COMMENT

AGE APPROPRIATENESS AS A FACTOR IN EDUCATIONAL PLACEMENT DECISIONS

I

INTRODUCTION

Handicapped students are becoming integrated into the mainstream of public education as hundreds of thousands of exceptional children are now served in public schools at public expense[1] following the enactment of Public Law No. 94-142, the Education for All Handicapped Children Act of 1975[2] (EAHCA or Act) and section 504 of the Rehabilitation Act of 1973.[3] Enormous gains have been made toward achieving full educational opportunities for handicapped children. Now that the legislation appears to be successful in meeting its broad goals of providing access to an adequate public education for handicapped children, however, parents, school systems, and ultimately courts are grappling with many questions regarding specific placement decisions within the public school system—a particularly difficult task because the legislation gives little guidance regarding substantive requirements for the educational programs of handicapped children.[4]

One of these difficult questions will be addressed in this comment: should school districts be required to place children in an educational setting where they will have an opportunity to interact with chronological age peers, even if they are functioning academically at a different level? This question is not directly addressed by either of these statutes or their accompanying regulations, and few reported cases have even considered the question in making a placement decision—much less made it the determining factor. The issue, however, was recently litigated in the Durham (North Carolina) County School System when parents of an 18-year-old mentally retarded student challenged the placement of their son in a self-contained classroom for mentally handicapped students located in a junior high school because it was not "age appropriate." Instead, the parents requested the same academic program—a self-contained classroom for academic instruction with mainstreaming for physical education and extracurricular activities—but located at the high

1. Stark, *Tragic Choices in Special Education: The Effect of Scarce Resources on the Implementation of Pub. L. No. 94-142,* 14 CONN. L. REV. 477, 478 (1982).
2. 89 Stat. 773 (codified as amended at 20 U.S.C. §§ 1401-1461 (1982)).
3. Pub. L. No. 93-112, 87 Stat. 394 (codified at 29 U.S.C. § 794 (1982)).
4. *See infra* note 24 and accompanying text.

school where the mainstreaming would be carried out with his chronological age peers. Although the parents lost on this issue at the due process hearing, and this decision was subsequently affirmed at the state hearing review level and in state court, the parties were not allowed to develop this issue fully at the first hearing.[5] Full development of the legal issues shows that consideration of chronological age appropriateness may be required as a factor in placement decisions for some children.

This comment will first describe the North Carolina case as an illustration of the issue of age-appropriate placement and then explore ways in which the two statutes and accompanying regulations may require consideration and implementation of chronological age-appropriate educational placement.

Second, it will develop the idea that education includes nonacademic benefits such as the development of social skills. Thus, age appropriateness should be considered in every placement decision as a method of providing socialization skills and may be required in cases where the child's individual program shows that he can function in and gain benefit from an age-appropriate environment. The comment will then show that the integration principle expressed by the least restrictive environment mandate also requires age-appropriate placement unless the handicapping condition requires removal from such a regular educational environment. Furthermore, it will assert that such a requirement does not infringe upon local autonomy in the field of public education as states have chosen to have their freedom of decisionmaking curbed to the extent necessary to comply with the statutory requirements for federal funding.

Finally, the comment will explore the idea that refusing to allow equal socialization benefits from participation in age-appropriate placements constitutes discrimination under section 504 of the Rehabilitation Act. It will also explore the suggestion that, in some situations, affirmative modification of programs may be required to avoid such discrimination.

II

POE CASE

A. Educational Placement

At the time of the hearing, Clint Poe was an 18-year-old moderately retarded student attending public school in the Durham County School System (hereinafter also referred to as the local educational agency or LEA or school system). He was classified as trainable mentally handicapped (TMH)[6]

5. Administrative Hearing Decision at 2 (Durham, N.C. 1982) [hereinafter cited as Hearing Decision]. The transcript of this hearing is recorded in three volumes, hereinafter cited as I, II or III Hearing Transcript.

6. Mental retardation is "a term referring to that group of conditions characterized by a) slow rate of maturation, b) reduced learning capacity, and c) inadequate social adjustment, present singly or in combination and associated with intellectual functioning which is below the average range. . . ." C. GOOD, DICTIONARY OF EDUCATION 499 (3d ed. 1973). Mentally retarded individuals are classified according to IQ range. Trainable mentally retarded individuals function in approxi-

and was functioning academically at approximately the first grade level.[7] The level of his social functioning was in dispute. The LEA contended that he was functioning at a pre-teen social level, while his parents and community acquaintances argued that he functioned well among persons of his own age and older.[8] Clint was receiving academic instruction in a self-contained classroom for TMH students located in a junior high school. Though he was not interacting with nonhandicapped students in the classroom, he did have an opportunity to do so at lunch time, between classes, and during field trips and other extracurricular activities.[9]

A survey of his placement history reveals that Clint was never placed in a school containing chronological age peers. Upon entering the Durham County School System in 1973 at age nine, he was placed in the TMH program which was then located at the Kindergarten Center.[10] He remained there through the 1975-76 school year when the school system established a second location for its TMH program. At age twelve, Clint moved with his class to a sixth grade center where he remained for three school years until age fifteen.[11]

In 1979, in response both to parental requests for age-appropriate placement for their retarded children and to a similar recommendation from its own TMR Study Committee, the LEA established a TMH class at the junior high school level.[12] Clint moved there at age fifteen and remained in that

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mately the 40-60 IQ range and are capable of being trained "to perform some personally and socially useful operations, but . . . cannot acquire functional literacy." *Id.* at 362. Educable mentally retarded individuals fall within the 50-75 IQ range, "do not exhibit unusual or erratic behavior, are not necessarily marked by any special physical stigmata . . . are almost indistinguishable from the normal population," and may be expected to achieve literacy to the fourth or fifth grade level. *Id.*

Clint's psychological tests indicate that he did not fit the classical pattern for either TMH or EMH students. The parties, however, agreed that he functioned as a moderately retarded or TMH student.

7. Hearing Review Decision at 4 (Raleigh, N.C. 1982) [hereinafter cited as Hearing Review Decision].

8. *Id.*

9. Brief for Appellants at 7, Poe v. Durham County Schools, No. 82-2566 (N.C. Super. Ct. 1982) [hereinafter cited as Appellants' Brief].

10. Although Clint had begun his schooling in a TMH placement in another school system, upon first entering the Durham County System, his parents agreed to try placing Clint in an EMH program because he was testing at a mildly retarded level and because they considered the Kindergarten Center an undesirable location for the TMH class. However, Clint was not successful in the EMH program housed in a "regular" elementary school, and his parents agreed to return him to a TMH placement. Petitioners' Brief at 1, Administrative Hearing for Clint Poe (Durham, N.C. 1982) [hereinafter cited as Petitioners' Brief].

11. *Id.*

12. In fact, during the 1977-78 school year a group of concerned parents in the Durham City and Durham County School Systems studied the question of appropriate educational placement for retarded children. An early suggestion for a center for handicapped students segregated from both school systems eventually was rejected by the majority. Instead, based upon their studies of learning principles including role modeling, normalization, and least restrictive environment, 489 parents (184 parents of handicapped children and 305 parents of nonhandicapped children) endorsed a plan which called for "education in the least restrictive environment, placement of handicapped children in age appropriate settings, four levels of school placement (pre-school, elementary, junior high, and high school), a strong vocational program, and access to extracurricular and 'nonacademic' activities." Petitioners' Brief at 1.

After the plan was presented to both school systems in May 1978, the Durham County School

placement through the 1981-82 school year, when his due process LEA hearing was held. He was then eighteen years old.

The LEA argued that Clint could interact with chronological age peers even though placed at the junior high level because the school population included older nonhandicappped students. However, a study of the nonhandicapped junior high school population at Clint's school showed that, of the total 858 students attending:

- 600 were 14 years of age or younger
- 113 were 15
- 18 were 16
- 3 were 17
- 0 were 18 (Clint's age).[13]

Clint's teacher for 1981-82 suggested in the proposed 1982-83 individualized education program (IEP) developed for Clint that a high school placement would be preferred.[14] Durham County Schools did offer a program for mentally retarded students at the high school level, but it was designed for educable mentally handicapped (EMH) students and therefore was structurally different from a TMH program. The Durham program offered one to three class periods a day of academic work for EMH students in a separate classroom. The students joined nonhandicapped students for nonacademic classes and extracurricular activities.

Two TMH students who were functioning particularly well had moved into this program at the high school with some success, and such placement was offered to Clint. However, this program was not recommended for TMH students because it did not offer the necessary curriculum, structure, or pupil/teacher ratio for such students and the school system did not adapt the program to accommodate entering TMH students.[15] The Poes, therefore, refused such placement, requesting instead that an appropriate TMH program be established at the high school level so that Clint and other high-school-aged TMH students could be taught separately from EMH students in a self-contained classroom with appropriate vocational education,[16] yet could

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System decided that it was not feasible to establish a joint program with the City Schools and set up its own TMR Study Committee. After conducting its own study which included visiting other school systems, the Committee reached the consensus that the system "should offer TMH classes in 'age-appropriate' settings with nonhandicapped students in at least three settings—elementary, junior high, and high school." *Id.*

13. Petitioners' Brief at 3.

14. Petitioners' Brief at 1, State Hearing Review (Raleigh, N.C. 1982).

15. Petitioners' Brief at 2; Appellants' Brief at 8.

16. The Poes requested in-school, hands-on vocational instruction for two hours daily to replace the introductory and exploratory courses which Clint was receiving for two hours every other week. They contended that the task training must be provided at the high school because of the programs and facilities available there. Although both hearing officers found that Clint did indeed need increased task training to prepare him for future employment and to allow him increased independence, the officers found that it was not necessary to provide this training at the high school because appropriate modifications could be made to his program at the junior high school. Hearing Decision at 7; Hearing Review Decision at 7.

be mainstreamed for lunch, assemblies, and school-wide events and possibly mainstreamed for nonacademic subjects.

