Adequate Special Education: Do California Schools Meet the Test?*

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When we take people . . . merely as they are, we make them worse; [but] when we treat them as if they were what they should be, we improve them as far as they can be improved.

I. INTRODUCTION

Thirty years ago, disabled children were excluded from education. In some states, education of the handicapped was considered futile and the exclusion of disabled children was condoned or even required. In


2. The definition of disability and the relationship between impairment, disability, and handicap has been set forth as:
   Impairment is a medical term for anatomical loss or a loss of bodily function.
   Disability is the measurable, functional loss resulting from an impairment.
   Handicap is the social consequence caused by environmental and social conditions which prevent a person achieving the maximum potential a person seeks. Disabilities are what people cannot do.

3. Gillian Fulcher, Disabling Policies? A Comparative Approach to Education Policy and Disability 22 (1989) (citation omitted). The legal definition of disability and handicap depend on the particular statute or constitutional principle asserted. The Individuals with Disabilities Education Act defines the handicapping conditions covered under the Act as "mental retardation, hearing impairments including deafness, speech or language impairments, visual impairments including blindness, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities." 20 U.S.C. § 1401(3)(A) (1994 & Supp. III 1997). Section 504 of the Rehabilitation Act of 1973 applies a functional definition of handicap to include "any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." 34 C.F.R. § 104.3 (1998) (implementing the Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (codified as amended at 29 U.S.C. § 794 (1994))). For a comparison of these definitions, see H. Rutherford Turnbull III, Free Appropriate Public Education: The Law and Children with Disabilities 20-22 (3d ed. 1990). It is important to note, however, that many children who qualify as educationally handicapped would not otherwise be thought of as disabled. See Donna L. Terman et al., Special Education for Students with Disabilities: Analysis and Recommendations, Future Children, Spring 1996, at 4, 5. Children with specific learning disabilities, for example, are unlikely to be considered disabled outside the education system. See id.


5. See Mark C. Weber, The Transformation of the Education of the Handicapped Act: A Study in the Interpretation of Radical Statutes, 24 U.C. Davis L. Rev. 349, 355 (1990); LaDonna L. Boeckman, Note, Bestowing the Key to Public Education: The Effects of Judicial Determinations of the Individuals with Disabilities Education Act on
other states, education of disabled children was merely a token gesture offering little substantive educational content. In these situations, the placement of children in classrooms amounted to little more than babysitting or warehousing.

The past thirty years have substantially altered public policy toward the disabled. In particular, the seminal Individuals with Disabilities Education Act (IDEA) reflects a sea of change in the public obligation to specially educate the disabled by investing affirmatively in their mental and physical development. But are disabled children receiving the fruits of that intended investment? Are they receiving more than babysitting? Are they receiving valuable education? Many would argue that they are not.

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6. See id. Mildly impaired students were placed in regular classrooms if they could "survive" without specialized services, moderately disabled students were given "custodial" care in segregated settings by uncertified staff, and severely disabled children were institutionalized. Id.

7. See generally TURNBULL, supra note 2.


10. See, e.g., Goldman, supra note 5, at 245 (arguing that the promise of educational rights for handicapped children remains unfulfilled); Robert Caperton Hannon, Note, Returning to the True Goal of the Individuals with Disabilities Education Act: Self-Sufficiency, 50 VAND. L. REV. 715 passim (1997) (describing societal lack of commitment to provide funding and services under the IDEA); Tara L. Eyer, Commentary, Greater Expectations: How the 1997 IDEA Amendments Raise the Basic Floor of Opportunity for Children with Disabilities, 126 EDUC. L. REP. 1, 1 (1998) (noting that today many children receive little more than a seat in a public school classroom). A scathing report released recently by the National Council on Disability charges that "many children with disabilities are getting substandard and below par schooling because they are not complying with federal rules on special education." Karen Gullo, Study: States Ignore Special Ed Law, ASSOCIATED PRESS, Jan. 24, 2000, available in 2000 WL 214
These are the same questions our country is asking for non-disabled children. Parents, educators, and child advocates are demanding that children receive more than a seat in a classroom for twelve years. They are demanding high-quality education that focuses on positive outcomes, high standards, and accountability.

Both special education and general education reforms can be traced, in part, to litigation asserting substantive rights to Equal Protection and a measurable quantum of education. Unlike general education reforms, however, which have met unsuccessful federal lawsuits with successful state constitutional challenges, special education reforms have followed a primarily legislative path. The judicial path of general education has yielded a substantive right to adequate education in more than a dozen states. In contrast, the legislative path has provided little more than inefficient and often obtuse procedural remedies for an ill-defined and frequently disputed statutory entitlement to special education. Without the substantive right to a measurable quantity of education, schools may go through the motions of instruction, but far too often, children with special needs do not learn.

This Comment argues that the demands for general education efficacy apply a fortiori to disabled children. This Comment further contends that while special education law based on federal statute may be insufficient to support such accountability, the California Constitution provides a legal basis without further statutory enactments. The basis
is found in adequacy assurances of article IX, section 1 of the California Constitution: the Education Clause.19

Part II of this Comment provides a brief history of special education in the United States, from early demands for equal access to the current emphasis on outcomes. Part III examines general education reform from equality to adequacy, and suggests that its lessons be applied to special education reform as well. Part IV draws upon California precedent and constitutional challenges brought in state courts across the country in asking whether the California Constitution requires adequacy in education. Part V identifies essential elements of adequate education and evaluates California’s programs against that test. Finally, Part VI suggests legal and policy strategies to improve the quality of special education in California schools.

