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Safeguarding The Handicapped Child's Right To a Free Appropriate Public Education in Pennsylvania

I. Introduction

In our increasingly technological society getting at least a high school education is almost a necessity for survival. Stripping a child of access to educational opportunity is a life sentence to second-rate citizenship. . .¹

Congress and the courts did not significantly advance the educational rights of handicapped² children³ until the 1970s,⁴ despite the

1. *Lee v. Mason County Bd. of Educ.*, 490 F.2d 458 (5th Cir. 1974).

2. A handicapped child "deviates from the average or normal child (1) in mental characteristics, (2) in sensory abilities, (3) in neuromuscular or physical characteristics, (4) in social or emotional behavior, (5) in communication abilities, or (6) in multiple handicaps to such an extent" that his school program or special educational services must be modified for him to maximize his potential. S.KIRK, *EDUCATING EXCEPTIONAL CHILDREN* 4 (1972) [hereinafter cited as KIRK]. See also U.S.C. § 1401(1) (1976) (definition of handicapped children); PA. STAT. ANN. tit. 24, § 13-1371(1) (Purdon 1962 & Supp. 1983); 34 C.F.R. § 300.5(a) (1982); 22 PA. ADMIN. CODE § 13.1 (Shepard's 1982). While the handicapped child may not derive any benefits if kept isolated, he can learn if provided with "a structured program of education." GILHOOL, *EDUCATION, AN INALIENABLE RIGHT*, 597, 603 (1973) [hereinafter cited as GILHOOL]. (Gilhool was the attorney for the mentally retarded children in *Pennsylvania Association for Retarded Children v. Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972). See *infra* notes 32-35 and accompanying text).

For purposes of this comment, the term "handicapped children" includes the following: (1) mentally handicapped individuals who are educable mentally retarded, trainable mentally retarded, severely and profoundly mentally retarded, and socially and emotionally disturbed; (2) physically handicapped individuals who are physically handicapped, brain damaged, learning disabled, speech or language impaired, visually handicapped, and hearing impaired; and (3) multi-handicapped individuals who have two or more severe handicaps as defined in clauses (1) and (2). 22 PA. ADMIN. CODE § 13.1(i) (Shepard's 1982).

An "educable mentally retarded child" is one who is "so intellectually retarded that it is impossible for [him] to be adequately educated in the regular classroom." Johnson, *The Education of Mentally Retarded Children*, in *EDUCATION OF EXCEPTIONAL CHILDREN AND YOUTH* 201 (W. Cruickshank & G. Johnson ed. 1975) [hereinafter cited as Johnson]. The educable mentally retarded child's I.Q. varies between 55 or 60 and 80. Cruickshank, *The Development of Education for Exceptional Children*, in *EDUCATION OF EXCEPTIONAL CHILDREN AND YOUTH* 4 (W. Cruickshank & G. Johnson ed. 1975). See 22 PA. ADMIN. CODE § 341.1(v)(A) (Shepard's 1979).

A "trainable mentally retarded child" is incapable of learning academic skills and will require continual care and supervision for his entire life. Johnson, *supra* at 200. Nevertheless, a trainable mentally retarded child has the potential for learning self-help skills, adjusting socially in the home and neighborhood, and being useful economically at home, in school, or in a well-supervised workshop. KIRK, *supra* at 164. This child's I.Q. ranges from 30-35 to 50-55. *Id.* See 22 PA. ADMIN. CODE § 341.1(v)(B) (Shepard's 1979).

A "severely and profoundly mentally retarded child" requires constant care and supervi-

federal government's financial assistance for educating handicapped children.⁵ Congress enacted the Education for All Handicapped Children Act of 1975 (EAHCA)⁶ because it found that the special educational needs of the then more than eight million handicapped

sion for his entire life, since he is incapable of living without assistance. KIRK, *supra* at 166. This child's I.Q. falls below 25-30. *Id.* at 164. See 22 PA. ADMIN. CODE § 341.1(v)(C) (Shepard's 1979).

The "socially disturbed child" often is described as lacking moral development, incapable of following accepted norms of behavior, and rejecting authority and discipline. H. LOVE, EDUCATING EXCEPTIONAL CHILDREN IN REGULAR CLASSROOMS 152-53 (1972) [hereinafter cited as LOVE]. See 22 PA. ADMIN. CODE § 341.1(viii) (Shepard's 1981).

An "emotionally disturbed child" may be defined as one who, because of organic and environmental influences, habitually displays: "(a) inability to learn at a rate commensurate with his intellectual, sensory-motor and physical development; (b) inability to establish and maintain adequate social relationships; (c) inability to respond appropriately in day-to-day life situations; and (d) a variety of excessive behavior ranging from hyperactive, impulsive responses to depression and withdrawal." LOVE, *supra* at 153, quoting Haring, *The Emotionally Disturbed*, in BEHAVIORAL RESEARCH ON EXCEPTIONAL CHILDREN (S. Kirk & B. Weiner ed. 1963). See 22 PA. ADMIN. CODE § 341.1(viii) (Shepard's 1981); 34 C.F.R. § 300.5(b)(8) (1982). For definitions of other handicapped children, see 22 PA. ADMIN. CODE § 341.1 (Shepard's 1979).

3. The EAHCA requires that states provide a free appropriate public education to all handicapped children between the ages of five and eighteen. In addition, if states provide an education to nonhandicapped children aged three to five and aged eighteen to twenty-one, then states must educate handicapped individuals of the same age. 20 U.S.C. § 1412(2)(B) (1976); 34 C.F.R. § 300.122 (1982). See also 22 PA. ADMIN. CODE § 13.1 (Shepard's 1983) (definition of school-aged children).

During the 1980-81 school year, 182,542 handicapped children in Pennsylvania received a public education. Of these, 71,687 were speech impaired, 50,179 learning disabled, 42,143 mentally retarded, 10,433 emotionally disturbed, and 724 multi-handicapped. DIVISION OF EDUCATIONAL SERVICES & SPECIAL EDUCATION PROGRAMS, U.S. DEPARTMENT OF EDUCATION, FOURTH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF PUBLIC LAW 94-142: THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT 101 (1982) [hereinafter cited as DEPARTMENT OF EDUCATION REPORT].

4. The rights of handicapped children were greatly expanded in *Pennsylvania Association for Retarded Children (PARC) v. Pennsylvania*, 343 F. Supp. 279 (E.D.Pa. 1972), *Mills v. Board of Education*, 348 F. Supp. 866 (D.D.C. 1972), and *Lebanks v. Spears*, 60 F.R.D. 135 (E.D.La. 1973). For further discussion of *PARC* and *Mills*, see L. LIPPMAN & I. GOLDBERG, RIGHT TO EDUCATION (1973); Alschuler, *Education for the Handicapped*, 7 J.L. & EDUC. 523 (1978); Haggerty & Sacks, *Education of the Handicapped: Towards a Definition of an Appropriate Education*, 50 TEMP.L.Q. 961 (1977); Herr, *Retarded Children and the Law: Enforcing the Constitutional Rights of the Mentally Retarded*, 23 SYRACUSE L.REV. 995 (1972); Schwartz, *The Education of Handicapped Children: Emerging Legal Doctrines*, 7 CLEARINGHOUSE REV. 125 (1973); Comment, *The Exceptional Child's Right to an Approved Private School Program in Pennsylvania: Practice and Problems*, 84 DICK.L.REV. 417 (1980) [hereinafter cited as DICK.L.REV.]; Comment, *The Handicapped Child Has a Right to an Appropriate Education*, 55 NEB. L. REV. 637 (1976) [hereinafter cited as NEB. L. REV.]; Comment, *Toward a Legal Theory of the Right to Education of the Mentally Retarded*, 34 OHIO ST.L.J. 554 (1973); Comment, *Educational Equality for the Mentally Retarded*, 23 SYRACUSE L.REV. 1141 (1972); Comment, *The Right to Education: A Constitutional Analysis*, 44 U.CIN.L.REV. 796 (1975).

5. In 1966, Congress added Title VI to the Elementary and Secondary Education Act. Pub. L. No. 89-750, § 161, 80 Stat. 1204, codified at 20 U.S.C. §§ 1201-1213 (1966). Title VI established the Federal Bureau of Education for the Handicapped and granted federal funds to states for expanding special education programs. After Congress repealed Title VI, the Education of the Handicapped Act was enacted in 1970. Pub. L. No. 91-230, §§ 601-662, 84 Stat. 175-88 (1970). This act increased state funding to improve programs for the handicapped.

6. 20 U.S.C. §§ 1400-1461 (1976 and Supp. V 1981). Regulations published pursuant to the EAHCA are found in 34 C.F.R. §§ 300.1-300.754 (1982) (formerly found in 45 C.F.R. §§ 121a.1-754).

children were not being met.⁷

The intent of the EAHCA was to help states educate their handicapped children by providing federal funds.⁸ States that accept such funding⁹ must create a plan that "assures all handicapped children the right to a free appropriate public education."¹⁰ In addition, these states must establish and maintain procedures that guarantee due process safeguards¹¹ to the handicapped child and to his parents.¹² These protections include the right to receive written notice before a change in the child's educational placement;¹³ to present complaints

7. 20 U.S.C. § 1400(b)(1),(2) (Supp. V 1981).

8. *Id.* at § 1400(c). See S. REP. NO. 168, 94th Cong., 1st Sess. 7-9, reprinted in [1971] U.S. CODE CONG. & AD. NEWS 1431-33 [hereinafter cited as SENATE REPORT]. See generally Note, *The Education of All Handicapped Children Act of 1975*, 10 U. MICH. J. L. REF. 110, 118-28 (1976) [hereinafter cited as U. MICH. J. L. REF.].

9. The EAHCA does not compel states to accept federal funds. *New Mexico Ass'n for Retarded Citizens v. New Mexico*, 495 F. Supp. 391, 394 (D.N.M. 1980), *rev'd*, 678 F.2d 847 (10th Cir. 1982).

10. 20 U.S.C. § 1412(1)(2) (1976). The EAHCA defines "free appropriate public education" as "special education and related services. . . provided at public expense and under public supervision and direction. . . ." 20 U.S.C. § 1401(18) (1976). See 34 C.F.R. § 300.4 (1982). "Special education" under the EAHCA "means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions." 20 U.S.C. § 1401(16) (1976). See 34 C.F.R. § 300.14 (1982). "Related services" include "transportation, and such developmental, corrective, and other supportive services. . . 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). See 34 C.F.R. § 300.13 (1982). See also Parks v. Pavkovic, 3 EHLR (CRR) 553:610 (N.D.Ill. 1982) (definition of "free education"); R. MARTIN, EDUCATING HANDICAPPED CHILDREN 57 (1979) (interpretation of "appropriate").

In *Hendrick Hudson Central School Dist. Bd. of Educ. v. Rowley*, 102 S. Ct. 3034 (1982), the United States Supreme Court addressed the definition of a free appropriate public education under the EAHCA. The case dealt with a deaf girl who was furnished with a special hearing aid for classroom use. Her parents requested that she be provided with a sign-language interpreter in all of her classes. After the school administrators denied their request, the parents brought an action against the administrators for violating the EAHCA's provisions guaranteeing a free appropriate public education to all handicapped children.

Reversing the lower courts, the Supreme Court did not find a denial of a free appropriate public education. Writing for the majority, Justice Rehnquist stated that the school had satisfied the EAHCA's requirements by enabling the child to derive some educational benefit from her instruction. Rehnquist concluded that since the child performed better than the average child in her class, she must be receiving an adequate education. N.C. GEN. STAT. § 115C-106(a) (Supp. 1981). ("every child [entitled to] a fair and full opportunity to reach his full potential. . .").

11. See generally 20 U.S.C. § 1415 (1976); 34 C.F.R. §§ 300.500-589 (1982).

12. For purposes of this comment, the word "parents" includes guardian. See 22 PA. ADMIN. CODE § 13.1 (Shepard's 1983).

13. 20 U.S.C. § 1415(b)(1)(c) (1976). See 34 C.F.R. § 300.504(a) (1982); 22 PA. ADMIN. CODE § 13.31(d) (Shepard's 1983); *Id.* at § 13.62(2) (Shepard's 1981). Parents of a handicapped child receive prior written notice whenever the school "proposes to initiate or change, or refuses to initiate or change, the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child." 20 U.S.C. § 1415(b)(1)(c) (1976).

The United States Court of Appeals for the Second Circuit has defined a change in educational placement as "any significant alteration in the programs, activities, or services provided by [schools] to handicapped children. . . , including changes in the degree to which handicapped children are integrated with nonhandicapped children in these programs and ac-

regarding the appropriateness of placement;¹⁴ to have an impartial hearing¹⁵ if the placement is in dispute;¹⁶ to be represented by counsel at the hearing;¹⁷ and to appeal the decision made in the hearing and bring a civil action.¹⁸

This comment examines how states comply with the due process procedures prescribed by the EAHCA and applicable federal regulations when school officials attempt to change the educational placement of handicapped children. By comparing Pennsylvania's

activities. . . ." *Concerned Parents v. New York City Bd. of Educ.*, 629 F.2d 751, 752-53 (2d Cir. 1980). Several courts have interpreted a change in educational placement to include expulsions from school. *See Kaelin v. Grubbs*, 682 F.2d 595 (6th Cir. 1982); *S-1 v. Turlington*, 635 F.2d 342 (5th Cir. 1981), *cert. denied*, 454 U.S. 1030 (1981); *Doe v. Koger*, 480 F. Supp. 225 (N.D. Ind. 1979); *Sherry v. New York State Educ. Dep't*, 497 F. Supp. 1328 (W.D.N.Y. 1979); *Stuart v. Nappi*, 443 F. Supp. 1235 (D.Conn. 1978); *Southeast Warren Community School Dist. v. Dep't of Public Instruction*, 285 N.W.2d 173 (Iowa 1979). *Bd. of Educ. of Peoria v. Illinois State Bd. of Educ.*, 531 F. Supp. 148 (C.D.Ill. 1982) (one week suspension did not constitute a change in educational placement).

