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Public Law 94-142 and the Texas Law.

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PUBLIC LAW 94-142 AND THE TEXAS VIEW

ANN MacMURRAY

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The answer which a society provides by its laws, actions and attitudes speaks eloquently about that society's values and the degree of its dedication to the principle that individual human beings, solely by virtue of their humanity, must be accorded some minimum level of dignity and respect, and the greatest possible opportunity to live a full and meaningful life.¹

Of the estimated thirty-five million handicapped people in America, seven to eight million are children.² As of 1975 less than half of these children were receiving an education appropriate to their needs; the others were receiving either an inappropriate education or none at all.³ In

1. Baugh, *The Federal Legislation on Equal Educational Opportunity for the Handicapped*, 15 IDAHO L. REV. 65, 65 (1978).

2. Compare S. REP. No. 168, 94th Cong., 1st Sess. 8, reprinted in [1975] U.S. CODE CONG. & AD. NEWS 1425, 1432 (estimated 8 million children between birth and 21) and *Extension of Education of the Handicapped Act: Hearings on H.R. 7217 Before the Subcomm. on Select Education of the House Comm. on Education and Labor, 94th Cong., 1st Sess. 103 (1975)* (statement of Mr. Brademas) (estimated 7 million children) with U.S. DEP'T OF HEALTH, EDUC. & WELFARE, 2 THE WHITE HOUSE CONFERENCE ON HANDICAPPED INDIVIDUALS Part a, 5 (1977) (estimated 7 million children, 28 million adults). See generally Comment, *Legislative Notes: The Education of All Handicapped Children Act of 1975*, 10 U. MICH. J.L. REF. 110, 110 (1976).

3. S. REP. No. 168, 94th Cong., 1st Sess. 8, reprinted in [1975] U.S. CODE CONG. & AD. NEWS 1425, 1432 (approximately 1.75 million receive no educational services and 2.5 million receive inappropriate education); *Extension of Education of the Handicapped Act: Hearings on H.R. 7217 Before the Subcomm. on Select Education of the House Comm. on Education and Labor, 94th Cong., 1st Sess. 103 (1975)* (statements of Mr. Brademas) (half receive an appropriate education, one million receive nothing). The results of a study conducted in the early 1970's by the Council for Exceptional Children, in which statistical data were analyzed on a state by state basis, lends credence to the conclusions drawn as to

the last decade, however, proponents of legislation for the handicapped have garnered enough public support to strengthen and effectively advocate their positions.⁴ As a result, the hands of human dignity have re-

the lack of educational opportunity available to the handicapped. Figures representing the number of children receiving an appropriate education ranged from 50 percent in Delaware to less than 25 percent in Texas and Maine. COUNCIL FOR EXCEPTIONAL CHILDREN, STATUS OF STATE EDUCATION PROGRAMS FOR HANDICAPPED CHILDREN, reprinted in *Extension of Education of the Handicapped Act: Hearings on H.R. 7217 Before the Subcomm. on Select Education of the House Comm. on Education and Labor, 94th Cong., 1st Sess. app.*, at 177-88 (1975). Such data are supportive of the premise that as late as the 1970's the educational needs of handicapped children were largely neglected. See Alschuler, *Education for the Handicapped*, 7 J. L. & EDUC. 523, 524 (1978) (handicapped children are historically excluded from public education); Dimond, *The Constitutional Right to Education: The Quiet Revolution*, 24 HASTINGS L.J. 1087, 1088 (1973) (handicapped children's education characterized by noneducation or miseducation). The harsh reality of the statistics presented is softened by considering that between 1969 and 1974 all states had enacted some form of legislation designed to remedy the problem. COUNCIL FOR EXCEPTIONAL CHILDREN, STATUS OF STATE EDUCATION PROGRAMS FOR HANDICAPPED CHILDREN, reprinted in *Extension of Education of the Handicapped Act: Hearings on H.R. 7217 Before the Subcomm. on Select Education of the House Comm. on Education and Labor, 94th Cong., 1st Sess. app.*, at 189-90 (1975); see NATIONAL ASS'N OF STATE DIRECTORS OF SPECIAL EDUCATION, STATE PROFILES IN SPECIAL EDUCATION (1977) (profiles state special education programs).

4. See Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 394 (current version at 29 U.S.C. § 794 (Supp. 1979)). "No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." *Id.* Section 794 represented the first federal civil rights law protecting rights of the handicapped and reflected a national commitment to end discrimination on the basis of handicap. S. REP. NO. 1297, 93d Cong., 2d Sess. 14, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 6373, 6390. Title III of the Rehabilitation Act Amendments of 1974 authorized the President to call a White House Conference on Handicapped Individuals. Rehabilitation Act Amendments of 1974, Pub. L. No. 93-516, 88 Stat. 1631 (current version at 29 U.S.C. § 701 (Supp. 1979)). In 1977 the first conference formulated and encouraged support of a national policy to ensure full participation of the handicapped in society. U.S. DEP'T OF HEALTH, EDUC. & WELFARE, 2 THE WHITE HOUSE CONFERENCE ON HANDICAPPED INDIVIDUALS Part a, 6 (1977).

President Jimmy Carter stated the commitment of the Administration . . . "I am committed to the proposition that the disabled people deserve to control and shape their own lives. I am committed to insuring that our disabled citizens have the rights and the opportunity to function independently and creatively in our society, rather than be segregated from it."

U.S. DEP'T OF HEALTH, EDUC. & WELFARE, 3 THE WHITE HOUSE CONFERENCE ON HANDICAPPED INDIVIDUALS, IMPLEMENTATION PLAN 9 (1977); see F. WEINTRAUB & A. ABESON, NEW EDUCATION POLICIES FOR THE HANDICAPPED: THE QUIET REVOLUTION, reprinted in *Extension of Education of the Handicapped Act: Hearings on H.R. 7217 Before the Subcomm. on Select Education of the House Comm. on Education and Labor, 94th Cong., 1st Sess. app.*, at 169, 170 (1975). See generally Baugh, *The Federal Legislation on Equal Educational Opportunity for the Handicapped*, 15 IDAHO L. REV. 65, 66 (1978); Project, *Education and the Law: State Interests and Individual Rights*, 74 MICH. L. REV. 1373, 1375 (1976).

cently been extended to handicapped children.

Educational institutions of this country seek not only to instill necessary academic skills, but to impart values considered essential to further public good. No other governmental activity plays such an important and influential role in the formative years of the nation's young.⁵ The Supreme Court in *Brown v. Board of Education*⁶ felt it "doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."⁷ Interpretation of the language in *Brown* necessitates reflection on conventional definitions of human competency, health, and normalcy and an understanding that these concepts are not static.⁸ The "need for the general socialization and education of all persons toward greater tolerance of wider ranges of acceptable behavior" must be kept in mind.⁹ Accepting this premise and recognizing that every child, regardless of the severity of his handicap, is capable of benefitting from an education tailored to individual needs has provided much of the impetus for judicial¹⁰ and legislative recognition of educational rights for the handicapped.¹¹ The purpose of this comment is to track judicial and legislative initiatives focusing on the Education for All Handicapped Children Act of 1975, Public Law 94-142,¹² and Texas' compliance with its statutory mandates.

5. See *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954); Project, *Education and the Law: State Interests and Individual Rights*, 74 MICH. L. REV. 1373, 1373 (1976).

[E]ducation is perhaps the most important function of state and local governments It is required in the performance of our most basic public responsibilities. . . . It is the very foundation of good citizenship. . . . It is a principle instrument in awakening the child to cultural values . . . and in helping him to adjust normally to his environment.

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

6. 347 U.S. 483 (1954).

7. *Id.* at 493; accord, e.g., *Howard S. v. Friendswood Independent School Dist.*, 454 F. Supp. 634, 641 (S.D. Tex. 1978) (handicapped individuals can become productive citizens with proper education); *Hairston v. Drosick*, 423 F. Supp. 180, 183 (S.D. W. Va. 1976) (child's chance is through education); *Fialkowski v. Shapp*, 405 F. Supp. 946, 959 (E.D. Pa. 1975) (denial of education denies opportunity for basic skills).