B. The Poes' Challenge

When the Durham School System refused to establish such a program at the high school level, the Poes requested a hearing to determine whether the EAHCA required that an appropriate educational program for Clint include a high school placement with chronological age peers. In addition, they sought a determination of whether the failure to make accommodations for Clint to receive educational benefits and services in a high school with chronological age peers was a denial of equal educational opportunity in violation of section 504 of the Rehabilitation Act of 1973.

Although the hearing officer heard extensive testimony, much of which related to chronological age placement, she expressly declined to consider or determine the issue of whether chronological age placement was a necessary element of appropriate education for all trainable mentally retarded individuals. Because she believed the purpose of the hearing was to determine the appropriate placement for one individual, she did not allow the parties to fully develop the issue on the record; she considered only evidence and testimony specific to Clint's educational program, giving primary attention to his level of performance and his identified strengths and weaknesses.[17]

The hearing officer found that Clint's current placement in a self-contained class at the junior high level was appropriate[18] because no federal or state regulation required "a local school administrative unit to set up a particular type of class at each level within the educational system or . . . [indicated] that students, in order to receive an appropriate education, must be placed in a school with students of the same age."[19] She also found that section 504 only required that handicapped children have an opportunity to participate in nonacademic activities with nonhandicapped children—not necessarily nonhandicapped age mates.[20]

These factual and legal findings were affirmed by a State Hearing Review Officer. However, he specifically found that it was possible for a student "to benefit in social skills development from contact with other persons of approximately his chronological age," and that "the student could have increased access to such persons by placement at the senior high school level."[21] He also stated that he could not say that the parents' position was without merit because Clint and other high-school-aged TMH students might benefit from a self-contained class at the senior high school level and because the class might thrive with the support of the school system and the commu-

17. Hearing Decision at 2.
18. The Hearing Officer did require certain vocational training modifications to the current IEP. *See supra* note 16.
19. Hearing Decision at 6-7.
20. *Id.* at 7.
21. Hearing Review Decision at 5.

nity. The Hearing Review Officer suggested, however, that the local board of education would be the proper forum for requesting such a program, and that based upon the record of this case he could not order the requested placement.[22]

III

APPROPRIATE EDUCATION UNDER PUBLIC LAW NO. 94-142

The Poes' major argument under the EAHCA[23] was that Clint was not receiving the "appropriate" education which is required by the statute. To evaluate the validity of this argument, one must consider what is meant by "appropriate."

The EAHCA provides federal funds to assist state and local education agencies in educating their handicapped students. To qualify for such funds, a state must comply with the objectives and procedures established by the Act. The statute contains both procedural and substantive requirements. However, the procedural requirements far outweigh the substantive requirements in number, complexity, and specificity.[24] The goals, programs, and timetables of the state plan which must be submitted[25] and the methods for challenging the appropriateness of particular educational programs[26] are spelled out in great detail, whereas the major substantive requirement of the Act is merely that the state provide a "free appropriate public education" to handicapped children.[27] As one commentator noted, "in effect, the Act guarantees procedures whereby parents may challenge the appropriateness of their child's educational program, but provides only the most general guidelines for resolving the substantive questions such challenges may present."[28]

Because of the lack of substantive guidelines, most disputes have involved the meaning of "appropriate" education. Some commentators and courts concluded that Congress did not define the term because it intended that the

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22. *Id.* at 17.

23. Pub. L. No. 94-142, 89 Stat. 773 (codified as amended at 20 U.S.C. §§ 1401-1461 (1982)).

24. In fact, one commentator noted that "it is difficult to find, in other Federal legislation concerning matters of such traditional local concern as education, a statute that is so prescriptive in its procedural obligations." *EHLR Analysis, What* Rowley *Means,* 1982-83 EDUC. HANDICAPPED L. REP. (CRR) SA-29, -34 (Supp. 84, Nov. 12, 1982).

There are good reasons for not creating specific substantive requirements for educational programs for the handicapped. Given the broad range of handicapping conditions covered by the statute, it would be virtually impossible to write generic requirements for educational programs without ignoring important differences among individuals. *See infra* Part III B. The lack of agreement among educators as to the most effective programs for certain handicapped students would also make Congress reluctant to adopt specific guidelines, especially since statutory adoption of certain methods would tend to stop potentially valuable experimentation at the local level. Furthermore, Congress is particularly wary of ordering specific programs because of the traditional notion that education is primarily a state and local concern. *See infra* part V; Note, *Enforcing the Right to an "Appropriate" Education: The Education for All Handicapped Children Act of 1975,* 92 HARV. L. REV. 1103, 1108-09 (1979).

25. 20 U.S.C. § 1413 (1982).

26. *Id.* § 1415(b), (e)(2).

27. *Id.* § 1412(1).

28. Note, *supra* note 24, at 1103.

courts and hearing officers should do so.[29] Although admitting that the definition "tends toward the cryptic rather than the comprehensive," the Supreme Court rejected this view in *Board of Education v. Rowley,*[30] finding that the Act does indeed define the term "appropriate education."[31] Based upon these statutory definitions, the majority stated a two-part standard[32] which may bear on the question of age- appropriate placement. A placement must both benefit the child educationally and provide the child with an individualized education program. This part of the comment addresses both of those elements.

A. Educational Benefits

At this point in our history there is little dispute that education and the benefits derived from education are not purely academic in nature. Education is also an instrument for socialization—both teaching cultural values and helping the child adjust to his environment. The Supreme Court accepted this notion in *Brown v. Board of Education*[33] when it found education to be a principal instrument in developing good citizenship and cultural values, preparing the child for later training, and helping him adjust normally to his environment.[34] In *Wisconsin v. Yoder,*[35] the Court further acknowledged the importance of public education in preparing individuals to be "self-reliant and self-sufficient participants in society" and accepted the view that the value

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29. Stark, *supra* note 1, at 498 ("Nowhere does the EAHCA specify what is meant by an 'appropriate' education for handicapped children."); Rowley v. Board of Educ., 483 F. Supp. 528, 533 (S.D.N.Y.) ("[T]he Act itself does not define 'appropriate education' . . . it has been left entirely to the courts and the hearing officers to give content to the requirement of an appropriate education."), *aff'd,* 632 F.2d 945 (2d Cir. 1980), *rev'd,* 458 U.S. 176 (1982).

30. 458 U.S. 176, 188 (1982).

31. The Court stated:

> The term "free appropriate public education" means *special education* and *related services* which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

Id. (citing 20 U.S.C. § 1401(18) (1982)) (emphasis added).

"Special education" is defined as "specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicaapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions." 20 U.S.C. § 1401(16) (1982). "Related services" are "transportation, and such developmental, corrective, and other supportive services . . . as may be required to assist a handicapped child to benefit from special education." 20 U.S.C. § 1401(17) (1982).

32. The Court stated:

> Insofar as a State is required to provide a handicapped child with a "free appropriate public education," we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP.

458 U.S. at 203.

33. 347 U.S. 483 (1954).

34. *Id.* at 493.

35. 406 U.S. 205 (1972).

of all education must be assessed in terms of its capacity to prepare the child for life.[36] Thus, socialization, social skill development, and the development of self-sufficiency must be objectives of an appropriate education for every student.

Congress recognized that it is particularly important that such nonacademic components of education be offered to handicapped students; self-sufficiency and self-respect were major goals of the legislation. As expressed on the Senate floor, the goal and purpose of the statute was "to meet the unmet needs of all handicapped children" which included "making them productive citizens, capable of self-respect and pride which they rightly deserve."[37] Congress based these goals for the education of handicapped students at least partly on its assumption that spending the money to maximize the independence and self-sufficiency of handicapped students would ultimately relieve taxpayers of the burden of supporting unproductive members of society. Congress argued that "[w]ith proper education services, many [handicapped children] would be able to become productive citizens, contributing to society instead of being forced to remain burdens. Others, through such services, would increase their independence, thus reducing their dependence on society."[38]

Some courts in determining an appropriate education for handicapped students have considered whether a student was receiving necessary nonacademic educational benefits as part of his program. As a district court in Texas noted, "Full social interaction is an important part of today's educational curriculum and is even more vital to a child . . . who necessarily suffers a certain degree of isolation as a result of his handicap."[39] That court specifically found that depriving a handicapped child of an opportunity to interact fully with his peers constituted a deprivation of educational benefits.[40]

Advocates of age-appropriate placement argue that the handicapped student's social skills and self-respect are enhanced by such placement—in other words, that the student receives nonacademic educational benefits necessary to an appropriate education from the placement—while placement elsewhere deprives the student of proper, age-appropriate role models. In the Poe case,

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36. *Id.* at 221.

37. 121 CONG. REC. 37,413 (1975) (statement of Sen. Williams).

38. S. REP. NO. 168, 94th Cong., 1st Sess. 9, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 1425, 1433.

39. Espino v. Besteiro, 520 F. Supp. 905, 913 (S.D. Tex. 1981) (granting motion for preliminary injunction based upon likelihood of success under EAHCA).

