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### Does Ohio Provide Autistic Children A Free Appropriate Public Education

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# DOES OHIO PROVIDE AUTISTIC CHILDREN A FREE APPROPRIATE PUBLIC EDUCATION?

by  
SHEILA M. MCCARTHY

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## I. INTRODUCTION

To facilitate the special educational needs of handicapped<sup>1</sup> children,<sup>2</sup> Congress enacted the Education for All Handicapped Children Act of 1975<sup>3</sup> (EAHCA) which provides federal funds to encourage states to educate their handicapped children. States which accept federal funding must formulate a plan that assures that "all handicapped children have available to them . . . a free appropriate public education."<sup>4</sup>

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<sup>1</sup> A handicapped child "deviates from the average or normal child (1) in mental characteristics, (2) in sensory abilities, (3) in neuromuscular or physical characteristics, (4) in social or emotional behavior, (5) in communication abilities, or (6) in multiple handicaps to such an extent" that his school program or special educational services must be modified for him to maximize his potential. S. KIRK, EDUCATING EXCEPTIONAL CHILDREN 4 (2d ed. 1972). See *infra* note 34. While the handicapped child may not derive any benefits if kept isolated, he can learn if provided with "a structured program of education." GILHOOL, EDUCATION, AN INALIENABLE RIGHT 597, 603 (1973).

<sup>2</sup> The EAHCA dictates that states provide a "free appropriate public education" to all handicapped children between the ages of five and eighteen. Furthermore, if states provide an education to nonhandicapped children aged three to five and aged eighteen to twenty-one, then these states must educate handicapped children of the same age. 20 U.S.C. § 1412(2)(B) (1982 & Supp. V 1987); 34 C.F.R. § 300.122 (1988).

<sup>3</sup> Pub. L. No. 94-142, 89 Stat. 774 (1975) (amending Pub. L. No. 91-230, § 601, 84 Stat. 175 (1970) (codified as amended at 20 U.S.C. §§ 1400-1461 (1982 & Supp. V 1987))). Some courts and commentators refer to the statute as the Education of the Handicapped Act (EHA). Regulations published pursuant to the EAHCA are found in 34 C.F.R. §§ 300.1-300.754 (1988) (previously found in 45 C.F.R. §§ 121a.1-121a.754). Handicapped children may also utilize 29 U.S.C. § 794 (1982 & Supp. V 1987) (Section 504 of the Rehabilitation Act of 1973), 42 U.S.C. § 1983 (1982 & Supp. V 1987) (the Civil Rights Act of 1971), and the Equal Protection and Due Process Clauses of the Fourteenth Amendment to provide further relief from inaccurate and often erroneous special education placements. This Note discusses the EAHCA as a source of relief for providing autistic children with a free appropriate public education, however, it should be noted that the United States Supreme Court concluded "that where the [EAHCA] is available to a handicapped

Complying states must establish and maintain procedures that guarantee due process safeguards<sup>5</sup> to the handicapped child and to her parents or guardians. These protections include the right to receive written notice before a change in the child's educational placement,<sup>6</sup> the right to present complaints regarding the appropriateness of placement,<sup>7</sup> the

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child asserting a right to a free appropriate public education, based either on the [EAHCA] or on the Equal Protection Clause of the Fourteenth Amendment, the [EAHCA] is the exclusive avenue through which the child and his parents or guardian can pursue their claim." *Smith v. Robinson*, 468 U.S. 992, 1013 (1984).

<sup>4</sup> 20 U.S.C. § 1400(C) (1982 & Supp. V 1987). The EAHCA defines a "free appropriate" public education as:

[S]pecial 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.

20 U.S.C. § 1401(18) (1982 & Supp. V 1987).

<sup>5</sup> See generally 20 U.S.C. § 1415 (1982 & Supp. V 1987); 34 C.F.R. §§ 300.500-300.589 (1988).

<sup>6</sup> 20 U.S.C. § 1415 (b)(1)(C) (1982 & Supp. V 1987); 34 C.F.R. § 300.504(a) (1988). Parents of a handicapped child must receive prior written notice whenever the school "proposes to initiate or change, or refuses to initiate or change, the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child." 20 U.S.C. § 1415 (b)(1)(C) (1982 & Supp. V 1987). See *infra* note 43.

The United States Court of Appeals for the Second Circuit has defined a change in educational placement as "any significant alterations in the programs, activities, or services provided by [schools] to handicapped children . . . includ[ing] changes in the degree to which handicapped children are integrated with nonhandicapped children in these programs and activities." *Concerned Parents v. New York City Bd. of Ed.*, 629 F.2d 751, 752-53 (2d Cir. 1980), *cert. denied*, 449 U.S. 1078 (1981). Several courts have interpreted a change in educational placement to include expulsion from schools. See *S-1 v. Turlington*, 635 F.2d 342 (5th Cir.), *cert. denied*, 454 U.S. 1030 (1981); *Kaelin v. Grubbs*, 682 F.2d 595 (6th Cir. 1982); *Doe v. Koger*, 480 F. Supp. 225 (N.D. Ind. 1979); *Stuart v. Nappi*, 443 F. Supp. 1235 (D. Conn. 1978); *Board of Ed. of City of Peoria v. Illinois State Bd. of Ed.*, 531 F. Supp. 148 (C.D. Ill. 1982) (one week suspension did not constitute a change in educational placement).

<sup>7</sup> The complaint may concern any aspect of the child's identification, evaluation, or educational placement. 20 U.S.C. § 1415 (b)(1)(E) (1982 & Supp. V 1987). See *infra* note 43. One writer suggests that the EAHCA's failure to limit the persons who may complain to the Commissioner or State agency presumably permits anyone to make a report. Krass, *The Right to Public Education for Handicapped Children: A Primer for the New Advocate*, 1976 U. ILL. L. F. 1016, 1072. Krass' interpretation furthers the EAHCA's purpose of providing handicapped children with an appropriate education. To read into the omission that only parents can present complaints would hinder the EAHCA's aim.

Knowing that interested parties have the right to present complaints might cause a school to comply with the law. A "watchdog" provision could provide a similar scare tactic. See CONN. GEN. STAT. ANN. § 10-76b(d) (West Supp. 1988); LA. REV. STAT. ANN. § 17:1944 (B) (8) (West 1977); ME. REV. STAT. ANN. tit. 20A § 7205 (West 1983); N.Y. ED. LAW 4403(4) (McKinney 1987) (state education department has the power and the duty to make periodic inspections of special education programs and facilities and to report on whether the services are adequate).

right to have an impartial hearing<sup>8</sup> if the placement is in dispute,<sup>9</sup> the right to be represented by counsel at the hearing,<sup>10</sup> and the right to appeal the decision made in the hearing and bring a civil action.<sup>11</sup>

Autistic children are handicapped children within the meaning of the EAHCA, therefore, they are entitled to receive "free appropriate public education." This Note will discuss whether Ohio currently provides autistic children a "free appropriate public education" in accordance with the EAHCA. Ohio's parallel statute, the State Education of Handicapped Act<sup>12</sup> (State Act), is compared to similar legislation currently existing in various other states throughout the United States. Areas in the State Act needing clarification are scrutinized and statutory revisions are recommended. This Note concludes that Ohio should adopt additional safeguards to ensure that autistic children receive a "free appropriate public education."

## II. AUTISM DEFINED

Autism is a severe and incapacitating developmental neurological disability that usually appears during the first three years of life.<sup>13</sup> It occurs in approximately fifteen out of every 10,000 births.<sup>14</sup> Out of the nearly 3.75 million births recorded in the United States each year, 5,625 children are born with autism.<sup>15</sup> Also, autism is four times more common in boys than in girls and is found throughout the world in families of all racial, ethnic, and social backgrounds.<sup>16</sup>

Dr. Bernard Rimland,<sup>17</sup> a recognized authority on the treatment of autistic and hyperactive children, describes this disorder as:

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<sup>8</sup> The EAHCA provides parents with the opportunity for an impartial due process hearing. To ensure the hearing officer's impartiality, the EAHCA stipulates that hearings may not be conducted by employees of the school involved in the child's education or care. 20 U.S.C. § 1415(b)(2) (1982 & Supp. V 1987); 34 C.F.R. § 300.506 (1988). *See infra* note 43.

<sup>9</sup> 20 U.S.C. § 1415 (b)(2) (1982 & Supp. V 1987); 34 C.F.R. § 300.506-300.510 (1988). *See infra* note 43.

<sup>10</sup> 20 U.S.C. § 1415 (d) (1982 & Supp. V 1987); 34 C.F.R. § 300.508 (a)(1) (1987). *See infra* note 44.

<sup>11</sup> 20 U.S.C. § 1415 (e) (1982 & Supp. V 1987); 34 C.F.R., §§ 300.510-300.511 (1988). *See infra* note 45.

<sup>12</sup> OHIO REV. CODE ANN. §§ 3323.01-3323.16 (Baldwin 1976).

<sup>13</sup> *Autism Society of America*, 19 *ADVOCATE* No. 4, at 23 (1987) (hereinafter *ADVOCATE*).

<sup>14</sup> *Id.* at 10. To get an idea of the autistic population, one can calculate, based on 15 in every 10,000 that there are approximately 300,000 people (children and adults) with autism and related communications handicaps in this country.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 23.

