EDUCATION FOR THE HANDICAPPED: A SENATOR'S PERSPECTIVE

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Every American child has a right to an equal educational opportunity.

This doctrine has been set forth by numerous state constitutions,[1] Supreme Court decisions[2] and federal civil rights laws.[3] While the doctrine is disputed by some, it is a generally accepted principle upon which the Congress has based several important education laws in the last decade.

The enactment of the Education for All Handicapped Children Act of 1975[4] is founded on this American principle guaranteed by our Constitution.[5] In essence, this Act seeks to guarantee a handicapped child the right to a free, appropriate, public education in the least restrictive educational environment.

There are undoubtedly numerous ways of characterizing what the Education for All Handicapped Children Act of 1975 is really all about. I am reminded of a line from Ralph Ellison's *Invisible Man:*

> I am invisible . . . I am a man of substance, of flesh and bone, fiber, and liquids—and I might even be said to possess a mind. I am invisible, understand, simply because people refuse to see me.[6]

This invisibility has, until quite recently, been the condition of handicapped Americans in relation to their fellow citizens, and it

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1. *See* COUNCIL FOR EXCEPTIONAL CHILDREN, DIGEST OF STATE AND FEDERAL LAWS: EDUCATION OF HANDICAPPED CHILDREN (1971), [hereinafter cited as DIGEST OF LAWS].

2. *See, e.g.*, Brown v. Board of Education, 347 U.S. 483 (1954). The United States Supreme Court affirmed the rights of all children to an equal education. *See* text accompanying notes 12 & 13 *infra*.

3. For a discussion of the right to education principle as established within federal and state litigation and legislation, see Zettel & Abeson, *The Right to a Free Appropriate Public Education*, in THE COURTS AND EDUCATION 193-99 (C. Hooker ed. 1978).

4. 20 U.S.C. §§ 1401-1461 (1970 & Supp. V 1975).

5. U.S. CONST. amend. XIV, § 1.

6. R. ELLISON, INVISIBLE MAN 3 (1952).

has been an invisibility of two varieties: the gross invisibility of literally being hidden away from the rest of us, and, secondly, the more subtle and perhaps more destructive invisibility of being in fact "seen," but "seen" by an inner eye that perceives a label rather than a unique person. An eye which does not see Johnny or Susie, but instead, sees "crippled," or "retarded," or "maladjusted." And doubt it not, this two-tiered invisibility has been bred in the schoolhouses of America as much as in any other of the Nation's institutions.

It seems to me that, as much as any other action of the Congress in the two hundred years of the Republic, the Education for All Handicapped Children Act represents a gallant and determined effort to terminate the two-tiered invisibility once and for all with respect to exceptional children in the Nation's school systems. It is not a perfect attempt, because there is no such thing as a perfect, nationwide law that will fit both the demands and the conditions of the Bronx and the Bayou, the townships of the North Country of New England and at the same time the large Chicano and Black communities of Los Angeles.

Let us step backward for a moment and take a look at the origins of this Act, an Act which may be said to embody the major features of the overall federal commitment to our handicapped children in both basic areas of *educational rights and fiscal partnership.*[7]

It is important to bear in mind that the Education for All Handicapped Children Act was not born out of a vacuum. In point of fact, the law is largely an affirmation of, and is actually modeled upon, all of the following:

—mandatory full service statutes in practically all the states[8]
—numerous court decrees[9]
—prior federal law dating back to 1967[10]

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7. *See* SENATE COMM. ON LABOR & PUBLIC WELFARE, EDUCATION FOR ALL HANDICAPPED CHILDREN ACT OF 1975, S. REP. No. 94-168, 94th Cong., 1st Sess., *reprinted in* [1975] U.S. CODE CONG. & AD. NEWS 1425 [hereinafter cited as SENATE REPORT].

8. *See* DIGEST OF LAWS, *supra* note 1.

9. *See* THE COURTS AND EDUCATION, note 3 *supra.*

10. The Elementary and Secondary Education Amendments of 1966, Pub. L. No. 89-750, 80 Stat. 1191 (1966) amended the Elementary and Secondary Education Act of 1965, Pub.

