Educating the handicapped: reforming a radical law

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Few educators would dispute the fact that Public Law 94-142, the somewhat grandiosely-titled “Education for All Handicapped Children Act” (hereafter, the Act), was the single most important piece of federal education legislation enacted during the 1970’s. In one sense, it can be seen as a logical outgrowth of the civil rights legislation of an earlier period—the extension to handicapped children of “equal protection” in the form of equal access to the public schools of America. But in other ways, the Act went far beyond any prior legislation.

Essentially, the Act attempts to improve the education of handicapped children by creating two quite distinct “rights,” which can be usefully classified as substantive and procedural. The substantive right is the right to an “appropriate” education—a term not otherwise defined, except that the Act creates a presumption against the appropriateness of separate classes or facilities for handicapped children. The procedural right is, in fact, a bundle of rights which is intended to ensure that the decision-making process is fair, and involves continuous participation by the parents or others acting on behalf of the child. The bundle includes, among other things, the right to a formal due-process hearing, the right of appeal to state authority, and a further right of appeal to either state or federal
courts. Both types of rights are unique, in the sense that they have not been accorded by federal law to any other category of student.

The Act does not represent the first instance of federal involvement in the education of handicapped children. In fact, that involvement may properly be said to have begun in 1854 with the establishment of the Kendall School for the Deaf on federally owned land, which later became a part of Gallaudet College and is still a nationally known center for the education of the deaf. Beginning in 1958, the federal government provided grants for the training of teachers of the mentally retarded. A new act in 1963 included teachers of children with all kinds of handicaps, and provided funds for research into various handicapping conditions and for the establishment of demonstration schools and projects.

These and other pre-1970 efforts had certain common characteristics. They were voluntary, in that any state or school district was free not to apply for the funds, and when they chose to apply the conditions to be met were not onerous. Furthermore, the amount of money available was modest, judged either in terms of the needs of the children or the amounts already being spent by states and school districts which continued to be seen as having the chief responsibility for educating handicapped children; the role of the federal government was one of encouraging and assisting, rather than mandating and monitoring.

In contrast, the Act has not only greatly extended the duties of the states and local schools with regard to the education of handicapped children, but is probably the most prescriptive education statute ever passed by Congress. It purports to tell educators where to go and how to get there, and in the sort of detail that is generally found in regulations, not in statutes. The Act, unlike prior legislation, does not just give federal money to states and school districts on the condition that they use the federal dollars in specified ways; it makes the receipt of federal funds dependent on the willingness of states and school districts to use their own money in ways that are acceptable to Congress. For all of these reasons, the origins, passage, and likely consequences of the Act are of great interest.

The great transformation

The late 1960's witnessed dramatic changes in the way public schools treated exceptional children. The roots of these almost revolutionary changes grew out of a unique confluence of social forces. The original concern, of course, was for the rights of black Ameri-
cans; but that concern prepared the ground in at least three ways for a cognate concern for the handicapped. It helped to create an atmosphere in which "great expectations" flourished. It furnished an arsenal of legal weapons, derived chiefly from the due process and equal protection clauses of the Fourteenth Amendment. And it spawned a cadre of reformers—lawyers, social workers, and parents—who were prepared, and in fact anxious, to use these weapons on behalf of handicapped children.

When the Supreme Court said in *Brown v. the Board of Education*

Today education is perhaps the most important function of the state and local governments . . . [and] where states have undertaken to provide it, [it] is a right which must be available to all on equal terms. . . .1

it did more than end legal segregation in the public schools. It created a tool by which other groups who felt themselves discriminated against might seek redress through the courts. And so, in the 1960's, representatives of exceptional children began to see the equal protection clause as an instrument for the much needed reform of special education.

Public law centers gave the new movement focus and momentum. Several of the centers, especially the ones in Boston and Philadelphia, became deeply involved in litigation on behalf of the handicapped. Without their leadership, progress would have been far less rapid.

That legal activism was particularly necessary for retarded individuals has been demonstrated repeatedly. Studies have shown that Americans have greater apprehension about contact with the retarded than with members of any other group, even those from racial and religious minorities. This apprehension supported the segregation and even the exclusion of retarded children from public schools. It was certainly a major stumbling block to reforms in special education until the Kennedy years. The President's general compassion and specific willingness to discuss his own family's experience with retardation began to alter long-standing attitudes and focussed public attention on the plight of the retarded. Later, Vice-President Humphrey's appearances on national television with his retarded grandchild continued this process.

During these same years reports began to appear in the media of the neglect and abuse of mentally retarded children who were confined to state-run residential facilities. Concerned parents began to organize in an effort to remedy specific situations and improve the quality of treatment generally. One way of protecting against abuses
was to remove the children from such institutions altogether—an option that was feasible only if local schools could provide appropriate education and training. In addition, researchers began to discover that, when tested more carefully, many children in public school classes for the mildly retarded were, in fact, misclassified and belonged with their “normal” peers. This situation was especially grave since such misclassified children tended to be disproportionately from black and Hispanic backgrounds. Here, the proposed remedy was stricter controls over the testing and placement procedures used by school districts.

In addition to lawyers, educators and social workers furnished political muscle and theoretical support. Samuel Beer has described how government policy at all levels has been influenced by professional guilds whose members have more in common with each other than with laymen working at the same level of government. Nowhere is this more evident than in special education. Teachers, psychologists, social workers, and others, organized into the Council for Exceptional Children and other more specialized groups, have had a profound influence, especially in Washington.

