in Vocational and Training Settings*, SYSTEMATIC INSTRUCTION OF THE MODERATELY AND SEVERELY HANDICAPPED 421 (1978).

137. *Id.*

been made to be lost simply because of a failure to appreciate the issues. Hopefully, most courts, educators, and psychologists would define education more broadly than did the *Levine* court, and include non-academic type training of self-help skills within the concept. This broader definition, and a philosophy that, with the development of appropriate educational technology, severely and profoundly retarded children are educable,¹³⁸ provide an appropriate starting point from which to evaluate the social policy question of which educational rights the law should provide profoundly handicapped children. But the real policy question which must be faced, in deciding whether to legislatively mandate the motivation to develop appropriate techniques to educate or to train severely and profoundly handicapped children, is a question of money. Are the large financial commitments per child which are necessary in order to educate these children desirable or necessary? This author certainly believes they are. But if Congress and our legislatures decide that certain children do not have a right to education, the focus must then be placed on the process of exclusion.

3. *Process for Determining Whether an Individual Is Educable*

a. *Due Process Generally*

If certain individuals are to be classified as uneducable, and thereby, denied the benefits of the school system, the process for making that decision must be fair. Several procedural questions immediately arise: Who will make that decision? When will that decision be made? What kind of evidence will be required? Who will bear the burden of proving educability? What safeguards should be provided to ensure that periodic reevaluations are made as teaching technology improves? And what standards of judicial review should be established? The difficulties inherent in these questions can be illustrated by examining them in relation to provisions in the EHCA.

The EHCA provides a mechanism to ensure that a free appropriate public education is made available to all handicapped children.¹³⁹ First, the states must establish priorities for providing education to even the most severely handicapped children.¹⁴⁰ The states must then establish procedural safeguards as required under the EHCA.¹⁴¹ Among the procedural rights required include, the right of the child or his representative "to present com-

138. This is the view in the EHCA. *See supra* note 73 and accompanying text.

139. 20 U.S.C. § 1412(2)(B) (1976).

140. *Id.* at § 1412(3).

141. *Id.* at § 1412(5).

plaints with respect to *any matter* relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child."¹⁴² Written prior notice to the parents or guardian of a child must be provided whenever the state educational agency proposes to initiate a change or refuses to initiate a change in regard to the education of a child protected by the EHCA.¹⁴³ Whenever a complaint is made under the EHCA, the parents or guardian "shall have an opportunity for an impartial due process hearing,"¹⁴⁴ from which an appeal may be taken.¹⁴⁵

After considering this procedural framework for educational placement of handicapped children, the question at hand must again be faced: what process should be required if certain handicapped children are to be totally excluded from the educational process because they are uneducable. Although the EHCA process is satisfactory as far as it goes, a number of problems would be encountered if it were merely carried over and applied in cases of total exclusion from education.

The first problem in merely adopting the EHCA process is that certain safeguards which may be applicable to *placement*, are either inadequate or unnecessary in regard to questions of *uneducability*. An example of this situation involves the delay associated with appealing from a placement decision. The federal regulations require that each state's compliance plan¹⁴⁶ provide that within 45 days after receipt of a request for a hearing by a public agency a final decision be reached,¹⁴⁷ and that if this decision is appealed to the state educational agency, the state agency shall make its final decision within 30 days.¹⁴⁸ An appeal from the state educational agency's decision may be taken to the state or federal courts.¹⁴⁹ If the time delay due to the initial placement proceedings¹⁵⁰ is added, and if no sanction is levied against the state for failure to comply with the regulations cited above,¹⁵¹ it be-

142. *Id.* at § 1415(b)(1)(E) (emphasis added).

143. *Id.* at § 1415(b)(1)(c).

144. *Id.* at § 1415(b)(2).

145. *Id.* at § 1415(e)(1).

146. *Id.* at § 1412(2).

147. 34 C.F.R. § 300.512(a) (1981).

148. *Id.* at § 300.512(b).

149. *Id.* at § 300.511.

150. *Id.* at § 300.504.