II. THE HISTORY OF SPECIAL EDUCATION REFORM IN THE UNITED STATES

In the wake of civil rights successes of the 1960s and sparked by Equal Protection promises of Brown v. Board of Education,20 parents of handicapped children began to demand access to education during the 1970s.21 The initial forum for these demands was the courts. In 1972, two pivotal cases led the way: Pennsylvania Ass’n for Retarded Children (PARC) v. Pennsylvania22 and Mills v. Board of Education.23

A. Early Case Law in Special Education

In PARC, parents of mentally retarded students challenged or enforcement schemes without legislative guidance. Indeed, given the pretrial impediments to court-supervised monitoring involving the varied population and complex issues here implied, a detailed statutory scheme may be well-advised. Such a system is not precluded by federal law, because no federal law “occupies the field.” However, as argued below, accountability is constitutionally grounded and may be demanded even absent a best case approach.

18. Adequate is defined as: “Sufficient; commensurate; equally efficient; equal to what is required; suitable to the case or occasion; satisfactory. Equal to some given occasion or work.” BLACK’S LAW DICTIONARY 39 (6th ed. 1990). Adequacy is used as a term of art applied to analysis of state constitution education clauses. See discussion infra Part III.C-D. Thus, adequacy is a quality standard defining the minimum quantum of education that a state must constitutionally provide to its children.

19. CAL. CONST. art. IX, § 1 (“A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement.”).

20. 347 U.S. 483 (1954); see discussion infra Part III.
21. See HUDGINS & VACCA, supra note 9, at 456; Goldman, supra note 5, at 246.
Pennsylvania statutes that excluded them from public education. The federal district court agreed, noting expert testimony that stated "[a]ll mentally retarded persons are capable of benefitting from a program of education and training." The consent decree that settled PARC established Pennsylvania's obligation to educate mentally retarded children, while an accompanying stipulation detailed procedural safeguards protecting the right to education for all students.

Similar Due Process and Equal Protection violations were asserted in

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24. See PARC, 343 F. Supp. at 281-82. Section 13-1375 of the Pennsylvania law provided for the establishment of standards to certify children as "uneducable and untrainable" and relieved the State Board of Education from educating or training such children. Id. at 282 & n.3. Children could also be denied education based on section 13-1304 of the law, which excluded children who had not reached a mental age of five (effectively excluding children with an I.Q. of 35 or below). See id. at 282 & n.4. A determination that a child was unable to profit from school attendance also justified denying education. See id. at 282 & nn.5-6.

25. See id. at 283. PARC alleged that retarded students were arbitrarily denied education given to other children and labeled "uneducable" without a rational basis in fact, thus violating Equal Protection. Id. PARC also contended that because the United States Constitution and the laws of Pennsylvania guaranteed education to all children, the statutes in question violated substantive Due Process by arbitrarily and capriciously denying education to retarded children. This contention also raised the question of whether the state law of Pennsylvania afforded children an affirmative right to education. Finally, PARC argued that the Pennsylvania statutes offended procedural Due Process because the statutes lacked any provision for notice or hearing before excluding mentally retarded students from the public school system. See id.

26. Id. at 296. Because this case was settled by the parties, the court was not asked to decide the merits of the plaintiffs' claims. See id. at 290. The defendants agreed to settle only after the plaintiffs had presented expert testimony indicating that all mentally retarded children could benefit from education. See id. at 285, 296. However, of the nearly 600 defendants, a single defendant school district refused to accept the negotiated settlement and challenged the jurisdiction of the court over the parties and the subject matter of the controversy. See id. at 289-90. In deciding the issue of subject matter jurisdiction, the court reviewed the record independently in order to satisfy itself that the plaintiffs' claims were not "wholly insubstantial and frivolous." Id. at 293 (quoting Bell v. Hood, 327 U.S. 678, 682-83 (1946)). The court was convinced that PARC had established a colorable procedural Due Process claim and had raised "serious doubts ... as to the existence of a rational basis" for the alleged Equal Protection violations. Id. at 297. The court described the settlement as an "intelligent response to overwhelming evidence against" the defendants' case. Id. at 291.

27. See id. at 306-16.

28. See id. at 303-05. The stipulation gave parents of mentally retarded children an active role in their education, including the right to notice of any proposed changes in educational status; the right to inspect their child's educational records; and an opportunity for a due process hearing in which parents could present evidence, be represented by counsel, and for which they could receive a transcript. See id.
Mills by a plaintiff class comprised of children with behavioral and emotional problems, as well as mental retardation.\textsuperscript{29} The defendant school district did not dispute its affirmative duty to provide public education or constitutionally adequate Due Process, admitting failure to discharge both obligations.\textsuperscript{30} The school district asserted that it was unable to provide the required educational services given available funds, for to do so would be "inequitable" to other children in the school district.\textsuperscript{31} However, the Mills court rejected these claims, stating that the financial inadequacies of the district "cannot be permitted to bear more heavily on the 'exceptional' or handicapped child than on the normal child."\textsuperscript{32} The court ruled that "available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education."\textsuperscript{33}