Advances in the diagnosis and treatment of various handicapping conditions have made educators and politicians more optimistic about the chances for success and less willing to label even a severely retarded child as “uneducable.” Some problems—autism, for example—have not yielded much to the assaults of theory or practice. But behavior modification programs for the retarded, better understanding of the nature (if not the causes) of such disorders as dyslexia and aphasia, the use of captioned films for the deaf, and many other developments have made many hopeful, which in turn has stimulated legal and political activity.

While new knowledge in the field has added impetus to demands for change, the rapid growth of special education had the political appeal of creating new jobs for the very professionals working to promote change. Not only did it expand the role and relative influence of psychologists and researchers, but it came at a time when school enrollments were leveling off (even declining) and the supply of teachers was beginning to outrun the demand. The increasing need for special education suggested a way of taking up the slack by providing employment for some of the thousands of young women and men pouring out of the teacher-training institutions. In short, by 1970 a variety of forces had created a situation in which it was clear that major changes in the education of handicapped children were in the offing.
The Pennsylvania experience

The late 1960's and early 1970's witnessed a flurry of activity in the states on behalf of handicapped children. In some states—Massachusetts, California, Connecticut, and Illinois—this activity took the form of new and more far-reaching statutes. In others, such as Pennsylvania and the District of Columbia, the impetus for reform came from the courts. But few states were entirely untouched.

It is worthwhile to examine more closely the experiences of Pennsylvania and Massachusetts. Not that these states were typical—far from it. In Pennsylvania, court-sanctioned reform had its most far-reaching success; in Massachusetts, the legislature passed what is clearly the most comprehensive statute. But such an examination will allow us to see some of the forces at work, and to learn from the experiences of these two pioneering states some of the difficulties that lie in the way of a policy of nondiscrimination toward handicapped children.

Prior to 1971 Pennsylvania required all children between the ages of 8 and 17 to attend school, but made an exception for any child judged by a school psychologist to be “unable to profit from further school attendance” or deemed “uneducable or untrainable.” Such children were excused—or, more precisely, excluded—from the public schools. In 1971 the Pennsylvania Association for Retarded Children (PARC) filed suit against the Commonwealth, challenging the constitutionality of excluding severely retarded children. PARC argued that the assignment of retarded children to any program without prior notice and the opportunity of a hearing was a denial of due process and, further, that the exclusion of the severely retarded from public education altogether contravened the equal protection clause.

The three-judge federal district court did not have to rule on the merits of the case. After a single day of testimony, in which the plaintiffs presented evidence tending to show that no child is uneducable, the state caved in. The resulting Consent Agreement afforded all retarded children the right to a free public education and required the state to locate and identify all previously excluded children. In order to ensure proper classification and placement, local districts were required to undertake thorough medical and psychological evaluations of excluded children, as well as reevaluations of those already in special classes.

By far the most dramatic safeguard provided by the PARC case was the right to due process. Parents had to have written notice before any change in a child's placement, and the chance to object
to unfavorable school decisions in due-process hearings presided over by impartial hearing officers. In addition, three administrative mechanisms were put in place to ensure that the Agreement would be faithfully carried out. The court appointed two Masters to oversee state-wide policies. A Right-to-Education Office was established in the state Department of Education which, together with the Masters, was responsible for planning, implementing, and monitoring the changes required by the Agreement. And task forces were organized on the local level to provide a forum for those most directly affected.

The prompt and relatively amicable settlement in the PARC case owed much to a confluence of several factors. They included a newly elected Governor, Milton J. Shapp, who was, by philosophy and temperament, well-disposed toward the claims of the plaintiffs; an Attorney General, J. Shane Craemer, who accurately reflected the Governor's views; and a Department of Education which accepted in principle the justice of the plaintiffs' claims. Lost in the zeal to reach a morally and legally defensible solution were the practical administrative and financial concerns of the state budget secretary and the local districts.

The implementation of the PARC Agreement has received mixed reviews. Most observers gave the state good marks for its attempt to locate previously unserved children. Partly because of the success of this search, and partly because of the identification of many children with marginal disabilities, the total number of children served by special education programs rose from 169,875 in 1972-73 to 240,000 in 1979-80. Financing this increase in services did not, at least in the beginning, appear to cause serious problems. It is true that state and local expenditures for special education rose from $211 million in 1972-73 to $473 million in 1979-80; but about 30 percent of the increase came from state revenues, somewhat easing the additional burden on the local property tax. (In doing this the state was helped by Governor Shapp's decision to devote a substantial part of the state's share of general revenue sharing funds, which became available for the first time in Fiscal Year 1973, to special education.)

At least two studies have shown that the quality of programs has varied widely, ranging from excellent to poor. Several serious problems have arisen, however, which may shed some light on what can be expected under the Act. Some have been corrected by administrative or legislative action; others remain to this day.

One of the few academic studies of the implementation of PARC
looked at the results of 31 due-process hearings which were appealed to the state Department of Education during the period 1975-77. The study found much to criticize in the Department's resolution of those appeals, noting that they were characterized by doctrinal inconsistencies and serious delays. In the years since 1977 the Department has worked hard, and with some success, to develop a more coherent body of doctrine; but there is some evidence that it is simply not possible to develop legal rules relating to the disposition of these complex issues.