151. *See supra* notes 147-50 and accompanying text. There is, of course, the sanction that federal funds may be withdrawn. Note that during these proceedings, the child is to remain in the existing educational setting, unless the parents and public agency agree otherwise. If the proceedings involve the initial placement, and the parents consent, the child must be placed in the regular public school program. 34 C.F.R. § 300.513 (1981).

comes obvious that a great period of time may elapse before an ultimate decision is reached. This may not be avoidable or detrimental in the placement context because the child remains in the educational setting,¹⁵² but where the child is to be excluded from the educational system altogether, additional, explicit safeguards seem warranted.

The second problem involves the economics of due process. Under the EHCA, the parents have a right "to examine all relevant records"¹⁵³ regarding their child's education and obtain copies at a reasonable cost.¹⁵⁴ Additionally, the parents have a conditional right to an independent educational evaluation of their child at public expense if they disagree with the public agency's evaluation.¹⁵⁵ But the EHCA does not provide for the parents' attorney's fees or other costs to be paid even when a placement decision by the state has been challenged successfully.¹⁵⁶

In most instances it is in the interest of the parents to have an attorney or trained lay advocate present even at impartial hearings,¹⁵⁷ and unless there is an advocate available at no cost through legal aid or some other program, this can be a costly option. Moreover, there are many cases in which expert witnesses, such as psychiatrists, psychologists, and therapists, are necessary, or at least helpful, in presenting the parents' case. When dealing with such complex questions as whether a particular child is "educable," this is almost certain to be true. Unless these witnesses can be obtained at no charge, this can be another particularly costly item. Whether these costs must be borne by the state seems to be a matter of legislative prerogative when placement decisions are made under the EHCA, but the same prerogative may not exist when the right to any education at all is at stake.¹⁵⁸ Such is the

152. 20 U.S.C. § 1415(e)(3); 34 C.F.R. § 300.513 (1981).

153. 20 U.S.C. § 1415(b)(1)(A); 34 C.F.R. §§ 300.502, 300.562 (1981).

154. 34 C.F.R. § 300.566(a) (1981).

155. *Id.* at § 300.503. The parent still has a right to an independent evaluation if the hearing results in a finding that the first evaluation was appropriate, but the second evaluation is not to be paid for at public expense. *Id.* at § 300.503(b).

156. The public agency only has an obligation to *inform* the parent of available free or low-cost legal counsel. *Id.* at § 300.506(c).

157. 20 U.S.C. § 1415(b)(2) (1976).

158. *Cf. Boddie v. Connecticut*, 401 U.S. 371 (1971) (state law conditioning judicial decree of divorce upon claimant's ability to pay court fees and cost held unconstitutional as denial of access to judicial proceeding which was the exclusive means of resolving the dispute); *Griffin v. Illinois*, 351 U.S. 12 (1956) (state statute requiring the payment of fees to acquire transcript and court records necessary for full appellate review found violative of equal protection as denial of access to appeal).

See also text accompanying note 97, *supra*.

case when educability is being determined.

A third problem which should warrant different procedural treatment when the issue is educability, rather than placement, is the necessary professional expertise of the hearing officer. The EHCA requires the hearing officer to be impartial,¹⁵⁹ but there are no specific guidelines as to the expertise this person must possess. Perhaps the hearing officer should be viewed no differently than a judge who is called upon to make difficult decisions about technical areas of the law, such as medical malpractice, tax, and patent law, in which he has little expertise. But to do so ignores the reality of the situation. Hearing officers do not serve the same function as a judge. They should be experts in their own right, if only to be able to determine which side's expert witnesses should carry the day in the battle of philosophies and credentials.

A proposal to lessen this problem is to institute a hearing panel to make these decisions.¹⁶⁰ The panel would be composed of an educator, a psychologist or psychiatrist, and a lay person. This composition has the virtue of being able to take into consideration a broader range of values and ideas in determining something so amorphous as educability.

b. Evidence of Uneducability and the Burden of Proof

There is no general rule regarding which party in a particular matter bears the burden of proof. The burden is usually placed on the party who is presumed to have the "peculiar means of knowledge enabling him to prove its falsity if it is false."¹⁶¹ There is a tendency to place the burden on the party desiring change.¹⁶² Applying these rules to the situation in which a school system is asserting that a child is uneducable, it is not clear which party should bear the burden of proof. There would probably be a strong argument, however, that the school would be the party presumed to have facts peculiarly within its knowledge, *i.e.*, access to school records, school psychologists, and special educators. It is also arguable that the presumption should be that all children are educable,¹⁶³ and that the party desiring the change, the school, should bear the burden.