8. See E. DE LORENZO, *PLANNING THE FUTURE OF SPECIAL EDUCATION: OUR DUTY, OUR RESPONSIBILITY AND OUR PRIVILEGE* 3 (1978).

9. *Id.* at 3.

10. See, e.g., *Lebanks v. Spears*, 60 F.R.D. 135, 137-38 (E.D. La. 1973); *Mills v. Board of Educ.*, 348 F. Supp. 866, 878 (D.D.C. 1972); *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 343 F. Supp. 279, 285 (E.D. Pa. 1972). *Pennsylvania Association for Retarded Children* will be referred to as *P.A.R.C.* hereinafter.

11. See, e.g., Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (codified at 20 U.S.C. §§ 1401, 1405-06, 1411-20, 1453 (1976)); MASS. ANN. LAWS ch. 71B, § 2 (Michie/Law Co-op 1978); TEX. EDUC. CODE ANN. § 16.104 (Vernon Supp. 1980).

12. Pub. L. No. 94-142, 89 Stat. 773 (codified at 20 U.S.C. §§ 1401, 1405-06, 1411-20, 1453 (1976)).

I. ESTABLISHING THE HANDICAPPED CHILD'S RIGHT TO EDUCATION:
JUDICIAL RECOGNITION

Although education has not been recognized as a fundamental right,¹³ the United States Supreme Court has made clear that when a state undertakes to provide education,¹⁴ it must do so in terms insuring equal availability to all.¹⁵ Subsequent litigation successfully established the handicap's right to education under both the due process and equal protection clauses of the United States Constitution.¹⁶ *Pennsylvania Associ-*

13. See *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973); Comment, *Legislative Notes: The Education of All Handicapped Children Act of 1975*, 10 U. MICH. J.L. REF. 110, 113 (1976).

14. All powers not specified in the Constitution are reserved for the states. U.S. CONST. amend. X. Because the Constitution is silent on the matter of education, the tenth amendment implicitly confers authority on states to handle their own policy. See *id.*; Project, *Education and the Law: State Interests and Individual Rights*, 74 MICH. L. REV. 1373, 1375 n.4 (1976); Note, *The Right to Education: A Constitutional Analysis*, 44 U. CINN. L. REV. 796, 797-98 (1975). Education is both a constitutional and statutory obligation of the state. See Project, *Education and the Law: State Interests and Individual Rights*, 74 MICH. L. REV. 1373, 1375 n.4 (1976). Compare MICH. CONST. art 8, § 1 (encouragement of education) and N.C. CONST. art. IX, § 1 (education promoted) and N.Y. CONST. art. XI, § 1 (legislature to provide free schools for all children) and TEX. CONST. art. VII, § 1 (legislative duty for support and maintenance of free public schools) with CALIF. EDUC. CODE § 48200 (*Deering* 1978) (children six to sixteen subject to compulsory, full time education) and MASS. ANN. LAWS ch. 76, § 1 (*Michie/Law. Co-op* 1978) (school attendance regulated) and N.Y. EDUC. LAW § 3205 (*McKinney* 1970) (children six to sixteen shall attend full time instruction) and TEX. EDUC. CODE ANN. § 21.031(b) (*Vernon Supp.* 1980) (all children six to twenty-one permitted to attend free public school).

15. *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954); see *Lau v. Nichols*, 414 U.S. 563, 566 (1974); *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 29, 30 (1973). A distinction, however, must be recognized regarding equal educational opportunities sought by Blacks and those sought by the handicapped. See *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954). Regarding the handicapped the emphasis is not so much on equality as it is opportunity. To realize full potential the handicapped must be afforded special education in accordance with their individual needs; therefore, opportunity for the handicapped will be different than the majority of students. See *Lau v. Nichols*, 414 U.S. 563, 567-68 (1974). Equality of treatment is not given merely by providing students with the same materials. *Id.* at 566. "Equal Protection Clause does not require absolute equality or precisely equal advantages." *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 24 (1973). See generally *Dimond, The Constitutional Right to Education: The Quiet Revolution*, 24 HASTINGS L.J. 1087, 1096 (1973); *Haggerty & Sacks, Education of the Handicapped: Towards a Definition of an Appropriate Education*, 50 TEMPLE L.Q. 961, 963 (1977).

16. See, e.g., *Lora v. Board of Educ.*, 456 F. Supp. 1211, 1275-76 (E.D. N.Y. 1978); *Hairston v. Drosick*, 423 F. Supp. 180, 184-85 (S.D. W. Va. 1976); *Lebanks v. Spears*, 60 F.R.D. 135, 139 (E.D. La. 1973). See generally U.S. CONST. amend. XIV. The P.A.R.C. court outlined procedural requirements demanding parental notice and advisement of rights be given. *P.A.R.C. v. Pennsylvania*, 343 F. Supp. 279, 304 (E.D. Pa. 1972). Written notice of the proposed change in status, containing a full explanation of why it is deemed necessary must be provided to the parents of the handicapped child. *Id.* at 303-04. The parents must addi-

ation for *Retarded Children v. Pennsylvania*,¹⁷ (*P.A.R.C.*), stands as the initial landmark decision challenging the constitutionality of state statutes permitting the exclusion of individuals considered "uneducable" and "unable to profit" from education.¹⁸ The court found labeling a child mentally retarded placed a significant stigma, thus warranting due process proceedings before such label could attach.¹⁹ Acknowledging that all children benefit from an education appropriate to their needs, the parties conceded the equal protection argument by consent agreement.²⁰ The court stated that Pennsylvania, having undertaken the responsibility of providing its citizens a free, public education must provide mentally retarded children an education tailored to individual needs and placed em-

tionally be advised of the following rights inhering to a change in status proceeding: (1) alternative educational opportunities; (2) independent medical, psychological, educational evaluation; (3) full hearing to contest the proposed charges. This hearing includes the right to counsel, to access of all records, to compel attendance of and cross-examine witnesses, to present evidence and testimony, and to an expeditious disposition by the hearing officer. *Id.* at 304-05. See generally F. WEINTRAUB & A. ABESON, *NEW EDUCATION POLICIES FOR THE HANDICAPPED: THE QUIET REVOLUTION*, reprinted in *Extension of Education of the Handicapped Act: Hearings on H.R. 7217 Before the Subcomm. on Select Education of the House Comm. on Education and Labor*, 94th Cong., 1st Sess. app., at 169, 171 (1975); see also S. REP. NO. 168, 94th Cong., 1st Sess. 6, 9, reprinted in [1975] U.S. CODE CONG. & AD. NEWS 1425, 1430, 1433. The right to education, guaranteed by equal protection of the law, is no longer an issue, and Congress must actively exercise its responsibility and provide equal educational opportunities. *Id.* at 6, 9, reprinted in [1975] U.S. CODE CONG. & AD. NEWS 1430, 1433. See generally Project, *Special Education: The Struggle for Equal Educational Opportunity in Iowa*, 62 IOWA L. REV. 1283, 1367 (1977) (as of May 1977, 49 states had enacted some type of mandatory special education legislation).

17. 343 F. Supp. 279 (E.D. Pa. 1972).

18. See *id.* at 282. The Pennsylvania statute seemed to excuse any child whom a psychologist found unable to profit from compulsory school attendance. *Id.* at 282; see PA. STAT. ANN. tit. 24, § 13-1330 (Purdon 1962) (amended 1965).

19. *P.A.R.C. v. Pennsylvania*, 343 F. Supp. 279, 295 (E.D. Pa. 1972); see, e.g., *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971) (due process hearing necessary before state stigmatizes citizen); *Howard S. v. Friendswood Independent School Dist.*, 454 F. Supp. 634, 637 (S.D. Tex. 1978) (due process hearing required prior to dismissal from school); *Hairston v. Drosick*, 423 F. Supp. 180, 184 (S.D. W. Va. 1976) (due process procedures must accompany decisions regarding initial educational formula for child); cf. *Goss v. Lopez*, 419 U.S. 565, 579-80 (1975) (education is a property right); *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954) (education is a necessity to adjust and succeed in life).