<sup>17</sup> Rimland, *On Autism: An Interview*, *Institute for Child Research Behavior*. Dr. Rimland is the Director of the Institute for Child Behavior Research in San Diego, California.

[A] very severe behavioral disorder of childhood, which in most cases starts at birth, or soon after birth, and presents a major handicap to the individual for his or her entire life, although there have been a few unexpected cases of at least partial recovery. Autistic children are generally very well formed and physically attractive. Their disorder is difficult to characterize, but a very prominent feature is their inability to relate to or communicate with other human beings in ways that are natural or meaningful. Some autistic are mute and others do have speech, but it is usually of a rather bizarre, ritualistic type, which is not very well suited to communication.

An autistic child has been described as living in a dream world, in a glass ball, or in a world of his own. The cause is unknown, although it is known that the old fashioned idea that autism was an emotional disorder is entirely incorrect. It is well known that autism is brought about by some metabolic dysfunction of the brain, but beyond that, the cause is not known.<sup>18</sup>

Caused by physical disorders of the brain, the usual symptoms of autism include: the inability to process external information which leads to problems in learning, communication, and behavior;<sup>19</sup> disturbances in the rate of appearance of physical, social, and language skills; abnormal responses to sensations;<sup>20</sup> and abnormal ways of relating to people, objects, and events.<sup>21</sup>

Typically, autistic children resist change and frequently immerse themselves in self-stimulating activities like rocking and hand-flapping. An autistic child can be erratic, hyperactive, self-destructive or totally withdrawn. Speech and language are generally lacking or lagging. Many autistic children also have other handicaps.<sup>22</sup>

Autism is frequently confused with, but greatly differs from mental retardation. Distinctive and specific thinking capabilities may be present in autistic children which do not exist in mentally retarded children.<sup>23</sup> Oftentimes, people with autism marginally function in society. Appropriate education can enable autistic children to become functioning citizens rather than institutionalized beings.<sup>24</sup>

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<sup>18</sup> *Id.*

<sup>19</sup> Lundberg, *New Hope for Autistic Children*, Boston Globe, Aug. 24, 1986, at 84, 86, col. 1.

<sup>20</sup> Any one or a combination of senses or responses are influenced: sight, hearing, touch, balance, smell, taste, reaction of pain, and the way a child holds his or her body. *ADVOCATE*, *supra* note 13, at 24.

<sup>21</sup> *Id.*

<sup>22</sup> Lundberg, *supra* note 19, at 88.

<sup>23</sup> It is important to distinguish autism from retardation or mental disorders since diagnostic confusion may potentially result in inappropriate and ineffective treatment techniques. *ADVOCATE*, *supra* note 13, at 24.

<sup>24</sup> F. Warren, *Future Directions in Educational Planning: The Problem is the Problem, and It's Real*, in *CRITICAL ISSUES IN EDUCATING AUTISTIC CHILDREN AND YOUTH* 286, 287 (Wilcox & Thompson eds. 1986) (in reference to the results of a study funded by HEW (now Health and Human Services) and conducted by R. Sullivan in 1977).

Research has established that the most beneficial treatment for autistic children is a firmly structured, purposeful educational program.<sup>25</sup> According to Dr. Rimland, autistic children generally have a limited degree of understanding and the type of teaching which is most effective is behavior modification.<sup>26</sup> Psychotherapy and psychoanalysis were at one time the principle methods of treating autistic children, however, today, these methods do much more harm than good.<sup>27</sup>

Since 1943, autism has existed as a distinct classification of childhood disorders.<sup>28</sup> The initial perception of autism as an emotional disturbance

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<sup>25</sup> Rimland, *supra* note 17.

<sup>26</sup> Behavior modification involves the use of rewards and sometimes mild punishments. It is the method by which Helen Keller was taught. Rimland, *supra* note 17. Normal people and non-autistic retarded people develop a system of internalized ideas that act as a guide for conduct in diverse situations. Due to their impairments, autistic and autistic-like people have no organized system of either thinking about past events, or interpreting the present and planning for the future. They cannot create this inner world of thoughts and ideas. Consequently, to educate an autistic person, structure and organization must be provided from the outside. CRITICAL ISSUES, *supra* note 24, at 292-93 (describing three features of autism set forth by L. Wing, Diagnosing Autism and Autistic-Like Conditions in an address to the National Society for Autistic Children, San Jose, Cal. 1979).

Another useful treatment for autism is the use of high dosage levels (usually 350 mg. to 1000 mg. per day) of vitamin B6, along with Recommended Daily Allowance levels of the mineral magnesium. Although it is recommended that B6 be combined with other B vitamins, research done by the Institute of Child Behavior Research, as well as by a number of other researchers in the United States and abroad, has demonstrated that 30% to 60% of autistic children show significant behavioral and other benefits after the administration of the B6 and magnesium.

According to Dr. Rimland:

[T]he studies have used not only behavioral measures to determine whether or not the children have improved, but also in some cases brain wave analysis and urine studies have been applied to groups of autistic children before and after treatment with the vitamin B6, and the B6 brings about improvements as measured in all three of these criteria.

Rimland, *supra* note 17.

<sup>27</sup> Rimland, *supra* note 17.

<sup>28</sup> The term autism was first used by Dr. Leo Kanner of Johns Hopkins School of Medicine in 1943 to describe eleven children with the following behavioral characteristics: (1) inability to develop relationships with people, (2) delay in speech acquisition, (3) non-communicative use of speech after it develops, (4) delayed echolalia, (5) pronoun reversal, (6) repetitive and stereotyped play activities, (7) an obsessive insistence on the maintenance of sameness, (8) lack of imagination, (9) a good rote memory, and (10) a normal physical appearance. Kanner, *Autistic Disturbances of Affective Contact*, 2 *Nervous Child* 217, 217-50 (1943). "The use of the term 'autism' to describe children with these characteristics was perhaps an unfortunate choice because it was immediately confused with Bleuler's (1911) use of the same word to describe an active withdrawal into fantasy shown by patients with schizophrenia." CRITICAL ISSUES, *supra* note 24, at 288 (referring to a study by E. Bleuler, *Demantia Praecox Oder Gruppe Der Schizophrenien* (1911) (Translated by J. Zinkim 1950)).

has been discarded by virtually all professionals. Most states, however, continue to administer educational services for autistic children under the emotionally handicapped grouping.<sup>29</sup> Consequently, the administrative structure has had the effect of perpetuating the obsolete version of autism.

Funds designated for the education of emotionally disturbed children do not provide adequate services for autistic children. Dr. Leo Kanner's original description of autism evidenced that autistic children "are all unquestionably endowed with good cognitive potentialities."<sup>30</sup> A broader conception of autism, however, has evolved since 1943 which has consequently changed Kanner's initial description of autism.

In the past, most autistic children were generally considered to be severely handicapped, functioning at moderately to severely retarded levels. As funds and services for severely handicapped children became more widely available throughout the 1970's, many educators and legislators assumed that autistic children were being served under this designation. Parents of autistic children, however, believe that their children have been left out of or have been inadequately served in both the emotionally disturbed and the severely handicapped programs. The establishment of a new educational category of autism is necessary.<sup>31</sup>

The immediate advantage of using autism as a classification for education planning would emphasize the needs of a group of children who have been inadequately served in the past and would further result in funds specifically channeled for services to autistic children. More accurate data on the number of autistic children being served could then be collected

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<sup>29</sup> See, e.g., OHIO REV. CODE ANN. § 5126.01(F)(1)(2) (Baldwin 1980) which defines developmentally disabled as:

[H]aving a disability that originates before age eighteen, has continued or can be expected to continue indefinitely, and constitutes a substantial handicap to the person's ability to function normally in society, and is attributable to one of the following: (1) Mental retardation, cerebral palsy, the epilepsies, or autism; (2) Any other condition found to be closely related to mental retardation because it results in impairment of general intellectual functioning or adaptive behavior similar to that of mentally retarded persons or requires treatment and services similar to those required for such persons.

<sup>30</sup> Kanner, *supra* note 28, at 47.

<sup>31</sup> The National Society for Autistic Children proposed the creation of a separate educational category for "autistic and related communications handicaps." CRITICAL ISSUES, *supra* note 24, at 295. A difficulty, however, exists regarding categorization:

*With categories*, children have been labeled, stigmatized, rejected, institutionalized and, in the extreme, killed by harsh environmental conditions found in various 'asylums,' conditions created as a result of societal rejection and neglect. Documentation of the harm that can result from labeling is extensive. *Without categories*, children have been overlooked, ignored, rejected, endlessly assessed and diagnosed, but unserved. They and their parents have wandered from one rejection to another until they grew old. Many have found no place where their problem could be addressed, because it was undefined, confusing, and presented unknown qualities. No category meant no recognition, no advocates, no program, and no funding.