40. *Id.* The court went on to discuss the fact that the placement was not providing an opportunity for maximization of the student's social interaction skills commensurate with that provided other children in the class and that, in view of all the circumstances, he might be deprived of a full educational opportunity. These statements are very similar to the New York district court's definition of appropriate education—"an opportunity to achieve [her] full potential commensurate with the opportunity provided to other children"—which was later discredited by the Supreme Court in *Rowley*. 458 U.S. at 186. However, the *Rowley* decision should not be fatal to the holding in *Espino* that the child's placement was inappropriate since the court had specifically found that the student was receiving no educational benefits from the placement and that the placement might not be in conformity with his IEP. *Espino*, 520 F. Supp. at 913.

one expert witness testified that contact with chronological age peers would increase Clint's chance of modeling older students' behavior and allow him to profit from incidental learning—learning from his surroundings.[41] The Supreme Court seemed to approve of this type of learning in *Wisconsin v. Yoder* as a means of preparing the child for his adult role at least "during the crucial and formative adolescent period of life."[42] "During this period, the children must acquire Amish attitudes . . . and the specific skills needed to perform the adult role . . . . These traits, skills, and attitudes admittedly fall within the category of those best learned through example and 'doing' rather than in the classroom."[43]

In the special education context, providing the child with an opportunity to benefit from age-appropriate role models was a major reason for bringing handicapped children into the public schools. As several writers have argued, "With systematic instruction, many severely handicapped students can be taught to learn by imitating many of the appropriate actions of their chronological age peers. Interaction with nonhandicapped students thus provides the potential instructional advantage of having access to constructive models. . . ."[44] This "contact for normalization" was cited by the teacher of a high school EMH program in Durham County as the reason for including mainstreaming as one of the three components necessary for an appropriate TMH program.[45] In his opinion this would mean placing the program for high-school-aged students in or near the high school building so that students could have contact with others of the same age and size.[46] One of the experts testifying for Clint Poe succinctly stated the argument for moving the present TMH academic program to the high school: "Methods can be used anywhere and should be. Age-appropriate models are hard to provide outside of the place where age-appropriate models go to school."[47]

The importance of providing age-appropriate models as part of a handicapped child's educational program has been noted by several courts in determining the appropriateness of an educational placement. In *Campbell v. Talladega County Board of Education,*[48] the court ordered that the educational program of an 18-year-old severely retarded student include increased contact with nonhandicapped students based on the fact that "considerable evidence established that such interaction is essential to provide him with role

41. I Hearing Transcript at 48-50 (testimony of Kenneth Jens, Clinical Associate Professor of Special Education at the University of North Carolina).

42. 406 U.S. 205, 211 (1972).

43. *Id.*

44. Brown, Branston, Hamre-Nietupski, Johnson, Wilcox & Gruenewald, *A Rationale for Comprehensive Longitudinal Interactions Between Severely Handicapped Students and Nonhandicapped Students and Other Citizens,* AAESPH REV., Spring 1979, at 7.

45. III Hearing Transcript at 171 (testimony of Peter Hoyt, teacher of high school EMH program).

46. *Id.* at 174.

47. I Hearing Transcript at 48 (testimony of Kenneth Jens, Clinical Associate Professor of Special Education at the University of North Carolina).

48. 518 F. Supp. 47 (N.D. Ala. 1981).

models . . . ."[49] In reaching its decision, the court relied upon expert testimony that "considerable interaction between nonhandicapped and mentally handicapped children may be achieved when they are educated under the same roof and that such integration has been attained successfully in school districts across the country."[50]

Similarly, in *Mallory v. Drake*,[51] a Missouri state court upheld a hearing panel's decision that a severely handicapped student should be placed in a classroom with other severely handicapped children "located in a public school setting where she will have access to social interaction and modeling of less handicapped children."[52] And again, in *Hines v. Pitt County Board of Education*,[53] a federal district court in North Carolina, considering the proper residential placement for a 10-year-old emotionally handicapped student, specifically found that "an appropriate peer group for [the] plaintiff would be made up of children ages eight through ten."[54] The court then studied the ages of the student population in the student's current placement (which included no 10-year-olds, four 11-year-olds and nineteen children ranging from 12 to 17) and concluded that it was insufficient to meet his need for an appropriate peer group.[55] In reaching its decision, the court relied upon expert testimony that the age of the child's peer group was of primary importance.[56]

At the admininstrative hearing for Clint Poe, the school system countered the Poes' contention that Clint could benefit educationally from a high school placement by arguing that inclusion in the high school program actually would be harmful to Clint due to the risk that he would be ridiculed and would be unable to fit in.[57] It argued that TMH students in a self-contained classroom would be isolated from the rest of the students, that the greater tendency of high school students, as compared to junior high school students, is to operate as individuals rather than as part of a group, and that this tendency would make it harder for the TMH students to make friends and interact with nonhandicapped students.[58]

There was, however, contrary testimony that the tendency of high school students to make decisions as individuals rather than as part of a group, cou-

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49. *Id.* at 55.
50. *Id.* at 50.
51. 616 S.W.2d 124 (Mo. App. 1981).
52. *Id.* at 127.
53. 497 F. Supp. 403, (E.D.N.C. 1980).
54. *Id.* at 407.
55. *Id.*
56. *Id.* at 408.
57. Respondent's Brief at 6, Administrative Hearing for Clint Poe (Durham, N.C. 1982) [hereinafter cited as Respondent's Brief].

The Durham County System also contended that this conclusion was based upon its unsuccessful experience with a self-contained classroom for retarded students located at one of its high schools during the late 1960's and early 1970's. It is undisputed, however, that this program was entirely self-contained for all school activities, both academic and nonacademic, and that the current program for EMH students which included appropriate mainstreaming for nonacademic instruction and other school activities was successful. Appellants' Brief at 15; Respondent's Brief at 10.

58. Respondent's Brief at 10-11.

pled with their greater maturity and volunteerism, would make them more likely to react positively to such a class.[59] The view that contact with age-appropriate peers was beneficial rather than harmful was also suported by actual experience within the Durham County School System. Clint's teacher observed an improvement in the social skills and behavior exhibited by him and others in his TMH class when they were moved from a sixth grade center to the junior high setting, a setting which, at the time, provided more age-appropriate peers.[60] Also, the teacher of the EMH program at the high school testified to behavioral gains and improved self-esteem achieved (though not without difficulty) by the two borderline EMH/TMH students who joined his program.[61] Further support for the view that such contact within a high school setting was beneficial to TMH students was provided by testimony that other school systems in North Carolina which were educating TMH students in age-appropriate high school settings reported successful educational programs, including observable improvements in the social behavior of handicapped students.[62]

The EAHCA clearly supports the argument that such interaction is beneficial, not harmful. As one hearing officer concluded:

> The statutes do not consider social interaction with peers to be harmful . . . . Rather, the statutes contemplate that interaction with similarly handicapped children or non-handicapped children will be a positive social experience for the child and that interaction with . . . children of approximately the same age will be socially beneficial to the child's development.[63]

The EAHCA also seems to contemplate that an appropriate education is to be provided at the proper chronological age level, as the definition of free appropriate public education "include[s] an appropriate preschool, elementary, or secondary school education in the State involved."[64] The *Rowley* Court included this requirement in its definitional checklist of items which must be satisfied, stating that the personalized instruction and supportive services provided the child must "approximate the grade levels used in the State's regular education."[65] Since many handicapped students, especially retarded students, will never be able to approximate the grade levels of a regular education academically, the statute must refer to placement of children in approximately the grade level that nonhandicapped children their age would attend. Most school systems allow this type of age placement for nonhandicapped children despite failure to meet grade level academic standards. The superintendent of the Durham County School System testified that placement

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59. Petitioners' Brief at 4; Appellants' Brief at 15.

60. Appellants' Brief at 16.

61. III Hearing Transcript at 174-75 (testimony of Peter Hoyt, teacher of high school EMH program).

62. II Hearing Transcript at 125-27 (testimony of Lynn Whitley, Advocate, Governor's Advocacy Council for Persons with Disabilities); *see also* Appellants' Brief at 15-16.

63. *In re* Tracy, 1981-82 EDUC. HANDICAPPED L. REP. (CRR) 503:297, :299 (Ill. SEA 1982) (hearing officer approved placement of 14-year-old girl in public school behaviorally disordered class despite parents' request for residential placement).

64. 20 U.S.C. § 1401(18)(C) (1982).

65. 458 U.S. at 189.

for nonhandicapped students was allowed in his system, at least through the tenth grade, on the basis of psychological considerations, academics, social skills, and other subjective criteria.[66] In accordance with the statute, then, this local practice should be followed for handicapped students as well.

The State Hearing Review Officer in the Poe case reached an interesting conclusion with respect to the requirement of approximating the grade levels of the state's regular education. He considered it arguable that the clear language of the statute required the TMH program to be provided both at the elementary and the secondary levels. State law defined elementary and secondary education; in North Carolina, elementary school included grades one through eight while grades nine through twelve made up secondary school. Local school systems, however, could choose to operate a junior high school including no more than grades seven through nine which would be a hybrid elementary/secondary school. Therefore, according to the hearing review officer, the Durham County School System arguably satisfied the specific mandate of the statute by providing education at both an elementary and secondary level by placing the program at a junior high.[67]

Following this logic, handicapped classes containing children from age 6 to 18 (approximately first grade through twelfth grade for nonhandicapped children) could be placed in such hybrid schools which would "arguably . . . provid[e] education both at the elementary and the secondary levels."[68] Such a situation would allow a significant departure from the congressional mandate that education be provided at regular educational levels.

The language of the EAHCA supports placement of handicapped children at regular educational levels. This preference reflects the general understanding that education includes nonacademic benefits such as the development of social skills and cultural values. Because the development of social skills and self-reliance was an important purpose of the EAHCA, some courts, in determining an appropriate education for handicapped children, have already considered age-appropriate placement as one method of helping handicapped children achieve these skills. Such nonacademic benefits should therefore be considered under the *Rowley* standard in determining the content of an appropriate education in every case. Whether such educational benefits are required for a particular handicapped child would be determined by his "unique needs" as identified in his individualized education program.

