Approved: 2/10/94
Date

MINUTES OF THE SENATE COMMITTEE ON EDUCATION

The meeting was called to order by Chairperson Dave Kerr at 1:30 p.m. on February 7, 1994 in Room 123-S of the Capitol.

All members were present except: Senator Tim Emert (Excused)

Committee staff present: Ben Barrett, Legislative Research Department
Carolyn Rampey, Legislative Research Department
Avis Swartzman, Revisor of Statutes
LaVonne Mumert, Committee Secretary

Conferees appearing before the committee:
Chet Johnson, Reno County Educational Cooperative
Ronald Sarnacki, Hutchinson Public Schools
Larry Clark, Sedgwick County Area Educational Services Interlocal Cooperative

Others attending: See attached list

Senator Tiahrt made a motion that the minutes of the February 3, 1994 meeting be approved. Senator Walker seconded the motion, and the motion carried.

Three bill requests were presented to the Committee. Under the provisions of the first draft, the responsibility for regulation of school buses would be transferred from the Department of Transportation to the State Board of Education. Senator Tiahrt made a motion that the Committee introduce the bill. Senator Walker seconded the motion, and the motion carried.

The second bill draft is a resolution directing Kansas, Inc. to develop a reference document on state and federal workforce training and retraining for use by legislators and others. Senator Tiahrt made a motion that the Committee introduce the bill. Senator Walker seconded the motion, and the motion carried.

The last bill draft would establish the learning earning alliance development program which would provide grants for development of model school-to-work projects. Senator Downey made a motion that the Committee introduce the bill. Senator Langworthy seconded the motion, and the motion carried.

Chet Johnson, Reno County Education Cooperative, discussed the topic of inclusion (Attachment No. 1). He said that handicapped students vary with regard to their special education needs and some need more special education than can be provided in regular classes, decisions must be based on the needs of individuals and districts must provide special education commensurate with each student's capabilities and provide a full continuum of programs and services. He stressed that the principle of what is appropriate for the child should be regarded as paramount rather than the principle of least restrictive environment. Dr. Johnson said the concept of full inclusion is incompatible with the requirement to provide a full continuum of options. He discussed the increased demands placed on regular classroom teachers by inclusion. Dr. Johnson talked about the costs associated with full inclusion and detailed three legal decisions where inclusion was an issue.

Ronald Sarnacki, Hutchinson Public Schools, stated that his concerns with full inclusion are with regard to appropriateness and cost (Attachment No. 2). Dr. Sarnacki gave some examples of the need for additional staff resulting from inclusion programs.

Larry Clark, Sedgwick County Area Educational Services Interlocal Cooperative, said that the concept of full inclusion is appropriate for some students but not for others and decisions should be made on an individual basis. He expressed concern that inclusion will affect the resources of smaller schools to a greater degree than larger schools who have more flexibility. He noted that he has not felt any pressure to go to full inclusion.

Responding to questions from Committee members, Dr. Johnson said they could break out the costs of educating different exceptionalities in special education. Dr. Johnson said he has not felt direct pressure from the state level to move toward a full inclusion model but that it is evident to him that that is the preference at the state level and the direction in which the State Department of Education has been moving. A question was asked if a special education service can be denied because of cost. Mr. Clark answered that a service cannot be denied if it is written in the IEP. The conferees were asked if the rights of regular education students are weighed equally with those of the special education student in making decisions on inclusion. Dr. Johnson does not believe they are and said the Texas case he provided is pertinent to this issue.

Chairman Kerr announced that the Committee would give consideration to the four appointees to the Board of Regents previously interviewed by the Committee.

Senator Corbin made a motion that the Committee recommend confirmation of the appointment of Thomas Hammond to the Kansas Board of Regents. Senator Tiahrt seconded the motion, and the motion carried.

Senator Langworthy made a motion that the Committee recommend confirmation of the appointment of Karen Krepps to the Kansas Board of Regents. Senator Oleen seconded the motion, and the motion carried.

Senator Frahm made a motion that the Committee recommend confirmation of the appointment of Catherine Conger to the Kansas Board of Regents. Senator Corbin seconded the motion, and the motion carried.

Senator Jones made a motion that the Committee recommend confirmation of the appointment of Phyllis Nolan to the Kansas Board of Regents. Senator Walker seconded the motion, and the motion carried.

The meeting was adjourned at 2:25 p.m. The next meeting is scheduled for February 8, 1994.

SENATE EDUCATION COMMITTEE

TIME: 1:30 PLACE: 123-S DATE: 2/7/94

GUEST LIST

NAME	ADDRESS	ORGANIZATION
Jim Yonally	Overland Park	USD #512
Mark Tallman	Topeka	KASB
Wes Espeny	Olsburg	USD 384
Jacque Oakes	Topeka	SDE
Tom Laing	Topeka	Ks Assoc of Rehab Facilities
Josie Torres	Topeka	Families Together
Jane Rhys	Topeka	KS Planning Council on DD
Helen Stephens	"	BV USD 229
Anna Burnett	Topeka	USD 501
Connie Hubbell	Topeka	St Bd of Ed
Denise Apt	Topeka	U.S.A
Kathy Sexton	"	Div. of Budget
Robin Cleaver's	Wichita	Wichita Public Schools
Lowell Mark	Osborne	Osborne Co Leadership
Pat Nichols	Alton	Os Co Leadership
Judith Markham	Osborne	Osb. Co. Leadership
John Cockrum	Osborne	Osb Co. leadership
Jaquelyn Heist	Osborne	Osb Co Leadership
Lisa Heist	Osborne	Osborne Co. Leader Course
Teresa Griffin	Natoma	Osborne Co Leader Course
Larry W Clark	Valley Center	Interlocal #618
Ron Sorgacki	Hutchinson	USD #308
Betty Weathers	Topeka	KSBE
Melissa Lipe	Holton	Holton Sp. Ed. Coop.

SENATE EDUCATION COMMITTEE

TIME: _____ PLACE: _____ DATE: _____

GUEST LIST

NAME	ADDRESS	ORGANIZATION
Mary Conlon	Overland Park	Shawnee Mission USD 512
Joe Meyers	2570 S. 42, KC, K	Turner 202
Don Seibel	Lawrence Ks	Lawrence Public Schools
Sharon Strangellero	Topeka	Concerned Women for America of Ks
Ken Freckett	Topeka	Parent
Sue Chase	Topeka	KNEA
Craig Grant	Topeka	KNEA

INCLUSION POSITION STATEMENT

February 7, 1994

Presented to: The Senate Education Committee

By:

1. Chet Johnson, Executive Director, Reno County Education Cooperative
2. Ron Sarnacki, Director of Special Education, USD 308, Hutchinson, Kansas.
3. Larry Clark, Executive Director, Sedgwick County Area Educational Services Interlocal Cooperative

I. INCLUSION DEFINED

There are those who are advocating that most, perhaps all, handicapped students should be educated exclusively in regular education learning environments with whatever it takes to enable them to benefit.

II. POSITION OF PRESENTERS

1. Handicapped students vary with regard to their special education needs. Generally speaking, the more extensive the handicap, the greater the need for special education.

2. Some students can be successfully educated full time in regular classes in their home schools with no significant special education services. Others will need more special education than can be provided in regular classes.

3. Decisions must be based on the needs of individuals.

4. Districts are legally and morally obligated to provide special education commensurate with each student's capabilities.

5. Districts must provide a full continuum of special education programs and services.

6. The principal of appropriateness is more important than least restrictiveness.

7. Responsible inclusion is appropriate; irresponsible inclusion should not occur.

Sen. Ed.
2/7/94
Attachment 1

III. INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA)

A. Requirements

1. Identify all handicapped students.

2. Provide each student a free and appropriate education in the least restrictive environment.

3. Provide each student with whatever special education and related services he or she needs in order to have an appropriate education.

4. Develop an Individual Education Plan (IEP) that specifies the special education and related services the child needs.

5. Provide a full continuum of special education options.

IV. FULL CONTINUUM

(From least to most restrictive)

1. Regular classes with supplemental aids and services.

2. Part time special education (itinerant and resource room instruction).

3. Special education class in a regular school with selective integration (inclusion).

4. Special education class in a regular school with no integration.

5. Special education school (with or without integration).

6. Homebound/Hospital instruction.

7. Residential placement (public or private).

The continuum requirement recognizes that handicapped students vary with regard to the amount and type of special education they need to have appropriate educations.

IV. KANSAS REQUIREMENTS

The State Regulations for Special Education (effective 6/1/1993) and the Kansas State Plan for Special Education(1994-1996) are presently compatible with IDEA.

A. References from the State Plan

1. *Provide **Inclusive** Learning Environments**

   Objective 1.2. To ensure availability of a **full continuum** of services in least restrictive environments for all students with exceptionalities based on the individual needs of the student.** (Page 2)

2. ***Exceptional children*** means those who *differ in physical, mental, social, emotional, or educational characteristics to the extent that **special education services are necessary to enable them to progress** toward the maximum of their abilities or capacities [K.S.A. 72-962(f)(2)].* Included in this definition are *those children who have autism, mental retardation, specific learning disabilities, hearing impairments, language impairments, speech impairments, behavior disorders, physical impairments, other health impairments, severe multiple disabilities, deaf-blindness, traumatic brain injury, or visual impairments, children eligible for early childhood special education services, or children who are gifted (K.A.R. 91-12-22). (Page 4)*

3. ***Appropriate education*** means special education and **related services which:**

   a. meet the standards and requirements of the Individuals with Disabilities Education Act, Part B (20 USC 1400 *et seq.),* The Vocational Education Act (20 USC 2301 *et seq.),* the Rehabilitation Act of 1973 (Section 504), the Kansas Special Education for Exceptional Children Act (K.S.A. 72-966), and of the Kansas State Board of Education. (page 4)

4. ***Free education*** **means special education provided at public expense** with no cost to parents other than fees or charges which are charged to all students, such as textbook rental, school lunch, laboratory fees, or students trips. (page 5)

5. ***Related services means*** *those services that are required to assist an exceptional child to benefit from special education. Related services include art therapy, assistive technology devices and services, audiology, counseling services, dance movement therapy, medical services for diagnostic or evaluation purposes, music therapy, occupational therapy, parent counseling and training, physical therapy, school psychological services, recreation, school health services, rehabilitation counseling*

services, school social work services, special education administration and supervision, special music education, speech and language services, and transportation (K.A.R. 91-12-22). Related services shall be provided in accordance with standards set by the State Board of Education. (Page 5)