14. The complaint may concern any aspect of the child's identification, evaluation, or educational placement. 20 U.S.C. § 1415(b)(1)(E) (1976). *See infra* note 66.

15. The EAHCA provides parents with the opportunity for an impartial due process hearing. To ensure the hearing officer's impartiality, the EAHCA stipulates that hearings may not be conducted by employees of the school involved in the child's education or care. 20 U.S.C. § 1415(b)(2). *See* 34 C.F.R. § 300.507 (1982).

16. 20 U.S.C. § 1415(b)(2) (1976). *See* 34 C.F.R. §§300.506-510 (1982).

17. 20 U.S.C. § 1415(d) (1976). *See* 34 C.F.R. §300.508(a)(1) (1982).

18. 20 U.S.C. § 1415(e) (1976); 34 C.F.R. § 300.511 (1982). The EAHCA mandates that administrative hearings be available to resolve problems involving the handicapped child's education. Each state may adopt either a hearing procedure conducted by the local school district with an appeal to the state's department of education or a procedure conducted entirely by that department. 20 U.S.C. § 1415(b)(2) (1976). Pennsylvania has adopted the two-tiered administrative hearing procedure. *See* 22 PA. ADMIN. CODE § 13.32 (Shepard's 1983).

Aggrieved parties may appeal these administrative decisions by commencing a civil action in state or federal court. Under the EAHCA, the court receives the records from the administrative proceedings, hears additional evidence if a party makes a request, and renders a decision based on the preponderance of the evidence. 20 U.S.C. § 1415(e)(2) (1976). The court is authorized to grant "appropriate relief." *Id.*

The scope of this phrase, however, is unclear. *Compare Quackenbush v. Johnson City School Dist.*, 3 EHLR (CRR) 553: 586 [1981-1982 DEC.] (N.D.N.Y. 1982); *Cluff v Johnson City School Dist.*, 3 EHLR (CRR) 553: 598 [1981-82 DEC.] (N.D.N.Y. 1982), (the EAHCA does not provide exclusive injunctive remedy, and therefore, parents of handicapped children were able to invoke rights granted by the EAHCA to recover compensatory and punitive damages in actions brought under the Civil Rights Act, 42 U.S.C. § 1983) *with* *Meiner v. Missouri*, 673 F.2d 969 (8th Cir. 1982); *Blomster v. Massachusetts Dep't of Educ.*, 3 EHLR (CRR) 553:627 [1981-82 DEC.] (D. Mass. 1982); *Dep't of Educ. v. Dorr*, 3 EHLR (CRR) 553:529 [1981-82 DEC.] (D.N.H. 1982); *Gregg B. v. Bd. of Educ. of Lawrence School Dist.*, 3 EHLR (CRR) 553:632 [1981-82 DEC.] (E.D.N.Y. 1982) (general damages may not be obtained under the EAHCA, but parents may recover out-of-pocket expenses incurred because child was denied appropriate education) *and* *Anderson v. Thompson*, 658 F.2d 1205, 1213-14 (7th Cir. 1981); *Ruth Anne W. v. Alvin Independent School dist.*, 3 EHLR (CRR) 553:565 [1981-82 DEC.] (S.D. Tex. 1982); *Powell v. Defore*, 3 EHLR (CRR) 553-293 [1981-82 DEC.] (M.D.Ca. 1982); *Colin K. v Schmidt*, 3 EHLR (CRR) 553:507 [1981-82 DEC.] (D.R.I. 1981); *Jaworski v. Rhode Island Bd. of Regents*, 3 EHLR (CRR) 553:525 [1981-82 DEC.] (D.R.I. 1981) (by providing comprehensive remedies under the EAHCA, Congress intended to preclude actions under the Civil Rights Act; however, an exception permits action for damages when the school district endangers a child's health by failing to provide an appropriate program or intentionally fails to afford a handicapped child due process safeguards enumerated in the EAHCA).

provisions¹⁹ with those of other states, this comment addresses areas needing clarification, and recommends statutory and regulatory revisions of Pennsylvania's scheme for complying with the EAHCA. Finally, this comment proposes that Pennsylvania adopt additional rules and regulations to ensure that handicapped children receive a free appropriate public education.²⁰

II. Background

A. The Status of Handicapped Children Before 1972

Prior to 1972, handicapped children were excluded from the educational system because states lacked the understanding that such children could benefit from education or training.²¹ While special education programs began to appear in the early nineteenth century,²² early case law represents a primitive attitude toward the handicapped and evidences society's ignorance of the handicapped's need for education.²³

19. See Penna. Public School Code of 1949, 24 PA. STAT. ANN. tit. 24, §§ 13-1371 to 13-1382 (Purdon 1962 & Supp. 1982) (statutory provisions pertaining to handicapped children); 22 PA. ADMIN. CODE Ch. 13 and 341 (special education regulations).

20. See *infra* notes 212-43 and accompanying text.

21. See E. LEVINE & E. WEXLER, PL 94-142 AN ACT OF CONGRESS 12-13 (1981) [hereinafter cited as LEVINE]; LOVE, *supra* note 2, at 22; Burgdorf & Burgdorf, *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a "Suspect Class" under the Equal Protection Clause*, 15 SANTA CLARA L.REV. 855, 871-72 (1975) [hereinafter cited as Burgdorf]; NEB.L.REV., *supra* note 4, at 641-42. Educators in early America observed that some handicapped children made little progress with the "three R's." Instead of analyzing the curriculum, educators believed these children were incapable of profiting from education and labeled them "uneducable." Hence, the children's exclusion from school. Burgdorf, *supra* at 871. See L. FISCHER & D. SCHIMMEL, *THE RIGHTS OF STUDENTS AND TEACHERS* 389-90 (1982) [hereinafter cited as FISCHER]; LOVE, *supra* at 22; NEB.L.REV., *supra* at 642.

22. Pennsylvania Ass'n for Retarded Children (PARC) v Pennsylvania, 343 F. Supp. 279, 294 (3d Cir. 1972) (1948); LEVINE, *supra* note 21, at 12 (the 1820s); Burgdorf, *supra* note 21 at 872-73 (the 1860s). Massachusetts was the most progressive state, opening the first school for mentally retarded children in 1850. The first classes for the mentally retarded in public schools were established in Providence, Rhode Island, in 1896, and in Springfield, Massachusetts, in 1897. Nevertheless, handicapped children were relegated to sitting in regular classrooms where they received inadequate instruction and experienced much frustration. LOVE, *supra* note 2, at 21. Massachusetts required school districts to provide special classes for the mentally retarded once there were ten or more children. LEVINE, *supra* note 21, at 13.

23. In *Watson v. City of Cambridge*, 157 Mass. 561, 32 N.E. 864 (1893), the Massachusetts Supreme Judicial Court upheld a school committee's decision to exclude a student from school "because he was too weak-minded to derive profit from instruction." *Id.* The Wisconsin Supreme Court in *Beattie v. Bd. of Educ. of Antigo*, 169 Wis. 231, 172 N.W. 153 (1919), was faced with the exclusion of a student who had a form of paralysis resulting in a "peculiarly high, rasping, and disturbing tone of voice, uncontrollable facial contortions, and uncontrollable flow of saliva." The school excluded the child because his physical appearance depressed and nauseated his peers and teachers.

In *Buck v. Bell*, 274 U.S. 200,207 (1926), upholding Virginia's compulsory sterilization law, Justice Holmes wrote:

We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate

Concurrently, the federal government provided little financial assistance for programs to educate handicapped children.²⁴ In 1966, however, Congress added Title VI to the Elementary and Secondary Education Act.²⁵ Title VI authorized funding to the states for the overall improvement of the education of handicapped students. Congress replaced Title VI in 1970 with the Education of the Handicapped Act,²⁶ which increased such funding.

B. The Expansion of the Educational Rights of Handicapped Children in Pennsylvania Association for Retarded (PARC) Children v. Pennsylvania and Mills v. Board of Education in 1972

Title VI of Elementary and Secondary Education Act²⁷ and the Education of the Handicapped Act²⁸ provided federal funding to the states for developing better educational programs for handicapped children.²⁹ Congress' failure to specify how these funds were to be used, however, had undesirable In addition to pointing out these inadequacies in the law, the *PARC*³⁰ and *Mills*³¹ cases expanded the educational rights of handicapped children.

1. *Pennsylvania Association for Retarded Children v. Pennsylvania* —*PARC* was a class action suit brought on behalf of mentally retarded persons being deprived of a public education because they had been classified as "uneducable" or "untrainable."³² Following the testimony of numerous experts, the United States District Court for the Eastern District of Pennsylvania found that every mentally retarded person had the potential to benefit from a program of education and training.³³ The court held for the plaintiffs and ap-

offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. . . . Three generations of imbeciles are enough.

24. SENATE REPORT, *supra* note 8, at 1429; LEVINE, *supra* note 21, at 13; LOVE, *supra* note 2, at 25-26. Education was, and still is, essentially a state function. See Note, *Enforcing the Right to an "Appropriate" Education: The Education for All Handicapped Children Act of 1975*, 92 HARV.L.REV. 1103, 1109 (1979) [hereinafter cited as HARV.L.REV.].

25. Act of Nov. 3, 1966, Pub. L. No. 89-750, § 161, 80 Stat. 1204, codified at 20 U.S.C. §§ 1201-1213 (1966).

26. Act of Apr. 13, 1970, Pub. L. No. 91-230, §§ 601-662, 84 Stat. 175-88 (1970).

27. See *supra* note 25 and accompanying text.

28. See *supra* note 26 and accompanying text.

29. See, e.g., *McMillan v. Bd. of Educ.*, 430 F.2d 1145, 1149 (2d Cir. 1970), (declaring that if a state decided to limit funding of public education for the handicapped at the elementary school level, there was no denial of equal protection to some handicapped children since all students were prevented from attending classes).

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

31. 348 F. Supp. 866 (D.D.C. 1972).

32. Representing the class as plaintiffs were the Pennsylvania Association for Retarded Children and the parents of thirteen mentally retarded children. 343 F. Supp. at 281.

33. *Id.* at 307. A codification of the statement in *PARC* regarding a mentally retarded child's potential appears in a North Carolina statute that expands the statement to include all handicapped children. The statute provides that: "[t]he General Assembly finds that all chil-

proved a consent decree guaranteeing mentally retarded children access to a free public education.³⁴ Of greater significance than the holding itself is the decree's provision entitling mentally retarded children to due process safeguards.³⁵

2. *Mills v. Board of Education*—*Mills v. Board of Education*³⁶ expanded the *PARC* holding by extending the right of a free public education to *all* handicapped children, including mentally retarded, emotionally disturbed, physically handicapped, hyperactive, and other children with behavioral problems.³⁷ Additionally, the *Mills* court found that the District of Columbia Board of Education had violated the due process rights of handicapped children by denying them a publicly supported education.³⁸

In defense, the school officials argue that they lacked sufficient funds to educate handicapped children at a level commensurate with their need. Moreover, the officials contended that diverting additional funds to special education would be inequitable to nonhandicapped students.³⁹ Nonetheless, the court ordered that if available funds

dren with special needs are capable of benefitting from appropriate programs of special education and training and that they have the ability to be educated and trained and to learn and develop. Accordingly, the State has a duty to provide them with a free appropriate public education." N.C. GEN. STAT. § 115c-107 (Supp. 1981).

34. 343 F. Supp. at 307.

35. *Id.* at 303-6. The due process protections include: (1) notice to parents describing the proposed change in the child's educational placement and the reasons for the change; (2) the child's right to an independent medical, psychological, and educational evaluation; (3) the parents' right to be represented by counsel at a hearing; and (4) the parents' right to compel witnesses to attend the hearing to question them.

PARC's consent agreement also stated that mentally retarded children must be placed in a regular public school class before being relegated to a special public school class or any other type of education and training program. *Id.* at 307. This procedure is known as mainstreaming, a practice used to maximize contact between handicapped and nonhandicapped children. S. HASAZI, P. RICE & R. YORK, *MAINSTREAMING: MERGING REGULAR AND SPECIAL EDUCATION* 6 (1979). For a discussion of the merits of mainstreaming, see NEB.L.REV., *supra* note 4, at 672-77 (student commentator concludes that handicapped children learn best when placed in regular classrooms with special education teachers who are available when necessary).