The implementation of the PARC Agreement has been marred by a running dispute between the state, supported by most local officials and some parents, and the Bureau for the Education of the Handicapped (now the Office for Special Education) in Washington, supported by other parents and several advocacy groups. The issue involves the propriety of separate facilities for handicapped children. In the decade preceding the Agreement several school districts and intermediate units in Pennsylvania had constructed separate buildings, often elaborately equipped, for the education of children with certain handicapping conditions. These were hailed at the time as a major step forward. Suddenly they were attacked. Advocacy groups, and some parents, took the position that separate facilities were suspect. In their view, the idea of “mainstreaming” created a presumption in favor of education in a regular school, and the burden was placed on the school to justify the placement of any child in a separate facility. The issue has never been fully resolved.

The PARC Agreement also has spawned a continuing series of lawsuits, most of them involving implementation (or the alleged lack of it) by the Philadelphia School District. Special education is not, however, unique in posing its most difficult problems for Philadelphia. The worst teacher strikes occur there; the principal Title I lawsuits originate there; and a desegregation suit involving Philadelphia is unresolved after a decade in the courts. It is hardly surprising, though perhaps dispiriting, that the implementation of PARC has been least adequate in a district teetering constantly on the edge of bankruptcy.

Finally, the costs associated with the PARC Agreement (and, since 1977, with P.L. 94-142) have posed increasingly serious problems. In part this may stem from the fact that Pennsylvania finances the cost of special education by means of a formula based on “excess cost.” This is to say, the local school district must contribute to the cost of a handicapped child's education the average amount it spends on children generally; the cost above this amount comes from the
state. But state officials are increasingly convinced that this is a bad system, because it contains no incentive on the part of the schools to keep costs down. The Thornburgh Administration planned to introduce legislation in the 1981-82 session requiring local districts to share some part of the excess cost, but opposition from local officials and the lobby for the handicapped has forced the Administration to retreat for the moment.

**The Massachusetts experience**

The most spectacular state legislative developments took place in Massachusetts. Spurred by a state-wide coalition of advocates marching under the banner of the "Special Class Assistance Council," the legislature sent to Governor Francis Sargent, in June of 1972, a bill that went well beyond anything in existence at the time. It applied to all children with "special needs," not just handicapped children; it mandated an independent evaluation of the child's condition at public expense; it abolished all references to "retarded," "emotionally disturbed," and similar categories; and it prescribed a wide range of services, including many that would normally be thought to fall within the range of responsibility of the medical or social work professions, also at public expense. Significantly, it did not provide any new state money to defray the cost of all this.

Chapter 766 (as the Massachusetts Act is called) has now been law for nearly a decade. What have been the results? Most obviously—and advocates for the handicapped would surely say, most importantly—the number of "special needs" children being served has increased rapidly from 68,160 in 1972-73 to 160,599 in 1979-80.² It is not possible to make any such categorical statement about the quality of the programs. One can, of course, measure quantity more easily than quality, but it seems reasonable to assume on the basis of fragmentary but fairly widespread evidence that the average level of service has improved considerably in Massachusetts during the past eight years. As a result, the Bureau of Education for the Handicapped (BEH) was able to assure the state, in October of 1978, that it was "99 percent" in compliance with P.L. 94-142 shortly after the federal statute took effect.

What cannot be disputed is the cost, which has far outrun expectations. The legislature estimated those costs at $7 million for the first year. In fact, expenditures in Massachusetts on "special needs" children from state and local sources have risen from $104.7 million in 1973-74 to $310.8 million in 1979-80.⁴ Most of the new
money has had to come from local taxes, especially from the real estate tax.

That was not the original plan. Chapter 766 was drafted so as to require the state to fund the "excess cost" of educating children with special needs. In a technical sense, this is what the legislature has done. But because it did not have the political fortitude to increase the total amount of money available for public education during these years, the legislature simply met its obligation under Chapter 766 by skimming the money needed for special education off the top of the general school subsidy. The effect of this sleight-of-hand has been to force town meetings to fund the rapidly increasing cost of education out of local property taxes, thereby giving Massachusetts some of the highest property taxes in the nation. And the consequent unhappiness with high property taxes was a major factor in the passage, in 1980, of "Proposition 2½," a constitutional amendment putting a ceiling on local property tax rates and greatly complicating the task of funding the public schools.

Chapter 766 has also exacerbated relations between the state and local schools. Massachusetts historically had been known as a state devoted to the notion of local control of educational policy. The state Department of Education contented itself until the 1970's with offering a modest level of technical services. Chapter 766 has altered the state role in important ways. Not only has the state reneged, in the eyes of many school and town officials, on its promises of financial support; it has also promulgated regulations which are far too detailed and which fail to take local difficulties into account.

In about 1977 the state began making concessions to these sentiments. The regulations were rewritten, this time with more input from local officials. When the Associate Commissioner for Special Education, a vigorous advocate of the handicapped, resigned in the summer of 1977 he was replaced by the special education director of a suburban Boston school system. There are signs that the state is modifying its view of what is an appropriate monitoring system. But until more of the financial burdens imposed by Chapter 766 are borne by the state, the statute will continue to be a major source of friction between the state and its communities.