6. ***Special education services means*** *programs for which specialized training, specialized instruction, programming techniques, facilities and equipment may be needed for the education of exceptional children [K.S.A. 72-962(h)].* Such services include physical education (regular or adapted) and vocation education. (Page 6)

7. ***Supplementary aids and services*** means special instruction, curricular adaptations, instructional support services, materials, or equipment provided in conjunction with general education instruction including consultant teacher, itinerant instruction, resource room instruction, tutoring, instructional support provided by teacher aides and paraprofessional personnel, technology, readers and interpreters. (Page 44)

8. ***Maximum extent appropriate*** means the integration of students with and without a disability in instructional and noninstructional environments consistent with the ability of the students with disabilities to achieve satisfactory educational performance. (Page 43)

9. **Placement/Service Options Required.** Each LEA shall provide:

   a. support services to enable each student with disabilities to remain in a general education class placement to the maximum extent appropriate, and

   b. a continuum of placement/service options so that there is the least necessary deviation from the educational and curricular experiences provided for a student with disabilities and his or her peers with no disability. Students with giftedness also shall have the availability of a continuum of placement options so that their unique learning needs may be met. The placement/service options for children and youth with disabilities shall include:

      1) general classroom instruction for the entire school day with special materials, equipment, modification to the general education instructional program, and/or indirect services provided by special education or related services personnel;

      2) general classroom instruction for 95-100 percent of the student's educational program, with special education and/or related services for the remainder of his/her program;

      3) general classroom instruction for 80-94 percent of the student's educational program, with special education and/or related services for the remainder of his/her program;

4) general classroom instruction for 40-79 percent of the student's educational program, with special education and/or related services for the remainder of his/her program;

5) special education classroom instruction for more than 60 percent of the student's educational program with services provided in the general education classroom for the remainder of his/her program;

6) full-time instruction in special education with opportunities for participation with students with no disabilities in nonacademic and extracurricular activities;

7) instruction in a separate special school for most of the school day, with instruction in the general education classroom for part of the school day or opportunities for participation in nonacademic and extracurricular activities in a general education school setting;

8) full-time instruction in a separate special school;

9) instruction provided in a hospital setting or residential facility on an individual or group basis;

10) instruction provided on an individual basis in a home (it should be noted that home-based instruction is not necessarily considered as most restrictive for preschool age); and,

11) instruction provided in a special secure setting.

These placement options shall be made available to the extent necessary to implement the individualized education program (IEP) for each student with a disability in the local education agencies' jurisdiction. Enrollment in the State schools for the Blind and the Deaf may be used to provide a placement option.

34 CFR 300.551 **K.A.R. 91-12-35(b)**
34 CFR 300.552(b)

The above references indicate that Kansas understands that full inclusion is both inappropriate and illegal.

V. REASONS WHY SPECIAL EDUCATION COSTS INCREASE

1. School districts have added positions to **improve** their special education programs and services. More affluent districts are more likely to employ more special education personnel than are less affluent districts of comparable size.

2. Inclusion has and will require an increase in the number of special education personnel. Inclusion is more labor intensive. If not, the special education needs of many students will not be met.

3. Kansas now requires school districts to provide special education services to children three through four years of age.

4. School districts are now required to provide extended school year services to students who regress significantly over the summer months.

5. School districts are now being told that they must continue to provide special education programs for handicapped students who have been expelled from attending school.

6. Traumatic Brain Disorders and Attention Deficit Disorders (ADD) have been added as categories of exceptionality. Experts estimate that about 4.0% of students have ADD.

7. The federal government has mandated transitional services.

8. A few Kansas school districts have experienced significant enrollment increases. Such increases always include some handicapped and gifted students.

9. The list of related services that school districts must provide has expanded. The Kansas Regulations for Special Education (effective June 1, 1993) state on page 4:

   "Related services" means those services that are required to assist an exceptional child to benefit from special education. Related services include art therapy, assistive technology devices and services, audiology, counseling services, dance movement therapy, medical services for diagnostic or evaluation purposes, music therapy, occupational therapy, parent counseling and training, physical therapy, school psychological services, recreation, school health services, rehabilitation counseling services, school social work services, special education administration and supervision, special music education, speech and language services, and transportation.

10. The Kansas Regulations for Special Education sets teacher/pupil limits and paraprofessional requirements.

11. Districts give in to parents to avoid expensive litigation. In recent years over ninety percent of school law suits have involved special education issues.

12. Deinstitutionalization has required school districts to provide extensive services for students formerly served in more restrictive environments.

13. Society continues to produce more seriously and multiply handicapped children who need extensive special education and related services:

    a. Medical science is saving more babies who have extensive medical and physical problems that have educational implications.

    b. Drug and alcohol use during pregnancy produces children who are very hard to manage and educate.

    c. Poverty, child abuse, and family instability are producing more multiply handicapped students.

14. The United States Supreme Court recently ruled that certain special education services can be provided in parochial schools under IDEA without violating the separation of church and state principal of the U.S. constitution.

15. Inflation

VI. FULL INCLUSION IS MORE EXPENSIVE

1. We affirm that full inclusion does not meet the special education needs of many handicapped students, and that to the extent that it does not, those students are being neglected. Example: a trainable mentally handicapped student.

2. Many regular class teachers do not have the training or time to constantly meet the needs of an assortment of handicapped students.

3. Regular class teachers cannot be expected to give handicapped students a disproportionate percent of their time and energy without neglecting the needs of other equally deserving students. It is not fair to overload regular class teachers. If we do, the education of many students, normal and handicapped, will be affected adversely.

4. School districts do not have unlimited financial and human resources. Districts cannot duplicate in every regular class the special education conditions that can be more efficiently and effectively provided in more restrictive environments.

5. Attempting to provide special education services in regular classes will not be effective, efficient, or cost effective in many cases.

   Example 1: Eight TMH students

   Example 2: Learning Disabilities Resource Room

VII. NATIONAL STATISTICS

Source: 15th Annual Report to Congress, 1993

Locations Where Handicapped Students are Being Educated	Percent
Regular Schools	94.4
Separate Schools	4.2
Residential Facilities	.8
Home	.6

School Environments in Which Handicapped Students are Being Served	Percent
Regular classrooms more than 40% of time	69.3
Special Education Classrooms for at least 60% of the time	25.1
Separate Schools	4.2
Other environments	1.5

VIII. LEGAL DECISIONS

Case One

The Atwood Public School District (USD 318) operates a separate school for trainable mentally handicapped students who are accepted from several counties in Northwest Kansas. The separate school is three blocks from a regular school to which the TMH students are transported for part of the day to interact with non-handicapped

students. During the 1992/93 school year, the KSBE, Special Education Division, attempted to close down the school because officials considered it to be in violation of the principal of least restrictive placement. The district legally resisted the pressure to eliminate the program. The KSBE responded by filing a formal complaint against the district with the U.S. Office of Civil Rights. That agency did a thorough evaluation of the program and ruled in favor of the district. Source of Information: James E. Finn, Superintendent of Schools, USD 318.

Case Two

The parents of a mentally handicapped student brought suit against the El Paso Independent School District because the district proposed to place the student in a special education class. The parents wanted the child educated in a regular class. The case was eventually decided by the U.S. Court of Appeals, Fifth Circuit, in 1989, in favor of the school district's position. A copy of the court's decision is attached.

Case Three

In 1993, the U.S. Department of Education issued a guidance policy relevant to providing special education services to deaf students that supports more restrictive environments when in the best interest of individual students. The policy makes it clear that appropriateness outweighs the least restrictive placement principal. The U.S. Office of Education issues interpretations of IDEA and investigates complaints.

Enclosed is a copy of an article that provides information about this Notice of Policy Guidance. We have taken the liberty to highlight some information to facilitate the readers review of the policy.

DANIEL R.
Plaintiff-Appellant

v.

EL PASO INDEPENDENT SCHOOL DISTRICT
Defendant-Appellee

874 F. 2d 1036
1989

U.S. Court of Appeals, Fifth Circuit

Appeal from the U.S. District Court for the Western District of Texas

Before Thornberry, Gee and Politz, Circuit Judges

GEE, Circuit Judge:

. ıtiffs in this action, a handicapped boy and his parents, urge that a local school district failed to comply with the Education of the Handicapped Act.* Specifically, they maintain that a school district's refusal to place the child in a class with nonhandicapped students violates the Act. The district court disagreed and, after a careful review of the record, we affirm the district court.

I. Background

A. General

In 1975, on a finding that almost half of the handicapped children in the United States were receiving an inadequate education or none at all, Congress passed the Education of the Handicapped Act (EHA or Act). See 20 U.S.C.A. §1400(b) (West 1988 Supp.); S.Rep. No. 168, 94th Cong., 1st Sess. 8 (1975), reprinted in 1975 U.S. Code Cong. & Admin.News 1425, 1432. Before passage of the Act, as the Supreme Court has noted, many handicapped children suffered under one of two equally ineffective approaches to their educational needs: either they were excluded entirely from public education or they were deposited in regular education classrooms with no assistance, left to fend for themselves in an environment inappropriate for their needs. *Hendrick Hudson District Board of Education v. Rowley*, 458 U.S. 176, 191, 102 . 3034, 3043, 73 L.Ed.2d 690, 702 (1982) (citing H.R.Rep. No. 332, 94th Cong., 1st Sess. 2 (1975); S.Rep. No. 168, 94th Cong., 1st Sess. 8 (1975) 1975 U.S. Code Cong. & Admin. News 1432). To entice state and local school officials to improve upon these inadequate methods of educating children wit al needs, Congress created the EHA, having as its purpose providing handicapped children access to public education and requiring states to adopt procedures that will result in individualized consideration of and instruction for each handicapped child. *id.* at 192, 102 S.Ct. at 3043, 73 L.Ed.2d at 703.

The Act is largely procedural. It mandates a "free appropriate public education" for each handicapped child and sets forth procedures designed to ensure that each child's education meets that requirement. 20 U.S.C.A. §§1412(l) and 1415(a)-(e). School officials are required to determine the appropriate placement for each child and must develop an Individualized Educational Plan (IEP) that tailors the child's education to his individual needs. The child's parents are involved at all stages of the process. See generally §1415(b). In addition, the Act requires that handicapped children be educated in regular education classrooms, with nonhandicapped students as opposed to special education classrooms with handicapped students only—to the greatest extent appropriate. §1412(5)(B). Educating a handicapped child in a regular education classroom with nonhandicapped children is familiarly known as "mainstreaming," and the mainstreaming requirement is the source of the controversy between the parties before us today.