20. *P.A.R.C. v. Pennsylvania*, 343 F. Supp. 279, 296 (E.D. Pa. 1972); see, e.g., *Lora v. Board of Educ.*, 456 F. Supp. 1211, 1276 (E.D. N.Y. 1978); (special educational needs must be met); *Panitch v. Wisconsin*, 444 F. Supp. 320, 322 (E.D. Wis. 1977) (meaningful education commensurate with needs); *Mills v. Board of Educ.*, 348 F. Supp. 866, 874-75 (D.C. Cir. 1972) (appropriate specialized education). See generally Dimond, *The Constitutional Right to Education: The Quiet Revolution*, 24 HASTINGS L.J. 1087, 1092 (1973); Haggerty & Sacks, *Education of the Handicapped: Towards a Definition of an Appropriate Education*, 50 TEMPLE L.Q. 961, 967 (1977).

phasis on education in the regular classroom.²¹

The P.A.R.C. principles were extended to all handicapped children in *Mills v. Board of Education*.²² Additionally, the *Mills* court held the interest in educating children far outweighs preservation of funds and found financial and administrative expense arguments unacceptable excuses for not providing proper education to all handicapped children.²³ Together, P.A.R.C. and *Mills* laid the foundation for the 1970's comprehensive legislation.²⁴

II. LEGISLATIVE INITIATIVES

A. Federal Response

In response to case law²⁵ and increasing public concern,²⁶ Congress at-

21. P.A.R.C. v. Pennsylvania, 343 F. Supp. 279, 307 (E.D. Pa. 1972). The evidence raised serious doubts that exclusion of mentally retarded children from public education had a rational basis. *Id.* at 297; *cf.* *Mills v. Board of Educ.*, 348 F. Supp. 866, 876 (D.D.C. 1972) (inadequate funding and administrative inefficiency are not acceptable arguments). See generally *Developments in the Law: Equal Protection*, 82 HARV. L. REV. 1065, 1077-1131 (1969) (reviews analysis standards of equal protection); Comment, *Legislative Notes: The Education of all Handicapped Children Act of 1975*, 10 U. MICH. J.L. REF. 110, 114-15 (1976) (discusses equal protection standards of suspect class, fundamental interest, and rational basis).

22. 348 F. Supp. 866, 878 (D.D.C. 1972). Some writers feel *Mills* is stronger precedent than P.A.R.C. since rights were extended to all handicapped children, not just to the mentally retarded, and because the holding is grounded by judicial decree rather than consent order. See F. WEINTRAUB & A. ABESON, *NEW EDUCATION POLICIES FOR THE HANDICAPPED: THE QUIET REVOLUTION*, reprinted in *Extension of Education of the Handicapped Act: Hearings on H.R. 7217 Before the Subcomm. on Select Education of the House Comm. on Education and Labor*, 94th Cong., 1st Sess. app., at 169, 171-72 (1975); Baugh, *The Federal Legislation on Equal Educational Opportunity for the Handicapped*, 15 IDAHO L. REV. 65, 70 (1978); Comment, *The Handicapped Child Has a Right to an Appropriate Education*, 55 NEB. L. REV. 637, 650 (1976).

23. *Mills v. Board of Educ.*, 348 F. Supp. 866, 876 (D.D.C. 1972); *cf.* *Goldberg v. Kelly*, 397 U.S. 254, 266 (1970) (constitutional right to due process hearing outweighs expenses involved); Dimond, *The Constitutional Right to Education: The Quiet Revolution*, 24 HASTINGS L.J. 1087, 1119 n.126 (1973) (procedural fairness has priority over arguments concerning cost). *But cf.* *Dandridge v. Williams*, 397 U.S. 471, 478 (1970) (states allowed wide degree of discretion in dealing with economic and social problems).

24. See, e.g., *Mills v. Board of Educ.*, 348 F. Supp. 866, 878 (D.D.C. 1972); P.A.R.C. v. Pennsylvania, 343 F. Supp. 279, 302 (E.D. Pa. 1972); S. REP. NO. 168, 94th Cong., 1st Sess. 11, reprinted in [1975] U.S. CODE CONG. & AD. NEWS 1425, 1444-45.

25. See *Mills v. Board of Educ.*, 348 F. Supp. 866, 878 (D.D.C. 1972); P.A.R.C. v. Pennsylvania, 343 F. Supp. 279, 302 (E.D. Pa. 1972). See generally S. REP. NO. 168, 94th Cong., 1st Sess. 6, reprinted in [1975] U.S. CODE CONG. & AD. NEWS 1425, 1430 (legislation introduced following a series of landmark cases establishing handicapped children's right to education).

26. See F. WEINTRAUB & A. ABESON, *NEW EDUCATION POLICIES FOR THE HANDICAPPED:*

tempted to solidify the rights of handicapped children by enacting laws establishing enforceable goals to assure equal educational opportunity.²⁷ Prior to this, the federal government had done little for the handicapped in the field of education.²⁸ Federal initiative took the form of a state grant program²⁹ which functioned as a catalyst for state and local programs.³⁰ The Elementary, Secondary and Other Educational Amendments of 1969 became the foundation upon which subsequent statutes were predicated.³¹ Until the 1974 and 1975 amendments the federal government continued its passive role by supplying non-matching funds.³² In the wake

THE QUIET REVOLUTION, reprinted in *Extension of Education of the Handicapped Act: Hearings on H.R. 7217 Before the Subcomm. on Select Education of the House Comm. on Education and Labor, 94th Cong., 1st Sess. app.*, at 169, 169 (1975); Dimond, *The Constitutional Right to Education: The Quiet Revolution*, 24 HASTINGS L.J. 1087, 1087 (1973).

27. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (codified at 20 U.S.C. §§ 1401, 1405-1406, 1411-1420, 1453 (1976)); Education Amendments of 1974, Pub. L. No. 93-380, 88 Stat. 579 (codified in scattered sections of 20 U.S.C. §§ 1401-1461 (1976)); Elementary and Secondary Education Amendments of 1969, Pub. L. No. 91-230, 84 Stat. 188 (codified in scattered sections of 20 U.S.C. §§ 1401-1461 (1976)); S. REP. No. 168, 94th Cong., 1st Sess. 9, reprinted in [1975] U.S. CODE CONG. & AD. NEWS 1425, 1433; Haggerty & Sacks, *Education of the Handicapped: Towards a Definition of an Appropriate Education*, 50 TEMPLE L.Q. 961, 973 (1977).

28. See S. REP. No. 168, 94th Cong., 1st Sess. 5, reprinted in [1975] U.S. CODE CONG. & AD. NEWS 1425, 1429. Title VI to the Elementary and Secondary Education Act was added in 1966 creating the Bureau of Education. Elementary and Secondary Education Amendments of 1966, Pub. L. No. 89-750, § 609, 80 Stat. 1208 (codified in scattered sections of 20 U.S.C. §§ 1401-1461 (1976)). The Bureau was designed to cure the ineffectiveness of existing programs. S. REP. No. 168, 94th Cong., 1st Sess. 5, reprinted in [1975] U.S. CODE CONG. & AD. NEWS 1425, 1429.

29. See Elementary and Secondary Education Amendments of 1969, Pub. L. No. 91-230, 84 Stat. 188 (codified in scattered sections of 20 U.S.C. §§ 1401-1461 (1976)). Subsequently, Senate Bill 896 was passed extending the provisions of Public Law 91-230 to ensure continued funding to initiate and improve programs for the handicapped. See S. REP. No. 168, 94th Cong., 1st Sess. 5, reprinted in [1975] U.S. CODE CONG. & AD. NEWS 1425, 1429.

30. See *id.*

31. See Elementary and Secondary Education Amendments of 1969, Pub. L. No. 91-230, 84 Stat. 188 (codified in scattered sections of 20 U.S.C. §§ 1401-1461 (1976)) (repealing Pub. L. No. 89-750, Title VI and establishing Education of the Handicapped Act). Part B, aid to the states, laid the foundation for subsequent amendments. See Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (codified at 20 U.S.C. §§ 1401, 1405-1406, 1411-20, 1453 (1976)); Education Amendments of 1974, Pub. L. No. 93-380, 88 Stat. 579 (codified in scattered sections of 20 U.S.C. §§ 1401-1461 (1976)); S. REP. No. 168, 94th Cong., 1st Sess. 5-6, reprinted in [1975] U.S. CODE CONG. & AD. NEWS 1425, 1429-30.