*Id.*

by state agencies and used to both encourage and promote the training of teachers, school psychologists, speech pathologists, and other necessary related personnel. Moreover, the stigma associated with the emotionally disturbed would be removed, thereby freeing autistic children of an untrue and unnecessary stereotype.<sup>32</sup>

### III. THE EAHCA

The Education for All Handicapped Children Act<sup>33</sup> was enacted to "assure that all handicapped children<sup>34</sup> have available to them a . . . free appropriate public education."<sup>35</sup> Under the EAHCA, a state may receive federal funds for educating handicapped children only if the state demonstrates that it "has in effect a policy that assures all handicapped children the right to a free appropriate education."<sup>36</sup>

States are obligated to ensure that educational agencies provide procedures to refer and evaluate<sup>37</sup> all children thought to have a handicap. Each child who is identified as handicapped through this procedure must

<sup>32</sup> *Id.*

<sup>33</sup> The EAHCA became effective on October 1, 1977. See 20 U.S.C. § 1411 (1976 & Supp. 1989). For the history and background which led to the adoption of the EAHCA, see PLACING CHILDREN IN SPECIAL EDUCATION: A STRATEGY FOR EQUITY 23 (K. Heller, W. Holtzman & S. Messick eds. 1982); Lazerson, *The Origins of Special Education* in SPECIAL EDUCATION POLICIES: THEIR HISTORY, IMPLEMENTATION AND FINANCE 15 (J. Chambers & W. Hartman eds. 1983); Colley, *The Education for All Handicapped Children Act (EHA): A Statutory and Legal Analysis*, 10 J. L. & EDUC. 137 (1981); Herr, *Retarded Children and the Law: Enforcing the Constitutional Rights of the Mentally Retarded*, 23 SYRACUSE L. REV. 995 (1972); Note, *The Right of Handicapped Children to an Education: The Phoenix of Rodriguez*, 59 CORNELL L. REV. 519 (1974); Note, *Enforcing the Right to an "Appropriate" Education: The Education for All Handicapped Children Act of 1975*, 92 HARV. L. REV. 1103 (1979); Note, *The Education of All Handicapped Children Act of 1975*, U. MICH. J. L. REF. 110 (1976).

<sup>34</sup> The EAHCA defines "handicapped children" as children who are "mentally retarded, hard of hearing, deaf, speech or language impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, or children with specific learning disabilities, who by reason thereof require special education and related services." 20 U.S.C. § 1401(1) (1975 & Supp. 1987).

<sup>35</sup> 20 U.S.C. § 1400(c) (1982). See *supra* note 4.

<sup>36</sup> 20 U.S.C. § 1412(1) (1976).

<sup>37</sup> A state applying for EAHCA funds must show to the Secretary of Education that:

[A]ll children residing in the State who are handicapped, regardless of the severity of their handicap, and who are in need of special education and related services are identified, located, and evaluated, and that a practical method is developed and implemented to determine which children are currently receiving needed special education and related services.

20 U.S.C. § 1412(2)(C) (1976 & Supp. 1987); 34 C.F.R. § 300.4 (1988). Local education agencies or intermediate education units must submit applications for funds to the states which similarly confirm that proper referral and evaluation procedures are situated. 20 U.S.C. § 1414(A)(1)(a) (1976 & Supp. 1987).



then receive an Individualized Education Program (IEP)<sup>38</sup> which, among other things, details the specific educational services, the duration of the services, and the instructional setting that the child will receive.<sup>39</sup> The IEP is formulated at a meeting attended by a qualified education agency representative (such as a psychologist, principal, or counselor), the child's teacher, the parents or guardian, and occasionally the child.<sup>40</sup> Furthermore, children identified as handicapped before the enactment of the EAHCA must also receive an IEP which must be periodically reviewed and revised as required.<sup>41</sup>

Complying states must establish and maintain procedures which guarantee due process safeguards to the handicapped child and to her parents.<sup>42</sup> Parents and guardians who oppose the child's proposed placement may file a complaint and obtain an impartial due process hearing conducted by the state or local education agency.<sup>43</sup> Any party aggrieved

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<sup>38</sup> The EAHCA defines the IEP as:

[A] written statement for each handicapped child developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

20 U.S.C. § 1401(19) (1976 & Supp. 1987).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> 20 U.S.C. § 1414(a) (5) (1976 & Supp. 1987).

<sup>42</sup> Compliance is assured by provisions permitting the withholding of federal funds upon determination that a participating state or local agency has failed to satisfy the requirements of the EAHCA, 20 U.S.C. §§ 1414(b)(2)(A), 1416 (1976 & Supp. 1987), and by the provision for judicial review. Presently, all states except New Mexico receive federal funds under the EAHCA.

<sup>43</sup> The EAHCA dictates that each local education agency shall provide: (1)(A) an opportunity for the parents or guardian of a handicapped child to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent evaluation of the child;

(B) procedures to protect the rights of the child whenever the parents or guardian of the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as a surrogate for the parents or guardian;

(C) written prior notice to the parents or guardian of the child whenever such agency or unit—

(i) proposes to initiate or change, or

by the findings and decision of the hearing may appeal to the state education agency for an impartial review.<sup>44</sup> The law grants parties the right to have counsel and specialists in education of the handicapped present, the right to present evidence, the right to confront, cross-examine, and compel the attendance of witnesses, the right to a written or electronic verbatim record of such hearing, and the right to written findings of fact and decision.<sup>45</sup>

Furthermore, if the parents or school district are still aggrieved by the decision after the appeal, they may file a civil action in any state court of competent jurisdiction or in a federal district court without regard to the amount in controversy.<sup>46</sup> The court shall then review the administrative

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- (ii) refuses to initiate or change, the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

(D) procedures designed to assure that the notice required by clause (C) fully inform the parents or guardian in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and

(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

20 U.S.C. § 1415(b) (1975).

The due process hearing must occur within 45 days of the hearing request. 34 C.F.R. § 300.512(a) (1987). Either party may request that the hearing officer grant a specific extension beyond the 45 day period. 34 C.F.R. § 300.512(c) (1987). The hearing must be conducted at a time and place reasonably convenient for the parents and child. 34 C.F.R. § 300.512(d) (1987).

<sup>44</sup> When a local decision is reviewed by a state educational agency, federal law requires that:

- (c) If the hearing in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

20 U.S.C. § 1415(c) (1976).

<sup>45</sup> 20 U.S.C. § 1415(d) (1976 & Supp. 1987).

<sup>46</sup> 20 U.S.C. § 1415(e)(2) (1976 & Supp. 1987). The EAHCA also requires that: During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

20 U.S.C. § 1415(e)(3) (1976 & Supp. 1987).

record, may hear additional evidence at the request of either party and, using a preponderance of the evidence standard, "shall grant such relief as the court determines is appropriate."<sup>47</sup>

#### IV. *Board of Education v. Rowley*

The United States Supreme Court considered the meaning of the statutory term "free appropriate public education"<sup>48</sup> in *Board of Education v. Rowley*,<sup>49</sup> the first case in which the Court interpreted any provision of the EAHCA. In *Rowley*, the Court focused substantial attention on Congress' intent encompassing the background, formulation, and enactment of the EAHCA. The Court held that the EAHCA requires that a participating state provide personalized instruction and related support services.<sup>50</sup>

The EAHCA legislation was enacted in response to Congress' perception that a majority of handicapped children in the United States "were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time that they were old enough to 'drop out'."<sup>51</sup> In

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<sup>47</sup> Any party aggrieved by the findings and decision made under subsection (b) of this section, who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence, shall grant such relief as the court determines is appropriate. 20 U.S.C. § 1415(e)(2) (1976 & Supp. 1987).

<sup>48</sup> In cases brought under the EAHCA, perhaps the most difficult task confronting judges and administrative hearing officers has been interpretation and application of the requirement that the education of each handicapped child be "appropriate." See, e.g., *Colin v. Schmidt*, 536 F. Supp. 1375 (D.R.I. 1982), *aff'd*, 715 F.2d 1 (1st Cir. 1983); *Campbell v. Talladeger County Bd. of Educ.*, 518 F. Supp. 47 (N.D.Ala. 1981); *Noeris v. Massachusetts Dep't of Educ.*, 529 F. Supp. 759 (D.Mass. 1981); *Buchholtz v. Iowa Dep't of Pub. Instruction*, 315 N.W.2d 789 (Iowa 1982); *Shanberg v. Pennsylvania*, 57 Pa. Commw. 384, 426 A.2d 232 (1981).

<sup>49</sup> 458 U.S. 176 (1982).

<sup>50</sup> *Id.* at 203. In particular, the *Rowley* court concluded that the EAHCA did not obligate the state of New York to provide a sign language interpreter to assist a deaf child who had progressed easily from grade to grade, but was not learning as much as she would with the interpreter's assistance. *Id.* at 185-86. The Court limited its holding to the facts of the case and found Amy Rowley's academic progress, considered in light of the special services and "professional considerations" afforded by the school administrators, to be dispositive. *Id.* at 203 n. 25. For a complete discussion of *Rowley*, see Zirkel, *Building an Appropriate Education from Board of Education v. Rowley: Razing the Door and Raising the Floor*, 42 Md. L. Rev. 466 (1983); Comment, *Board of Education v. Rowley: Handicapped Children are Entitled to a Beneficial Education*, 69 Iowa L. Rev. 23 (1983).

<sup>51</sup> *Rowley*, 458 U.S. at 179 (citations omitted). The Court in *Rowley* discussed the events and legislative enactments preceeding Congressional adoption of the EAHCA. *Id.* at 179-80.