B. Particular

Daniel R. is a six year old boy who was enrolled, at the time this case arose, in the El Paso Independent School District (EPISD). A victim of Downs Syndrome, Daniel is mentally retarded and speech impaired. By September 1987, Daniel's developmental age was between two and three years and his communication skills were slightly less than those of a two year old.

In 1985, Daniel's parents, Mr. and Mrs. R., enrolled him in EPISD's Early Childhood Program, a half-day program devoted entirely to special education. Daniel completed one academic year in the Early Childhood Program. Before the 1986-87 school year began, Mrs. R. requested a new placement that would provide association with nonhandicapped children. Mrs. R. wanted EPISD to place Daniel in Pre-kindergarten halfday, regular education class. Mrs. R. conferred with Joan Norton, the Pre-kindergarten instructor, proposing that Daniel attend the half-day Pre-kindergarten class in addition to the halfday Early Childhood class. As a result, EPISD's Admission, Review and Dismissal (ARD) Committee met and designated the combined regular and special education program as Daniel's placement.

This soon proved unwise, and not long into the school year Mrs. Norton began to have reservations about Daniel's presence in her class. Daniel did not participate without constant, individual attention from the teacher or her aide, and failed to master any of the skills Mrs. Norton was trying to teach her students. Modifying the Prekindergarten curriculum and her teaching methods sufficiently to reach Daniel would have required Mrs. Norton to modify the curriculum almost beyond recognition. In November 1986, the ARD Committee met again, concluded that Pre-kindergarten was inappropriate for Daniel, and decided to change Daniel's placement. Under the new placement, Daniel would attend only the special education, Early Childhood class; would

ch in the school cafeteria, with nonhandicapped children, ... days a week if his mother was present to supervise him; and would have contact with nonhandicapped students during recess. Believing that the ARD had improperly shut the door to regular ...cation for Daniel, Mr. and Mrs. R. exercised their right to a ...view of the ARD Committee's decision.

As the EHA requires, Mr. and Mrs. R. appealed to a hearing officer who upheld the ARD Committee's decision. See §1415(b)(2). After a hearing which consumed five days of testimony and produced over 2500 pages of transcript, the hearing officer concluded that Daniel could not participate in the Pre-kindergarten class without constant attention from the instructor because the curriculum was beyond his abilities. In addition, the hearing officer found, Daniel was receiving little educational benefit from Pre-kindergarten and was disrupting the class not in the ordinary sense of the term, but in the sense that his needs absorbed most of the teacher's time and diverted too much of her attention away from the rest of the class. Finally, the instructor would have to downgrade 90 to 100 percent of the Pre-kindergarten curriculum to bring it to a level that Daniel could master. Thus, the hearing officer concluded, the regular education, Pre-kindergarten class was not the appropriate placement for Daniel.

Dissatisfied with the hearing officer's decision, Mr. and Mrs. R. proceeded to the next level of review by filing this action in the district court. See §1415(e). Although the EHA permits the parties to supplement the administrative record, Daniel's representatives declined to do so; and the court conducted its *de novo* ...ew on the basis of the administrative record alone. The district court decided the case on cross motions for summary judgment. Relying primarily on Daniel's inability to receive an educational benefit in regular education, the district court affirmed the hearing officer's decision.

Mr. and Mrs. R. again appeal, but before we turn to the merits of the appeal we must pause to consider an issue that neither of the parties raised but which we must consider on our own initiative.

II. Mootness

Two years passed while this case wound its way through the course of administrative and judicial review procedures. Several events that occurred during these two years might have rendered the case moot. First, the placement and IEP at issue today set forth Daniel's educational plan for the 1986-87 school year, one long past. Indeed, counsel informed us at oral argument that EPISD had reevaluated Daniel in May 1988, formulating a new IEP for the 1988-89 school year as a result. The placement and IEP upon which Daniel bases his claim have been or will, at the close of this litigation, be superseded. Second, we may hope that Daniel's development has not entirely stagnated while these proceedings have been pending, although the record does not contain the results of the May 1988 evaluation. We therefore cannot know ...much Daniel has developed over the past two years, nor can ...ivine whether Daniel's development has rendered Prekindergarten any more or less appropriate for him now than it was when EPISD reconsidered his placement. It may well be that neither Pre-kindergarten, nor Early Childhood, nor any mix of the two would be appropriate for Daniel at this tim... ...ird, EPISD informed us at oral argument that Daniel is no longer enrolled in the Texas public school system. Dissatisfied with EPISD's 1988 evaluation and its I 988-89 IEP, Daniel's parents chose to send Daniel to a private school, where he remained as of the time of oral argument. Although neither of the parties raised the issue, these events force us to pause momentarily to consider whether the case continues to present a live case or controversy.

A case may circumvent the mootness doctrine if the conduct about which the plaintiff originally complained is "capable of repetition, yet evading review." *Honig v. Doe*, 484 U.S. 305, 108 S.Ct. 592, 600, 98 L.Ed.2d 686, 703 (1988) (quoting *Murphy v. Hunt*, 455 U.S. 478, 482, 102 S.Ct. 1181, 1183, 71 L.Ed.2d 353 (1982)); *Valley Construction Co. v. Marsh*, 714 F.2d 26, 28 (5th Cir. 1983) (quoting *Southern Pacific Terminal Co. I.C.C.*, 219 U.S. 498, 31 S.Ct. 279, 55 L.Ed. 310 (1911)). Because there is a reasonable expectation that the conduct giving rise, to this suit will recur every school year, yet evade review during the nine-month academic term, we conclude that the case is not moot.

Conduct is capable of repetition if there is a reasonable expectation or a demonstrated probability that the same controversy will recur. *Honig*, 484 U.S. at & n. 7, 108 S.Ct. at 603 & n. 7, 98 L.Ed.2d at 704 & n. 7 (citations omitted); *Valley Construction Co.*, 714 F.2d at 28. The conduct about which Daniel originally complained is EPISD's refusal to "mainstream" him. EPISD is unwilling to mainstream a child who cannot enjoy an academic benefit in regular education. Daniel's parents insist that EPISD must mainstream Daniel even if he cannot thrive academically in regular education. According to Mr. and Mrs. R. EPISD should mainstream Daniel solely to provide him with the company of nonhandicapped students. Each side of this controversy steadfastly adheres to its perception of the EHA's mainstreaming requirement. Given the parties' irreconcilable views on the issue, whether and to what extent to mainstream Daniel will be an issue every time EPISD prepares a new placement or IEP or proposes to change an existing one. The parties have a reasonable expectation of confronting this controversy every year that Daniel is eligible for public education.

Neither the expiration of the 1986-87 IEP, nor Daniel's development over the past two years, nor the new IEP change our conclusion. Certainly, the controversy whether the 1986-87 placement and IEP comply with the EHA's mainstreaming requirement is not likely to recur. The primary controversy, however, is the extent of EPISD's mainstreaming obligation, a controversy that is reasonably likely to recur as Daniel develops and as EPISD prepares placements and IEPs for each new school year. Nor does Mr. and Mr. R.'s recent decision to remove Daniel from the EPISD system render the case moot. Although Daniel no longer attends public school, he remains a citizen of the State of Texas and, thus, remains entitled to a free appropriate public education in the state. Given Daniel's continued eligibility for public educational services under the EHA, the mainstreaming controversy remains capable of repetition. See *Honig*, 484 U.S. at ___ ___ 108 S.Ct. at 602-603, 98 L.Ed.2d at 703-704.

This recurring controversy will evade review during the effective period of each IEP. A placement and an IEP cover an academic

nine month period. The Supreme Court has observed that ...strative and judicial review of an IEP is "ponderous" and usually will not be complete until a year after the IEP has expired. School Committee of the Town of Burlington v. Department of ...cation of the Commonwealth of Massachusetts, 471 U.S. ..., 370, 105 S.Ct. 1996, 2002, 85 L.Ed.2d 385, 395 (1985); see Rowley, 458 U.S. at 186 n. 9, 102 S.Ct. at 3041, n. 9, 73 L.Ed.2d at 699 n. 9 (noting that judicial and administrative review of an IEP "invariably" takes more than nine months.). In Rowley, the Court held that the controversy was capable of repetition yet evading review even though the IEP should have expired two years before the case reached the court. Rowley, 458 U.S. at 186 n. 9, 102 S.Ct. at 3041 n. 9, 73 L.Ed.2d at 699 n. 9. Here, Daniel exhausted his state administrative remedies and, then, filed suit in the district court. The ponderous administrative and judicial review did, as the Court predicted, outlive Daniel's placement and IEP, allowing them to evade review. As the case presents a live controversy, we turn to the merits of Daniel's appeal.

III. Procedural Violations

At the heart of the EHA lie detailed procedural provisions, processes designed to guarantee that each handicapped student's education is tailored to his unique needs and abilities. The EHA, and the regulations promulgated pursuant to it, contain procedures for determining whether the appropriate placement is regular or special education, for preparing an IEP once the child is, placed. for changing the placement or the IEP, and for removing the child from regular education. 20 U.S.C.A. §§1412 and 1415; 34 C.F.R. §§300.300 300.576 (1986). The Act's ...edural guarantees are not mere procedural hoops through which Congress wanted state and local educational agencies to jump. Rather, "the formality of the Act's procedures is itself a safeguard against arbitrary or erroneous decisionmaking." *Jackson v. Franklin County School Board*, 806 F.2d 623, 630 (5th Cir. 1986).[1] Indeed, a violation of the EHA's procedural guarantees may be a sufficient ground for holding that a school system has failed to provide a tree appropriate public education and, thus, has violated the Act. [cf. at 629; *Hall v. Vance County Board of Education*, 774 F.2d 629, 635 (4th Cir. 1985). Daniel raises five claims of procedural error, each without merit.

First, Daniel contends that EPISD failed to give proper notice of a proposed change in his IEP, an assertion that misconstrues the nature of EPISD's proposed action. The regulations that implement the EHA require school officials to give written notice before "propos[ing] to...change the identification, evaluation or educational placement of the child 34 C.F.R. §300.504(a)(I) (1986). The regulations also prescribe the content of the notice: it must include a description of the action proposed or refused by the agency. an explanation of why the agency proposes or refuses to take the action, and a description of any options the agency considered and the reasons why those options were rejected." [*cf.* §300.505(a)(I). Daniel complains that EPISD did not provide notice that it proposed to change his IEP and that the notice which ...SD did provide stated that it would not change the IEP. ...ough Daniel's description of the notice is accurate, his conclusion that the notice does not conform to the EHA's regulations is incorrect.

