

# ACT 230: COST CONTAINMENT, DEREGULATION, AND THE REFORM OF SPECIAL EDUCATION IN VERMONT

## INTRODUCTION

Like the rest of the nation, Vermont is struggling with the high cost of providing a free appropriate education to students with disabilities.<sup>1</sup> Since the passage of the federal Education for All Handicapped Children Act<sup>2</sup> (now known as the Individuals with Disabilities Education Act) in 1975, the number of Vermont children enrolled in special education programs has increased steadily.<sup>3</sup> State spending for special education has also increased; during fiscal year 1992, Vermont will spend roughly forty-six million dollars in providing services to children classified in need of special education.<sup>4</sup> A good portion of these funds will be used to pay special educators to do the significant amount of paperwork that the federal law requires.<sup>5</sup>

In 1990, after several years of studying ways of containing special education costs and enrollments, the Vermont Legislature

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1. Although Act 230 is not solely about cost containment, this note focuses on its cost containment aspects. A primary concern of Vermont officials and legislators was to reform a system that tended to label and stigmatize children and entailed an enormous amount of regulation and paperwork. See ACT 230: DEALING WITH THE DEMANDS OF DIVERSITY (Vermont Dep't of Educ. Video, Feb. 1991) [hereinafter Video]; Peggy Grodinsky, *Act 230: Money and Time Count*, VALLEY NEWS (West Lebanon, N.H.), Dec. 27, 1991 at 1, 6 [hereinafter *Money and Time*].

However, there is no denying that cost containment was a major goal of Act 230. For example, the Special Commission on Special Education was commissioned by the Vermont Legislature "to 'review special education eligibility standards, service delivery models, and cost containment strategies.'" SPECIAL COMM'N ON SPECIAL EDUC., NEW DIRECTIONS FOR A NEW DECADE (Jan. 1990) [hereinafter NEW DIRECTIONS]; see also *Money and Time, supra*, at 1; Anne Geggis, *Special Ed Changes Coming*, BURLINGTON FREE PRESS, Sept. 3, 1991, at B1.

2. Pub. L. No. 94-142, 89 Stat. 773 (codified as amended at 20 U.S.C. §§ 1400-1485 (1988 & Supp. II 1991)).

3. NEW DIRECTIONS, *supra* note 1, at 5. However, in 1990, the number of students identified for special education declined by 6.7%. THE PAPERWORK AND REGULATION REVIEW TASK FORCE, REFORMING THE SPECIAL EDUCATION PROCESS 4 (Aug. 1992). Special education enrollments declined an additional 6% in 1991, the year Act 230 went into effect. *Id.*

4. Telephone interview with Margaret Schelley, Budget Coordinator, Vermont Dep't of Educ., Special Education Unit, Montpelier, Vt. (Sept. 1, 1992).

5. Peggy Grodinsky, *Paperwork Buries Special Education*, VALLEY NEWS (West Lebanon, N.H.), Dec. 27, 1991, at 1, 6.

passed Act 230.<sup>6</sup> The goal of Act 230 is simple: to reduce the number of children enrolled in special education programs.<sup>7</sup> To achieve this goal, the Act mandates training teachers to accommodate children with disabilities in the regular classroom.<sup>8</sup> The Act also requires the statewide use of Instructional Support Teams ("ISTs") to decrease the frequency of special education referrals.<sup>9</sup> The purpose of these teams is to find ways to serve a child with learning problems in the regular classroom, rather than refer that child to special education.<sup>10</sup> The ultimate goal of Act 230 is for regular education to meet the needs of most children with disabilities, with special education reserved only for students with the severest disabilities.<sup>11</sup>

After over a year of implementation, the Vermont Department of Education reports that Act 230 is a spectacular success. Special education enrollments are down, and teachers are finding ways to serve children in the regular classroom before making a special education referral.<sup>12</sup> Through the use of ISTs, children with mild disabilities no longer require special education services. The Department also reports that although costs are still high, they are no longer out of control.<sup>13</sup>

Emboldened by these early results, the Department of Education plans to recommend that the Vermont Legislature "intensify" Act 230.<sup>14</sup> Clearly, Act 230 can succeed over the long

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6. VT. STAT. ANN. tit. 16, §§ 2901, 2902, 2948(c), 2956, 2961, 2961(a), 2962-2964, 2967-2973 (Supp. 1991).

7. Marc E. Hull, Synopsis of Act 230, Reforms in Special Education 2 (June 15, 1990) (unpublished synopsis, on file in the Vermont Law School Library).

8. VT. STAT. ANN. tit. 16, § 2901(b)(4) (Supp. 1991).

9. *Id.* § 2902.

10. *Id.* § 2901(a).

11. Hull, *supra* note 7, at 2.

12. Vermont Dep't of Educ., Special Education Reform—It's Working! (Dec. 1991) [hereinafter *It's Working*] (available from Vermont Dep't of Educ.); see also Muriel Cohen, *New Rules Will Limit Special Education*, BOSTON GLOBE, Mar. 22, 1992, at 29.

13. *It's Working*, *supra* note 12. For example, the special education budget has a surplus of \$1,700,000 due to declining enrollments. Christopher Graff, *Vermont Cuts: Some Are, But Some Aren't*, VALLEY NEWS (West Lebanon, N.H.), July 22, 1992, at 2; see also Cohen, *supra* note 12.

14. THE PAPERWORK AND REGULATION REVIEW TASK FORCE, REFORMING THE SPECIAL EDUCATION PROCESS 8 (Aug. 1992). This "intensification" would include a "continuing focus on school restructuring to develop a comprehensive system of educational services to meet the needs of all students." *Id.*

term in decreasing the number of children enrolled in special education.<sup>15</sup> The Act's success, however, depends on the ability of regular education to address the needs of children with disabilities. Overzealous application of Act 230 in the name of cost containment could result in the placement of children with disabilities with teachers who are unable or simply unwilling to teach them. Also, use of ISTs to delay special education referrals could deprive some children of their rights under federal law.<sup>16</sup> Therefore, rather than "intensify" Act 230, the Vermont Legislature should take steps to ensure that the Act is implemented with restraint.

Part I of this note traces the history of exclusion of children with disabilities from public schools. Part II discusses important federal special education legislation, specifically section 504 of the Rehabilitation Act and the Individuals with Disabilities Education Act. After a brief discussion of how the federal law is implemented in state schools, part III addresses the problems with special education, both nationwide and in Vermont.

Part IV focuses on Act 230 itself, Vermont's response to the problems associated with special education. Specifically, this section examines: (1) whether regular education teachers can adequately address the needs of students with disabilities; and (2) whether ISTs will delay the provision of special education services to students with disabilities. The note concludes that Act 230 can be beneficial if it focuses on children who probably never should have been in special education in the first place. Unrestrained application of the Act, however, may truly deprive some children of their right to an individualized and specialized education.

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15. The decrease in special education enrollments in 1990 and 1991 has been attributed to changes in teaching strategies in anticipation of, and as a result of, Act 230. *Id.* at 4.

16. A major impetus for the passage of federal special education laws was the unwillingness and inability of regular education to accommodate children with disabilities. *See infra* text accompanying notes 17-52.

## I. BACKGROUND TO THE EDUCATION OF PEOPLE WITH DISABILITIES IN AMERICA

### *A. Exclusion of Children with Disabilities from Public Schools*

Prior to the enactment of the Education for All Handicapped Children Act in 1975,<sup>17</sup> children with disabilities were routinely excluded from public schools.<sup>18</sup> In 1893, the Supreme Judicial Court of Massachusetts upheld the exclusion of a retarded child from the public schools on the basis that the child was too "weak in mind" to benefit from instruction.<sup>19</sup> In 1919, the Wisconsin Supreme Court allowed the exclusion of a paralyzed student from the public schools.<sup>20</sup> Although the student was of normal intelligence, his physical appearance "nauseated" teachers and other students.<sup>21</sup> These exclusions continued well into the twentieth century. In a 1958 case, the Supreme Court of Illinois held that the state was not required to provide a free public education to "mentally deficient or feeble minded" children.<sup>22</sup> Aside from case law, several state statutes provided for the exclusion of

17. Education for All Handicapped Children Act ("EAHCA"), Pub. L. No. 94-142, 89 Stat. 773 (codified as amended at 20 U.S.C. §§ 1400-1485 (1988 & Supp. II 1991)). For the purposes of this note, the acronym "IDEA" refers to both the 1975 Act and its 1990 amendments.

18. See ALLAN G. OSBORNE JR., COMPLETE LEGAL GUIDE TO SPECIAL EDUCATION SERVICES 1-5 (1988) (historical overview of the exclusion of children with disabilities from public schools); LAURA F. ROTHSTEIN, SPECIAL EDUCATION LAW 1-14 (1990) (same); ROSEMARY C. SALOMONE, EQUAL EDUCATION UNDER LAW, 137-40 (1986) (same); see also Mark C. Weber, *The Transformation of the Education of the Handicapped Act: A Study in the Interpretation of Radical Statutes*, 24 U.C. DAVIS L. REV. 349, 355-56 (1990); Marcia Pearce Burgdorf & Robert Burgdorf, Jr., *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a "Suspect Class" Under the Equal Protection Clause*, 15 SANTA CLARA L. REV. 855, 871-83 (1975); Contemporary Studies Project, *Special Education: The Struggle for Equal Educational Opportunity in Iowa*, 62 IOWA L. REV. 1283, 1291-98 (1977) (historical overview of the development of special education in the United States).

19. *Watson v. City of Cambridge*, 32 N.E. 864 (Mass. 1893).

20. *State ex rel. Beattie v. Board of Educ.*, 172 N.W. 153 (Wis. 1919).

21. *Id.* at 154.

22. *Department of Pub. Welfare v. Haas*, 154 N.E.2d 265, 270 (Ill. 1958). In *Haas*, the defendant argued that his son should be educated in public school, and cited article VIII, § 1 of the Illinois Constitution, which mandated a "thorough and efficient system of free schools, whereby all children of this state may receive a good common school education." *Id.* The court held that this constitutional mandate did not apply because "feeble minded or mentally deficient children" were "unable to receive a good common school education." *Id.*

children with disabilities from public schools.<sup>23</sup> A North Carolina statute, repealed in 1969, made it a misdemeanor for any parent to force the attendance of a child who was statutorily excluded from the public schools.<sup>24</sup>

### *B. The Civil Rights Movement and the Education of People with Disabilities*

The civil rights movement of the 1950s and 1960s provided the impetus for the special education movement.<sup>25</sup> In 1954, the Supreme Court held in *Brown v. Board of Education* that segregation of children in the public schools on the basis of race violated the Fourteenth Amendment's guarantee of equal protection.<sup>26</sup> The Court stated, "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the

23. See Richard C. Handel, *The Role of the Advocate in Securing the Handicapped Child's Right to an Effective Minimal Education*, 36 OHIO ST. L.J. 349, 351 (1974); see also PA. STAT. ANN. tit. 24, § 13-1375 (1962). The Pennsylvania statute provided that "[t]he State Council of Education shall establish regulations for temporary or permanent exclusion from the public schools of children who are found to be uneducable and untrainable in the public schools." *Id.*

Although Vermont did not specifically provide for the exclusion of children with disabilities, state law allowed the superintendent to dismiss from the public school any "undesirable" whose "personal habits, infirmities or influence is such as to make the presence of such pupil harmful to the welfare of the school." VT. STAT. ANN. tit. 18, § 4327 (1947) repealed by VT. STAT. ANN. tit. 16, § 1162 (1977). The law was changed in 1977 to provide for the exclusion of a pupil whose "misconduct makes the continued presence of the pupil harmful to the welfare of the school." VT. STAT. ANN. tit. 16, § 1162 (1977).