*Rowley*, the Court considered two questions: What is meant by the EAHCA's requirement of a "free appropriate public education"; and, what is the role of state and federal courts in exercising the review granted by the EAHCA.<sup>52</sup>

The EAHCA defines "free appropriate public education":

The term 'free appropriate public education' means special education and related service 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.<sup>53</sup>

"Special education" under the EAHCA means "specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions."<sup>54</sup> "Related services" are defined as "transportation, and such developmental, corrective, and other supportive services . . . as may be required to assist a handicapped child to benefit from special education."<sup>55</sup>

The Supreme Court noted that "[b]y passing the EAHCA, Congress sought primarily to make public education available to handicapped children."<sup>56</sup> Congress expressly "recognize[d] that in many instances the process of providing special education and related services to handicapped children is not guaranteed to produce any particular outcome."<sup>57</sup>

The Supreme Court further commented that the intent of the EAHCA was "more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside."<sup>58</sup> Moreover, under the EAHCA "Congress sought primarily to identify and evaluate handicapped children, and to provide them with access to a free public education."<sup>59</sup> The Court concluded "that the 'basic

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<sup>52</sup> *Id.* at 186.

<sup>53</sup> 20 U.S.C. § 1401(18) (1976 & Supp. 1987). See *supra* note 4.

<sup>54</sup> 20 U.S.C. § 1401(16) (1976 & Supp. 1987); 34 C.F.R. § 300.12 (1987). See also *Parks v. Pavkovic*, 536 F. Supp. 296 (N.D. Ill. 1982), *aff'd in part, rev'd in part*, 753 F.2d 1397 (7th Cir. 1985) (definition of "free education"); R. MARTIN, *EDUCATING HANDICAPPED CHILDREN: THE LEGAL MANDATE* 57 (1979) (interpretation of "appropriate").

<sup>55</sup> 20 U.S.C. § 1401(17) (1976 & Supp. 1987). Examples of "related services" identified in the EAHCA are "speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only." *Id.*

<sup>56</sup> *Rowley*, 458 U.S. at 192.

<sup>57</sup> S. Rep. No. 168, 94th Cong., 1st Sess. 11, reprinted in 1975 U.S. Code Cong. & Admin. News 1425, 1435.

<sup>58</sup> *Rowley*, 458 U.S. at 192.

<sup>59</sup> *Id.* at 200.

floor of opportunity' provided by the [EAHCA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child."<sup>60</sup>

An appropriate education is provided when personalized education services are furnished. The Supreme Court declared: "the requirement that a state provide specialized educational services to handicapped children generates no additional requirement that the services so provided be sufficient to maximize each child's potential 'commensurate with the opportunity provided other children'."<sup>61</sup> The EAHCA mandates that participating states educate handicapped children with nonhandicapped children whenever possible.<sup>62</sup> When the "mainstreaming"<sup>63</sup> preference of the EAHCA is met and a child is being educated in the regular classrooms of a public school system, the school system still must monitor the educational progress of the child.<sup>64</sup>

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<sup>60</sup> *Id.* at 201. Another important goal of the EAHCA is to reduce costs to the government and taxpayers by helping handicapped people become self-sufficient. In *Kruelle v. New Castle County School Dist.*, 642 F.2d 687, 691 (3d Cir. 1981) the court noted:

A cost-benefit philosophy supported these interlocking goals. Instead of saddling public agencies and taxpayers with the enormous expenditures necessary to maintain the handicapped as lifelong dependents in a minimally acceptable institutionalized existence, Congress reasoned that the early injection of federal money and provision of educational services would remove this burden by creating productive citizens.

<sup>61</sup> *Rowley*, 458 U.S. at 198.

<sup>62</sup> 20 U.S.C. § 1412(5) (1976 & Supp. 1987) requires that participating states establish:

Procedures to assure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, 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.

<sup>63</sup> The mainstreaming requirement provides that an appropriate education take place in the "least restrictive environment." The state must adopt "procedures to assure that, to the maximum extent appropriate, handicapped children . . . are educated with children who are not handicapped." 20 U.S.C. § 1412(5)(B) (1975 & Supp. 1987). Any other alternative may be seen as "restrictive." A restrictive environment limits the way teachers and students view the child and could injure the child's chances of becoming self-sufficient. See R. MARTIN, *supra* note 54, at 85. Mainstreaming is a response to the practice of placing handicapped children in institutions. Many schools did not favor having "slow" children in their classrooms. The integration of handicapped children into the regular classroom has been proven to substantially improve their performance. See S. KIRK, *supra* note 1, at 199-201. As a result, separate schooling is to be considered only as a last resort for the severely handicapped child.

<sup>64</sup> *Rowley*, 458 U.S. at 203. The Court further noted that customary exams, grades, and yearly advancement to the next grade is permitted for children who achieve an adequate knowledge of the course material. Those who graduate from

A state satisfies the EAHCA's requirement of providing a handicapped child a "free appropriate public education" by furnishing personalized instruction with suitable support services which allows the child to benefit educationally from such instruction. The Supreme Court further emphasized that:

Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP. In addition, the IEP, and therefore the personalized instruction, should be formulated with the requirements of the [EAHCA] and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.<sup>65</sup>

The second question the Supreme Court addresses in *Rowley* pertains to the role of state and federal courts in exercising the review granted by the EAHCA. The scope of judicial review in cases brought under the EAHCA involves a two-part inquiry. First, the court will inquire as to whether the State has complied with the procedures set forth in the EAHCA<sup>66</sup> and, secondly, whether the individualized educational program developed through the EAHCA's procedures is reasonably calculated to enable the child to receive educational benefits.<sup>67</sup>

In making these determinations, a court must make an independent review of the evidence, but in doing so it must give "due weight" to the expertise of the school officials responsible for the child's education.<sup>68</sup> Then, "basing its decision on the preponderance of the evidence," the court "shall grant such relief as [it] determines is appropriate."<sup>69</sup> If the State satisfies the inquiry's requirements, it has followed the obligations enacted by Congress, thereafter the courts may not compel more.

Additionally, once a court ascertains that the requirements of the EAHCA have been met, questions of methodology are to be resolved by the States. The EAHCA grants states and local educational agencies the responsibility of formulating a handicapped child's education and selecting the educational method most suitable to the child's individual needs.

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public school systems are deemed "educated" by society; access to an "education" is specifically what Congress sought to provide in the EAHCA. *Id.*

<sup>65</sup> *Id.* at 203-04.

<sup>66</sup> *Id.* at 206-07 n.27. The Supreme Court stated that "this inquiry will require a court not only to satisfy itself that the State has adopted the state plan, policies, and assurances required by the [EAHCA], but also to determine that the state has created an IEP for the child in question which conforms with the requirements of Section 1401(19)." *Id.*

<sup>67</sup> The Supreme Court further noted that "when the handicapped child is being educated in the regular classrooms of a public school system, the achievement of passing marks and advancement from grade to grade will be one important factor in determining educational benefit." *Id.* at 207 n.28. See *supra* note 63.

<sup>68</sup> *Rowley*, 458 U.S. at 205-06.

<sup>69</sup> 20 U.S.C. § 1415(e) (1976 & Supp. 1987).

The EAHCA explicitly delegates states with the responsibility of "acquiring and disseminating to teachers and administrators of programs for handicapped children significant information derived from educational research, demonstration, and similar projects, and (B) adopting, where appropriate, promising educational practices and materials."<sup>70</sup>

The EAHCA's core principles emerged from the decision intact; *Rowley* affirmed the rights of handicapped children:<sup>71</sup>

- (1) to be educated by public schools without charge;<sup>72</sup>
- (2) to be provided with individualized, beneficial, meaningful services designed through the IEP process;<sup>73</sup>
- (3) to be mainstreamed where possible;<sup>74</sup>
- (4) to receive an instructional program that approximates the grade levels used in the state's regular education program;<sup>75</sup>
- (5) to be provided with related and supportive services needed to derive benefits from their education;<sup>76</sup>
- (6) to have parents or guardians actively involved in the planning of their education;<sup>77</sup>
- (7) to challenge the adequacy of their education programs in due process hearings;<sup>78</sup>
- (8) to challenge in federal court both the substance of their IEP and the procedures afforded for its development and review.<sup>79</sup>

While state and local educational agencies are primarily responsible for the formulation and execution of a handicapped child's education, the EAHCA provides the child with protection. Parental involvement plays an important role in the development of state plans and policies<sup>80</sup> and in the formulation of the child's Individual Educational Program.<sup>81</sup>

<sup>70</sup> 20 U.S.C. § 1413(a)(3) (1976 & Supp. 1987).

<sup>71</sup> For a discussion of the effect that the *Rowley* decision may have had on the education of all handicapped children, see Beyer, *A Free Appropriate Public Education*, 5 W. NEW ENG. L. REV. 363, 382 (1983).

<sup>72</sup> *Rowley*, 458 U.S. at 188, 203.

<sup>73</sup> *Id.* at 203.

<sup>74</sup> *Id.* at 202-03.

<sup>75</sup> *Id.* at 203.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 208-09.

<sup>78</sup> *Id.* at 205-06.

<sup>79</sup> *Id.* at 206-07.

<sup>80</sup> See *supra* note 43.