> —and, of special importance, the best and most progressive professional practice of all who are involved in the instructional development of exceptional children.[11]

The legal foundation underpinning the development of a federal law guaranteeing the right to an education for handicapped children lies in the United States Supreme Court decision of *Brown v. Board of Education.*[12] The Court used this language:

> In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[13]

It is true that the arguments of the *Brown* case challenged the practice of public school segregation on the basis of race and no other factor was directly at issue. But the principle of the *Brown* decision was extended by the successful arguments urged on behalf of handicapped children in two famous federal cases: *Pennsylvania Association for Retarded Children v. Pennsylvania*[14] *(PARC)* and *Mills v. Board of Education.*[15]

PARC was the first court decision which discussed the right to education for retarded children and held that the state was responsible for providing every child with suitable public education. This case was actually settled by a court approved consent decree. The decree established a firm basis for arguing that all children are educable to some degree. The court in *PARC* explicitly noted that

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L. No. 89-10, 79 Stat. 27 (1965) by adding a new title VI, effective June 30, 1966. Title VI was replaced by the Education of the Handicapped Act, Pub. L. No. 91-230, 84 Stat. 175 (1970) (codified at 20 U.S.C. § 1401). The Education of the Handicapped Act also superceded title III of the Mental Retardation Facilities Construction Act, Pub. L. No. 88-164, 77 Stat. 282 (1963), the Grants for Teaching in the Education of Handicapped Children, Pub. L. No. 85-926, 72 Stat. 1777 (1958), and the Instructional Media for Handicapped Children Act, Pub. L. No. 85-905, 72 Stat. 1742 (1958). The Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235 (1972), the Education Amendments of 1974, Pub. L. No. 93-380, 88 Stat. 484 (1974), and the Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (1975) also amended the Education of the Handicapped Act. *See* 20 U.S.C. §§ 1401-1461 (1970 & Supp. V 1975).

11. *See* SENATE REPORT, *supra* note 7.

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

13. *Id.* at 493.

14. 343 F. Supp. 279 (E.D. Pa. 1972).

15. 348 F. Supp. 866 (D.D.C. 1972).

"a mentally retarded person can benefit at any point in his life and development from a program of education."[16]

This case also established—through the consent agreement—a right of a due process hearing before any child could be denied admission to public school or, thereafter, having his or her status changed. These are basic principles figuring in almost every right-to-education decision since and now have been woven into the federal statute.[17]

The *Mills* decision was based on the Constitution's due process and equal protection clauses.[18] In *Mills,* the Court ordered that:

> The District of Columbia . . . provide to each child of school age a free and suitable publicly supported education regardless of the degree of the child's mental, physical or emotional disability or impairment.[19]

The plaintiffs in *Mills* included children who had been classified as brain-damaged, hyperactive, epileptic and mentally retarded. The language of that decision, however, reaches broadly beyond those particular afflictions and extends its protection to all handicapped children.

Those of us who drafted the Education for All Handicapped Children Act were influenced and instructed by these decisions, because in some ways, the handicapped individual represented a class of citizens similar to other aggrieved classes for whom civil rights laws have been expressly enacted.[20] In many other important ways, the handicapped individual is very different from other classes of aggrieved citizens. This difference has made the law-drafting task more difficult and raised the opportunity for error or omission.

Unlike the other categories of minority groups, membership is not necessarily fixed at birth. Any one of us may become handicapped through accident or illness. Old age is likely to bring us all within the class if we live long enough. However, some who are

16. 343 F. Supp. at 296.
17. 20 U.S.C. § 1415 (Supp. V 1975).
18. 348 F. Supp. at 875.
19. *Id.* at 878.
20. *See, e.g.,* 42 U.S.C. §§ 1971-2000h-6 (1970).

handicapped leave the classification through rehabilitation. So we are dealing with a rather amorphous group of individuals when we seek to legislate for our handicapped citizens. In a true sense we are legislating for all of us.

This federal statute is best characterized as one which provides a minimum floor of collective responsibility for the Nation as a whole. It tackles the delicate mission of prodding, through legislation, those regions which are not correctly serving their handicapped population while at the same time not penalizing those who are doing a good job.

The Act is 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.