24. Act of 1965, ch. 584, 1965 N.C. Sess. Laws 641. The statute read as follows:  
A child so severely afflicted by mental, emotional, or physical incapacity as to make it impossible for such child to profit by instruction given in the public schools shall not be permitted to attend the public schools of the State. . . . Upon a receipt of a report indicating that the child cannot profit from instruction given in the public schools the county or city superintendent of schools is hereby authorized to exclude said child from the public schools. . . . If the parent or guardian of such a child persists in forcing his attendance after such report has determined that the child should not attend the public schools, he shall be guilty of a misdemeanor and upon conviction shall be punished in the discretion of the court.

*Id.*

25. OSBORNE, *supra* note 18, at 3; ROTHSTEIN, *supra* note 18, at 2. Parents of children with disabilities had already begun to organize to protect their children's rights. In 1949, the New York State Cerebral Palsy Association was formed, which later led to the formation of a national organization. Contemporary Studies Project, *supra* note 18, at 1296. In 1950, parents formed the National Association for Retarded Citizens ("NARC"). *Id.* Both groups had a major impact on legislation to educate people with disabilities. *Id.*

26. *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."<sup>27</sup> This language became the rallying cry for special education advocates who argued that, like minority children, children with disabilities were being denied the right to an equal educational opportunity.<sup>28</sup>

The Supreme Court's reasoning in *Brown* formed the basis of two landmark 1972 district court decisions, which dealt with the right of children with disabilities to an education.<sup>29</sup> In *Pennsylvania Ass'n for Retarded Children v. Pennsylvania* ("PARC"), parents of retarded children challenged state laws that excluded "uneducable" children from public education.<sup>30</sup> The parents argued that because Pennsylvania law guaranteed an education to all children, the state could not deny that right to retarded children.<sup>31</sup>

The court approved a settlement agreement which stated that Pennsylvania had an obligation to provide each mentally retarded child with "a free, public program of education and training appropriate to the child's capacity."<sup>32</sup> Although the *PARC* court did not rule on the equal protection question, it stated that

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27. *Id.* at 493.

28. See, e.g., Frederick F. Weintraub & Alan R. Abeson, *Appropriate Education for All Handicapped Children: A Growing Issue*, 23 SYRACUSE L. REV. 1037 (1972); Bernard J. Kubetz, Note, *Educational Equality for the Mentally Retarded*, 23 SYRACUSE L. REV. 1141 (1972); Stanley Herr, *Retarded Children and the Law: Enforcing the Constitutional Rights of the Mentally Retarded*, 23 SYRACUSE L. REV. 995 (1972).

29. *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972); *Mills v. Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972); see Herr, *supra* note 28, at 1002-15 (comprehensive analysis of these cases).

30. *Pennsylvania Ass'n for Retarded Children*, 343 F. Supp. at 282. One law provided that "uneducable" and "untrainable" children could be temporarily or permanently excluded from the public schools. *Id.* Another statute allowed the indefinite postponement of admission to public schools of any child who has not attained a mental age of five years. *Id.*

31. *Id.* at 297.

32. *Id.* at 307. In a separate court order, Pennsylvania was enjoined from applying the exclusionary laws "so as to postpone, to terminate or in any way deny to any mentally retarded child access to a free program of education and training." *Id.* at 302. Pennsylvania also was required to provide free public education to every person with a learning disability between the ages of six and twenty-one no later than September 1, 1972. *Id.* at 302-03. The agreement also provided for notice and opportunity for a hearing before a child with a learning disability could be subjected to any change in educational status. *Id.* at 303-04.

Pennsylvania's exclusion of retarded children from public schools raised "serious doubts [under *Brown*] . . . as to the existence of a rational basis for such exclusions."<sup>33</sup>

A federal district court subsequently ruled on the equal protection question in *Mills v. Board of Education*.<sup>34</sup> In *Mills*, seven children with disabilities ranging from mental retardation to hyperactivity challenged their exclusion from the public schools.<sup>35</sup> The court extended *Brown's* mandate of equal educational opportunity, holding that a denial of public education to children with disabilities violated equal protection under the Due Process Clause of the Fifth Amendment.<sup>36</sup> The court ordered the District of Columbia to provide each child in the district with a "free and suitable publicly-supported education regardless of the degree of the child's mental, physical or emotional disability or

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33. *Id.* at 297. The court did not have to rule on the constitutional challenges because *PARC* and the state reached a settlement agreement. This does not, however, diminish *PARC's* significance. As one commentator notes, "*PARC* was the first case to raise the constitutional issues inherent in the exclusion of handicapped children from public education, and the suit prompted Pennsylvania to become the first state to accept the notion that all retarded children can benefit from education." Contemporary Studies Project, *supra* note 18, at 1346 (citation omitted); see also Milton J. Shapp, *The Right to an Education for the Retarded in Pennsylvania*, 23 SYRACUSE L. REV. 1085, 1085 (1972).

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

35. Of the seven children, four were brain-damaged or otherwise learning disabled, two were "behavioral problems," and one was hyperactive. *Id.* at 869-70. Plaintiffs brought the action on behalf of a class of all other children with disabilities who were excluded from the schools. *Id.* at 868. The District of Columbia admitted that an estimated 12,340 children with disabilities were not receiving a free public education at the time. *Id.* at 869. These children were excluded, expelled, or transferred from regular school classes without notice or an opportunity to be heard. *Id.* at 868.

36. *Mills*, 348 F. Supp. at 875. The Fourteenth Amendment does not apply to the District of Columbia because it is not a state. "However, if the federal government classifies individuals in a way which would violate the equal protection clause, it will be held to contravene the due process clause of the fifth amendment." JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.1, at 569 (4th ed. 1991).

The *Mills* court also held that the District's exclusion of children with disabilities from public schools could not be excused by a claim of insufficient funds because the District's "interest in educating the excluded children clearly must outweigh its interest in preserving its financial resources." 348 F. Supp. at 876. The court also held that "[i]f sufficient funds are not available to finance all of the services . . . in the system then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom." *Id.*

impairment.<sup>37</sup> The court also outlined a comprehensive system of procedural safeguards, such as notice to parents prior to placement of any child with a disability, and the right to a hearing in case of objection to the proposed placement.<sup>38</sup>

Together, the *PARC* and *Mills* cases had a major impact on the education of children with disabilities in this country.<sup>39</sup> Shortly after the decisions in *PARC* and *Mills*, thirty-six similar cases were brought in twenty-seven jurisdictions.<sup>40</sup> In 1972 alone, eleven states enacted laws providing for the education of children with disabilities.<sup>41</sup> By 1975, special education was mandatory in most states;<sup>42</sup> state educational agencies channeled funds to local school districts to provide programs and services for these children.<sup>43</sup> With this state assistance, local schools began to provide children with disabilities access to an equal educational opportunity.<sup>44</sup>

Despite the increased state role in providing services, special education in the early 1970s was, on the whole, inadequate.<sup>45</sup> The identification and placement of children with disabilities was marked by inconsistencies:<sup>46</sup> children who truly required special education services were overlooked, and others, especially minority children, were wrongly classified as "handicapped" and

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37. *Id.* at 878. Unlike *PARC*, the *Mills* requirement of equal educational opportunity extended to all children with disabilities, not just children with learning disabilities. SALOMONE, *supra* note 18, at 139.

38. *Mills*, 348 F. Supp. at 880-83. The impact of *Mills* is highlighted by the fact that these procedures were later incorporated into the federal special education law. See 20 U.S.C. § 1415 (1988 & Supp. II 1991).

39. See SALOMONE, *supra* note 18, at 139-40; Darwin L. Miller & Marilee A. Miller, *The Handicapped Child's Civil Right as it Relates to the "Least Restrictive Environment" and Appropriate Mainstreaming*, 54 IND. L.J. 1, 12-14 (1978). The legislative history to the Education for All Handicapped Children Act states that *PARC* and *Mills* "guarantee the right to free publicly-supported education for handicapped children." S. Rep. No. 168, 94th Cong., 1st Sess. 6 (1975), reprinted in 1975 U.S.C.A.N. 1425, 1430 [hereinafter 1975 Senate Report].

40. SALOMONE, *supra* note 18, at 140.

41. Miller & Miller, *supra* note 39, at 13-14.

42. See Laurence E. Lynn, Jr., *The Emerging System for Educating Handicapped Children*, 2 POLY STUD. REV. 21, 28 (1983).

43. *Id.*

44. *Id.*

45. See ROTHSTEIN, *supra* note 18, at 2.

46. *Id.*

placed in special education programs.<sup>47</sup> Children who did receive services were often segregated into special classrooms, removing them from significant contact with their non-disabled peers.<sup>48</sup> In general, parental participation in the identification and placement of children in special education was discouraged by school officials.<sup>49</sup>

Underlying all these problems was a lack of financial resources: state and local school districts simply did not have the money to provide all children with an appropriate education.<sup>50</sup> Of the more than eight million children with disabilities in the United States in 1975, only 3,900,000 were receiving an appropriate education,<sup>51</sup> 1,750,000 children received no education at all, while 2,500,000 children received an "inappropriate" education.<sup>52</sup>

## II. THE FEDERAL LAW

Following the decisions in *PARC* and *Mills*, Congress enacted the two pieces of federal legislation that form the basis of a child's right to a free appropriate education: section 504 of the Rehabili-

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47. *Id.* The misclassification of children with disabilities was a major concern of Congress in enacting the Education for All Handicapped Children Act of 1975. Congress was "deeply concerned about practices and procedures which result in classifying children as having handicapping conditions when, in fact, they do not have such conditions." 1975 Senate Report, *supra* note 39, at 1450. The Senate Committee on Labor and Public Welfare identified three concerns regarding problems of identification and classification of children with disabilities: "(1) the misuse of appropriate identification and classification data within the educational process itself; (2) discriminatory treatment as the result of the identification of a handicapping condition; and (3) misuse of identification procedures or methods which results in erroneous classification of a child as having a handicapping condition." *Id.*

48. H. RUTHERFORD TURNBULL III, *FREE APPROPRIATE PUBLIC EDUCATION* 15-16 (3d ed. 1990).

49. *Id.* at 16; *see also* ROTHSTEIN, *supra* note 18, at 44. The legislative history to the Education for All Handicapped Children Act indicates the scope of the problem:

Whereas the actions taken at the State and national levels over the past few years have brought substantial progress, the parents of a handicapped child or a handicapped child himself must still too often be told that adequate funds do not exist to assure that child the availability of a free appropriate public education.

1975 Senate Report, *supra* note 39, at 1432.

50. TURNBULL, *supra* note 48, at 16.

51. 1975 Senate Report, *supra* note 39, at 1432.

52. *Id.*

tation Act of 1973;<sup>53</sup> and the Individuals with Disabilities Education Act.<sup>54</sup>

### A. Section 504

Section 504 of the Rehabilitation Act of 1973 ("section 504") was enacted to prevent discrimination against people with disabilities in education, employment, transportation, housing, and health services.<sup>55</sup> The section prohibits any program or activity receiving federal assistance from discriminating against, excluding, or denying benefits to an "otherwise qualified handicapped" individual.<sup>56</sup> A person is "otherwise qualified" under section 504 if she meets all of the program's requirements despite her physical or mental impairment.<sup>57</sup>

The definition of "handicaps" under section 504 is broad. It protects any individual with a physical or mental impairment that "substantially limits" one or more "major life activities," has a "record of such an impairment," or is "regarded as having such an impairment."<sup>58</sup> The range of those required to comply with

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53. Pub. L. No. 93-112, 87 Stat. 394 (codified as amended at 29 U.S.C. § 794 (1988)).