The EAHCA's mainstreaming provision is found in 20 U.S.C. § 1412(5)(B) (1976). To comply, states must establish procedures that enable handicapped children to be educated with nonhandicapped children in the least restrictive environment. Handicapped children should be placed in special classes or separate schools only when education in regular classes with the use of supplementary aids cannot be achieved satisfactorily. See 34 C.F.R. § 300.132 (1982).

During the 1979-1980 school year, 2,799,012 handicapped children in the United States attended regular classes, 1,052,322 students were in separate classes, 212,021 attended separate schools, and 70,893 were placed in other environments. In Pennsylvania, 63,269 students received their instruction in regular classes, 64,524 children were placed in separate classes, 18,964 children were educated in separate schools, and 2836 children were placed in other environments. DEPARTMENT OF EDUCATION REPORT, *supra* note 3, at 124.

36. 348 F. Supp. 866 (D.D.C. 1972).

37. *Id.* at 868.

38. *Id.* at 875. In contrast, *PARC* never reached the plaintiffs' due process claim, since the court disposed of the case with the consent decree. The *PARC* court, however, did express satisfaction with the plaintiffs' evidence that raised "serious doubts (and hence a colorable claim) as to the existence of a rational basis" for the state's exclusion of mentally retarded children from school. 343 F. Supp. at 297.

39. 348 F. Supp. at 875.

were insufficient to finance all the educational programs, then the "funds must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom."⁴⁰

III. The Education for All Handicapped Children Act of 1975

A. *Legislative Purpose*

In response to the landmark decisions in *PARC*⁴¹ and *Mills*⁴² Congress enacted the EAHCA.⁴³ The primary purpose was to grant financial aid to the states to enable them to provide handicapped children with a free appropriate public education.⁴⁴ Also of importance was Congress' desire that parents need not resort to litigation to remedy their child's educational deprivation.⁴⁵

B. *Provisions of the EAHCA*

1. *Overview.*—While the EAHCA does not require the states to accept federal funding,⁴⁶ it does demand compliance with certain specific requirements.⁴⁷ Among the provisions the state must effectuate are: (1) a policy guaranteeing all handicapped children the right to a free appropriate public education;⁴⁸ (2) a plan detailing how the state will accomplish this goal and how the state will identify, locate, and evaluate⁴⁹ handicapped children to determine their needs;⁵⁰ and (3) the delegation of responsibility to the state educational agency⁵¹ to supervise the special education programs.⁵² Furthermore, the

40. *Id.* at 896.

41. 343 F. Supp. at 279.

42. 348 F. Supp. at 866.

43. See *supra* note 6. See Fanning & Schrant, *The Education of Handicapped Children: Administrative Remedies*, 10 COLO. LAW. 1878, 1885 (1981) [hereinafter cited as COLO. LAW.]. See generally SENATE REPORT, *supra* note 8; Stafford, *Education for the Handicapped: A Senator's Perspective*, 3 VT.L.REV. 71 (1978); HARV.L.REV., *supra* note 24; U.MICH.J.L.REF., *supra* note 8.

44. See *supra* notes 6-8 and accompanying text. For a discussion of free appropriate public education, see *supra* note 10.

45. See SENATE REPORT, *supra* note 8, at 1433.

46. See *supra* note 9 and accompanying text.

47. See generally 20 U.S.C. §§ 1412, 1413 (1976).

48. *Id.* at § 1412(1). See SENATE REPORT, *supra* note 8, at 1440.

49. The tests, evaluation materials, and procedures used to evaluate the child and determine his placement may not be racially or culturally discriminatory. 20 U.S.C. § 1412(5)(C) (1976); 34 C.F.R. §§ 300.133, .530-.532 (1982). See SENATE REPORT, *supra* note 8, at 1453; HARV.L.REV., *supra* note 24, at 1114-18 (analysis of past evaluation controversies that stemmed from biased testing procedures and disturbing prediction that discriminatory tests will still be used).

50. 20 U.S.C. § 1412(2)(A) (1976); 34 C.F.R. §§ 300.123-.126 (1982).

51. Under the EAHCA, "state educational agency" means either the state board of education or an officer who is primarily responsible for supervising the state's public elementary and secondary schools. 20 U.S.C. § 1401(7) (1976).

52. *Id.* at § 1413(a)(12). Each state must establish an advisory panel on the education

EAHCA obligates each local education agency⁵³ or intermediate educational unit⁵⁴ to develop an individualized education plan (IEP) for every handicapped child.⁵⁵ The IEP is a written statement regarding the child's present educational level and annual goals and the teacher's short and long-term objectives.⁵⁶ To ensure the accuracy of the handicapped child's educational placement, the IEP is prepared and reviewed annually,⁵⁷ following a multidisciplinary team's⁵⁸ analysis of the child's needs.

2. *State and Local Compliance with Procedural Safeguards Enumerated in the EAHCA and Federal Regulations.*—As discussed above, each state seeking federal funds under the EAHCA must develop a detailed plan to indicate how the state will guarantee every handicapped child an appropriate education.⁵⁹ The plan must confirm the state's adoption of procedural safeguards enumerated in the EAHCA and in the federal regulations.⁶⁰ These safeguards serve to check potential arbitrary and capricious behavior by school officials and to minimize the risk of misdiagnosis and educational misplacement.⁶¹ The EAHCA and regulations, therefore, give parents the following rights: (1) To examine all records pertaining to the evaluation and placement of the child;⁶² (2) to obtain an independent educational evaluation of their child at public expense;⁶³ (3) to

of handicapped children. The panel must be composed of individuals concerned with the education of these children. Most desirable would be a panel that strikes a balance between professionals and parents, advocates, or handicapped individuals. 34 C.F.R. § 300.651 comment (1982). The panel advises the state educational agency about unmet educational needs of the state's handicapped children and comments publicly on the state's annual program plan and proposed rules and regulations concerning the education of handicapped children. *Id.* at § 300.652.

53. "Local educational agency" refers to a "public board of education or other public authority legally constituted within a state for either administrative control or direction of . . . public elementary or secondary schools. . . ." 20 U.S.C. § 1401(8) (1976).

54. 20 U.S.C. § 1414(a)(5) (1976); 34 C.F.R. § 300.235 (1982). "Intermediate educational unit" refers to a public authority, other than a local educational agency, which is under the general supervision of a state educational agency, which is established by state law for the purpose of providing free public education on a regional basis, and which provides special education and related services for handicapped children within that state. 20 U.S.C. § 1401(22) (1976).

55. 20 U.S.C. § 1414(a)(5) (1976); 34 C.F.R. § 300.235 (1982).

56. 20 U.S.C. § 1401(19) (1976); 34 C.F.R. §§ 300.340, 300.346 (1982).

57. 34 C.F.R. § 300.343(d) (1982).

58. The multidisciplinary team includes a qualified employee of the board of education, the child's teacher and parents, and, whenever appropriate, the child. 20 U.S.C. § 1401(19) (1976). See 22 PA. ADMIN. CODE § 341.16(a) (Shepard's 1979).

59. 20 U.S.C. §§ 1412(2), 1413 (1976); 34 C.F.R. §§ 300.110, .111, .121-.151 (1982).

60. 20 U.S.C. §§ 1412(5), 1415 (1976) (section 1415 details the safeguards); 34 C.F.R. §§ 300.500-.589 (1982).

61. As a result of misdiagnosis, nonhandicapped children erroneously have been placed in special education classes. FISCHER, *supra* note 21, at 390. For a general discussion of the dangers of misclassification and incorrect labeling of handicapped children, see DICK, L. REV., *supra* note 4, at 435-37.

62. 20 U.S.C. § 1415(b)(1)(A) (1976); 34 C.F.R. § 300.502 (1982).

63. 20 U.S.C. § 1415(b)(1)(A) (1976); 34 C.F.R. § 300.503(a)(1) (1982). For a discus-

receive written notice⁶⁴ before a change in the child's educational placement;⁶⁵ (4) to present complaints about the appropriateness of the child's educational placement;⁶⁶ (5) to have an impartial⁶⁷ due process hearing when the child's educational placement is in dispute;⁶⁸ (6) to be represented by counsel at the hearing;⁶⁹ and (7) to appeal the decision made in the hearing and bring a civil action.⁷⁰

In addition, the EAHCA entitles handicapped children to due process protections in cases of exclusion from school.⁷¹ Moreover, the contours of due process "var[y] according to specific factual contexts. . . , [t]he nature of the alleged rights involved, the nature of the proceeding, and the possible burden on that proceeding."⁷² Consequently, the longer the anticipated exclusion, the more rigorous are

sion of the confusion surrounding the "free" evaluation, see *infra* notes 138-48 and accompanying text.

64. See *supra* note 13 and accompanying text.

65. *Id.*

66. The EAHCA provides that parents have the right to present complaints concerning any matter related to the identification, evaluation, or educational placement of their child or to the provision of a free appropriate public education. 20 U.S.C. § 1415(b)(1)(E) (1976). One writer suggests that the EAHCA's failure to limit the persons who may complain to the Commissioner or state agency presumably permits anyone to make a report. Krass, *The Right to Public Education for Handicapped Children: A Primer for the New Advocate*, 1976 U. ILL. L.F. 1016, 1072. Krass' interpretation furthers the EAHCA's purpose of providing handicapped children with an appropriate education. To read into the omission that only parents can present complaints would hinder the EAHCA's aim.

Knowing that interested parties have the right to present complaints might cause a school to comply with the law. A "watchdog" provision could provide a similar scare tactic. See CONN. GEN. STAT. ANN. § 10-76b(d) (West Supp. 1982); LA. REV. STAT. ANN. § 1944(B)(8) (West 1982); ME. REV. STAT. ANN. tit. 20A, § 7205 (1982); N.Y. EDUC. LAW § 4403(4) (McKinney 1981) (state education department has the power and the duty to make periodic inspections of special education programs and facilities and to report on whether the services are adequate).

67. See *supra* note 15.

68. See *supra* note 16.

69. See *supra* note 17.

70. See *supra* note 18.

71. Exclusion might constitute a change in placement entitling the student to the procedural safeguards guaranteed him under the EAHCA. See 20 U.S.C. § 1415(b)(1)(C) (1976); 34 C.F.R. § 300.504(a) (1982); 22 PA. ADMIN. CODE § 13.31(d) (Shepard's 1983). The term "exclusion" encompasses both expulsion and suspension. Generally, expulsion means a long-term removal of a student from school. SPECIAL EDUCATION PROGRAMS, DIVISION OF EDUCATIONAL SERVICES, U.S. DEPARTMENT OF EDUCATION, SUSPENSION AND EXPULSION IN SPECIAL EDUCATION: A TECHNICAL ASSISTANCE GUIDE 1 (1982) (prepared by John D. Cressey) [hereinafter cited as TECHNICAL ASSISTANCE GUIDE]. Throughout most of Pennsylvania, expulsion is an exclusion from school in excess of ten days. 22 PA. ADMIN. CODE § 12.6(b)(3) (Shepard's 1983). A "temporary dismissal" from school constitutes suspension. TECHNICAL ASSISTANCE GUIDE, *supra*, at 1. A "temporary suspension" is a removal from school for up to three school days and a full suspension is an exclusion for up to ten school days. 22 PA. ADMIN. CODE §§ 12.6(b)(1),(2) (Shepard's 1983). The Philadelphia school district differs from Pennsylvania's other 500 school districts because a dismissal from school for more than five days is considered an expulsion. This difference resulted from the decision in *Jones v. Gillespie*, 60 Pa. D. & C.2d 576 (1973).

72. *Hannah v. Larche*, 363 U.S. 420, 442 (1960). See *Pervis v. LaMarque Independent School Dist.*, 466 F.2d 1054, 1057 (5th Cir. 1972); *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 158-59 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961); *Baker v. Hardway*, 283 F. Supp. 228, 237 (S.D.W.Va. 1968), *cert. denied*, 394 U.S. 905 (1969).

the requirements of due process.⁷³

When a handicapped student is disciplined,⁷⁴ the outlines of due process becomes elusive.⁷⁵ The nature of handicapping conditions presents difficulties for school officials. Before a handicapped student may be excluded from school, the school disciplinarian must assure himself that the misconduct is unrelated to the handicap.⁷⁶ Otherwise, discipline might result in punishing a handicapped child for his disability.⁷⁷ Wrongful discipline defeats the purpose of an educational program designed to remedy the child's disability.

To minimize this possibility and to guarantee due process, the EAHCA and the federal regulations afford procedural safeguards to handicapped children and concomitant rights to their parents. If parents are ignorant of these protections, then the rights guaranteed by the EAHCA are of dubious utility.

73. See FISCHER, *supra* note 21, at 326.

74. The disciplinary authority of school officials is well established. See 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 452-53 (G. Sharswood ed. 1959) for the common law position on *in loco parentis*, a doctrine that enables a parent to "delegate part of his parental authority. . . to the tutor or school master of his child." *Accord*, *Guerrieri v. Tyson*, 147 Pa. 239, 24 A.2d 468 (1942). The United States Supreme Court frequently has stressed the importance of "affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 507 (1969). In Pennsylvania, the legislature has expressly granted parental authority to school officials in the conduct of their duties. PA. STAT. ANN. tit. 24, § 13-1317 (Purdon 1962 & Supp. 1982)

75. When a nonhandicapped student is suspended from school, he is awarded the minimum due process safeguards set forth by the Supreme Court in *Goss v. Lopez*, 419 U.S. 565 (1975). In *Goss*, nine high school students were suspended for ten days because of their disruptive and disobedient conduct. The students were not given a hearing prior to their exclusion from school. In addition to holding unconstitutional the Ohio statute allowing this absence of due process, the Court detailed the minimum constitutional requirements of due process for a student with respect to a suspension from one to ten days.