We in Congress did not attempt to define "appropriate" in the law but instead, we established a base-line mechanism, a written document called the Individualized Education Program (IEP).[21]

The Act requires that, to qualify for funding, the local education agency must, among other things:

> provide assurances that [it] will establish, or revise, whichever is appropriate, an individualized education program for each handicapped child at the beginning of each school year and will then review and, if appropriate revise, its provisions periodically, but not less than annually. . . .[22]

A right of consultation and due process appeal is provided to the parent, or guardian of the child who is not satisfied by the dispositions made for the child by the school authorities.[23]

The law provides that parents have: the right to a public hearing before an objective presiding officer; the right to counsel and expert witnesses to testify; the right of cross-examination of witnesses; and the right to appeal to state and federal courts.[24] Here

21. *See* Weintraub, *Understanding the Individualized Education Program "IEP"*, AMICUS, July 1977, at 26-31.

22. 20 U.S.C. § 1414(a)(5) (Supp. V 1975).

23. *Id.* § 1415.

24. *Id.*

again the law codified rights already spelled out in earlier court decisions.[25] These safeguards are further spelled out in department regulations.[26]

The law also provides for an "appropriate"[27] education to take place in the least restrictive environment. Some call this "mainstreaming"[28] but that is not, in my view, a good expression because it implies that all handicapped children must be educated in the regular classroom. That is not at all what we in the Congress sought or intended. Rather, we had a view to integration with non-handicapped children as the governing principle, especially where there is clear evidence that just the opposite was what was occurring in the past. We recognized, however, that there are many instances when it would be harmful to a handicapped child to force him or her into a regular classroom situation.[29] This is a decision which should be reached during the construction of the individualized education plan.[30]

The law is thus very mission-oriented and presents us with the challenge of marshalling the total public resources (federal, state and local), not simply the funds provided under the Act, to achieve that mission.

This new law certainly has its fair share of detractors, which is not alarming, because any Act which seeks to remedy behaviors and policies impacting negatively on vulnerable children certainly is going to include requirements which may be unpleasant to some. While I do not intend to use this article to defend every verb and noun in the Act, I do want to raise some of the more controversial sections of the bill and discuss why we included them.

Some critics had problems with "the sole state agency provi-

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25. *See, e.g.*, Mills v. Board of Education, 348 F. Supp. 866 (D.D.C. 1972).

26. *See* Education of Handicapped Children—Implementation of Part B of the Education of the Handicapped Act, 42 Fed. Reg. 42,494-500 (1977) (to be codified in 45 C.F.R. §§ 121a.500-.593).

27. 20 U.S.C. §§ 1412-1414 (Supp. V 1975).

28. For a discussion of the differences between the concepts of least restrictive environment and mainstreaming, see Abeson, *The Educational Least Restrictive Alternative*, AMICUS, June 1977, at 23-26.

29. *See* H.R. REP. No. 94-332, 94th Cong., 1st Sess. 9 (1975).

30. *See* 20 U.S.C. § 1401(19) (Supp. V 1975).

sion"[31] of the Act, which deals with the administrative responsibility of the state education agency in assuring that each handicapped child needing special education receives that service in accordance with all of the requirements of the Act. The specific aspect of this requirement that is questioned pertains to the assignment to the state education agency of general supervision for the special education programs for handicapped children that are provided by state or local agencies other than the education agencies. This section also requires that the special education of handicapped children in *other than* education agencies shall meet the education standards of the state education agency.[32]

By putting this requirement in the Act, the Congress attempted to deal with a major problem concerning the education of handicapped children who for a variety of reasons, receive their education through other than education agencies, such as state departments of mental retardation, welfare, health, mental hygiene and others. All too frequently, the educational services received by these children were nonexistent or of limited quantity or quality, particularly when contrasted with their peers enrolled in public school programs administered by state and local education agencies.

The sheer force of logic and responsible management techniques dictated that state education agencies should have this authority. First, the funds provided by the Education for All Handicapped Children Act flow to and through the state education agencies.[33] It seemed to the Congress that, if efficiency and administrative control were to be maintained, it was imperative to grant the regulatory authority to the agency through which the funds flow.

Second, a given state might not have, for instance, a Department of Mental Retardation. But every state has a state education agency. Thus, we achieved through the law a state-by-state uniformity of accountability rather than the inefficient alternative of trying to keep track of the program when different agencies in different states would be responsible in different ways.