Another feature of the experience to date under Chapter 766 is worth noting. Like P.L. 94-142, Chapter 766 allows the parents of any special needs child to contest the appropriateness of the child's placement in a due-process hearing. More than a thousand hearings were requested and held during the first three years. In many cases parents seem to have used due-process procedures for pur-
poses which run contrary to the dominant philosophy of both Chapter 766 and P.L. 94-142. That philosophy is "mainstreaming"—the notion that handicapped children should be educated in circumstances which are as close to normal as their condition permits. Massachusetts parents have often sought to keep or place their children in more restrictive environments. About 40 percent of the first 1,000 cases, for example, involved attempts by parents to keep or place their children in private schools. So we may be dealing with a genuine conflict between parents who want the best quality education, no matter where it takes place, and advocacy groups committed to an anti-segregation philosophy.

Chapter 766 has had some other interesting and unexpected outcomes. In a thoughtful study Richard A. Weatherly looked at the early implementation of Chapter 766 in three medium-to-large school districts. He found that school officials, who were generally sympathetic to the aims of the statute, made a conscientious effort to carry it out, in many cases working longer hours than they had before. But because the statute required a vast increase in the number of meetings and the amount of paperwork, and because the state provided no new resources, professionals often coped with these requirements in ways that had perverse effects. They informally discouraged parents from seeking evaluations, conducted evaluations by means that were not sensitive to the needs of individual children, and saw children in groups rather than individually. Regular classroom teachers often used the machinery of Chapter 766 for getting rid of disruptive children. Most serious, from Weatherly's point of view, were the effects on equity. Because parents who were wealthy or well-educated tended to live in the more affluent districts (districts that complied more faithfully with the law), and because such parents were better able to articulate their concerns, demand evaluations, and appeal when necessary, the effect of the law was to increase the disparity between the special education services available to children at opposite ends of the social ladder. (Boston children, just like Philadelphia children, were probably least well served.)

Weatherly studied only seven schools in three districts, and some of the difficulties he describes may be "start-up" phenomena. But in a fairly pessimistic final chapter Weatherly concludes that we should not expect rapid or radical changes in the way Chapter 766 is being implemented, chiefly because when "street level bureaucrats" have to carry out new duties without new resources, they often resort to stratagems which run counter to the aims of the statute.
The situation at the beginning of the 1975-76 session of Congress was fluid. A number of states were revising their own statutes to improve the quality of education available to handicapped children. In some of these states, like Massachusetts, the changes were vast and promised to improve conditions substantially. In others, efforts were more modest—more generous financial support, a broader definition of the children entitled to special treatment, a cautious move away from segregated classes and facilities. And in a few, progress was slight or non-existent.

Meanwhile, another group of states was carrying out court-ordered reforms of their special education systems. In some, like Pennsylvania, the reforms were far-reaching and had at least the ostensible support of the appropriate state officials. In others, the court mandates were less far-reaching, or appeared to encounter a certain amount of foot-dragging on the part of state and local authorities. The outlook, nationally, was for steady if uneven progress over the next several years.

Into this situation Congress in 1975 moved with speed and vigor. It is not necessary to spend much time on the passage of the Act itself. It was a foregone conclusion from the moment the 96th Congress convened. Although Congress had only recently (1972) passed another statute, P.L. 93-380, which went well beyond the laws then in place, it did not tarry to find out what problems might be associated with attempts to guarantee, as a national right, a free public education to all handicapped children. P.L. 93-380 was seen as a stopgap measure, a way of helping the states meet the costs imposed by court decisions pending the writing of a more comprehensive statute.

In order to gauge the effects, both actual and probable, of P.L. 94-142, it will be useful to discuss its principal features, focusing on those provisions which represent a new role for the national government and which impose heavy obligations on the states and the schools.

1. At the core of the Act is a requirement that not later than September 1, 1978 each state receiving federal money afford to every handicapped child within its jurisdiction a free appropriate public education. Every child, however handicapped, is deemed capable of benefitting from access to a publicly supported education.

2. This free appropriate public education must be provided in the least restrictive environment. The law requires the states to give assurances,
that, to the maximum extent appropriate, handicapped children . . . are educated with children who are not handicapped . . . .\textsuperscript{8}

This is the "mainstreaming" about which much has been said and written. Its origins are moral and political as well as scientific. Advocates clearly believed, and Congress apparently agreed, that handicapped children should be segregated as little as possible, probably because they feared (with much justification) that "out of sight" would mean "out of mind."

3. Each handicapped child must be provided with what the statute calls an "individualized education program" (IEP). This is further defined as

a written statement for each handicapped child . . . which statement shall include (A) a statement of the present levels of education performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.\textsuperscript{9}

This requirement is the principal source of subsequent complaints about the amount of paperwork generated by the Act.

4. The Act mandates elaborate "due process" procedures, making them available to parents, guardians, and "surrogates" who wish to contest the appropriateness of a child's placement. First comes a hearing at the local level before a neutral body, from which an appeal goes to the state. The person hearing the appeal at the state level must make an "independent" decision. Finally, an appeal lies from the states to either a federal district court or a state court of competent jurisdiction, which "shall hear additional evidence at the request of a party" and shall base its decision "on the preponderance of the evidence."

5. The Act obligates state departments of education to monitor compliance both by local school systems and by other state agencies having custody of handicapped children. To some extent this seems likely to reinforce other trends which are slowly altering the historic balance of power between the states and local school systems.

6. Some interesting issues were raised by the very broad way in which Congress defined the services which must be made available to handicapped children. These range from transportation and speech pathology on the one hand to physical and occupational
therapy on the other. Many of these services, such as physical and occupational therapy, have not historically been available in the public schools and are only marginally related to their mission. To the extent that schools must now provide them, or purchase them elsewhere, they will be venturing into new and expensive areas.

