INTRODUCTION

General Policy

The proper educational treatment for exceptional children raises issues that I find difficult, both in theoretical and practical terms. Problems in this field are increasingly before the courts.
At one end of the spectrum are the extremely bright; at the other are those who suffer from a series of disadvantages, ranging from emotional and mental to physical problems. Some twelve percent of children are estimated to fall into these two broad categories.

Classification of these children for educational purposes is difficult, for so much of their behavior may depend upon individual adaptations to meet conditions not generally faced by the majority of children. Moreover, important legal and social consequences flow from any attempt at categorization, because society treats its "pigeonholed" children differently, and the child tends to adjust to the label and status he is given. Normality and exceptionality are


3. Professor Turnbull III refers to the latter group as "retarded, handicapped or developmentally disabled," defining these terms as follows:

school-aged children who are mentally retarded, have cerebral palsy, are epileptic, have a learning disability, have behavioral problems, are emotionally disturbed, are hyperactive, physically handicapped, autistic, multiple handicapped, homebound, pregnant, deaf or hearing-impaired, language or speech-impaired, blind or sight-impaired, abused or neglected, or are socially maladjusted.


Professor Cruickshank loosely defines "an exceptional child [as] one who deviates intellectually, physically or socially, or emotionally so much from what is considered to be normal growth and development that he cannot receive maximum benefit from a regular school program and requires a special class or supplementary instruction and services." W. CRUICKSHANK & G. JOHNSON, supra note 1, at 3-4. Gifted children fall into a group with I.Q.'s ranging above 125-130. Id. at 4. Slow learners, educable mentally retarded and severely retarded children have, respectively, I.Q.'s of 80-95, 55-80 and 30-55. Id.


5. I have not touched upon the horrifying examples that have come to our attention, mainly through the press, of those children committed to mental institutions voluntarily or involuntarily through ignorance or worse, who are discovered many years later, to have been people well within the range of normality. Though too frequent, they do not represent the tens of millions of cases educators must deal with. See, e.g., Wyrich, Laws Give the Young Few Rights, Joey's Case Puts Plight of Patients in Court, Newsday, Oct. 2, 1978, at 5; Lost: 12 Days, 3 Years, A Lifetime,
“not absolutes”; they are culturally defined at “particular times and [for] particular purposes.” The penalties from the stig- 
mata of classification are greater than the benefits of available spe-
cial programs to which classified children may be referred.

Mass public education has existed in this country for only a
little over one hundred years. The concept of equal educational 
opportunity is, therefore, relatively recent. The notion of providing 
an appropriate education for each child which encompasses a com-
mitment not merely to admission to school, but also to special

Newsday, Oct. 3, 1978, at 4; Hospitalization in Past Can Imperil Future Jobs, News-
The problems of mental hospitals and the extensive literature and case law 
designed to afford due process to prospective, actual, and past patients is beyond 
the scope of this paper. Cf. N. Hobbs, THE FUTURES OF CHILDREN (1975). 

“[P]lacement in most institutions means placing a lid on the child's potential by 
assigning him to custodial care—sometimes humane but often inhumane by any-
one's standards.” Id. at 142.

When the country is in a conservative mood, when established values and 
institutions go unquestioned, then the difficulties of an individual are likely 
to be attributed to his personal weaknesses and deficiencies. The child or 
adult who experiences difficulty will be seen as somehow inadequate, as 
unable to take advantage of existing opportunities until those inadequacies 
are remedied.

When, however, increasing numbers of persons become discontented 
and begin to challenge the legitimacy of specific social norms and to advo-
cate social change, then the individual will be viewed as basically good. 
Problems in living will be attributed largely to the inadequate circum-
stances of an individual's life rather than to his personal failings. Helping 
forms then will emphasize the need to modify existing social institutions to 
increase their relevance to current, general conditions of life.

Id. See also Mercer, Sociocultural Factors in Educational Labeling, in THE MENT-
ALLY RETARDED AND SOCIETY: A SOCIAL SCIENCE PERSPECTIVE 141 (1975):

This paper is a report on the current status of a project designed to develop 
a multicultural, pluralistic method of educational assessment which will 
evaluate the child as a multi-dimensional person being socialized within a 
particular sociocultural setting. The need for such a system was demon-
strated in earlier research studies which established that 1) disproportio-
nate numbers of children from lower socioeconomic levels and from 
minority group backgrounds are being labeled as mentally retarded by the 
public schools and placed in classes for the mentally retarded, 2) minority 
students labeled as mentally retarded have significantly higher IQ scores 
and fewer identified physical anomalies than their Anglo-American coun-
terparts, and 3) the public schools rely almost entirely upon individually 
administered tests of "intelligence" as a diagnostic tool and do not system-
atically take the sociocultural background of the student into account when 
interpreting the meaning of his or her score on the test or in making deci-
sions about educational programs.

Id. See also A. Goldman, Special Classes Help Gifted in Ghettos, N.Y. Times, Dec. 

Compulsory education was instituted first in Massachusetts in 1852; most 
recently in Mississippi in 1918. Goldberg & Lippman, Plato Had a Word For It, 40 
treatment where needed, is even more recent. The legal establishment, as well as educational authorities and the public will have to address the problems raised by education of exceptional children with increased frequency. In particular, current legislation addressing the problem, along with the application of a variety of due process and equal protection concepts, will need to be considered.

Part of the difficulty stems from philosophical or jurisprudential dilemmas, which are brought into sharp focus in the educational field. Our nation was born from the concept of equality, and yet, from the very outset we have been aware that all men and women do not have equal capacity. We know that from the moment of birth, familial, social and other pressures condition each of us. By the time we reach the age when we are ready for school, our potential varies enormously. Our schools are devoted to equalizing educational opportunities and eliminating social and intellectual barriers to individual progress as far as possible. To accomplish this goal, it has become increasingly apparent that special provisions for exceptional children are necessary.

Exceptional children are by definition not created equal. Rather they are at either end of a bell-like curve of human abilities. To force the exceptionally bright into the mold of the average, even if this were possible, would be to deprive them and society. Similarly, to compel those who, by virtue of handicaps, find it extremely difficult to learn in the average classroom, to struggle along with all others, or to exclude them from any educational facility, is to deny them equal educational opportunity. There is, in sum, a growing realization that true equality of educational opportunity does not consist simply of treating all alike.

Yet there are problems of infringement on the rights of "normal" students if limited resources are directed towards education of the exceptional at the expense of the average. Such an allocation may be viewed as an impingement on the interests of those who do not need special provisions as well as a departure from the most elementary form of equality—treating all the same.

Equal protection of the laws implies a form of equal treatment. But the courts necessarily recognize that legislatures must have the power to utilize some forms of classification to reflect significant societal differences and public requirements. Abstract utili-

8. Although some provisions for the handicapped date back to the early 1800's, see text accompanying notes 114-115 and note 147 infra, the notion of mandatory appropriate education for every handicapped individual has spread throughout the country only in the past few years.
zation of the principle of equal treatment—or of other philosophical approaches—furnishes courts little guidance for the specific legal issues presented in this field of education.\(^9\)

Suppose the state decided not to classify. Is it equal to provide a gross equality of expenditure—\(X\) dollars for each pupil? Since exceptional pupils usually require substantially higher expenditures,\(^10\) such an equalization would result in minimal educational opportunity for exceptional students. Or suppose, given limited resources and the fact that, as compared with average children, increased expenditures for disabled children result in only marginal learning improvement, the legislature elected to spend funds only for students in the average or above category?\(^11\) Would this constitute an unconstitutionally irrational classification scheme?\(^12\) Triage is not irrational. On the contrary, perhaps it is so coldly rational as applied here to living children that it shocks our con-

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10. See, e.g., Lora v. Board of Educ., 456 F. Supp. 1211 (E.D.N.Y. 1978). The higher cost of educating exceptional children can be traced to lower pupil-teacher ratios, use of specialized equipment, support personnel, and transportation. J. Paushtr, A Study of Opinions of Predicted Future Events Affecting the Education of the Handicapped Child 1975-2000 (unpublished doctoral dissertation, Columbia University, Teachers' College 1976). See also Board of Educ. v. Nyquist, — A.D.2d —, 408 N.Y.S.2d 606 (1978). There is also the problem that districts with low property wealth, most often in large cities, cannot obtain a sufficient amount of money necessary for special provisions, whether for the handicapped or the exceptionally bright. To compound the problem, these areas often have the highest number of children with specific problems. Id.

11. Once the legislature begins to provide special education for some disadvantaged classes, it opens the way for a challenge by others. The [equal protection] claim is essentially, that the plaintiffs have the same rights to education as other children. This claim has two parts: if the complaint is that there is differential treatment among and within the class (all developmentally disabled children)—i.e., that some are receiving education (or a certain type of education) while others are not—the violation of equal protection consists of the irrationality in providing or denying education to persons who are similarly classified by reason of being developmentally disabled. The requested remedy is that all such children be given an education. If the complaint is that some handicapped children are not provided with an education while “normal” children are, the violation consists of the irrationality in providing or denying education to persons who are similarly classified by reason of being school-aged citizens, and the requested remedy is that all children including the handicapped, be included in the public education system.

H. Turnbull, supra note 3, at 180-81.

Philosophical considerations of the importance of each individual and of permitting each to develop his or her full potential\(^\text{14}\) are intuitively accepted by most Americans and many would be offended by a system that abandoned the disadvantaged. But it would certainly be open to the legislature to reject the arguments of individual dignity and of utilitarian total happiness or national economic advantage because of short-run cost considerations. While expenditures for the disadvantaged will pay off in the long-run by savings on welfare and other future costs, is it unconstitutional to be penny wise and pound foolish?

Various arguments pointing in different directions are also at hand when we consider gifted students. It would seem "rational" for the legislature to settle on any of three alternatives. First, it could decide that the gifted should receive the same expenditures per capita as other students, on the ground that this would be true equality. Second, it could decide that the gifted should receive less than the average, on the ground that those with greater capacity will themselves overcome any funding deficiency. Third, it could conclude that more should be spent for the brightest, on the ground that—by a utilitarian calculus—society, including each average member, will benefit most by fully educating the ablest.\(^\text{15}\)

While Rawls'\(^\text{16}\) analysis of a social "contract" entered into between mature persons who could not predict their status in society

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13. 411 U.S. 1, 36-37 (1973). The court found that education is not a fundamental right guaranteed by the Constitution but recognized the open question of whether "some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise" of the right to vote or freedom of speech. Given our present situation, some kind of basic education is essential to a meaningful life and the pursuit of happiness. Since no state seems inclined to stop educating its children—its young citizens would just abandon it for a sensible place where education is available—the issue of no education is entirely academic. Nearly all state constitutions require an educational system. See listing in Comment, Toward a Legal Theory of the Right to Education of the Mentally Retarded, 34 Ohio St. L.J. 554, 570 (1973). See generally lectures on Equality, Liberty and Education by the author to be published in the 1979 Cincinnati Law Review, note * supra.


15. See Report of Special Master at 23-26, Hart v. Community School Bd., 383 F. Supp. 699 (E.D.N.Y. 1975) (stressing point that added expense occasioned by establishment of a magnet school for the gifted and talented in New York City should not deter implementation of the project upon which hinges both the fate of desegregation in the city and the development of human resources of able students, and is thus money well spent in the public interest).

was meant for assistance in analysis—a figurative rather than a literal statement of arms length negotiations between prospective members of a future society—it is in a curious sense unmetrical in the areas we are considering. Many of us can, perhaps, ignore the humbling insight that “There, but for the Grace of God, go I.” But few of us are so stupid, arrogant or insensitive as to deny the understanding that, “There, but for the Grace of God, go my grandchildren.” Given the vicissitudes of life and generational changes in condition, few responsible persons will feel assurance about the needs and status of their distant progeny. We are under some pressure, therefore, to help design a system that will be fair to them whether they turn out to be exceptionally bright (as we hope), average (as will probably be the case), or disadvantaged (as statistics tell us will likely be the case with at least some). We are not creating a system of education for Hotentots, but for our own countrymen, our kith and our kin. Fortunately, only a small portion of our population is yet so self-centered and selfish as to pursue only personal pleasure, unencumbered by the responsibilities (and delights) of procreation and thoughts of future generations.

Rawls’ theories could argue for extra help for the disadvantaged, but it is not clear how much additional aid for brighter students his writings would support. On the assumption that more educational advantages for the gifted would result in some increased productivity and thus a greater total product—however that is measured—to be shared with poorer persons, extra aid is justified. It is hard to predict, however, whether more education for the brightest will actually lead to appreciably greater shared productivity rather than to greater personal satisfaction for members of this favored group.

Nozick’s views might lead to less aid for the disadvantaged as well as the advantaged on the theory that minimum governmental involvement is to be encouraged. But even the Nozickian would appreciate the need for effective public education lest this country become, within a generation, an undeveloping nation without the wide-based educated population required for a modern technical production-consumption society that his views assume.