The notice that EPISD sent to Daniel's parents apprise... of the precise action which EPISD proposed to take: a change in Daniel's placement. Daniel's placement was a mixed regular and special education program, with time allocated approximately equally between the two environments. Daniel's IEP, in contrast, outlined his needs and goals for the academic year; simply, it was a list of what EPISD and Daniel's parents hoped Daniel would achieve. EPISD did not propose merely to alter Daniel's IEP, scaling back its expectations or altering its objectives for Daniel's progress. Instead, EPISD proposed the more drastic step of removing Daniel from the regular education class, thus changing his placement. The notice that EPISD provided accurately informed Mr. and Mrs. R. of EPISD's proposal. EPISD sent Mrs. R. its form "Notice of Admission, Review and Dismissal (ARD) Committee Meeting." On the notice form, EPISD indicated that it would review Daniel's progress, that it would "consider the appropriate educational placement," and that the options it was considering included a regular classroom and a self-contained classroom.[2] Thus, EPISD's notice adequately warned Mr. and Mrs. R. that the appropriate placement for their son was at issue and that EPISD was considering placing Daniel in a self-contained classroom.

EPISD did indicate, as Daniel contends, that it was not considering a change in Daniel's IEP. EPISD's explanation of its plans did not, however, mislead Mr. and Mrs. R. or fail to give notice of EPISD's proposal. EPISD did not propose to change Daniel's IEP. Indeed, an indication on the notice form that EPISD proposed to alter the IEP could have been misleading. As the notice form accurately notified Mr. and Mrs. R. of the proposed change in placement, we find no procedural defect in EPISD's notice.

Second, ignoring the events surrounding EPISD's decision, Daniel complains that EPISD did not evaluate him before removing him from regular education. According to Daniel, school officials must reevaluate a handicapped student before removing him from regular education. See 34 C.F.R. §104.35(a).[3] EPISD's failure to evaluate Daniel does not constitute a reason to reverse this case. In the "Stipulations and Agreements" submitted to the hearing officer, Daniel stated that he did not contest EPISD's current evaluation. Furthermore, Daniel's parents refused to consent to a new evaluation because they felt it was not necessary. When a student and his parents agree with the school's current evaluation and refuse a new evaluation, they can scarcely be heard to complain of a procedural violation based upon the school's failure to conduct a new evaluation.

Third, Daniel asserts that EPISD failed to provide a continuum of educational services. The EHA's regulations require' school officials to "insure that a continuum of alternative placements is available to meet the needs of handicapped children for special education and related services." 34 C.F.R. §300.551(a). The continuum must include alternative placements and supplementary services in conjunction with regular class placement. [cf. §300.551(b). In its effort to find the appropriate placement for Daniel, EPISD experimented with a variety of alternative placements and supplementary services. First, EPISD attempted a mixed placement that allocated Daniel's time equally between regular and special education. The regular education instructor attempted to modify and supplement the regular education cur-

n to meet Daniel's needs. When EPISD concluded that I was not thriving in this environment, it proposed a different combination of educational experiences. Under the new plan, Daniel would spend all of his academic time in special ucation but would mix with nonhandicapped children during ich and recess. EPISD has provided a continuum of alternative placements and has demonstrated an admirable willingness to experiment with and to adjust Daniel's placement to arrive at the appropriate mix of educational environments.

Fourth, Daniel maintains that EPISD removed him from the regular classroom for disciplinary reasons but failed to follow the EHA's procedure for removals based on disciplinary problems. Again, Daniel has misconstrued the events leading to this appeal. The hearing officer found that

> [w]hile there is no evidence that Daniel's behavior in Pre-kindergarten is disruptive in the ordinary sense of the term, it is obvious that the amount of attention he requires is, nevertheless, disruptive by so absorbing the efforts and energy of the staff as to impair the quality of the entire program for the other children.

This finding in no way reflects a disciplinary problem. Thus, EPISD's decision to remove Daniel from regular education did not trigger the EHA's disciplinary procedures.

Finally, Daniel suggests that EPISD did not follow the EHA's procedure for removing a child from regular education. The EHA provides that a child shall be removed from a regular classroom only if education in the regular classroom, with the use of oplementary aids and services, cannot be achieved satisfacto- . §1412(5)(B). According to Daniel, EPISD never attempted to use any supplementary aids and services in Pre-kindergarten and, thus, cannot demonstrate that education in the regular classroom cannot be achieved satisfactorily. Daniel misunderstands the nature of this issue; it relates to the substantive question whether and to what extent Daniel should be mainstreamed, not to the procedural requirements of the EHA. Moreover, even if this were a procedural question, EPISD met the requirement of providing supplementary aids and services. The record indicates that the Pre-kindergarten teacher made genuine efforts to modify and supplement her teaching program to reach Daniel. Unfortunately, even with the teacher's assistance, Daniel could not thrive in regular education. As we find no merit to Daniel's claims of procedural error, we turn to his substantive claims.

IV. Substantive Violations

A. Mainstreaming Under the EHA

The cornerstone of the EHA is the "free appropriate public education." As a condition of receiving federal funds, states must have "in effect a policy that assures all handicapped children the right to a free appropriate public education." §1412(1). The Act defines a free appropriate public education in broad, general terms without dictating substantive educational policy or man- ing specific educational methods.[4] In Rowley, the Supreme Court fleshed out the Act's skeletal definition of its principal term: "a free appropriate public education' consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as . ces- sary to permit the child to benefit from the instruction." Rowley, 458 U.S. at 188-189, 102 S.Ct. at 3042, 73 L.Ed.2d at 701. The Court's interpretation of the Act's language does not, however, add substance to the Act's vague terms; instruction specially designed to meet each student's unique needs is as imprecise a directive as the language actually found in the Act.

The imprecise nature of the EHA's mandate does not reflect legislative omission. Rather, it reflects two deliberate legislative decisions. Congress chose to leave the selection of educational policy and methods where they traditionally have resided with state and local school officials. *Rowley*, 458 U.S. at 207, 102 S.Ct. at 3051, 73 L.Ed.2d at 712-13. In addition, Congress's goal was to bring handicapped children into the public school system and to provide them with an education tailored to meet their particular needs. [*id.* at 189, 102 S.Ct. at 3042, 73 L.Ed.2d at 701. Such needs span the spectrum of mental and physical handicaps, with no two children necessarily suffering the same condition or requiring the same services or education. *Id.* at 189, 102 S.Ct. at 3042, 73 L.Ed.2d at 701. Schools must retain significant flexibility in educational planning if they truly are to address each child's needs. A congressional mandate that dictates the substance of educational programs, policies and methods would deprive school officials of the flexibility so important to their tasks. Ultimately, the Act mandates an education for each handicapped child that is responsive to his needs, but leaves the substance and the details of that education to state and local school officials.

In contrast to the EHA's vague mandate for a free appropriate public education lies one very specific directive prescribing the educational environment for handicapped children. Each state must establish

> procedures to assure that, to the maximum extent appropriate, handicapped children...are educated with children who are not handicapped, and that special education, separate schooling or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

§1412(5)(B). with this provision, Congress created a strong preference in favor of mainstreaming. *Lachman v. Illinois State Board of Education*, 852 F.2d 290, 295 (7th Cir.), cert. denied, ___ U S ___ 109 S.Ct. 308, 102 L.Ed.2d 327(1988); *A.W. v. Northwest R-1 School District*, 813 F.2d. 158, 162 (8th Cir.), cert denied, ___ U.S. ___ 108 S.Ct. 144, 98 L.Ed.2d. 100 (1987); *Roncker v. Walter*, 700 F 2d. 1058, 1063 (6th Cir.), cert. denied, 464 U.S. 864, 104 S.Ct. 196, 78 L.Ed.2d 171 (1983).

By creating a statutory preference for mainstreaming, Congress also created a tension between two provisions of the Act. School districts must both seek to mainstream handicapped children and, at the same time, must tailor each child's educational placement and program to his special needs. §§1412(1) and (5)(B). Regular classes, however, will not provide an education that accounts for each child's particular needs in every case. The nature or severity of some children's handicaps is such that only special education

ldress their needs. For these children, mainstreaming does rovide an education designed to meet their unique needs and, thus, does not provide a free appropriate public education. As a result, we cannot evaluate in the abstract whether a chal-ged placement meets the EHA's mainstreaming requirement. ather, that laudable policy objective must be weighed in tandem with the Act's principal goal of ensuring that the public schools provide handicapped children with a free appropriate public education." *Lachman*, 852 F.2d at 299; *Wilson v. Marana Unified School District*, 735 F.2d 1178, 1183 (9th Cir. 1984) (citations omitted).

Although Congress preferred education in the regular education environment, it also recognized that regular education is not a suitable setting for educating many handicapped children. *Rowley*, 458 U.S. at 181 n. 4, 102 S.Ct. at 3038 n. 4, 73 L.Ed.2d at 696 n. 4; Lachman, 852 F.2d at 295. Thus, the EHA allows school officials to remove a handicapped child from regular education or to provide special education if they cannot educate the child satisfactorily in the regular classroom. §1412(5)(B). Even when school officials can mainstream the child, they need not provide for an exclusively mainstreamed environment; the Act requires school officials to mainstream each child only to the maximum extent appropriate. *Id.* In short, the Act's mandate for a free appropriate public education qualifies and limits its mandate for education in the regular classroom. Schools must provide a free appropriate public education and must do so, to the maximum extent appropriate, in regular education classrooms. But when education in a regular classroom cannot meet the handicapped child's unique needs, the presumption in favor of mainstreaming)vercome and the school need not place the child in regular ducation. See *Lachman*, 852 F.2d at 295; *A. W.*, 813 F.2d at 163; *Roncker*, 700 F.2d at 1063. The Act does not, however, provide any substantive standards for striking the proper balance between its requirement for mainstreaming and its mandate for a free appropriate public education.