The more difficult question is what type of evidence must be introduced to prove the uneducability of a particular child. Bricker has suggested that the quantum and quality of evidence necessary

159. 34 C.F.R. § 300.507 (1981).

160. *Cf.* 34 C.F.R. § 300.650 (1981) (state advisory panel).

161. 9 WIGMORE, EVIDENCE § 2486, at 275 (3d ed. 1978).

162. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 337, at 785 (2d ed. 1972).

163. *See supra* note 73 and accompanying text. *See also* 34 C.F.R. § 300.503(b) (1981) (burden is on public agency to show evaluation is appropriate).

to prove that a child is uneducable should require showing "the failure of a perfectly valid, perfectly reliable, perfectly efficient program of training" ¹⁶⁴ Of course, this burden of proof would essentially mean that no one could be determined to be uneducable because there is no such thing as perfectly valid, perfectly reliable, perfectly efficient program of training. A more reasonable standard might be that if a generally accepted program of training had been implemented by appropriately trained personnel for a reasonable amount of time, with no resulting progress, the child could be defined as uneducable. ¹⁶⁵ Still, considering the complexity and controversial nature of educational psychology and methodology, it is likely that no consensus could be reached as to what training programs are appropriate, what personnel are appropriately trained, what constitutes a reasonable amount of time, and what indicates a lack of progress. Litigation could be expected on these matters, which are currently the subjects of extensive research and development. ¹⁶⁶

c. *Process for Reevaluation*

Under the EHCA, the states are charged with providing individualized educational programs (IEP) for "each handicapped child" ¹⁶⁷ The regulations require that each handicapped child's IEP be reviewed at least every three years, and more frequently if necessary, or if requested by either the school or the parents. ¹⁶⁸

164. Favell, Risley, Wolfe, Riddle, & Rasmussen, *supra* note 125, at 39; Baumeister, *supra* note 129, at 68.

165. *See supra* notes 130, 135 and accompanying text.

166. *See, e.g.,* Guess, Sailor, Keogh & Baer, *Language Development Programs for Severely Handicapped Children*, 1 *TEACHING THE SEVERELY HANDICAPPED* 301 (1976).

167. 20 U.S.C. § 1412(4).

An IEP is defined in the EHCA as

a written statement for each handicapped child developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

20 U.S.C. § 1401(19) (1976); *see also* 34 C.F.R. § 300.340 (1981).

168. 34 C.F.R. § 300.534 (1981).

Likewise, it would seem clear that a procedure for periodic re-evaluation of the educability of a child should be provided. The need for reevaluation is even more urgent when the issue is educability, than where appropriate programming is the question, because the child who is placed in a program is receiving *some* educational services (even though they may later be determined to be inappropriate), while the uneducable child is being denied educational services altogether.

Given the changes in teaching techniques and methodology that are bound to result from ongoing research,¹⁶⁹ it would seem that frequent reevaluation must be an explicit requirement in the procedural safeguards established for determining whether a child is educable.

V. CONCLUSIONS AND RECOMMENDATIONS

Given the differences of opinion among psychologists, educators, and other experts about the educability of profoundly retarded individuals,¹⁷⁰ and the high cost of providing education to this segment of the population,¹⁷¹ it seems clear that a careful re-examination of the issue of education of the profoundly retarded is necessary at this time. If significant resources are to be directed to this effort to the detriment of other handicapped students,¹⁷² it is possible that a backlash might result from taxpayers who feel that on the basis of a cost-benefit analysis, money for special education is being unwisely spent.¹⁷³

This Article was not intended to decide whether certain individ-

169. See generally Lindsley, *Direct Measurement & Prosthesis of Retarded Children*, 147 J. EDUC. 62-81 (1964).

170. See discussion in text at sections IV(B)(1)(c) and IV(B)(2) *supra*.

171. Bailey, *Wanted: A Rational Search for the Limiting Conditions of Habilitation in the Retarded*, SYMPOSIUM, *supra* note 4, at 50.