In any event, having abandoned the Founding Fathers’ concept of noninvolvement of government (which never really existed as witness Hamilton’s policy of aiding manufacturers), I do not
think it possible—even as a matter of constitutional law—to completely ignore the needs of some groups and individuals. Once we aid some portions of society through social welfare laws, we are driven by rudimentary concepts of fairness, equal protection, due process and fit relationships,\textsuperscript{20} to develop rationales and practices that enable all segments of society to acquire some “fair” share in the welfare pie.\textsuperscript{21} The role of the courts in assuring some degree of fairness during what Professor Rand Rosenblatt has referred to as the “transitional period,”\textsuperscript{22} before the legislature has spoken or public opinion reached a consensus, raises difficult issues upon which I can offer little guidance in this paper.

Given the inconclusive results reached by attempted application of any equal protection or jurisprudential principle, it is not surprising that in the final analysis these questions are decided on public policy grounds, as shaped by political pressures. Parents of disabled children, many of whom come from the middle classes, have desperately sought help; and they have been effective lobbyists—the more they have pressed for relief for their suffering children, the more the legislatures have responded.\textsuperscript{23} The handicapped themselves have emerged as a forceful political pressure group.\textsuperscript{24} Moreover, government officials and agencies have demon-


\textsuperscript{22} Private letter to author from Professor R. Rosenblatt, dated December 26, 1978.

\textsuperscript{23} When the timidity, guilt and shame of parents with handicapped children gave way to insistence on help from the state, their organization into parent groups became a key factor in recent legislation. Professor Cruickshank lists this factor along with growth of day school programs, the impact of the great wars on attitudes towards the disabled, and research and teacher training, as creating a more positive attitude on the part of the public towards the handicapped. W. Cruickshank & G. Johnson, supra note 1, at 16-19. Parent groups first organized informally, then more formally, according to type of handicap. Initially, they sought help for their children in private schools; later, through legislation, they pressured for response from public schools. Cain, Parent Groups: Their Role in a Better Life for the Handicapped, 42 EXCEPTIONAL CHILDREN 432, 433 (1976).

\textsuperscript{24} See, e.g., The Handicapped Are Emerging as a Vocal Political Action
strated a marked willingness to put societal energies and re-
resources into disability problems; this is due, perhaps in part, to the
fact that emphasis on these issues by government is less politically
dangerous than action in other areas, such as elimination of racial
discrimination.25

By comparison, parents of gifted children are less prone to be
anxious about their children—they seem to be doing well, and
where problems do exist, they may be subtle. Thus, recent govern-
mental efforts reflect much less impetus for reform in the arena of
education for the gifted child.

Judicial involvement on any sustained basis with the problems
of educating the exceptional child will, given the ambiguous nature
of applicable constitutional principles and the limits of proper judi-
cial roles, necessarily be predicated on underlying statutory pro-
nouncements which reflect legislative judgment as to appropriate
public policies in this area. This is well illustrated by Lau v. 
Nichols.26 There, the Ninth Circuit had rejected the claim of Chi-
nese-speaking plaintiffs that the equal protection clause and sec-
tion 601 of the Civil Rights Act of 1964 were violated by the use of
only English language materials in their schools.27 The Supreme
Court reversed,28 but its decision was predicated solely on the fed-
eral statute, which bars racial discrimination in federally-funded
educational institutions. The Court's reliance on the statute—and
its implementing regulations—must be seen as explained by more
than just the time-honored preference for decision on non-consti-
tutional grounds.29 As already noted, application of equal protec-
tion clause analysis would be highly problematic, especially given
the wide range of arguably "rational" choices open to the legisla-
ture in the education field, and the lack of judicial expertise and

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27. 483 F.2d 791, 804-05 (9th Cir. 1973).
(1936) (Brandeis, J., concurring).
competence in such matters. Newer cases expanding and elucidating the rights of exceptional children are thus predicated on legislation—often more specifically tailored than that in *Lau*—and on government agency interpretations of legislative mandates.

However valid in the abstract, special provisions designed to equalize educational opportunity have themselves been attacked as producing inequality. Segregation of students by ability or handicap raises philosophical and legal, as well as educational, questions. If tracking of students, ostensibly designed to facilitate programming suited to individual ability, is carried out in a racially or culturally biased manner, or if grouping is inflexible, not allowing for individual improvement, then equalization is thwarted and illusory.

**Mainstreaming**

In a society such as ours, jurisprudence and pedagogical theory reflect, to a considerable degree, underlying long-term public attitudes. Teachers, judges, executives and legislators share with other members of the public a common heritage of ideas and aspirations that colors our joint approach to educational-legal problems. Many of our shared philosophical concerns are evident in the major concept which has developed in the field of special education in recent years—that known as *mainstreaming*. Mainstreaming may be viewed as an attempt to accommodate some of the competing equality and liberty interests.

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   See also 414 U.S. at 569-71 (Stewart, J., concurring) (noting that but for HEW implementing regulation in *Lau*, Court's decision would be problematic, since statute alone tracks equal protection clause language).


Briefly, mainstreaming involves integration of the exceptional child to the greatest degree possible into the regular classroom. Such programs for accomplishing integration of "normal" with exceptional pupils are founded upon the premise that properly trained regular teachers, supported and counseled by special educators, can adapt classroom procedures to serve all children adequately. Effective mainstreaming requires, therefore, extensive teacher training, support personnel (including consultants), crisis or resource room teachers, psychologists and psychiatrists. Under this approach, only in extreme circumstances are totally separate facilities acceptable and movement out of such segregated settings is a high priority. Although much of the literature discusses mainstreaming in connection with the mildly handicapped, the movement has had an impact on new approaches to the education of the gifted and talented as well.35

Mainstreaming enables us to escape from the tension between the ideal of equality and the reality of disequality. We believe that given the opportunity people will be able to achieve a level in a mobile society reflective of their capacity. But reality shows that by the time people get to school, given differences in genetic and environmental background, there is a wide divergence in opportunities. By emphasizing the fact that the exceptional child can be handled as a transient problem, quickly brought into the regular classroom, we learn to live with the conceptual difficulty.36 Mainstreaming is founded upon a democratic acceptance of diversity; it acknowledges that the educational system is training people to live in a real world with people of all kinds, not in a hot-house where only one type is permitted to bloom at a time. Thus, average as well as exceptional children are to benefit from its implementation.

Moreover, by providing for a minimum of special treatment, mainstreaming arguably represents an attempt to avoid infringe-

35. The theory of mainstreaming is outlined in more detail in Lora v. Board of Educ., 456 F. Supp. 1211 (E.D.N.Y. 1978). Except as otherwise noted, I have drawn here upon the sources used in that opinion.

36. One facet of mainstreaming, the "normalization" principle is illustrative. Developed originally in the Scandinavian countries, normalization involves making available to the mentally retarded patterns and conditions of everyday life which are as close as possible to those of the mainstream of society. The emphasis is on deinstitutionalization of the retarded, including integration with "normal" children in the classroom. The acceptance of diversity within the mainstream, the development of services, situations, and attitudes expectant of normalcy, is considered more helpful to the retarded than treatment which focuses on defects. See generally Vitello, The Institutionalism and Deinstitutionalization of the Mentally Retarded in the United States, in THE THIRD REVIEW OF SPECIAL EDUCATION (1976). Bruininks & Rynders, Alternatives to Special Class Placement for Educable Mentally Retarded Children, in ALTERNATIVES TO TEACHING EXCEPTIONAL CHILDREN 100-02 (1975).
ment of liberty interests. It presents a method for escaping—at least in part—the dilemma of limited resources: that to expend large amounts of personal and public wealth at either end of the educational spectrum deprives those in the middle.

Finally, mainstreaming reflects more concrete social and political concerns. It represents a dissatisfaction with the use of special education programs to permit regular teachers to avoid problems they should be capable of dealing with. It is a reaction against the use of special schools or classes as dumping grounds for minority children, and against elitist special enrichment schools or classes which may become havens for the middle class. It discourages the use of standardized, culturally-based tests in educational placement of children at either end of the spectrum. Yet, despite its theoretical attractiveness, it is clear that without the backing of adequate funding and teacher training, mainstreaming may in reality become a method of ignoring the special needs of children with special problems.37

LEGAL DEVELOPMENTS

The concerns raised by the mainstreaming movement—and by the underlying philosophical and jurisprudential dilemma occasioned by the problem of educating exceptional children—are reflected in far-reaching reforms adopted by Congress and the state legislatures within the past ten years. Recently enacted statutes and regulations establish elaborate due process protection for students referred to special educational settings, require that children be evaluated for special programs according to objective criteria, and prohibit classification decisions based on any single test.38 As a reaction against inflexible categorization, broad definitions of both the “gifted” and the “handicapped” appear in this legislation. In the case of the handicapped, statutes provide that children should be educated in the least restrictive environment possible. For the gifted, utilization of differential programs which allow for contact with "average" children during at least some part of the

37. S. COHEN, SPECIAL PEOPLE: A BRIGHTER FUTURE FOR EVERYONE WITH PHYSICAL, MENTAL AND EMOTIONAL DISABILITIES 128 (1977); Greenberg & Doolittle, Can Schools Speak the Language of the Deaf?, N.Y. Times, Dec. 11, 1977, at Magazine 50 (problems created in mainstreaming where tried). Sometimes the problems are unexpected. See, e.g., Eastern District of New York rejection of segregated classrooms for retarded who may tend to spread hepatitis because they slobber, kiss and bite more than normal students, in Court Mandates No Segregation of the Retarded, N.Y. Times, March 1, 1979, at B4, col. 3.

38. For a summary of federal and state legislation on due process protections in this area, see generally L. KOTIN & N. EAGER, DUE PROCESS IN SPECIAL EDUCATION: A LEGAL ANALYSIS (1977).
school day is favored. In-service teacher training to facilitate the accommodation of various ability levels within a single classroom has been emphasized.

Much of the new legislation gives the judiciary enormous potential authority and responsibility in the special education field, especially with regard to due process protections, where traditional judicial and administrative machinery is heavily relied upon. For example, under the Education for All Handicapped Children Act, any party may appeal a decision concerning a child's placement or education to a United States District Court. The Rehabilitation Act of 1973 also has enforcement provisions. So, too, do analogous state statutes. Increasingly, therefore, the courts and educational authorities will be working closely together to carry out national (and in some cases local) policy and to implement detailed legislation.

As in many of the educational problems that we deal with in the courts, the underlying bedrock factors of race and socioeconomic disadvantage cannot be ignored. Many of the theoretical advantages of due process and institutional reform are not available to those who neither fully understand their rights nor have the energy and capacity to use them. In many instances, therefore, reforms may in reality enhance the advantages of those already in a better position than their fellow citizens in the lower socioeconomic classes.

Against this background, this article will examine our nation's educational treatment of exceptional children. Part II will consider the treatment of the particularly able; Part III will examine

42. See generally discussion in Lora v. Board of Educ., 456 F. Supp. 1211 (E.D.N.Y. 1978); Brunet, A Study in the Allocation of Scarc Judicial Resources: The Efficiency of Federal Intervention Criteria, 12 GA. L. REV. 701, 708 (1978) ("A thorough study of the incomes of the complainants to a single consumer frauds bureau . . . found that '[a]lthough consumer fraud primarily affects the poor minorities, it is mostly the middle class who complain . . . .'"
treatment of the handicapped. In each case, the history of attitudes in the educational field will be briefly sketched, followed by an examination of legal developments.

TREATMENT OF GIFTED AND TALENTED CHILDREN

HISTORY OF TREATMENT

Various cultures have attempted to develop individuals of exceptional intelligence. Over 2,000 years ago, in ancient Greece, Plato advocated that children with superior intellect be selected, at an early age, and offered specialized instruction in science, philosophy and metaphysics. The most intelligent and knowledgeable would then become leaders of the state. According to Plato, the survival of Greek democracy was contingent upon the education of superior citizens for leadership positions in society.43

The Jews, from ancient times, have favored the best religious scholars by aiding them with food and board as students and then arranging favorable marriages. Community respect provided the main pressure to assist those able to deal intellectually with religious issues.44

In the sixteenth century, Sulerman the Magnificent made special efforts to identify gifted Christian youth throughout the Turkish Empire and provide them with education in Moslem faith and in war, art, science and philosophy.45 Talent scouts surveyed the population at regular intervals. While the causal relationship is not certain, within a generation the Ottoman Empire became a great power in art, science, culture—and war. It is not without significance that modern China has had to abandon its rigid egalitarian pretensions in favor of such forms of elitism as special schools for training bright students.46

During the nineteenth and twentieth centuries, there has been little organized effort in Europe to identify gifted children and offer them special education. Secondary schools and universities have generally been keyed to educate those in the higher social strata,

43. PLATO, THE REPUBLIC 177-82 (2d ed. D. Lee trans. 1974). See also ARISTOTLE, THE POLITICS, 127-33 (T.A. Sinclair trans. 1962); S. KIRK, supra note 1, at 105. On the other side of the coin, the Greeks advocated that offspring of the inferior, or of the superior, where deformed, be put away. Goldberg & Lippman, supra note 7, at 328.
45. S. KIRK, supra note 1, at 105.
from which it was believed the more intelligent leadership would come. Until recently, the French system of selecting a small proportion of children in the early grades for eventual attendance at academic secondary schools and universities was utilized in many European countries; those not chosen continued in common schools to learn a trade. Although recently the emphasis has shifted somewhat away from social class and family, the percentage of children attending academic high schools and universities is much smaller in the European countries than in the United States.  