32. See S. REP. No. 168, 94th Cong., 1st Sess. 5, reprinted in [1975] U.S. CODE CONG. & AD. NEWS 1425, 1429. Congress sought to take a more active role ensuring these rights were protected as opposed to previous passive, unenforceable requirements that all children be in school. *Id.* at 5-6, 9, reprinted in [1975] U.S. CODE CONG. & AD. NEWS 1425, 1429-31, 1433; Comment, *Legislative Notes: The Education of All Handicapped Children Act of 1975*, 10

of the pronouncements of *P.A.R.C.* and *Mills*, Congress enacted the Education Amendments of 1974 which incorporated the major principle of the "right to education" cases.³³ The amendment required each state to establish a goal of full educational opportunity as a prerequisite to federal funding.³⁴ Two primary objectives concerning handicapped children became firmly engrained: provision for a free, appropriate public education, and the "guarantee of the essential rights of handicapped children and their parents within the total educational environment."³⁵

B. *Texas Response*

Texas, by comparison, has actively pursued responsibility in recognizing the plight of handicapped individuals.³⁶ Originally, the only identifiable sources of state support were the State Deaf and Dumb Institute and the State Institution for the Blind, both established in 1854.³⁷ In 1945 the

U. MICH. J.L. REF. 110, 119 (1976).

33. Pub. L. No. 93-380, 88 Stat. 579 (codified in scattered sections of 20 U.S.C. §§ 1401-1461 (1976)); see S. REP. NO. 168, 94th Cong., 1st Sess. 8, reprinted in [1975] U.S. CODE CONG. & AD. NEWS 1425, 1432.

34. Pub. L. No. 93-380, 88 Stat. 579 (codified at 20 U.S.C. § 1412(2)(a)(i) (1976)); see S. REP. NO. 168, 94th Cong., 1st Sess. 6-7, reprinted in [1975] U.S. CODE CONG. & AD. NEWS 1425, 1432. The Education Amendments of 1974 firmly established a basic aid program available to the states and the Bureau of Education for the Handicapped. *Extension of Education of the Handicapped Act: Hearings on H.R. 7217 Before the Subcomm. on Select Education of the House Comm. on Education and Labor*, 94th Cong., 1st Sess. 28 (1975) (statement of Frederick J. Weintraub). The amendment mandated preparation and submission by states of a "comprehensive blueprint for the education of all handicapped children." *Id.* at 28. Plans submitted thereunder are to include, among other things, priority in use of funds for children not now receiving an education; a provision guaranteeing due process to children and their parents; and a plan showing how children will be educated in the least restrictive environment; and how they will be classified in a non-discriminatory manner. *Id.* at 28.

35. *Id.* at 28; see, e.g., *Mills v. Board of Educ.*, 348 F. Supp. 866, 875-76 (D.D.C. 1972); *P.A.R.C. v. Pennsylvania*, 343 F. Supp. 279 285, 303 (E.D. Pa. 1972); Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (codified at 20 U.S.C. §§ 1412, 1415 (1976)). See generally Comment, *Legislative Notes: The Education of All Handicapped Children Act of 1975*, 10 U. MICH. J.L. REF. 110, 120 (1976).

36. See, e.g., S. REP. NO. 168, 94th Cong., 1st Sess. 11, reprinted in [1975] U.S. CODE CONG. & AD. NEWS 1425, 1425 (Texas statute enacted in 1969); JOINT INTERIM COMM. ON SPECIAL EDUCATION 66TH LEGISLATURE OF TEXAS, REPORT ON EDUCATION FOR THE HANDICAPPED CHILDREN OF TEXAS 13 (1979) [hereinafter cited as SPECIAL EDUC. REPORT]. As reported by the Interim Committee, implementation of Plan A placed Texas in a "national leadership role in special education." SPECIAL EDUC. REPORT, *supra*, at 13; see EARLY CHILDHOOD DEVELOPMENT DIVISION, TEXAS DEPARTMENT OF COMMUNITY AFFAIRS, LAWS AFFECTING HANDICAPPED CHILDREN IN TEXAS: A SUMMARY 21 (1977).

37. SPECIAL EDUC. REPORT, *supra* note 36, at 9.

state began allocating funds for special education.³⁸ With enactment of The Special Educational Services for Exceptional Children Act³⁹ Texas began to acknowledge its responsibility of providing educational opportunities to all children of the state.⁴⁰ Of particular significance was the provision requiring eligible physically handicapped children be provided with special services to make school attendance possible.⁴¹ Today special education,⁴² supplemented with related services, forms a fundamental component of the free, appropriate public education to be accorded all handicapped children.⁴³

The Foundation School Program,⁴⁴ established by the legislature to fund the needs of the public school system, has promoted financial stability of special education programs.⁴⁵ Between 1949 and 1969 incremental changes in basic policy evolved as insight into handicapped needs was

38. SPECIAL EDUC. REPORT, *supra* note 36, at 9 (from 1854 to 1945 support for special education classes was found in large urban areas).

39. 1945 Tex. Gen. Laws, ch. 369, art I, § 2, at 668.

40. *See id.* at 668. The purpose of the Act was to provide an education for exceptional children ages 6-17. *Id.* art. I, § 1, at 668. An exceptional child was defined as "any child of educable mind whose bodily functions or members are so impaired that he cannot be safely or adequately educated in the regular classes of the public schools without the provision of special services." *Id.* art. I, § 2, at 668. This section explicitly excluded children eligible for the state blind or deaf schools. *Id.* art. I, § 2, at 668. The Act also created a Division of Special Education within the State Department of Education, which had responsibility for the program of educating exceptional children. *Id.* art. II, § 2, at 669. Feebleminded children were specifically excluded by the Education of Exceptional Children Act in the next legislature. 1947 Tex. Gen. Laws, ch. 136, § 2, at 233; *see* SPECIAL EDUC. REPORT, *supra* note 36, at 11.

41. 1945 Tex. Gen. Laws, ch. 369, art I, § 2, at 668. Special services included: "transportation; special teaching in the public school curriculum; corrective teaching, such as lip reading, speech correction, sight conservation, and corrective health habits; the provision of special seats, books and teaching supplies, and equipment." *Id.* art. I, § 2, at 668; *see* SPECIAL EDUC. REPORT, *supra* note 36, at 11.

42. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 776 (codified at 20 U.S.C. § 1401(16) (1976)). Special education is to be provided a child in accordance with his specific needs at no cost to the parent. Instruction in classrooms, at home, in hospitals, and in physical education are specifically enumerated. 45 C.F.R. § 121a.14 (1979).

43. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 775 (codified at 20 U.S.C. § 1401(17) (1976)). Related services include such services as may be required to enable the handicapped child to benefit from education. Such services include transportation, speech pathology, psychological services, and counseling services. *Id.*; *see* 45 C.F.R. § 121a.13 (1979).

44. 1949 Tex. Gen. Laws, ch. 334, art. I, § 1 & art. II, § 1, at 626. The Foundation School Program was enacted to guarantee a child education at least nine months a year. *Id.* art. I, § 1, at 626; *see* McKinney v. Blankenship, 154 Tex. 632, 641, 282 S.W.2d 691, 698 (1955); SPECIAL EDUC. REPORT, *supra* note 36, at 11.

45. SPECIAL EDUC. REPORT, *supra* note 36, at 11.

gained.⁴⁶ In 1969 The Comprehensive Special Education Program for Exceptional Children Act,⁴⁷ Plan A, was enacted to provide a uniform, coordinated special education policy and to remedy inadequacies in funding provisions.⁴⁸ Among the more important subsequent amendments of this comprehensive approach were the expanded role given the regional education service centers for coordinating services to handicapped children,⁴⁹ the definition of impediments to be covered,⁵⁰ and the funding priorities that stressed the need for identifying children with handicaps.⁵¹

Although emphasis shifted to a comprehensive approach under Plan A, categorical program development kept pace.⁵² The Central Education Agency was mandated to develop a statewide plan designing appropriate services for deaf and blind individuals.⁵³ The emphasis behind such legislation was to give these handicapped children the same opportunities as their non-handicapped peers⁵⁴ while accomodating those with varying degrees of impairment.⁵⁵ Primarily, education was to be provided in the student's home district supplemented with special education services⁵⁶

46. See, e.g., 1969 Tex. Gen. Laws, ch. 95, § 1, at 248 (pregnancy provision added); 1963 Tex. Gen. Laws, ch. 471, § 1, at 1186 (emotionally disturbed added to list of eligibles; coverage extended to age 21); 1951 Tex. Gen. Laws, ch. 39, § 1, at 65 (mentally retarded included in definition of eligibles); SPECIAL EDUC. REPORT, *supra* note 36, at 12.