54. Pub. L. No. 94-142, 89 Stat. 773 (codified as amended at 20 U.S.C. §§ 1400-1485 (1988 & Supp. II 1991)). Together, IDEA and section 504 provide "a framework for a highly specific set of legal requirements for the provision of special education." ROTHSTEIN, *supra* note 18, at xxiii.

55. S. Rep. No. 1297, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 6373, 6388.

56. 29 U.S.C. § 794(a) (1988). The section states, in relevant part: "No otherwise qualified individual with handicaps in the United States . . . shall, solely by reason of her or 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." *Id.*; see Judith W. Wegner, *The Anti-Discrimination Model Reconsidered: Ensuring Equal Opportunity Without Respect to Handicap Under Section 504 of the Rehabilitation Act of 1973*, 69 CORNELL L. REV. 401 (1984) (comprehensive treatment of section 504); Bonnie P. Tucker, *Section 504 of the Rehabilitation Act After Ten Years of Enforcement: The Past and Future*, U. ILL. L. REV. 845 (1989) (same).

57. *Southeastern Community College v. Davis*, 442 U.S. 397, 406 (1979).

58. 29 U.S.C. § 706(8)(B) (1988). The regulations promulgated pursuant to section 504 define physical or mental impairment as:

(A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

section 504 is similarly broad. A "program or activity" receiving federal aid encompasses employers, welfare agencies, hospitals, federally assisted transportation programs, and public school systems.<sup>59</sup>

Under section 504 regulations, state and local agencies that receive federal aid cannot exclude "any qualified handicapped person" from a public elementary or high school education.<sup>60</sup> In addition, federal aid recipients that operate public elementary and secondary school programs must locate, identify, evaluate, and provide each child with a disability with a free appropriate public education.<sup>61</sup> The regulations also require a system of procedural safeguards with respect to the identification and placement of such children.<sup>62</sup> These procedures include notice and opportunity for parents to examine their child's records, and an impartial hearing to review parental objections.<sup>63</sup>

Section 504 regulations dealing with the provision of a free appropriate public education to children with disabilities are enforced by the Office of Civil Rights ("OCR") within the United

34 C.F.R. § 104.3(2)(i) (1991).

The regulations define "major life activities" as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." *Id.* § 104.3 (2)(ii). Due to this broad definition of "impairment," section 504 protects children who do not fall within the class protected by IDEA, such as AIDS victims, drug abusers, alcoholics, and people with temporary disabilities. The scope of this note is limited to children who are protected by both section 504 and IDEA.

59. ROTHSTEIN, *supra* note 18, at 26. Any doubt that section 504 applies to local public schools was dispelled when Congress passed section 4 of the Civil Rights Restoration Act of 1987. The Act amended section 504 to state:

"[P]rogram or activity" means all of the operations of—

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance . . . .

[(2)](B) a local educational agency (as defined in section 2891 (12) of title 20).

29 U.S.C. § 794(b)(1), (b)(2)(B) (1988). It would be difficult to find a public school system that did not fall under the section 504 umbrella, since public education is "so permeated with federal funding." ROTHSTEIN, *supra* note 13, at 27.

60. 34 C.F.R. § 104.33(d) (1991).

61. *Id.* §§ 104.31-104.39.

62. *Id.* § 104.36.

63. *Id.* The regulations for section 504, including procedural safeguards, are similar to those under IDEA. See 34 C.F.R. §§ 300.126-300.133 (1991).

States Department of Education.<sup>64</sup> Noncompliance with section 504 regulations can result in termination of federal funds.<sup>65</sup> Most courts have found that a private right of action exists under section 504,<sup>66</sup> especially where a state or local school district has denied educational benefits to a substantial number of students,<sup>67</sup> or where an individual child has been denied an appropriate education.<sup>68</sup> Although injunctive relief is available where appropriate,<sup>69</sup> courts are divided on the issue of monetary damages under section 504.<sup>70</sup>

### B. Individuals with Disabilities Education Act

Although section 504 protects children with disabilities against discrimination by school districts, the Individuals with Disabilities Education Act ("IDEA") is the basis of special education in this country.<sup>71</sup> First enacted in 1975,<sup>72</sup> IDEA

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64. 20 U.S.C. §§ 3441(a)(3), 3413(b)(1) (1988). The Office of Civil Rights has regional offices that investigate complaints, mediate disputes, and issue letters of findings. Judith W. Wegner, *Educational Rights of Handicapped Children* (pts. 1 & 2), 17 J.L. & EDUC. 387, 625, 691 (1988). OCR letters of findings are reported in the *Individuals with Disabilities Education Law Reporter* (formerly the *Education of the Handicapped Law Reporter*).

65. See 34 C.F.R. §§ 100.6-100.10 (1991).

66. For example, in the Second Circuit, it is "settled that a private right of action against recipients of federal financial assistance may be implied from section 504." *Rothschild v. Grottenthaler*, 907 F.2d 286, 289 (2d Cir. 1990).

67. Wegner, *supra* note 64, at 637.

68. *Id.*

69. See BONNIE P. TUCKER & BRUCE A. GOLDSTEIN, *LEGAL RIGHTS OF PERSONS WITH DISABILITIES* 8:14 (1992).

70. *Id.* at 8:3. In *Miener v. Missouri*, the Court of Appeals for the Eighth Circuit held that all remedies, including damages, were available under section 504. 673 F.2d 969 (8th Cir.), *cert. denied*, 459 U.S. 909 (1982). Other courts have followed suit. See, e.g., *Greater Los Angeles Council on Deafness, Inc. v. Zolin*, 812 F.2d 1103 (9th Cir. 1987); *Ciampa v. Massachusetts Rehabilitation Comm'n*, 718 F.2d 1 (1st Cir. 1983).

Other courts, however, have held that damages are not available under section 504 absent a claim of intentional discrimination. See, e.g., *Sabo v. O'Bannon*, 586 F. Supp. 1132 (E.D. Pa. 1984); *Marvin H. v. Austin Indep. Sch. Dist.*, 714 F.2d 1348 (5th Cir. 1983). The Supreme Court has not yet ruled on the issue of damages under section 504. See TUCKER & GOLDSTEIN, *supra* note 69, at 8:3-8:10 (complete discussion of remedies available under section 504).

71. IDEA's provisions are contained in 20 U.S.C. §§ 1400-1485 (1988 & Supp. II 1991). Vermont Senator Robert Stafford, one of the sponsors of the original bill, characterized the Act as "uniquely oriented to children, their parents, their teachers and to the nature of the teaching environment. It establishes in federal statute the right of all handicapped children to a free appropriate education wholly at public expense." Robert T. Stafford, *Education for the Handicapped: A Senator's Perspective*, 3 VT. L. REV. 71, 75 (1978). In the 1989-90 school year, 4,687,620 children received special education services under IDEA.

provides federal funds to assist state and local school districts in educating all children with disabilities.<sup>73</sup> Building on *Brown's* mandate of equal educational opportunity, IDEA is based on a "zero reject" principle: all children, no matter how severe their disabilities, are entitled to a free appropriate public education.<sup>74</sup> Thus, to qualify for federal funding under IDEA, a state must institute or establish a policy that "assures all children with disabilities the right to a free appropriate public education."<sup>75</sup> This includes a system for the identification, evaluation, and placement of all children in need of special education.<sup>76</sup>

Unlike section 504, which is "institutional" in focus,<sup>77</sup> IDEA centers on the individual child.<sup>78</sup> Thus, the "free appropriate education" required by the Act is achieved through an Individualized Education Program ("IEP") designed to address the unique needs of a child with disabilities.<sup>79</sup> The IEP is a written docu-

U.S. DEPT OF EDUC., TO ASSURE THE FREE APPROPRIATE PUBLIC EDUCATION OF ALL CHILDREN WITH DISABILITIES, at xv (1991).

72. The legislation was titled the Education for All Handicapped Children Act of 1975 ("EAHCA"), Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as amended at 20 U.S.C. §§ 1400-1485 (1988 & Supp. II 1991)). The Act was the culmination of a series of efforts by Congress, dating back to 1966, to stimulate state development of special education resources. TURNBULL, *supra* note 48, at 13-14. In 1990, Congress amended the Act to refer to handicapped children as children "with disabilities." Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, 104 Stat. 1103, 1141-51 (1990) (codified at 20 U.S.C. §§ 1400-1485 (Supp. II 1991)).

73. 20 U.S.C. § 1400(c) (Supp. II 1991). The purpose of the Act is to:  
[A]ssure that all children with disabilities have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of children with disabilities and their parents or guardians are protected, to assist States and localities to provide for the education of all children with disabilities, and to assess and assure the effectiveness of efforts to educate children with disabilities.

*Id.*

74. TUCKER & GOLDSTEIN, *supra* note 69, at 12:19.

75. 20 U.S.C. § 1412(1) (Supp. II 1991).

76. See 34 C.F.R. §§ 300.110-300.151 (1991).

77. See Wegner, *supra* note 64, at 397. "The Rehabilitation Act is designed to control institutional behavior." *Manecke v. School Bd.*, 553 F. Supp. 787, 790 (M.D. Fla. 1982), *aff'd in part, rev'd in part*, 762 F.2d 912 (11th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986).

78. Wegner, *supra* note 64, at 405. The Act defines special education as "specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a child with a disability." 20 U.S.C. § 1401(a)(16) (Supp. II 1991).

79. 20 U.S.C. § 1401(a)(18)(D) (1988); see TUCKER & GOLDSTEIN, *supra* note 69, at 18:1-18:28 (detailed discussion of the IEP and its place in special education).

ment containing a statement of the child's present level of performance,<sup>80</sup> a list of annual goals and short term objectives,<sup>81</sup> and the specific educational services required to achieve those goals.<sup>82</sup> The IEP must also specify dates for the initiation and anticipated duration of the special education services,<sup>83</sup> and include objective criteria and evaluation procedures to determine whether the instructional goals are being attained.<sup>84</sup> The contents of the IEP are determined at a meeting attended by the child's parents, teacher, a special education teacher, and, where appropriate, the child.<sup>85</sup> Because a child's educational program is governed by this close assessment of individual need and abilities,<sup>86</sup> the IEP is considered the "heart" of IDEA.<sup>87</sup>

Also essential to the Act is the concept of "mainstreaming."<sup>88</sup> Under IDEA, schools must educate children with disabilities together with all other children to the maximum extent appropriate.<sup>89</sup> The placement of a child in special classes or separate schooling is permissible only when education in the regular classroom cannot be achieved with the use of supplementary aids and services.<sup>90</sup> The amount of time a child will spend in the regular classroom and in the special education environment is

80. 20 U.S.C. § 1401(a)(2)(A) (Supp. II 1991).

81. *Id.* § 1401(a)(2)(B).

82. *Id.* § 1401(a)(2)(C).

83. *Id.* § 1401(a)(2)(E).