In our nation, special education for most gifted children has, until relatively recently, received short shrift. Ironically, the peculiarly American faith that all men are created with equal potential—and that education is the avenue through which this equality will express itself—has thwarted efforts to develop programs tailored to the needs of the gifted. The prevailing view has been that the very bright will always make it on their own. A noted behaviorist psychologist, John B. Watson, bolstered this view when he stated that he could take any well-formed, healthy baby and make of it what he pleased—"rich man, poor man, beggarman, thief." Thus, the traditional concept of American education was to open the schools to everyone, rich and poor, and let them make the most of their opportunities. Of course, as in Europe, the rich could always avail themselves of special schools or tutoring, but there was little of this available for those not in the highest social strata. New York City established special public high schools for the gifted in specific subject areas relatively early in this century, but such programs were the exception, not the rule.

47. S. Kirk, supra note 1, at 105-06.
48. But cf. Thomas Jefferson's position summarized in J. Pole, The Pursuit of Equality in American History 119-120 (1978), as part of a general system of education of three years for the masses, grammar school for the select few, to college for the elite. "By means of a system of selective examinations, Jefferson remarked in a letter describing the scheme, 'twenty of the best geniuses will be raked from the rubbish annually, and be instructed, at public expense, as far as grammar schools go.'” Id. at 120.
49. Id. at 106.
50. Id.; Weintrab, Recent Influences of Law Regarding Identification and Educational Placement of Children, in Alternatives to Teaching Exceptional Children 56 (1975). Weintrab quotes the populist Tom Watson who stated in 1938: “Close no entrance to the poorest, the weakest, the humblest. Say to ambition everywhere 'the field is clear, the contest fair, come on, win your share if you can.'” Id.
51. Stuyvesant High School was established at the turn of the century; Bronx High School of Science and the High School of Music and Art in 1938; the High School of Performing Arts in 1948.

Since the turn of the century, educators in New York City have been concerned with the gifted and have instituted a variety of programs including acceleration, various groupings, special classes and enrichment courses at all levels, as well as
In the last three to four decades, however, this country has directed considerably more attention towards the gifted. Several phenomena are responsible. First, lack of support for special provisions for the gifted had been based in part on the perception that there was already sufficient diversification of curriculum in the secondary schools—including vocational and trade courses on the one hand, college preparatory courses on the other—to accommodate differing levels of intelligence. Multi-track programs, together with the ostensible availability of colleges and universities for the very bright, were considered adequate to meet the needs of the gifted. But it became apparent that the benefits of these provisions were more theoretical than real. During the depression years, through 1940, only a very small proportion of poor, gifted children were able to afford the advantages of higher education. And although the G.I. Bill following World War II acted as a temporary corrective, it became clear during the 1950's that society was wasting a great deal of its intellectual potential.

This conclusion was driven home dramatically in the late 1950's, at the height of the Cold War. The Soviet Union's launching of Sputnik convinced some that survival of Western democracy was threatened by a laxness in our educational system, particularly in science and mathematics. A series of hearings held before the Senate Committee on Labor and Public Welfare to explore the question of science and education for national defense is illustrative. The message that emerged from educators and scientists was relatively uniform: the United States must harness every bit of academic and technological potential in order to protect the democratic system. The American school system would have to be re-examined and fortified. Witness after witness testified about the need to fight student apathy, to improve teacher training and upgrade teacher salaries. A renewed emphasis on substantive academic areas, especially science, mathematics and foreign languages, was urged; "basket weaving" courses without intellectual content were condemned. The need for special schools for the special high schools. Board of Educ. of the City of New York, Bureau of Curriculum Research, The Gifted Student in New York City Schools: A Memorandum and Bibliography (1959). In 1935, treatment of the gifted in New York City was studied in an attempt to undertake more organized efforts in this direction. H. Cohen & N. Coryell, Educating Superior Students (1953).

53. E.g., id. at 36, 55 (statement of Dr. Lee A. DuBridge, President of California Institute of Technology).
gifted was noted. In the wake of these hearings, Congress, using a defense rationale to counter the traditional beliefs that education should remain the exclusive province of state and local governments and that federal aid would lead to excessive centralized governmental control, passed the National Defense Education Act of 1958, which provided federal monies for math, science and advanced foreign language study.

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54. Id. at 58-59 (statement of Dr. I. I. Rabi, Higgins Professor of Physics at Columbia University).

55. In the course of these hearings, Senator Strom Thurmond stated:

I feel . . . that education is a local and a state responsibility. I think it is essential that that be the case . . . . I feel that every step possible should be taken to encourage the states and political subdivisions of the states to meet their responsibilities, but I am confident if the Federal government enters the field of education, gives federal aid to education, it is going to destroy the initiative. Id. at 31-32 (statement of Senator Thurmond).

Opponents of the bill that served as the basis for the National Defense Education Act of 1958, see text at notes 57-58 infra, stated:

We find ample evidence that able young people who wish to go to college find ways and go to college. Further, that the public schools have the funds to provide better science, mathematics, and foreign language instruction, but that some prefer to use their staffs, facilities, and money to run courses which are unrelated to the educational purposes of the schools, such as date behavior, beauty care, consumer buying, stagecraft, square dancing, pep club, marriage and family relationships, junior homemaking for boys, etc. It is apparent that the purposes of this bill can be better accomplished without Federal aid by the local schools and communities, and by the students who have the ability and desire to acquire a college education. The philosophy of this bill, like so many others, apparently seems to have altered a famous and good saying: "God helps those who help themselves" by adding: "The Government helps all others." Thus, the apparent conclusion of the majority of the committee that Federal scholarships are needed, and will succeed in inducing more of our ablest youth to attend college is not substantiated by the evidence presented to the committee.

Instead, the most obvious consequence of such a Federal scholarship program would, we believe, be that voiced by many witnesses; namely "the discouragement of State and private programs," certainly, the lessening of local effort.

Minority Views, H.R. REP. No. 2157, 85th Cong., 2d Sess. 3, reprinted in [1958] U.S. CODE CONG. & AD. NEWS 4772. Inadequacies in the educational system were found due, not to lack of money, but to a decline of educational standards and a "debasement of curriculum" Id.


57. The House Report on the bill which served as the basis for the Act, stated its purpose as follows:

The purpose . . . . is to assist in the improvement and strengthening of our educational system at all levels and to encourage able students to continue their education beyond high school. It is designed to accomplish these objectives by (1) establishing a limited program of Federal scholarships, (2) establishing loan programs for students at institutions of higher education, (3) providing grants to States for strengthening science, mathematics, and modern foreign language instruction in public schools, (4) establishing language institutes and area centers to expand and improve the teaching of languages, (5) assisting in the expansion of graduate education, (6) assist-
Thus, demand for rigor in academia, brought on by political concerns, accrued to the benefit of the gifted. The late 1950's and early 1960's witnessed a variety of federally sponsored academic enrichment programs. New textbooks were developed; new approaches to learning, stressing the conceptual in place of rote memorization, were introduced. College level courses became available to high school students. After-school and weekend classes for the gifted were initiated in some communities, and colleges and universities actively solicited funding for improved facilities.

Beginning in the 1960's, however, interest in the gifted and talented waned as issues of civil rights, poverty and American involvement in Southeast Asia captured public attention. Thus, during the 1970's educators have expressed substantial concern that not enough is being done for exceptionally bright students.

For example, in 1971 the Council of Education for Exceptional Children policy statement noted:

Because the gifted are always with us, their education does not arouse prompt professional fervour. And because their neglect represents a subtle long-term wastage rather than a present threatening issue, educational systems channel their energies in other directions. . . . Special education for the gifted is not a question of advantage to the individual versus advantage to society. It is a matter of advantage to both. Society has an urgent and accelerated need to develop the abilities and talents of those who promise high contribution. To ignore this obligation is not only shortsighted, but does violence to the


basic concept of full educational opportunity for all. . . .

More and more, it has been recognized that the gifted are disadvantaged or handicapped if not afforded suitable educational programs.

Concern that not enough is being done for the gifted is often pitted against a countervailing fear that elitism and racism both result from and are reflected in special groupings of students. The pros and cons of curriculum tracking, for example, have been hotly debated along political, ideological and economic as well as educational lines. Tracking may enable students of varying ability levels to attain their individual potentials, but it may also enhance socioeconomic inequalities. Special classes and schools have been criticized as elitist and undemocratic. Any special provision for the gifted may effectively shut out minorities either because eligibility is determined by culturally biased testing, or because minority group members lack the drive to be admitted to such


\[62\] One recent study on curriculum tracking identified "two counter-poised perspectives [on the proper role of curriculum differentiation in high school education] in the sociological and educational literatures and in a popular thought." First, is the view that resources should be allocated where they can achieve maximum returns, thus supporting enrichment for the gifted and general and vocational tracking for those of lesser abilities. Each group of students would, therefore, be taught at a level appropriate to its potential. On the other hand, opponents of tracking suggest that it channels scarce resources to those who have the least need for them. In this view, students in the non-college tracks are denied access to students, teachers, counselors and information which might broaden their interests and accelerate achievement. They who most need help are relegated to a position of perceived inferiority and shut off from any chance of successful competition both in later schooling and in their adult life. The results of that study gave some support to each of the views. It found that the major determinants of tracking are achievement-related, but that over 60% of the variance in placement is left unexplained by such factors and there is a tendency for higher status students to be represented disproportionately in the higher tracks. Whether or not the equalities outweigh the benefits of tracking remains essentially a political and ideological question. Alexander, Cook & McDill, *Curriculum Tracking and Educational Stratification; Some Further Evidence*, 43 Am. Sociological Rev. 47, 62-66 (1978). Cf. Report of Special Master at 17-19, Hart v. Community School Bd., *supra* note 14 (criticism of tracking which may result in ethnic segregation leading to proposal that flexible programming, including the option to take an alternative course other than being left back, and implementation of certain courses over expanded time spans for students who learn more slowly than others, be used in a magnet school for the gifted and talented instead of tracking). But see text at notes 108-109 *infra* on problems of in-class tracking and self-segregation within the special school.


\[64\] *See* note 3 *supra.*
programs. Empirical evidence on the extent to which separation of the gifted actually leads to positive improvement in achievement levels is itself conflicting, further fueling the controversy.

What may be a current mild revolution in the identification and treatment of the exceptionally bright—one in which the marks of the mainstreaming movement discussed above can be discerned—represents an attempt to deal with these problems, to provide services without exclusion. New emphasis is being placed on development of programs that are sufficiently open-ended to provide flexible attention to each individual. Standardized organizational procedures used over the years in education of the gifted—including acceleration, curriculum enrichment, special schools and classes—have been criticized for their over-emphasis on uniformity and standardization. Acceleration, administratively the easiest method, is particularly disfavored because separation of children from their peer age group is viewed as the cause of emotional problems.

Curriculum enrichment has become increasingly sophisticated. The emphasis is on tailoring education to meet each exceptional child's particular needs. Individualized programs may involve new organizational schemes, including non-graded plans, team teaching, specialized personnel, use of resource rooms, independent study, and short-term intensive training programs modelled on higher education plans. Computers have been developed to aid in the creation of individual pupil programs and creativity-stimulating curricula. A method known as "precision teaching"—involving an attempt to sustain student interest by having

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65. *E.g.*, Letter from Dr. Martin H. Gerry, Director, Office of Civil Rights, Department of Health, Education and Welfare, to Chancellor Irving Anker, Board of Education, City of New York (1977) (special progress classes and academic high schools for the gifted found inaccessible to minorities due, in part, to admission procedures based exclusively on standardized tests); *Grouping by Ability of Students Upheld for New York City*, N.Y. Times, June 16, 1978, at A1, col. 11; Alexander, Cook & McDill, *supra* note 62, at 64 (curriculum differentiation has been criticized as serving "especially the interests of higher status parents who exploit such mechanisms to legitimate and perpetuate their children's success.").

66. *See, e.g.*, Passow, *Fostering Creativity in the Gifted Child*, 43 EXCEPTIONAL CHILDREN 358 (1977). Little is known about the effect of organizational procedures, such as mainstreaming and grouping, on the nurturing of creativity, although it is acknowledged that program flexibility including different kinds of scheduling and grouping may be needed. *Id.* at 363. It has been noted that:

Americans have a love-hate relationship with the gifted/talented. They want and desperately need the creators, the problem solvers, the leaders, the inventors, the pathfinders, the artists, yet at the same time they fear that special education for the gifted may create an elite. Their thinking is further muddled by the delusion that the gifted need no help. *Draft, Planning Programs for the Gifted and Talented*, New York State Education Department (mimeo 1978).
the student involved in curriculum planning by daily recording of pupil preferences—has been suggested. Of course, these individualized enrichment programs can work only if teachers are well-trained and able to deal constructively with a wide range of ability in a single classroom. Development of innovative teaching techniques is considered paramount and favored by many educators over isolation of the gifted in special settings.