B. Determining Compliance With the Mainstreaming Requirement

Determining the contours of the mainstreaming requirement is a question of first impression for us. In the seminal interpretation of the EM A, the Supreme Court posited a two-part test for determining whether a school has provided a free appropriate public education: "First, has the State complied with the procedures set forth in the Act. And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 206-207, 102 S.Ct. at 3051, 73 L.Ed.2d at 712 (footnotes omitted). Despite the attractive ease of this two part inquiry, it is not the appropriate tool for determining whether a school district has met its mainstreaming obligations. In Rowley, the handicapped student was placed in a regular education class; the EHA's mainstreaming requirement was not an issue presented for the Court's consideration. Indeed, the ~ourt carefully limited its decision to the facts before it, noting .t it was not establishing a single test that would determine "the adequacy of educational benefits conferred upon all children covered by the Act." *Id.* at 202, 102 S.Ct. at 3049, 73 L.Ed.2d at 709. Faced with the same issue we face today, both the Sixth and the Eighth Circuit concluded that the Rowley tes not intended to decide mainstreaming issues. *A.W.*, 813 F.2d at 163; *Roncker*, 700 F.2d at 1063. Moreover, both Circuits noted that the *Rowley* Court's analysis is ill suited for evaluating compliance with the mainstreaming requirement. *A.W.*, 813 F.2d at 163; *Roncker*, 700 F.2d at 1062. As the Eighth Circuit explained, the Rowley test assumes that the state has met all of the requirements of the Act, including the mainstreaming requirement. *A.W.*, 813 F.2d at 163 n. 7 (citations omitted). The *Rowley* test thus assumes the answer to the question presented in a mainstreaming case. Given the *Rowley* Court's express limitation on its own opinion, we must agree with the Sixth and Eighth Circuits that the Rowley test does not advance our inquiry when the question presented is whether the Act's mainstreaming requirement has been met.

Although we have not yet developed a standard for evaluating mainstreaming questions, we decline to adopt the approach that other circuits have taken. In *Roncker*, visiting the same question which we address today, the Sixth Circuit devised its own test to determine when and to what extent a handicapped child must be mainstreamed. According to the Roncker court

> [T]he proper inquiry is whether a proposed placement is appropriate under the Act.... In a case where the segregated facility is considered superior, the court should determine whether the services which make the placement superior could be feasibly provided in a non-segregated setting. If they can, the placement in the segregated school would be inappropriate under the Act.

Roncker, 700 F.2d at 1063 (citation and footnote omitted); accord. A.W. 813 F.2d at 163.[5] We respectfully decline to follow the Sixth Circuit's analysis. Certainly, the Roncker test accounts for factors that are important in any mainstreaming case. We believe, however, that the test necessitates too intrusive an inquiry into the educational policy choices that Congress deliberately left to state and local school officials. Whether a particular service feasibly can be provided in a regular or special education setting is an administrative determination that state and local school officials are far better qualified and situated than are we to make. Moreover, the test makes little reference to the language of the EHA. Yet, as we shall see, we believe that the language of the Act itself provides a workable test for determining whether a state has complied with the Act's mainstreaming requirement.

Nor do we find the district court's approach to the issue the proper tool for analyzing the mainstreaming obligation. Relying primarily on whether Daniel could receive an educational benefit from regular education, the district court held that the special education class was the appropriate placement for Daniel. According to the court, "some children, even aided by supplemental aids and services in a regular education classroom, will never receive an educational benefit that approximates the level of skill and comprehension acquisition of nonhandicapped children." In these cases, regular education does not provide the child an appropriate education and the presumption in favor of mainstreaming is overcome. As no aspect of the Pre-kindergarten curriculum was within Daniel's reach, EPISD was not required to mainstream him.[6] Given the nature and severity of Daniel's handicap at the time EPISD placed him, we agree with the district court's conclusion that EPISD was not required to mainstream Daniel.

I disagree, however, with the court's analysis of the mainstreaming issue, finding it troublesome for two reasons: first, as a prerequisite to mainstreaming, the court would require handicapped children to learn at approximately the same level as their nonhandicapped classmates. Second, the court places too much emphasis on the handicapped student's ability to achieve an educational benefit.

First, requiring as a prerequisite to mainstreaming that the handicapped child be able to learn at approximately the same level as his nonhandicapped classmates fails to take into account the principles that the Supreme Court announced in *Rowley*. Our public school system tolerates a wide range of differing learning abilities; at the same time, it provides educational opportunities that do not necessarily account for all of those different capacities to learn. As the *Rowley* Court noted, "[t]he educational opportunities provided by our public school systems undoubtedly differ from student to student, depending upon a myriad of factors that might affect a particular student's ability to assimilate information presented in the classroom." *Rowley*, 458 U.S. 198, 102 S.Ct. at 3047, 73 L.Ed.2d at 707.

With the EHA, Congress extended the states' tolerance of educational differences to include tolerance of many handicapped children. States must accept in their public schools children whose abilities and needs differ from those of the average student. Moreover, some of those students' abilities are vastly different from those of their nonhandicapped peers:

> [T]he Act requires participating states to educate a wide spectrum of handicapped children, from the marginally hearing impaired to the profoundly retarded and palsied. It is clear that the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between. One child may have little difficulty competing successfully with nonhandicapped children while another child may encounter great difficulty in acquiring even the most basic of self maintenance skills.

Rowley. 458 U.S. at 202, 102 S.Ct. at 3048, 73 L.Ed.2d at 709. The *Rowley* court rejected the notion that the EHA requires states to provide handicapped children with educational opportunities that are equal to those provided to nonhandicapped students. *Id.* at 189, 102 S.Ct. at 3042, 73 L.Ed.2d at 707. Thus, the Court recognized that the Act draws handicapped children into the regular education environment but, in the nature of things, cannot always offer them the same educational opportunities that regular education offers nonhandicapped children. States must tolerate educational differences; they need not perform the impossible: erase those differences by taking steps to equalize educational opportunities. As a result, the Act accepts the notion that handicapped students will participate in regular education but that some of them will not benefit as much as nonhandicapped students will. The Act requires states to tolerate a wide range of educational abilities in their schools and, specifically, in regular education—the EHA's preferred educational environment. Given the tolerance embodied in the EHA, we cannot predicate access to regular education on a child's ability to perform on par with nonhandicapped children.[7]

We recognize that some handicapped children may not be able to master as much of the regular education curriculum as their nonhandicapped classmates. This does not mean, however, that those handicapped children are not receiving any benefit from regular education. Nor does it mean that they are not receiving all of the benefit that their handicapping condition will permit. If the child's individual needs make mainstreaming appropriate, we cannot deny the child access to regular education simply because his educational achievement lags behind that of his classmates.

Second, the district court placed too much emphasis on educational benefits.[8] Certainly, whether a child will benefit educationally from regular education is relevant and important to our analysis. Congress's primary purpose in enacting the EHA was to provide access to education for handicapped children. *Rowley*, 458 U.S. at 192, 193 n. 15, 102 S.Ct. at 3043, 3044 n. 15, 73 L.Ed.2d at 703, 704 n. 15. Implicit in Congress's purpose to provide access is a purpose to provide meaningful access, access that is sufficient to confer some educational benefit on the child. *Id.* at 200, 102 S.Ct. at 3047, 73 L.Ed.2d at 708. Thus, the decision whether to mainstream a child must include an inquiry into whether the student will gain any educational benefit from regular education. Our analysis cannot stop here, however, for educational benefits are not mainstreaming's only virtue. Rather, mainstreaming may have benefits in and of itself. For example, the language and behavior models available from nonhandicapped children may be essential or helpful to the handicapped child's development. In other words, although a handicapped child may not be able to absorb all of the regular education curriculum, he may benefit from nonacademic experiences in the regular education environment. As the Sixth Circuit explained "[i]n some cases, a placement which may be considered better for academic reasons may not be appropriate because of the failure to provide for mainstreaming." Roncker, 700 F.2d at 1063. As we are not comfortable with the district court or the Sixth Circuit's approach to the mainstreaming question. We return to the text of the EHA for guidance.

Ultimately, our task is to balance competing requirements of the EHA's dual mandate: a free appropriate public education that is provided, to the maximum extent appropriate, in the regular education classroom. As we begin our task we must keep in mind that Congress left the choice of educational policies and methods where it properly belongs in the hands of state and local school officials. Our task is not to second-guess state and local policy decisions; rather, it is the narrow one of determining whether state and local school officials have complied with the Act. Adhering to the language of the EHA, we discern a two part test for determining compliance with the mainstreaming requirement. First, we ask whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given child. Sec §1412(5)(B). If it cannot and the school intends to provide special education or to remove the child from regular education, we ask, second, whether the school has mainstreamed the child to the maximum extent appropriate. See *id.* A variety of factors will inform each stage of our inquiry; the factors that we consider today do not constitute an exhaustive list of factors relevant to the mainstreaming issue. Moreover, no single factor is dispositive in all cases. Rather, our analysis is an individualized, fact-specific inquiry that requires us to examine

ully the nature and severity of the child's handicapping condition, his needs and abilities, and the schools' response to the child's needs.

this case. several factors assist the first stage of our inquiry, whether EPISD can achieve education in the regular classroom satisfactorily. At the outset, we must examine whether the state has taken steps to accommodate the handicapped child in regular education. The Act requires states to provide supplementary aids and services and to modify the regular education program when they mainstream handicapped children. See §1401(17), (18), §1412(5)(B); *Rowley*, 458 U.S. at 189, 102 S.Ct. at 3042, 73 L.Ed.2d at 701; 34 C.F.R. Part 300, App. C Question 48; see also Tex.Admin.Code Tit.19 §89.223(a)(4)(C) If the state has made no effort to take such accommodating steps, our inquiry ends, for the state is in violation of the Act's express mandate to supplement and modify regular education. If the state is providing supplementary aids and services and is modifying its regular education program, we must examine whether its efforts are sufficient. The Act does not permit states to make mere token gestures to accommodate handicapped students; its requirement for modifying and supplementing regular education is broad. See 34 C.F.R. Part 300, App. C. Question 48; see, *e.g.*, *Irving Independent School District v. Tatro*, 468 U.S. 883, 104 S.Ct. 3371, 82 L.Ed.2d 664 (1984). Indeed, Texas expressly requires its local school districts to modify their regular education program when necessary to accommodate a handicapped child. Tex.Admin.Code Tit. 19 §89.223(a)(4)(C).