84. *Id.* § 1401(a)(2)(F). This assessment must be done at least annually. *Id.*

85. *Id.* § 1401(a)(2). Cooperation between parents and the school in determining an appropriate education for the child is an important facet of IDEA. As one commentator notes: "Congress intended to make parents and school districts operate as equal participants in the decisions involving a disabled child's educational plan." TUCKER & GOLDSTEIN, *supra* note 69, at 18:4 (citation omitted).

Vermont procedures governing the IEP meeting are contained in VERMONT DEP'T OF EDUC., SPECIAL EDUC. RULE 2364.2 (June 5, 1991) [hereinafter V.S.E.R.].

86. TUCKER & GOLDSTEIN, *supra* note 69, at 18:1.

87. *Id.*

88. Although the word "mainstreaming" is not used in the Act, it refers to the Act's mandate that children with disabilities be educated in a regular classroom to the maximum extent appropriate. See 20 U.S.C. § 1412(5)(B) (Supp. II 1991); 34 C.F.R. § 300.550(b)(1)-(2) (1991); see also ROTHSTEIN, *supra* note 18, ch. 8; TUCKER & GOLDSTEIN, *supra* note 69, at 12:11-12:12, 15:17-15:19 (discussing the mainstreaming principles of IDEA).

89. 20 U.S.C. § 1412(5) (Supp. II 1991).

90. *Id.*; see also 34 C.F.R. § 300.550(b)(2) (1991).

determined by the IEP,<sup>91</sup> and therefore is based on the child's individual needs.<sup>92</sup> As opposed to the exclusion and segregation of children with disabilities that characterized their education for decades,<sup>93</sup> IDEA creates a "presumption in favor of integration."<sup>94</sup> This presumption is based on the stigma associated with segregation, and the psychological benefits of integration for all children.<sup>95</sup>

Another important feature of IDEA is the substantial and detailed procedural requirements it imposes on states and local school districts to protect the parents of children with disabilities.<sup>96</sup> The parents must be notified of any proposal to initiate or change the identification, evaluation, or educational placement of their child.<sup>97</sup> Parents also must be notified of a school's refusal to initiate or change a child's identification, evaluation, or placement.<sup>98</sup> Parents who disagree with a school's identification, evaluation, or placement may request an administrative due process hearing before an impartial hearing officer.<sup>99</sup> Parents who do not agree with the resulting administrative decision may bring a civil action in state or federal court.<sup>100</sup> Courts in IDEA cases may grant "appropriate relief,"<sup>101</sup> which has usually meant

91. 20 U.S.C. § 1401(a)(2)(C) (Supp. II 1991).

92. 34 C.F.R. § 300.552 cmt. (1991).

93. See *supra* text accompanying notes 17-24.

94. TUCKER & GOLDSTEIN, *supra* note 69, at 15:17.

95. ROTHSTEIN, *supra* note 18, at 110.

96. These procedural safeguards are contained in 20 U.S.C. § 1415 (1988 & Supp. II 1991) and 34 C.F.R. §§ 300.500-300.514 (1991).

97. 34 C.F.R. § 300.504(a)(1) (1991).

98. *Id.* § 300.504(a)(2).

99. 20 U.S.C. § 1415(a)(2) (1988); 34 C.F.R. § 300.506 (1991) (impartial due process hearing); *id.* § 300.507 (1991) (impartial hearing officer). Parents have the right to be accompanied by counsel, to present evidence, and cross-examine witnesses. *Id.* § 300.508 (1991) (hearing rights).

The impartial due process hearing procedures in Vermont are governed by V.S.E.R. 2364.3.5, and VT. STAT. ANN. tit. 16, § 2957 (1989). Section 2957 provides that "[a]n action against a local, intermediate, or state education agency seeking enforcement of special education rights . . . shall be commenced by an administrative due process hearing within 2 years of the alleged violation." *Id.*

100. 20 U.S.C. § 1415(e) (1988 & Supp. II 1991); 34 C.F.R. § 300.511 (1991); V.S.E.R. 2304 (providing that "the decision of the hearing officer is final unless appealed to a state or federal court of civil jurisdiction").

101. 20 U.S.C. § 1415(e)(2) (1988); see TUCKER & GOLDSTEIN, *supra* note 69, at 17:1-17:24 (full discussion of remedies available under IDEA).

injunctive or declaratory relief.<sup>102</sup> Although most courts have held that damages are unavailable under IDEA,<sup>103</sup> the Supreme Court has ruled that parents may be reimbursed for a private special education placement that is later determined to have been necessary for the provision of a free appropriate education.<sup>104</sup> Courts also have held that compensatory educational services are available as a remedy under IDEA.<sup>105</sup> Although IDEA did not initially provide for the award of attorney's fees, a 1986 amendment to the Act allows parents who prevail in an IDEA action to recover attorney's fees as part of the costs.<sup>106</sup> The 1986 amendment also provides that a claim under IDEA does not bar claims under other federal statutes that ensure the rights of children with disabilities, such as section 504.<sup>107</sup>

### C. Application of IDEA to Vermont Public Schools

To receive special education services under IDEA, a child must: (1) be identified as disabled under the Act, and (2) be in need of special education.<sup>108</sup> Although IDEA specifies the various categories of disability that will entitle a child to special

102. Wegner, *supra* note 64, at 408.

103. See TUCKER & GOLDSTEIN, *supra* note 69, at 17:3.

104. School Comm. v. Department of Educ., 471 U.S. 359, 369-70 (1985).

105. Compensatory educational services "are designed to remedy—in whole or in part—the progress lost by a student with a disability because he or she was previously denied a FAPE [Free Appropriate Public Education]." TUCKER & GOLDSTEIN, *supra* note 69, at 17:11.

106. Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796-98 (1986) (codified at 20 U.S.C. § 1415(e)(4)(B)-(F) (1988 & Supp. II 1991)). This Act overruled *Smith v. Robinson*, 468 U.S. 992 (1984), which held that IDEA provided the sole remedy for children with disabilities denied a free appropriate public education.

107. 20 U.S.C. § 1415(f) (Supp. II 1991); see Wegner, *supra* note 64 (comprehensive discussion of the interaction of IDEA with other federal civil rights statutes).

108. 20 U.S.C. § 1401(a)(1)(A)-(B) (Supp. II 1991). Vermont Department of Education, Special Education Rule 2362 provides that:

(1) to be determined eligible for special education, an elementary or secondary student must receive a comprehensive evaluation under the auspices of a basic staffing team; and based on the results of the comprehensive evaluation the Basic Staffing Team must determine that the student:

- (a) meets one or more disability categories;
- (b) exhibits the adverse effect of the disability on educational performance;
- and
- (c) is in need of special education.

VERMONT DEPT OF EDUC., SPECIAL EDUC. RULE 2362 (July 1, 1992) (citations omitted).

education, states and local school districts are responsible for determining the standards of eligibility for each category.<sup>109</sup> The Vermont Rules of Special Education contain detailed criteria that a child must meet before being classified as "learning disabled" or "seriously emotionally disturbed."<sup>110</sup>

The special education process begins with a referral for evaluation by a parent or teacher who believes a child may have a disability.<sup>111</sup> A Basic Staffing Team ("BST") is then convened.<sup>112</sup> The BST must include the child's teacher and at least one person with knowledge in the child's area of suspected disability.<sup>113</sup> The BST conducts a comprehensive evaluation to determine if the child has a disability and is in need of special education.<sup>114</sup> Evaluation procedures must be racially and culturally nondiscriminatory, and no single evaluation procedure may be used as the sole basis for determining special education eligibility.<sup>115</sup> This comprehensive evaluation must be completed within forty-five days of the referral.<sup>116</sup> If the child is found eligible for special education, an IEP must be prepared within thirty days,<sup>117</sup> and the child must be placed in the least restrictive environment appropriate to his or her educational needs.<sup>118</sup> A parent who disagrees with an evaluation may obtain an independent educational evaluation at public expense.<sup>119</sup>

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109. 20 U.S.C. § 1412(2)(C) (Supp. II 1991). The federal statute provides that states are responsible for developing detailed policies and procedures to ensure that all children in need of special education are identified, located, and evaluated. *Id.* Since there is substantial disagreement among educators and officials as to the "correct definition" of certain disabilities, "[d]epending on what definition is used, one locality may have a much larger number of handicapped children than another." ROTHSTEIN, *supra* note 18, at 32.

110. VERMONT DEP'T OF EDUC., SPECIAL EDUC. RULE 2362.1 (July 1, 1992).

111. TUCKER & GOLDSTEIN, *supra* note 69, at 18:1.

112. V.S.E.R. 2362.2.3.

113. V.S.E.R. 2364.1.

114. V.S.E.R. 2362.2.6.

115. V.S.E.R. 2362.2.5.

116. V.S.E.R. 2362.2.3(2).

117. V.S.E.R. 2363.3.1.

118. V.S.E.R. 2363.3.2, 2363.4.

119. V.S.E.R. 2364.3.4.

## III. PROBLEMS WITH SPECIAL EDUCATION UNDER IDEA

A. *In General*

Although IDEA has virtually eliminated the exclusion of children with disabilities from public schools,<sup>120</sup> the special education system created by the Act has its problems.<sup>121</sup> Some critics believe that special education has developed into an over-regulated system in which educators spend more time doing paperwork than teaching.<sup>122</sup> Others point to the high percentage of children classified as "learning disabled,"<sup>123</sup> and contend that many of these children are merely "slow learners" who are referred to special education by teachers who are not prepared to deal with them in the regular classroom.<sup>124</sup> Nearly all critics agree that IDEA has engendered too much litigation. Since the enactment of IDEA in 1975, hundreds of parents have sued school systems in state and federal courts.<sup>125</sup> Parents have sued for failure to identify and evaluate children who may have disabilities, for improper evaluation and placement, and for failure to provide a free appropriate education.<sup>126</sup>

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120. NATIONAL COUNCIL ON DISABILITY, *THE EDUCATION OF STUDENTS WITH DISABILITIES: WHERE DO WE STAND* 1 (1989).

121. See Christopher Connell & Lee Mitgang, *Special Education; U.S. Sets World Standard, But Critics Question Costs, Benefits, Inequities*, L.A. TIMES, Nov. 15, 1987, at 2.

122. *Id.*; see also NEW DIRECTIONS, *supra* note 1, at 7.

123. According to U.S. Government figures, 47% of children receiving special education services under IDEA were classified as "learning disabled." NATIONAL COUNCIL ON DISABILITY, *supra* note 120, at 11.

124. See, e.g., NEW DIRECTIONS, *supra* note 1, at 10; ROTHSTEIN, *supra* note 18, at 93. Rothstein points out that the reasons for "what is probably overidentification of children as learning disabled" include overworked regular education teachers, improperly trained personnel, and a dispute among professionals as to the proper definition of learning disabled. *Id.* at 69.

125. Dixie Snow Huefner, *Judicial Review of the Special Educational Program Requirements Under the Education for All Handicapped Children Act: Where Have We Been and Where Should We Be Going?*, 14 HARV. J.L. & PUB. POLY 483, 483 (1991); see also Perry A. Zirkel & Sharon N. Richardson, *The "Explosion" in Education Litigation*, 53 EDUC. L. REP. 767 (West 1989).

126. Shelley Jackson, *Introduction to Education Law*, 23 CLEARINGHOUSE REV. 883, 884 (1989). This "litigation explosion" is so intense that there are over a dozen attorneys in Vermont who practice full time in the area of disability law. NEW DIRECTIONS, *supra* note 1, at 3.