There is, moreover, a growing perception of the need at times for education to go beyond the classroom in order to forestall boredom, which may lead to the crushing of potential talent, initiative and curiosity, and to alienation and anti-social behavior. Suggested programs include community projects, association with research projects, organization of schools by gifted high school students for younger students, talent and achievement contests, and participation in societies for gifted children. Association with professional adults, aside from teachers, who can act as stimulants in a variety of fields is encouraged.67

Along with these developments has come a reaction against identification of children as gifted by means of standardized exams. An expanded concept of the gifted, which allows for demonstration of a variety of strengths and talents, has emerged since the 1960's.68 Although use of standardized tests is not ruled out completely, evaluation by teachers and even peer judgments are now encouraged as complements to testing. The need to identify and nurture creative potential and productive behavior at all stages of a child's development and among all groups, including the disadvantaged and the handicapped, has accompanied the movement away from inflexible testing and categorization.

Nevertheless, the tension remains. The newest approaches are only in the incipient stages, and are not without opposition.

67. All of these new approaches, including program flexibility, individualized curriculum, independent and out-of-class study, and de-emphasis on numerical grades, were expressed as goals to be achieved through implementation of a magnet school for the gifted and talented in New York City. Report of Special Master, Hart v. Community School Bd., supra note 15, at 12. See also text accompanying notes 103-109 infra.

68. A broadened concept of giftedness is most often traced to the work of J.P. Guilford, who in 1959 introduced a three-dimensional "structure of intellect" model made up of 120 components, amounting to a periodic table of different kinds of intellectual functioning. The significance of this model was that it included creative abilities along with qualities which would show up on a straight intelligence test. Building on this model, other educators have shown that highly divergent, or creative adolescents achieved as well as their highly intelligent peers, in spite of the fact that the two groups scored differently on standardized I.Q. tests. Exclusive reliance on such tests, therefore, was found to cause large numbers of creative students who could benefit from enriched curriculum and other special programs to miss these opportunities. See S. Kirk, supra note 1, at 127-31.
Much retraining of personnel is needed for their implementation. There is, moreover, the danger that even the more flexible in-class procedure for enrichment sketched above will result in a form of tracking. Signs of the problem of in-class separation have emerged in the context of “magnet” schools, which will be discussed below.

**LEGAL DEVELOPMENTS**

The recent concern for the paucity of provisions encouraging special efforts at education of the gifted is mirrored in the comparatively small steps which have been taken to enforce by legal means the rights of such children to an appropriate education.

**Judicial**

There has been virtually no explicit judicial articulation of the rights of gifted and talented children to an enriched educational experience. The only cases touching, at least implicitly, upon the issue involve racial or cultural bias in tracking or testing. Thus, where grouping of students, designed to provide some with enriched curriculum, is accomplished by use of biased criteria resulting in racial imbalance, programs have been disbanded or school systems enjoined from using certain examinations.69

These cases, of course, were not brought directly on behalf of gifted and talented children seeking appropriate levels of education. Nevertheless, the movement away from culturally-biased tracking, and the recognition of the danger that potentially bright minority students may be misclassified and prevented from availing themselves of full educational opportunity, constitutes at least implicit pronouncement of a fundamental right to educational development for gifted members of a suspect class.70

Biased tests, as well as the lack of appreciation by parents and gifted children of their special qualifications, may create classification difficulties for minorities.71 Perhaps because of this prejudice,

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69. See cases cited in note 3 supra.

70. Cf. Bauza v. Carrion, 47 U.S.L.W. 2020, 2021 (1st Cir. 1978) (The right of a child to attend a superior public school reserved for the gifted is “not a fundamental right such as would warrant strict judicial scrutiny of the classificatory criteria; [selection criteria must] perhaps be broadly rational, [but scrutiny would be stricter if there were] any claim or evidence that the challenged admissions procedure worked to the disadvantage of a class of persons to which the courts have given special protection.”)

suburban school populations typically show more students with higher IQ's than those of central cities. The courts can be expected to insist on elimination of testing bias due to race to the extent possible. They may also require the schools to actively seek out gifted children to avoid the skewing of the gifted population which results from middle class aggressiveness.

*Legislative Developments*

1. **Federal**

   Until very recently, little had been done legislatively to articulate basic rights of the gifted and talented to an appropriate education. Nevertheless, in the past few years there has been considerable expression of concern at the federal level for these children, and attempts to target monies for development of specialized projects to improve educational offerings for them. Judicial resistance to biased testing is reflected—and further developed—in recent legislation, which emphasizes the need to identify the gifted among disadvantaged and minority groups and requires states to gear special programs to all segments of the population.

   In 1970, Congress expressed its interest and concern in the education of the gifted and talented by amending the Elementary and Secondary Education Act Amendments of 1969 to add a new section entitled “Provisions Related to Gifted and Talented Children.” This new provision effected two specific changes in existing legislation: first, it explicated congressional intent that the gifted and talented benefit from federal education legislation—notably Titles III and V of the Elementary and Secondary Education Act and teacher fellowship provisions of the Higher Education Act of 1956; second, it directed the Commissioner of Education to conduct a study assessing the status of existing programs and to recommend new approaches in educational assistance for the gifted and talented. A report was issued by the Commissioner in response to this mandate.


72. S. Kirk, *supra* note 1, at 115 (I.Q. above 140, .05-1% in average community and 2-3% in superior socioeconomic community).


74. There was, as noted above, a flurry of federal aid for scientific and other academic enrichment programs following the Sputnick scare. However, none of this focused directly on any “right” to appropriate education for the gifted or targeted specific funds for that purpose.

That report, published in 1972, represented an initial hard look at the status of education of the gifted and talented. As had professional educators, the Commissioner found that existing programs were insufficient to serve the estimated 1.5 to 2.5 million gifted students in the nation (1970 estimate). Fewer than four percent of the country's gifted and talented youth, the report found, were receiving appropriate educational services. Apathy and even hostility towards the gifted on the part of teachers, administrators, guidance counselors, and psychologists, the perception of differential education for these children as a low priority by federal, state and local governments as well as the public at large, and the failure of existing programs to reach sub-populations (including minorities and the disadvantaged) were all found responsible for the neglect of these children. The report called for specific targeting of funds for education of the gifted and talented as well as development of organizational structures for the dissemination of information or available programs. The need for programs aimed at identification of the gifted and talented among handicapped and disadvantaged groups was also emphasized.

Subsequent to that report, pursuant to section 404 of the Education Act Amendments of 1975, an office for the gifted and talented was established within the Office of Education to coordinate all programs for gifted youth and to act as a clearinghouse for obtaining and disseminating information pertaining to these students. The statute also provides for granting of monies to state and local educational agencies for planning and improvement of programs for the gifted and talented at preschool, elementary and secondary school levels.

76. See U.S. COMM. OF EDUC., 92D CONG., 2D SESS., REPORT ON EDUCATION OF THE GIFTED AND TALENTED 3 (Comm. Print 1922). A high priority was the strengthening of state involvement in the education of the gifted and talented. A National Leadership Training Institute for the Gifted and Talented was established to train teams of five leaders from every state. At the time the report was written only ten out of the fifty states had individuals whose responsibility it was to oversee the educational needs of exceptionally bright students. By the end of 1976, 21 state departments of education had full-time persons whose work was associated with the gifted; 23 others had such a person at least half-time. Lyon, Education of the Gifted and Talented, 43 EXCEPTIONAL CHILDREN 166, 167 (1976). See also text at notes 77-79 infra.


78. Id.

79. Any agency applying for a grant must submit an application to the Commissioner of Education providing assurance that funds will be used to plan programs to identify and meet the special educational needs of this favored group of nature. It sets forth procedures for acquiring techniques in this area. Local educational agencies must have their plans approved by the state. The Commissioner is also authorized to make grants for training of personnel for the education of gifted children, 20 U.S.C. § 1863(d)-(e) (1976), and to enter into contracts (using amounts not to exceed 15% of monies expended under the section in any fiscal year) with
Regulations promulgated under this statute became effective in June of 1976. Fleshing out the statutory language, the regulations echo recent trends in the educational field, including salient aspects of the mainstreaming movement discussed above. For example, "gifted and talented" youngsters are defined in terms of their need for specialized services; no more specific description or testing score cut-off points are used. Identification of the gifted must be accomplished by use of multiple methods, including at least two acceptable procedures relating to a specific category (the regulations specify five different possible categories), rather than through a single standardized test. Entities applying for federal grants must make provisions for assistance to all gifted and talented students, including those who are "economically deprived, handicapped, or culturally different as evidenced by traits such as bilingual capability, or other traits common to the cultural norm," within the area to be served.

Two recent bills, one pending in the Senate, and one in the House, call for further amendments to Title IV of the Elementary and Secondary Education Act of 1965. Each reflects the growing congressional conviction that it is in the national interest not to forfeit the potential resources of gifted and talented youth. Each bill calls for specific targeting of funds for planning and improving programs for these children, for conducting research and collecting information on special methodology for their education, and for training of personnel; each bill also reiterates concern that disadvantaged gifted and talented youth be identified and provided with activities to enable them to develop to their fullest potential. Existing and expanding congressional concern notwithstanding, available funds are limited, and any widespread obligation for school districts to assure appropriate education for the gifted and talented along specific lines is nascent. Our embarrassment at recognizing an elite in this country has resulted, until very recently, in a sparcity of legislation on this front. The result is that treatment of the gifted remains much more rudimentary than that of the handicapped.

Public and private agencies and organizations to establish projects for identification and education of gifted and talented children including programs such as career education and education for handicapped and environmentally disadvantaged children. Id. § 1863(g).

1. 45 C.F.R. § 160b.2(c) (1976).
2. Id. § 160b.3(b)(1)(ii).
3. Id. § 160b.3(b)(6).
2. State

As of 1978, forty-three states have some written policy—either by statute, administrative regulation, or both—regarding education affecting the gifted and talented. Only eighteen states, however, have officially adopted plans tailored specifically to meet these children's educational needs. Many states are in the process of developing plans along these lines. The efforts of New York and Nebraska are illustrative of such trends.

New York's development is revealing. Progress in education for the gifted and talented dates to 1919, when the New York State Board of Regents convened an Educational Congress, expressing concern for the "superior" child. In 1931 the State Legislature adopted a resolution calling for formation of a Commission on Mentally Retarded and Gifted Children; in 1935 that Commission recommended a state survey to locate gifted children and develop programs for them. Renewed concern emerged in the 1950's; in the late 1950's and early 1960's efforts were initiated by the State Education Department through the work of temporary consultants, which laid the groundwork for establishment of a fulltime, state-supported position as supervisor of education of the gifted.

In 1976, the Board of Regents issued a policy statement urging identification and development of coordinated programs for the gifted and talented. Although it was recognized that local school authorities cited in note 1 supra, and state statutes cited in note 41 supra. 85. See, e.g., authorities cited in note 1 supra, and state statutes cited in note 41 supra. 86. R. Ming, Gifted and Talented Education in New York State: An Update in '78, at 1 (mimeo 1978). 87. REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, EDUCATING THE GIFTED AND TALENTED IN NEW YORK STATE (1976) [hereinafter cited as REGENTS]. In his forward, the President of the University of the State of New York noted:

The state educational system functions very well in educating the vast numbers of students in the middle, the so-called normal range of ability, but official and public enthusiasm and support are often less generous when the gifted and other exceptional students on the fringes are singled out for special or differentiated treatment. Thus, such students often do not receive true equality of opportunity for growth.

In this Bicentennial Year, it is appropriate to note that Thomas Jefferson insisted that the only natural aristocracy among men is grounded on talent. In fairness, we must honor those able students whose eventual membership in that natural aristocracy can be anticipated in their early years, by according them equal opportunity for growth commensurate with their capabilities.

Equal opportunity does not mean the same length or type of education for everyone. True equality consists in treating unequal talents unequally. Id. at 4 (emphasis added). A survey of education for the gifted and talented in New York State, conducted by the State Department of Education in 1974-75, had revealed that less than 0.02 of one percent of total school budgets were earmarked to support programming for the gifted and talented. Out of each $1,000,000 of budget...
districts already had instituted a variety of programs for the gifted and talented, these reached only a small percentage of the exceptionally bright in the state. The policy statement emphasized, therefore, the necessity for coordinated programming to replace piecemeal provisions in this area. Recommendation was made for the development of strategies to identify and encourage "those gifted and talented pupils who may be disadvantaged because of race, ethnic origin, language barriers, handicapping conditions, sex, a rural or urban environment, or economic deprivation." State-wide organization of regional resource development and demonstration centers, such as those used for the handicapped, was also recommended; State Education Department resources were committed to develop materials and teaching practices to assist local school districts.

Under the provisions of a federal grant, the State Education Department proceeded with development of a plan to implement the Regent's 1976 policy statement. Included were preparation of guidelines for establishment and operation of Regional Resource Centers on education of the gifted and talented, for in-service and preservice activities, and for preparation of training manuals on identification of and programming for the gifted and talented.