<sup>81</sup> The Senate Report states:

The Committee recognizes that in many instances the process of providing special education and related services to handicapped children is not guaranteed to produce any particular outcome. By changing the language [of the provision relating to individualized educational programs] to emphasize the process of parent and child involvement and to provide a written record of reasonable expectations, the Committee intends to clarify that such individualized planning conferences are a way to provide parent involvement and protection to assure that appropriate services are provided to a handicapped child.

## V. CASE LAW

In *Burlington School Committee v. Department of Education*<sup>82</sup>, the Supreme Court clarified the issue regarding the availability of a reimbursement remedy for costs incurred by parents in educating their handicapped children who did not receive a "free appropriate public education" under the EAHCA. In *Burlington*, the Supreme Court held that the authority granted to a court reviewing a plan under the EAHCA includes the power to order school authorities to reimburse parents for their expenditures for private special education for a handicapped child if the court ultimately determines that private placement is proper. The Court further held that parental violation of the EAHCA by changing the "then current educational placement" of the child during pendency proceedings to review the challenged plan does not constitute a waiver of the parents' right to reimbursement.<sup>83</sup>

The Court maintained: "We are confident that by empowering the court to grant 'appropriate' relief Congress meant to include retroactive reimbursement to parents as an available remedy in a proper case."<sup>84</sup> The

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S. REP. NO. 168, 94th Cong., 1st Sess. 11-12 (1975). See also S. CONF. REP. NO. 455, 94th Cong., 1st Sess. 30, reprinted in 1975 U.S. CODE CONG. & ADMIN. NEWS 1483; 34 C.F.R. § 300.345 (1987).

Furthermore, because of *Rowley's* emphasis on the primary role of local and state educational agencies on developing and reviewing a child's IEP, advocates for handicapped children would be well advised to contest inappropriate programs or an inadequate provision of services at the earliest possible point in the administrative process. See generally M. BUDOFF, A. ORENSTEIN & C. KERVICK, *DUE PROCESS IN SPECIAL EDUCATION: ON GOING TO A HEARING* (1982) [hereinafter Budoff]; B. CUTLER, *UNRAVELING THE SPECIAL EDUCATION MAZE: AN ACTION GUIDE FOR PARENTS* (1981).

<sup>82</sup> 471 U.S. 359 (1985).

<sup>83</sup> *Id.* at 360.

<sup>84</sup> *Id.* at 370-71. The Court further stated that:

Reimbursement merely requires the Town to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP. Such a post-hoc determination of financial responsibility was contemplated in the [EAHCA's] legislative history:

If a parent contends that he or she has been forced, at that parent's own expense, to seek private schooling for the child because an appropriate program does not exist within the local educational agency responsible for the child's education and the local educational agency disagrees, that disagreement and the question of who remains financially responsible is a matter to which the due process procedures established under [the predecessor to Section 1415] appl[y].

S. REP. NO. 168, 94th Cong., 1st Sess. 32, reprinted in 1975 U.S. CODE CONG. & ADMIN. NEWS 1425, 1456, (quoting *Burlington School Committee v. Department of Educ.*, 471 U.S. 359, 371 (1985) (emphasis in original)).



statute directs the court to "grant such relief as [it] determines is appropriate"<sup>85</sup> and thereby authorizes the power to order school authorities to reimburse parents for their expenditures on private special education for a child if the court determines such placement, rather than the proposed IEP, is proper under the EAHCA. Consequently, placement in private schools at public expense is permissible under federal legislation where it is not possible to provide an appropriate education in the public schools.<sup>86</sup>

The State, however, is not required to pay all of the expenses incurred by parents in educating a child, whether the child is handicapped or non-handicapped. Furthermore, the state is not required to provide a perfect education to any child; an appropriate education is not synonymous with the best possible education.<sup>87</sup>

In *Bales v. Clarke*,<sup>88</sup> the court held that the state of Virginia must provide the plaintiff, a handicapped child, with a free appropriate public education under the EAHCA.<sup>89</sup> In *Bales*, the child's parents sought an ideal education for their daughter, however, as the court noted:

[N]either they nor any other parents have the right under the law to write a prescription for an ideal education for their child and to have the prescription filled at public expense. The law requires an appropriate free education. Efforts to build this requirement into something more will threaten the substantial gains already made in the education of the handicapped.<sup>90</sup>

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<sup>85</sup> See *supra* note 43. Broad discretion is granted to impartial hearing officers and to district courts in securing compliance with the law. A hearing officer's discretion has been held to include reimbursing parents for interim placement of a handicapped child in an in-state private school. *Burlington*, 471 U.S. at 359. It has been suggested that the *Burlington* holding can logically be extended to apply to out-of-state placements where no appropriate in-state placements exist. *Matta v. Indian Hill Exempted Village School District*, (Indian Hill School District, April 13, 1987) (Interim Decision, *aff'd in part, rev'd in part*). (Copies of both the interim and final decisions are on file in the Journal office.) Moreover, a hearing officer's discretion extends to ordering a school district to reimburse parents for private residential placement of a handicapped child out-of-state during the pendency of the impartial due process hearing procedures and appeals. *McKenzie v. Smith*, 771 F.2d 1527 (D.C. Cir. 1985); *Geis v. Board of Educ. of Parisippa-Troy Hills*, 774 F.2d 575 (3d Cir. 1985); *Hall v. Vance County Bd. of Educ.*, 774 F.2d 629 (4th Cir. 1985). The hearing officer renders a decision in accordance with the rules and regulations. See OHIO REV. CODE ANN. §§ 3323.04-3323.05 (Baldwin 1976); OHIO ADMIN. CODE § 3301.51-02 (1984) and 34 C.F.R. §§ 300.506, 300.509 (1987).

<sup>86</sup> 20 U.S.C. § 1412(5) (1976 & Supp. 1987); 34 C.F.R. §§ 300.132, 300.227, 300.307(b), 300.347 (1988). Although, in such cases, the EAHCA requires that "to the maximum extent possible, without sacrificing the child's right to an appropriate education, the handicapped must be educated with the nonhandicapped." 20 U.S.C. § 1412(5)(B) (1976 & Supp. 1987).

<sup>87</sup> *Springdale School Dist. v. Grace*, 693 F.2d 41, 42 (8th Cir. 1982), *cert. denied*, 461 U.S. 927 (1983). The *Rowley* court held that federal law did not require New York "to maximize the potential of each handicapped child." 458 U.S. at 200.

<sup>88</sup> 523 F. Supp. 1366 (E.D. Va. 1981).

<sup>89</sup> Under the EAHCA and the Virginia law, the handicapped child failed to prove that the regional school was inappropriate and that the academy chosen by the child's parents was appropriate. *Id.* at 1370.

<sup>90</sup> *Id.* at 1371.

A right to an extended school year is supported in *Rowley*<sup>91</sup> when designated in a handicapped child's IEP. In *Battle v. Pennsylvania*, the court concluded:

We believe the inflexibility of the defendant's policy of refusing to provide more than 180 days of education to be incompatible with the [EAHCA's] emphasis on the individual. Rather than ascertaining the reasonable educational needs of each child in light of reasonable educational goals, the 180 day rule imposes with rigid certainty a program restriction which may be wholly inappropriate to the child's educational objectives. This the [EAHCA] will not permit.<sup>92</sup>

In *Yaris v. Special School District*,<sup>93</sup> the court held that Missouri's policy of refusing to provide more than 180 days of education for severely handicapped children is incompatible with the EAHCA. The state policy precluded "individualized consideration of and instruction for each child," therefore, the court found that the state was failing to provide these children with "the basic floor of opportunity" embodied in the EAHCA.<sup>94</sup>

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<sup>91</sup> *Rowley*, 458 U.S. at 189-90. Some courts have held that the school districts must extend the duration of instruction for handicapped children beyond 180 days if a normal school calendar would prevent the proper formulation of educational goals for handicapped children. See, e.g., *Crawford v. Pittman*, 708 F.2d 1028, 1035 (5th Cir. 1983) (Mississippi's policy of refusing to consider or provide special education programs for longer than 180 days is inconsistent with its obligations under the EAHCA.); *Tilton v. Jefferson County Bd. of Educ.*, 705 F.2d 800, 804 (6th Cir. 1983), cert. denied, 465 U.S. 1006 (1984) (transfer from year-round program to 180 day program constituted an impermissible change of placement under the EAHCA). But cf. *Stanton v. Board of Educ. of Norwood Cent. School Dist.*, 581 F. Supp. 190, 194 (N.D.N.Y. 1983) (allegation that school board failed to provide special summer services for handicapped children who required a twelve-month educational program was actionable under the EAHCA). See generally Note, *Application of Pennsylvania Department of Education's 180 Day Maximum School Year Policy to Class of Handicapped Students Exhibiting "Regression-Recoupment" Phenomenon Violated "Free Appropriate Public Education" Mandate of Education of All Handicapped Children Act of 1975*, 54 TEMP. L.Q. 145 (1981) (discussing *Battle v. Pennsylvania*, 629 F.2d 269 (3d Cir. 1980), cert. denied sub nom. *Scanlon v. Battle*, 452 U.S. 968 (1981)); Note, *Refusal to Provide Mentally Handicapped Children with More than 180 Days of Education Per Year Violates Right to Appropriate Education Under the Education for All Handicapped Children Act*, 26 VILL. L. REV. 876 (1981) (Discussing *Battle*).