Before a student may be suspended, a school official must notify him of the charges against him. If the student denies the charges, the official must inform him of evidence that implicates him. Finally, the student must be permitted to explain his actions.

76. In *Kaelin v. Grubbs*, 682 F.2d 595 (6th Cir. 1982), a handicapped child was suspended from school for his misbehavior, without a school official questioning the relationship between the child's misconduct and handicap. The school later expelled the child and denied his request for a due process hearing. The United States Court of Appeals for the Sixth Circuit affirmed the district court's holding that the child's expulsion constituted a change in placement and that the school's failure to provide the child with a hearing violated the EAHCA. The question whether there was a relationship between the child's handicap and behavior was never answered by the *Kaelin* court. Nevertheless, the case illustrates how a rash disciplinarian could harm a handicapped child. See also *S-1 v. Turlington*, 635 F.2d 342 (5th Cir. 1981), *cert. denied*, 454 U.S. 1030 (1981) (nine mentally retarded high school students expelled for masturbation, use of obscenity, willful defiance of authority, and destruction of property without a school official first determining that there was no relationship between their handicap and their behavior). See also *Doe v. Koger*, 480 F. Supp. 225, 228 (N.D.Ind. 1979); *Stuart v. Nappi*, 443 F. Supp. 1235, 1243 (D.Conn. 1978). For a discussion of school officials' difficulties with determining whether there is a cause and effect relationship between the student's handicap and behavior, see TECHNICAL ASSISTANCE GUIDE, *supra* note 80, at 11.

77. 35 Op. Pa. Att'y Gen. 83, 92 (1973). See Comment, *The Rights of Handicapped Students in Disciplinary Proceedings By Public School Authorities*, 53 U.COLO.L.REV. 367, 392 (1982) [hereinafter cited as U.COLO.L.REV.].

IV. Guarantees to Ensure a Handicapped Child's Right to a Free Appropriate Public Education

A. Parental Notice of the Provisions of the EAHCA and the Federal Regulations

As a result of *PARC*⁷⁸ and the enactment of the EAHCA in 1975, the educational rights of handicapped children in Pennsylvania have greatly expanded. These advancements, however, did not create an awareness and comprehension of such rights on the part of those whom *PARC* and the EAHCA were intended to protect.⁷⁹ Thus, states must actively seek to inform and educate parents of handicapped children about their child's rights and about due process procedures available to safeguard those rights.⁸⁰

The EAHCA mandates that a school district notify parents after an initial determination that their child needs special education and related services.⁸¹ Additionally, the federal regulation recommends that parents be present at a school meeting to plan their child's IEP.⁸² If parents fail to participate, the school should ascertain that they understand the proceedings at the meeting.⁸³ The scope of the school's responsibility is uncertain, however, because neither the EAHCA nor the federal regulation dictates what kind of information a school should convey to parents about the meeting's procedures.⁸⁴ At a minimum, a school should inform parents in writ-

78. *Pennsylvania Association for Retarded Children v. Pennsylvania*, 343 F. Supp. 279 (3d Cir. 1972). See *supra* notes 32-35 and accompanying text.

79. Before the EAHCA was in effect, parents of handicapped children often were led to believe that their children were incapable of leading meaningful lives. As a result, parents refrained from advocating their children's rights. SENATE REPORT, *supra* note 8, at 1433. In *Savka v. Pennsylvania*, 44 Pa. Commw. 62, 403 A.2d 142 (1979), parents of a handicapped child argued that they were denied an impartial hearing because the hearing officer was an employee of another school district and, therefore, partial. The *Savka* court rejected the parents' allegation that they were denied an impartial hearing because they failed to raise the argument during the hearing. *Savka* illustrates how a school district might violate a provision of the EAHCA with impunity when parents are uninformed of their rights.

The United States Court of Appeals for the Fifth Circuit, in *S-1 v. Turlington*, 635 F.2d 342 (5th Cir. 1981), *cert. denied*, 454 U.S. 1030, recognized that most parents of handicapped children were without the opportunity to know or to assert rights granted by the EAHCA. Consequently, the court required that school officials, not parents, must determine whether the child's misconduct was related to his handicap. *Id.* at 349. For a discussion of how schools have taken unfair advantage of uninformed parents, see HARV. L. REV., *supra* note 24, at 1111.

80. See CAL. EDUC. CODE § 56300 (West Supp. 1983) (school districts must seek out individuals needing special education).

81. 20 U.S.C. § 1415(b)(1)(C) (1976); 34 C.F.R. § 300.343 (1982).

82. 34 C.F.R. § 300.345 (1982). For a discussion of the handicapped child's individualized education program (IEP), see *supra* notes 55-58 and accompanying text.

83. 34 C.F.R. § 300-345(c),(d),(e) (1982).

84. 20 U.S.C. § 1414(a)(1)(C)(iii) (1976); 34 C.F.R. § 300.345 (1982). The federal regulation states that if parents are unable to attend the meeting, then the school must keep records of its attempts to encourage parents to participate in the meeting. These records would contain a list of telephone calls made, copies of letters sent to parents, and records of visits made to the home or to the parents' place of work. The regulation also requires that a school "take whatever action is necessary" to ensure that a parent understands the meeting's proceed-

ing about the nature of their child's problem, their right to have an independent evaluation at public expense, and other available procedural safeguards.⁸⁵

If the school's notification procedure is inadequate, parents may not learn about their rights until the school notifies them in writing about a recommended change in their child's special education placement.⁸⁶ Moreover, the school's reliance on a potentially erroneous presumption that parents are aware of their rights thwarts the EAHCA's and the regulations' aim to have parents understand the evaluation process and the statutory and regulatory provisions concerning an appropriate education.⁸⁷ Thus, notice to parents regarding the EAHCA's provisions is an indispensable first step toward providing each handicapped child with a free appropriate public education.

States have implemented various methods of educating parents. In Pennsylvania, when a handicapped child has been referred for evaluation⁸⁸ and before such a child's educational placement is changed,⁸⁹ school officials must notify parents in writing of the referral or recommended placement change. This notice also includes information regarding the parents' right to object to the evaluation's results and to the recommended placement change, their right to a due process hearing,⁹⁰ and their right to be represented by counsel at the hearing.⁹¹

Furthermore, the written notice gives parents the telephone number and location of the local Pennsylvania Association for Retarded Citizens (PARC), an organization whose employees are available to assist parents with the hearing. For parents who have only a minimal understanding of their child's problems and rights, the group's assistance is essential. Unfortunately, however, although the notice alerts parents to PARC's existence, it fails to indicate how the organization may help parents or whether there is a fee for its services.⁹²

Consequently, many parents may not seek PARC's help.

Furthermore, Pennsylvania's written notice should explain how parents may obtain free or low-cost legal services, since federal regu-

ings. *Id.* Unfortunately, by failing to specify what a school should relate to parents, the regulation leaves schools without a standard to follow.

85. A school should inform parents in writing regarding the procedural safeguards afforded by the EAHCA and stated in the Code of Federal Regulations.

86. This notification is required by 20 U.S.C. § 1415(b)(1)(C) (1976); 34 C.F.R. § 504 (1982).

87. See 20 U.S.C. § 1414(a)(1)(C)(iii) (1976); 34 C.F.R. § 300.345 (1982).

88. 22 PA. ADMIN. CODE § 341.12(e) (Shepard's 1981).

89. *Id.* at § 13.32(1).

90. *Id.* at § 13.32(9).

91. *Id.* at § 13.32(17).

92. See *Id.* at § 13.32 (1)(i).

lations require that parents eventually receive this additional information if they initiate a due process hearing.⁹³ Otherwise, parents might be unaware that they can obtain legal assistance without incurring prohibitive costs.⁹⁴ By emphasizing the availability of free or low-cost legal services, the notice would encourage parents to consider actions challenging intended placement changes.

A school district can utilize other methods to disseminate information about the scope of parental rights and the availability of legal aid. In New York, the state education department prepares and distributes a handbook to parents of handicapped children.⁹⁵ Written for lay persons, the handbook explains the financial and educational obligation of the state, county, city, and local school districts, and the special education programs and legal procedures available to parents of handicapped children.⁹⁶ Similarly, in New Jersey each school district's board of education must prepare copies of the special education chapter of the state code and all current pertinent laws and regulations for parents who request them.⁹⁷

Likewise, in Texas, every school district must provide a document to parents of handicapped children that details the special education rights of handicapped children.⁹⁸ These rights include the right to contest the contents of educational records, the right to request a due process hearing and an explanation of the procedural protections contained in the Code of Federal Regulations.

Of even greater benefit is the scheme in effect in Louisiana. There, the school board first must organize a public awareness program detailing available special education programs and related services.⁹⁹ Second, the board must provide parents of handicapped chil-

93. 34 C.F.R. § 300.506(c) (1982).

94. The Association's employees do not charge a fee for advising or training parents or for accompanying parents to a due process hearing. For the view that high transaction costs deter parents from challenging a school's action, see Timar, *The Aftermath of Goss in the Federal Courts*, 9 NOLPE SCHOOL L.J. 123, 140 (1981).

95. N.Y. EDUC. LAW. § 4403(8) (McKinney 1981).

96. New York supplies parents with a plethora of information. In addition to the comprehensive 36 page handbook, parents may obtain a pamphlet that contains general information about the EAHCA and New York's special education laws. Also available is a handbook entitled "Regulations of the Commissioner of Education." These regulations are designed to assist individuals wishing to bring appeals to the Commissioner. See also NEW YORK STATE EDUCATION DEPARTMENT, YOUR CHILD'S RIGHT TO AN EDUCATION: A GUIDE FOR PARENTS OF CHILDREN WITH HANDICAPPING CONDITIONS IN NEW YORK STATE (1981); NEW YORK STATE EDUCATION DEPARTMENT, KNOWING ABOUT SPECIAL EDUCATION TO HELP YOUR CHILD; OFFICE OF COUNCIL, THE STATE EDUCATION DEPARTMENT, THE UNIVERSITY OF THE STATE OF NEW YORK, REGULATIONS OF THE COMMISSIONER OF EDUCATION (1980).

97. N.J. STAT. ANN. § 18A:46-7.1 (West Supp. 1982-1983). The section neglects to mention how parents are to learn that they can obtain copies. A fee is imposed.

98. See *In re Manor Independent School Dist.*, 4 EHLR (CRR) 504:109 (Feb. 9, 1982) (Case No. 027-SE-1081) (hearing officer ordered each school district to send the document to parents whose children were evaluated and found not to need a special education, thus alerting parents to their right to contest the evaluation conducted by the school district).

99. LA. REV. STAT. ANN. § 1944(b)(5) (West 1982).

dren with written statement of parental rights, childrens' rights and any procedure established to protect these rights.¹⁰⁰ Third, the board must involve parents of handicapped children in the development and evaluation of special education programs.¹⁰¹ Finally, the board has the unique duty of developing in-service education programs for parents of handicapped children.¹⁰²

By participating in the programs organized for parents in Louisiana, and through exposure to the information contained in materials distributed in New Jersey, New York, Texas, and Louisiana, parents of handicapped children can better comprehend their rights, the school's obligations, and the operation of the system. Consequently, parents may feel less hostile to a school district, perceiving it as more committed to providing a free appropriate public education to their child.¹⁰³ A reduction in hostility could minimize the number of administrative and judicial adversary proceedings if parents and schools could amicably resolve their differences through informal conferences or mediation.

B. A Handicapped Child's Right to Receive Information About His Educational Placement

Before changing a handicapped child's educational placement, the EAHCA requires that the school provide the child's parents with written notice.¹⁰⁴ In a recent Texas decision,¹⁰⁵ a hearing officer required every school district in Texas to supply both parents *and* their eligible handicapped child with written notice prior to an initial evaluation, initiation of a change in educational placement, or a subsequent evaluation. The hearing officer also ordered school districts to provide an eligible child and his parents with a document informing them of the special education rights of handicapped children.¹⁰⁶

The Texas opinion shows sensitivity to the special needs of parents. Even more important, it breaks with the usual practice of withholding information from the handicapped child concerning his intended placement and demonstrates an awareness of his right to receive such information.¹⁰⁷

100. *Id.* at § 1952(A).

101. *Id.* at § 1944(B)(10).

102. *Id.* at § 1944(B)(15).

103. Smith & Podemski, *Special Education Hearings: How to Do Them Correctly*, 3 THE EXECUTIVE EDUCATOR 22, 24 (1981).

104. *See supra* note 13 and accompanying text.

105. *In re* Manor Independent School District, 3 EHLR (CRR) 504:109 (Feb. 9, 1982) (Case No. 027-SE-1081).

106. *Id.* MD. ADMIN. CODE tit. 13A, § 5.01.06C(4) (1982) (Maryland regulation requiring school districts to provide parents and "students as appropriate" with written information regarding their rights and the safeguards to protect these rights).