Taken together, these cases defined the contours of education for handicapped children for the next quarter century. Three basic principles established in PARC and Mills formed the essential foundation for subsequent litigation and legislative reforms.\textsuperscript{34} First, Equal Protection and substantive Due Process prevent states that choose to provide public education from excluding children solely on the basis of disability.\textsuperscript{35} Second, parents of the disabled are entitled to procedural

\textsuperscript{29.} See id. This case involved disabled children in the District of Columbia. See id. As such, their education was covered by section 31-201 of the District of Columbia Code, requiring mandatory school attendance, and by D.C. Board of Education rules, requiring attendance in specialized education classes for students who could benefit from such education. See id. at 873-74. The court interpreted these provisions to impose an affirmative duty upon the D.C. Board of Education for educating all D.C. children, including those with exceptional needs. See id. at 874. The Mills court fashioned its constitutional analysis of the case after similar education cases involving District of Columbia students. See id. at 874-75. In Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), Judge Skelly Wright had held that the Fifth Amendment Due Process Clause implicated an Equal Protection guarantee of the right to equal educational opportunity by analogy to the Fourteenth Amendment's incorporation of First, Fifth, Sixth, and Eighth Amendment rights. See Mills, 348 F. Supp. at 875 (citing Hobson, 269 F. Supp. at 493). The Mills court extended the right of equal opportunity for publicly supported education to disabled children. See id. The court also held that procedural elements of Fifth Amendment Due Process required a hearing prior to exclusion, termination, or special education classification of exceptional D.C. students. See id.

\textsuperscript{30.} See Mills, 348 F. Supp. at 871.

\textsuperscript{31.} Id. at 875.

\textsuperscript{32.} Id. at 876.

\textsuperscript{33.} Id.

\textsuperscript{34.} See generally HUDGINS & VACCA, supra note 9; TURNBULL, supra note 2; Weber, supra note 4.

\textsuperscript{35.} The early cases did not explicitly prohibit states from excluding children from education upon an unequivocal determination that they could not, in any way, benefit from its provision. See Mills, 348 F. Supp. at 866-83; Pennsylvania Ass'n for Retarded Children (PARC) v. Pennsylvania, 343 F. Supp. 279, 279-316 (E.D. Pa. 1972). Research showing that all children could benefit from some form of education or training, however, effectively closed the door on such exclusion. See PARC, 343 F. Supp. at 285,
Due Process in order to assert their children’s right to receive public education. Third, the additional costs of providing appropriate educational services to disabled students cannot be used to justify categorical exclusion of disabled children from public school. The gates to the schoolhouse had been opened for handicapped children.

B. Congressional Actions to Advance Education of Disabled Children

Beginning in 1958, Congress expressed support for the education of handicapped children through various grant programs. In 1970, Congress replaced and expanded existing programs by enacting the Education of the Handicapped Act. Subsequent amendments conditioned federal assistance on state assurances of educational opportunity for all handicapped children, and due process protections should services be denied. By 1975, however, less than half the estimated eight million handicapped children in the United States were receiving appropriate education while 1.75 million were not receiving

296. This principle has become known as the “zero reject” policy. See Turnbull, supra note 2, at 27-79.

36. Procedural Due Process was initially envisioned as a check on the State’s ability to exclude disabled students from education or to label them as special needs, but has evolved to encompass parental rights to challenge an array of school district decisions regarding their children’s education. See generally Turnbull, supra note 2, at 192-211.

37. Under the “zero reject” policy, all children must be served by state-supported education. See id. at 27-79, 172-79. Subsequent development of special education law has permitted the consideration of cost in determining the level of services provided to an individual student. See id. at 172-79. Most recently, however, the U.S. Supreme Court reiterated its interpretation of the IDEA as requiring the provision of services necessary for a child to attend school without consideration of the cost or magnitude of those services. See Cedar Rapids Community Sch. Dist. v. Garret F., 119 S. Ct. 992 (1999); see also infra note 138 (providing details of this case in greater depth). In order to be able to attend school, Garret requires extensive support in the form of health-related services that can be performed by a non-physician caregiver. See id.


any educational services at all.\textsuperscript{41}

A 1975 report of the Senate Labor and Public Welfare Committee acknowledged the rights of handicapped children to appropriate education which, by that time, had been repeated in more than thirty-six state and federal court decisions.\textsuperscript{42} Lack of financial resources, the Committee concluded, prevented states from implementing the law.\textsuperscript{43} The report stressed the need for legislation to address this issue, on economic as well as constitutional grounds, asserting that proper education would permit the handicapped to "become productive citizens, contributing to society instead of being forced to remain burdens."\textsuperscript{44} Accordingly, Congress concluded that it was in the "national interest that the Federal Government assist [s]tate and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law."\textsuperscript{45} With this patina of intent, Congress enacted the Education for All Handicapped Children Act (EAHCA) in 1975 for the purpose of ensuring that

all handicapped children have available . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist [s]tates and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children.\textsuperscript{46}

Although case law and other federal statutes arguably imposed substantially similar requirements on states,\textsuperscript{47} the EAHCA provided

\begin{thebibliography}{99}
\bibitem{42} See id. at 7, reprinted in 1975 U.S.C.C.A.N. at 1431.
\bibitem{43} See id. at 7-8, reprinted in 1975 U.S.C.C.A.N. at 1431-32.
\bibitem{44} Id. at 9, reprinted in 1975 U.S.C.C.A.N. at 1433.
\bibitem{45} Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, sec. 3(a), § 601(b)(9), 89 Stat. 773, 775.
\bibitem{46} Id. § 601(c).
\end{thebibliography}
incentives in the form of grants rather than a federal mandate to follow its provisions. States would be entitled to receive federal funds upon a showing of compliance, but were not precluded by federal law from eschewing such support and meeting a lesser standard.48