B. Individualization

Although the EAHCA as a whole has a broad goal—to provide a free appropriate public education for all handicapped children—it seeks to accomplish this goal by focusing on each individual handicapped student in order to identify and meet his specific educational needs. As one court pointed out, the Act "represents a clear national commitment to meet each handicapped

66. III Hearing Transcript at 19-23.
67. Hearing Review Decision at 17.
68. *Id.*

child's special needs in as integrated and complete a way as possible."[69]

Congress recognized that being handicapped is a complex, multidimensional condition[70] and therefore made no effort to establish educational programs or standards for each handicapping condition.[71] Instead, it provided that an individualized education program (IEP) must be developed for each handicapped child.[72] As one of the statute's supporters remarked during the House debate, "Because handicapped children are unique, setting up plans for each one makes good sense."[73]

The IEP prescribed by the Act is a written plan

> developed jointly by the local education agencies, a teacher involved with the specific education of the handicapped child, and his parents or guardian. The plan [includes] a statement of the child's present level of educational performance, a statement of the goals to be achieved, a statement of the specific services which will have to be provided, a projected date for initiation and duration of the services, and criteria and evaluation procedures for determining whether the objectives are being met.[74]

One of the Act's sponsors viewed the plan as an important means of achieving the goals of the statute: "Individualized plans are of great importance in the education of handicapped children in order to help them develop their full potential."[75]

In evaluating an educational program, hearing officers and courts must consider whether the program was designed to meet the unique needs of the handicapped child as developed in the IEP. As one court declared, "[T]here can be little doubt that by requiring attention to 'unique needs,' the Act demands that special education be tailored to the individual."[76] The court then took action to implement this requirement, holding that Pennsylvania could not inflexibly apply its absolute standard of a maximum 180-day school year to handicapped children because such a practice precluded consideration of individual needs.[77]

The United States Supreme Court recognized in *Rowley* that whether a handicapped child is benefiting educationally must also be determined by considering the child's unique abilities, needs, and related educational goals. The Court specifically stated that it was not attempting "to establish any one test for determining the adequacy of educational benefits conferred upon all children by the Act" because of the difficulty of answering this question for the broad spectrum of handicapping conditions.[78]

One commentator has suggested that the *Rowley* standard therefore calls

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69. Lora v. Board of Educ., 456 F. Supp. 1211, 1226 (E.D.N.Y. 1978), *aff'd in part, vacated in part,* 623 F.2d 248 (2d Cir. 1980).

70. Krass, *The Right to Public Education for Handicapped Children: A Primer for the New Advocate,* 1976 U. ILL. L.F. 1016, 1065 [hereinafter cited as *Primer for the New Advocate*].

71. *See supra* note 24.

72. 20 U.S.C. §§ 1401(19), 1414(a)(5) (1982) (definition).

73. 121 CONG. REC. 23,707 (1975) (statement of Congressman Quie).

74. *Id.*

75. 121 CONG. REC. 23,705 (1975)(statement of Congressman Brademas).

76. Battle v. Pennsylvania, 629 F.2d 269, 280 (3d Cir. 1980), *cert. denied,* 452 U.S. 968 (1981).

77. *Id.*

78. 458 U.S. at 202.

for a two-pronged approach.[79] First, the child's abilities, needs, and objectives must be examined. Then the program must be examined to determine whether it benefits the child in terms of his or her uniqueness.[80] Such an analysis will focus even greater attention on the precise nature of the individual handicapped child's needs and abilities—"including needs for emotional as well as intellectual development"—in making and reviewing decisions.[81]

Social skill development may be included in the needs and goals described by an IEP. Indeed, it was identified as a primary educational goal for Clint Poe by several witnesses who cited lack of social skills as the main reason for vocational failure by the mentally retarded.[82] These witnesses considered this goal more important than many of the academic goals identified in Clint's IEP, an assertion which was uncontested by the school system.

Furthermore, in Clint's IEP, his teacher described him as "behaving socially in an age-appropriate manner, being well-liked by peers, and demonstrating 'normalized' social skills."[83] She therefore recommended in his IEP for 1981-82 that Clint be offered a high school program. This recommendation was supported by Clint's most recent psychological evaluation which stated that the lack of opportunity to interact with chronological age peers was one reason for his scoring at a pre-adolescent level in social development, and added that he would benefit from more contact with high school age peers.[84] Thus, Clint was being denied educational benefits necessary to meet his unique needs and objectives.

Although the importance of a chronological age peer group for meeting the socialization needs of a handicapped student has been litigated in few reported decisions, it has been a factor in several decisions. One California hearing considered an almost identical issue to the Poe question—whether for integration to be appropriate, it must be with nonhandicapped peers who are chronologically age equivalent rather than mentally age equivalent.[85] Although the California hearing officer felt that the addition of chronologically age-appropriate integration would make the educational program ideal, the lack of such integration did not make the program inappropriate.[86] In fact, the hearing officer opined that although the student might receive great

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79. Wegner, *Variations on a Theme: The Concept of Equal Educational Opportunity and Programming Decisions under the Education for All Handicapped Children Act of 1975*, LAW AND CONTEMP. PROBS., Winter 1985, at 169, 186.

80. *Id.* at 186.

81. *Id.* at 187.

82. Petitioners' Brief at 23.

83. Appellants' Brief at 10.

84. Petitioners' Brief at 3.

85. *In re* Marin County Office of Educ., 1982-83 EDUC. HANDICAPPED L. REP. (CRR) 504:162 (Cal. SEA 1982).

86. 1982-83 EDUC. HANDICAPPED L. REP. at 504:165. Compare this finding with the statement by the Hearing Review Officer in the Clint Poe case that the Poes' position was not without merit because it could be that TMH students aged 16 to 18 would benefit from a class located at the high school and that the class might thrive, but that the evidence on the record did not show that it was required by the student. Hearing Review Decision at 17.

benefits from chronologically age equivalent nonhandicapped peer integration, it did not follow that integration with similarly functioning handicapped students would not bring its own unique benefits.[87]

This analysis seems to be based upon a "net benefits" determination. Under this approach, if the student is benefiting from the program in any way or if the student is receiving more benefit than harm, the educational program is deemed appropriate. Although it has been argued that this is the *Rowley* standard,[88] both the thrust of the statute towards individualization and the *Rowley* Court's recognition that a single benefits test cannot be articulated, suggest a benefits test which addresses the specific abilities, needs, and objectives of the individual. Thus, in determining whether a student is benefiting educationally from a placement, one should carefully scrutinize the student's needs and goals and ask whether they will be addressed in the particular placement. If all the student's needs cannot be met equally well in one placement, then one must determine the primary needs and meet those first and best.

Two other cases have analyzed the placement decision by considering the importance of the peer group in relation to the unique needs of the individual student. *In re Matthew S.*[89] involved a hearing to determine whether a profoundly deaf 7-year-old boy should continue in his placement at a learning center for the deaf or move to a public school's hearing impaired class which included students aged 6 to 8. The agency heard testimony that Matthew's paramount need at the time was "to strengthen his self-esteem, peer group identity, and social skills in the deaf community" where he could "find friends, competitors, and role models."[90] As in the Poe case, all agreed that the student could "learn his academics in either setting," so the hearing officer found that the question of his placement could not be dictated by his academic needs. Rather, the importance of socialization and peer group identity issues "made [the public school placement] inappropriate at this time."[91] Thus, in this case the student was not placed with age peers but with deaf peers. The placement points out the importance of determining with precision the socialization needs of the individual and meeting those needs in making a placement decision. For Matthew, it was determined that his need to socialize with other deaf students outweighed his need to interact with others in the community who could hear. The hearing officer was careful to note that this placement was necessary to meet his present socialization needs—the implication being that such needs may change over time as Matthew becomes adjusted to the deaf community. He then may need to move out into the hearing community, and this change in his needs would trigger a corresponding change in placement.

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87. *Id.*
88. Wegner, *supra* note 79, at 186.
89. 1980-81 EDUC. HANDICAPPED L. REP. (CRR) 502:346 (Mass. SEA 1981).
90. *Id.* at 502:347.
91. *Id.*

In *Hines v. Pitt County Board of Education,*[92] a federal district court determined that placement of a 10-year-old emotionally handicapped student in a school with students aged 11 through 18 was inappropriate. Finding that "[f]or Brad, . . . the *most* important factor in that determination is his peer group," the court relied on "[t]he testimony of all the expert witnesses who pointed out that the age of the peer group was very important to Brad's further education, although they disagreed as to its relative importance vis-a-vis other desirable factors."[93] The court canvassed the population at his present placement and found that of the twenty-three children currently enrolled, there were no 10-year-old children and four 11-year-old children, with all other children ranging in age from 12 through 17. The court therefore found the current child population not appropriate to meet the unique needs of the plaintiff for a chronological age peer group and determined that he was appropriately placed in a program designed for pre-adolescent children.[94]

The Durham County School System argued that the junior high placement was appropriate to meet Clint's socialization needs based upon the presence of nonhandicapped high-school-aged students at the junior high school and the support of its SCREEN (placement) team decision for the junior high school placement.[95] The first contention, that chronological age peers were available at the junior high school, was belied by the kind of canvassing of the student population which the *Hines* court used. Of the nonhandicapped students among the 858 students at the junior high, none were 18; only 3 were 17 years old; 18 were 16 years old; 113 were 15 years old; and the vast majority were 14 years old and younger. Therefore, less than 3 percent of the student population was 16 or older.[96] The analysis of the *Hines* court, therefore, would lead to a finding that the junior high placement was inappropriate because it was insufficient to meet Clint's unique needs for an appropriate peer group.

The Durham County SCREEN team did recommend continued placement at the junior high school despite Clint's teacher's recommendation for high school placement in his IEP. However, testimony of SCREEN team members at the hearing indicated that they considered the junior high placement to be the best available and that they had, therefore, recommended it because they were unable to recommend any placement that was not currently available in

92. 497 F. Supp. 403 (E.D.N.C. 1980).

93. *Id.* at 408 (emphasis in original). *Cf.* Grkman v. Scanlon, 528 F. Supp. 1032, 1036 (W.D. Pa. 1981) (closeness in age to other pupils merely considered one advantage of continued placement at center for deaf students), *remanded,* 707 F.2d 1391 (3d Cir. 1982) (to be reconsidered in light of *Rowley*), *reh'g,* 563 F. Supp. 793 (W.D. Pa. 1983) (ordered current evaluation and IEP); *In re* Brockton Pub. Schools, 1982-83 EDUC. HANDICAPPED L. REP. (CRR) 504:128 (Mass. SEA 16, 1982) (lack of sufficient peer group because of age gap between 5-year-old handicapped student and other students aged 8, 10, and 12 considered as a factor in placement decision).