107. In California, parents *and* pupils may initiate the due process procedures enumerated in the EAHCA and California's code. CALIF. EDUC. CODE § 56501 (West Supp. 1982).

If the child is learning disabled or socially and emotionally disturbed, he is mentally capable of understanding whether his education program is too difficult or too easy, or whether other problems need to be addressed.¹⁰⁸ Moreover, if parents alone can contest their child's placement or make suggestions regarding the program,¹⁰⁹ the child suffers if his parents refuse to participate in planning an education geared to his needs.¹¹⁰ Therefore, unless his parents serve as his advocate,¹¹¹ the child is at the mercy of school officials desirous of cutting corners on special education programs.¹¹² To avoid leaving a child with neither an appropriate program nor an opportunity to contest his educational placement, schools should solicit the child's opinion, permit him to make suggestions, and involve him in decisions concerning his placement.

C. *Procedures to Reduce the Frequency of Wrongful Discipline*

Ensuring that a child with special needs receives a free appropriate public education without being wrongfully disciplined requires more than the participation of well-informed parents in the development of their child's program. Each state receiving federal funds under the EAHCA must eliminate obstacles to a handicapped child's development and adopt procedures that reduce the incidence of wrongful discipline.

1. *The Use of an Individualized Education Program to Reduce the Frequency of Wrongful Discipline.*—The EAHCA entitles a handicapped child to an individualized education program (IEP) to assist him in maximizing his potential.¹¹³ Although Pennsylvania's

Notwithstanding the child's right, California law requires that schools notify only parents of recommended changes in the child's placement. *Id.* at § 56506. *Accord* CONN. GEN. STAT. ANN. § 10-76h(a)(1) (West Supp. 1982); ILL. ANN. STAT. ch.122, § 14-8.02(f)(Smith-Hurd Supp. 1982-1983); LA. REV. STAT. ANN. § 1952(B)(3)(West 1982); N.Y. EDUC. LAW § 4402(3)(c)(McKinney 1981). In contrast, Pennsylvania's enigmatic regulation requires that a school provide parents and their child with notice of the school's proposed action, but the regulation further states that the notice need inform only parents of the various due process safeguards. *See* 22 PA. ADMIN. CODE § 13.32 (Shepard's 1983).

108. *See supra* note 2.

109. Many states deny children the right to assert any of the due process safeguards provided by the EAHCA, like requesting a due process hearing before an impartial hearing officer, appealing the hearing's decision, and bringing a civil action after exhausting all administrative remedies. *See supra* notes 59-70 and accompanying text.

110. Whether due to lack of interest or time, deference to "benevolent" school officials, or inability to take time away from work, parents may forego challenges to placement decisions. *See* HARV.L.REV., *supra* note 24, at 1110-11. Denied the right to protect themselves and without parents to safeguard their rights, handicapped children are incapable of effecting changes in their educational placement.

111. Many states permit only parents to assert the rights of their handicapped children and not the children themselves. *See supra* note 109.

112. Sindelar, *Suspensions and Expulsion of Handicapped Students: The Evolving Case Law*, 12 SCHOOL LAW BULLETIN 1, 6 (1981).

113. *See supra* notes 52-58 and accompanying text.

IEP provision¹¹⁴ complies with the minimum requirements enumerated in the EAHCA,¹¹⁵ it does not require, nor does the EAHCA mandate, that the IEP include a statement of potential ways in which the handicapped child possibly might behave. By indicating what behavioral patterns to expect from the child and what can be done to alleviate his problems, the IEP would further minimize the risk of error when a school official disciplines a handicapped student.¹¹⁶

A school official must make an informed decision whether the child's behavior is a manifestation of his handicap. Requiring a school official to examine the handicapped child's recurring patterns of behavior and the connection between the child's behavior and his handicap could reduce wrongful discipline.¹¹⁷ Thus, the multidisciplinary team's¹¹⁸ inclusion of additional information on the handicapped child's IEP could further help the child maximize his potential by protecting him from wrongful discipline.¹¹⁹

2. *The Use of In-Service Training to Educate Instructors About Handicapped Children.*—To minimize the risk of wrongful discipline, school officials need a certain degree of expertise concerning the needs and rights of handicapped students.¹²⁰ School officials may acquire such information by attending in-service special education training programs provided by school districts. In Pennsylvania, the State Board of Education requires school districts to provide such

114. 22 PA. ADMIN. CODE § 341.15 (Shepard's 1979).

115. 20 U.S.C. § 1401(18) (1976); 34 C.F.R. § 300.346 (1982).

116. One school district includes statements in the IEP that describe the child's handicap, his handicap-related behavior, and the child's behavior that is unrelated to his handicap. TECHNICAL ASSISTANCE GUIDE, *supra* note 71, at 11-12. See HARV.L.REV., *supra* note 24, at 1122-23 n.130-131, and accompanying text; U.COLO.L.REV., *supra* note 77, at 388. For a discussion of the school official's difficult task of determining whether the child's behavior is related to his handicap, see *supra* notes 74-77 and accompanying text.

117. A school official's consideration of the child's IEP that includes a brief history of the child's conduct should not replace the official's circumspect questioning of whether there exists a connection between the child's handicap and behavior. Predictive labeling may be unreliable. See Dershowitz, *Preventive Confinement: A Suggested Framework for Constitutional Analysis*, 51 TEX.L.REV. 1277, 1305-07 (1973). A disciplinary official should not rule out other types of conduct that could be handicap-related merely because a child's IEP contains a statement of behavioral patterns.

118. See *supra* note 58.

119. The interruption of a handicapped child's education could severely restrict the child's attainment of self-sufficiency and independence. A list of suspensions on the child's educational record could interfere with future opportunities for further education and employment. See *Goss v. Lopez*, 419 U.S. 565, 575 (1975). A handicapped student's regression caused by interruptions in his education program, together with his "limited recoupment capacity, renders it impossible or unlikely that the student will" be able to maximize his potential. *Armstrong v. Kline*, No. 78-172 (E.D.Pa., Sept. 5, 1979) (Remedial order No. 2).

120. See *S-1 v. Turlington*, 635 F.2d 342 (5th Cir. 1981), *cert. denied*, 454 U.S. 1030 (1981) (school officials who were authorized to determine whether misconduct was related to the handicap were incapable of making such a decision since they lacked the necessary expertise).

training for all personnel involved in the education of handicapped children.¹²¹ The regulation containing this order, however, neglects to state how frequently such training should be offered.¹²²

Texas, on the other hand, requires the commissioner of education to guarantee that all school districts devote one full day of their required in-service program each school year to special education training sessions for regular and special education teachers who instruct handicapped students.¹²³ If it adopted a rule that specifies the frequency of special education in-service training sessions, the Pennsylvania State Board of Education could effect compliance by imposing a penalty, like a temporary loss of funds, on school districts that fail to comply with the Board's standard.¹²⁴

3. *Elimination of Discriminatory Disciplinary Procedures in Pennsylvania.*—Exclusion of a handicapped student for more than ten days is deemed a change in placement, entitling his parents to written notice, an opportunity for a hearing, and the right to be represented by counsel at the hearing.¹²⁵ Three factors minimize instances of wrongful discipline. First, the child's parents must consent to the exclusion.¹²⁶ Second, if the child's parents refuse to consent, the child may not be removed from his educational program pending the hearing regarding his placement.¹²⁷ Third, the school official bears the burden of proving that the student's misconduct was not a manifestation of his handicap and that the child should be excluded.¹²⁸

121. 22 PA. ADMIN. CODE § 341.57(d) (Shepard's 1979).

122. Equally vague is Maine's statute that requires the commissioner of education to "[i]nform and train each school administrative unit on exceptional students' rights to due process under state laws and rules and federal law and regulations." ME. REV. STAT. ANN. tit. 20A, § 7204(5)(B) (1982). Other states' provisions also lack guidance on how often schools must provide in-service training programs to educate instructors of handicapped children. See MD. ADMIN. CODE tit. 13A, § 5.01.03F (1982); N.J. ADMIN. CODE tit. 6, § 29-1.1(g) (1978).

123. TEX. EDUC. CODE ANN. § 16.104(a)(6) (Vernon Supp. 1982-1983). See also LA. REV. STAT. ANN. § 1953 (West 1982). See also SENATE REPORT, *supra* note 8, at 1457-58.

124. The EAHCA authorizes a state educational agency to terminate funding to local educational agencies for failing to comply with any provision of the EAHCA. 20 U.S.C. § 1414(b)(2) (1976). See also LA. REV. STAT. ANN. § 1944(B)(16) (West 1982) (funds may be withheld following a due process hearing); ME. REV. STAT. ANN. tit. 20A, § 7206 (1982) (commissioner of education may order compliance, withhold financial aid, and refer the matter to the Attorney General); WASH. REV. CODE ANN. § 28A.13.080 (1982) (superintendent of schools may apply appropriate sanctions to any school district that fails to comply with the special education laws); Krass, *The Right to Public Education for Handicapped Children: A Primer for the New Advocate*, 1976 U. ILL. L.F. 1016, 1072-73.

125. 22 PA. ADMIN. CODE § 13.32 (Shepard's 1983).

126. *Id.* at § 13.32(1).

127. 20 U.S.C. § 1415(e)(3) (1976); 22 PA. ADMIN. CODE § 13.32(22) (Shepard's 1983). The practice that maintains the status quo is known as the "stay put" provision. *S-1 v. Turlington*, 635 F.2d 342, 348 (5th Cir. 1981), *cert. denied*, 454 U.S. 1030 (1981); *Monahan v. Nebraska*, 491 F. Supp. 1074, 1088-89, *aff'd in part, vacated in part*, 645 F.2d 592 (8th Cir. 1981); *Stuart v. Nappi*, 443 F. Supp. 1235 (D.Conn. 1978).

128. See *supra* note 79.

Instances of wrongful discipline likewise may be minimized in situations when a school official considers excluding a mentally retarded¹²⁹ child for fewer than ten days. Since the official initially must consider the connection between the child's handicap and his behavior,¹³⁰ he presumably would avoid rash decisions. If, however, the child has a learning disability or is socially and emotionally disturbed (SED),¹³¹ Pennsylvania's regulations prescribe the application of minimal rules governing nonhandicapped students.¹³² Although Pennsylvania school administrators are advised to consider the possible relationship between the learning disabled or SED child's handicap and his problem behavior prior to suspension,¹³³ exercise of this consideration is only recommended, not mandatory. Clearly, therefore, the risk of wrongful suspension of an SED or learning disabled child increases if a school official fails to consider the child's handicap.¹³⁴ If a school official were required to consider an IEP that delineated foreseeable problems related to the child's handicap, the official could learn whether the child's present misbehavior was handicap-related.¹³⁵

Not only should school officials consider the child's IEP, but the Pennsylvania State Board of Education should eliminate the separate disciplinary standards for handicapped children who are mentally retarded and for handicapped children who are not. Two reasons support elimination of the separate procedure for handicapped children other than the mentally retarded. First, the EAHCA neither requires nor mentions states' maintenance of separate rules. Second, Pennsylvania's rules are useless because the due process safeguards afforded SED and learning disabled children fail to protect them: the misconduct of such children inherently relates to their handicap,¹³⁶ yet

129. See *supra* note 2.

130. 22 PA. ADMIN. CODE § 13.62(2) (Shepard's 1981).

131. See *supra* note 2.

132. 22 PA. ADMIN. CODE §§ 341.91(b)(4) (Shepard's 1982), 12.6 (Shepard's 1983). See *supra* note 75. These rules do not require a school official to consider the child's handicap. Thus an SED or learning disabled child could be suspended for at least two days without a hearing if he is informed of the reason for suspension and given an opportunity to explain his conduct. Memorandum from Gary J. Makuch, Director, Bureau of Special Education in Pennsylvania, to Directors of Special Education and Elementary Principals 2 (August 30, 1978).

133. See TECHNICAL ASSISTANCE GROUP FOR RIGHT TO EDUCATION, REQUIREMENTS FOR SUSPENSION/EXCLUSION OF EXCEPTIONAL STUDENTS 3 (1982) (a document developed by the Bureau of Special Education of the Pennsylvania Department of Education to supply school administrators with information on requirements for the exclusion of handicapped students).

134. See *supra* text accompanying notes 117.

135. See *generally* text accompanying notes 113-119.

136. A student who has a learning disability may reveal his learning difficulties by his "hyperactivity, impulsivity, low frustration level and short attention span. . . [or] through his fighting, loss of temper control and generally aggressive behavior." See Levinson, *The Right to a Minimally Adequate Education for Learning Disabled Children*, 12 VAL. U.L. REV. 253,272 (1978).