Federal money was supposed to make these mandates palatable. The sponsors of the Act talked grandly about billions of dollars; the hopes of state and local school officials were at least as high. But the promises inherent in the statute itself—even if they had been fulfilled—were decidedly more modest. The funding scheme was relatively simple. Each state was to receive, in any particular year, a percentage of the average state-wide cost of educating all children in the last year for which reliable figures were available, multiplied by the number of children served. The federal percentage was to rise from 5 percent in FY 1978 to 40 percent in FY 1982. But since handicapped children cost on the average nearly twice as much to educate as regular children, and since the appropriations were generally based on cost figures that were at least two years old, the 40 percent figure was purely illusory. At best Washington would have ended up defraying not more than 15 percent of the total cost. And, as we shall soon see, it wound up paying for far less than that.

**Handicapped children will benefit**

Will the Act prove to be, as its sponsors claim, a “bill of rights” for the handicapped children of America, leading to their absorption into the mainstream of American life after decades of abuse and neglect? Or will it turn out to be, as critics charge, an expensive and largely unworkable monument to the power of the handicapped lobby, saddling school districts with exorbitant costs and cumbersome legal and administrative burdens?

Some consequences for handicapped children are fairly clear:

1. All handicapped children will have access to programs of publicly supported education, ending up either in the public schools or in private programs supported by the taxpayers. No child will henceforth be rejected as “uneducable.” This represents an enormous advance in civic sensitivity. Whatever the actual outcomes for handicapped children themselves, we have said to their parents, “The burden of caring for your child is one that ought to be shared by the entire community, not borne by you alone.” That, surely, is a great gain.
2. The number of children involved is not likely to be quite as great as anticipated. This has turned out to be true at all levels. When the PARC decree was signed in Pennsylvania, advocates predicted that it would result in the entry into the public schools of nearly 50,000 previously excluded children. As it turned out, the number was about 7,500, and of these, about 5,000 were known to state authorities but had been languishing in state schools and hospitals. Only about 2,500 were previously unidentified children living in private homes. Federal authorities have consistently overestimated the number of children involved.

3. The quality of programs available to handicapped children is likely to improve substantially. Several forces are at work. One is money—not only money for programs, but money for research and training as well. Another is public attention, which has brought to special education a prestige formerly lacking. And a third is the availability of due process—its very existence has forced school officials to be more careful in the diagnosis and placement of handicapped children. On the other side of the ledger there is some evidence that more time will be spent on paperwork, less time on the actual provision of services.

4. Despite the improved quality of programs generally, there will be wide variations in the extent to which children will benefit. Some will make substantial progress; others will not. The failure to progress will have a variety of causes. In some cases, the child will be found not capable of making any real progress. Despite much recent rhetoric to the contrary, a small number of children probably are not educable in the sense that they will never be able to perform the simplest mental operations. (This is not, however, an argument for failing to provide a decent level of custodial care.) A somewhat larger number of children will fail to make much progress because we do not yet have an adequate understanding of the nature of their handicapping condition. Some children will fail to advance very far, not because their needs cannot be met, but simply because they will not be met. And many others will make genuine progress of a sort that until recently would have seemed incomprehensible.

5. It is a fairly safe bet that when current authorizations expire in 1982 we will not have a very clear idea about what we are getting for what we are spending. It might seem surprising that Congress is willing to authorize the expenditure each year of over a billion dollars in federal money, and to require the expenditure of several billion more in state and local money, without getting any
comprehensive evidence about the gains being made by handicapped children as a result. In fact it is not so surprising. To those who look on the Act as a civil-rights statute, the question of results is essentially irrelevant; access is what counts. Even if we wanted to measure what is happening, it is not clear we could. There is a bewildering variety of handicapping conditions and an equally bewildering number of ways of dealing with them. Finally, the Office of Special Education may not be very keen about Congress or the general public having access to accurate information about results and costs. If the average taxpayer knew that we were spending $10,000 per-child per-year teaching severely retarded children to put on their own clothes, his continued support for such programs might be in doubt.

6. The hopes of Congress for the employment of handicapped children after they leave school are almost surely doomed to disappointment. This will have much to do with our economy and little to do with our schools. It is hardly surprising that an economy which cannot provide gainful employment for 7 million nonhandicapped adults will have trouble absorbing approximately 275,000 handicapped teenagers each year. Section 504 of the Rehabilitation Act is designed to protect the handicapped as they compete with others for jobs, and it may well do just that; but it cannot increase the total number of jobs available. Only a healthy economy can do that.

The financial costs could be staggering

It is not possible to confine an analysis of the likely impact of the Act to handicapped children themselves. One of the weaknesses of many policy analyses is their failure to come to grips with some of the side-effects—good or bad, intended or unintended—of the policies which they attempt to assess. Especially in the case of a statute like P.L. 94-142, which aims to bring about major changes in the way school people think and act, to ignore these side-effects would be foolish.

Financial costs are important. In 1977 a consortium of state-level organizations estimated that the Act would add 4 billion dollars per year to the cost of public education. That figure is clearly too high. For one thing, the number of children needing to be served is turning out to be somewhat lower than predicted. For another, those organizations probably overlooked the extent to which handicapped children were already being served (however inadequately). The
increase in state and local expenditures on the education of handicapped children between 1972-73 and 1979-80 is probably around 5 billion dollars, but much of that took place before the effective date of the Act. What is very clear is that Washington is not coming even close to defraying a substantial part of the cost. For the first two years Congress lived up to the promises implicit in the authorizations, but the honeymoon is over. Table I tells the story.