During 1977-78, the Department established three prototype regional resource development and demonstration service centers; these are designed to provide staff training for identification of the gifted and development of educational programs. Additional funds are being sought to expand the network of centers; it is hoped that twenty-one centers—together with a suitable number of satel-
lites—to be supported primarily by sustained state aid, will be established.\textsuperscript{93}

The growth of concern for the gifted and talented is further evidenced by state legislative grants to local school districts in support of projects for these students.\textsuperscript{94} In addition, newly formed advocacy groups have been emerging throughout the state at the local, county and state levels. Two of these groups operate statewide, and are dedicated to marshalling human and financial resources for improving the education of the exceptionally bright.\textsuperscript{95}

These developments notwithstanding, the state legislature has been slow to act. To date, there is no comprehensive New York State plan, either statutorily or through administrative regulations, for education of the exceptionally bright. Those closely involved in the fight for a sustained effort in this direction feel that the state is still far from making a substantial commitment.\textsuperscript{96}

Typically, Nebraska, like New York, lacks a comprehensive statutory plan for the education of gifted children. But Nebraska encourages its state school districts to make special provisions for these children. The State Department of Education is authorized to employ a consultant to advise all state schools in the development and implementation of plans for the education of such children.\textsuperscript{97} This provision, enacted in 1967, defines “gifted children” as children who excel markedly in ability to think, reason, judge, invent, or create and who need special facilities or educational services or both such facilities and services in order to assist them to achieve more nearly their potentials for their own sakes as individuals and for the increased contributions they may make to the community, state, and nation.\textsuperscript{98}

Nebraska also makes appropriations from the State School Foundation and Education Fund to school districts which have submitted approved special educational programs for exceptionally bright students.\textsuperscript{99} The State Board of Education not only has

\textsuperscript{93} Ming, supra note 86, at 7.
\textsuperscript{94} Id. at 6. One grant of $50,000 was awarded for a project in New York City Community School District No. 18 in Brooklyn; $75,000 was awarded to the Long Beach City School District in Nassau County. In both instances, the school districts themselves took the initiative to obtain the funds through direct requests to the state legislature. Id.
\textsuperscript{95} Id. at 6.
\textsuperscript{96} Conversation with Roger W. Ming, supra note 88.
\textsuperscript{98} Id.
\textsuperscript{99} Neb. Rev. Stat. § 79-1337 (Supp. 1977). See also id. § 79-1336. Total per pupil allocations range from $300 for kindergarten students to $960 for those in grades 9-12.
responsibility for approving plans submitted by the school districts, but also for establishing criteria for the classification of gifted children.\textsuperscript{100} Regulations, promulgated by the Department of Education, provide multiple methods to identify gifted children, including: (1) general intellectual ability; (2) specific academic aptitude; (3) creative or productive thinking ability; (4) leadership ability; (5) visual or performing arts ability; and (6) psychomotor ability.\textsuperscript{101}

There are potential difficulties with this encouragement through financial support, because there is no guarantee to the participating school districts that the School Foundation and Equalization Fund will have sufficient money to provide adequate financial assistance for any ongoing program. The School Foundation and Equalization Fund consists of only such sums "as the Legislature may appropriate, . . ."\textsuperscript{102} and other incentive payments are given priority in funding.\textsuperscript{103}

Magnet Schools

The concept of a "magnet" school for the exceptionally bright or talented has recently come to the fore as a method for educating the gifted while coping with problems of segregation. The schools are designed to provide enriched curriculum in a variety of academic and artistic areas; they may also provide special career educational options. Development of a magnet school in a segregated district is aimed at attracting a racial mix of students from beyond the immediate community so that integration may be achieved without forced busing.\textsuperscript{104} Magnet schools have been established

\textsuperscript{100} NEB. REV. STAT. § 79-1337 (Reissue 1976).

\textsuperscript{101} 2 Neb. Admin. Rules & Regs., State Dept. of Educ. Rule 3, at 3-3 (1977). The total number of children who may be identified in a district special education program is limited to the larger of 10\% of the district student population or 10 students. Students who score in the 98th percentile or higher on an individual psychological (IQ) test and who achieve a 96th percentile or higher score on a standardized achievement test must be identified first to the program. In addition to these students, if the 10%/10 student aggregate limitation has not been exhausted, then students eligible under categories (3) through (6) above may also be identified to the program, but not more than 5\% of the total student population. Rule 3 of the Regulations further sets down program requirements dealing with general procedural and administrative matters, rather than substantive guidelines. The rule also prescribes teacher qualifications for gifted student programs but does not require special certification.

\textsuperscript{102} NEB. REV. STAT. § 79-1332 (Reissue 1976) (emphasis added).

\textsuperscript{103} NEB. REV. STAT. § 79-1343 (Supp. 1977). Available funds are divided so as to effect a pro rata reduction in the sums which would have been provided for special education under applicable formulae. NEB. REV. STAT. § 79-1342 (Reissue 1976).

\textsuperscript{104} See, e.g., G. ORFIELD, MUST WE BUS? 133 n.52, 276, 405 (1978); H. KALODNER & J. FISHMAN, LIMITS OF JUSTICE: THE COURT'S ROLE IN SCHOOL DESEGREGATION 159 (1978); Macruff, Magnet Schools Hailed in Integration Drive, N.Y. Times, Jan. 21,
voluntarily by school board officials (e.g., Chicago), or by court order (e.g., Mark Twain Junior High School in Brooklyn, New York, established pursuant to the plan of a Special Master following a trial at which the school was found to be racially segregated). 105

Experience with the magnet schools has been mixed. For example, it is unclear whether a specialty school established in a predominantly black neighborhood actually has the potential for attracting a true racial mix. 106 Other internal problems arose in the school established following the decision in the Mark Twain case. 107 A recent study found self-segregation in social settings such as the school cafeteria and athletics. On the academic side, integration was found most successful in the arts and least in mathematics and sciences. In many of the academic areas, individualized differentiation within the class—often dividing along

105. See Report of the Special Master, Hart v. Community School Bd., supra note 14, at 3-4 (plan for magnet school designed to avoid forced busing which "in today's emotional climate . . . must be a solution of last resort and not the place to begin."); New York's Best Public Schools Defy Racial Stereotyping, N.Y. Times, Jan. 23, 1978, at B1, col. 1 (citing Mark Twain School). In the Mark Twain case, in order to equalize the educational opportunities of blacks and other minorities, a plan requiring approximately equal percentages of blacks and others in the district was developed. The plan, however, had to account for the need of maintaining the school in a somewhat dangerous, all-black area which was run down, where whites would be reluctant to be bused in. There had been a heavy leakage of whites in the school district to many private institutions. To solve the problem and avoid a further flight of whites, a fully integrated school for the superior was developed at Mark Twain with a racial make-up equal to that of other parts of the district. Since selection only on the basis of demonstrated intellectual ability would have reduced the percentage of blacks to less than the overall percentage in the district, admission to the school was broadened to include a variety of different forms of superiority in the arts and in athletics.

106. See Report of the Special Master, November 15, 1976, at 2, Armstrong v. O'Connell, 408 F. Supp. 825 (E.D. Wis. 1976). Evidence revealed that the Board of Education's assumption that high quality elementary and junior high specialty schools established in predominantly black neighborhoods will attract non-black and black students in sufficient numbers to provide desegregated student populations at or near the capacity of those schools was not valid. But cf. Report of Special Master, Hart v. Community School Bd., supra note 14, at 5-6, noting success of magnet schools established in ghetto areas of Boston, Massachusetts and Providence, Rhode Island; and of a voluntary program for art and music in an elementary school in a predominantly minority-populated area of New York City. That report also called for strong advertising and recruitment efforts aimed at informing the white community of the advantages of the magnet school for their children.

107. Attaining a racial mix was not a problem in the Mark Twain School. The school proved quite popular among parents who had formerly been dissatisfied with the segregated atmosphere and inadequate facilities.
racial lines—became obvious, causing just those separatist tendencies and resentment the school was designed to avoid. Subconscious bias and disillusionment on the part of teachers were also cited as factors contributing to racial tension.\textsuperscript{108}

In short, experience teaches that the magnet school itself cannot magically erase years of racial prejudice and socio-economic discrepancies.\textsuperscript{109} Moreover, establishment of magnet schools constitutes a rejection of the mainstreaming philosophy. It may be argued that the advantages of an enriched program are countered by elitism and an unhealthy lack of exposure of students to the diversity of ability representative of the outside world. Furthermore, when the best students in the district are concentrated in one school they undoubtedly feed on each other; the result may be that this select group obtains an education superior to that offered in other schools. The problem is similar to that engendered by selection procedures in first-rate private colleges: they may lead to long-term disparity in training and, consequently, higher social and economic status for those admitted. Thus—as in other efforts in this field—magnet schools are born in the name of equality but may end, albeit unintentionally, by emphasizing and promoting inequality. No true consensus has been reached on the wisdom of the magnet school concept; clearly, many of the problems raised are beyond the power of the courts to solve.

\section*{Remaining Problems}

The prevailing legal picture is that there is no clear legislative or judicial remedy for the gifted child whose capacities are somewhat inhibited by lack of facilities capable of allowing development up to his fullest potential. We still assume, for the most part, that genetically favored children will learn more rapidly themselves and find their way to superior positions.

This, however, is not always true. It is a particularly problematical assumption when applied to children of the lower classes, whose parents may not recognize their potential, or if they do, do not have the patience or wherewithal to assure its fullest develop-

\begin{footnotesize}
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\item 109. Realization of this problem led the Special Master in the Hart case to recommend: programs on racial relations in schools within the district; engagement of a full-time human relations aid from the minority community to act as a representative and confidant for minority students; establishment of an orientation program for students entering the magnet school; use of groups and agencies experienced in resolving intergroup conflicts for advice in preparing the community for the transition towards implementation of the magnet school.
\end{itemize}
\end{footnotesize}
ment. Instead, the tensions which may be caused by the extraordinarily gifted child often result in a squelching of talent. Recognition of these problems has led to concern for identification of gifted and talented youth among disadvantaged populations in the legislation described above, and to the move against culturally biased testing. But these concerns are recent, and attempts to solve the problem are at best in the incipient stages.

Progress is thwarted, in part, by the strong egalitarian trend counseling against the availability of special public facilities for, or attention to, gifted children. As noted above, entrance examinations to special schools for the gifted have been attacked as racially discriminatory; such attitudes have raised questions about the core validity of such programs. On the other hand, opening up all special facilities equally has been attacked as decreasing advantages for those with great potential; the libertarian interest in each individual's attaining the highest level possible would, it is argued, be ignored or forfeited.

The concept of mainstreaming, under which separate schools for the gifted are phased out and exceptional children are brought back into the regular school with special enriched curriculum, use of resource rooms, or extra-curricular activities, has been introduced in an attempt to avoid these philosophical difficulties. This tendency is not altogether acceptable, however, and may be self-defeating. Even in the magnet school, where in-class differentiation perhaps would not be as great as in a totally mainstreamed environment, it is apparent that children perceive that some are receiving greater attention and opportunity than others. It may even be argued that seeing the difference emphasized every day in the same setting creates more of a sense of elitism and deprivation than having separate institutions with some criteria for selection.

**TREATMENT OF HANDICAPPED CHILDREN**

Legislatures and the courts have given a great deal more attention to handicapped children than to the gifted and talented. Partly, this may be a result of the more obvious disadvantage of the handicapped in terms of their ability to overcome mediocrity and indifference in our institutions. Although the gifted and talented will not, in all instances, be able to live up to their potential

110. Far from being a straightforward technical problem of how best to relate diagnosis and treatment, the classification and labeling of children . . . has to be seen also as a process of social control. Classification and labeling serve several purposes not immediately obvious: to maintain the stability of the community and its institutions, to control the allocation of resources and govern access to them, to reduce discord in school and neigh-
unaided, there is the common perception that they will thrust their way through disadvantage, certainly with more ease than the handicapped.

HISTORY OF TREATMENT

There are three major historical stages in the development of attitudes towards the handicapped child. First, during the pre-Christian era, persons we might characterize as handicapped were, in many places, persecuted, neglected, or mistreated. Second, during the spread of Christianity, they were alternatively persecuted and pitied. During these earlier stages, killing by exposure as practiced by the Greeks or "overlaying" and smothering as practiced until very recently in Western Europe were common.111 Third, in recent years there has been a movement towards acceptance of the handicapped and their integration into society to the greatest degree possible. Societal attitudes have changed from those reflected in Sparta's practice of killing the deviant or malformed infant or from the exploitation of the handicapped as court jester.112

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111. See, e.g., Harriss, Why Men Dominate Women, in COLUMBIA 9, 12 (1978).
112. S. KIRK, supra note 1, at 6. The ancients saw the handicapped as bad omens, drags on society, non-workers, accursed by the gods and unworthy of human rights. The term "idiot" came into being in ancient Greece. Literally, it means peculiar or different, and it was applied originally to all types of deviance. The Romans had a more paternalistic attitude towards the handicapped, who often served as entertainers for the rich. In ancient China, however, Confucius wrote about the weak-minded and taught that society should assume responsibility for those unable to care for themselves.