47. 1969 Tex. Gen. Laws, ch. 863, § 1, at 2602.

48. *Id.* § 5, at 2605-06; see SPECIAL EDUC. REPORT, *supra* note 36, at 12.

49. 1977 Tex. Gen. Laws, 1st Spec. Sess., ch. 1, § 19, at 36. The regional education service centers were given responsibility to assist local school districts in identifying handicapped children and existing services supporting the handicapped. *Id.* at 36; see SPECIAL EDUC. REPORT, *supra* note 36, at 17.

50. See, e.g., 1975 Tex. Gen. Laws, ch. 398, § 1, at 1032-33 (multiple handicapped provision included); 1973 Tex. Gen. Laws, ch. 287, § 1, at 687-88 (autistic children added); 1969 Tex. Gen. Laws, ch. 863, § 1, at 2603 (learning and language disability category added); SPECIAL EDUC. REPORT, *supra* note 36, at 14.

51. See 1977 Tex. Gen. Laws, 1st Spec. Sess., ch. 1, § 7, at 23 (first priority to handicap children not receiving education; then to those within each disability receiving an inappropriate education); SPECIAL EDUC. REPORT, *supra* note 36, at 14.

52. See SPECIAL EDUC. REPORT, *supra* note 36, at 18.

53. 1975 Tex. Gen. Laws, ch. 734, § 23, at 2397 (blind); 1973 Tex. Gen. Laws, ch. 574, § 1, at 1591 (deaf); see SPECIAL EDUC. REPORT, *supra* note 36, at 18-23.

54. See 1975 Tex. Gen. Laws, ch. 734, § 23, at 2397; 1973 Tex. Gen. Laws, ch. 574, § 1, at 1591; SPECIAL EDUC. REPORT, *supra* note 36, at 19, 21.

55. See 1975 Tex. Gen. Laws, ch. 734, § 13, at 2384-85; 1973 Tex. Gen. Laws, ch. 574, § 1, at 1591-92.

56. See 1973 Tex. Gen. Laws, ch. 574, § 1, at 1591-92. The primary support established for the deaf by this legislation was the Regional Day School Program. Program objectives sought to provide service to handicapped children ages 3-21, emphasizing education in the local school district supplemented by the regional day school as appropriate for individual needs. *Id.* at 1591. Alternatively, placement could be made available in residential facilities or foster homes to enable the child to attend the day school. *Id.* at 1591-92; SPECIAL EDUC. REPORT, *supra* note 36, at 19. To accommodate the blind and visually handicapped the Cen-

deemed appropriate for the needs of the individual.⁵⁷ Enrollment in the Texas School for the Deaf or Blind is still an option after determining the child's best interests would be served.⁵⁸ Best interests can only be determined after periodic evaluation of the child's needs in light of his individual education formula.⁵⁹

C. 94-142 and Texas Compliance

The rights of the handicapped to education culminated in Public Law 94-142.⁶⁰ This legislation was intended to provide a mechanism to ensure enforcement of due process and equal protection rights enacted in the 1974 education amendments.⁶¹ The statute and regulations promulgated under Public Law 94-142 set forth specific requirements states must meet to be eligible to receive federal funds.⁶² The Texas Legislature has continued to respond to the impetus created by Public Law 94-142.⁶³ The comprehensive system that evolved throughout the 1970's, a consequence of legislative acknowledgement of both judicial and federal government mandates, is embodied in three instruments⁶⁴ serving to bring Texas law,

tral Education Agency, in accordance with legislative mandate, established the visually handicapped program. 1975 Tex. Gen. Laws, ch. 734, § 23(a) at 2397; see SPECIAL EDUC. REPORT, *supra* note 36, at 21. The program was designed around the needs of the individual with emphasis on education in the home community. An "individualized written service plan" is to be written setting forth the child's particular education formula. 1975 Tex. Gen. Laws, ch. 734, §§ 13(e), 23(c), at 2384, 2398. The local district is to implement the formula by retaining the student in the district, by contracting services with available public and private agencies, or by using any pertinent resource available. See *id.* at 2398-99; SPECIAL EDUC. REPORT, *supra* note 36, at 21-22.

57. 1975 Tex. Gen. Laws, ch. 734, §§ 13(e), 23(c), at 2384-85, 2398; 1973 Tex. Gen. Laws, ch. 574, § 1(o)(6), at 1592.

58. See 1975 Tex. Gen. Laws, ch. 734, § 19(1), (3), at 2393; 1973 Tex. Gen. Laws, ch. 574, § 1(o)(4), at 1592.

59. See 1975 Tex. Gen. Laws, ch. 734, §§ 13(e)(10), 23(e) at 2385, 2398; 1973 Tex. Gen. Laws, ch. 574, § 1(o)(5), at 1592.

60. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (codified at 20 U.S.C. §§ 1401, 1405-1406, 1411-1420, 1453 (1976)).

61. S. REP. NO. 168, 94th Cong., 1st Sess. 6, reprinted in [1975] U.S. CODE CONG. & AD. NEWS 1425, 1430; see *Extension of Education of the Handicapped Act: Hearings on H.R. 7217 Before the Subcomm. on Select Education of the House Comm. on Education and Labor*, 94th Cong., 1st Sess. 28, 29 (1975) (statement of Frederick J. Weintraub).

62. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 780 (codified at 20 U.S.C. §§ 1412-1414 (1976)); see 45 C.F.R. § 121a.110-.240 (1979).

63. See TEX. EDUC. CODE ANN. § 16.104 (Vernon Supp. 1980); 1977 Tex. Gen. Laws, 1st Spec. Sess., ch. 1, § 7, at 19; SPECIAL EDUC. REPORT, *supra* note 36, at 24.

64. See TEX. EDUC. AGENCY, TEXAS STATE PLANNING DESIGN FOR THE EDUCATION OF HANDICAPPED CHILDREN; TEX. EDUC. AGENCY, FISCAL YEAR 1981-83 STATE PLAN FOR PART B OF THE EDUCATION OF THE HANDICAPPED ACT AS AMENDED BY PUBLIC LAW 94-142 (Jan. 1980) (at regional education service centers for comment and criticism by public) [hereinafter

policy, and procedure into conformance with the federal mandates.⁶⁵

To be eligible for receipt of funds under Public Law 94-142, a state must submit a state plan⁶⁶ for approval by the Commissioner of Education.⁶⁷ The state plan must detail policies and procedures for providing all handicapped children ages three to twenty-one with a "free appropriate public education" by September 1, 1980.⁶⁸ It is clear each state must conform to specific priorities⁶⁹ in the "identification, location and evaluation" of handicapped children.⁷⁰ Those children receiving no education

cited as STATE PLAN]; TEX. EDUC. AGENCY, FISCAL YEAR 1980 ANNUAL PROGRAM PLAN FOR PART B OF THE EDUCATION OF THE HANDICAPPED ACT AS AMENDED BY PUBLIC LAW 94-142 (May 1979) (plan presently in effect) [hereinafter cited as ANNUAL PROGRAM PLAN]; TEX. EDUC. AGENCY, POLICIES AND ADMINISTRATIVE PROCEDURES FOR THE EDUCATION OF HANDICAPPED STUDENTS (1980) (Pub. No. APO 87101) (State Board of Education policies and procedures) [hereinafter cited as POLICIES & PROCEDURES].

65. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 780 (codified at 20 U.S.C. § 1412 (1976)) (each state must establish plan); TEX. EDUC. CODE ANN. § 16.104(a) (Vernon Supp. 1980) (authority for development of statewide design).

66. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 780 (codified at 20 U.S.C. § 1412(2) (1976)); see 45 C.F.R. § 121a.110 (1979). The plan must be made available for public review and comment. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 782 (codified at 20 U.S.C. § 1412(7) (1976)); see 45 C.F.R. §§ 121a.120, .280-.284 (1979). The Texas State Plan was on review at regional education service centers and local districts from February 1, 1980 through March 19, 1980. See STATE PLAN, *supra* note 64, at 1.

67. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 784 (codified at 20 U.S.C. § 1413(c) (1976)) (commissioner to review plan for compliance with §§ 1412, 1413); see 45 C.F.R. § 121a.113 (1979).

68. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 780 (codified at 20 U.S.C. § 1412(1), (2)(B) (1976)); 45 C.F.R. §§ 121a.121, .122 (1979); see TEX. EDUC. CODE ANN. § 16.104(a) (Vernon Supp. 1980). States must make provisions to serve all handicapped children notwithstanding the severity of their impediment. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 780, 781 (codified at 20 U.S.C. § 1412(1), (2)(c) (1976)). A "free appropriate public education" is defined as special education and related services formulated in accordance with the needs of the individual handicapped child provided without expense to the parent." Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 775 (codified at 20 U.S.C. § 1401 (18) (1976)); 45 C.F.R. § 121a.4 (1979); see STATE PLAN, *supra* note 64, at 5-6; ANNUAL PROGRAM PLAN, *supra* note 64, at 5-6; POLICIES & PROCEDURES, *supra* note 64, 35.71.010, at 1-2.

69. See, e.g., Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 781 (codified at 20 U.S.C. § 1412(3) (1976)) (section 1413 sets forth specific requisites for inclusion in the State plan); *id.* at 785 (codified at 20 U.S.C. § 1414(a)(1)(C)(ii) (1976)) (sets forth requisites for inclusion in local educational district application for funds); TEX. EDUC. CODE ANN. § 16.104(q) (Vernon Supp. 1980) (establishes priorities in accordance with federal mandate); 45 C.F.R. §§ 121a.127, .320-.324 (1979). See generally STATE PLAN, *supra* note 64, at 9-10; ANNUAL PROGRAM PLAN, *supra* note 64, at 9-15; POLICIES & PROCEDURES, *supra* note 64, 35.71.010, at 2.

70. Education for All Handicapped Children of 1975, Pub. L. No. 94-142, 89 Stat. 781, 784 (codified at 20 U.S.C. §§ 1412(2)(C), 1414(a)(1)(A) (1976)); see TEX. EDUC. CODE ANN.

are to be given first priority; second priority goes to those most severely handicapped within each disability who receive inappropriate education.⁷¹ To ensure proper identification and appropriate education, the regulations require individual preplacement evaluation, placement procedures, and reevaluation.⁷² Placement of the child is to be in the "least restrictive environment" considered appropriate for the assessed needs.⁷³ The emphasis of the "least restrictive environment" provision is that each handicapped child is to be educated to the maximum extent possible with non-handicapped peers.⁷⁴ Removal of the child from the regular classroom is to occur only when an appropriate education cannot be provided, even with the aid of supplemental services,⁷⁵ because of the nature or severity

§ 11.33(c) (Vernon Supp. 1980); 45 C.F.R. §§ 121a.128, .220 (1979); STATE PLAN, *supra* note 64, at 11-16; ANNUAL PROGRAM PLAN, *supra* note 64, at 17-19; POLICIES & PROCEDURES, *supra* note 64, 35.72.020-.030, at 11.

71. Education for All Handicapped Children of 1975, Pub. L. No. 94-142, 89 Stat. 781, 785 (codified at 20 U.S.C. §§ 1412(3), 1414(a)(1)(C)(ii) (1976)); TEX. EDUC. CODE ANN. § 16.104(q) (Vernon Supp. 1980); 45 C.F.R. §§ 121a.127, .225, .320-.324 (1979); *see* STATE PLAN, *supra* note 64, at 9; ANNUAL PROGRAM PLAN, *supra* note 64, at 9; POLICIES & PROCEDURES, *supra* note 64, 35.71.010, at 2.

72. 45 C.F.R. §§ 121a.133, .530-.534 (1979). Prior to initial placement each child must be given full evaluation using methods, materials, and administrative procedures in a non-discriminatory manner, racially and culturally. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 781 (codified at 20 U.S.C. § 1412(5)(C) (1976)); *see* Larry P. v. Riles, 343 F. Supp. 1306, 1315 (N.D. Cal. 1972), *aff'd*, 502 F.2d 963 (9th Cir. 1974). *See generally* Alschuler, *Education for the Handicapped*, 7 J. L. & Educ. 523, 533-34 (1978); Dimond, *The Constitutional Right to Education: The Quiet Revolution*, 24 HASTINGS L.J. 1087, 1088-89 (1973). The primary thrust of the section focuses on evaluation specifically geared for each child in all areas "related to the suspected disability, including . . . health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status and motor abilities." 45 C.F.R. § 121a.532 (1979); *see* STATE PLAN, *supra* note 64, at 11-16, 49-66; ANNUAL PROGRAM PLAN, *supra* note 64, at 17-19, 49-60; POLICIES & PROCEDURES, *supra* note 64, 35.72.030, at 14-28.

73. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 781 (codified at 20 U.S.C. §§ 1412(5)(B), 1414(a)(1)(C)(iv) (1976)); TEX. EDUC. CODE ANN. § 16.104(a)(8) (Vernon Supp. 1980); *see* 45 C.F.R. §§ 121a.132, .227, .550-.556 (1979); STATE PLAN, *supra* note 64, at 43-47; ANNUAL PROGRAM PLAN, *supra* note 64, at 43-46; POLICIES & PROCEDURES, *supra* note 64, 35.71.010, at 2. *See generally* Lora v. Board of Educ., 456 F. Supp. 1211, 1267 (E.D. N.Y. 1978); Halderman v. Pennhurst State School & Hosp., 446 F. Supp. 1295, 1319 (E.D. Pa. 1977). The state in pursuit of its legitimate objective, when considering the principle of least restrictive alternative, must select means which accomplish its purpose with the least infringement of individual liberty. *See* Halderman v. Pennhurst State School & Hosp., 446 F. Supp. 1295, 1319 (E.D. Pa. 1977); *cf.* Aptheker v. Secretary of State, 378 U.S. 500, 517 (1964) (freedom of travel is a constitutional liberty closely related to freedom of speech and association); Shelton v. Tucker, 364 U.S. 479, 485-86 (1960) (compelling disclosure of associational ties impairs right of free association).

74. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 781 (codified at 20 U.S.C. § 1412(5)(B) (1976)); 45 C.F.R. § 121a.550 (1979).

75. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat.

of the handicap.⁷⁶ The components of free appropriate education, proper placement, and least restrictive environment, establish the requisites of a child's "individualized education program."⁷⁷ The child is to be reevaluated at least annually to determine whether the plan is still appropriate.⁷⁸

Of major importance throughout the statute and accompanying regulations are due process procedures⁷⁹ incorporated from the right to education cases.⁸⁰ The public agency is required to take affirmative steps to ensure the parent has every opportunity to participate in the development of his child's individualized program.⁸¹ The right to examine records is available not only with respect to the individual education program but covers any aspect of free appropriate education, identification, evaluation,

775 (codified at 20 U.S.C. § 1401(17) (1976)); see 45 C.F.R. § 121a.13 (1979). The list of related services is not exclusive but this section provides an idea of the support systems available: counseling, medical and psychological services, recreation, speech pathology, and transportation. 45 C.F.R. § 121a.13 (1979). These services are to be provided in regular and special classes, home instruction, and any compatible combination that serves the needs of the handicapped child. See *id.* § 121a.551.

76. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 781 (codified at 20 U.S.C. § 1412(5)(B) (1976)); see 45 C.F.R. § 121a.550 (1979).

77. See Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142 (codified at 20 U.S.C. §§ 1401(1), (19), 1414(a) (1976)). The individualized education program consists of a statement of present level of educational performance and the specifics to be provided the child in order to reach short and long term goals established in accordance with the anticipated duration of the program. See Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 776 (codified at 20 U.S.C. § 1401(19) (1976)); STATE PLAN, *supra* note 64, at 17-22; ANNUAL PROGRAM PLAN, *supra* note 64, at 21-24; POLICIES & PROCEDURES, *supra* note 64, 35.72.040-.050, at 37-39.

78. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 776, 781, 786 (codified at 20 U.S.C. §§ 1401(19), 1412(4), 1414(a)(5) (1976)); 45 C.F.R. § 121a.343(d) (1979); see STATE PLAN, *supra* note 64, at 67-68; ANNUAL PROGRAM PLAN, *supra* note 67, at 61-63; POLICIES & PROCEDURES, *supra* note 64, 35.72.070, at 42-45.

79. See Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 781 (codified at 20 U.S.C. § 1412(5)(A) (1976)); 45 C.F.R. §§ 121a.237, .500-.514 (1979); STATE PLAN, *supra* note 64, at 23-24; ANNUAL PROGRAM PLAN, *supra* note 64, at 25-42; POLICIES & PROCEDURES, *supra* note 64, 35.75.070, at 114-20; Howard S. v. Friendswood Independent School Dist., 454 F. Supp. 634, 637 (S.D. Tex. 1978); Hairston v. Drosick, 423 F. Supp. 180, 185 (S.D. W. Va. 1976); cf. Lebanks v. Spears, 60 F.R.D. 135, 140-41 (E.D. La. 1973) (decision based on Louisiana statutory provisions). The question of "due process" is not merely the "weight" of the individual's interest, but whether the nature of the interest is within contemplation of "liberty or property" language of the fourteenth amendment. Morrissey v. Brewer, 408 U.S. 471, 481 (1972); cf. Goss v. Lopez, 419 U.S. 565, 574 (1975) (education is a property right).

80. See Mills v. Board of Educ., 348 F. Supp. 866, 880 (D.D.C. 1972); P.A.R.C. v. Pennsylvania, 343 F. Supp. 279, 302-03 (E.D. Pa. 1972).

81. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 781 (codified at 20 U.S.C. §§ 1412(4), (5)(A), (6), 1415(a) (1976)); 45 C.F.R. § 121a.345 (1979); see STATE PLAN, *supra* note 64, at 18; ANNUAL PROGRAM PLAN, *supra* note 64, at 22-23; POLICIES & PROCEDURES, *supra* note 64, 35.72.040, at 35.

and placement of the child.⁸² Prior to any proposed change in the education formula of the child, the parent must be given written notice.⁸³ Should the parent disagree with the child's evaluation he may seek an independent examiner's opinion.⁸⁴ If no resolution between parent and agency can be reached, either party may initiate a hearing conducted by an impartial hearing officer.⁸⁵ The parties to the suit have the right to counsel and to an individual knowledgeable in the field of special education, to present evidence, confront and cross-examine witnesses, and to written findings of facts and decisions.⁸⁶ "Any party aggrieved by" the outcome of the hearing may appeal to the State Education Agency⁸⁷ and then to civil court if an agreement is not reached.⁸⁸

The preceding analysis indicates Texas law and policy extensively conforms with federal mandates at least with regard to the basic system of

82. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 788 (codified at 20 U.S.C. § 1415(b)(1)(A) (1976)); *see id.* at 781 (codified at 20 U.S.C. § 1412(5)(A) (1976)); 45 C.F.R. §§ 121a.131, .500-.514 (1979); STATE PLAN, *supra* note 64, at 25, 32; ANNUAL PROGRAM PLAN, *supra* note 64, at 27; POLICIES & PROCEDURES, *supra* note 64, 35.75.070, at 115-117.

83. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 788 (codified at 20 U.S.C. § 1415(b)(1)(C), (D) (1976)); 45 C.F.R. § 121a.504 (1979); *see* STATE PLAN, *supra* note 64, at 26; ANNUAL PROGRAM PLAN, *supra* note 64, at 34, 35; POLICIES & PROCEDURES, *supra* note 64, 35.75.070(1)(B)(c), at 114. Parents must be given notice of any change in the child's education formula; however, after initial placement, changes need not be subject to parental consent. 45 C.F.R. § 121a.504 (1979) (comment).

84. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 788 (codified at 20 U.S.C. § 1415(b)(1)(A) (1976)); 45 C.F.R. § 121a.503 (1979) (hearing provided at public expense unless a final hearing decision determines the education plan is appropriate; parent must then pay for independent evaluation); *see* STATE PLAN, *supra* note 64, at 27-28. *See generally* POLICIES & PROCEDURES, *supra* note 64, 35.75.070(1)(E)(ii), at 119.

85. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 788 (codified at 20 U.S.C. § 1415(b)(2) (1976)); 45 C.F.R. §§ 121a.506-.507 (1979); STATE PLAN, *supra* note 66, at 37, 38. Although not required by statute or regulation, Texas and other states have provisions for an informal mediation process to try to resolve parent-agency disputes concerning identification, evaluation, education placement of the child, and provisions of their free appropriate public education. 45 C.F.R. § 121a.506 (1979) (comment); *see* STATE PLAN, *supra* note 64, at 33; ANNUAL PROGRAM PLAN, *supra* note 64, at 29(c)(2); POLICIES & PROCEDURES, *supra* note 64, 35.75.070(1)(G), at 119-20.

86. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 789 (codified at 20 U.S.C. § 1415(d) (1976)); 45 C.F.R. § 121a.508 (1979); ANNUAL PROGRAM PLAN, *supra* note 64, at 30.

87. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 789 (codified at 20 U.S.C. § 1415(c) (1976)); 45 C.F.R. § 121a.510 (1979); STATE PLAN, *supra* note 64, at 35-36; ANNUAL PROGRAM PLAN, *supra* note 64, at 38-39.

88. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 789 (codified at 20 U.S.C. § 1415(e) (1976)); 45 C.F.R. § 121a.511 (1979).

special education built around comprehensive child centered services.⁸⁹ Texas has a program for identifying children in need of special education through public awareness campaigns and referral processes.⁹⁰ Once identified in possible need of assistance,⁹¹ the child is assessed through a battery of exams and interviews to determine his physical, mental, and emotional levels,⁹² as well as education and learning proficiency levels.⁹³ The assessment is designed to assist the admission, review, and dismissal committee in establishing an appropriate education formula embodied in the individualized education program drawn for each child.⁹⁴ The child's progress is to be reviewed at least annually,⁹⁵ and due process procedures insure that parents and child have a viable means of enforcing rights under state and federal law.⁹⁶ The conformity of Texas legislation and policy to federal mandate can be questioned when considering whether it reaches all handicapped children.⁹⁷ The state education agency is given primary responsibility for implementing the provisions of Public Law 94-142.⁹⁸ The Act designates this agency singly responsible for all public ed-

89. See TEX. EDUC. CODE ANN. §§ 11.03, .052, .10, .103, .32, .33, 16.104 (Vernon Supp. 1980). See generally POLICIES & PROCEDURES, *supra* note 64, 35.72.010-.070, at 14-45; SPECIAL EDUC. REPORT, *supra* note 36, at 26. The program elements of the plan are: The Basic Special Education Program; The Regional Day School Program for the Deaf; Comprehensive Services for the Visually Handicapped; The Texas School for the Blind and Texas School for the Deaf; and Handicapped Services of Regional Education Service Centers. POLICIES & PROCEDURES, *supra* note 64, 35.73.010-.060, at 47-104; SPECIAL EDUC. REPORT, *supra* note 36, at 25-26.

90. See POLICIES & PROCEDURES, *supra* note 64, 35.72.020, at 11-12; SPECIAL EDUC. REPORT, *supra* note 36, at 26.

91. Criteria for determining potentially handicapping conditions has recently been expanded. The definition now includes orthopedically impaired, other health impediments (chronic or acute health problems), and auditorial and speech handicaps. See TEX. EDUC. CODE ANN. § 16.104(c) (Vernon Supp. 1980); POLICIES & PROCEDURES, *supra* note 64, 35.72.030(7), at 29-31.

92. POLICIES & PROCEDURES, *supra* note 64, 35.72.030, at 15-16. Five areas must be assessed with regard to physical, mental, and emotional condition: language, physical, emotional/behavioral, sociological, intellectual. POLICIES & PROCEDURES, *supra* note 64, 35.72.030, at 16-18; see SPECIAL EDUC. REPORT, *supra* note 36, at 26.