Even these figures exaggerate the dimensions of federal largesse, for two reasons. The first is that they are based on average costs for all children. Since the cost of educating handicapped children is nearly double that for others, these percentages must be reduced by a factor of nearly two in order to arrive at the federal share of total costs. Moreover, the federal contribution is based on average costs in the last year for which there are reliable figures, which until now has been two years before the year in question. Since per-pupil costs have been rising nationwide at about 10 percent per year, a further discount of about 20 percent must be applied. In short, even in FY 1981, when the nominal federal contribution reached a high of 13 percent, the actual federal share of the total current cost of educating handicapped children was on the order of 6 percent. In FY 1982 it will fall to 5 percent. The Act imposes very real (if incalculable) costs and makes a very modest contribution toward meeting them.

The results are not hard to predict. One is a continuing nationwide rise in real property taxes, spawning counter-measures like Proposition 13 in California, Proposition 2 1/2 in Massachusetts, and the defeat of numerous school tax levies in Ohio and other states. Another is cutbacks in programs for non-handicapped children—the arts, foreign languages, and programs in elementary guidance and physical education seem likely candidates—since not all school

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<td>10</td>
</tr>
</tbody>
</table>

boards can or will raise local taxes to meet the increasing costs of programs for the handicapped. Another quite unanticipated consequence will be growing inequity in the way schools are financed. Since federal money under the Act flows to schools on a per-capita basis, it does nothing to address the gap between wealthy and poor districts, and may, in fact, be disequalizing, inasmuch as programs for the handicapped will generally be more expensive in the poorer urban schools.

Moreover, the Act should continue to inflate school costs. A trickle of cases which threatens to become a flood is now entering the federal courts; and, in general, the decided cases take a very expansive (and expensive) view of state and local obligations under the Act. A case in point is the recent *Armstrong v. Kline*.11 There the issue was whether Pennsylvania could refuse to provide more than the standard 180 days of school per year to certain seriously handicapped children in the face of evidence tending to show that children with these handicaps regressed more than normal children over the long summer holiday. The answer, at all levels, was "no."

In the District Court, Judge Clarence Newcomer discerned in the Act a policy aimed at permitting handicapped children to achieve "self-sufficiency"; this policy, he concluded, was frustrated by Pennsylvania's enforcement of the 180-day limitation. The Third Circuit took a somewhat broader view of the basis for decision; although each of the three participating judges wrote a separate opinion, all agreed that the 180-day rule could not be sustained for certain seriously handicapped children in the face of the imperatives of P.L. 94-142.

The Supreme Court denied certiorari in the *Armstrong* case on June 22, 1981, thus allowing the Third Circuit's decision to stand. The decision is significant on two levels. If the views of the Third Circuit prevail around the country on the central issue in the *Armstrong* case—that all 50 states offer year-round school to certain categories of handicapped children—the added costs may come to $830 million per year.12

On another level, the *Armstrong* decision has even more serious cost implications. The central issue, although none of the various judges addressed it squarely, is the meaning of "appropriate" in the Act. In commanding the states to provide a "free appropriate education" to all handicapped children, was Congress simply ordering the schools to open their doors to handicapped children and to devise programs which plausibly address their needs? Or does "appropriate" mean "optimal"—whatever services and programs are
needed to maximize a particular child’s learning capacity? The Third Circuit comes very close to endorsing the latter view—and thus opens the door to demands for a range of programs and services which cannot at this point even be described, let alone assigned a cost figure.

**Making schools more litigious and bureaucratic**

The passage of the Act also represents a major step in the procedural revolution that has been taking place in the schools. Due-process protections of one sort or another now surround decisions relating to teacher tenure, to student discipline, to the release of student records, to numerous questions related to testing, and now to the diagnosis and placement of handicapped children.

Opinions differ as to whether or not all this is a good thing. The advocates of universal due process stress the importance, in a democratic system, of widespread fairness: “Justice must be done and must be seen to be done.” They say that due process has often led to a more accurate diagnosis of a child’s handicapping condition. They argue less convincingly that due process also leads to better placements and ultimately to more effective programs.

But fairness is costly. In assessing costs, one has to look not just at the outright legal costs, but at costs in professional and administrative time, energy, and morale. Bad feelings sometimes result from adversary proceedings. A survey of parents of fifty handicapped children who had asked for due-process hearings in Massachusetts disclosed that half of them would not willingly go through such an experience again, even if they knew it would improve conditions for their children. A study of due process for the mentally retarded in Pennsylvania is not only critical of the state’s handling of due process appeals, but raises serious questions about the appropriateness of a legal regime in this entire area. Finally, one wonders about the effects of burdening state and federal courts with a new class of “federal cases” at a time when many trial courts, both state and federal, are seriously behind in their work.

These issues cannot be resolved on the basis of the evidence at hand. What we know suggests that the procedural revolution has not yet spent its force. Advocates for the handicapped are currently searching for a legal strategy for forcing states and schools to deal with the problems of the adult handicapped. It would be foolhardy to predict that they will be unsuccessful. The Pennsylvania State Board of Education has extended due-process protections to the
gifted and talented, and already one hears it said that any child ought to be able to challenge the fairness of any major educational decision affecting him. Where will it end? And with what consequences for public education?