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Although broad, the requirement is not limitless. States need not provide every conceivable supplementary aid or service to assist the child. See generally *Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690. Furthermore, the Act does not require regular education instructors to devote all or most of their time to one handicapped child or to modify the regular education program beyond recognition. If a regular education instructor must devote all of her time to one handicapped child, she will be acting as a special education teacher in a regular education classroom. Moreover, she will be focusing her attentions on one child to the detriment of her entire class, including, perhaps, other, equally deserving, handicapped children who also may require extra attention. Likewise, mainstreaming would be pointless if we forced instructors to modify the regular education curriculum to the extent that the handicapped child is not required to learn any of the skills normally taught in regular education. The child would be receiving special education classroom; the only advantage to such an arrangement would be that the child is sitting next to a nonhandicapped student.[9]

Next, we examine whether the child will receive an educational benefit from regular education. This inquiry necessarily will focus on the student's ability to grasp the essential elements of the regular education curriculum. Thus, we must pay close attention to the nature and severity of the child's handicap as well as to the curriculum and goals of the regular education class. For example, the goal of a particular program is enhancing the child's development, as opposed to teaching him specific subjects. such as reading or mathematics, our inquiry must focus on the child's ability to benefit from the developmental lessons, not exclusively on his potential for learning to read. We reiterate, however, that academic achievement is not the only purpose of mainstreaming. Integrating a handicapped child into a nonhandicapped environment may be beneficial in and of itself. Thus, our inquiry must extend beyond the educational benefits that the child may receive in regular education.

We also must examine the child's overall educational experience in the mainstreamed environment, balancing the benefits of regular and special education for each individual child. For example, a child may be able to absorb only a minimal amount of the regular education program, but may benefit enormously from the language models that his nonhandicapped peers provide for him. In such a case, the benefit that the child receives from mainstreaming may tip the balance in favor of mainstreaming, even if the child cannot flourish academically. *Roncker*, 700 F.2d at 1063. On the other hand, placing a child in regular education may be detrimental to the child. In such a case, mainstreaming would not provide an education that is attuned to the child's unique needs and would not be required under the Act. Indeed, mainstreaming a child who will suffer from the experience would violate the Act's mandate for a free appropriate public education.

Finally, we ask what effect the handicapped child's presence has on the regular classroom environment and, thus, on the education that the other students are receiving. A handicapped child's placement in regular education may prove troublesome for two reasons. First, the handicapped child may, as a result of his handicap, engage in disruptive behavior. "[W]here a handicapped child is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment. Therefore, regular placement would not be appropriate to his or her needs." 34 C.F.R. §300.552 Comment (quoting 34 CFR Part 104—Appendix, Paragraph 24) Second, the child may require so much of the instructor's attention that the instructor will have to ignore the other student's needs in order to tend to the handicapped child. The Act and its regulations mandate that the school provide supplementary aids and services in the regular education classroom. A teaching assistant or an aide may minimize the burden on the teacher.

If, however, the handicapped child requires so much of the teacher or the aide's time that the rest of the class suffers, then the balance will tip in favor of placing the child in special education.

If we determine that education in the regular classroom cannot be achieved satisfactorily, we next ask whether the child has been mainstreamed to the maximum extent appropriate. The EHA and its regulations do not contemplate an all-or-nothing educational system in which handicapped children attend either regular or special education. Rather, the Act and its regulations require schools to offer a continuum of services. 34 C.E.R. §300.551; *Lachman*, 813 F.2d at 296 n. 7 (citing *Wilson v. Marana School District No. 6 of Pima County*, 735 F.2d 1178, 1183 (9th Cir. 1984)). Thus, the school must take intermediate steps where appropriate, such as placing the child in regular education for some academic classes and in special education for others, mainstreaming the child for nonacademic classes only,[10] or providing interaction with nonhandicapped children during lunch and recess. The appropriate mix will vary from child to child and,

be hoped, from school year to school year as the child develops. If the school officials have provided the maximum appropriate exposure to non-handicapped students, they have fulfilled their obligation under the EHA.

C. EPISD's Compliance with the Mainstreaming Requirement

After a careful review of the voluminous administrative record, we must agree with the trial court that EPISD's decision to remove Daniel from regular education does not run afoul of the EHA's preference for mainstreaming. Accounting for all of the factors we have identified today, we find that EPISD cannot educate Daniel satisfactorily in the regular education classroom. Furthermore, EPISD has taken creative steps to provide Daniel as much access to nonhandicapped students as it can, while providing him an education that is tailored to his unique needs. Thus, EPISD has mainstreamed Daniel to the maximum extent appropriate.

EPISD cannot educate Daniel satisfactorily in the regular education classroom; each of the factors we identified today counsels against placing Daniel in regular education. First, EPISD took steps to modify the Prekindergarten program and to provide supplementary aids and services for Daniel—all of which constitute a sufficient effort. Daniel contends that EPISD took no such steps and that, as a result, we can never know whether Daniel could have been educated in a regular classroom. Daniel's assertion is not supported by the record. The Prekindergarten teacher made genuine and creative efforts to reach Daniel, devoting a substantial—indeed, a disproportionate amount of her time to him and modifying the class curriculum to meet his abilities. Unfortunately, Daniel's needs commanded most of the Prekindergarten instructor's time and diverted much of her attention away from the rest of her students. Furthermore, the instructor's efforts to modify the Pre-kindergarten curriculum produced few benefits to Daniel. Indeed, she would have to alter 90 to 100 percent of the curriculum to tailor it to Daniel's abilities. Such an effort would modify the curriculum beyond recognition, an effort which we will not require in the name of mainstreaming.

Second, Daniel receives little, if any, educational benefit in Prekindergarten. Dr. Bonnie Fairall, EPISD's Director of Special Education, testified that the Prekindergarten curriculum is "developmental in nature; communication skills, gross motor [skills]" and the like. The curriculum in Kindergarten and other grades is an academic program; the developmental skills taught in Prekindergarten are essential to success in the academic classes. Daniel's handicap has slowed his development so that he is not yet ready to learn the developmental skills offered in Prekindergarten. Daniel does not participate in class activities; he cannot master most or all of the lessons taught in the class. Very simply, Pre-kindergarten offers Daniel nothing but an opportunity to associate with nonhandicapped students.

Third, Daniel's overall educational experience has not been merely beneficial. As we explained, Daniel can grasp little of the Pre-kindergarten curriculum; the only value of regular education for Daniel is the interaction which he has with nonhandicapped students. Daniel asserts that the opportunity for interaction, alone, is a sufficient ground for mainstreaming him. When we balance the benefits of regular education against those of special education, we cannot agree that the opportunity for Daniel to interact with nonhandicapped students is a sufficient ground for mainstreaming him. Regular education not only offers Daniel little in the way of academic or other benefits, it also may be harming him. When Daniel was placed in Pre-kindergarten, he attended school for a full day; both Pre-kindergarten and Early Childhood were half-day classes. The experts who testified before the hearing officer indicated that the full day program is too strenuous for a child with Daniel's condition. Simply put, Daniel is exhausted and, as a result, he sometimes falls asleep at school. Moreover, the record indicates that the stress of regular education may be causing Daniel to develop a stutter. Special education, on the other hand, is an educational environment in which Daniel is making progress. Balancing the benefits of a program that is only marginally beneficial and is somewhat detrimental against the benefits of a program that is clearly beneficial, we must agree that the beneficial program provides the more appropriate placement.

Finally, we agree that Daniel's presence in regular Prekindergarten is unfair to the rest of the class. When Daniel is in the Prekindergarten classroom, the instructor must devote all or most of her time to Daniel. Yet she has a classroom filled with other, equally deserving students who need her attention. Although regular education instructors must devote extra attention to their handicapped students, we will not require them to do so at the expense of their entire class.

Alone, each of the factors that we have reviewed suggests that EPISD cannot educate Daniel satisfactorily in the regular education classroom. Together, they clearly tip the balance in favor of placing Daniel in special education. Thus, we turn to the next phase of our inquiry and conclude that EPISD has mainstreamed Daniel to the maximum extent appropriate. Finding that a placement that allocates Daniel's time equally between regular and special education is not appropriate, EPISD has taken the intermediate step of mainstreaming Daniel for lunch and recess. This opportunity for association with nonhandicapped students is not as extensive as Daniel's parents would like. It is however, an appropriate step that may help to prepare Daniel for regular education in the future. As education in the regular classroom, with the use of supplementary aids and services cannot be achieved satisfactorily, and as EPISD has placed Daniel with nonhandicapped students to the maximum extent appropriate, we affirm the district court.

V. EPISD's Request for Sanctions

EPISD requests that we sanction Daniel's parents and his counsel for bringing a frivolous appeal, a course we decline to take. See Fed.R.App.P. 38. EPISD alleges that Mr. and Mrs. R. brought this appeal and engaged in delay tactics for one purpose: to keep Daniel in the Prekindergarten program for as long as possible.[11] Furthermore, EPISD asserts, the record does not contain any evidence that would support Mr. and Mrs. R.'s position. We cannot agree that Mr. and Mrs. R., or their attorney, deserve sanctions. The record does not indicate that Mr. and Mrs. R. exercised their right to appellate review for improper purposes. Absent any evidence, we refuse to attribute an improper notice to

ent seeking to provide for his child. Moreover, our circuit has not yet considered the issue presented in this case when Mr. and Mrs. R. brought their appeal. Finally, as the district court explained when it rejected EPISD's request for Rule 11 sanctions, Mr. and Mrs. R. and their counsel "were strong advocates of a position they held in good faith arguing for an extension of the presumption contained in the EHA for mainstreaming handicapped youth[s] to the case at bar." We decline to sanction them.

VI. Conclusion

When a parent is examining the educational opportunities available for his handicapped child, he may be expected to focus primarily on his own child's best interest. Likewise, when state and local school officials are examining the alternatives for educating a handicapped child, the child's needs are a principal concern. But other concerns must enter into the school official's calculus. Public education of handicapped children occurs in the public school system, a public institution entrusted with the enormous task of serving a variety of often competing needs. In the eyes of the school official, each need is equally important and each child is equally deserving of his share of the school's limited resources. In this case, the trial court correctly concluded that the needs of the handicapped child and the needs of the nonhandicapped students in the Prekindergarten class tip the balance in favor of placing Daniel in special education. We thus

AFFIRM.

ootnotes

* In accordance with Court policy, this opinion, being one which initiates a conflict with the rule declared in another circuit, was circulated before release to the entire Court, and rehearing en banc was not voted by a majority of the judges in active service.

[1] Contrasting the Act's "elaborate and highly specific procedural safeguards" with its "general and somewhat imprecise substantive admonitions," the Supreme Court found a "legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP." *Rowley*, 458 U.S. at 205-206, 102 S.Ct. at 3050, 73 L.Ed.2d at 711-12.

[2] Generally, a class that is devoted entirely to special education is a "self-contained," classroom.

[3] We note in passing that the regulation to which Daniel refers us is one promulgated under the Rehabilitation Act of 1973. Given our disposition of this issue, we need not delve into the relationship between the Rehabilitation Act and the EHA or the effect of a violation of one of the Rehabilitation Act's regulations.