94. 497 F. Supp. at 407.

95. Petitioners' Brief at 3-4. The State Hearing Review Officer evidently accepted the argument that chronological age peers were available at the junior high school, because he specifically found that the LEA had provided the student with opportunities for contact with his chronological age peers. Conclusion of Law No. 12, Hearing Review Decision at 9.

96. Petitioners' Brief at 3.

the school system. Two of these witnesses stated that if a high school placement had been available it could have been considered appropriate for Clint.[97]

This limitation upon the SCREEN team's ability to make recommendations seems to bear out the fears of early commentators on the statute who felt that although the content of the appropriate education to meet each individual's needs was to be developed through the IEP, "it is perhaps more likely that the needs of the child will only be delineated in terms of the services actually available."[98] This type of limitation is totally inappropriate under the statute. For, as another commentator noted, "Congress has focused on the individual child's needs rather than those of the state as the standard by which the provision of educational benefits is to be measured."[99] Thus, although other factors which a school system takes into account, such as cost,[100] may be considered in an effort to weigh the needs of the individual nonhandicapped student against those of other handicapped and nonhandicapped students, this weighing should not take place until after the needs of the handicapped individual have been evaluated. Then, the system may consider existing resources (not programs) to decide how best to meet as many of the needs of all children in the system as possible.

IV

LEAST RESTRICTIVE ENVIRONMENT UNDER PUBLIC LAW NO. 94-142

Although the EAHCA does not specify the substantive content of an appropriate program, "[t]o direct placement decisions, it does include the requirement that handicapped children should be educated together with the nonhandicapped 'to the maximum extent appropriate.' "[101] Handicapped children should be removed from the regular educational environment only when the nature or severity of their handicap requires removal in order to provide a proper education. This requirement, popularly know as mainstreaming, is an integration principle distinct from the definition of the appropriate educational program, which states a preference for *where* educational services should be provided.[102] As such, it is "an antisegregation principle,

97. *Id.* at 4.

98. Haggerty & Sacks, *Education of the Handicapped: Towards a Definition of an Appropriate Education*, 50 TEMP. L.Q. 961, 989 (1977); *see also* Note, *supra* note 24, at 1109-10 ("Even assuming good faith on the part of school officials in dealing with the problems of handicapped children, budgetary constraints will inevitably color many decisions and restrict the range of alternatives offered in the formulation of individualized educational programs . . . . [l]ocal school administrators may focus on what is available within the school system rather than on what is most appropriate for an individual child.").

99. *Primer for the New Advocate, supra* note 70, at 1065.

100. *See, e.g.*, Pinkerton v. Moye, 509 F. Supp. 107, 112-13 (W.D. Va. 1981); *see infra* notes 122-25 and accompanying text.

101. Note, *supra* note 24, at 1106 (citing 20 U.S.C. § 1412(5)(B) (1976)). Indeed, one commentator sees this placement directive as the "only substantive requirement" of the Act. Stark, *supra* note 1, at 482.

102. *See* Roncker v. Walter, 700 F.2d 1058, 1062 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 196 (1983) ("The use of 'appropriate' in the language of the Act, although by no means definitive, sug-

analogous to that established in *Brown v. Board of Educ[ation]*" designed to stop the automatic institutionalization and isolation of most handicapped children.[103] Congress was "concerned that children with handicapping conditions be educated in the most normal and least restrictive setting, for how else will they adapt to the world beyond the educational environment, and how else will the nonhandicapped adapt to them?"[104]

The regulations promulgated pursuant to the EAHCA add greater meaning to the requirement. In addition to repeating the requirement that separate schooling or removal from the regular educational environment occurs only when required by the nature or severity of the handicap,[105] the regulations require each agency to insure the availability of a continuum of alternative placements to meet the needs of all handicapped children.[106] The regulations also make clear that the least restrictive environment requirement applies to nonacademic services, including extracurricular services, meals, and recess periods.[107] In determining the placement for a specific handicapped child, the regulations require that the placement be based upon his IEP. Unless the IEP requires some other arrangement, the child must be educated in the school which he or she would attend if not handicapped.[108]

In the Poe case, the Hearing Review Officer found that because the least restrictive environment language referred only to contact with nonhandicapped persons, it did not require "age groupings."[109] The Poes argued that, although there may not be an absolute requirement of chronological age placement for every child, the language of the regulations does assume the least restrictive environment requirement normally will involve placement with age peers unless the individual's handicapping condition makes such placement impossible. First, the regulations state that removal from the regular educational environment is not preferred, but allowed only when ade-

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gests that Congress used the word as much to prescribe the settings in which handicapped children should be educated as to prescribe the substantive content or supportive services of their education."). *Cf. Rowley*, 458 U.S. at 197 n.21. This statement supports the notion that setting is part of the definition of "appropriate" as discussed in part III rather than the idea that the least restrictive environment requirement is not a distinct integration principle which determines where the appropriate education will be provided.

103. Stark, *supra* note 1, at 482 n. 18.

104. 120 CONG. REC. 15,272 (1974) (statement of Sen. Stafford).

105. 34 C.F.R. § 300.550(b) (1984).

106. *Id.* § 300.551.

107. *Id.* §§ 300.306, .553.

108. *Id.* § 300.552(c).

109. Hearing Review Decision at 16. It is true that reported decisions generally refer to providing contact with nonhandicapped students without specifically considering age. *See, e.g.*, Campbell v. Talladega County Bd. of Educ., 518 F. Supp. 47 (N.D. Ala. 1981); Mallory v. Drake, 616 S.W.2d 124 (Mo. App. 1981); *In re* Educ. Assignment of Michael G., 1983-84 EDUC. HANDICAPPED L. REP. (CRR) 505:188 (Pa. SEA 1983); *cf. In re* Marin County Office of Educ., 1982-83 EDUC. HANDICAPPED L. REP. (CRR) 504:162 (Cal. SEA 1982).

Although the issue in *Marin County* was framed in terms of integration— whether for integration to be appropriate, it must be with chronological age equivalent nonhandicapped peers rather than mental age equivalent peers—the discussion and decision turned upon the "threshold question of appropriateness." *Id.* at 504:165.

quate education cannot be provided in regular classes.[110] Thus, the regular educational environment for nonhandicapped students is a classroom setting with others of his same age. Whether a handicapped student should be removed from this setting then depends upon the special needs imposed by his handicap as determined in his IEP.

Furthermore, the regulations require that the student be placed in the school he would attend if not handicapped—that is, with chronological age peers—unless the IEP requires something different.[111] Therefore, the student's IEP must include a statement describing the extent to which he will be able to take part in regular educational programs. These regulations emphasize the fact that Congress envisioned a combination of possible settings in a handicapped child's educational program.[112] For example, a student may be able to attend all regular classes with support services added, to attend special academic classes with mainstreaming for nonacademic classes, or to attend special classes with mainstreaming for lunch, recess, and extracurricular activities. Once the child's ability to learn in regular classes and activities is determined, "any adjustment made in the educational plan for a child because of a handicap must be scrutinized carefully to minimize the possibility that such a plan might encourage rather than reduce developmental discrepancies between that child and nonhandicapped students."[113]

"Only if a child cannot be educated 'satisfactorily' in the regular classroom either part of the time or all of the time should he or she be removed. Placement must then be in the next least restrictive setting."[114] The appropriate setting is determined by looking over the continuum of alternatives provided by the LEA and placing the child "in that environment which is consistent with his needs, yet does not restrict his freedom to associate with his normal peers [more] than is absolutely necessary."[115] As one court noted, this requirement is especially important for children whose educational needs necessitate their being solely with other handicapped children during most of each day.[116]

If these standards are applied to the Poe case, it is apparent that Clint's IEP did not require that he be removed from the regular age-appropriate school which he would normally attend; it merely required that he be placed in a self-contained classroom for academic instruction. In fact, as his IEP reflected, Clint's social goals would be better implemented in the high school

110. 34 C.F.R. § 300.550 (1984).

111. *Id.* § 300.552.

112. Comment, *The Least Restrictive Environment Section of the Education for All Handicapped Children Act of 1975: A Legislative History and an Analysis,* 13 GONZ. L. REV. 717 (1978).

113. Brown, Wilcox, Sontag, Vincent, Dodd & Gruenewald, *Toward the Realization of the Least Restrictive Educational Environments for Severely Handicapped Students,* AAESPH REV., Dec. 1977, at 195, 197 [hereinafter cited as *Least Restrictive Environments*].

114. Comment, *supra* note 112, at 776.

115. Goldgraber, *Educating Severely Handicapped Children in the Least Restrictive Environment,* 17 J. SPECIAL EDUCATORS 401, 407 (1981).

116. Campbell v. Talladega County Bd. of Educ., 518 F. Supp. 47, 53 (N.D. Ala. 1981) (quoting 34 C.F.R. § 104, app. A, subpart D, ¶ 24).

he would normally be attending. This placement would have provided the "most normal setting in which the pupil can function effectively"[117]—the goal of the least restrictive environment.