Underlying these problems is the high cost of providing special education to children with disabilities.<sup>127</sup> The costs of educating a child with disabilities are twice as high as the per child costs of regular education.<sup>128</sup> Residential or private school placements can cost much more.<sup>129</sup> In addition to paying for evaluations and special education teachers, local school districts also must pay for teacher aides, related services,<sup>130</sup> and the costs of due process hearings.<sup>131</sup> These cost problems are exacerbated by the fact that special education placements have increased steadily since the passage of IDEA.<sup>132</sup> Presently, about 4.5 million children nationwide receive special education services.<sup>133</sup> Given scarce state resources in the face of increasing placements, special education has become the subject of political debate, as state legislatures look for ways to reform the system and contain the costs of educating children with disabilities.<sup>134</sup>

### B. In Vermont

Like the rest of the country, Vermont has been struggling with the high costs of educating children with disabilities.<sup>135</sup> At

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127. See James H. 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 (1982).

128. Katharine T. Bartlett, *The Role of Cost in Educational Decisionmaking for the Handicapped Child*, 48 LAW & CONTEMP. PROBS. 7, 7 (1985).

129. See, e.g., *Clevenger v. Oak Ridge Sch. Bd.*, 744 F.2d 514, 516-17 (6th Cir. 1984) (residential placement costing \$88,000 per year). A local school district can exhaust its entire special education budget in providing residential placements for two or three children. ROTHSTEIN, *supra* note 18, at 32.

130. "Related services" include "transportation, and such developmental, corrective, and other supportive services [including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation and social work services, and medical and counseling services . . . as may be required to assist a child with a disability to benefit from special education." 20 U.S.C. § 1401(a)(17) (Supp. II 1991).

131. ROTHSTEIN, *supra* note 18, at 183. This does not include the cost of representation unless the parents are the prevailing parties. *Id.*

132. U.S. DEPT. OF EDUCATION, *TO ASSURE THE FREE APPROPRIATE PUBLIC EDUCATION OF ALL CHILDREN WITH DISABILITIES* 4 (1991).

133. *Id.* at 2.

134. See, e.g., *Grading Special Education*, BOSTON GLOBE, Sept. 2, 1991, at 13-14 (editorial on attempts in Massachusetts to contain special education costs); Conell & Mitgang, *supra* note 121 (on nationwide call for reform).

135. See NEW DIRECTIONS, *supra* note 1, at 1. "The high cost of special education in Vermont has been the focus of six summer study committees, blue ribbon panels, or special commissions since the enactment of PL[94-142] in 1976." *Id.*

the time Act 230 was passed, Vermont's special education enrollments were increasing annually at three times the rate of enrollment in regular education.<sup>136</sup> According to the Vermont State Board of Education's 1990 figures, 11,481 of the state's 97,169 students in grades K through 12 received special education services.<sup>137</sup> In 1987, the state spent \$24,200,000 on special education.<sup>138</sup> The state has allotted almost \$46,000,000 for special education for fiscal year 1992.<sup>139</sup> Much of this budget will be spent on residential placements,<sup>140</sup> private school tuition,<sup>141</sup> teacher aides,<sup>142</sup> psychological services,<sup>143</sup> and independent evaluations.<sup>144</sup>

According to findings of the Vermont Special Commission on Special Education, one of the main reasons for the high cost of special education is mislabeling: too many children with "mild disabilities" are referred for special education.<sup>145</sup> The Commission found that many schools refer children for special education without first exhausting other supplemental and remedial services.<sup>146</sup>

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136. See Video, *supra* note 1.

137. Laura Batten, *School Reform Accelerates in Vermont*, BOSTON GLOBE, Sept. 1, 1991, at 10. This actually represents a slight decrease from 1989, when 12,717 children in Vermont received special education. NEW DIRECTIONS, *supra* note 1, at 4. The commission report notes, however, that in some Vermont schools, one out of every four children receives special education services. *Id.*

138. Batten, *supra* note 137, at 2.

139. Telephone interview with Margaret Schelley, Budget Coordinator, Vermont Dep't of Educ., Special Education Unit, Montpelier, Vt. (Sept. 1, 1992).

140. NEW DIRECTIONS, *supra* note 1, at 5. Residential costs have doubled in the past few years. *Id.*

141. *Id.* It was estimated that private school tuition exceeded \$5,000,000 in fiscal year 1991. *Id.*

142. *Id.* More than \$8,900,000 was spent on teacher aides in fiscal year 1991. *Id.*

143. *Id.* In fiscal year 1991 more than \$2,200,000 was spent on psychological services. *Id.*

144. *Id.* The report notes that "[a] notable cottage industry has been spawned by the federal regulations which give parents the right to independent evaluations at public expense." *Id.*

145. *Id.* at 10.

146. *Id.* at 10. These supplemental services include the federal Chapter One program, which provides compensatory educational services for children in the areas of math and reading. *Id.* at 7.

The Commission attributed the high rate of special education referrals to the "failure of general education" to meet the needs of children with "mild disabilities."<sup>147</sup> The Commission also found that special education funds are used to cover "too many non-educational costs" such as family counseling, in-home care, structural modifications, and physical and occupational therapy.<sup>148</sup>

#### IV. THE SOLUTION: ACT 230

In 1989, the Vermont Legislature established the Special Commission on Special Education to study cost containment, eligibility standards, and service delivery, and to recommend reforms to the 1990 Legislature.<sup>149</sup> The Commission's report laid the foundation for the Special Education Reform Bill ("Act 230").<sup>150</sup> Act 230 was signed by Governor Madeleine Kunin on June 4, 1990, and took effect on July 1, 1991.<sup>151</sup>

Basically, the Act seeks to reduce the number of children classified as "disabled" and "in need of" special education services.<sup>152</sup> The Act requires each local school district to design and implement a "comprehensive system of education services that will result, to the maximum extent possible, in all students succeeding in the regular classroom."<sup>153</sup> Although the Act requires local school districts to avoid the "inappropriate use" of special education resources,<sup>154</sup> it also mandates that a range of "effective education services" be available to "all students who are failing or at risk of failing academically."<sup>155</sup>

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147. *Id.* at 10.

148. *Id.* The report recommends that these services be covered by other departments in the Agency of Human Services. *Id.*

149. Hull, *supra* note 7, at 1.

150. 1990 Vt. Laws 230, *codified at* VT. STAT. ANN. tit. 16, §§ 2901, 2902, 2948(c), 2956, 2961, 2961(a), 2962-2964, 2967-2973 (Supp. 1991).

151. Marc Hull, *Special Education Reform Bill—Now Law!*, SPECIAL EDUCATION NEWS, Spring 1990, at 1 [hereinafter SPECIAL EDUCATION NEWS].

152. Hull, *supra* note 7, at 2. Act 230 "envision[s] a day when only a small percentage of students will have to be labeled as disabled in order to access specially designed instruction." *Id.*

153. VT. STAT. ANN. tit. 16, § 2901(a) (Supp. 1991). This system must be designed in consultation with parents. *Id.*

154. *Id.*

155. *Id.*

The key to Act 230 is the training of regular classroom teachers to accommodate children with special needs.<sup>156</sup> The Act requires that school districts employ classroom teachers who are trained to deal with a "wide variation in learning styles and individual strengths and weaknesses."<sup>157</sup> By increasing the capacity of regular education to address the specialized needs of children with disabilities, Act 230 is intended to decrease the "need" for special education services under IDEA.<sup>158</sup> To help accomplish this goal, the Act requires that one percent of the state's special education appropriation be used to train teachers to accommodate special needs children.<sup>159</sup>

The most important provision of Act 230 is the requirement of an "instructional support system" in each Vermont public school.<sup>160</sup> The purpose of the instructional support system is to address the needs of all children "who require additional classroom assistance."<sup>161</sup> A key component of this system is the "instructional support team" ("IST"), which consists of teachers and other providers of support services.<sup>162</sup> The object of the IST

156. Hull, *supra* note 7, at 8.

157. VT. STAT. ANN. tit. 16, § 2901(b)(4) (Supp. 1991).

158. Hull, *supra* note 7, at 2; *see also* NEW DIRECTIONS, *supra* note 1, at 14-15.

In the past two decades, teaching strategies and materials have been developed or refined for effectively conveying essential concepts to students with a wide range of special needs. We have learned that most special instruction can take place in regular classes. We have learned that teachers working as teams can meet the challenges presented by virtually all students, including students with severe disabilities.

*Id.* at 15.

159. VT. STAT. ANN. tit. 16, § 2969(c) (Supp. 1991).

160. *Id.* § 2902.

161. *Id.* The system must include:

- (1) Procedures and training for instructional support teams[;]
- (2) Teacher assistance and support services for classroom accommodations and remedial services[;]
- (3) Screening to determine whether or not classroom accommodations and remedial services have been tried[;]
- (4) Determination of whether any additional accommodations, such as guidance and referral services or remedial services, may appropriately meet a child's educational needs[;]
- (5) A procedure for timely referral for evaluation for special education eligibility when warranted.

*Id.*

162. V.S.E.R. 2194.

is to identify children who require special attention,<sup>163</sup> and to assist teachers in providing that attention in the regular classroom.<sup>164</sup> Under Act 230, a teacher refers a child in need of special attention to the IST.<sup>165</sup> The IST then conducts a screening to determine whether classroom accommodations or other remedial services have been tried to meet the child's needs.<sup>166</sup> If such accommodations have not been tried, the team discusses ways in which regular education may "appropriately" meet the child's needs.<sup>167</sup> If the child's needs cannot be met through regular education, the child is referred for a special education evaluation.<sup>168</sup> Despite criticism by some lawyers and educators that the IST will impede the special education process,<sup>169</sup> the Vermont State Board of Education insists that the teams "shall not interfere with a student's right to a timely referral" for a special education evaluation.<sup>170</sup>

To help achieve the aims of the Act, Vermont has tightened its eligibility standards for special education.<sup>171</sup> Under the Act, each school district must follow these standards strictly.<sup>172</sup> Districts whose special education enrollments are twenty percent above the statewide average must submit a written explanation to the Commissioner of Education.<sup>173</sup>

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163. Hull, *supra* note 7, at 3.

164. V.S.E.R. 2194.

165. See DEVELOPING INSTRUCTIONAL SUPPORT TEAMS (Vermont Dep't of Educ. Video, Jan. 1992).

166. VT. STAT. ANN. tit. 16, § 2902(3) (Supp. 1991).

167. *Id.* § 2902(4).

168. *Id.* § 2902(5).

169. Interview with Lou Helmuth and Greg Van Buiten, Partners, Helmuth & Van Buiten, P.C., in Burlington, Vt. (Nov. 14, 1991).

170. V.S.E.R. 2194(7).

171. See Memorandum from Paul C. Fassler, Esq., and Elizabeth Grant, Esq., to Superintendents and Special Education Administrators (May 5, 1992) (on file in the Vermont Law School Library). The standards have been rewritten for speech and language impairments, learning impairments, specific learning disabilities, and serious emotional disturbances. The new regulations went into effect July 1, 1992. *Id.*

172. VT. STAT. ANN. tit. 16, § 2901(b)(1) (Supp. 1991).

173. *Id.* § 2972.