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31. *Id.* § 1412(6).
32. *See* SENATE REPORT, *supra* note 7, at 15, 16, 24-32.
33. 20 U.S.C. § 1412(6) (Supp. V 1975).

Third, maintenance of responsibility with the state educational agency, which is likely to house professional educational expertise which other agencies are not likely to have, greatly reduces the likelihood of nonexistent or totally inadequate instructional programs in other delivering agencies.

In reviewing the procedural safeguards built into the law,[34] some critics have questioned the requirement for the opportunity of state-level appeals following the impartial hearings. The necessity for such an appeals procedure reflects our concern for insuring that the states have the primary responsibility for education of handicapped children. With the imposition of responsibility, the state must have the capacity to enforce its own requirements. The direction to act had to be accompanied with the power to act.

Furthermore, the provision of state-level appeal again reflected the direction being taken in the majority of those states which now are well along in the development of their own procedural safeguard mechanisms.[35] Undoubtedly, a governing consideration has been the enhancement of impartiality of treatment made possible by the factor of distance from the local school districts. A balance between the individual education plan (the most intensely local application) and the control from afar by an impartial authority promised the greatest chance of fairness.

Lastly, we in Congress observed that, in general, where state administrative appeal procedures are in operation, they afford a timely, fair system for resolving conflicts. In this way, the number of cases going into court has been reduced. As a result of this reduction many parents have been spared the heavy financial burden of going to court.

Some critics have expressed dismay for what they characterize as the Act's onerous requirement of a new accounting system.[36] It is well known that school districts historically have been required to submit various types of data to their state governments. These requirements have placed a responsibility on local schools to keep records on children under a system by which they can be held ac-

34. *Id.* § 1415.
35. *See* DIGEST OF LAWS, *supra* note 1.
36. 42 Fed. Reg. at 42,503-04.

countable. The Education for All Handicapped Children Act does not require *more* information, only *better* information regarding ongoing educational decisionmaking. We do not want and did not mandate another layer of management for states and localities. What we did was simply to require more specific, accountable information.

Another objection raised in some quarters takes the form of a proposition that the services to be provided as a result of the agreement made jointly by the parents and the school system through the mechanism of the individualized education program do not have to be provided.[37]

To let that proposition stand would render useless the central part of this Act as we wrote it and intended it to be carried out. The reason that we in the Senate consider this provision so important is that to determine that a child is handicapped and to place him in a specialized program is a very serious matter. That decision is one of the most important, if not the most important, decision that will ever be made in that person's life.

That is why the courts,[38] state legislatures[39] and the Congress[40] have required that placements be appropriate to the child's needs and that procedural safeguards be available. The IEP is required as a mechanism to reach and document agreement on what is appropriate. To accept what some are suggesting—that there is no real requirement to provide what has been agreed to—would make a mockery of the law and fling many children back into the jeopardy of being by-passed educationally, something the Act is particularly and precisely designed to prevent.

If there were any doubt as to the intent of the Education for All Handicapped Children Act or the regulations issued under it, they should be dispelled by section 504 of the Rehabilitation Act of

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37. *See* Boston, *Education Policy and the Education for All Handicapped Children Act (P.L. 94-142)*, in INSTITUTE FOR EDUCATIONAL LEADERSHIP (1977).

38. *See, e.g.*, Mills v. Board of Education, 348 F. Supp. 866 (D.D.C. 1972); Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279 (E.D. Pa. 1972).

39. *See* DIGEST OF LAWS, *supra* note 1.

40. 20 U.S.C. § 1415 (Supp. V 1975).

1973,[41] and by the issuance of the regulations on May 4, 1977.[42] Section 504 states:

> No otherwise qualified handicapped individual in the United States, as defined in Section 7(6), shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[43]

This very broad language applies to all handicapped children, but it has established a deep foundation for civil rights of handicapped individuals which is much broader in scope than the Education for All Handicapped Children Act itself.

The teeth of section 504 are provided by its extensive regulations. Let us examine briefly how they interact with and buttress the rights written into the law by the Education for All Handicapped Children Act.