Educators also support the argument that the least restrictive environment mandate of the EAHCA requires placement with age-appropriate peers:

> Severely handicapped students should interact with nonhandicapped students of approximately the same chronological ages throughout their education. Placing secondary aged/young adult severely handicapped students in educational settings where there are no nonhandicapped students of the same age is not acceptable. For example, a wing serving severely handicapped students from ages five to twenty-five attached to an elementary school serving nonhandicapped students from ages five to twelve does not provide age appropriate peers for the severely handicapped students over age twelve. It is therefore unduly restrictive.[118]

Of course, individual needs may require removal from the regular school setting in which the child would normally function. A Michigan hearing officer found that a 20-year-old EMH student should remain at a center for the retarded rather than moving to the public high school as requested by parents because of specific findings that her directional and spatial difficulties would make close supervision and monitoring necessary to allow her to move around the large high school building.[119] The public high school was considered to be far more restrictive and destructive to the development of peer relationships than her present placement. Because of the finding that the unique needs of the student actually made the center the least restrictive environment, the hearing officer found it unnecessary to "compare the peer population of the [placement alternatives] desired for modeling purposes."[120]

Cost may also be a factor in deciding whether a particular placement is possible since excessive spending on one child may deprive other students, handicapped and nonhandicapped, of educational benefits.[121] At the Poe hearing, there was conflicting testimony regarding the feasibility of establishing a self-contained program at the high school based upon cost, potential transportation problems, and personnel reorganization. There was also a dispute as to whether all alternatives for the high school program, including those proposed by the Poes, had been explored by the school system. Furthermore, since the hearing was to determine an individual placement, the Hearing Officer did not consider the possibility that other high-school-aged TMH students might also be appropriately placed in the high school class if one were available, causing a change in personnel, transportation, and other cost-related factors.[122]

As one court pointed out, although cost is a proper factor to consider, it

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117. Haggerty & Sacks, *supra* note 98, at 972.

118. *Least Restrictive Environments, supra* note 113, at 198.

119. Case No. H-487, 1979-80 EDUC. HANDICAPPED L. REP. (CRR) 501:174, :175-76 (Mich. SEA 1979).

120. *Id.* at 501:176.

121. Pinkerton v. Moye, 509 F. Supp. 102 (W.D. Va. 1981).

122. Hearing Review Decision at 5-6, 14-15; Appellants' Brief at 16-18. The Hearing Officer made no findings on the cost issue. The State Hearing Review Officer, however, accepted the evidence introduced by the school system regarding changes which would have to be implemented to

"is no defense . . . if the school district has failed to use its funds to provide a proper continuum of alternative placements for handicapped children."[123] Based upon the language of the regulations, it might be said that a "proper" continuum would include placement in an age-appropriate school unless the IEP required something different. The *Roncker* court pointed out that "provision of such alternative placements benefits all handicapped children."[124] This is even more likely in a system like Durham County where there are evidently a number of handicapped children who might benefit from age-appropriate placements were they available.[125]

Because of the cost factor and because of traditional judicial reluctance to invade local autonomy in the area of public education, some courts have declined to order a particular placement which might involve creation of new classes or programs (thus incidentally involving the court or officer in making funding allocation decisions); instead, the least restrictive environment requirement is stated as a mandate, and it is left to the schools to decide how it is to be implemented. For example, one hearing officer found that the law did not require the City of Cincinnati to recreate or duplicate its comprehensive TMR program in a regular elementary school building but did require that provisions be made for the handicapped child's interaction with nonhandicapped peers.[126] It was thus up to the school system to decide how to provide this interaction during the times it was appropriate for the student—lunch, recess, and during extracurricular activities. Under this approach, which represents one reasonable accommodation of the competing interests, if the Durham County School System did not place Clint's class at the high school, it would have to find another method to provide the requisite interaction during lunch and extracurricular activities.

V

DEFERENCE TO LOCAL AUTONOMY UNDER PUBLIC LAW NO. 94-142

At the Poe hearing, witnesses for the two parties expressed their beliefs regarding two different theories of social development. The Poes' expert witnesses believed that students of Clint's own chronological age would be role models for him and that he could benefit from incidental learning, or learning from his surroundings.[127] The school system argued that children learn social skills sequentially and the fact that Clint's social skills tested at a pre-adoles-

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provide high school placement for Clint alone without considering the alternatives proposed by the Petitioners or the placement of other TMH students.

123. *Roncker*, 700 F.2d at 1063.

124. *Id.*

125. *See* Appellants' Brief at 8-9.

126. *In re* Cincinnati City School Dist., 1980-81 EDUC. HANDICAPPED L. REP. (CRR) 502:117, :120 (Ohio SEA 1979); *see also Roncker*, 700 F.2d at 1061 (Ohio State Board of Education found that academic instruction at a county school was appropriate but that provision should also be made to provide interaction with nonhandicapped students at lunch and recess).

127. I Hearing Transcript at 48-50 (testimony of Kenneth Jens, Clinical Associate Professor of Special Education at the University of North Carolina).

cent level meant that he had junior high level social skills still to learn, which could best be learned at the junior high school.[128]

The Hearing Officer did not consider this evidence in reaching her decision because it was her opinion that the purpose of the hearing was to determine the placement for one individual. She considered only evidence specific to Clint's program, concentrating on his level of performance and his demonstrated strengths and weaknesses.[129] The Hearing Review Officer did, however, make a specific finding that there is disagreement among educators concerning the process of social development. Educators are divided between the two theories argued by the Poes and by the school system, even though the two theories are not mutually exclusive.[130] This dispute points up a difficult problem in making placement decisions and determining educational programs: when there is disagreement over learning theories, how should a school system choose the method to be used for a particular handicapped student?

> The response to almost any interesting question concerning the education of the handicapped is either that the answer is unknown or that no generalizable beneficial effect of a given treatment can be demonstrated. This lack of knowledge, which is hardly peculiar to special education, makes it difficult to predict the consequences of any policy change.[131]

Congress chose not to establish specific substantive guidelines for appropriate educational programs for handicapped students. Among the reasons, evidently, was the difficulty of determining the best educational program for students with particular handicaps and the desire not to inhibit continued experimentation and innovation in the field of special education.[132] Recognizing the importance of experimentation and innovation in education, particularly special education, and the desirability of implementing the best available programs and techniques, Congress required the states to set up procedures to ensure that information produced by educational research is acquired and disseminated and that promising educational practices and materials developed by such research are adopted.[133]

The EAHCA does not, however, explain what qualifies as an educational theory or mandate when a state or LEA must adopt a promising educational practice. In other words, the statute does not provide specific guidelines for educational programs, nor does it give any guidance as to how school districts should decide which programs to use. The reason for the lack of specific mandates is probably that Congress felt constrained by its traditional deference

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128. II Hearing Transcript at 154 (testimony of Jim Polk, Special Assistant to the Superintendent for Community Education and Social Services); *id.* at 204 (testimony of Genevieve Ortman, Director of Programs for Exceptional Children).

129. Hearing Decision at 2.

130. Finding of Fact No. 15, Hearing Review Decision at 5.

131. Kirp, Buss & Kuriloff, *Legal Reform of Special Education: Empirical Studies and Procedural Proposals*, 62 CAL. L. REV. 40, 47-48 (1974).

132. Note, *supra* note 24, at 1109.

133. 20 U.S.C. § 1413(a)(3) (1982). The *Rowley* Court saw this directive as additional evidence supporting the view that courts must show deference to the state's choice of an educational theory when reviewing a challenge to a program's appropriateness. 458 U.S. at 207-08.

towards state and local autonomy in the area of public education[134]—an area historically left to local discretion except in the face of overriding national policy concerns, such as racial integration. Thus, under the Act, state educational departments and local school boards "are given wide discretion to apply their expertise to devise the package of services appropriate to their locale and suited in some degree to each individual's capacities."[135]

Since the Act provides for judicial review of substantive questions regarding educational programs courts have also been cautioned to show deference to local decisionmakers.

> Because education generally reflects local values and interests, a court should bear in mind that its judgment may to some degree be viewed as second-guessing collective community wisdom. The importance of local control of education should encourage a court to exercise restraint in deciding cases under the Act.[136]

The *Rowley* opinion reiterated this view:

> In assuring that the requirements of the Act have been met, courts must be careful to avoid imposing their view of preferable educational methods upon the States. The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child.[137]

Though realizing that states had the ultimate authority to choose educational methods, commentators hoped that "agencies and courts reviewing local schools' decisions as to appropriate education for the handicapped [would] require the schools to make a showing that the curriculum and teaching methods conform to a substantial body of expert opinion."[138] One court seemed to accept this view when it stated, albeit in dictum, that although a school system need not "experiment with every new teaching technique that may be suggested," it does have an obligation to keep abreast of changing educational strategies and implement them where success "may be demonstrated."[139]

This standard suggests that evidence of successful programs utilizing age-appropriate placement should be given substantial weight in making placement decisions. The Poes, for example, introduced expert testimony regarding a number of studies performed over a period of years which showed that placements such as the one suggested by the Poes were quite successful.[140] There was also testimony that such programs were operating

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134. Note, *supra* note 24, at 1109.

135. Haggerty & Sacks, *supra* note 98, at 994; *see also,* Comment, *Self-Sufficiency Under the Education for All Handicapped Children Act: A Suggested Judicial Approach,* 1981 DUKE L.J. 516, 524 ("Aware of the Act's potentially destructive impact on local decision-making, the drafters of the Act were concerned that it reflect due regard for state and local sovereignty.").

136. Comment, *supra* note 135, at 529-30.

137. 458 U.S. at 207.

138. Haggerty & Sacks, *supra* note 98, at 994.

139. Rettig v. Kent County School Dist., 539 F. Supp. 768 (N.D. Ohio 1981), *aff'd in part, vacated in part,* 720 F.2d 463 (6th Cir. 1983), *cert. denied,* 104 S. Ct. 2379 (1984).

140. I Hearing Transcript at 48-49 (testimony of Kenneth Jens, Clinical Associate Professor of Special Education at the University of North Carolina).

successfully in other states[141] and, closer to home, that such high school programs for TMH students were operating successfully and bringing about improvements in the students' social behavior in other school districts in North Carolina.[142]

The question thus arises—would requiring the school system to accept a mainstreaming method successfully adopted elsewhere violate the requirement of local autonomy in determining educational policy? The *Rowley* Court recognized that courts lack the " 'specialized knowledge and experience' necessary to resolve 'persistent and difficult questions of educational policy.' "[143] On the other hand, the Court acknowledged that "once a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the States."[144] In other words, courts have discretion to determine whether the requirements of the statute are being met, that is, whether a child's program provides an appropriate education and whether the child is being educated in the least restrictive environment. School systems may choose among teaching methods which meet these requirements. Thus, judicial acceptance of a particular method may be mandated by the substantive requirements of the Act if statutory requirements are being met through the use of that method.