<sup>92</sup> *Battle*, 629 F.2d at 280.

<sup>93</sup> 558 F. Supp. 545 (E.D. Mo. 1983), aff'd, 728 F.2d 1055 (8th Cir. 1984).

<sup>94</sup> *Id.* at 559-60. The court also held that because Missouri receives federal funds that it distributes to local school districts for the purpose of educating handicapped children during the summer months, without comparable services for severely handicapped children, the state was also in violation of Section 504 of the Rehabilitation Act of 1973. Section 504 bans discrimination on the basis of handicap in programs receiving federal financial assistance. Its requirements were interpreted by the Supreme Court in *Southeastern Community College v. Davis*, 442 U.S. 397, 405-07 (1979), a case involving an individual with a severe hearing impairment.

Other than emphasizing its individualized nature, the Court in *Rowley* provided no guidance for determining the adequacy of the benefits required.<sup>95</sup> In *Abrahamson v. Hershman*,<sup>96</sup> the First Circuit held that the district court had "ample authority" under the EAHCA to order the placement of a severely retarded boy with "autistic-like" behavior in a residential program upon finding that he needed residential care with "round-the-clock training . . . in order to make any educational progress."<sup>97</sup>

#### VI. *Matta v. Indian Hill Exempted Village School District*

A recent Interim Decision resulting from an administrative hearing directly deals with the issue this Note seeks to discuss: Whether or not Ohio provides autistic children with a free appropriate public education.

In *Matta v. Indian Hill Exempted Village School District*,<sup>98</sup> the parents of an autistic child, Ashish Matta, initiated a due process hearing under state and federal law.<sup>99</sup> Essentially, they were extremely concerned about their son's total lack of progress during the previous two years of schooling under the IEP developed by the Indian Hill Exempted Village School District (Indian Hill). The Mattas refused to sign the proposed IEP for the 1986-1987 school year prepared by the Indian Hill since it was a virtual carbon copy of the two earlier unsuccessful IEPs. They had no reason to believe their son would receive any educational benefit during the upcoming school year.

According to the Mattas, the proposed placement of Ashish was not appropriate. After no appropriate alternative placements were offered by Indian Hill, the Mattas placed their son in the Musashino Higashi Gakuen School (Higashi)<sup>100</sup> located in Tokyo, Japan. The Higashi school has a pro-

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<sup>95</sup> "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." *Rowley*, 458 U.S. at 203.

<sup>96</sup> 701 F.2d 223 (1st Cir. 1983).

<sup>97</sup> *Id.*

<sup>98</sup> *Matta v. Indian Hill Exempted Village School Dist.*, (Indian Hill School District, April 13, 1987).

<sup>99</sup> See Ohio Admin. Code § 3301-51-02(G)(1984); 20 U.S.C. § 1414(b)(2)(A)(1976 & Supp. 1987). See also *supra* note 42.

<sup>100</sup> The Higashi school was founded by Dr. Kiyo Kitahara in 1964 in Tokyo, Japan. In August of 1987, Dr. Kitahara established the Boston Higashi School located in Lexington, Massachusetts. Both schools are oriented toward the same goal: to help autistic children conquer the obstacles they encounter along the road to social independence. Through education, the children receive an inner sense of independence, self-confidence, and happiness. BOSTON HIGASHI SCHOOL, PROSPECTUS (1987) available from Boston Higashi School, 2618 Massachusetts Avenue, Lexington, MA 02173; (617) 862-7222. Based upon Dr. Kitahara's many years of experience as a teacher and principal, she has developed a unique method of educating autistic children known as Daily Life therapy.

Daily Life Therapy, which emphasizes a strong body via physical activity, helps autistic children acquire perseverance, emotional stability, and proper rhythm. It provides these children with a systematic education through "incessant stimula-

gram specifically designed to educate autistic children offering a wide range of autistic students the maximum feasible education in the least restrictive setting. Since Ashish's placement at Higashi, he has shown progress for the first time in three years.

The Mattas requested that Indian Hill reimburse them for costs they incurred resulting from the placement of their son in the Higashi school. They also requested that Indian Hill assume responsibility for the ongoing costs of Ashish's education. The school district refused to both reimburse the Mattas and assume the costs of educating Ashish. Thereafter, the Mattas sought the protection set forth under both state and federal statutory provisions, specifically covered by EAHCA's procedural safeguards. On November 24, 1986, Dr. and Mrs. Matta requested in writing an impartial due process hearing from the Board of Education of Indian Hill to resolve the issue of whether an Ohio school district must assume the cost of private education in Japan of a handicapped child.

Monica R. Bohlen, the hearing officer who made the Interim Decision, noted that the issue was one of first impression, controlled by both federal and state law mandating that every handicapped child is entitled to a free appropriate public education. After addressing the requirements set forth in the EAHCA, the hearing officer discussed the state specifications governed by the State Act.<sup>101</sup>

Indian Hill argued that the federal definition of free appropriate public education<sup>102</sup> suggests a Congressional intent to limit a handicapped child's educational opportunities to the state of residence.<sup>103</sup> Congressional intent

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tion" by the teachers and their peers. Many of their peers are in fact normal children who represent role models to the autistic children. A primary goal behind Dr. Kitahara's method is for the autistic children to develop similarly to normal children, through consistent and concerted growth of knowledge, emotions, and body. Through the implementation of this method of education, these children begin to live a more normal life and obtain the capability to develop language and cognitive abilities. *Id.*

Daily Life therapy is composed of three essential elements: (1) building physical strength, (2) stabilizing the emotions, and (3) normalizing the child's intellectual interest. *Id.*

During the 1987-1988 school year, eight autistic children from Ohio attended the Boston Higashi School.

<sup>101</sup> The Ohio legislature employed a parallel definition of a free appropriate public education. OHIO REV. CODE ANN. § 3323.01(d) (Baldwin 1976) provides: Appropriate public education means special education and related services that:

- (1) are provided at public expense and under public supervision,
- (2) meet the standards of the state Board of Education,
- (3) include an elementary and secondary education and may include a pre-school education,
- (4) are provided in conformity with the individualized education program required under this Chapter.

<sup>102</sup> See *supra* note 4.

<sup>103</sup> Indian Hills further noted how the term "State," was defined in 20 U.S.C. § 1401(a)(6) (1976 & Supp. 1987). *Indian Hill* at 4. Section 1401(6) defines state as "each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands and the Trust Territory of the Pacific Islands."

concerning the EAHCA and the State Act promotes the necessity of educating handicapped children within the boundaries of the state, however, neither the federal nor state legislation specifically provide for, nor do they prohibit, the placement of children in educational programs outside of state borders. Furthermore, Ms. Bohlen commented:

This legislative mandate does not however, limit the options a state has in providing a handicapped child a free appropriate public education, nor does it limit the remedies available to a handicapped child and the parents of a handicapped child who find that a free appropriate public education is not provided the child in their school district nor, indeed, elsewhere within the state boundaries.<sup>104</sup>

Furthermore, if the school district's argument pertaining to the interpretation of sections 1401(6)<sup>105</sup> and 1401(18)<sup>106</sup> of the EAHCA were accepted, the legislation's influence would be ineffective. Ms. Bohlen also pointed out:

If the state failed to provide appropriate education to its handicapped students, and there existed no appropriate private educational program within the state,<sup>107</sup> the parents and children would have no recourse to enforce the [EAHCA] other than to seek a due process hearing<sup>108</sup> and judicial review while the children continue to be deprived of an appropriate education.<sup>109</sup>

The United States Supreme Court has recognized a parent's right to seek interim placement under such circumstances (thereby preventing an "empty victory") after parents have successfully pursued administrative and judicial appeals provided for in the EAHCA.<sup>110</sup> Moreover, even though "the *Burlington* case involved in-state private placement, the holding can logically be extended to apply to out-of-state placements when there are no appropriate in-state placements."<sup>111</sup>

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<sup>104</sup> *Matta v. Indian Hill Exempted Village School Dist.*, (Indian Hill School District, April 13, 1987) at 5.

<sup>105</sup> See *supra* note 103.

<sup>106</sup> See *supra* note 4.

<sup>107</sup> See *supra* note 103.

<sup>108</sup> The expense of a due process hearing oftentimes presents a tremendous barrier to parents of handicapped children.

<sup>109</sup> *Matta v. Indian Hill Exempted Village School Dist.*, (Indian Hill School District, April 13, 1987) at 5-6.

<sup>110</sup> *Burlington*, 471 U.S. at 369.