The subject of education is dealt with in subparts D and E of the regulations. Subpart D deals with Preschool, Elementary and Secondary Education. Subpart E deals with Postsecondary Education.

The comments under subpart D explicitly acknowledge that:

> Subpart B [*sic*] generally conforms to the standards established for the education of handicapped persons in *Mills v. Board of Education of the District of Columbia*, 348 F. Supp. 866 (D.D.C. 1972), *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania*, 334 F. Supp. 1257 (E.D. 1971), 343 F. Supp. 279 (E.D. Pa. 1972), and *Lebanks v. Spears*, 60, [*sic*] F.R.D. 135 (E.D. La. 1973), as well as in the Education of the Handicapped Act, as amended by Public Law 94-142 (the EHA).[44]

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41. Vocational Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 394 (codified at 29 U.S.C. § 794 (Supp. V 1975)) [hereinafter cited as Vocational Rehabilitation Act]. This section, along with the rest of the Act, became law on September 26, 1973, when Congress overrode President Nixon's second veto of this legislation.

42. *See* Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefitting from Federal Financial Assistance, 42 Fed. Reg. 22,676-702 (1977) (to be codified in 45 C.F.R. §§ 84.1-.4).

43. *See* Vocational Rehabilitiation Act, *supra* note 41. The ultimate sanction for failure to comply is the loss of federal financial assistance.

44. 42 Fed. Reg. at 22,690 (1977).

The basic requirements of the regulations are:

> (1) that handicapped persons, regardless of the nature or severity of their handicap, be provided a free, appropriate public education, (2) that handicapped students be educated with nonhandicapped students to the maximum extent appropriate to their needs, (3) that educational agencies undertake to identify and locate all unserved handicapped children, (4) that evaluation procedures be improved in order to avoid the inappropriate education that results from the misclassification of students, and (5) that procedural safeguards be established to enable parents and guardians to influence decisions regarding the evaluation and placement of their children.[45]

The regulation goes on to state that its objective is to ensure that no child is denied education in public school if schooling is appropriate and, moreover, that if his or her needs cannot be met satisfactorily in a regular educational setting that a suitable alternative be provided at no expense to the parents.

Thus, a recipient of federal funds, must either educate handicapped children in its regular program or provide such children with appropriate alternative education at public expense.

Public schools are required each year to identify and locate handicapped children who are not receiving an education and to make sure that the parents and families understand what the school's obligation is to them.[46]

Like the Education for All Handicapped Children Act, the section 504 regulations require that a free and appropriate education must be provided to qualified handicapped children no later than September 1, 1978.

The regulations require due process procedures to be available to parents and guardians with respect to the identification, evaluation and placement of a handicapped child who may need special services.[47] Such procedures must include notice,[48] a right to inspect

45. *Id.*
46. *Id.* at 22,682 (to be codified in 45 C.F.R. § 84.32).
47. *Id.* at 22,683 (to be codified in 45 C.F.R. § 84.36).
48. *Id.*

records,[49] an impartial hearing with representation by counsel[50] and a review procedure.[51]

Subpart E similarly sets forth detailed requirements that guarantee the right of qualified handicapped persons to be admitted to postsecondary institutions. Detailed requirements are set forth governing the treatment of students, their housing, academic adjustments, and prohibiting discrimination in financial assistance, sports and social activities.[52]

The two laws and their regulations reinforce and reciprocate each other. No educational jurisdiction which receives federal funds and wishes to continue to receive them can escape their provisions.

I strongly believe that these new laws will correct the traditional neglect suffered by handicapped individuals and thereby will strengthen our entire educational and social system.

In closing, may I submit the following: no federal law (this one included), no state law, no court decree, no executive order of a governor or a President in an area such as the one with which we are dealing—the educational well-being of vulnerable children—is an instant cure-all for the ills that would be alleviated. The Education for All Handicapped Children Act is one more weapon in the arsenal; its effectiveness will have a direct relation to the degree of its use.

It was former Supreme Court Justice Cardozo who offered a cold splash of reality which I like to keep in mind: the law never is; the law is always about to be.[53]

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49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.* at 22,683-84 (to be codified in 45 C.F.R. §§ 84.41-.47).
53. *See* B. CARDOZO, THE GROWTH OF LAW 19 (1924).