Cases decided since *Rowley* have recognized its distinction between questions of methodology and factual determinations.[145] The First Circuit, while acknowledging that courts may not interfere with school authorities on issues of educational policy, held that judges may resolve difficult and complicated factual disputes regarding whether a child will benefit from a proposed placement. The court found that the dispute involved "not a choice of educational *policy*, but resolution of an individualized *factual* issue as to the effect of John's handicap on his ability to benefit from the proposed school setting. This falls within the scope of the question which *Rowley* says is for the court. . . ."[146] In resolving these "individualized factual issues," courts tend to rely upon the testimony of qualified witnesses; when a majority of such witnesses, especially teachers who have continuously worked with the child, support a particular program or service, their views usually convince the hearing officer or judge.[147] However, parties who demand a particular methodology without

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141. *Id.* at 45 (witness had personal knowledge of thirteen to fourteen other programs in the nation where Clint would be in a high school setting).

142. II Hearing Transcript at 124-27 (testimony of Lynn Whitley, Advocate, Governor's Advocacy Council for Persons with Disabilities).

143. 458 U.S. at 208 (citing San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 42 (1973)).

144. *Id.*

145. *EHLR Analysis, Application of* Rowley *by Courts and SEAs,* 1982-83 EDUC. HANDICAPPED L. REP. (CRR) SA-107, -112 to -13 (Supp. 93, Apr. 1, 1983) [hereinafter cited as *Application of* Rowley].

146. Doe v. Anrig, 692 F.2d 800, 806 (1st Cir. 1982) (emphasis in original).

147. *Application of* Rowley, *supra* note 145, at SA-108. Courts and Hearing Officers rely heavily upon the testimony of experts in the field of education including teachers and other school personnel who have worked closely with the child in determining programs. *See, e.g., In re* Campbell v. Talladega County Bd. of Educ., 518 F. Supp. 47, 55 (N.D. Ala. 1981) (expert testimony relied upon regarding successful programs in "school districts across the country"); Kruelle v. Biggs, 489 F.

presenting convincing expert testimony that it is needed by the child, tend to lose.[148]

The Sixth Circuit made the same distinction between a question of educational methodology, such as that involved in *Rowley,* and a factual determination as to whether a particular placement qualified as the least restrictive environment.[149] The court found that "the question is not one of methodology but rather involves a determination of whether the school district has satisfied the Act's requirement that handicapped children be educated alongside nonhandicapped children to the maximum extent appropriate . . . . Since Congress has decided that mainstreaming is appropriate, the states

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Supp. 169 (D. Del. 1980) (school system recommendation refused and appropriate placement ordered on basis of expert testimony), *aff'd,* 642 F.2d 687 (3d Cir. 1981); Brockton Pub. Schools, 1982-83 EDUC. HANDICAPPED L. REP. (CRR) 504:128, :131 (Mass. SEA 1982) (finding that no professional who had worked with or evaluated the student recommended the requested change of placement); *In re* West Brookfield Pub. Schools, 1982-83 EDUC. HANDICAPPED L. REP. (CRR) 504:166, :169 (Mass. SEA 1982) (abundant expert evidence heard in support of need for full-time aide).

The decisionmakers have also relied upon the insights and special knowledge of a child's abilities and needs which parents may impart. The wishes of the parents may be a factor to be considered in making a special education placement decision, *In re* Madison Metropolitan School Dist., 1981-82 EDUC. HANDICAPPED L. REP. (CRR) 503:125, :127 (Wis. SEA 1981), but will not be accepted as controlling absent other evidence or expert testimony regarding the issue. Johnston v. Ann Arbor Pub. Schools, 569 F. Supp. 1502, 1509 (E.D. Mich. 1983) (granting summary judgment to school district when no genuine issue of material fact was presented since plaintiff offered only opinion of her mother who is not an expert in field of special education); Frank v. Grover, 1982-83 EDUC. HANDICAPPED L. REP. (CRR) 554:148 (Wis. Cir. Ct. 1982) (expert testimony, including that of teacher, relied upon to uphold school's IEP and refuse parents' request for different educational method).

The Act encourages parental involvement in a number of ways, including requiring parents to be a part of the development of the IEP and allowing parents to file complaints challenging the educational program. *Rowley,* 458 U.S. at 182-83 n.6. The Comments to the EAHCA regulations make it clear that the parents are to have an active role as "equal participants" in developing the child's educational program. Comment, 34 C.F.R. § 300, app. C, at 65, 74 (1980). One court has seen the involvement of the parents in all significant decisions made by the LEA as necessary to justify the statutory deference accorded the state and local decisionmakers. Lang v. Braintree School Comm., 545 F. Supp. 1221, 1223 n.3 (D. Mass. 1982). As another court has noted,

> Although the procedure established for formulation of these IEPs requires parental input, there is little doubt that the final decision rests with the local educational agency, a subdivision of the state. This fact is reflected in . . . the statutory appeal procedure which grants a right only to the parents to complain about the IEP, in contrast with the right to appeal decisions of the hearing examiner, which is granted to both the state and to the parents.

Battle v. Pennsylvania, 629 F.2d 269, 278 (3d Cir. 1980), *cert. denied,* 452 U.S. 968 (1981).

The placement of ultimate decisionmaking upon the state or local agency undoubtedly is based upon the fact that the agency is in a better position to weigh and balance the competing interests of *all* students within the system while parents' primary concern understandably will be the individual child.

In weighing these interests, however, school systems may make policy and budgetary decisions which unnecessarily limit the options available to the handicapped student before the parents ever are involved in the decisionmaking process through development of the IEP. *See* Sindelar, *How and Why the Law Has Failed: An Historical Analysis of Services for the Retarded in North Carolina and a Prescription for Change,* LAW. & CONTEMP. PROBS. Spring 1985, at 125. *See also supra* note 98 and accompanying text. One commentator has, therefore, proposed training parents to participate in the bureaucratic decisionmaking process. Sindelar, at 149-51. Such an undertaking should not only increase awareness of the needs of the handicapped on the part of the school system and public at large, but should also give parents of handicapped children greater insight into system-wide programs, priorities, and budgetary constraints.

148. *Application of* Rowley, *supra* note 145, at SA-109.

149. Roncker v. Walter, 700 F.2d 1058 (6th Cir. 1983), *cert. denied,* 104 S. Ct. 196 (1983).

must accept that decision if they desire federal funds."[150]

Even courts which have deferred to the LEA's choice of method have indicated that they did so after noting that the requirements of the Act had been met. For example, in *Lang v. Braintree School Committee,*[151] although the court stated that it would not interfere with a state's choice as long as it was a "minimally acceptable educational approach,"[152] it also specifically stated that "[i]nasmuch as the Braintree IEP relies on legitimate educational philosophy akin to the mainstreaming approach preferred by the Act, and will provide . . . what this court views as an education that benefits [the plaintiff] within the meaning of the Act, the IEP must be deemed satisfactory under the Act."[153] Decisions such as *Lang* indicate that courts are indeed attempting to balance concern for the individual child's welfare as defined by the statute against the principle of preserving local control over education decisions.[154]

VI

SECTION 504 OF THE REHABILITATION ACT

The Poes also challenged the school system's refusal to offer a chronologically age-appropriate placement at the high school as a violation of section 504 of the Rehabilitation Act of 1973[155] in that Clint and other high-school-aged TMH students were being excluded from programs and services to which they were entitled.

A. Requirement of Nondiscrimination

Section 504 is a broad requirement of nondiscrimination against the handicapped in all federally assisted programs—including public schools. It provides:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .[156]

Regulations promulgated pursuant to section 504 add substance to its requirements.[157] The regulations provide that a recipient of federal funds may not:

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150. *Id.* at 1062.

151. 545 F. Supp. 1221 (D. Mass. 1982).

152. *Id.* at 1227.

153. *Id.* at 1228; *see also* Silvio v. Commonwealth, 64 Pa. Commw. 192, 439 A.2d 893, 897-98 (1982) (court has no disposition to overturn conclusions of school district regarding "clash of philosophies among experts" when conclusion is based upon ample evidence and is in keeping with least restrictive environment requirement), *aff'd,* 500 Pa. 431, 456 A.2d 1366 (1983).

154. Comment, *supra* note 135, at 528.

155. Pub. L. No. 93-112, 87 Stat. 394 (codified at 29 U.S.C. § 794 (1982)).

156. *Id.* It was undisputed, and the State Hearing Officer concluded, that Clint Poe is a qualified handicapped person as defined in the statute and implementing regulations and that the Durham County School System is a recipient of federal funds and therefore subject to the requirements of the statute. Appellants' Brief at 40.

157. 34 C.F.R. §§ 104.1-104.61 (1984).