172. Judge Waddy in the case of *Mills v. Board of Educ. of the District of Columbia*, 348 F. Supp. 866 (D.D.C. 1972) addressed the defense frequently raised by school districts that they lack sufficient funds to pay for special education. "If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education . . ." *Id.* at 876. The lack of adequate funds under the EHCA to meet all of its mandates (particularly with respect to educating profoundly retarded) has been raised before Congress and in administrative rule-making proceedings, but little has been done to respond to this concern. *Hearings on the Implementation of the Education for All Handicapped Children Act Before the Subcomm. on the Handicapped of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. 59, 60, 69, 78, 419, 485 (1977); *Hearings on the Education for All Handicapped Children Act Before the Subcomm. on Select Education of the House Comm. on Education & Labor*, 95th Cong., 1st Sess. 3, 29, 33, 63, 70, 82-83, 110 (1977).

173. See Bailey, *supra* note 171, at 50.

uals are educable or not; whether the EHCA, as it exists, adequately addresses this conundrum; or whether a change in the existing law is necessary. What was intended was to point out that the process of educating profoundly retarded individuals was not carefully analyzed at any point during congressional debate¹⁷⁴ of the EHCA or in the implementation of the regulations.¹⁷⁵

What should be done at this point is to urge Congress and the Department of Education to reexamine this issue. In reevaluating

174. In the hearings that led up to the passage of the ECHA there were over 200 presentations by witnesses, prepared statements, and other written submissions. Of these only a handful mentioned providing education to the profoundly retarded and multiply-handicapped. See *Hearings on S. 6 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor & Public Welfare*, 93d Cong., 1st & 2d Sess. 30 (1973-1974) (statement of Mrs. Patricia Juliano) (inadequacy of programming for her multi-handicapped children); *id.* at 25 (statement of Mrs. Mildred Ricci) (unavailability of education for her handicapped child); *id.* at 34 (statement of Mrs. Jean Hatt) (unfamiliarity of school districts with severely retarded children); *id.* at 45 (statement of Paul Crawford) (lack of educational opportunity for severely and profoundly retarded); *id.* at 50 (statement of Robert Stearns, Member, Montgomery (Maryland) County Association for Retarded Citizens) (severely and profoundly handicapped can benefit from education and have long been overlooked); *id.* at 313-18 (Testimony of Phillip A. Bellefleur, Headmaster, Pennsylvania School for the Deaf) (complexity of providing education to the multiply handicapped); *id.* at 395 (statement of Mrs. Barbara Cutler, Past President of the Association for Mentally Ill Children in Massachusetts) (recognition of inclusion of very handicapped children in the public school system); *id.* at 443 (statement of Ben E. Hoffmeyer, Executive Director of the American School for the Deaf) (complexity of educating the multiply handicapped); *id.* at 706 (statement of Dr. Oliver L. Hurley, Associate Professor of Special Education, University of Georgia) (exclusion of severely or profoundly handicapped children from public schools); *id.* at 793 (statement of Mrs. Christine Griffith) (exclusion of her autistic child from public education); *id.* at 822 (statement of Landis Stetler, Florida State Administrator, Education for Exceptional Children) (need to provide programs to severely handicapped); *id.* at 1199 (Testimony of John C. Groos, Director of Special Education, Minnesota Department of Education) (resource demands of severely handicapped not adequately met, particularly in rural areas); *id.* at 2151 (Comment by National Schools Boards Association) (some severely disabled children cannot benefit from certain services); *id.* at 1442 (statement of John C. Pittenger, Secretary of Education, Pennsylvania) (profoundly retarded children receiving inadequate education); *id.* at 1453 (statement of Donald M. Carroll, Jr., Deputy Secretary & Commissioner for Basic Education, Pennsylvania, Department of Education) (recognizing gradations in educability of retarded children); *id.* at 1490 (statement of Peter Polloni, Executive Director, Pennsylvania Association for Retarded Citizens) (lack of programs for severely and profoundly retarded); *id.* at 1540 (statement of Ellen Somerton, Coordinator, Right to Education Program) (progress of severely retarded after receiving self-help skills training); *id.* at 1657 (Article submitted by David Kirp, William Buss, and Peter Kuriloff) (exclusion of severely handicapped children from public schools).