## V. ANALYSIS

Although it is labeled a "special education reform law,"<sup>174</sup> Act 230 is directed primarily at regular education.<sup>175</sup> The Act seeks to develop a "comprehensive system of education services" within regular education.<sup>176</sup> Two essential components of this system are the training of regular classroom teachers to accommodate children with special needs<sup>177</sup> and the implementation of instructional support systems.<sup>178</sup> By raising the capacity of regular education to provide services to children with disabilities, the Act is intended to diminish the "need" for special education under IDEA,<sup>179</sup> and to decrease the number of teacher referrals for special education.<sup>180</sup> The ultimate goal of the Act is for regular education to meet the needs of most children with disabilities,<sup>181</sup> reserving special education for those children with the most severe disabilities.<sup>182</sup>

Although the goals of the Act are ambitious, the fact remains that under Act 230, children who previously would have received special education services will find themselves no longer eligible, or not evaluated at all.<sup>183</sup> This means that the needs of many children with learning difficulties will not be served by an Individualized Education Plan.<sup>184</sup> Instead, those needs will be addressed by a regular classroom teacher who is trained to teach children with diverse learning styles and needs.<sup>185</sup> Rather than refer a problem child for a special education evaluation, teachers will seek the assistance of an Instructional Support Team that

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174. 1990 Vt. Laws 230. Act 230 is titled "An Act Relating to Reforms in Special Education." *Id.*

175. Claudia Moore, *Act 230 at CVU*, CSEA NEWSLETTER, June 1991, at 5.

176. VT. STAT. ANN. tit. 16, § 2901(a) (Supp. 1991).

177. *Id.* § 2901(b)(4).

178. *Id.* § 2902.

179. Hull, *supra* note 7, at 2.

180. SPECIAL EDUCATION NEWS, *supra* note 151, at 1. Reducing the number of referrals is the main function of the Instructional Support Team. See *infra* text accompanying notes 233-40.

181. NEW DIRECTIONS, *supra* note 1, at 17.

182. *Id.*

183. Hull, *supra* note 7, at 5; see also SPECIAL EDUCATION NEWS, *supra* note 151, at 1 (Act 230 seeks to lower the number of students referred for special education).

184. See *supra* text accompanying notes 79-92.

185. VT. STAT. ANN. tit. 16, § 2901(b)(4) (Supp. 1991).

will recommend ways to accommodate the child through regular education services.<sup>186</sup> This section examines first the extent to which regular classroom teachers can adequately address the needs of children with disabilities. Second is a discussion of whether, under federal law, the use of Instructional Support Teams violates the rights both of children with disabilities and their parents.

*A. Toward a Comprehensive System of Educational Services: Teacher Training and the Regular Education Initiative*

1. The Regular Education Initiative

Act 230 embodies an approach to special education known as the Regular Education Initiative ("REI").<sup>187</sup> This approach involves the merger of regular and special education into a unitary system in which most or all children are taught in the regular classroom.<sup>188</sup> According to REI proponents, most children who are currently classified as mildly disabled (learning disabled, emotionally disturbed, and educably mentally retarded) and who are receiving special education services under IDEA can be better served through general education.<sup>189</sup> Advocates argue that, given the proper training, support, and curriculum, classroom teachers can provide individualized instruction to most students.<sup>190</sup> By broadening the classroom teacher's responsibility for her students, special needs children can receive adequate services without the stigma of a label under IDEA.<sup>191</sup>

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186. *Id.* § 2902.

187. REI is also known as "Inclusive Education." See Madeline C. Will, *Educating Children with Learning Problems: A Shared Responsibility*, 52 *EXCEPTIONAL CHILDREN* 411 (1986) (general overview of the Regular Education Initiative); Alan Gartner & Dorothy K. Lipsky, *Beyond Special Education: Toward A Quality System for All Students*, 57 *HARV. EDUC. REV.* 367 (1987) (same).

188. Thomas M. Skrtic, *The Special Education Paradox: Equity as the Way to Excellence*, 61 *HARV. EDUC. REV.* 148, 158 (1991).

189. James M. Kauffman et al., *Arguable Assumptions Underlying the Regular Education Initiative*, 21 *J. LEARNING DISABILITIES* 6, 6-7 (1988).

190. Gartner & Lipsky, *supra* note 187, at 385-88.

191. *Id.* at 388.

Although the strategies vary, most REI proposals emphasize the need for collaboration among teachers,<sup>192</sup> and the most frequently mentioned collaborative approach is team teaching.<sup>193</sup> Under this approach, teams comprised of classroom teachers, special educators, and community volunteers share responsibility for instructing and evaluating a group of students.<sup>194</sup> According to team teaching advocates, this shared responsibility allows for an individualized assessment of student needs,<sup>195</sup> and for the provision of specialized instruction in the regular classroom.<sup>196</sup> In addition to team teaching, REI proponents stress the importance of peer collaboration: teachers consulting one another to solve instructional problems and to address the needs of particular students.<sup>197</sup>

Proponents of REI also agree that teachers must change the way they teach. Rather than use one curriculum geared toward the "average" student, teachers must try different approaches for different students.<sup>198</sup> Also, instead of encouraging competition in the classroom, teachers should use cooperative learning procedures, in which students of differing abilities work together to solve a common problem.<sup>199</sup> Through intensive and ongoing training in the use of innovative instructional techniques, REI supporters believe that the classroom teacher can meet the needs of most students.<sup>200</sup>

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192. See generally Mara Sapon-Shevin, *Working Towards Merger Together: Seeing Beyond Distrust and Fear*, 11 *TEACHER EDUC. & SPECIAL EDUC.* 103 (1988).

193. Jacqueline S. Thousand & Richard A. Villa, *Sharing Expertise and Responsibilities Through Teaching Teams*, in *SUPPORT NETWORKS FOR INCLUSIVE SCHOOLING: INTERDEPENDENT INTEGRATED EDUCATION* 151, 151-52 (William Stainback & Susan Stainback eds., 1990).

194. *Id.* at 153.

195. *Id.*

196. *Id.*

197. See Marleen C. Pugach & Lawrence J. Johnson, *Meeting Diverse Needs Through Professional Peer Collaboration*, in *SUPPORT NETWORKS FOR INCLUSIVE SCHOOLING: INTERDEPENDENT INTEGRATED EDUCATION* 123 (William Stainback & Susan Stainback eds., 1990).

198. See Thousand & Villa, *supra* note 193, at 10.

199. See Mara Sapon-Shevin, *Student Support through Cooperative Learning*, in *SUPPORT NETWORKS FOR INCLUSIVE SCHOOLING: INTERDEPENDENT INTEGRATED EDUCATION* 65-79 (William Stainback & Susan Stainback eds., 1990).

200. See generally Gartner & Lipsky, *supra* note 187.

Although some educators embrace REI as a step in the right direction, many advocates for children with disabilities strongly oppose it.<sup>201</sup> A major concern is that children with disabilities will not receive the attention they need in the regular classroom.<sup>202</sup> One commentator compares REI to the homelessness that resulted from the deinstitutionalization of mental patients. "I worry that we will see a new type of homeless—students with learning disabilities, wandering the halls. Students with learning disabilities walking to the office because they have misbehaved. Students who will give up on education and become school 'pushouts,' not 'dropouts.'"<sup>203</sup> Others worry that the techniques used to train teachers in team teaching and cooperative learning are not researched well enough to justify abandoning traditional special education instruction.<sup>204</sup>

The most prominent concern, however, is the capacity and willingness of classroom teachers to shoulder the added responsibility that REI demands.<sup>205</sup> Some argue that, as a practical matter, the classroom teacher cannot appropriately meet the needs of both special and regular students.<sup>206</sup> Others point to the historic unwillingness of regular education teachers to accommodate students with disabilities.<sup>207</sup> According to a recent study,<sup>208</sup> most classroom teachers favor the current system of special education.<sup>209</sup> In fact, many teachers believe that full-time placement of students with disabilities in the regular classroom could "negatively effect the distribution" of instruc-

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201. See Larry B. Silver, *The Regular Education Initiative: A Déjà Vu Remembered with Sadness and Concern*, 24 J. LEARNING DISABILITIES 389 (1991); John F. Messinger, *Commentary on "A Rationale for the Merger of Regular and Special Education," or, Is It Now Time for the Lamb to Lie down with the Lion?*, 51 EXCEPTIONAL CHILDREN 510 (1985).

202. Silver, *supra* note 201, at 389.

203. *Id.* at 390.

204. See John W. Lloyd et al., *Redefining the Applied Research Agenda: Cooperative Learning, Prereferral, Teacher Consultation, and Peer-Mediated Interventions*, 21 J. LEARNING DISABILITIES 43 (1988).

205. See Kauffman et al., *supra* note 189, at 9; Melvyn I. Semmel et al., *Teacher Perceptions of the Regular Education Initiative*, 58 EXCEPTIONAL CHILDREN 9 (1991).

206. Silver, *supra* note 201, at 390.

207. See Laurence M. Lieberman, *Special Education and Regular Education: A Merger Made in Heaven?*, 51 EXCEPTIONAL CHILDREN 513, 514 (1985).

208. Semmel, *supra* note 205, at 9.

209. *Id.*

tion.<sup>210</sup> Whatever changes are made in the current system of special education, two things are clear: classroom teachers must be willing participants,<sup>211</sup> and they must be protected from unrealistic demands on their time and resources.<sup>212</sup>

## 2. Act 230 and REI

Like REI proposals, Act 230 presumes that the regular classroom is the best place for instructing children with disabilities.<sup>213</sup> The "comprehensive system of education services" mandated by the Act consists mainly of REI strategies such as team teaching, peer collaboration, and cooperative learning.<sup>214</sup> State officials claim that the Act will increase the ability of regular education to provide services to special needs students without the stigmatizing labels of IDEA.<sup>215</sup> However, serious questions remain regarding the provision of adequate teacher training under the Act, and the willingness and capacity of Vermont teachers to serve special needs students in the regular classroom.

### a. Teacher training under Act 230

To help accomplish the goal of educating all students in the regular classroom, Act 230 requires that one percent of the state's special education appropriation be used for teacher training.<sup>216</sup> For fiscal year 1991, this amounted to \$360,000, or sixty dollars per teacher.<sup>217</sup> The money will be made available through fiscal year 1995 in the form of grants for in-service training.<sup>218</sup> Under the Act, school districts and supervisory unions must submit grant applications to the Commissioner of Education.<sup>219</sup> Each application must contain a plan for the training of teachers and

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210. *Id.* at 19.

211. Lieberman, *supra* note 207, at 513.

212. Joseph R. Jenkins et al., *Special Education and the Regular Education Initiative: Basic Assumptions*, 56 *EXCEPTIONAL CHILDREN* 479, 485 (1990).

213. See VT. STAT. ANN. tit. 16, §§ 2901-2902 (Supp. 1991).

214. See Video, *supra* note 1.

215. Hull, *supra* note 7, at 2.

216. VT. STAT. ANN. tit. 16, § 2969(c) (Supp. 1991); see also V.S.E.R. 2195(1).

217. NEW DIRECTIONS, *supra* note 1, at 15.

218. V.S.E.R. 2195(1).

219. *Id.*

administrators in the "identification and evaluation of, and provision of education services to children who require classroom supports."<sup>220</sup> The plan also must explain "ways in which the training will result in lasting changes in their school system."<sup>221</sup> Districts that show the greatest need are given preference in the distribution of training funds.<sup>222</sup>

#### b. Concerns of Vermont teachers regarding Act 230 training

Vermont educators agree that training is essential to the success of Act 230.<sup>223</sup> There is concern, however, that teachers will not receive the training they need to accommodate children with disabilities in the classroom. For example, in testimony before the Vermont House Education Committee, education administrators questioned whether the one percent appropriation was adequate to meet training needs.<sup>224</sup> Even if more funds were available, some educators assert that it takes "more than a workshop" to learn how to meet the needs of children with disabilities effectively.<sup>225</sup>

Other Vermont educators doubt the capacity of regular education to address the needs of students with disabilities.<sup>226</sup>

220. VT. STAT. ANN. tit. 16, § 2969(c) (Supp. 1991). Concepts that should be covered in teacher training include effective teaching strategies, collaborative teaching and program planning, learning styles of children, diagnosis and management of classic learning problems, and child development. *NEW DIRECTIONS*, *supra* note 1, at 15.