<sup>111</sup> *Matta v. Indian Hill Exempted Village School Dist.*, (Indian Hill School District, April 13, 1987) at 6. Basing its argument on a 1965 Ohio Attorney General Opinion, Indian Hill School District unsuccessfully asserted that Ohio law did not permit the payment of tuition to schools or school districts outside the State of Ohio. Since the Attorney General Opinion pre-dates the enactment of the EAHCA and the State Act by an excess of ten years, the opinion is not controlling. The hearing officer, Ms. Bohlen, stated:

Although Ohio law may not provide for the payment of out of state tuition for handicapped children, this does not shield the state from its responsibility to provide a free appropriate public education to handicapped children, nor does it limit the authority of the hearing officer

Procedural safeguards are delineated in both the EAHCA and the State Act.<sup>112</sup> In securing compliance with the law, broad discretion is granted to impartial hearing officers and the district courts.<sup>113</sup> The hearing officer's discretion has been held to include reimbursing parents for the interim placement of a handicapped child in an in-state private school.<sup>114</sup>

In *Matta*, the hearing officer's discretion extended to reimbursing parents for the interim placement of a child in an out-of-country school.<sup>115</sup> The exercise of such discretion in ordering a school district to reimburse a parent for private residential placement of a handicapped child out of state during the pendency of impartial due process and appeals has been upheld.<sup>116</sup> Ms. Bohlen specified that the controlling issue presented in *Matta* is "whether [Ohio] is providing a free appropriate public education to the [autistic] child; [i]f not, then the parents can place their children in an appropriate educational program during the pendency of due process hearings to challenge the state's action."<sup>117</sup>

Moreover, whether Indian Hill is relieved of any potential obligation to reimburse the Mattas for the cost of private education for their son

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to fashion a remedy for the State's alleged failure to provide [an autistic child] with a free appropriate public education that may include an order to reimburse [the child's] parents for expenditures on private education . . .

*Id.*

<sup>112</sup> See *supra* note 43.

<sup>113</sup> *Burlington*, 471 U.S. at 359. See also 20 U.S.C. § 1415 (Supp. 1989); OHIO REV. CODE ANN. § 3323.05 (Baldwin 1976); OHIO ADMIN. CODE § 3301-51-02 (eff. 10-22-84).

A hearing officer shall render a decision in accordance with the rules for special education adopted by the State Board of Education and federal rules and regulations. Ohio Admin. Code § 3301-51-02 (1984).

<sup>114</sup> *Burlington*, 471 U.S. at 360.

<sup>115</sup> The Higashi school has since opened a school in Lexington, Massachusetts to educate autistic children. See *supra* note 100.

<sup>116</sup> *McKenzie v. Smith*, 771 F.2d 1527 (D.C. Cir. 1985); *Geis v. Board of Educ. of Parisppany-Troy Hills*, 774 F.2d 575 (3d Cir. 1985); *Hall v. Vance County Bd. of Educ.*, 774 F.2d 629 (4th Cir. 1985). As noted by the *Matta* hearing officer, these cases "do not involve out of country payment, [however] the distinction between out of country and out of state reimbursement payment is not persuasive. If neither the state nor the federal legislation specifically provide for the out of state placement of handicapped children, then it really makes [trivial] sense to distinguish between out of state and out of country placement." *Matta v. Indian Hill Exempted Village School Dist.*, (Indian Hill School District, April 13, 1987) at 8.

<sup>117</sup> The hearing officer stated that:

[T]he issue [presented by Indian Hill] concerning interstate payment of tuition may be a moot issue due to the fact that the school can reimburse the parents directly within the state, for tuition that the parents have paid to an educational facility located outside of the state or outside of the country. This would seem to avoid any problem with an asserted prohibition or asserted restriction on a state from paying tuition out of the state.

*Matta v. Indian Hill Exempted Village School Dist.*, (Indian Hill School District, April 13, 1987) at 9.

depends upon the facts proven at the impartial due process hearing. Prior to any order of reimbursement the hearing officer noted that the facts must affirm a finding that Indian Hill's individualized educational program<sup>118</sup> for Ashish for the 1986-1987 school year was inappropriate, and that the Mattas' private placement of their son at the Higashi school was appropriate under the EAHCA.<sup>119</sup>

A criteria to consider in evaluating the appropriateness of the parents' interim placement is whether this placement is the "least restrictive environment" for education of this child. This concept is frequently referred to as "mainstreaming."<sup>120</sup> "Least restrictive environment" means:

[T]hat, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicapped is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.<sup>121</sup>

The reasonableness of cost is another factor that has been considered in deciding the appropriateness of an educational program.<sup>122</sup>

Lastly, the hearing officer stated that:

[I]n determining the appropriateness of the IEP proposed by Indian Hill for the 1986-1987 school year, the standard to be imposed is not whether the services provided by the state are sufficient to maximize [the handicapped child's] potential 'commensurate with the opportunity provided other children,' but only to determine whether [the handicapped child] was offered access to specialized instruction and related services which were individually designed to provide some educational benefit to him.<sup>123</sup>

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<sup>118</sup> See *supra* note 38.

<sup>119</sup> Since the private educational program in Japan is not state certified, the parents must show that the program at least meets the standards of the Ohio Board of Education. This has been established as a minimal criteria of an "appropriate" education in both state and federal legislation. 20 U.S.C. § 1401(a)(18) (1989); OHIO REV. CODE ANN. § 3323.01(D) (2) (Baldwin 1988).

<sup>120</sup> *Springdale School Dist. v. Grace*, 494 F. Supp. 266, 273 (W.D. Ark. 1980), *cert. denied*, 461 U.S. 927 (1983). See *supra* note 63.

<sup>121</sup> 20 U.S.C. § 1412(5) (B) (1989); 34 C.F.R. §§ 300.132, 300.550-556 (1988); OHIO ADMIN. CODE § 3301-51-01 (AA) (eff. 7-1-82).

<sup>122</sup> *Bales v. Clarke*, 523 F. Supp. 1366, 1371 (E.D. Va. 1981). The *Burlington* court warned that "parents who unilaterally change their child's placement during the pendency of review proceedings, without the consent of state and local school officials, do so at their own financial risk." 471 U.S. at 373-74; *accord Hall*, 774 F.2d 629, 633 n.4 (4th Cir. 1985).

<sup>123</sup> *Matta v. Indian Hill Exempted School Dist.*, (Indian Hill Exempted Village School District, April 13, 1987) at 11-12 (*quoting* *Board of Educ. v. Rowley*, 458

## VII. COMPARISON OF STATE LEGISLATION

Before 1971, many state statutes excluded children with certain physical or mental conditions.<sup>124</sup> In 1970, few states had statutes requiring appropriate education for handicapped children.<sup>125</sup> By 1974, forty-six states had adopted this type of legislation.<sup>126</sup> Some of these laws constituted sweeping revisions of prior special education statutes and served as models for the federal EAHCA.<sup>127</sup>

The quality of special education varies among states depending upon the standard mandated in the applicable statutory provision. Some states incorporate "maximum" capacity language in their statutes.<sup>128</sup> Other states simply require that special education meet the "needs" of children.<sup>129</sup> Still others incorporate only miscellaneous expressions as their statutory standard.<sup>130</sup> Three states specifically include "autistic" in their definition of handicapped children, exceptional children, or children with special needs.<sup>131</sup>

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U.S. 176, 188-89 (1982)). "If it is determined at the hearing that the IEP proposed by Indian Hill was appropriate, the Mattas would be barred from obtaining reimbursement for any interim period in which their child's placement violated Section 1415(e)(3) [of the EACA which requires] that a child shall remain in the current educational placement during the pendency of due process proceedings unless the state and parents agree otherwise." *Indian Hill* at 12 (quoting *Burlington*, 471 U.S. at 374).

<sup>124</sup> Beyer, *supra* note 71, at 367 (citing Comptroller General of the United States, *Disparities Still Exist in Who Gets Special Education* (1981)).

<sup>125</sup> *Id.* Two class action suits ignited a change in the educational rights of handicapped children. See *Mills v. Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972); *Pennsylvania Ass'n for Retarded Children v. Commonwealth*, 334 F. Supp. 1257 (E.D. Pa. 1971), *modified*, 343 F. Supp. 279 (E.D. Pa. 1972) (establishing that *all* children are entitled to and capable of benefitting from an appropriate public education). See also Beyer, *supra* note 124, at 365-66.

<sup>126</sup> Beyer, *supra* note 124.

<sup>127</sup> See, e.g., 1972 MASS. ACTS 692 (codified as amended at MASS. GEN. LAWS ANN. ch. 71B (West 1978)).

<sup>128</sup> See, e.g., ARK. REV. STAT. ANN. § 80-2116 (1979) ("to meet the needs and maximize the capabilities"); IDAHO CODE § 33-2002 (1981) ("to develop to their fullest capacity"); MASS GEN. LAWS ANN. ch. 71B § 2 (West Supp. 1978) ("to assure the maximum possible development of a child with special needs").

<sup>129</sup> See, e.g., ARIZ. REV. STAT. ANN. § 15-763 (1981) ("commensurate with their abilities and needs"); KAN. STAT. ANN. § 72-961 (1979) ("in accord with his or her abilities and capabilities"); KY. REV. STAT. ANN. § 157.200(2) (1980) ("to meet the unique needs"); R.I. GEN. LAWS § 16-24-1 (1981) ("best satisfy the needs").

<sup>130</sup> See, e.g., CONN. GEN. STAT. ANN. § 10-76d(a) (West Supp. 1988) ("suitable"); N. J. STAT. ANN. § 18A 46-13 (West 1966) ("suitable"); N.Y. EDUC. LAW § 4402.2 (McKinney 1987) ("suitable"); NEV. REV. STAT. § 388.450(1) (1979) ("equal educational opportunity"); P.A. STAT. ANN. tit. 24 § 13-1372 (Purdon Supp. 1987) ("proper"); VT. STAT. ANN. tit. 16, § 2941 (1968) ("equal educational opportunity").