[4] The EHA defines a free appropriate public education as "special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the state involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title." §1491(18).

[5] When the court conducts this inquiry, it may consider cost and the handicapped child's educational progress. Roncker, 700 F.2d at 163 (citation omitted). It appears that the court also should compare the benefits the child would receive in special education to the benefits he would receive in regular' education. *Id.*

[6] In addition, it was relevant to the court, but not dispositive, that Daniel's presence in the regular classroom was disruptive in that he required too much of the teacher's attention.

[7] We emphasize, however, that school officials are not obligated to mainstream every handicapped child without regard for whether the regular classroom provides a free appropriate public education.

[8] As we use the term "educational benefits" here, we, like the hearing officer and the district court, refer to the academic benefits available through education—as opposed to the overall growth and development benefits gained from education.

[9] The Sixth Circuit has concluded that, in a limited fashion, cost is a relevant factor in determining compliance with the mainstreaming requirement. Roncker, 700 F.2d at 1063 (citing *Age v. Bullitt County Schools*, 673 F.2d 141, 145 (6th Cir. 1982)). As neither of the parties has raised cost as an issue, we need not consider whether the cost of a supplementary aid or service is a relevant factor.

[10] Nonacademic classes may include art, music or physical education.

[11] When a parent challenges a placement under the EHA, the child remains in the "status quo" during the pendency of the appellate process. §1415(e)(3). Thus, Daniel has remained in Prekindergarten during the two years that this case has meandered through the review process.

THE SCHOOLS' ADVOCATE

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Jane E. Slenkovich—Editor

IN THIS ISSUE:

Department of Education advises that *appropriateness* is the paramount consideration, with *least restrictive environment* a secondary consideration for deaf students

In a forceful *Notice of Policy Guidance* the U.S. Department of Education has released a powerful mandate for deaf students on the issue of *least restrictive environment* versus *appropriateness* of educational program.

Purporting to apply only to deaf students, the Department notes that Congress never meant to sacrifice *appropriateness* to the shrine of *least restrictive environment.*

In fact, the *Policy Guidance* applies equally to any of the thirteen categories of disabilities under IDEA, stating what has always been the law.

The *Notice of Policy Guidance* printed in its entirety [emphasis and paragraph breaks added]:

U.S. Department of Education
October 30, 1992

Background

In the past twenty-five years, two national panels have concluded that the education of deaf students must be improved in order to meet their unique communication and related needs. The most recent of these panels, the Commission on Education of the Deaf (COED), recommended a number of changes in the way the Federal government supports the education of individuals who are deaf from birth through postsecondary schooling and training. With this notice, the Secretary implements several COED recommendations relating to the provision of appropriate education for elementary and secondary students who are deaf.

The COED's report and its primary finding [#1] reflect a fundamental concern within much of the deaf community that students who are deaf have significant obstacles to overcome in order to have access to a free appropriate public education that meets their unique educational needs, particularly their communication and related needs. [#2]

The disability of deafness often results in significant and unique educational needs for the individual child. The major barriers to learning associated with deafness relate to language and communication, which, in turn, profoundly affect most aspects of the educational process.

For example, acquiring basic English language skills is a tremendous challenge for most students who are deaf. While the Department and others are supporting research activities in the area of language acquisition for children who are deaf, effective methods of instruction that can be implemented in a variety of educational settings are still not available. The reading skills of deaf children reflect perhaps the most momentous and dismal effects of the disability and of the education system's struggle to effectively teach deaf children: hearing impaired students

See LRE, p. 634

L[illegible]om p. 633

"level off" in their reading comprehension achievement at about the third grade level. [#3]

Compounding the manifest educational considerations, the communication nature of the disability is inherently isolating, with considerable effect on the interaction with peers and teachers that make up the educational process. This interaction, for the purpose of transmitting knowledge and developing the child's self-esteem and identity, is dependent upon direct communication.

Yet, communication is the area most hampered between a deaf child and his or her hearing peers and teachers. Even the availability of interpreter services in the educational setting may not address deaf children's needs for direct and meaningful communication with peers and teachers.

Because deafness is a low incidence disability, there is not widespread understanding of its educational implications, even among special educators. This lack of knowledge and skills in our education system contributes to the already substantial barriers to deaf students in receiving appropriate educational services.

In light of all these factors, the Secretary believes that it is important to provide additional guidance to State and local education agencies to ensure that the needs of students who are deaf are appropriately identified and met, and that placement decisions for students who are deaf meet the standards of the applicable statutes and their implementing regulations.

It is the purpose of this document to (1) clarify the free appropriate public education provisions of IDEA for children who are deaf, including important factors in the determination of appropriate education for such children and the requirement that education be provided in the least restrictive environment, and (2) clarify the applicability of the procedural safeguards in placement decisions. Nothing in this notice alters a public agency's obligation to place a student with a disability in a regular classroom if FAPE can be provided in that setting.

Free Appropriate Public Education

The provision of a free appropriate public education based on the unique needs of the child is at the heart of the IDEA. Similarly, the Section 504 regulation at 34 CFR 104.33-104.36 contains free appropriate public education requirements, which are also applicable to local educational agencies serving children who are deaf. A child is receiving an appropriate education when all of the requirements in the statute and the regulations are met.

The Secretary believes that full consideration

See LRE, p. 635

Publicly funded special education may not be provided in parochial school

Affirming the Constitutional separation of church and state, a state superior court has followed the lead of the U.S. Supreme Court, denying the request of the parents of a disabled student to have special services continued at his private parochial school.

The controversy was presented in the case of *Wright v. Saco School Department* (Me. Super. Ct., 1991). In the case, the parents of the student argued that a hearing officer had misapplied a state regulation which allowed publicly-funded special education services only in "religiously neutral" sites.

The parents argued, as long as the services were provided in buildings which did not have overtly religious objects, (in the school library, for example) the services would not be in violation of the law.

As stated by the court [emphasis and paragraph breaks added; some citations omitted]:

> [The student] is a nine year old boy who resides [within the boundaries of the school district] and attends ... a Catholic elementary school [in another town]. [At the age of five], he received a severe head injury in an automobile accident and now requires special education services from a physical therapist and an occupational therapist.
>
> Those services had been provided to him three afternoons a week at [the parochial school] by therapists hired by [the school district]. The therapists worked at the school and consulted periodically with [the student's] teachers.
>
> [Nearly two and a half years after the student's debilitating accident] ... a special services consultant for [the district] ... wrote to [the parents] informing them that the services could no longer be provided at [the parochial school] as services could not be provided in a religious setting.
>
> He stated that services would be provided at a public school ... and that [the district] would provide transportation [to and from the parochial school]....

The parents requested a due process hearing, at which their request to have the special education services continued at the parochial school were denied.

On appeal, the parents argue that the hearing officer misinterpreted IDEA and the state law which allows special education services to be provided at a public school or religiously neutral site. As the court states:

> ...[The district] and the Hearing Officer interpreted that requirement to mean somewhere other than on the [parochial school] grounds. [The student's] family argues that the services can be provided on the grounds as long as the services are not provided in a religious setting such as a chapel or classroom with religious artifacts....
>
> The Hearing Officer found that the services were provided in the school library, on the playground or in a classroom. She determined that "the parochial school is not an obviously religious environment."...

As the law has been applied by the Supreme Court, the issue of whether the environment is obviously religious or not is immaterial to the purpose behind the law itself. As this court notes:

> ...[T]he [state] regulation was developed in light of decisions of the Supreme Court of the United States interpreting the establishment of religion clause. That clause states that "Congress shall make no law respecting an establishment of religion...."
>
> In *Wolman v. Walter*, (433 U.S. 229, 1977) the Court dealt with the Constitutionality of an Ohio statute which authorized the expenditure of public funds for a variety of items and services for non-public schools.
>
> In that case the Court ... cited its earlier cases which stated that to "pass muster, a statute must have a secular legislative purpose, must have a principal or primary effect that neither advances nor inhibits religion, and must not foster an excessive government entanglement with religion."

Applied to this case, the court finds:

> ...In light of [the Supreme Court's findings] the meaning of the state regulation comes into clearer focus. The regulation means what it says and a Catholic school cannot be a religiously neutral site for the provision of ongoing therapeutic services.
>
> The Supreme Court decisions require that even the best intentioned services be conducted off premises. The interpretation of the regulation by the Hearing Officer is consistent with the Supreme Court decisions.
>
> The regulation's reference to a "religiously neutral site" also makes sense in that some

See PRIVATE SCHOOL, p. 635

!VATE SCHOOL from p. 634

private schools are non-sectarian. In the case of a sectarian private school the hearing officer was not incorrect in stating that the services must be off premises....

Ramifications and Recommendations:

The case in which the Supreme Court developed the position reached in *Wolman* came in an earlier decision of *Meek v. Pittenger* (421 U.S. 349, 1975). In that case, the Court firmly expressed the need to keep publicly-funded education off property belonging to a group with a religious affiliation.

Stated the Court:

> ...To be sure, auxiliary-services personnel, because not employed by the nonpublic schools, are not directly subject to the discipline of a religious authority.
>
> But they are performing important educational services in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained.
>
> The potential for impermissible fostering of religion under these circumstances, although somewhat reduced, is nonetheless present. To be certain that auxiliary teachers remain religiously neutral, as the Constitution demands, the State would have to impose limitations on the activities of auxiliary personnel and then engage in some form of continuing surveillance to ensure that those restrictions were being followed. ■

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LRE from p. 634

of the unique needs of a child who is deaf will help to ensure the provision of an appropriate education. For children who are eligible under Part B of the IDEA, this is accomplished through the IEP process. For children determined to be handicapped under Section 504, implementation of an individualized education program developed in accordance with Part B of the IDEA is one means of meeting the free appropriate public education requirements of the Section 504 regulations.

As part of the process of developing an individualized education program (IEP) for a child with disabilities under the IDEA, State and local education agencies must comply with the evaluation and placement regulations at 34 CFR 300.530-300.534. In meeting the individual education needs of children who are deaf under Section 504, LEAs must comply with the evaluation and placement requirements of 34 CFR 104.35 of the Section 504 regulation, which contain requirements similar to those of the IDEA.

However, the Secretary believes that the unique communication and related needs of many children who are deaf have not been adequately considered in the development of their IEP's.

To assist public agencies in carrying out their responsibilities for children who are deaf, the Department provides the following guidance. The Secretary believes it is important that State and local education agencies, in developing an IEP for a child who is deaf, take into consideration such factors as:

1. communication needs and the child's and family's preferred mode of communication;
2. linguistic needs;
3. severity of hearing loss and potential for using residual hearing;
4. academic level; and
5. social, emotional, and cultural needs, including opportunities for peer interactions and communication.