221. VT. STAT. ANN. tit. 16, § 2969(c) (Supp. 1991).

222. *Id.* The following factors are considered in determining greatest need:

- (a) the percentage of students in special education;
- (b) the percentage of students receiving special education outside of the regular classroom environment;
- (c) the degree of the school restructuring activities being proposed;
- (d) the extent to which the proposed training will result in lasting change to the school system;
- (e) the unique training requirements based on staff turnover, staff shortages or the training needs of the staff; and
- (f) a high student to staff ratio.

V.S.E.R. 2195(3).

223. VERMONT NEA TASK FORCE ON INCLUSIVE EDUC., AN EDUCATOR'S GUIDE TO ACT 230 AND INCLUSIVE EDUCATION (1991).

224. Tape of Hearings on S. 377, held before the Vermont House Education Committee (April 5, 1990) (testimony of Brian O'Regan) (on file in the Vermont Law School Library).

225. Peggy Grodinsky, *Mainstreaming's Newest Push: Act 230 Getting Mixed Reviews*, VALLEY NEWS (West Lebanon, N.H.), Dec. 26, 1991 at 6 [hereinafter *Mixed Reviews*].

226. *Id.*

A recent publication on Act 230 by the Vermont National Education Association expresses concern that already overburdened teachers will have to assume additional responsibilities for which they are untrained.<sup>227</sup> Teachers also fear that students will suffer as the classroom teacher attempts in vain to balance the needs of regular and special students.<sup>228</sup> Of particular concern is the loss of individualized instruction and evaluation that IDEA provides special needs students through the IEP.<sup>229</sup> Like their national counterparts, Vermont teachers seem to favor the current system of special education.

c. A realistic appraisal of the teacher's ability to serve students with disabilities in the classroom

The concerns of Vermont educators regarding Act 230 make it clear that school districts must not use the Act to place unrealistic demands on classroom teachers. There is no doubt that the process of labeling children under IDEA is costly and time-consuming. The paperwork necessary to evaluate and classify one child for special education may take up to forty hours to complete.<sup>230</sup> This paperwork, however, opens the door of educational opportunity for many children who cannot maintain the pace of a regular classroom without the individualized evaluation and instruction special education provides.<sup>231</sup> Furthermore, special educators have received intensive undergraduate and graduate level training in the evaluation and instruction of children with disabilities such as dyslexia, serious emotional disturbances, and mental deficiencies. Classroom teachers cannot realistically be expected to acquire this expertise through an occasional workshop.

However, classroom teachers can increase their capacity to instruct "slow learners" and other children who are not truly disabled.<sup>232</sup> By reducing the number of such children enrolled in special education, Act 230 can free up scarce human and

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227. VERMONT NEA TASK FORCE ON INCLUSIVE EDUC., *supra* note 223, at 15.

228. *Id.*

229. Geggis, *supra* note 1.

230. Grodinsky, *supra* note 5, at 1; *see also* Geggis, *supra* note 1.

231. *Money and Time*, *supra* note 1, at 6.

232. *Mixed Reviews*, *supra* note 225, at 1.

financial resources to address the needs of students with disabilities. This will have a positive impact on the education of children with disabilities in Vermont. On the other hand, if Act 230 is viewed as an "all out effort" at cost containment, and the classroom teacher is subjected to unrealistic expectations, the quality of education for all children will suffer.

*B. Instructional Support Teams:  
A Way of Circumventing Federal Law?*

1. What Is an Instructional Support Team?

The Instructional Support Team ("IST") is based on an educational strategy known as pre-referral intervention.<sup>233</sup> Pre-referral intervention entails "a teacher's modification of instruction or classroom management to better accommodate a

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233. See Lloyd, *supra* note 204, at 44. The legal division of the Vermont Department of Education maintains that the IST is not a *pre-referral* device. See *infra* notes 278-81 and accompanying text. Instead, the Department emphasizes that the IST operates within the regular education system, and is not a substitute for the special education process.

However, legislative documents and documents from the Vermont Department of Education are filled with references to the IST as a pre-referral process. For example, the text of the Act itself, as passed by the Vermont Legislature, explicitly refers to the IST as a "pre-referral system." See 1990 Vt. Laws 230. The Report of the Special Commission on Special Education, upon which Act 230 was based, states that "all schools should be required to establish pre-referral systems to screen referrals for special education." NEW DIRECTIONS, *supra* note 1, at 20. Also, documents from the Department of Education refer to the IST as "pre-referral." See, e.g., SPECIAL EDUCATION NEWS, *supra* note 151. A recent article distributed to school districts, along with a Department of Education video on instructional support teams, speaks of providing "an efficient pre-referral screening for special education services." James C. Chalfant & Margaret Van Dusen Pysh, *Teacher Assistance Teams: A Model for Within-Building Problem Solving* (Vermont Dep't of Educ.) (on file in the Vermont Law School Library).

These references to the IST as "pre-referral" come as no surprise. "Pre-referral intervention" appears to be the established educational term for the use of IST-type strategies. "Pre-referral Intervention is a service delivery approach currently supported by a majority of state education agencies. It can be broadly defined as a systematic effort to assist classroom teachers in the education of students experiencing difficulty in school." J. Ron Nelson et al., *A Statewide Survey of Special Education Administrators Regarding Mandated Prereferral Interventions*, 13 REMEDIAL & SPEC. EDUC. 34 (1992) (citation omitted); see also U.S. DEPT OF EDUC., TO ASSURE THE FREE APPROPRIATE PUBLIC EDUCATION OF ALL CHILDREN WITH DISABILITIES (1991). "Pre-referral activities typically include school-based, problem-solving consultation teams which provide assistance and recommendations to the regular education teacher regarding strategies aimed at maintaining 'difficult to teach' children in the regular classroom." *Id.* at 3.

difficult-to-teach . . . pupil without disabilities."<sup>234</sup> If the modifications are successful, the teacher will have no need to make a special education referral. The goal of pre-referral intervention is to contain special education enrollments by curtailing the number of "invalid special education placements."<sup>235</sup>

Pre-referral intervention is implemented through pre-referral teams (e.g., Teacher Assistance Teams, Instructional Support Teams).<sup>236</sup> These teams consist of teachers, special educators, and various providers of support services.<sup>237</sup> Teachers refer "problem" students to the team, which then suggests ways for the teacher to accommodate the child in the regular classroom.<sup>238</sup> Various school systems across the country now have pre-referral teams in place. Most report that these teams have dramatically reduced the number of special education referrals.<sup>239</sup> Indeed, pre-referral intervention has been so successful in reducing the number of special education referrals that "[a] majority of state education agencies recommend or mandate that school districts employ prereferral interventions."<sup>240</sup>

Despite the success of pre-referral intervention, there is a great potential for conflict with federal law in the statewide use of ISTs. Specifically, the use of ISTs may deprive parents of their procedural rights under federal law, as well as deprive children with disabilities of their right to a specialized education.

## 2. Parental Rights

Federal law provides extensive and detailed procedural rights for parents of children with disabilities.<sup>241</sup> Of particular importance are procedures that ensure parental notice and participation

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234. Douglas Fuchs et al., *Mainstream Assistance Teams: A Scientific Basis for the Art of Consultation*, 57 *EXCEPTIONAL CHILDREN* 128, 128 (1990).

235. *Id.*

236. Lloyd, *supra* note 204, at 45.

237. *See supra* text accompanying notes 160-70.

238. *Id.*

239. Lloyd, *supra* note 204, at 45; *see also Budget Provides Significant Increases in Education Funding*, PR Newswire, Feb. 23, 1991, available in LEXIS, Nexis library, Omni file.

240. Nelson, *supra* note 233, at 36 (citation omitted).

241. *See supra* notes 54-107 and accompanying text.

in the child's evaluation and the subsequent formulation of an educational plan.<sup>242</sup> The activities of the IST mandated by Act 230 appear to include evaluating a child and formulating an educational plan. For example, the IST examines a child's behavior and educational progress, and devises a plan to accommodate the child in the regular classroom.<sup>243</sup> If the child cannot be accommodated in the regular classroom, the IST will recommend a referral to special education.<sup>244</sup> Act 230, however, provides no procedural rights for parents of children referred to an IST. Although the Act states that the Instructional Support System shall be designed and implemented in consultation with parents,<sup>245</sup> parental consultation is not required.<sup>246</sup> Instead, school districts are "encouraged" to inform parents when a "significant change" is made in their child's educational program as a result of an IST recommendation.<sup>247</sup>

Recognizing that the use of pre-referral teams can easily result in important decisions concerning a child's education without parental participation, the Office of Civil Rights ("OCR") has placed restrictive limits on pre-referral procedures. In a 1986 case, *Forest Park School District*, the OCR considered the validity under section 504 of an informal screening process that teachers relied upon for help in dealing with problem students.<sup>248</sup> The process consisted mainly of teacher consultation, but could also include testing, interviewing, or observing a particular student.<sup>249</sup> The process, which was used to determine whether a child should be referred for special education, did not require parental notice or consent.<sup>250</sup> The OCR ruled that "informal consultation" between special educators and classroom teachers regarding students who are "experiencing difficulties" is permissi-

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242. *Id.*

243. V.S.E.R. 2194(7).

244. *Id.*

245. VT. STAT. ANN. tit. 16, § 2901(a) (Supp. 1991).

246. *Id.* § 2901(a) (Supp. 1991). School districts are required only to provide all parents with "information regarding the existence, purpose and function of the instructional support system including the instructional support team." V.S.E.R. 2194(6).

247. V.S.E.R. 2194(9)(b).

248. *Forest Park Sch. Dist.*, 352 EDUC. FOR HANDICAPPED L. REP. 182, 183 (CRR Pub. Co.) (Feb. 28, 1986).

249. *Id.*

250. *Id.*

ble under section 504.<sup>251</sup> Any form of testing or interviewing with a particular student, however, constitutes an evaluation that requires parental notification and consent.<sup>252</sup> The OCR required the district to notify parents and obtain their consent prior to any evaluation undertaken as part of the screening process.<sup>253</sup>

In a 1989 case, the OCR dealt with a pre-referral process similar to Act 230's Instructional Support Team.<sup>254</sup> The San Diego City School District used "Site Consultation Teams" to deal with children who were having problems in school.<sup>255</sup> The team would discuss each student referred, and recommend either accommodations in the regular classroom, or a referral for special education.<sup>256</sup> Like Act 230, the district did not require parental involvement in this process, but merely "recommended" that teachers notify parents of team activities.<sup>257</sup> The OCR found that these teams made decisions directly affecting the evaluation and placement of students "who may be in need of special education."<sup>258</sup> The OCR held that San Diego's pre-referral process constituted an evaluation system, and that parents must be provided with "full procedural safeguards" throughout the process.<sup>259</sup>

As in the *Forest Park* and *San Diego* cases, one of the functions of the IST under Act 230 is to decide whether a child should be referred for a full special education evaluation.<sup>260</sup> Thus, the IST makes decisions that directly affect the evaluation and placement of students who may need special education. Therefore, under OCR decisions, the IST activities appear to be

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251. *Id.*

252. *Id.*

253. *Id.* at 184.