With the coming of Christianity, handicapped individuals were treated more kindly; they were regarded as unfortunates for whom God expected others to make provisions. Begging was allowed and considered God's will.

Exceptional individuals were used as fools and jesters in medieval courts. Starting in the 12th century, the kings of England made the care and treatment of idiots a matter of royal concern. Renaissance kings enacted some measures for the protection of the handicapped in the areas of criminal and property law. These attempts, however, were crude at best. Neither did the Protestant reformation help to enlighten attitudes toward the handicapped: Luther and Calvin considered intellectual retardation to be essentially evil; the deviant were regarded as possessed by the devil.

Significant strides toward constructive caring for and treatment of the handicapped got under way in the 18th and 19th centuries, although it is not until very recently that major attempts have been made to bring the handicapped into the mainstream of society. L'Abate & Curtis, Historical Background, in CONTEMPORARY ISSUES IN SPECIAL EDUCATION 3 (1977).
In our nation, prior to the 1800’s there were very few educational provisions for the handicapped. In the early part of the nineteenth century, several prominent citizens spoke out on behalf of the retarded, the socially maladjusted, and the deaf. Between 1817 and 1850, spurred by the initiatives of Horace Mann, Samuel Gridley Howe, and others, residential schools were established for these handicapped groups. The schools offered training and a protective environment, often covering the life span of the individual. From 1850 to 1920 such schools grew rapidly. Social organizations and state legislatures began to become aware of the need to care for the disabled. The problem, of course, was that too often the handicapped were merely sent away and forgotten.

Beginning in the early part of this century, the policy shifted from the building of large residential institutions towards the establishment of facilities nearer to the child’s home. Local responsibility for the care of the handicapped developed. Mere custody and treatment gave way to a commitment to education and rehabilitation. Samuel Gridley Howe’s prophecy that the trend in education of exceptional children would be towards integrating them into “common” schools with “common” classmates in all possible areas was being fulfilled.

Tolerance of and concern for the handicapped increased with the advent of World Wars I and II, the Korean War and the Vietnam War. Many men, considered “normal” by their peers, were rejected for service in the armed forces due to some physical impairment; many others returned home injured and disabled. As disabilities became more common, society was forced to become more accepting. The Thalidomide story and fear of widespread future genetic damage because of chemicals, drugs and radiation has sensitized many of us to the issue of the incapacitated. Changing parental attitudes also contributed to the development of care for the handicapped; parental interest and pressure on behalf of the handicapped fueled medical and psychological research, legislation, teacher education, improved transportation and the like.

In the last decade, public concern for the handicapped as well as handicapped group activism has exploded. And, as noted elsewhere, mainstreaming has wrought a drastic turnabout in attitudes towards treatment of the handicapped. Since the turn of the

113. S. Kirk, supra note 1, at 6; W. Cruickshank and G. Johnson, supra note 1, at 11-12; L’Abate & Curtis, supra note 112, at 5.
114. See note 147 infra.
116. See text at notes 23-24 supra.
century, when special classes were first established in this country, segregated classroom environments of some type had been the most popular means of dealing with the handicapped. Now, at least in the case of mildly handicapped youngsters, more than minimal use of such provisions is considered by many educators to represent an unnecessary and undesirable educational tool; placement in the regular class with supplemental services is favored. Concerns about biased testing and the use of special education programs as dumping grounds are, as noted above, part and parcel of this mainstreaming movement and apply to care of the handicapped as well as to treatment of the exceptionally bright.

**LEGAL DEVELOPMENTS**

The great concern for the handicapped, accompanied by the mainstreaming theme, is reflected in judicial and legislative pronouncements on the problem. In this area, the judiciary has broken substantial ground in establishing rights of the handicapped to an appropriate public education. Extensive legislation on the federal and state levels has built upon judicial pronouncements and reserved another role for the courts: assuring enforcement and implementation of required procedures and services.

*Judicial*

Handicapped plaintiffs have found the courts sympathetic to their pleas for a right to an appropriate education. Several cases have established for the handicapped the same right of access to free public education established for all racial groups in the landmark Supreme Court ruling in *Brown v. Board of Education*.117

Some of these cases involve the danger of discrimination

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117. *See* text at notes 34-37 *supra*. Part of the impetus for the mainstreaming movement stemmed from equivocal results of studies measuring progress of handicapped students who had been placed in segregated settings. Of course, as in the case of treatment of the gifted, there is considerable difference of opinion as to how far mainstreaming should go and to what extent special provisions should be curtailed. *See* discussion in Lora v. Board of Educ., 456 F. Supp. 1211 (E.D.N.Y. 1978). Recently more and more studies have been conducted in an attempt to collect hard, empirical data in support of the mainstreaming trend. *E.g.*, Cantrell & Cantrell, Preventive Mainstreaming: Impact of a Supportive Services Program on Pupils, 42 Exceptional Children 381 (1976); Haring & Krug, Placement in Regular Programs: Procedures and Results, 41 Exceptional Children 413 (1975).

118. 347 U.S. 483 (1954). *See* discussion in Limits of Legal Redress for Children, in N. Hobbs, Issues in the Classification of Children 168-79 (1975); Burt, Judicial Action to Aid the Retarded, id. at 293; Kirp, Kuriloff & Buss, Legal Mandates and Organizational Change, id. at 319-55; Exploring Procedural Modes of Special Classification, id. at 386-431.
against minorities as a result of mislabelling. These, you will remember, focused on discriminatory tracking or testing. They not only support implicitly the right of gifted minority students to develop to their fullest potential, and to avoid misclassification as mentally retarded or the like, but also establish a right to adequate treatment for those minority students who may be handicapped. In one of the cases, for example, the court specifically attacked the school system's failure to provide remedial programs for disadvantaged and emotionally disturbed youngsters.119

The right of all handicapped children, minority or otherwise, to an appropriate education has been established explicitly under the equal protection and due process clauses. In Pennsylvania Association of Retarded Children v. Commonwealth of Pennsylvania,120 exclusion of mentally retarded children from the public education system was found violative of the equal protection clause. The court ruled that once having undertaken to establish a free public education for all children, the state must provide education "appropriate to the child's capacity" whether or not the child is mentally retarded.121 The case was resolved by a consent decree which encompassed comprehensive court-ordered changes in education of the retarded, including prior notice of suggested non-mainstream placement and the opportunity for a hearing to contest the recommendation. In its opinion, the court acknowledged the danger of stigma in the labelling of a child as mentally retarded; it emphasized the need for due process hearings in any instance where the state's action may result in stigmatization.122

A second key judicial pronouncement in this area was Mills v. Board of Education,123 which presented a challenge to classification and assignment of exceptional children to non-mainstream educational facilities. The court declared that since other handicapped children were given free public education, any exceptional


121. 343 F. Supp. at 285 (citations omitted).

122. Id. at 293.

child had a right, guaranteed under the federal equal protection clause, to a constructive education, including appropriate specialized instruction. It also noted that federal "[d]ue process of law requires a hearing prior to exclusion, termination or classification into a special program." To enforce this due process right the court ordered periodic review of each child's status and the soundness of existing placement.

State courts have also begun to recognize the rights of handicapped children to a full education, resting their decisions on state constitutional guarantees of free public education rather than on federal constitutional sources. For example, in *Elliott v. Chicago*, the court found such a mandate for free public education of the handicapped. And where private schools are used by the state to make available specialized instruction, tuition must be free. In Nebraska, *Schutte v. Decker* interpreted state statutes as not mandating public payment of transportation for handicapped children forced to attend school outside their school district, but this restrictive interpretation was reversed by legislation.

Another tack taken by some courts in furthering the rights of the handicapped to an appropriate education has been an expansion of a right to treatment, based on statutory and constitutional grounds. Initially articulated in habeas corpus cases which established that restraint of liberty by civil commitment cannot be justified if no treatment is rendered, the courts have developed a right to treatment for the handicapped in a variety of settings, in-

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124. *Id.* at 875 (citations omitted).
126. *Id.* Senator Robert T. Stafford of Vermont put the existence of "mandatory full service statutes in all the states as the first model for the federal Education for All Handicapped Children Act." Stafford, *Education for the Handicapped: A Senator's Perspective*, 3 VT. L. REV. 71, 72 (1978). He notes that Congress deliberately put responsibility in the state educational agency rather than other state departments which previously took charge of such children. *Id.* at 77.
127. 164 Neb. 582, 83 N.W.2d 69 (1957).
129. Donaldson v. O'Connor, 493 F.2d 507 (5th Cir. 1974), *vacated and remanded*, 422 U.S. 563 (1975) (to consider only the issue of monetary damages for violating a constitutional right to liberty, the issue of right to treatment during confinement not reached since Court noted that the state had no power to confine the patient in the first place. "A state cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself . . . ." *Id.* at 576.); Ragsdale v. Overholser, 281 F.2d 943, 950 (D.C. Cir. 1960) (Fahy, J., concurring). *See also* Darnell v. Cameron, 348 F.2d 64, 67 (D.C. Cir. 1965); *Developments in the Law—Civil Commitment*, 87 HARV. L. REV. 1190, 1324-29 (1974). *Cf.* Bouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966) (relying on statutory right to treatment grounded in District of Columbia's provisions concerning the mentally ill).
cluding schools. But without resources provided by the legislature, advocacy by local outside pressure groups, and supervision by masters or others to see that decrees are carried out, judicial decisions can achieve little of lasting significance.

Legislative

Reacting to public pressure, as evidenced particularly in the line of judicial decisions just described, Congress and state legislatures have taken substantial steps in recent years towards codifying standards to be met in the special education of the handicapped.

I. Federal

a. Education of All Handicapped Children Act

The Education of All Handicapped Children Act of 1975 ("EHA") represents the most recent statement of a strong federal policy favoring full education of all handicapped children. Congress first comprehensively considered special problems involved in educating the handicapped in 1966 when it added Title VI to the Elementary and Secondary Education Act. Title VI established the Bureau of Education for the Handicapped, designed to func-

130. In Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971); 334 F. Supp. 1341 (M.D. Ala. 1971); and 344 F. Supp. 373, 387 (M.D. Ala. 1972), aff'd sub nom. Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974), the lower court, relying on a due process rationale, found a right to adequate treatment for mentally retarded individuals committed to a state school. In affirming the opinions and decrees of the district court, the Court of Appeals declared that the Fifth Circuit "had established that the right to treatment arises as a matter of federal constitutional law under the due process clause of the Fourteenth Amendment." 503 F.2d at 1314.

In Inmates of Boys Trading School v. Affleck, 346 F. Supp. 1354 (D.R.I. 1972) and Martarella v. Kelley, 349 F. Supp. 575 (S.D.N.Y. 1972), a right to treatment was found for juveniles in training schools. In one recent case, it was held that there is a statutory and constitutional entitlement to adequate education and therapeutic support for emotionally disturbed students in special schools in New York City. Lora v. Board of Educ., 456 F. Supp. 1211, 1290-91 (E.D.N.Y. 1978).


132. 20 U.S.C. §§ 1401-1461 (1976). Pub. I. No. 94-14251 provides that the act "may be cited as the 'Education for All Handicapped Children Act of 1975.' "

133. Pub. L. No. 89-750, 80 Stat. 1191 (repealed 1970). Federal interest in educating the handicapped dates back to 1864 when Congress established the predecessor to Gallaudet College, designed to serve deaf students. In 1879, it began support of the American Printing Home for the Blind in Lexington, Kentucky. Report, Bureau for Education of the Handicapped, Department of Health, Education and Welfare (mimeo 1978). However, it is only in the last 30 years that the federal role has had major impact. Federally-initiated grants began during the 1950's. In the 1960's, under President Kennedy's leadership, there was an acceleration of efforts for aid to the handicapped, including the establishment in 1961 of the Presidential Commission on Mental Retardation. However, there was no major legislative attention until the mid-1960's. J. Pauschter, supra note 10, at 14. Pauschter indicates that
tion mainly as a research center. In 1970, Congress repealed Title VI and enacted the Education of the Handicapped Act, giving the Bureau of Education for the Handicapped power to disburse grants for studying and improving educational services for the handicapped. This funding was extended by Congress in 1973.

Amendments made in 1974 to the Education of the Handicapped Act represented a major change in direction. The federal government moved beyond the role of catalyst for state activities and increased its involvement in the control and funding of education for the handicapped. The 1974 amendments established detailed due process procedures for the placement and evaluation of handicapped children, and required states to create programs to identify, locate and evaluate these youngsters. In addition, the new provisions required states receiving federal funds to maintain a policy of educating all handicapped children.

Passage of the EHA in 1975 was meant to bring to fruition the plans and goals called for in the 1974 Act. Congress found that existing provisions had not had sufficient impact:

[of] the more than eight million children (between birth and twenty-one years of age) with handicapping conditions requiring special education and related services, only 3.9 million such children are receiving appropriate education. 1.75 million handicapped children are receiving no educational services at all, and 2.5 million handicapped children are receiving an inappropriate education.