In addition, the particular needs of an individual child may require the consideration of additional factors. *For example, the nature and severity of some children's needs will require the consideration of curriculum content and method of curriculum delivery in determining how those needs can be met. Including evaluators who are knowledgeable about these specific factors as part of the multidisciplinary team evaluating the student will help ensure that the deaf student's needs are correctly identified.*

Under the least restrictive environment (LRE) provision of IDEA, public agencies must establish procedures to ensure that "to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." [#4] The section 504 regulation at 34 CFR 104.34 contains a similar provision.

The Secretary is concerned that the least restrictive environment provisions of the IDEA and Section 504 are being interpreted, incorrectly, to require the placement of some children who are deaf in programs that may not meet the individual student's educational needs.

Meeting the unique communication and related needs of a student who is deaf is a fundamental part of providing a free appropriate public education (FAPE) to the child. Any setting, including a regular classroom, that prevents a child who is deaf from receiving an appropriate education that meets his or her needs, including communication needs, is not the LRE for that individual child.

Placement decisions must be based on the child's IEP. [#5] *Thus, the consideration of LRE as part of the placement decision must always be in the context of the LRE in which appropriate services can be provided.* Any setting which does not meet the communication and related needs of a child who is deaf, and therefore does not allow for the provision of FAPE, cannot be considered the LRE for that child.

The provision of FAPE is paramount, and the individual placement determination about LRE is to be considered within the context of FAPE.

The Secretary is concerned that some public agencies have misapplied the LRE provision by presuming that placements in or closer to the regular classroom are required for children who are deaf, without taking into consideration the range of communication and related needs that must be addressed in order to provide appropriate services.

The Secretary recognizes that the regular classroom is an appropriate placement for some children who are deaf, but for others it is not. The decision as to what placement will provide FAPE for an individual deaf child—which includes a determination as to the LRE in which appropriate services can be made available to the child—*must be made only after a full and complete IEP has been developed that addresses the full range of the child's needs.*

See LRE, p. 636

LR n p. 635

The Secretary believes that consideration of the factors mentioned above will assist placement teams in identifying the needs of children who are deaf and will enable them to place children in the least restrictive environment appropriate to their needs.

The overriding rule regarding placement is that placement decisions must be made on an individual basis. [#6] As in previous policy guidance, the Secretary emphasizes that placement decisions may not be based on category of disability, the configuration of the delivery system, the availability of educational or related services, availability of space, or administrative convenience.

States and school districts also are advised that the potential harmful effect of the placement on the deaf child or the quality of services he or she needs must be considered in determining the LRE.

The Secretary recognizes that regular educational settings are appropriate and adaptable to meet the unique needs of particular children who are deaf. *For others, a center or special school may be the least restrictive environment* in which the child's unique needs can be met.

A full range of alternative placements as described at 34 CFR 300.551(a) and (b)(1) of the IDEA regulations must be available to the extent necessary to implement each child's IEP. *There are cases when the nature of the disability and the individual child's needs dictate a specialized setting that provides structured curriculum or special methods of teaching.* Just as placement in the regular educational setting is required when it is appropriate for the unique needs of a child who is deaf, so is removal from the regular educational setting required when the child's needs cannot be met in that setting with the use of supplementary aids and services.

Procedural Safeguards

One important purpose of the procedural safeguards required under Part B and the Section 504 regulations is to ensure that parents are knowledgeable about their rights and about important decisions that public agencies make, such as placement decisions.

Under the Section 504 regulations at 34 CFR 104.36, a public agency must establish a system of procedural safeguards that includes, among other requirements, notice to parents with respect to placement decisions. Compliance with the Part B procedural safeguards is one means of meeting the requirements of the Section 504 regulations.

Under Part B, before a child is initially placed in special education the child's parents must be given written notice and must consent to the placement. The Part B regulations at 34 CFR 300.500(a) provide that consent means that parents have been fully informed of all information relevant to the placement decision.

The obligation to fully inform parents includes informing the parents that the public agency is required to have a full continuum of placement options available to meet the needs of children with disabilities, including instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions.

The Part B regulations at 34 CFR 300.504-300.505 also require that parents must be given written notice a reasonable time before a public agency proposes to initiate or change the identification, evaluation, educational placement or provision of a free appropriate public education to the child. This notice to parents must include a description of the action proposed or refused by the agency, an explanation of why the agency proposes or refuses to take the action, and a description of any options the agency considered and the reasons why those options were rejected.

The requirement to provide a description of any option considered includes a description of the types of placements that were actually considered, *e.g.*, special school or regular class, as well as any specific schools that were actually considered and the reasons why these placement options were rejected. Providing this kind of information to parents will enable them to play a more knowledgeable and informed role in the education of their children.

Authority: 20 U.S.C. 1411-1420; 29 U.S.C. 794.

Dated:

Lamar Alexander,
Secretary.

Footnotes:

#1. "The present status of education for per-

See LRE, p. 638

Court grants due process hearing to twenty-two-year-old woman

In a shocking reversal of a previously reported case, a U.S. District Court has allowed a woman with disabilities to pursue an IDEA due process hearing after she had reached the age of 21.

This is the result of a civil case, *Cocores v. Portsmouth School District* (D. N.H., 1991). A woman, now twenty-two years old, brought suit seeking the right of a due process hearing through which she hoped to gain compensatory education. Disabled by cerebral palsy, blindness, and severely mentally retarded, the woman claims that she was denied an appropriate education by the school district.

A Federal Magistrate had ruled that the woman was barred from compensation because her claim had been filed after she had turned twenty-one, the age limit for IDEA-funded education.

Reviewing the decision rendered by the Magistrate, the court at present states [paragraph breaks added; most citations omitted]:

> [The magistrate] relied on *Honig v. Doe* (484 U.S. 305, 1988), for the proposition that [the woman], because she is over the age of twenty-one, is ineligible for the benefits and protections of the IDEA. This court, however, finds *Honig* inapplicable to this case.

The court, in reference to the two students in *Honig*, notes that the Supreme Court decided:

> ...[T]he controversy was still justiciable as to Smith, who was just under twenty-one when the case reached the Court. This court is persuaded that "*Honig* does not bar relief after age 21, as long as [the student] is under 21 when the violation occurs."

To bolster this position, the court cites a decision reached in *Lester H. v. Gilhool* (3rd Cir., 1991) in which the court, in view of *Honig*, held:

> ...[A]s an adult ... Doe had no right to demand that the District comply with the Act either presently or in the future. The Act only gives minors the right to education.
>
> [This student], in contrast, is only requesting a remedy to compensate him for rights the district already denied him. He has the right to ask for compensation because the School District violated his statutory rights while he was entitled to them.
>
> If *Honig* stands for the proposition [the district] assert[s], school districts would be immune from suit if they simply stopped educating intended beneficiaries of the [Act] at age 18 or 19.
>
> Those beneficiaries' cases would take at least two years to be reviewed, and even if the reviewing courts found the school districts' behavior egregious, the courts would be pow-

See HEARING, p. 637

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KEYNOTE SPEAKERS:

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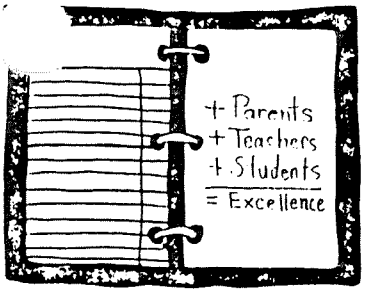

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RONALD L. SARNACKI, Ph.D.
DIRECTOR OF SPECIAL EDUCATION

January 13, 1994

Dr. John W. McClain
Committee on Education and Labor
U.S. House of Representatives
2181 Rayburn, 518 House Annex 1
Washington, D.C. 20515-8107

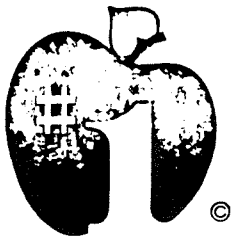
Dear Dr. McClain:

I received a letter from the American Association of School Administrators inviting me to respond with our district's thoughts on IDEA (Individuals with Disabilities Education Act). IDEA is being considered for reauthorization this spring. My response concerns points #3 and #6. Please consider these thoughts as laws are made that are in the best interest of students with disabilities.

Point #3 Barriers to School-to-Work Opportunities Act

Full inclusion would interfere with the district's ability to place students with disabilities on the job rather than attending academic classes with fellow students. Therefore, full inclusion practices should be discouraged since that philosophy interferes with district's ability to individualize educational opportunities for each student.

Point #6 Much emphasis appears to be placed on students with disabilities attending classes with their non-handicapped peers. While this ia a good idea many times, it is not always best for students with disabilities to work alongside their non-handicapped peers. Sometimes it may be in the student's best interest to be working outside the classroom on a job by himself or with a job coach, or to attend a resource room to get special assistance, or to be focusing on some functional life skills instead of dealing with academia. These are just a few examples of when full inclusion might not be in the best interest of the special education student. Therefore, federal legislation must continue to support the philosophy that a full continuum of services and placement options is necessary in order to meet the educational needs of students with disabilities.



I. Programs that have the **potential to increase costs** for special education services.

A. The Parsons Project - **Full Inclusion**

When moving from the standard delivery model to one of inclusion, the Tri-County Special Education Cooperative in southeast Kansas had the following results affecting fiscal planning. Tri-County served 58 special education students.

1. The number of paraprofessionals employed increased from 16 to 38. This was an increase of 137.5% in only one year!
2. Program costs remained stable for federal contributions. State aid increased from $297,742 to $416,115 - an increase of $118,373. Local costs increased from $243,592 to $280,204 - an increase of $36,612. Overall special education program costs increased by $154,985 in one year. This was an increase of 27% in expenditures in one year!

B. **Class-Within-A-Class (CWC)**

CWC is a teaching model where the regular classroom teacher and special education teacher collaborate and teach together in the regular classroom (i.e., students with mild disabilities are taught in the regular classroom instead of being pulled out into a resource room or into a self-contained classroom).

1. Elementary LD teachers cannot be in more than one classroom at a time (e.g., reading, math). Therefore, staff may need to be added to meet student needs.
2. Secondary LD teachers cannot be in all sections of a subject at one time. Therefore, staff may need to be added to meet student needs.
3. What about the students whose learning deficits are so severe that they cannot benefit academically from attending the regular class? What do you do with them?