The chief tenet of the EAHCA (and its successor, the IDEA) is the provision of a free appropriate public education (FAPE) for all children in the least restrictive environment (LRE).49 The mechanism for providing an appropriate education is the individualized education program (IEP).50 The IEP details educational and related services designed by a team of local educators, service providers, and the child’s parents, to meet the unique needs of that particular child.51 LRE is a term of art52 providing that handicapped children should be educated with children who are not handicapped “to the maximum extent appropriate” and should be segregated “only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”53

These seemingly straightforward provisions have become the basis for significant controversy since the EAHCA was first enacted.54 As detailed below, the questions of what defines an appropriate education in education litigation. See William D. Goren, Individuals with Disabilities Education Act: The Interrelationship to the ADA and Preventive Law, FLA. B.J., July-Aug. 1997, at 76, 78; see also Michael L. Williams, Assistant Secretary for Civil Rights, OCR Senior Staff Memorandum, U.S. Dept. of Educ., Office for Civil Rights (Nov. 19, 1992), reprinted in 19 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 859 (providing guidance on issues of coverage and comparing application of Title II of the ADA and section 504).

48. See, e.g., New Mexico Ass’n for Retarded Citizens v. State, 495 F. Supp. 391, 394 (D.N.M. 1980), rev’d on other grounds, 678 F.2d 847 (10th Cir. 1982). In order to avoid the requirements of the EAHCA, New Mexico did not apply for federal EAHCA funds until 1989. See Peter Cubra, Discrimination of People with Disabilities and Their Federal Rights—Still Waiting After All These Years, 22 N.M. L. REV. 277, 287 & n.57 (1992).


51. See id.; see also TURNBULL, supra note 2, at 121-24 (describing the components and rationale for the IEP).


54. Special education litigation has steadily increased in the past 20 years with the number of published decisions approaching 50 per year. See Perry A. Zirkel, Tuition Reimbursement for Special Education Students, FUTURE CHILDREN, Winter 1997, at 122, 123.
and least restrictive environment remain central issues in special education policy and law.

Another key element of the EAHCA was a high level of parental involvement. Parents would share in decisions regarding the placement of their children, the development of IEP goals, and the services to be provided to achieve these goals. To ensure parental involvement and protect the rights established for handicapped children, the EAHCA incorporated procedural safeguards modeled after the stipulation in PARC. If parents disagreed with the local education agency, these safeguards provided a variety of mechanisms for resolving the conflict, including informal negotiations, administrative hearings, and ultimately civil action in federal or state courts.

In reality, however, special education due process has become a complicated, burdensome, and expensive endeavor of which both parents and local school districts complain. School districts complain of the cost in both time and money, which could be better spent on providing educational services. Parents, although envisioned as partners in a non-adversarial process, are frequently intimidated by the educational bureaucracy into acquiescence with school district recommendations, which all too often, are motivated by fiscal and

56. See S. REP. NO. 94-168, at 10-12; Education for All Handicapped Children Act sec. 5, § 614(1)(C)(iii); Goldman, supra note 5, at 251.
57. See Education for All Handicapped Children Act sec. 5, § 615; Goldman, supra note 5, at 253, 280-82. See generally Antonis Katsiyannis & John W. Maag, Ensuring Appropriate Education: Emerging Remedies, Litigation, Compensation, and Other Legal Considerations, 63 EXCEPTIONAL CHILDREN 451 (1997) (discussing traditional remedies courts have awarded under the IDEA (EAHCA) and an increasing trend for courts to award compensatory education to students denied FAPE).
59. In the context of special education, due process is frequently used as a term of art, referring specifically to the detailed administrative procedures for asserting a child's right to special education and for disputing local education agency decisions regarding its provision. See generally COMMUNITY ALLIANCE FOR SPECIAL EDUC. & PROTECTION AND ADVOCACY, SPECIAL EDUCATION RIGHTS AND RESPONSIBILITIES (7th ed. 1998).
political incentives rather than the true needs of the child. When a dispute does arise, only the most sophisticated and affluent are able to mount a successful challenge, and it may take years to reach a judicially enforceable decision. Those who succeed in due process may secure educational opportunities for their children entirely unavailable to most. But even for these fortunate children, the cost in time spent disputing an educational program may be time irretrievably lost. Thus, the system designed to eliminate inequities in education may actually create a two-class system of discrimination based on the assertiveness and resources of the parents.

Another significant goal of the EAHCA was to assess and assure the effectiveness of education for handicapped children. Congress assumed that by specifying procedures for providing education and the

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61. See Goldman, supra note 5, at 263-65, 277-82. The parity position for parents is illusory; parents who challenge the school are criticized for not trusting professionals and may simply defer to their recommendations. See id. at 280. Court adjudications are rare despite school districts' inappropriate financial incentives regarding evaluation and placement, such as biased funding formulas, classroom space, and staff availability. See id. at 263-65; see also Theresa M. Willard, Note, Economics and the Individuals with Disabilities Education Act: The Influence of Funding Formulas on the Identification and Placement of Disabled Students, 31 IND. L. REV. 1167, 1181-84 (1998) (discussing ways that inappropriate funding incentives can lead to disputed educational placement recommendations). These types of problems have also been described in terms of "information costs" for the disabled. Scott A. Moss & Daniel A. Malin, Note, Public Funding for Disability Accommodations: A Rational Solution to Rational Discrimination and the Disabilities of the ADA, 33 HARV. C.R.-C.L. L. REV. 197, 214 (1998). The disabled can only take action against mistreatment they are aware of. See id. Furthermore, anti-discrimination policy can be furthered only to the extent that discrimination is uncovered and remediated—and these results deter future discrimination. See id. at 209.