254. San Diego City Sch. Dist., 353 EDUC. FOR HANDICAPPED L. REP. 236 (CRR Pub. Co.) (May 17, 1989).

255. *Id.* at 238.

256. *Id.*

257. *Id.*

258. *Id.* at 240.

259. *Id.* at 241.

260. VT. STAT. ANN. tit. 16, § 2902(5) (Supp. 1991).

subject to procedural safeguards under section 504.<sup>261</sup> To avoid conflict with section 504, Act 230 should be amended to require parental notice of IST meetings.<sup>262</sup> Parents should be notified of IST meeting results, especially a decision not to refer a child for a special education evaluation. Additionally, parental consent should be obtained prior to any testing or interviewing with a child. Writing these requirements into the law will ensure that the IST, while it decreases special education enrollments, will not deprive parents of their hard-earned right to participate fully in important decisions concerning the education of their children.

### 3. The Right of Children with Disabilities to a Specialized Education: The IST as a Delaying Tactic

#### a. Conflict with federal law

Many educators support the use of Instructional Support Teams to decrease the number of children with mild learning disabilities referred for special education.<sup>263</sup> There is concern, however, that improper use of the IST could delay the provision of special education services to children with disabilities.<sup>264</sup> If school districts use the IST as a delaying tactic for special education rather than a support system within regular education, conflict with federal law is inevitable.

In recent years, for example, parents have filed complaints under section 504 alleging that use of pre-referral teams resulted in a failure to identify and evaluate their children for special

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261. Again, Department of Education legal counsel maintains that there should be no conflict with section 504, because the IST is not a "pre-referral" process. Interview with Elizabeth Grant, Legal Counsel, Vermont Dep't of Educ., in Montpelier, Vt. (Oct. 4, 1991); interview with Paul Fassler, Legal Counsel, Vermont Dep't of Educ., in Montpelier, Vt. (Aug. 13, 1992). Given the similarities between Act 230's IST and the *Forest Park* and *San Diego* procedures, a mere change of terminology will not be enough to avoid conflict with section 504.

262. See *supra* note 246.

263. See generally Joseph E. Zins & Janet L. Graden, *Prereferral Intervention to Improve Special Services Delivery*, 4 SPECIAL SERVICES IN THE SCHOOLS 109, 110 (1988).

264. *Id.*

education services.<sup>265</sup> In *San Diego City School District*, parents claimed that the school system failed to provide special education to their children with learning disabilities.<sup>266</sup> The school used pre-referral teams to screen children having problems in the classroom.<sup>267</sup> The OCR required the school to separate strictly the pre-referral process from the special education process, and to notify parents of all pre-referral activities.<sup>268</sup>

In a 1990 case, the OCR examined the Dallas School District's pre-referral process for dyslexic students.<sup>269</sup> The district had a four-tier procedure for screening and treating dyslexic students.<sup>270</sup> In the first three tiers, the dyslexia was addressed through interventions in the regular classroom.<sup>271</sup> It was not until the fourth tier that students were referred for special education. At this point regular classroom interventions had already failed to meet the students' needs.<sup>272</sup> Two parents complained that this process resulted in a failure to evaluate and place their daughter, who had dyslexia, in a special education program.<sup>273</sup> To avoid delay in the provision of special education services to needy students, the OCR required the district to evaluate individually "all students suspected of dyslexia which substantially limits the learning process."<sup>274</sup>

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265. *San Diego City Sch. Dist.*, 353 EDUC. FOR HANDICAPPED L. REP. 236, 239 (CRR Pub. Co.) (May 17, 1989); *Dallas Indep. Sch. Dist.*, 16 EDUC. FOR HANDICAPPED L. REP. 902 (CRR Pub. Co.) (Mar. 13, 1990).

In a recent case, the OCR found that use of a pre-referral team (a "student support team") was partly responsible for lengthy delays in referrals for special education. *Cobb Cty. Sch. Dist.*, 19 INDIV. WITH DISABILITIES EDUC. L. REP. 29 (Apr. 29, 1992) (formerly EDUC. FOR HANDICAPPED L. REP.). The OCR held that:

The lengthy SST process, which includes implementation of informal and formal intervention strategies, and the bifurcated evaluation process which includes a preliminary psychological evaluation prior to a referral for a full evaluation resulted in the District taking an unreasonable period of time to determine whether the Students were eligible for special educational services.

*Id.* at 31.

266. *San Diego Sch. Dist.*, 353 EDUC. FOR HANDICAPPED L. REP. at 239.

267. *Id.* at 238.

268. *Id.* at 240-41.

269. *Dallas Indep. Sch. Dist.*, 16 EDUC. FOR HANDICAPPED L. REP. at 902-04.

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.* at 904.

Although there are no cases under IDEA dealing with pre-referral intervention, the statute requires school districts to evaluate, identify, and place children with disabilities in a timely manner.<sup>275</sup> Courts have held that failure to identify and evaluate a child later found to be disabled and in need of special education constitutes a denial of a child's right to a free appropriate education under IDEA.<sup>276</sup> Because Act 230 requires teachers to go through the IST before making a special education referral, the IST can easily impede the special education process. This is especially true where a child with a disability is served through regular classroom interventions that do not adequately address her needs, rather than through prompt referral for special education.<sup>277</sup>

b. How the Vermont Department of Education  
has addressed the potential for the IST  
to be used as a delaying tactic

The Vermont Department of Education strongly opposes the use of the IST as a delaying tactic or impediment to the special education process.<sup>278</sup> Indeed, the Department emphasizes that the IST is not a "pre-referral" device; rather, the IST operates within regular education to address the needs of students who are having difficulties in the classroom.<sup>279</sup> Department officials are working with teachers statewide to make certain that the IST is not used as a delaying tactic. For example, teachers are told to ask a series of "red flag" questions to determine if the child should be referred for a special education evaluation.<sup>280</sup> Also, special education regulations state that the IST is not a substitute for the

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275. See *supra* text accompanying notes 71-76.

276. See, e.g., *Jose P. v. Ambach*, 669 F.2d 865 (2d Cir. 1982); *Lloyd v. District of Columbia*, No. 91-0437, 1991 U.S. Dist. LEXIS 6026 (D.D.C. 1991) (agreeing with state hearing officer's decision that failure to evaluate and place a child with disabilities in a timely manner constituted a denial of special education under IDEA).

277. Interview with Lou Helmuth and Greg Van Buiten, Partners, Van Buiten & Helmuth, P.C., in Burlington, Vt. (Nov. 14, 1991).

278. Interview with Elizabeth Grant, Legal Counsel, Vermont Dep't of Educ., in Montpelier, Vt. (Oct. 4, 1991); interview with Paul Fassler, Legal Counsel, Vermont Dep't of Educ., in Montpelier, Vt. (Aug. 13, 1992).

279. *Id.*

280. *Id.*

special education process, and shall not interfere with a student's right to a timely referral for a special education evaluation.<sup>281</sup>

Although the Department's heart is in the right place, further steps are necessary to preserve a child's right to a timely special education evaluation. Simply maintaining that the IST is not a "pre-referral" team is not enough. After all, "pre-referral intervention" is the established educational term for such teams, whether they are called Instructional Support Teams or Teacher Assistance Teams. A stronger solution is required to ensure that the IST is not used as a delaying tactic.

### c. Pennsylvania's solution

Like Vermont, Pennsylvania mandates the statewide use of Instructional Support Teams. The Pennsylvania State Board of Education was especially concerned with the IST's potential to conflict with federal law by operating as a delaying tactic.<sup>282</sup> To prevent delay in providing specialized instruction to children with disabilities, Pennsylvania places a time limit on IST recommendations. Under the Pennsylvania Administrative Code, if IST activities "have produced little or no improvement within 60 school days after their initiation," the student shall be formally referred for a special education evaluation.<sup>283</sup> Also, parents have the right to bypass the IST and have the child directly referred for a special education evaluation.<sup>284</sup>

Thus far, there has been neither litigation nor administrative complaints in Pennsylvania claiming that the IST resulted in a delay in evaluation.<sup>285</sup> Statistics from the Pennsylvania Department of Education indicate that Pennsylvania has managed to

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281. V.S.E.R. 2194(7).

282. COMMONWEALTH OF PA., STATE BD. OF EDUC., REPORT ON SPECIAL EDUCATION 1, 3 (1990).

283. 22 PA. CODE § 14.24(g)(4) (1992). The Pennsylvania Administrative Code also provides that if IST activities have "produced little or no improvement within 30 school days after their initiation, the IST shall inform the student's principal, who shall refer the student for additional evaluation. Additional evaluation may include formal referral for multidisciplinary evaluation for special education services . . ." *Id.* § 14.42(g)(3).

284. *Id.* § 14.24(g)(5) (1992).

285. Letter from James A. Tucker, Ph.D., Director, Bureau of Special Education, Pennsylvania Dep't of Educ., to Gregory M. Eaton (Aug. 31, 1992) (on file in the Vermont Law School Library).

reduce its special education enrollments dramatically, while protecting the right of children with disabilities to a timely evaluation.<sup>286</sup>

Vermont should follow Pennsylvania's lead. Although Act 230's regulations provide that the IST shall not interfere with a student's right to a timely referral, there is no absolute time limit on IST interventions. Additionally, parents do not have the right to bypass the IST process. Incorporating these provisions into the law will make it difficult for the IST to be used as a delaying tactic. In general, Vermont educators should view the IST as a better way to accommodate children with mild learning difficulties in the regular classroom. Children who are having difficulty in school due to suspected disabilities should be referred promptly for special education.

#### CONCLUSION

Although it is not perfect, the current system of special education under IDEA provides children with disabilities with the equal educational opportunity mandated by the Supreme Court in *Brown*. The Instructional Support Team required by Act 230 may deprive children with disabilities of this opportunity by delaying the provision of special education services. To prevent such delay, this note proposes two amendments to Act 230. First, a sixty school-day time limit should be placed on IST activities. If a child has failed to make progress after sixty days, the child should be referred for a special education evaluation. Second, parents should have the right to bypass the IST and have their child referred for a special education evaluation directly. These amendments will serve Act 230's goal of preventing unnecessary special education referrals, and also will protect the rights of children with disabilities and their parents.

One of the primary goals of Act 230 is to broaden the classroom teacher's ability to teach students with diverse learning styles and needs. Act 230 can reduce the number of children

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286. *Id.* Pennsylvania Director of Special Education, Dr. James Tucker, reports that "the overall decrease in special education enrollment has been dramatic. In the 186 schools where the IST was first established, special education enrollment dropped by 45% in the first year." *Id.*

classified as needing special education by increasing the capacity of Vermont teachers to serve "slow learners" and other difficult-to-teach students in the regular classroom. This will allow the use of special education resources to serve children with real disabilities. The quality of education for all children will suffer if Act 230 is over-applied and the IST is used to delay the provision of services to children with disabilities. School administrators must approach Act 230 with restraint. There is, after all, the potential for the Act to turn back the clock to the time when the regular education system overlooked the needs of children with disabilities.

*Gregory M. Eaton*