<sup>131</sup> See, e.g., N.C. GEN. STAT. § 115C-109 (1987) (definition of children with special needs); OKLA. STAT. ANN. tit. 70, § 13-101 (West 1989) (exceptional children defined); VA. CODE ANN. § 22.1-213 (1985) (definition of handicapped children).

For example, Virginia's legislation provides:



The Ohio statute defines 'handicapped child' as:

[A] person under twenty-two years of age who is mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, multiply impaired, or otherwise health impaired, or who has specific learning disabilities, and by reason thereof requires special education.<sup>132</sup>

This definition, unlike several other states, omits "autism" from the meaning of handicapped child.<sup>133</sup> In Ohio, autistic children are grouped either with the mentally retarded or the seriously emotionally disturbed educational classifications.<sup>134</sup> These classifications, however, do not provide autistic children with an appropriate education nor with specific funding to meet their educational needs. Consequently, a significant number of autistic children are being inadequately served under the Ohio statute. Few states, however, have actually implemented a statewide plan for the comprehensive planning for autistic children even though some have studied the problem extensively and have made recommendations.

In Missouri,<sup>135</sup> autistic children attend one of approximately twenty classes for children with severe behavior disorders. These classes are located in separate schools for the severely handicapped. The Missouri plan includes extensive teacher training and consultation and a carefully planned program of transition to the public schools. Due to the separate nature of the plan, however, it fails to integrate "mainstreaming" and has

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'Handicapped children' means those persons (i) who are aged two to twenty-one . . . , (i) who are mentally retarded, physically handicapped, seriously emotionally disturbed, speech impaired, hearing impaired, visually impaired, multiple handicapped, other health impaired including *autistic* or who have a specific learning disability or who are otherwise handicapped as defined by the Board of Education and (iii) who because of such impairments need special education.

V.A. CODE ANN. § 22.1-213(1) (1985) (emphasis added).

North Carolina's statute provides:

The term 'children with special needs' includes, without limitation, all children from age five through age 20 who because of permanent or temporary mental, physical or emotional handicaps need special education, are unable to have all their needs met in a regular class without special education or related services, or are unable to be adequately educated in the public schools. It includes those who are mentally retarded, epileptic, learning disabled, cerebral palsied, seriously emotionally disturbed, orthopedically impaired, *autistic*, multiply handicapped, pregnant, hearing-impaired, speech-impaired, blind or visually impaired, other health impaired and academically gifted.

N.C. GEN. STAT. § 115C-109 (1987) (emphasis added).

<sup>132</sup> OHIO REV. CODE ANN. § 3323.01(A) (Baldwin 1988).

<sup>133</sup> See *supra* note 135.

<sup>134</sup> See *supra* notes 29, 31.

<sup>135</sup> Missouri defines handicapped children as "the speech defective, the crippled, the educable mentally retarded, and the blind or partially sighted and deaf or hard of hearing children who do not attend the state school for the deaf or the state school for the blind." MO. ANN. STAT. § 178.260(1) (Vernon 1965).

brought the threat of litigation for failure to comply with the EAHCA.<sup>136</sup>

The Department of Mental Health-Mental Retardation in South Carolina<sup>137</sup> operates regional centers which provide extensive services to autistic children, many of whom are extremely difficult to manage.<sup>138</sup> Moreover, good coordination with the Department of Education exists and the state has contracted with the Judevine Center in St. Louis for intensive teacher training. Nevertheless, South Carolina needs to advance toward the establishment of services in the local public schools.

North Carolina<sup>139</sup> hosts the oldest statewide, public school-based program for autistic children. The program is operated through a cooperative arrangement between the Department of Public Instruction and Division TEACCH (Treatment and Education of Autistic and Related Communication Handicapped Children) of the Department Psychiatry at the University of North Carolina at Chapel Hill.<sup>140</sup> Excellent support exists at the state level, and the connection with the University contributes an expertise in research and evaluation.

North Carolina's National Society for Adults and Children with Autism (NSAC) has been instrumental in promoting the needs of the autistic. After establishing a NSAC Chapter group home, the North Carolina NSAC Chapter has obtained a statewide system of public school classrooms, secured a statewide network for the treatment and education of autistic people, and acquired a state autism office.<sup>141</sup> North Carolina has a single strong state NSAC Chapter that has worked with both the state legislature and state government agencies to increase the visibility of autism advocating with one voice to meet the needs of North Carolina's autistic individuals.<sup>142</sup>

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<sup>136</sup> J.G. Olley, *Organization of Educational Services for Autistic Children and Youth*, in CRITICAL ISSUES, *supra* note 24, at 21.

<sup>137</sup> South Carolina's Special Education for Handicapped Children statute defines Handicapped Children as:

[T]hose who deviate from the normal either psychologically or physiologically to such an extent that special classes, special facilities, or special services are needed for their maximum development, including educable mentally handicapped, trainable mentally handicapped, emotionally handicapped, hearing handicapped, visually handicapped, orthopedically handicapped, speech handicapped and those handicapped by learning disabilities . . .

S.C. CODE ANN. § 59-33-20 (Law. Co-op. 1977).

<sup>138</sup> CRITICAL ISSUES, *supra* note 24, at 21.

<sup>139</sup> *Id.*

<sup>140</sup> In 1986, more than 60 self-contained, public school classes for autistic children were located throughout North Carolina. In order to receive initial training, in-service training, classroom consultation, administrative consultation, and a yearly reevaluation of each child through one of the six regional TEACCH centers, (Treatment and Education of Autistic and Related Communication Handicapped Children), 28 of the public school classes contracted with the Division TEACCH. These services are funded directly from the state legislature and from Title VI-B funds allocated to local school systems. Jeffries, *Services For Individuals with Autism: How Do We Get From Nowhere to Somewhere?* 18 ADVOCATE 8-9 (1986).

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

North Carolina's work with autism dates back to 1960, when the School of Medicine at the University of North Carolina in Chapel Hill first began to see children with autism. In 1966, the Child Research Project, founded by Dr. Eric Schopler was funded by a health grant from the National Institute of Mental Health. In 1970, the North Carolina society for Autistic Children (now the North Carolina Society for Autistic Adults and Children) was incorporated and immediately pursued funding for the Child Research Project to stabilize and expand it. In 1971, legislation mandating the creation of Division TEACCH the United States's first statewide community-based program for the treatment of children with autism and similar developmental disorders.<sup>143</sup>

### VIII. CONCLUSION

To learn, autistic children require specialized education. Behavior therapists have demonstrated that autistic children can learn through structured and active programming.<sup>144</sup> A structured educational approach emphasizing the curricular content areas of communication, cognition and social development is generally recommended.<sup>145</sup>

Autistic children are entitled to receive a free appropriate public education. Many states throughout the country, including Ohio, do not provide the necessary safeguards to ensure that autistic children receive a free appropriate public education.

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<sup>143</sup> The North Carolina Society expanded educational opportunities available to autistic individuals. Since 1972, the North Carolina Society has run a programmed, residential summer camp "to broaden the lives of autistic children and adults and to offer respite for their parents. *Id.* at 9. The camp is paid for by a combination of state funds, contributions, and sliding scale fees from parents. *Id.*

The North Carolina Society established the first group home in North Carolina in 1976, the Triad Home for Autistic Youth, to serve severely behavior-disordered, autistic adolescents. The home was the United States' first community-based group home for autistic individuals. As of 1986, North Carolina has seven additional homes - one for moderately to severely affected children, five for moderately to severely affected adults, one for severely affected adults, and one for high functioning adults capable of competitive employment. Three more homes are scheduled to open by 1991. *Id.*

After many years of work with legislators and state government agencies on the part of the North Carolina Society, the North Carolina legislature passed an omnibus bill in 1985. The bill, part of the governor's expansion budget, appropriated money to begin a sixth regional TEACCH center, to set up three new group homes for autistic individuals, and to begin a community living training program for persons with autism, which would become a part of North Carolina's continuum of services for people with developmental disabilities. *Id.* Established in conjunction with Division TEACCH, the community program serves as a model to conduct research into what works best for persons with autism, to train graduate and undergraduate students who desire to work with autistic and other related developmental disabilities, and to help autistic persons of all functional levels to achieve their fullest potential. *Id.*

<sup>144</sup> Handleman, *A Glimpse at Current Trends in the Education of Autistic Children*, 9 BEHAV. THERAPIST 137-39 (1986).

<sup>145</sup> *Id.*

This author concludes that Ohio does not have a suitable response for providing a free appropriate public education to its autistic children. Autism presents a host of difficult problems for the educator, specifically, how to educate a child who is withdrawn, isolated, and often temperamental. Educational programs available in Ohio do not provide an appropriate environment to effectively teach autistic children to reach their true potential.

To effectively address this issue, Ohio should begin by amending the current state statute<sup>146</sup> to include "autism" as a separate category in its definition of "handicapped child."<sup>147</sup> The establishment of a distinct classification is necessary to facilitate appropriate educational planning, to allocate funds for services to autistic individuals and to provide autistic children free appropriate public education throughout the state. Furthermore, the stigma associated with the emotionally disturbed would be removed, thereby freeing autistic children of an untrue and unnecessary stereotype.

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<sup>146</sup> OHIO REV. CODE ANN. § 3323.01(A).

<sup>147</sup> See *supra* note 135.