- deny a handicapped person the opportunity to participate in or benefit from an aid, service, or benefit provided by the local program;
- deny equal opportunities to a handicapped person to participate in or benefit from any aid, service, or benefit;
- provide an aid, service, or benefit to a handicapped person that is not as effective as that provided to others;
- provide different or separate aids, benefits, or services to handicapped persons unless necessary to make the program as effective as that offered to the nonhandicapped.[158]

As developed in part III of this comment, education involves more than academics. Thus, the aids, benefits, and services which a school must provide a student should include nonacademic elements of education because:

> school resources include both human and material elements that can influence achievement, social and cognitive development, and socialization. These resources may be highly motivated peers, specific socialization processes, counselors, or aspects of the curriculum and instructional program. By far the most important resource is interaction with nonhandicapped peers who provide entry into the normal life experiences of members of our society, such as going to dances, taking buses, shopping, dating and wearing fashionable clothes. Most of these normal life experiences can be obtained only within relationships with peers . . . .
>
> Experience with a broad range of peers is not a superficial luxury to be enjoyed by some students and not by others, but rather an absolute necessity for maximal achievement and healthy cognitive and social development.[159]

Thus, by failing to provide access to age-appropriate activities and peers and the benefits derived from such interaction, a school system precludes students from obtaining "system benefits," or at least benefits that were as effective as those realized by the nonhandicapped students in the system who do attend age appropriate schools. Such a practice may violate section 504.[160]

Part D of the section 504 regulations is directed at handicapped services offered by elementary and secondary schools. These regulations essentially parallel the substantive requirements of the EAHCA regulations, with some differences which seem to favor age-appropriate placement even more strongly. Relevant regulations include a requirement that a school system provide a free appropriate education to all handicapped students within the jurisdiction.[161] School systems must develop programs which meet the individual needs of handicapped students as adequately as the needs of nonhandicapped.[162] And to direct placement decisions, the regulations require that handicapped students be educated with nonhandicapped students "to the maximum extent appropriate to the needs of the handicapped person," placing him in the "regular educational environment operated by the recip-

158. *Id.* § 104.4.
159. Johnson & Johnson, *Integrating Handicapped Students into the Mainstream*, 47 EXCEPTIONAL CHILDREN 90 (1980).
160. New Mexico Ass'n for Retarded Citizens v. New Mexico, 678 F.2d 847, 853 (10th Cir. 1982).
161. 34 C.F.R. § 104.33(a) (1984).
162. *Id.* § 104.33(b).

ient unless it is demonstrated by the recipient" that education in that environment cannot be achieved satisfactorily, despite the provision of special services.[163] Under the regulations' mandate of the least restrictive educational environment, the student must be offered an equal opportunity to participate in nonacademic services such as physical education, athletics, and extracurricular activities.[164]

Note that this least restrictive environment requirement seems to be broader than its parallel regulation under the EAHCA. Its preference is not limited to regular classes but extends to the regular educational environment, which presumably could apply to a school facility as well as to a class. The burden is clearly placed upon the school system to show that the student's needs require his removal from the regular environment.

In the Poe case, the school system argued that social skills develop sequentially and that it would be inappropriate and perhaps harmful to place Clint at the high school while he was still testing at a pre-adolescent social skills level.[165] The superintendent of the system testified, however, that the school system had identified no specific social skill levels which all students must master in order to move to the high school,[166] that the activities, situations, and student behaviors at a high school were significantly different from those encountered in a junior high,[167] and that some nonhandicapped students were placed in grade levels (at least through the tenth grade) based upon subjective rather than academic considerations.[168] Thus, Clint was as qualified to attend the high school as these other students except for his handicap and was therefore excluded solely by reason of his handicap. To cure this problem, the system offered to place Clint at the high school in the EMH program, which everyone agreed was inappropriate to his needs, but refused to modify its existing program by providing a self-contained classroom for TMH students at the high school.[169]

B. Affirmative Modification

Although the Supreme Court has determined that the purpose of section 504 is to prohibit discrimination rather than to impose an affirmative action obligation,[170] the Court has also noted that the distinction between discrimination and affirmative action not taken is rather unclear and has conceded that in some situations refusal to modify an existing program might be discriminatory under section 504.[171] A number of courts have found a refusal to

163. *Id.* § 104.34(a).
164. *Id.* § 104.37.
165. Respondent's Brief at 5-6.
166. III Hearing Transcript at 38 (testimony of Dr. Yeager, Superintendent, Durham County Schools).
167. *Id.* at 10.
168. *Id.* at 19.
169. *Id.* at 38-39; Petitioners' Brief at 2.
170. Southeastern Community College v. Davis, 442 U.S. 397, 411-12 (1979).
171. *Id.* at 412-13.

make affirmative modifications to be a violation of section 504.[172] The courts have also stated, however, that they will not find a refusal to modify an educational program discriminatory under section 504 if the handicapped student could not realize the principal benefits of the program even after the accommodation was made since, as interpreted by the Supreme Court, "[S]ection 504 does not require 'substantial adjustments in existing programs beyond those necessary to eliminate discrimination against otherwise qualified individuals.' "[173] "Conversely, it is reasonable to conclude that refusal to accommodate a handicapped student in an educational program may constitute discrimination if the student could thereby realize and enjoy the program's benefits."[174]

Even in situations where the student could benefit from a modified program, the duty to modify is not unlimited. It is required only when it does not impose undue financial or admininstrative hardships.[175] Under this test, the school must show that modifying an existing program would cause sufficient hardship to justify its failure to take accommodating steps.[176] Thus, all alternatives and costs and administrative problems should be examined.[177] The Tenth Circuit has proposed a type of cost/benefit analysis, suggesting that "the greater the number of children needing the particular special education service, the more likely that failure to provide the service constitutes discrimination . . . because the more children in need of the service, the more the benefits of that service outweigh its cost."[178] In the Poe case, this type of analysis would require taking into account all other high school aged TMH students who might also benefit from a modification in the existing program.[179]

Although no cases were found which required a modification of existing programs based upon an age-appropriate placement mandate, the Office of Civil Rights did respond to a complaint from the Wake County (North Carolina) School District alleging that the educational settings of older TMH stu-

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172. *See, e.g.,* Tatro v. Texas, 625 F.2d 557 (5th Cir. 1980) (failure to provide catheterization), *on remand,* 516 F. Supp. 968 (N.D. Tex. 1981), *aff'd,* 703 F.2d 823 (5th Cir. 1983), *aff'd in part, rev'd in part sub nom.* Irving Indep. School Dist. v. Tatro, 104 S. Ct. 3371 (1984) (because school district was liable to provide catheterization under EAHCA and § 504 is inapplicable when relief is available under EAHCA to remedy a denial of educational services, respondents would not be entitled to relief under § 504); Camenisch v. Univ. of Texas, 616 F.2d 127 (5th Cir. 1980) (granting preliminary injunction based upon likelihood of success on merits where university refused to provide interpreter for deaf students), *vacated and remanded on other grounds,* 451 U.S. 390 (1981); Lora v. Board of Educ., 456 F. Supp. 1211 (E.D.N.Y. 1978) (inadequate educational services in day schools for emotionally disturbed children), *aff'd in part, vacated in part,* 623 F.2d 248 (2d Cir. 1980).

173. Tatro v. Texas, 625 F.2d at 564 n.19 (quoting Southeastern Community College v. Davis, 442 U.S. 397, 410 (1979)).

174. New Mexico Ass'n for Retarded Citizens v. New Mexico, 678 F.2d 847, 854 (10th Cir. 1982).

175. *Id.*

176. Lynch v. Maher, 507 F. Supp. 1268, 1280 (D. Conn. 1981).

177. *See supra* notes 122-25 and accompanying text.

178. *New Mexico Ass'n for Retarded Citizens,* 678 F.2d at 854 (considering possible statewide violations of section 504).

179. *See supra* notes 122-25 and accompanying text.

dents were inappropriate because they were in schools where they had no contact with students their own age. The Office of Civil Rights found this to be a violation of the regulation mandating education in the least restrictive environment.[180]

VII

CONCLUSION

Handicapped students have been discriminated against and isolated from the rest of society for centuries. The EAHCA and section 504 of the Rehabilitation Act are attempts to rectify this situation; handicapped students have made tremendous gains within the public schools since their enactment. As the broad goals of bringing students into the public schools have been met, and hearing officers and judges begin to grapple with thorny questions "at the fringe" of the statutes, they should do so by carefully interpreting the statutes with an eye toward implementing their goals and purposes.

Chronologically appropriate placement is important to implement the goal of integration of the handicapped. For, as one commentator noted,

> The Supreme Court cases of *Brown v. Board of Education* and *Wisconsin v. Yoder* express the idea that education . . . is the primary social learning mechanism of society. To be deprived of an education is to be socially crippled; to be denied the opportunity to education in a particular milieu is to be cut off and alienated from that milieu . . . . [Children's] handicapped conditions, if *Brown* and *Yoder* are accepted, can only be aggravated by the additional injury that the lack of appropriate social interaction with the wider society causes.[181]

Thus, age-appropriate placement should be a factor to be considered in a placement decision under the EAHCA because it affords nonacademic socialization benefits which are part of an education. If a child's unique abilities and needs as developed in his individual program show that he can function in an age-appropriate environment and that he would obtain educational benefit from such an environment, he should be placed in that setting to implement both the goal of providing a free appropriate public education and of providing an education in the least restrictive environment. Such a requirement does not infringe upon local autonomy in the field of public education since

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180. Wake County (N.C.) School Dist., Ref: Complaint No. 04-83-1006, 3 [§ 504 Rulings] EDUC. HANDICAPPED L. REP. (CRR) 257:432 (June 24, 1983).

No affirmative modification was required because the Wake County School District already had plans to provide age-appropriate placements.

In the Poe case, the Hearing Officer specifically found that the Office of Civil Rights has ruled that section 504 does not necessarily require that handicapped children of one age participate with nonhandicapped age mates. Conclusion of Law No. 2, Hearing Decision at 7. Evidently, this finding was based upon an earlier conclusion of the Office of Civil Rights that an age inappropriate setting for a severely retarded child did not violate section 504. In the earlier decision, however, it was determined that the child did not interact with other children or distinguish people or environments. Thus, this situation is easily distinguishable from the Poe case since this child was evidently being denied the benefits of interaction due to the severity of her handicap, and placement by the schools made little difference. Petitioners' Brief at 10; Telephone Interview with Karen Sindelar, Attorney, North Carolina Protection and Advocacy System (March 19, 1984).

181. Colley, *The Education for All Handicapped Children Act (EHA): A Statutory and Legal Analysis*, 10 J.L. & EDUC. 137, 139-40 (1981).

the states have chosen to have their freedom of decisionmaking sharply curtailed to the extent necessary to meet the basic requirements of the Act in return for federal funds. Furthermore, refusing to allow equal participation and benefit from educational programs, including nonacademic activities and interaction with peers, to otherwise qualified handicapped individuals, constitutes discrimination under section 504 and may, in some situations, require rectification through affirmative modification of programs.

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