The legislators recognized that the final cost of such neglect is far greater than the expense of providing an adequate remedy; the burden is borne ultimately by the children, their families, their communities and society as a whole.

The EHA was intended to assure an appropriate and adequate free public education for all handicapped children, including protection of the rights of these children and their parents or guardians. Through a system of grants the Act provides assistance to state and localities in providing special programs and constantly assessing the effectiveness of their efforts.}

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137. During fiscal year 1978, the states were to receive a total of $246 million of grant money pursuant to the EHA. B & H Notes, Bureau of Education for the Handicapped, U.S. Department of Health, Education and Welfare (December, 1977).
Of central concern to the legislature were practices and procedures which may either result in misclassification of children or be discriminatory. To avoid such dangers, Congress—aware of judicial pronouncements which, as we have seen, established constitutional rights to notice and hearing prior to a change in academic program as well as to equal educational opportunity for all children—provided for extensive due process guarantees whenever a change in educational placement is proposed, requested or refused. The input of parent and child in the classification decision is essential under the statute. And an opportunity to challenge any placement decision acts as a necessary check against the possibility of abusive classification and inappropriate educational services.

Explicit administrative and judicial protections for these due process rights were also provided. Any party, after exhaustion of available state administrative procedures, may appeal a decision concerning a child's placement or education to the United States District Court without regard to the amount in controversy. The district court is entitled to hear additional evidence and to review the record below, thus providing a de novo hearing to the parties. The court's decision is to be based upon a preponderance of the evidence, and the court may grant relief as it deems appropriate.

Aware that constant monitoring and reevaluation of pupils placed in special education programs is a necessary complement to these procedural safeguards, Congress created the “Individualized Educational Program” (“IEP”). Each child in a special education setting must be provided with an IEP, which includes a statement of present achievement levels and a plan of goals for improvement directed at ultimate placement in a regular educational setting. Periodic reevaluations of each child are also required.

Finally, drawing upon sociological and educational trends, Congress wrote into the law a preference for mainstreaming. States receiving funding must establish procedures to ensure, to the maximum extent possible, that the handicapped are educated along with “normal” students, with such education accompanied by supplementary aids and services where needed.

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138. See text at notes 73-79 supra.
b. Rehabilitation Act of 1973

The salient features of the EHA are echoed in regulations promulgated by the Department of Health, Education and Welfare in conjunction with section 794 of the Rehabilitation Act of 1973, which prohibits any discrimination against handicapped individuals. In 1974, the term "handicapped" was amended to explain that the Act was intended to cover education of handicapped individuals as well as employment-related activities.

Regulations promulgated under section 794 require, among other things, that recipients of federal funds provide every handicapped individual with an appropriate education. An "appropriate education" is the "provision of regular or special education and related aids and services that . . . are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons. . . ." Schooling must, in addition, meet requirements closely paralleling those of the EHA. Section 84.34 of the Regulations provides that a recipient of federal funds should educate a handicapped individual in the least restrictive setting possible, i.e., afford education, where feasible, along with persons who are not handicapped. Section 84.35—dealing with evaluation and placement—requires use of tests with more than a single intelligence quotient and administration of such tests by adequately trained personnel. In making placement decisions, no one criterion or single individual's opinion is to be determinative. Section 84.36 requires recipients of federal funds to establish and implement procedural safeguards, including "notice, an opportunity for the parents or guardians of the person to examine relevant records, an impartial hearing with opportunity for participation by the child's parents or guardian, representation by counsel, and a review procedure."

The significance of the regulations under the Rehabilitation Act is that they make the requirements of specially tailored programs, non-discriminatory evaluation and placement, and due process applicable to any institution receiving any federal funds. Moreover, by opening up the possibility for employment,
the statute and regulations make education for the handicapped potentially more meaningful.146

2. State

Although some state provisions for education of the handicapped have existed since before the turn of the century,147 the past few years have witnessed a vast and rapid proliferation of new provisions which encompass rights and guarantees developed by the case law and echoed in federal legislation. By 1974, all states had some type of legislation mandating education for at least some handicapped individuals. Since that time, newly promulgated provisions require that every handicapped child receive appropriate educational services, and set dates for compliance with statutory guidelines.148 The new legislation is also marked by extensive due process guarantees—including notice of suggested changes in

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146 See, e.g., DeWitt, Handicapped Maintain A Maryland Town, N.Y. Times, March 11, 1978, at 29, 31, col. 4. "Many of these people are more undereducated than retarded." Cf. Burgess v. Schlitz Brewing Co.—N.C.—, 47 U.S.L.W. 2501 (1979) (handicapped persons, according to HEW regulations, include those with visual disabilities less than blindness).

147 Public school special education classes for the deaf date to the 1860's; the first public school class for the mentally retarded was established in Providence, Rhode Island in 1896. By 1922, there were 191 public school programs for children with various handicapping conditions in cities with populations over 100,000.

Stimulating this growth was an increasing base of state legislation either requiring, or at least providing financial incentive for, the development of educational programs for the handicapped. Legislation of this type was introduced in New Jersey in 1911; in Minnesota in 1915; in New York, Wisconsin and Illinois in 1917; in Massachusetts in 1920. By 1948, 1,500 school systems reported special education programs; 3,600 in 1958; and 5,600 in 1963. Yet, in 1975, it was estimated that only 40% of the nation's handicapped children of school age were receiving special education services and that of the other 60%, approximately one million were excluded totally from a publicly supported education. Weintraub, Recent Influences of Law Regarding the Identification and Educational Placement of Children, in E. Mayen, G. Vergason & R. Whelan, supra note 1, at 55, 57; Melcher, supra note 24.

148 N. Bolick, DIGEST OF STATE AND FEDERAL LAWS: EDUCATION OF HANDICAPPED CHILDREN (1975). Many of the states have implemented what is termed "zero-reject" policy legislation; i.e., a statute the purpose of which is to assure that each child's capacities will be developed to the highest level of achievement of which he is capable through appropriate education. H. Turnbull, supra note 3, at 187-90.
placement, of tests used in evaluation, and of the opportunity to appeal placement decisions.\textsuperscript{149} State provisions provide for suitable education in a variety of fora, including the regular classroom, alternative settings within the public school system, or private schools, the cost of which will be reimbursed by the public school system. The statutes reflect a preference for education in the least restrictive environment feasible, and for training of regular school personnel to cope with the problems of the handicapped.\textsuperscript{150}

Again, the New York statutory scheme is typical of developments in many states. New York's laws have recently been amended to reflect federal requirements and concern that, as Governor Carey of New York stated when approving the amendments, previous laws had provided "an inequitable and often ineffective system of meeting the basic educational needs of many of our children."\textsuperscript{151} Article 89 of the New York Education Law deals with the education of children with handicapping conditions. State law defines the "handicapped child" as "a person under the age of twenty-one who is entitled to attend public schools . . . and who, because of mental, physical or, emotional reasons can receive appropriate educational opportunities from special services and programs. . . ."\textsuperscript{152} The board of education or trustee of each school district is required by statute to furnish "suitable educational opportunities for handicapped children" through special services or programs to be determined by the "need of the individual child."\textsuperscript{153}

Responsibility for identification and servicing of handicapped children is entrusted to a Committee on the Handicapped ("COH") consisting of clinical staff educators and the parent of a handicapped person in each local district.\textsuperscript{154} The COH evaluates each handicapped child annually and recommends an appropriate educational program;\textsuperscript{155} it also considers claims that a modification or change in identification, evaluation, educational placement or

\textsuperscript{149} The California legislative case study is described at some length in Kirp, Kuriloff & Buss, \textit{Legal Mandates and Organizational Change}, in 2 N. Hobbs, \textit{Issues in the Classification of Children} 362 (1975).
\textsuperscript{150} N. Bolick, \textit{supra} note 148. All of the development has been very rapid. Many states which at the time of the signing of the EHA had no legislation setting forth due process requirements for special education of the handicapped, now have either statutes, regulations, or plans submitted in compliance with the federal statute, or at least guidelines for proposed regulations in this area. L. Kotin & N. Eager, \textit{supra} note 38, at 7.
\textsuperscript{151} Governor Carey's message approving 1976 amendments, 1976 N.Y.Laws 2248-49.
\textsuperscript{152} N.Y. Educ. Law § 4401(1) (McKinney 1978).
\textsuperscript{153} Id. § 4402 2.a.
\textsuperscript{154} Id. § 4402 1.b(3).
provision of free appropriate public education are not acceptable
to the pupil's parent or guardian.\textsuperscript{156} In order to facilitate prompt
attention to the needs of all handicapped children, statutory regu-
lations require determination of a child's eligibility for a special
educational program within sixty days.\textsuperscript{157}

The statutes and regulations set out detailed procedures dealing
with challenges to placement.\textsuperscript{158} These include appeals from
the COH decision to an impartial hearing officer, review by the
State Commissioner of Education, and appeal to the courts.\textsuperscript{159}
Similar protections are afforded for changes in placement.\textsuperscript{160}

In 1941 Nebraska enacted a comprehensive scheme for the
care and education of children with handicapping conditions. The
legislative policy is to ensure that "all children in the State of Ne-
braska, regardless of physical or mental capacity, are entitled to a
meaningful educational program . . . . Such programs shall in-
clude, but not be restricted to, the development of self-realization,
social awareness, economic usefulness, and civil responsibility."\textsuperscript{161}
Handicapped children are defined as follows: "either physically
handicapped, educable mentally handicapped, mentally retarded,
emotionally disturbed children, children with specific learning dis-
abilities, or such other children as shall be defined by the State
Department of Education."\textsuperscript{162}

Nebraska pays for the care and education of children, from
birth until the age of twenty-one, who are either acoustically hand-
icapped or visually handicapped.\textsuperscript{163} These children are eligible to
to attend the Nebraska School for the Deaf or the Nebraska School
for the Visually Handicapped without charge if they cannot ac-
quire a satisfactory education in the common public schools of the
state.\textsuperscript{164} The board of education of each school district in the state
must pay transportation costs to and from these schools.\textsuperscript{165}

Residential schools for the education of trainable mentally re-
tarded children may be established by the state.\textsuperscript{166} In addition, a
public school district or a combination of districts may establish

\textsuperscript{156} \textit{Id.} § 200.3(b)(4).
\textsuperscript{157} \textit{Id.} § 200.5(d).
\textsuperscript{158} N.Y. Educ. Law § 4404 (McKinney 1978).
\textsuperscript{159} \textit{Id.}
\textsuperscript{162} \textit{Id.} § 43-604(2). \textit{See} 2 Neb. Admin. Rules & Regs., Rule 51 of the State Dept.
of Ed. (1977) for definition of "multihandicapped children."
\textsuperscript{165} Neb. Rev. Stat. § 43-607(3) (Reissue 1974).
\textsuperscript{166} \textit{Id.} § 43-617.
schools for the mentally handicapped with the approval of the State Department.

Each school district must "provide or contract for special education programs for all resident children who would benefit."167 There are a variety of programs, including visiting teachers for homebound handicapped students, correspondence instruction, and other methods of instruction approved by the Commissioner of Education.168

In 1978, the legislature adopted laws expanding the program and benefits available for handicapped children; the state will now pay the costs of "residential care" upon application by the handicapped child's resident school district where prior approval of the State Department of Education is obtained.169 Reimbursement of residential costs is limited to handicapped children who are forced to leave their resident school districts for educational reasons and for whom daily transportation is not reasonable.170 The costs of "food and lodging and any other related expenses which are not part of the education program" are included in the definition of "residential care."171

Early education is mandated in Nebraska. Every school district must demonstrate participation in a plan of services for handicapped children under five years of age. The state is required to reimburse school districts for ninety percent of the costs incurred in operating state approved special education programs for such children upon application of the resident school district. Rather than specify the kinds of services, the statute calls for special education plans to be prepared on a regional basis and submitted for approval to the State Department of Education; participation of individual school districts is also regulated and supervised by the State Department of Education.172

167. Id. § 43-641.
168. Id. § 43-607. Application for these benefits may be made to the district superintendent of schools by the superintendent, principal, teacher, board of education member, or parent or guardian of the handicapped child. Id. § 43-608. Each school district is required to include in its annual budget an amount for education of the handicapped child which is not less than the regular per pupil cost in the district. When that amount has been spent, the school district is entitled to state aid for handicapped children. Id. § 43-609.
170. Id. § 43-627.01.
171. Id. § 43-645(6).
172. "Multihandicapped children" are entitled to receive medical diagnosis, services, and benefits in addition to the special education programs; reimbursements of traveling and residential expenses are also available. Multihandicapped children are children under the age of 21 who suffer from two or more coincidental or educationally significant physical or psychological handicaps. Neb. Rev. Stat. § 43-629 (Reissue 1974). The costs of this program will be paid by the state, except
Responsibility for identification and treatment of handicapped children in Nebraska is generally entrusted to the State Department of Education. The Department is required to develop and maintain search and reporting systems to assist in the early identification and provision of educational services to handicapped children. It must, in addition, evaluate all special education programs, and provide the Legislature biennially with a detailed description of the groups served, the treatment provided, the costs of the services, and the effectiveness of such programs and services.