Pennsylvania's regulations do not require that a school official consider this relationship when he prepares to suspend these children.¹³⁷

D. The Handicapped Child's Right to Receive a Free Independent Evaluation

The appropriateness of a handicapped child's free public education depends upon the reliability of the tests performed on the child¹³⁸ and the competence of the tests' evaluators. The EAHCA therefore grants parents of a handicapped child the right to obtain an independent evaluation of their child when a school recommends a change in the child's educational placement.¹³⁹

Although a federal regulation provides for an evaluation at public expense,¹⁴⁰ the federal regulation¹⁴¹ and some state statutes and regulations¹⁴² may deter parents from taking advantage of this right because its exercise is conditioned on whether the school requests an impartial hearing to show that its evaluation is appropriate. If the hearing officer finds that the school's evaluation is appropriate, then parents still may seek an independent evaluation, but *not* at public

137. Consequently, a school official who suspends a learning disabled child for handicap-related conduct effects a punishment of the child's disability. This discrimination violates Section 504 of the Rehabilitation Act of 1973, as amended by the Rehabilitation, Comprehensive Services and Developmental Disabilities Act of 1978, 29 U.S.C. §§ 701-796 (Supp. III 1979). Section 504 of the Act prohibits discrimination of the handicapped in any federally funded program. 29 U.S.C. § 794 (Supp. III 1979). Courts have found that Section 1983 of the Civil Rights Act provides a remedy for a violation of Section 504. *Pushkin v. Regents of the University of Colorado*, 658 F.2d 1372 (10th Cir. 1981); *Quackenbush v. Johnson City School Dist.*, 3 EHLR (CRR) 553:586 [1981-82 DEC.] (N.D.N.Y. 1982); *Cluff v. Johnson City Central School Dist.*, 3 EHLR (CRR) 553:598 [1981-82 DEC.] (N.D.N.Y. 1982); *McGowan v. Hahn*, N. 78-C-4233 (N.D.Ill. July 27, 1981); *Medley v. Ginsberg*, 492 F. Supp. 1294 (S.D.W.Va. 1980).

138. See *supra* note 49.

139. See generally 20 U.S.C. § 1415(b)(1)(A) (1976); 34 C.F.R. § 300.503 (1982). If parents obtain an independent evaluation of their child at private expense, the school must consider the evaluation's results when contemplating changes in the child's program, and parents may present the evaluation's results as evidence at a due process hearing. 34 C.F.R. § 300.504(c)(1),(2) (1982). *Contra Bender & Lorant, Public Law 94-142: Challenging Individualized Education Programs Through Due Process Considerations*, 7 W. ST. U.L. REV. 137, 152-53 (1980) (school districts frequently ignore the recommendations of the independent evaluator).

140. 34 C.F.R. § 300.503(a)(3)(ii) (1982) ("public expense means that the public agency either pays the full cost of the evaluation or insures that the evaluation is otherwise provided at no cost to the parent. . .").

141. *Id.* at § 300.503(b) (1982).

142. CAL. EDUC. CODE § 56329(b) (West Supp. 1982) (identical to the federal regulation); ILL. ANN. STAT. ch.122, § 8.02(b) (Smith-Hurd Supp. 1982-1983) (identical to the federal regulation); MD. ADMIN. CODE tit. 13A, § 5.01.07A(6)(b) (1982); MASS. GEN. LAWS ANN. ch.71B, § 3 (West Supp. 1979) (handicapped child may obtain a free evaluation from child evaluation clinics or facilities approved of by the department of education); 22 PA. ADMIN. CODE § 13.32(1)(iii) (Shepard's 1983).

In New York and Wisconsin, on the other hand, parents may obtain an independent evaluation of their child at public expense when they disagree with the school's evaluation. 8 N.Y.C.R.R. § 200.5(b)(2) (1978); WIS. STAT. ANN. § 115.81(5) (West Supp. 1982-1983) (school district will reimburse parents who are unable to afford an examination or evaluation).

expense.¹⁴³

When parents in Pennsylvania contest the recommended change of their child's placement, the school notifies the parents that their child is "entitled" to an independent medical, psychological, and educational evaluation.¹⁴⁴ The notification, however, does not, explain the word "entitled." Moreover, nowhere in the notice can parents discern that their child has a right to an independent evaluation at public expense. Thus, Pennsylvania's special education provisions are not in accord with the spirit of the federal regulation that provides a handicapped child with a free evaluation¹⁴⁵ and obstructs parents' right to obtain a free independent evaluation. Consequently, the notification's ambiguity may deter parents from seeking another evaluation of their child.

Similarly, parents of handicapped children in Maryland may be unaware of their right to obtain an independent evaluation of their child. A regulation promulgated by the Maryland Board of Education obligates schools to inform parents of where their handicapped child may obtain an independent evaluation, but only if parents request the information.¹⁴⁶ While Maryland's regulation disadvantages parents who are ignorant of their child's rights and therefore may not request the information, it *is* in accord with the federal regulation,¹⁴⁷ which does not require schools to divulge information until parents make a request.

To prevent federal and state regulations from circumventing the EAHCA's provision that grants parents the right to obtain an independent evaluation of their child, schools should be required to inform parents where their child may receive an evaluation at public expense. Without such an evaluation, "appropriate" becomes a meaningless word to many parents who would be unable to mount an effective challenge to the school's recommended placement change.¹⁴⁸

E. The Right to a Hearing Before an Impartial Hearing Officer

In addition to granting parents the right to have their child in-

143. See *In re Marin County Office of Educ.*, 4 EHRLR (CRR) 504:166 (May 17, 1982) (Case No. 82-1). As one commentator points out, the added hearing causes delay and serves only to protect against evaluations that fail to conform to the EAHCA's requirements. Moreover, a hearing officer would have a difficult task to detect whether the original evaluators were biased or in error without a second evaluation with which to compare the first. HARV.L.REV., *supra* note 24, at 1112 n.60 and accompanying text.

144. 22 PA. ADMIN. CODE § 13.32(1)(iii) (Shepard's 1983).

145. 34 C.F.R. § 300.503(a)(3)(ii) (1982). See *supra* note 139.

146. MD. ADMIN. CODE tit. 13A, § 5.01.07A(6)(b) (1982).

147. 34 C.F.R. § 300.503(a)(2) (1982).

148. One such change might be the relegation of a mentally retarded child from a placement in school to a more restrictive "education and training" program under the auspices of the Department of Public Welfare. 22 PA. ADMIN. CODE § 13.62(9) (Shepard's 1982).

dependently evaluated, the EAHCA affords parents the right to an impartial due process hearing to resolve disagreements about their child's educational placement.¹⁴⁹ The EAHCA's provision that grants this right specifies that a hearing may not be conducted by an employee of the educational unit or agency involved in the handicapped child's program.¹⁵⁰

States have sought to guarantee the impartiality of hearing officers by various methods of selection. In Pennsylvania, the regulation pertaining to hearing officers requires that the officer not be an agent, employee, or officer of the school district where the handicapped child resides.¹⁵¹ The regulation, however, does not affirmatively state how the hearing officer is to be chosen. The pertinent statutory provisions in Maine¹⁵² and Wisconsin¹⁵³ neither mention how the hearing officer will be selected nor contain criteria referring to impartiality or interests that might render an individual incapable of being impartial.

In *Robert M. v. Benton*,¹⁵⁴ the Eighth Circuit dealt with whether Iowa's Superintendent of Public Instruction could serve as an impartial hearing officer.¹⁵⁵ The court held that the EAHCA precluded employees of state educational agencies from serving as hearing officers, even though the employees were not directly involved in the child's education program.¹⁵⁶ The court also found that the Superintendent was a State Board of Public Instruction employee who, therefore, was indirectly involved in the education of the handicapped child.¹⁵⁷ Hence the Superintendent was partial. Similarly, the Third Circuit, in *Grymes v. Madden*,¹⁵⁸ held that the EAHCA's impartiality requirement forbade the use of Delaware State Board of Education employees as review officers. Thus, the EAHCA's provision preventing employees of educational agencies involved in the

149. 20 U.S.C. § 1415(b)(2) (1976); 34 C.F.R. § 300.506 (1982).

150. 20 U.S.C. § 1415(b)(2) (1976). The pertinent federal regulation adds that a hearing may not be conducted by anyone with a personal or professional interest that would conflict with his objectivity. 34 C.F.R. § 300.507(a)(2) (1982).

151. 22 PA. ADMIN. CODE § 13.32(12) (Shepard's 1983).

152. ME. REV. STAT. ANN. tit. 20A, § 7207(3) (1982) (effective July 1, 1983).

153. WIS. STAT. ANN. § 115.81(4m) (West Supp. 1982-1983).

154. 634 F.2d 1139 (8th Cir. 1980).

155. The Superintendent had presided over the due process hearing of a mentally retarded child who was contesting the Superintendent's recommendation that she be placed in a more restrictive educational setting.

156. *Accord Vogel v. School Bd. of Montrose R-14 School Dist.*, 491 F. Supp. 989 (W.D.Mo. 1980) (State Deputy Commissioner of Education was not an impartial hearing officer). *Warren v. Nat'l Ass'n of Secondary School Principals*, 375 F. Supp. 1043 (N.D.Tex. 1974) (teacher who accused student of drinking could not serve as a judge at the student's dismissal hearing).

157. The court rejected the Superintendent's argument that he was not an employee of a direct provider of educational instruction, like a local school board, but rather a supervisor of the provider. *Robert M. v. Benton*, 634 F.2d 1139, 1141 (8th Cir. 1980).

158. 672 F.2d 321 (3d Cir. 1982)(per curiam).

child's program from serving as hearing officers has been broadly interpreted to preclude individuals who are only indirectly involved in the program.

The United States District Court for the District of New Jersey expanded the meaning of involvement even further. In *East Brunswick Board of Education v. New Jersey State Board of Education*,¹⁵⁹ the court declared that it is the "State's responsibility to go beyond its own doors to select hearing officers" who comply with the EAHCA's impartiality requirement.¹⁶⁰ Whether the court meant that New Jersey should hire hearing officers from a neighboring state or officers unassociated with New Jersey's educational agencies is unclear. In Connecticut, an impartial hearing board is composed of individuals knowledgeable in areas pertinent to the child's handicap.¹⁶¹

While the in-state procedure mentioned above seems to be a viable alternative, there nonetheless may be a problem in some states. Two writers¹⁶² point out that the requirements for hearing officers in California restrict the selection to individuals who are well-informed in the special education field and who are associated with an educational institution. Considering that most California schools are public institutions, the impartiality of hearing officers might be suspect. Nevertheless, a scrupulous method of selecting impartial hearing officers minimizes the chances of picking a partial individual to preside over the hearing.

In Maryland, a statutory scheme for choosing hearing officers better protects handicapped children from the decisions of partial hearing officers. When parents request the county board of education to review their child's proposed educational placement,¹⁶³ the board appoints a hearing officer or a hearing board to hear the case and render a decision.¹⁶⁴ Further, the statute mandates that neither the hearing officer nor the members of the board may be employees of the State Board or any county board of education, or have any interest that would conflict with the hearing officer's objectivity at the hearing.¹⁶⁵

After exhausting all available administrative remedies and procedures at the local level, aggrieved parents may request a review of

159. 4 EHLR (CRR) 554:122 (D.N.J. July 7, 1982) (No. 81 Civ. 3600).

160. *Id.* at 554:123.

161. CONN. GEN. STAT. ANN. § 10-76h(c) (West Supp. 1982) (hearing officers may be employees of state educational agencies or may be qualified individuals from outside the agencies).

162. Bender & Lorant, *Public Law 94-142: Challenging Individualized Education Programs Through Due Process Considerations*, W. ST. U.L. REV. 137, 154 (1980).

163. MD. EDUC. CODE ANN. § 8-415(a)(1) (Supp. 1982).

164. *Id.* at (a)(2)(i),(ii).

165. *Id.* at (a)(5)(i),(ii). See MD. ADMIN. CODE tit. 13A, § 5.01.07A(7)(d) (1982).

their child's placement from the State Board of Education.¹⁶⁶ At the local level, hearing officers or panel members are selected in rotating alphabetical order from a list of people qualified to serve.¹⁶⁷ The designation of review panel officers at the state level differs substantially. First, the State Board provides parents with four names chosen in rotating alphabetical order from a list, unless the parties stipulate otherwise.¹⁶⁸ Parents then have the option of picking three of the four names and notifying the Board of their selection within fifteen days.¹⁶⁹ Before making their decision, parents can examine the hearing officers' *curricula vitae*, since this information is open to public scrutiny.¹⁷⁰

By providing parents with an opportunity to have some choice in selecting hearing officers whom they can scrutinize beforehand and who are not employees of a school board, Maryland's system reduces the risk of selecting hearing officers who serve merely to rubber-stamp the school's decision regarding the program of "high-cost children."¹⁷¹ All too often the school's placement team only recommends programs that the school district can afford.¹⁷² A desirable system like Maryland's, if adopted in Pennsylvania, would help to ensure that handicapped children receive a free appropriate public education.¹⁷³ As an additional safeguard, parents should be able to question their hearing officer about his familiarity with the facts of the case. The officer's responses could provide valuable insight about whether he is a "biased decision maker" who is, therefore, "constitutionally unacceptable."¹⁷⁴

F. Attorney's Fees

When a school decides to alter a handicapped child's educational placement, the EAHCA grants the child's parents the right to

166. MD. EDUC. CODE ANN. § 8-415(b)(1) (Supp. 1982).

167. *Id.* at (a)(4).

168. *Id.* at (b)(5)(i).

169. *Id.* at (b)(5)(ii),(iii).

170. *Id.* at (b)(4).