The Act is also another step in what might be called the “bureaucratization” of the schools—the attempt to reduce implicit understandings to explicit undertakings. In one sense educators have only themselves to blame for this development. For several decades the phrase “individualization of instruction” has been part of the litany of educational reform. It has been taken seriously by advocates for handicapped children. It is hard to object in principle to the notion that schools ought to work out individual plans for all handicapped children. But in practice—the practice mandated by the Act—a degree of skepticism is in order. Once again, there are costs. Not minor costs, but major ones.

Weatherly hints at some of these costs. The more time teachers spend writing IEP’s, attending staff conferences, and testifying at due-process hearings, the less time they have for working directly with handicapped children. And there is room to doubt whether the “blueprint” model is appropriate to the classroom situation. Blueprints are crucial in the construction of buildings, where an error of even one inch may be fatal; but in teaching, a detailed blueprint may leave too little room for flexibility and the exercise of the teacher’s ingenuity and imagination.

There is a more intangible but even more important dimension to the problem of the cost associated with the bureaucratization of the schools. Superintendents and principals are increasingly surrounded by legalistic and bureaucratic restrictions—not just those emanating from the Act, but those spawned by a host of other laws and regulations. The purpose of many of these enactments is to require people in the schools to do the right thing, or at any rate to prevent them from doing the wrong thing. But the danger arises that the cumulative effect of these restrictions is to prevent anyone from exercising any leadership at all. And leadership, especially on the part of principals, is central to the performance of the public schools. A dynamic principal cannot single-handedly create a good school, but a good school is likely to have a dynamic principal at its center. And it is hard to be dynamic if you have to consult regulations, or the school solicitor, on a daily basis. What we may be doing, inadvertently, is creating an environment in which risk-avoidance, rather than risk-taking, is the norm—hardly a formula for curing what’s wrong with the public schools.
Public confidence and the "other" children

It is not possible to end our consideration of the effects of the Act on public education without a brief discussion of its likely impact on public confidence in the schools. Public confidence has diminished over the past decade, whether measured by public opinion polls, the fate of bond issues and tax referenda, or the growth of support for non-public schools. The reasons for this loss of confidence are fairly clear. To some extent schools are suffering from the effects of the general decline in respect for institutions that has affected every segment of American life. But there are other likely causes for the erosion of support: the poor performance of students on standardized tests, parental concern about the lack of discipline in the schools, the side effects of desegregation, and teacher strikes.

The cost of public education has also become the focal point for serious criticism. It is not simply a matter of total costs, although these have risen substantially. Rather, it is a question of these costs measured against two other variables: the number of pupils served and the quality of the education received. Pupil population in the public schools has been declining since it peaked in the school year 1971-72. As a result, per-pupil expenditures have been rising more rapidly than gross expenditures. All the while College Board scores continue to fall. So the public cry has arisen, what are we getting for what we are spending? Why do total expenditures continue to rise when the number of children continues to decline? And if we are spending more per pupil each year, why are the results so unsatisfactory?

Now, there are several answers to these questions. If per-pupil costs are measured in constant dollars, the increases are much less spectacular. Some costs (i.e., the amortization of bond issues) are relatively fixed, and cannot be adjusted to reflect declining enrollments. Schools are increasingly involved in activities—feeding and transportation, for example—which bear only an indirect relationship to the purpose for which they were established in the first place.

But the rapidly expanding cost of educating handicapped children is also an important part of the explanation. The figures for four states which together educate about 13 percent of the public school students in the United States suggest how important (Table II).

These figures indicate that at a time when gross expenditures on schools were increasing by 83 percent, and per-pupil expenditures by 113 percent, special education costs were going up by 160 percent in these four states. Some caveats are in order. These are states...
which rank at or above the median on most indices relating to education of the handicapped; thus, their special education expenditures between FY 1973 and FY 1980 may well have been increasing somewhat more rapidly than in the country as a whole. But even taking this point into account it is clear that the cost of educating handicapped children has been rising far more rapidly than the cost of public education generally. In fact, an educated guess would be that it has been, after inflation, the most important factor in school budget increases between 1973 and 1980.

This in itself is no argument against what has been happening. Advocates of the Act would surely say that this is exactly what the Act was intended to do: to remedy decades of neglect by forcing states and schools to increase special education spending at something more than a "normal" rate. But the problem from a public point of view is that these substantial increases in expenditures have had little or no impact on the performance of all students as it is conventionally measured in College Boards and other standardized tests. Some handicapped children, chiefly those whose handicaps are physical in nature, may now be entering the mainstream of public education as a result of the revolution of the past decade. But for many others, no such outcome is possible. If they become more self-sufficient, and less of a burden to others, that is a major achievement. But it is one that will not alter the judgments which the press and the public are making about the public schools, because it does not affect the ways in which their performance is generally measured.

**Reforms that probably won't happen**

The authorizations in P.L. 94-142 expire on June 30, 1982. If our analysis is correct, the Act has probably hastened and broadened the extent to which handicapped children are being educated at
public expense. It has done so, however, at a cost which cannot be measured in money alone, but must also be assessed in terms of legal, bureaucratic, and political dimensions as well. Where do we go—where should we go—from here?

President Reagan has recommended that the funding of the Act be absorbed into block grants to the states. Such a solution is certainly consistent with everything the President has been saying about the "new federalism"—his desire to return both power and responsibility to the states. But politically it won't fly. Even in the Senate, where the President's own party is in a majority, the Committee on Human Services has scuttled the idea of including the Act among the programs to be funded from block grants to the states. Outright repeal is even less likely.