93. POLICIES & PROCEDURES, *supra* note 64, 35.72.030(4), (5), at 19-20.

94. See POLICIES & PROCEDURES, *supra* note 64, 35.72.040, at 31-39; SPECIAL EDUC. REPORT, *supra* note 36, at 26.

95. See POLICIES & PROCEDURES, *supra* note 64, 35.72.070, at 42-45 (informal review every three months; formal review yearly); SPECIAL EDUC. REPORT, *supra* note 36, at 26.

96. See STATE PLAN, *supra* note 64, at 23-43; ANNUAL PROGRAM PLAN, *supra* note 64, at 25-43; POLICIES & PROCEDURES, *supra* note 64, 35.75.070, at 114-20.

97. See generally SPECIAL EDUC. REPORT, *supra* note 36, at 41-44.

98. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 781 (codified at 20 U.S.C. § 1412(6) (1976)); 45 C.F.R. §§ 121a.134, .600 (1979). The state education agency not only has responsibility for ensuring compliance by public agencies but also for private agencies when a child is either referred to or placed in such agency by the

ucation provided for the handicapped⁹⁹ and all private education when such agencies are involved in a child's education formula.¹⁰⁰ One of the primary reasons for the ineffectiveness of prior legislation was lack of strong, unified leadership.¹⁰¹ The Texas Education Agency has been given direct authority over the basic elements of the comprehensive special education program.¹⁰² There are, however, a variety of state agencies providing educational services¹⁰³ and others providing support services.¹⁰⁴ State policies establishing the Texas Education Agency's responsibility for this inclusive approach support this coordinated effort,¹⁰⁵ but in order to present a "unified declaration of all state policy in regard to the education of handicapped children" the Texas Education Code should be amended to reflect unified direction.¹⁰⁶ In this manner all state agencies rendering services in support of education for the handicapped would be required by statute to comply with policies and procedures promulgated by the State Board of Education.¹⁰⁷

public agency. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 783 (codified at 20 U.S.C. § 1413(a)(4)(B) (1976)); 45 C.F.R. § 121a.401 (1979).

99. 45 C.F.R. § 121a.600 (1979) (comment); see Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 781 (codified at 20 U.S.C. § 1421(6) (1976)).

100. See Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 783 (codified at 20 U.S.C. § 1413(a)(4)(B) (1976)); 45 C.F.R. 121a.400 (1979).

101. S. REP. NO. 168, 94th Cong., 1st Sess. 5, reprinted in [1975] U.S. CODE CONG. & AD. NEWS 1425, 1429.

102. See TEX. EDUC. CODE ANN. §§ 11.03, .052, .10, .103, .32, .33, 16.104 (Vernon Supp. 1980).

103. See SPECIAL EDUC. REPORT, *supra* note 36, at 27-34 (Department of Mental Health and Mental Retardation; Texas Youth Council; Department of Corrections; Texas Rehabilitation Commission).

104. See SPECIAL EDUC. REPORT, *supra* note 36, at 34-38 (Governor's Coordinating Office for the Visually Handicapped; State Commission for the Blind; Texas Commission for the Deaf; Texas Department of Health; Texas Department of Human Resources; State Board of Control; Texas Department of Community Affairs; Texas Board of Physical Therapy Examiners; State Board of Examiners of Psychologists).

105. See POLICIES & PROCEDURES, *supra* note 64, at 47; SPECIAL EDUC. REPORT, *supra* note 36, at 25, 26.

106. SPECIAL EDUC. REPORT, *supra* note 36, at 76 (recommendation 4). "Statements of general program context appear in statute with regard to most other services to handicapped children. Sound legislative policy should require such a basic declaration, particularly with respect to the comprehensive program." *Id.* at 76 (recommendation 4, commentary). See generally TEX. EDUC. CODE ANN. §§ 11.03, .052, .06, .10, .32, .33, 16.104 (Vernon Supp. 1980) (Texas Education Agency assigned to administer these provisions). The state can meet its responsibility by statute, regulation, or agreement between agency officials. 45 C.F.R. § 121a.600 (1979) (comment); see Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 781 (codified at 20 U.S.C. § 1412(6) (1976)).

107. SPECIAL EDUC. REPORT, *supra* note 36, at 76 (recommendation 5). The present and pending State Plan reflect that agency efforts are being coordinated through interagency agreements. STATE PLAN, *supra* note 64, at 102 (agreements drafted); ANNUAL PROGRAM

III. CONCLUSION

Texas has made commendable progress in implementing the national goal of providing appropriate education for handicapped children.¹⁰⁸ Prior to *Brown*, Texas had been accommodating changing needs by its early legislation in a manner considered appropriate for the times. Judicial and legislative recognition of education rights slowly evolved at all levels of government until it was realized that the handicapped not only have a right to education but benefit from education tailored to individual needs. Once this premise was recognized, the pace of remedial legislation quickened. Proper education opens the door to thousands of handicapped individuals who would otherwise be forced to remain burdens on society. Public Law 94-142 and state compliance holds open this door. Further analysis of underlying difficulties in regard to full implementation of the law is left to subsequent development.¹⁰⁹ One thing is clear, however, the public policy commitment necessary to ensure continued recognition of handicapped rights is in place and gaining momentum;¹¹⁰ strong fiscal

PLAN, *supra* note 64, at 102 (meeting between agencies held). The importance of state policy being established in statute becomes evident upon realization that 47 percent of the children committed to the Texas Youth Council are handicapped. SPECIAL EDUC. REPORT, *supra* note 36, at 31-32. A review by the Special Education Committee of Texas Department of Mental Health and Mental Retardation admission procedures revealed little attention is paid to input concerning the child from the local school district and coordination with the school district when seeking placement. SPECIAL EDUC. REPORT, *supra* note 36, at 30; *see* SPECIAL EDUC. REPORT, *supra* note 36, at 76 (recommendation 5 commentary); POLICIES & PROCEDURES, *supra* note 64, 35.74.040, at 101. *See generally* Benjamin & Blair, *Implementation of Education Laws Relating to Exceptional Children: The Maine Experience*, 11 CLEARINGHOUSE REV. 449, 449 (1977) (circumvention of law by adopting vague regulations).

108. *See* SPECIAL EDUC. REPORT, *supra* note 36, at 13; EARLY CHILDHOOD DEVELOPMENT DIVISION, TEXAS DEPARTMENT OF COMMUNITY AFFAIRS, LAWS AFFECTING HANDICAPPED CHILDREN IN TEXAS: A SUMMARY 21 (1977).

109. It is still too early to assess the full impact of the law. *See generally* U.S. DEP'T OF HEALTH, EDUC. & WELFARE, PROGRESS TOWARDS A FREE APPROPRIATE PUBLIC EDUCATION (Pub. No. (OE) 79-05003) (Jan. 1979) (annual progress report submitted to Congress as required by the Public Law 94-142); *Public Education and the Handicapped*, 12 J. RES. & DEV. ED. 1-112 (Summer 1979); *Educating Handicapped Individuals*, 29 J. TEACHER ED. 1-96 (Nov.-Dec. 1978).

110. Because the right to education is no longer at issue, class action suits will no doubt diminish and be replaced by suits brought by individuals under due process, procedural safeguards, and judicial review authorization of the Act. *See Public Education and the Handicapped*, 12 J. RES. & DEV. ED. 1-112 (Summer 1979). For the lawyer who may be involved with questions and litigation arising from the Act, Advocacy, Inc., in Austin, Texas is a good information source. "Advocacy, Inc., is a non-profit corporation affiliated with the State Bar of Texas, formed to protect the legal rights of persons who are "developmentally disabled." This corporation is a "statewide legal advocacy system that is completely independent from the service delivery system" and is funded through special legislation by the Department of Health, Education & Welfare.

commitment necessary to maintain education policy is being actively pursued by the new Department of Education.¹¹¹

111. Secretary of Education Shirley M. Hufstедler submitted to President Carter who in turn presented to Congress an \$18 billion budget for fiscal year 1981. Fields, *Research Gains, Loan Programs Lag in Carter's Higher Education Budget*, 19 CHRONICLE OF HIGHER EDUCATION 1 (Feb. 4, 1980).