62. See Goldman, supra note 5, at 279-82 (describing the hurdles of information, time, and money for parents in due process). The median time between filing a civil suit and convening court adjudication in special education cases has risen to almost three and a half years. See Robert L. Morgan et al., Use of Mediation and Negotiation in the Resolution of Special Education Disputes, 116 EDUC. 287, 287 (1995).

63. According to one special education administrator, "A few people are making a lot of noise and getting attorneys and getting a high degree of service.... [But] other people are getting a lower level of service." John Gittelsohn & Susan Kelleher, O.C. Special-Ed System at Precipice, ORANGE COUNTY REG., Dec. 23, 1998, at A1, available in 1998 WL 21286323 (indicating that 1% of special education students in Orange County are in private placements at an average cost of $21,000 per year, but also suggesting that costs in excess of $100,000 per student per year have been incurred).

64. See Willard, supra note 61, at 1187; see also Goldman, supra note 5, at 281-82 (noting that it is of little value to a child if the court finding that he received inappropriate first grade education does not come until he is in fourth grade).

65. See Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, sec. 3(a), § 601(c), 89 Stat 773, 775.
process by which its objectives would be implemented, the substantive content of that education would be assured. Until 1997, however, issues of educational quality and positive outcomes for students with disabilities had not been directly addressed by the Act. This Comment asserts that Congress’s inattention to these issues and its assumption that states would detail the requisite substantive components of educating disabled students, if given financial assistance, has resulted in great disappointment and confusion in special education. Describing only the manner in which education is to be provided has not guaranteed that its content is of high quality. Providing only the mechanism for students to enter the gates of the schoolhouse has proven a hollow victory for millions of disabled students who are not ensured meaningful education before leaving.

The EAHCA, however, is not static. Within the limits of their authority, Congress continues to improve upon and refine the EAHCA through amendment and reauthorization. In 1986, assistance for the development of early intervention services for infants and toddlers was added. The 1986 amendments also authorized attorneys’ fees for parents who prevail in due process proceedings and judicial actions against school districts. In 1990, the act was renamed the Individuals with Disabilities Education Act (IDEA). The most sweeping changes, however, were recently brought about by the 1997 amendments for the reauthorization of the IDEA, as discussed below in Part II.D.

C. Judicial Interpretation

Since its enactment, courts have been called upon to interpret the full

66. See Board of Educ. v. Rowley, 458 U.S. 176, 206 (1982). In reviewing the legislative history of the EAHCA, the Supreme Court concluded: We think that the congressional emphasis upon full participation of concerned parties throughout the development of the IEP, as well as the requirements that state and local plans be submitted to the Secretary for approval, demonstrates the 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.

Id.

67. See discussion infra Part II.D.


range of the EAHCA and IDEA provisions. However, two particularly relevant aspects of the statute have become the focus of significant judicial scrutiny: FAPE and LRE.

1. Free Appropriate Public Education

   In 1982, the U.S. Supreme Court was asked to interpret "appropriate" education under the Act. Amy Rowley, an intelligent deaf child, claimed that she had been denied an appropriate education because the Hendrick Hudson Central School District refused to provide a sign-language interpreter in her first grade classes. Because Amy had been performing well in the regular education environment with the additional supports of speech therapy, tutoring, and a hearing aid, the school district determined that she did not need an interpreter. However, she was "not learning as much, or performing as well academically, as she would without her handicap." Her parents asserted that sign-language interpretation would permit her to understand more of what was said in the classroom and thereby achieve more of her potential. The district court agreed, holding that an appropriate education must provide each child "an opportunity to achieve his full potential commensurate with the opportunity provided to other children." The United States Court

73. Board of Educ. v. Rowley, 458 U.S. 176, 186 (1982). Rowley was the first case to come before the U.S. Supreme Court under the EAHCA. See id. at 187.
74. See id. at 184-85.
75. See id. A sign-language interpreter had been provided for a trial period in kindergarten, but he concluded that Amy did not need his services at that time. See id. The school district had also consulted experts, Amy's teacher, and visited a class for the deaf before reaching its decision. See id.
76. Id. at 185 (quoting Rowley v. Board of Educ., 483 F. Supp. 528, 532 (S.D.N.Y. 1980)).
77. See id. at 184-85.
78. Rowley, 483 F. Supp. at 534. It should be noted that the district court did not attempt to establish a higher standard for educating handicapped students than for non-handicapped students. The court was careful to point out that "even the best public schools lack the resources to enable every child to achieve his full potential." Id. The qualification that a child's potential should be maximized "commensurate with the opportunity provided other children," was intended to impose a similar standard of education for both the handicapped and the non-handicapped. Id. at 534. The court suggested that an "appropriate" education standard should compare Amy Rowley's "performance to that of non-handicapped students of similar intellectual calibre and comparable energy and initiative" in determining the level of services that should be provided. Id. Under this standard, a handicapped child would be given the opportunity to achieve as much of his or her potential as a non-handicapped child in the same environment.
of Appeals for the Second Circuit affirmed.\textsuperscript{79}