175. See 34 C.F.R. §§ 300.1-300.754 (1981).

the EHCA, great attention should be paid to resolving the following issues:

- (1) What is the definition of "education" within the EHCA?
- (2) Are certain children "uneducable" or can "all handicapped children" be educated?
- (3) If certain children can be determined to be "uneducable," what process will be used? What safeguards need to be provided to insure a fair decision?
- (4) If education for profoundly handicapped children is to be provided at public expense, how should the costs of residential placement be allocated?¹⁷⁶

During this reexamination, congressional committees and regional administrative hearing committees should make every effort to obtain public comment.¹⁷⁷ This important ingredient in the legislative process has sometimes been forgotten. For example, a recent survey of the development of special education law concludes that while the initial political work to secure passage of the EHCA was done primarily by handicapped individuals themselves,¹⁷⁸ most recent activity has come from professional organizations directed by university-based professionals receiving federal financial support in the form of grants.¹⁷⁹ With increasing frequency, these self-interested professionals, including educators, psychologists, and lawyers, have begun to operate independently of citizen groups,¹⁸⁰ advocating positions regardless of differences of opinion with the citizen groups. The result has been the following:

With dramatic increases in the influence of both lawyers and applied behavioral psychologists, consumer advocacy groups have been overwhelmed by the rapid changes that are occurring in the development of

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176. In addressing the costs involved in educating profoundly retarded children, attention should be focused on the fact that institutionalizing a person over a lifetime can be far more costly than providing "education" (training for self-help skills) which may initially be expensive, but which is in the long run less expensive because individuals receiving this training will ultimately require less custodial care. This cost-benefit consideration has been recognized in Congressional hearings on the EHCA. See, e.g., *Hearings on S. 6 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor & Public Welfare*, 93d Cong., 1st & 2d Sess. 21 (1973-1974) (statement of Senator Harrison A. Williams, Jr.); *id.* at 1540 (statement of Ellen Somerton, Coordinator, Right to Education Program in Pennsylvania); SENATE COMM. ON LABOR & PUBLIC WELFARE, 94TH CONG., 1ST SESS.; REPORT ON EDUCATION FOR ALL HANDICAPPED CHILDREN ACT 8 (Comm. Print 1975).
 177. Townsend & Mattson, *The Interaction of Law and Special Education*, SYMPOSIUM, *supra* note 4, at 77-78. For a discussion of the means of obtaining consumer input in federal government decision-making, see Rothstein, *Presentation of the Consumer Viewpoint in Federal Administrative Proceedings: What's the Best Alternative?*, 41 U. PITT. L. REV. 565 (1980).
 178. Townsend & Mattson, *supra* note 177, at 77-78.
 179. *Id.* at 79.
 180. *Id.* at 80-81.

public policies regarding handicapped individuals. To cope with the volume of information that is being produced in the field, consumer advocacy groups have often hired special education professionals to direct their organizations. Consequently, consumer groups have been given little information which would allow them to develop a critical perspective on the activities of professionals in the field. Rather than leading the movement, consumer groups have been increasingly swept along by the stream of events impressed by the magnitude of change that seems to be occurring.¹⁸¹

The point is, that while professionals should be included in assessing the adequacy of the EHCA and its regulations, attention should also be given to parents and citizen advocacy groups. Both the professionals and the citizen groups should fully identify the sources of information they use as the basis for their opinions. The availability of many sources of information will illuminate the complexity of the issues; it is then that these complex issues will be dealt with appropriately.

In conclusion, this Article has answered fewer questions than it has raised. The issues have been unsettled and unanalyzed for some time, but with cases like *Levine*, they are being brought to light. The *mentally* handicapped are one of the minorities least able to assert their rights and advocate their position. The *profoundly* handicapped are clearly the least able of the least able. For this reason, great care must be taken in deciding whether education is to be provided at all, and if it is not to be provided, which safeguards of due process must be ensured. Decision makers should consider the viewpoints of all interested parties in making these important policy determinations.

181. *Id.* at 80-81. It is important in evaluating testimony that appropriate consideration be given to whether an opinion is based on personal experience and observation or on objective testing and analysis.