In order to coordinate programs for the handicapped, the Nebraska Coordinating Council for the Handicapped was established in 1973. The Council is required to maintain a directory of services for the handicapped; distribute information concerning such services; initiate coordinated planning among the various agencies and entities treating the handicapped; maintain records and information; and make recommendations concerning the need for additional services or areas in which coordination of services may benefit the handicapped.

In conformity with federal requirements and state policy, detailed procedures dealing with challenges to the placement, identification, or evaluation of the handicapped child and the provision of appropriate education services were enacted in 1978. A hearing may be initiated by a parent, guardian, competent student of the age of majority, or a school district. It is conducted by the Department of Education through an impartial hearing officer, who is required to make written findings; the Commissioner of Education directs any necessary action on the basis of the decision of the hearing officer. Hearing rights include: representation by counsel; presentation of evidence; subpoena of witnesses; confrontation of witnesses through cross examination; availability of a record of the hearing; availability of written findings of fact and decisions; and exclusion of evidence which has not been disclosed to the objecting party five days prior to the hear

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176. Id.
178. Id.
179. Id.
Judicial review is explicitly provided.

REMAINING PROBLEMS

Judicial action and legislative pronouncements have attempted to cope with problems of definition, selection and suitable facilities and instruction for the handicapped. There is also the need to assure, perhaps through use of an independent ombudsman, that despite environmental deprivation, including parental neglect, children are able to avail themselves of theoretical rights. As noted in connection with gifted and talented youth, parents, particularly those from lower socio-economic groups, are too often beset by their own problems to fight effectively for the best for their children, state authorities are thus left with an extra heavy burden of seeking out students with special problems and taking steps to obtain parental cooperation in taking advantage of special programs. In many cases, parents are either not equipped, or simply refuse, to represent what society sees as the best interests of their handicapped children.

A striking example of this phenomenon was brought to my attention during the course of the Lora trial, discussed above. The evidence in that case revealed that many more white, middle-class than minority, poorer parents took advantage of procedures designed to afford the best possible help for their troubled children. The result, in part, was that more white children were able, at public expense, to enter private schools where facilities were better than in the public schools. State and city notice provisions, while technically adequate, were ineffective in reaching other than the most highly intelligent and aware parents with time and energy to force the system to work for them.

180. Id. § 7 at 888.
181. Id. § 9 at 889.
182. See S. Burke, Affirmative Action Laws for People with Handicaps: Problems of Enforcement 14 (May 18-20, 1978) (paper presented at Nat'l Meeting of Law & Society Assoc. in Minneapolis, Minnesota) ("Architect Edward Steinfield, who headed the research team that recently revised the official standards for barrier-free design, attributes the awareness of architectural barriers as a problem to the results of the polio epidemic in this country in the 1940's and 1950's. 'While often handicapped people come from lower-income groups, the polio epidemic struck people of all income classes.' People with middle- and upper-class expectations found themselves or their children paraplegics, cut off from schooling and jobs.").
Obviously, where readily discernible defects are involved, more objective criteria and easier observability decrease the need for protection of the disadvantaged classes. But even as to such obvious handicaps as hearing and sight defects there is a problem of equalizing resources and capacities which must be addressed. This is especially the case given the lack of a national health program and the inability of some parents to recognize defects and to take their children for testing.

Thus, the task is not just to articulate rights, whether by legislation or judicial pronouncement, but also to assure that target populations are reached and informed of their rights. They must then be assisted to take full advantage of these rights as needed.

The role of the courts in education of exceptional children is limited. As with many of the issues we face, until there is an underlying consensus with respect to what is educationally sound, and to what society wants and will pay for, the courts can, in reality, do very little.

We have arrived at a point where, at least temporarily, there is growing agreement that the handicapped are entitled to extra attention so that they can be permitted, to the greatest degree practicable, to participate as full members of our society. This political agreement is reflected in the legislation already adverted to. Given this fairly definite educational and jurisprudential directive, the courts can play a useful role in ensuring that the substantive rights of exceptional children are enforced and that the details of protective procedure are followed. And with sufficient guidance from legislatures and administrative agencies the courts can measure the appropriateness of a given educational program.185

185. One commentator has suggested that in addition to litigation on procedure or the appropriateness of a given program, the courts may be faced with post hoc damage suits brought by adults who feel the special education they received as children was inadequate; with civil liability suits against school systems, teachers, support personnel and administrators held accountable for providing adequate education by recent legislation; and with civil suits for money damages brought by children affected by expulsion proceedings. Melcher, supra note 24, at 129-30.

Of course, the role of the courts in establishing substantive rights, see text accompanying notes 117-129 supra, is now receding in the face of newly promulgated, detailed federal and state legislation. This phenomenon is evidenced in the case of Harrison v. Michigan, 350 F. Supp. 846 (E.D. Mich. 1972). There, handicapped plaintiffs had claimed denial of their equal protection and due process rights resulting from denial of access to Michigan public schools and had alleged arbitrary suspension and expulsion procedures. The court, acknowledging the paucity of state effort in the area until very recently, dismissed the case as moot in view of a state statute passed since institution of the suit. The statute aimed to assure educational programs and services designed to allow every handicapped person to develop up to his maximum potential. The court stated:

Had the legislature not acted, this court would not have hesitated to step in
In the *Lora* case,\(^{186}\) the court ordered the parties to try to agree upon methods of effecting improvements in the referral and treatment of emotionally disturbed children in special day schools. This order was based, in part, on findings of violation of key provisions of the EHA, the Rehabilitation Act of 1973 and state law, all of which were held to grant plaintiffs a statutory right to treatment. In other cases, the federal EHA's detailed requirements have been held—wherever a state receives federal funds—to take precedence over any local statute or custom which may jeopardize the child's education;\(^{187}\) exclusion of handicapped children from regular classrooms in the absence of procedural safeguards has been found violative of the Rehabilitation Act;\(^{188}\) failure to provide physically handicapped individuals an accessible bus transportation system may also constitute such a violation.\(^{189}\) In still another recent case, long delay in effectuating a state law designed to give equal educational opportunity to the handicapped sustained a finding of "intentional discrimination" in violation of the equal protection clause.\(^{190}\)

American schools have always been publicly controlled, and school policy will normally not deviate substantially from popular dictates. Thus, continued special provision for exceptional children will depend ultimately on public attitudes. Moreover, whether any program will prove useful depends on whether the public is willing to pay the additional costs of this kind of education, including the costs of procedural machinery required to ensure a fair execution of the legislative program. Decisions on financing inject another political constraint.\(^{191}\)

While it is not an issue upon which the courts can speak with much authority, the enormous drive to reduce taxes and to lower the proportion of national resources devoted to public activities, including education, will certainly create added tension in this

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\(^{189}\) Leary v. Crapsey, 566 F.2d 863 (2d Cir. 1977).

\(^{190}\) Panitch v. Wisconsin, 444 F. Supp. 320, 322 (E.D. Wis. 1977).

\(^{191}\) D. Ravitch, *supra* note 7, at 15. Historically, Ravitch points out, whereas reformers might propose this or that change, they had always to win the approval of the local school board, which was either popularly elected or appointed by elected officials. *Id.*
area. At a time when assets are readily available, the courts can deal with problems by ordering relief occasioning additional expenditures for deprived and handicapped children without taking money from others. When resources are in short supply and the public is voting against school budgets, as they did in Ohio, and against local expenditures, as they did in California and elsewhere, then the courts—in attempting to do what the law requires—are bound to increase tensions, much as in the case of desegregation decisions. The shortage of resources, if it continues at the same time that our pretensions and expectations of helping the handicapped increase, is bound to create more difficult legal problems for judges.

It would be a great tragedy if the people as a whole were not aware of the substantial costs involved and were not willing to assume the burden. To promise succor and not deliver is even more of a sin than to ignore the plight of the handicapped.

Beyond all this, the success of a given program depends upon our educators—whether they in fact embrace new theoretical concepts and whether they are willing to attempt to deal with the problems presented by exceptional children.

In the area of the exceptionally able and gifted child, on the other hand, our society and legislatures have apparently not yet reached a clear consensus on how far we should go, or what type of education should be encouraged. Fear of elitism, open admissions and affirmative action programs designed to give minorities a headstart, vie with charges that to do away with special provisions for the gifted or to lower standards will undermine not only the futures of these children but that of society as a whole. Until some consensus is reached the courts will continue to fudge on the issues. The Bakke case192 is merely an extreme example of this problem; less familiar aspects are shot through a variety of issues at all levels of our educational institutions.

Increasingly, the power to resolve many of the legal and educational problems lies not in the courts, or even in the hands of educators in the field, but rather in the bureaucracies of state capitals and even more, in Washington. HEW is given enormous power under certain of the statutes to compel changes and to allocate funds. If discrimination or other failures to live up to statutory mandates are found, the agency can take action which may result in the cutting off of huge amounts of federal aid to local educational agencies.

This has occurred in New York City. In October 1977, the Of-

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Office of Civil Rights of the Department of Health, Education and Welfare addressed a letter of findings to Dr. Irving Anker, then chancellor of the New York City Board of Education, concerning the qualifications of personnel, the maintenance of facilities, the administration of discipline, and the availability of academic opportunities for students in the school system generally. These findings had been made in response to inquiries received by HEW about the City school system from a variety of sources. The letter, originally issued in January 1977 and then revised by HEW, represented the outgrowth of an eight-month review of the system.

Extensive illegal discrimination, in violation of Title VI of the Civil Rights Act of 1964193 and section 504 of the Rehabilitation Act of 1973,194 was charged. It was alleged that enrichment opportunities for the gifted and talented—including special progress classes, advanced placement classes, and special admissions academic high schools—were not sufficiently accessible to minorities. Discrimination against the handicapped was claimed, allegedly due to excessive waiting lists for diagnosis, reevaluation, and placement; dismissal of special education students before the normal 3:00 hour; inadequate and improper evaluation and placement of handicapped students under subjective, nonvalidated standards, resulting in racial disparities in certain special education settings; and lack of consistent mainstreaming or placement of students in an educational environment with non-handicapped students to the greatest degree possible.

The Board of Education was given forty-five days to respond to this warning by developing plans to bring its schools into compliance with Title VI and the Rehabilitation Act. In March 1978, an administrative enforcement action was instituted and in June an agreement was entered into between the Board of Education and HEW.

The proper limits of this type of review have not yet been spelled out. In view of the enormous powers involved, Congress will have to turn increasingly to the courts as a check on bureaucratic ineptitude or overreaching. The technique of the legislative veto and legislative oversight cannot handle the challenges which will arise in the future.195 This, therefore, may constitute still an-

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The right to education cases include methods for identifying excluded or
other path the courts will have to tread in playing their role in the legal, philosophical and pedagogical problems raised by education of exceptional children.

In the main, however, the court's role is a relatively minor one. The choice of how to spend limited resources is obviously of great significance to our society's future and the happiness of its individual members. But, within the broadest limits, such decisions are for the people—through elected representatives and through those charged with running the educational system. Only when they decide on directions can the courts assume their role of ensuring that policy is not flouted and that individual rights, as defined by the legislatures against our constitutional backdrop, are not violated.

CONCLUSION

Operating under appropriate federal, state and local laws and regulations, teachers and educational leaders—given the resources—can improve enormously the situation of exceptional children. The big question is, however, will they be given the resources that our compassionate and generous society can make available? Or will a more narrow-minded and selfish spirit prevail? As in many political-legal questions, a great deal will depend upon whether the parents of the children involved band together into coalitions that will (1) bring pressure on those with power over funding, (2) monitor and seek to improve the actual programs, (3) finance the necessary litigation, and (4), perhaps

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misplaced children, due process procedures for evaluation and placement, and standards for placement in programs appropriate to the child's capacity. Many of the remedial decrees also provide monitoring and enforcement mechanisms established by the court to aid in the implementation process, including citizen committees, expert panels, special masters, and extensive reporting requirements on compliance efforts.


196. There is, for example, a serious lack of available resources even in those states that have adopted legislation making special arrangements for gifted children. See U.S. Comm. of Educ., 92d Cong., 2d Sess., Report on Education of the Gifted and Talented 48-49 (Comm. Print 1972) (“The major deterrent, clearly, was the lack of sufficient funds to carry out significant program activity. The kinds of financial resources necessary to implement legislative intent are just not being allocated at the state level.”). Cf. Maeroff, Debate Rises on Mandatory School Plans for Handicapped, N.Y. Times, Jan. 15, 1979, at A10, col. 1 (abuses in implementation, as, for example, using mimeographed Individual Education Programs and avoiding parent input); McCarthy, City Nears Crisis in Schooling of Handicapped, N.Y. Daily News, Feb. 5, 1979 at 9, col. 1 (lack of funds). Robertson, A Newsletter for Parents of the Learning Disabled, N.Y. Times, Mar. 6, 1979, at C5, col. 1.


The problems are not much different in other related fields. See, e.g., the semi-
most important, educate the public at large so that it supports necessary programs.198