The U.S. Supreme Court, however, ruled that since Amy had been making satisfactory progress and had been provided personalized instruction and related services as required by the EAHCA, Amy’s education was appropriate.\textsuperscript{80} In reaching this decision, the Court adopted a two-part inquiry.\textsuperscript{81} First, had the state complied with the procedures of the EAHCA?\textsuperscript{82} Second, is the student’s individualized educational program “reasonably calculated to enable the child to receive educational benefits?”\textsuperscript{83} If these requirements were met, then the state had met its obligation under the EAHCA and the Court would require no more.\textsuperscript{84}

The Rowley Court rejected interpretations of appropriate education imposing both greater and lesser duties on states receiving EAHCA funds.\textsuperscript{85} In looking to legislative history, the Court concluded that the primary intent of Congress was “to open the door of public education to handicapped children” rather than “guarantee any particular level of education once inside.”\textsuperscript{86} Nevertheless, Congress had not intended to spend millions of dollars without the expectation of “some educational benefit” for handicapped children.\textsuperscript{87} Mere access to the same educational services provided non-handicapped children would probably fail short of the EAHCA’s requirements.\textsuperscript{88} Yet providing every special service necessary for a handicapped child to reach his or her maximum potential was more than Congress had intended.\textsuperscript{89}

Similarly, states were not required to provide objectively equal opportunities to learn because such a standard would prove “entirely unworkable . . . requiring impossible measurements and comparisons.”\textsuperscript{90} The Court construed the EAHCA to give deference to states in determining the substantive content of education, noting that “courts must be careful to avoid imposing their view of preferable educational methods.”\textsuperscript{91} Instead, compliance with extensive procedural requirements

\textsuperscript{79.} See Rowley v. Board of Educ., 632 F.2d 945, 945 (2d Cir. 1980).
\textsuperscript{80.} See Rowley, 458 U.S. at 206.
\textsuperscript{81.} See id. at 206-07.
\textsuperscript{82.} See id.
\textsuperscript{83.} Id. at 207.
\textsuperscript{84.} See id. at 206-07.
\textsuperscript{85.} See id. at 192-200.
\textsuperscript{86.} Id. at 192.
\textsuperscript{87.} See id. at 200-01. “Some educational benefit,” or more simply, “some benefit,” has become a term of art used to describe the standard espoused by the Rowley Court.
\textsuperscript{88.} See id. at 198-99.
\textsuperscript{89.} See id.
\textsuperscript{90.} Id. at 198.
\textsuperscript{91.} Id. at 207 (“The primary responsibility for formulating the education . . . and
was emphasized as the means Congress had intended to assure much, if not all, in the way of substantive educational content.92

The Rowley decision has been widely criticized as a setback for handicapped students.93 Scholars who had read great promise of bountiful rewards into the EAHCA were left with only the minimal expectation of "some benefit."94 Despite admonitions by the Court that Rowley should be read narrowly,95 it was feared that the decision would permit states to receive EAHCA funds yet provide only de minimis services.96

Indeed, many courts have relied on Rowley to deny services,97 such as placements in private school rather than public school.98 In denying

for choosing the educational method... was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child."

92. See id. at 206.
93. See, e.g., Weber, supra note 4, at 351, 364-66, 374-77 (describing expectations for the EAHCA prior to Rowley and reaction to the decision); Boeckman, supra note 4, at 868 (noting high hopes for the EAHCA).
94. See Weber, supra note 4, at 374 ("The Act's promise of lavish services for handicapped children was now a grudgingly borne obligation to do the minimum necessary.").
95. See Rowley, 458 U.S. at 202. Justice Rehnquist cautioned: We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act. Because in this case we are presented with a handicapped child who is receiving substantial specialized instruction and related services, and who is performing above average in the regular classrooms of a public school system, we confine our analysis to that situation.

Id.
96. See Weber, supra note 4, at 374-76; Eyer, supra note 10, at 8.
97. See Weber, supra note 4, at 377; Eyer, supra note 10, at 8.
98. See, e.g., Fort Zumwalt Sch. Dist. v. Clynes, 119 F.3d 607, 611-14 (8th Cir. 1997) (holding proposed public education, described by state level review officer as "hit and miss" and as not having produced a demonstrable plan of progress," was appropriate because the IEP outlined the student's particular needs, responded to them in compliance with IDEA, and no state educational authority had criticized the teaching method); Lenn v. Portland Sch. Comm., 998 F.2d 1083, 1085 (1st Cir. 1993) (affirming that school district's IEP was "reasonably calculated to be of significant educational benefit" despite evidence that the child's progress in public school had "slowed to a crawl"); G.D. v. Westmoreland Sch. Dist., 930 F.2d 942, 948 (1st Cir. 1991) (following Rowley and stating that "FAPE may not be the only appropriate choice, or the choice of certain selected experts, or the child's parents' first choice, or even the best choice... FAPE is simply one which fulfills the minimum federal statutory requirements") (emphasis added); see also Martin W. Bates, Free Appropriate Public Education Under the Individuals with Disabilities Education Act: Requirements, Issues and Suggestions, 1994 BYU EDUC. & L.J. 215, 220 (lamenting that the vague language of Rowley can be read by educational agencies as a relief from duty); Weber, supra note 4, at 377 n.166 (providing an extensive list of pre-1990 cases denying private placements and other
private school placement to a neurologically impaired child, for example, the Sixth Circuit Court of Appeals acknowledged that private school was likely superior to the public school placement proposed in the IEP. The court likened public placement to "a serviceable Chevrolet" while private school was the equivalent of "a Cadillac."