171. Sindelar, *Suspensions and Expulsion of Handicapped Students: The Evolving Case Law*, 12 SCHOOL LAW BULLETIN 1, 6 (1981).

172. *Id.*

173. Illinois' method of choosing hearing officers, like Maryland's scheme, reduces the possibility of selecting partial officers. The State Board of Education provides parents and the school board with a list of five prospective impartial hearing officers. Parents and the school board alternately strike one name from the list until one name remains. Additionally, hearing officers may not reside in the school district and may not be employed by the school district, by any program in which the district participates, or by any agencies that are directly involved with diagnosing, educating, or caring for handicapped students. Furthermore, impartial hearing officers must be knowledgeable of federal and state special education statutes, rules, and regulations. ILL. ANN. STAT. ch.122, § 8.02(g) (Smith-Hurd Supp. 1982).

174. *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). See *In re Murchison*, 349 U.S. 133, 136 (1955); *Tumey v. Ohio*, 273 U.S. 510, 532 (1927).

an impartial due process hearing.¹⁷⁵ At the hearing, parents are entitled to be represented by counsel or individuals knowledgeable in the field of special education.¹⁷⁶ The EAHCA, however, does not provide for an award of attorney's fees to the prevailing party.¹⁷⁷ Thus, for the "middle-class majority of this country, persons too affluent to qualify for government funded legal services but not wealthy enough to afford the fees of major law firms,"¹⁷⁸ a lawyer's services might not be utilized at either the due process hearing or the judicial proceeding¹⁷⁹ after parents exhaust their administrative remedies.¹⁸⁰

If a state does not grant attorney's fees for parents who lack the funds to retain a lawyer, the EAHCA's procedural protections become inaccessible. Admittedly, some courts, including the United States Supreme Court, have found that due process does not require a lawyer's presence at a noncriminal proceeding.¹⁸¹ Nevertheless, the Supreme Court has acknowledged the great benefit counsel can provide: "Counsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipient."¹⁸² Often parents are unable to understand or articulate either the issues involved in a particular case or the special needs of their handicapped child. There-

175. 20 U.S.C. § 1415(b)(2) (1976); 34 C.F.R. § 300.506 (1982).

176. 20 U.S.C. § 1415(d) (1976); 34 C.F.R. § 300.508 (1982). See 22 PA. ADMIN. CODE § 13.32(17) (Shepard's 1983). See also *Madera v. Bd. of Educ. of New York City*, 386 F.2d 778 (2d Cir. 1967), cert. denied, 390 U.S. 1028 (1968); *Goldwyn v. Allen*, 281 N.Y.S.2d 899 (Sup. Ct. 1967) (students have a right to be represented by counsel at a disciplinary hearing).

177. A federal regulation, however, does require that a school inform parents of any free or low-cost legal services available in the area if parents request the information or if parents or their child's school initiates a due process hearing. 34 C.F.R. § 300.506(c)(1),(2) (1982).

178. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 473 n.4 (1978) (Marshall, J., concurring). According to the Legal Services Corporation Poverty Guidelines, 45 C.F.R. § 1611, app. A (1982), a family of four whose income exceeds \$11,625, the maximum income suggested by the Legal Services Corporation, is ineligible for legal aid, unless other factors indicate that eligibility should be allowed. 45 C.F.R. §§ 1611.3-.6 (1982). Consequently, many individuals effectively will be prevented from obtaining legal services. See *Krass, The Right to Public Education for Handicapped Children: A Primer for the New Advocate*, 1976 U. ILL. L.F. 1016, 1075.

179. See *supra* note 18.

180. Courts have held that plaintiffs are not required to exhaust their administrative remedies set forth in the EAHCA if it would be futile to do so. *Tokarcik v. Forest Hills School Dist.*, 665 F.2d 443, 447 (3d Cir. 1981); *Monahan v. Nebraska*, 645 F.2d 592, 597 (8th Cir. 1981); *H.R. v. Hornbeck*, 524 F. Supp. 215, 219 (W.D.Md. 1981); *Doe v. Koger*, 480 F. Supp. 225, 227-28 (N.D.Ind. 1979); *Sherry v. New York Educ. Dep't*, 479 F. Supp. 1328, 1335 (W.D.N.Y. 1979); *Armstrong v. Kline*, 476 F. Supp. 583 587 (E.D.Pa. 1979) *remanded on other grounds sub nom. Battle v. Pennsylvania*, 629 F.2d 269 (3d Cir. 1980); *Loughran v. Flanders*, 470 F. Supp. 110, 112 (D.Conn. 1979). Strict standards for determining futility led to dismissals in *Riley v. Ambach*, 668 F.2d 635 (2d Cir. 1981); *Lombardi v. Ambach*, 522 F. Supp. 867 (E.D.N.Y. 1981). See U. COLO. L. REV., *supra* note 77, at 397-401.

181. *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Toney v. Reagan*, 467 F.2d 953 (9th Cir. 1972); *Camp v. United States*, 413 F.2d 419 (5th Cir. 1969); *Johnson v. Workman's Compensation Appeal Bd.*, 14 Pa. Commw. 220, 321 A.2d 728 (1974); *In re Coatesville Area School Dist.*, 4 EHLR (CRR) 504:145 (Aug. 11, 1982) (Case Nos. 203A, 203B, 203C).

182. *Goldberg v. Kelly*, 397 U.S. 254, 270-71 (1970).

fore, pitting the school board's experienced member or attorney against parents unaided by counsel is inconsistent with traditional notions of fairness.

Although the EAHCA does not entitle a prevailing party to attorney's fees, there are two alternative statutory bases for a recovery. Some courts¹⁸³ have found that violations of Section 504¹⁸⁴ of the Rehabilitation Act of 1973¹⁸⁵ permit a grant of attorney's fees.¹⁸⁶ This statute proscribes discrimination against the handicapped in programs that receive federal aid. Moreover, courts¹⁸⁷ have also awarded attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976,¹⁸⁸ which allows such an award when a plaintiff successfully proves the violation of a federal statutory right.

The award of attorney's fees under either of these statutes depends upon whether parents prevail in the underlying action.¹⁸⁹ Consequently, parents may hesitate to challenge a school's recommended placement change. Moreover, parents frequently will be unaware of the possibility of recouping attorney's fees.¹⁹⁰ Even if parents reside in a state complying with the federal regulation¹⁹¹ that requires a school to inform parents of available free or low-cost legal services,¹⁹² parents nevertheless may be ineligible for such services.¹⁹³

California law provides parents with the opportunity to recover attorney's fees regardless of the case's outcome.¹⁹⁴ The law also requires a school to notify parents, at least ten days before a state hearing, that it intends to use an attorney.¹⁹⁵ Upon receiving the notice, parents may hire an attorney and have the state pay his fees.¹⁹⁶

183. *Patsel v. Dist. of Columbia Bd. of Educ.*, 530 F. Supp. 660 (D.D.C. 1982); *Campbell v. Talladega County Bd. of Educ.*, 518 F. Supp. 47 (N.D.Ala. 1981); *Tatro v. Texas*, 516 F. Supp. 968 (N.D.Tex. 1981); *Pratt v. Bd. of Educ. of Frederick County*, 501 F. Supp. 232 (D.Md. 1980).

184. 29 U.S.C. § 794 (Supp. III 1979).

185. Rehabilitation Act of 1973 *as amended by* Rehabilitation, Comprehensive Services and Developmental Disabilities Act of 1978, 29 U.S.C. §§ 701-796 (Supp. III 1979).

186. The Rehabilitation, Comprehensive Services and Developmental Disabilities Act of 1978 grants the court authority to award attorney's fees to prevailing parties in a Section 504 claim. 29 U.S.C. § 794a(b) (Supp. III 1979).

187. *Dep't of Educ. v. Valenzuela*, 524 F. Supp. 261 (D. Hawaii 1981); *Mattie T. v. Holladay*, 522 F. Supp. 72 (N.D.Miss. 1981).

188. 42 U.S.C. § 1988 (1976).

189. *See, e.g., Anderson v. Thompson*, 658 F.2d 1205 (7th Cir. 1981); *Hines v. Pitt County Bd. of Educ.*, 497 F. Supp. 403 (E.D.N.C. 1980) (fees denied).

190. *See supra* note 94 and accompanying text.

191. *See supra* note 177.

192. CAL. EDUC. CODE § 56502(a) (West Supp. 1982); ILL. ANN. STAT. ch.122, § 8.02(f) (Smith-Hurd Supp. 1982-1983); MD. ADMIN. CODE tit. 13A, § 5.01.07A(6)(d) (1982). *See* NEW YORK STATE EDUCATION DEPARTMENT, YOUR CHILD'S RIGHT TO AN EDUCATION, A GUIDE FOR PARENTS OF CHILDREN WITH HANDICAPPING CONDITIONS IN NEW YORK STATE 18 (1981) [hereinafter cited as N.Y. GUIDE].

193. *See supra* note 177.

194. CAL. EDUC. CODE § 56507(a) (West Supp. 1982).

195. *Id.* at (b)(1).

196. *Id.* at (b)(3).

If, however, parents have retained an attorney *prior* to receiving the school's notice, the state has no duty to pay for the representation.¹⁹⁷

To allow such an important matter to rest on who has sought legal representation first is inequitable and illogical. The California law's positive aspect of providing some parents with free legal representation is outweighed by the discouraging effect of this procedural scheme on parents who wish to engage counsel. When a child's liberty and property interests¹⁹⁸ hinge upon a hearing or trial to determine his educational placement, a school should not only permit parents to be represented by counsel, but should incur attorney's fees on behalf of needy parents. Without this safeguard, the EAHCA's procedural protections become illusory.¹⁹⁹

G. Waiver of Fees

1. *The Right to Receive a Free Transcript.*—In addition to the right to be represented by counsel at a hearing,²⁰⁰ the EAHCA grants parents the right to receive a written or electronic record of the hearing.²⁰¹ The record is essential if aggrieved parents appeal the hearing officer's decision.²⁰² Parents who cannot afford the cost of duplicating the record are at an extreme disadvantage.

Some states afford parents the right to receive a record of the proceedings if parents request the transcript,²⁰³ but other statutes stipulate that the record is "available"²⁰⁴ to parents or may be obtained after paying for the actual²⁰⁵ or reasonable²⁰⁶ cost of duplication. In any event, if parents are unable to afford the charge, they are incapable of availing themselves of their statutory rights. By

197. *Id.* at (c)(1),(2).

198. In *Goss v. Lopez*, 419 U.S. 565, 576 (1975), the Supreme Court cautioned that "[n]either the property interest in educational benefits temporarily denied nor the liberty interest in reputation, which is also implicated, is so insubstantial that suspensions may constitutionally be imposed by any procedure the school chooses, no matter how arbitrary."

199. Commenting on the necessity of counsel, Justice Sutherland states that "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law." *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932).

200. 20 U.S.C. § 1415(d) (1976). See 34 C.F.R. § 300.508(a)(1) (1982).

201. 20 U.S.C. § 1415(a) (1976). See 34 C.F.R. § 300.508(a)(4) (1982).

202. For a brief description of administrative procedure, see *supra* note 18.

203. CONN. GEN. STAT. § 10-76h(e) (West Supp. 1982); WIS. STAT. ANN. § 115.81(4) (West Supp. 1982-1983). Although parents in both Connecticut and Wisconsin must request a copy of the transcript before they receive it, Wisconsin's statute places the onus on the hearing officer to apprise parents of their right to obtain a free transcript of the proceedings.

204. N.Y. EDUC. LAW § 4404(1) (McKinney 1981) (a record "shall be maintained and made available to" parents); N.J. ADMIN. CODE tit. 6, § 28-1.9(j)(2) (1978) ("[a] verbatim record of the hearing shall be kept"); 22 PA. ADMIN. CODE § 13.32(16) (Shepard's 1983) ("[a] record of the hearing shall be made and shall be available to the parent"). While schools in New York and Pennsylvania make a record available to parents, the provisions fail to indicate if there is a fee charged for doing so. To whom New Jersey makes the record available is unclear.

205. MD. ADMIN. CODE tit. 13A, § 5.01.07A(7)(f) (1982).

206. *Id.* at § 5.01.07B(7)(f) (1982).

waiving the fee when parents cannot afford to duplicate the record, Pennsylvania can best accomplish the EAHCA's "goal of providing full educational opportunity to all handicapped children."²⁰⁷

2. *Waiver of the Fee to File a Civil Action.*—In similar cases, the cost of filing a civil action should also be waived. Unlike the cost of duplicating the record, the fee for filing a civil action is not discussed in state education regulations, but is addressed by court rules.

Parents who wish to avoid paying this fee,²⁰⁸ must file a petition to proceed in forma pauperis²⁰⁹ before a court clerk will enter a civil action or file any papers.²¹⁰ This petition does not guarantee waiver; rather, the matter is discretionary with the court which must consider the petitioner's employment, income, assets, and liabilities. Since waiver is within the court's discretion, parents may be reluctant to initiate further proceedings after they have exhausted their administrative remedies. To safeguard parents' statutory right to bring a civil action,²¹¹ Pennsylvania should bear the cost of the filing fee.