At the other extreme, no one anticipates that the present Congress would be willing to extend the Act for another five years at anything like the present level. The outlook for FY 1983 (which, because of forward funding, depends on the FY 1982 budget) is discouraging. And given the predilections of the current President and the current Congress, it is not possible to be optimistic about FY 1984.

This leaves two "middle-of-the-road" solutions. One is to accept the inevitability of a decline in federal support, responding by limiting the burdens which the Act imposes on states and school systems. The other would likewise accept the decline in federal support, leaving the states and the schools to bridge the increasing gap between federal mandates and federal largesse. We prefer the former solution, but we suspect Congress will choose the latter.

How might Congress amend the Act in such a way as to reduce the burdens (and the costs) without abandoning the goal of a more adequate education for handicapped children? Here are some suggestions:

1. There is a serious danger that the courts will define "appropriate" to mean "optimal" or even "ideal." Such a reading is clearly not required by the equal protection clause; in fact, it puts handicapped children in a preferred position since no other class of children has a legal right to an ideal or even an optimal education. One solution might be to define "appropriate" more narrowly and accept any educational plan that is not clearly inappropriate.

2. Congress could eliminate that section of the statute which prescribes the form and content of the IEP. The IEP has contributed greatly to the bureaucratization of the schools. If an analogy to Chapter 766 is valid, it may even have reduced the amount of ser-
vice available directly to handicapped children, at least in the short run. Perhaps we ought to rely more on the leadership of good principals and the pedagogical skills of good teachers, and less on recipes and blueprints.

3. Since Congress has chosen to fund the Act at such niggardly levels, it seems only reasonable to take this fact into account. One way of doing so would be to stipulate that the mandates of the Act would not take effect until appropriations reached a certain level, say 20 percent of the total current cost of educating handicapped children. A less drastic solution to the same problem would provide that the prohibitions against commingling and supplanting come into force only when appropriations reach the same level.

4. Congress might amend the Act to eliminate the present prejudice against separate facilities or classes for the more severely handicapped. As the Act is currently being interpreted the placement of handicapped children in separate classes or facilities is presumed to violate the law. The burden then falls on the schools to justify such a placement. But there is no overpowering reason for such a bias. Not only are many parents supportive of separate placements, it is far from clear that "mainstreaming" has the kind of support in the research that would justify making it a central feature of the law for all classes and categories of handicaps.

5. A solution recommended by the Council of Chief State School Officers, and worth serious study, would make a distinction between severe and less-severe handicaps. The former would continue to be treated as justifying the full panoply of rights and procedures set forth in the Act; the latter would be exempted and treated, instead, as justifying the sort of special attention (and funding) given disadvantaged children under Title I of ESEA.

Other less far-reaching amendments might be considered. Congress could make it clear that independent evaluations are not to be at public expense. It could follow the example of Massachusetts, requiring informal conciliation or mediation before proceeding to a full-fledged due process hearing. Congress could and should clarify the point that the failure to carry out an IEP, or to achieve the results sought by the IEP, does not subject a teacher or administrator to personal liability. It might make sense to limit appeals to either the state or the federal courts (but not both), rather than allowing plaintiffs to shop around for a friendly forum. It might also make sense to require courts to pay more attention to the decisions of hearing officers and state departments of education. Finally, it would be wise to transfer to the National Institute of Edu-
cation the task of evaluating the results of P.L. 94-142; it is not good public policy to permit OSE to continue to function as both advocate and judge.

What are the chances of any of these suggestions being considered and adopted by Congress? Sad to say, they are slight. And the reason has as much to do with timing as with politics. Under the terms of the Budget Act, Congress had until October 1 to adopt a budget for the new fiscal year. The Joint Budget Committee adopted a resolution requiring the various authorizing committees to trim $36 billion from current programs, and to make appropriate changes in the authorizing legislation, before October 1, 1981. There was simply not enough time, under the circumstances, for Congress to engage in a thoughtful rewriting of the Act, something that even under normal conditions could be expected to occupy the relevant subcommittees for the better part of an entire session.

A more likely outcome is that Congress will gradually cut the funding for the Act while leaving the mandates in place. This will have, for the Congress anyway, the immense advantage of permitting everyone to claim victory. The conservatives will be able to say, with some justice, that they have cut costs; and the liberals will be able to say, with equal justice, that they have preserved the liberal impulses embodied in the Act.

The clear losers will be the states and, especially, the local schools. They will be squeezed even harder between the rock and the hard place. They can raise local taxes to supply the money that will not be forthcoming from Washington, and risk further taxpayer revolts along the lines of Proposition 13 and Proposition 2½. Or they can refuse to raise local taxes, courting lawsuits and a cutoff of federal funds. No matter what they do they are likely to disappoint both advocates for the handicapped, whose expectations have been raised to unrealistic levels by a Congress heedless of consequences, and the larger taxpaying public, which will not understand why costs are still going up while student population and student performance are going down.

NOTES

4 Ibid.
6 Ibid.
8 20 U.S.C. 1413(a) (4) (B).
12 Estimate of the National School Boards Association, contained in their amicus brief in Armstrong v. Kline, supra.
13 Massachusetts Education Policy Fellowship Program, pp. 13-14.

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Irving Kristol, Editor