Relying on Rowley, the court held that the state was "not required to provide a Cadillac, and that the proposed IEP [was] reasonably calculated to provide educational benefits," thus satisfying the requirements for appropriate education.

Recent attempts to require schools to demonstrate that a child has actually benefitted from his or her education have been largely unsuccessful. Courts have interpreted the FAPE requirement as prospective, requiring that school districts devise educational plans calculated to provide some benefit rather than provide education that actually benefits the child in a meaningful way.

In E.S. v. Independent School District, for example, the plaintiff, a dyslexic child entering seventh grade, claimed that the school district had provided inadequate education because she was reading at only a 3.8 grade-level. During the three previous years of special education, her reading had progressed only 0.8 grade-level equivalents. The school district agreed to provide one-to-one tutoring in the Orton-Gillingham instruction method during summer school. The plaintiff's mother requested continuation of this service because E.S. was making progress, but the school district refused. The Eighth Circuit Court of Appeals affirmed lower court and administrative rulings that E.S. had failed to prove that one-to-one instruction was necessary for her to benefit from her education, despite her showing of a lack of progress before services under Rowley); Eyer, supra note 10, at 8 & n.77 (observing that under Rowley, courts "have rarely held an IEP to be insufficient when the school complied with proper procedures" and listing case examples).

99. See Doe v. Board. of Educ., 9 F.3d 455, 459 (6th Cir. 1993). The student was unable to engage in normal language and thinking skills due to an impairment of auditory information processing. See id. at 456.
100. See id. at 459.
101. See id. at 460.
103. See id.
104. 135 F.3d 566 (8th Cir. 1998).
105. See id. at 567-68.
106. See id. at 567. Similar deficiencies were found in her written language and writing skills. See id.
107. See id. at 568. Orton-Gillingham is a multi-sensory approach used to instruct learning disabled students in reading. See id. at 568 n.4.
108. See id. at 568.
beginning the Orton-Gillingham program.  

Cases such as E.S. represent a significant departure from Rowley. Amy Rowley was making satisfactory progress, advancing easily from grade to grade even though she might have achieved greater academic success with additional supports. In contrast, E.S. had made less than one year of reading progress during three years of special education, which the court found sufficient to fulfill the requirements of the IDEA under Rowley. However, the Rowley Court had expressly limited its decision to the facts of that case specifically because Amy Rowley was performing above the average. Thus, despite the Supreme Court’s statement that they were not attempting “to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act,” lower courts appear to be interpreting Rowley as though its test for appropriateness applies in all cases.

In a small number of cases, however, courts have departed from the general trend by applying Rowley narrowly. Such courts have either interpreted Rowley to require additional services because the disputed IEP offered no benefit or have distinguished the facts of a case to avoid applying Rowley.

A broad interpretation of Rowley has proven especially difficult in cases involving the severely handicapped. Polk v. Central Susquehanna Intermediate Unit 16, for example, concerned a fourteen-year-old with the mental capacity of a toddler. Contrasting the meaning of “some

109. See id. at 568-69.
111. See E.S., 135 F.3d at 567.
113. Id.
114. See Eyer, supra note 10, at 8-10; see also Weber, supra note 4, at 377-404 (describing lower court decisions that retreat from Rowley and the basis for such decisions).
115. See, e.g., County of San Diego v. California Special Educ. Hearing Office, 93 F.3d 1458, 1459 (9th Cir. 1996) (finding residential placement appropriate for an emotionally disturbed teen because alternative day treatment program failed to implement major IEP goals and produced no real progress); Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171, 181 (3d Cir. 1988) (noting that Rowley is a narrow decision); Hall v. Vance County Bd. of Educ., 774 F.2d 629, 630-36 (4th Cir. 1985) (recognizing promotions from grade-to-grade as a fallible measure of educational benefit in the case of a functionally illiterate, 16-year-old dyslexic child); Weber, supra note 4, at 377-404; Eyer, supra note 10, at 8-10.
116. 853 F.2d 171 (3d Cir. 1988).
117. See id. at 173. Christopher Polk contracted encephalopathy at the age of seven months, which left him mentally retarded and severely developmentally delayed. See id.
benefit” in the context of educational progress made by Amy Rowley with that of Christopher Polk.\textsuperscript{118} The court held that the \textit{Rowley} standard required more than mere de minimis benefit.\textsuperscript{119} Due to the severity of Christopher’s disability, meaningful benefit, in which educational progress could be expected, was required.\textsuperscript{120}

Despite more than twenty years of interpretation, a clear definition of “appropriate” remains elusive. In some circumstances, appropriate education may provide opportunities approaching or even surpassing those afforded non-disabled children. Yet for some severely disabled children, no amount of instruction or services will enable them to perform academically at the same level as their non-disabled peers. Thus, the IDEA currently requires a case-by-case determination, the substantive component of which lies between the provision of no additional services and the provision of all services required to maximize potential. Unless the Supreme Court or Congress choose to define appropriate education more clearly, parents and educators will face continued confusion and be forced repeatedly into court for resolution of their conflicts under the IDEA.\textsuperscript{121}

2. Least Restrictive Environment

Superimposed on the requirement for appropriate education is an equally elusive requirement for educating children in the least restrictive environment.\textsuperscript{122} The EAHCA called for handicapped children to be

Christopher’s parents disputed his IEP because it substituted direct, hands-on physical therapy with only consultative services. See \textit{id.} at 173-74. The school district had previously provided direct services, but unilaterally discontinued the practice throughout the district. See \textit{id.} Christopher’s parents submitted evidence that physical therapy services, provided at their own expense, were necessary for Christopher to progress and had benefitted him. See \textit{id.} at 174 & n.4.