V. Model Rules to Safeguard the Handicapped Child's Right to Receive a Free Appropriate Public Education in Pennsylvania

A workable set of rules implies more than ambiguous provisions that operate as a cryptic code.²¹² Rules should provide procedural guidelines incapable of varied interpretations.²¹³ Furthermore, regulations not only must effectuate the above criteria, but preserve the handicapped child's right to a free appropriate public education and his concomitant right to procedural protections granted by the EAHCA and promote judicial economy by ensuring efficient and functional administrative procedures.

Model rules that modify, alter, and add to Pennsylvania's special education scheme would provide the following:²¹⁴

1. No student shall be denied access to a free and full public education, on account of race, religion, sex, national origin, or handicap.²¹⁵

207. 20 U.S.C. § 1412(2)(A) (1976).

208. There is a \$60 filing fee in federal district court. 28 U.S.C. § 1914 (Supp. V 1981).

209. *Id.* at § 1915(a) (1976).

210. M.D. PA. R. 808.

211. *See supra* note 18.

212. Unclear provisions regarding the right to an independent evaluation at public expense, the right to an impartial hearing officer, and the right to receive a transcript of the hearing lead to unsatisfactory results. *See, e.g., supra* note 79; *Savka v. Pennsylvania*, 44 Pa. Commw. 62, 403 A.2d 142 (1979).

213. *See HARV. L. REV., supra* note 24, at 1110 (suggesting that school officials will more likely observe clear guidelines than ignore flexible rules).

214. The proposed rules are drawn from those state statutory and regulatory provisions that best enable a handicapped child to receive a free appropriate public education.

215. This rule adds "or handicapped" to 22 PA. ADMIN. CODE § 12.4 (Shepard's 1983).

2. Each school district shall affirmatively seek out all individuals with special needs.²¹⁶

3. Each school district's board of education shall establish a committee on the handicapped (COH), composed of at least a school psychologist, a special education teacher or administrator, a school physician, and a parent of a handicapped child residing in the school district, provided that the parent is not an employee of the school district or under contract to the district.²¹⁷ Members of the COH shall serve without compensation, but shall be entitled to reimbursement for expenses incurred in furthering their service.²¹⁸

4. The COH's duties shall include the following:

(a) The COH shall notify parents that their child might be in need of special education services.²¹⁹

(b) The COH shall notify parents before the child's educational placement is changed.²²⁰

(c) The COH's notification shall inform parents of their right to an independent evaluation at public expense if they disagree with the school district's evaluation and recommendation. Parents shall be given a detailed description of the evaluation procedure and the purposes the evaluation shall serve.²²¹

(i) The notification shall inform parents of the date, time, and place where the COH shall meet to discuss their child. The notice shall advise parents of their right to speak to the COH regarding the evaluation procedure. Parents may be accompanied by anyone, including an attorney.²²²

(ii) The notification shall contain telephone numbers and locations of associations available to assist parents with understanding the procedures involved in providing their child with an appropriate education. The notice shall include an estimation of the cost of the association's services.²²³

(iii) The notification shall contain telephone numbers

The writer of this provision reproves the Pennsylvania State Board of Education for neglecting to prohibit discrimination against handicapped students in § 12.4 of the Pennsylvania Code. Moreover, by omitting the handicapped from this section, the State Board does not seem vehemently opposed to discrimination against the handicapped. Memorandum to students and their parents, friends and advocates from Caryl Andrea Oberman, a lawyer affiliated with the Education Law Center, Inc., in Philadelphia (Oct. 25, 1982) (regarding Pennsylvania State Board of Education's proposed changes in regulations covering students' rights and discipline).

216. CAL. EDUC. CODE § 56300 (West Supp. 1982).

217. N.Y. EDUC. LAW § 4402 (McKinney 1981).

218. *Id.* Since a salaried member is dependent on the school district for remuneration, he would more likely feel pressured to favor school district policy than a volunteer.

219. *See supra* note 81 and accompanying text.

220. *See supra* note 13 and accompanying text.

221. *See supra* notes 138-48 and accompanying text.

222. NEW YORK GUIDE, *supra* note 191, at 9.

223. *See supra* note 92 and accompanying text.

and addresses of organizations or individuals who provide free or low-cost legal services to parents at a due process hearing or civil action.²²⁴ If parents wish to be represented by an attorney but cannot afford one, the school district shall bear the attorney's fees when free or low-cost legal aid is unavailable.²²⁵

(iv) The notification, written in layman terms, shall comply with the requirements enumerated in the Education for All Handicapped Children Act of 1975 and in the Code of Federal Regulations.

(d) The COH is authorized to receive and investigate complaints, and to conduct hearings with power of subpoena, on behalf of any handicapped child regarding failure to comply with federal or state laws and regulations for handicapped children. Any person may present a complaint to the COH concerning the school district's noncompliance with the federal or state special education laws and regulations.²²⁶

(e) The COH shall organize a public awareness program detailing the available special education programs and related services.²²⁷

(f) The COH shall develop in-service education programs for parents of handicapped children.²²⁸

5. The state education department shall prepare and distribute a handbook to parents of handicapped children and members of the school district's COH. The handbook shall explain, in layman terms, the financial and educational obligations of the state, the county or city, the home school district, the COH, the special services or programs available for handicapped children and their parents, and the administrative and legal procedures available to aggrieved parents.²²⁹

(a) The handbook shall inform parents of the telephone numbers and locations of associations available to assist parents with understanding the procedures involved in providing their child with an appropriate education. The handbook shall include an estimation of the cost of the association's services.

(b) The handbook shall inform parents of the telephone numbers and addresses of organizations and individuals²³⁰ who are available to assist parents at a due process hearing or civil action. The handbook shall explain that if parents wish to be

224. See *supra* note 93-94 and accompanying text.

225. See *generally supra* notes 175-199 and accompanying text.

226. See *supra* note 124.

227. See *supra* note 99 and accompanying text.

228. See *supra* note 102 and accompanying text.

229. N.Y. EDUC. LAW § 4403(8) (McKinney 1981). See *supra* note 96 and accompanying text.

230. A layman experienced with the handicapped may be as effective as a lawyer with limited or no experience. See HARV. LAW. REV., *supra* note 24, at 1112 n.56.

represented by a lawyer but are unable to afford one, then the school district shall bear the attorney's fees.

6. A handicapped child's individualized education program (IEP) shall include a history of the child's past misconduct.²³¹

7. Prior to disciplining a handicapped child, a school official shall first determine that there is no connection between the child's misconduct and his handicap.²³²

8. The school official shall examine the child's IEP to discern whether the child's present misconduct is similar to past patterns of behavior indicated in the IEP.²³³

9. No handicapped child shall be excluded from school if his behavior was a manifestation of his handicap.²³⁴

10. School districts shall develop programs that permit a misbehaving student to be disciplined while not interrupting his education.²³⁵

11. A handicapped child and his parents shall receive written notice when the school proposes the change the child's educational status. If parents fail to respond to the notice, an eligible child may contest the proposed change.²³⁶

12. Parents shall have the right to an impartial hearing regarding their child's placement. The hearing officer shall not be employed by the school district where the child resides or by any state agency. Educators and psychologists who are knowledgeable in the special education field may serve as hearing officers. To ensure the officer's impartiality, parties may question the officer concerning his knowledge of the case. The officer's creden-

231. See *supra* notes 113-119 and accompanying text.

232. *Id.*

233. *Id.*

234. A socially and emotionally disturbed or learning disabled child should not receive fewer procedural protections than a mentally retarded child. See *supra* notes 131-133 and accompanying text.

235. Exclusion from school serves only to interrupt the education of a child who is not causing a danger to himself or others. Moreover, "[s]uspension and exclusion of troublesome students are only expedient solutions to the problem of maintaining a safe environment for learning in" schools. Jefferson, *Student Rights, Discipline, and Social Responsibility in American Education for the Year 1977*, in *STUDENT RIGHTS AND DISCIPLINE: POLICIES, PROGRAMS, AND PROCEDURES 10* (1978). See *Jones v. Gillespie*, 60 Pa. D.&C. 2d 576, 579 (1973) (discussion of the deleterious effects of a five day suspension).

If a child's misconduct is a reflection of the frustration he feels when his educational program inadequately meets his needs, exclusion exacerbates, rather than solves, the problem. PARENTS UNION FOR PUBLIC SCHOOLS, *SUSPENDED STUDENTS—SUSPENDED LEARNING: A REPORT ON SUSPENSIONS IN THE PHILADELPHIA PUBLIC SCHOOLS 5-6* (1982). Thus, as school officials treat the symptom by using expedient measures, they invariably evade the cause. See Kaeser, *Suspensions and School Discipline*, 11 *EDUCATION AND URBAN SOCIETY* 465 (1979), reprinted in S. GOLDSTEIN & E.G. GEE, *LAW AND PUBLIC EDUCATION* 387 (1980).

As an alternative to exclusion, school officials should consider re-evaluating the child to determine whether the child's misbehavior is attributable to an improper placement. In addition, schools should consider in-school suspension, hands-on vocational education programs with local mental health agencies, and work study programs for some students. Sindelar, *Suspensions and Expulsions of Handicapped Students: The Evolving Case Law*, 12 *SCHOOL LAW BULLETIN* 1, 9 (1981). See *TECHNICAL ASSISTANCE GUIDE*, *supra* note 71, at 12-13.

236. See *supra* notes 104-112 and accompanying text.

tials shall be available for scrutiny by their parents. The hearing officer shall be cognizant of federal and state laws and regulations regarding special education.²³⁷

13. A school may suggest mediation to resolve disputes prior to initiating the formal due process hearing. Parents are not obligated to resort to mediation.²³⁸

14. Parents shall have the right to compel the attendance of witnesses at a hearing. The hearing officer is authorized to require that a witness who fails to appear shall pay the reasonable expenses, including attorney's fees, caused by his nonappearance, unless the hearing officer finds that the witness' nonattendance was substantially justified.²³⁹

15. The school district shall inform parents of their right to obtain a record of the proceedings at public expense.²⁴⁰

16. Every instructor or school employee who comes in contact with handicapped children shall be qualified to recognize and handle their problems.

17. Each school district shall devote one full day a year to an in-service program to educate regular and special education teachers and school administrators about handicapped children.²⁴¹

18. An individual is liable if he intentionally or negligently causes harm to the educational progress of a handicapped child.²⁴²

19. The Pennsylvania Legislature shall appoint an equal educational opportunity (EEO) officer and staff to ensure that every handicapped child receives a free appropriate public education. The duties of the EEO officer and his staff shall include the following:

(a) The EEO officer shall investigate complaints concerning Pennsylvania's noncompliance with the EAHCA;

(b) The EEO officer shall periodically advertise on radio,

237. See *supra* notes 142-174 and accompanying text.

238. An adversarial hearing may not be the best solution for resolving differences between parents and schools regarding the child's program. Some states have found mediation to be a less stressful alternative. Following mediation, an aggrieved party still may have a formal due process hearing if he desires one. 34 C.F.R. § 300.506, comment (1982). Statutes in California and Connecticut provide for a mediation conference in lieu of an administrative review of a child's educational placement. If mediation fails to resolve the parties' dispute, either party may initiate a hearing. CAL. EDUC. CODE § 56503 (West Supp. 1982); CONN. GEN. STAT. ANN. § 10-76h(b) (West Supp. 1982).

239. FED. R. CIV. P. 37(b)(2)(E). Notwithstanding statutes and regulations that give parents the right to compel the attendance of witnesses, the provisions offer no concomitant remedy if witnesses disregard a subpoena commanding their presence at a hearing. Without a sanction, a child's procedural due process rights are toothless.

240. See *supra* note 203 and accompanying text.

241. See *supra* note 123 and accompanying text.

242. LA. REV. STAT. ANN. § 1958(c) (West 1982). ("Individuals who intentionally or by grossly negligent acts or omissions cause damages to an exceptional child or other individual participating in a special education or handicapped program" will be liable for civil damages resulting from their acts or omissions in rendering the requisite care or services.) See *supra* note 18.

television, and in newspapers regarding the problems and rights of handicapped children;

(c) Interested people may use a toll-free telephone number to question the EEO officer or his staff about the rights of handicapped children; and

(d) The EEO staff lawyers shall represent handicapped children whose parents are unable to afford a lawyer, whose parents are uninterested in pursuing their child's rights, or who are wards of the state.²⁴³

VI. Conclusion

The Education for All Handicapped Children Act of 1975 guarantees each handicapped child the right to a free appropriate public education and establishes due process safeguards to protect that right. Pennsylvania's special education statutes and regulations are ambiguous and inadequate and, therefore, insufficiently protect a handicapped child's rights. These rights will not be secured if his parents are unaware of them and incapable of understanding or articulating the child's needs. Furthermore, rules that discriminate against certain handicapped children and deter appeals from erroneous placement decisions contravene the EAHCA's goal.

Adoption of the model rules detailed above would clarify current vague provisions, educate parents who are unaware of their child's rights, and provide workable rules for school officials. Until handicapped children are afforded the protections guaranteed by the EAHCA, their rights will exist in theory—but not in practice.

LAURIE E. GOTTLIEB

243. Krass, *The Right to Public Education for Handicapped Children: A Primer for the New Advocate*, 1976 U. ILL. L.F. 1016, 1077-78.