\textsuperscript{118} See \textit{id.} at 181-83. The court noted the difficulty in applying \textit{Rowley} to this case because Christopher’s progress could not be measured in academic skills. “His needs are drastically different, but no less important.” \textit{Id.} at 182. Indeed, the EAHCA required that the most severely handicapped (i.e., children like Christopher) be served first. See \textit{id.} at 183.

\textsuperscript{119} See \textit{id.} at 182 (finding that EAHCA authors “must have envisioned that significant learning would transpire in the special education classroom . . . so that citizens who would otherwise become burdens on the [S]tate would be transformed into productive members of society”). In the case of Christopher Polk, learning was directed toward the goal of self-sufficiency although he was “not likely ever to attain this coveted status, no matter how excellent his educational program.” \textit{Id.}

\textsuperscript{120} See \textit{id.} at 183. Although the \textit{Rowley} Court emphasized procedural protection, “it is clear that the Court was not espousing an entirely toothless standard of substantive review.” \textit{Id.} at 179. Courts have a “responsibility for monitoring the substantive quality of education . . . [and] must ensure 'a basic floor of opportunity' that is defined by an individualized program that confers benefit.” \textit{Id.} at 179.

\textsuperscript{121} \textit{See} FULCHER, \textit{supra} note 2, at 120.

\textsuperscript{122} The discussion below attempts only a cursory review of LRE principles,
educated with children who are not handicapped "to the maximum extent appropriate." They should be segregated "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." As with FAPE, LRE could be interpreted to require a potentially limitless number of supplemental services to achieve satisfactory education in the regular classroom. As with FAPE, LRE embraces both Equal Protection and substantive educational components.

In the early years of special education, school districts found it convenient and cost-effective to centralize instruction of disabled students in separate classrooms or buildings. Segregation of disabled children, however, evokes concepts of discrimination rejected in Brown v. Board of Education. Inclusion advocates argue that handicapped children have a right to associate with non-handicapped peers. Since "separate but equal" is inherently unequal under Brown, segregation violates the spirit if not the letter of Fourteenth Amendment constitutional protection. Furthermore, increasing evidence suggests

positions, and interpretations. For more comprehensive and in-depth coverage, see generally Michael A. Rebell & Robert L. Hughes, Special Educational Inclusion and the Courts: A Proposal for a New Remedial Approach, 25 J.L. & EDUC. 523 (1996); Winter, supra note 52; Perry A. Zirkel, The "Inclusion" Case Law: A Factor Analysis, 127 EDUC. L. REP. 533 (1998); Melvin, supra note 4. 123. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, sec. 5, § 612(5), 89 Stat. 773, 781; see Rebell & Hughes, supra note 122, at 547; Winter, supra note 52, at 16. 124. Education for All Handicapped Children Act sec. 5, § 612(5). 125. See Goldman, supra note 5, at 263. 126. 347 U.S. 483 (1954); see discussion infra Part III. 127. Although the terms "inclusion" and "mainstreaming" are sometimes used interchangeably, for the purpose of this Comment, inclusion refers to situations in which a disabled child's primary educational placement is in a regular classroom. Mainstreaming refers to placing a child whose primary placement is in a segregated environment into the general education population for part of the school day. See Anne M. Hocutt, Effectiveness of Special Education: Is Placement a Critical Factor?, FUTURE CHILDREN, Spring 1996, at 77, 78-79. 128. See Goldman, supra note 5, at 262 (stating LRE is intended to give children the highest level of individual liberty); Melvin, supra note 4, at 610-12 (implicating a First Amendment right of association and a liberty interest in reputation by avoiding stigmatization). 129. Brown, 347 U.S. at 495. 130. See TURNBULL, supra note 2, at 158-60. The overall result of a dual system of education has been a denial of educational opportunities for handicapped children, including exclusion, misclassification, and inappropriate education. See id.; see also Melvin, supra note 4, at 610 (noting that although the U.S. Supreme Court has not
that inclusion confers independent educational and social benefits to the child.\textsuperscript{131} Children model other children's behavior and benefit from interaction with appropriate non-disabled peer models.\textsuperscript{132} This concept is intuitively appealing: if one goal of education is to promote the ability to participate productively in society, then children must have the opportunity to practice social participation in school.\textsuperscript{133}

Courts grappling with this issue have devised various balancing tests to weigh the benefits of inclusion or mainstreaming with the burdens imposed.\textsuperscript{134} In general, courts have placed the burden on school officials

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\textsuperscript{131} See Goldman, \textit{supra} note 5, at 265 (citing evidence that students who are included score in the 80th percentile academically as compared to the 50th percentile for segregated students); see also Rebell & Hughes, \textit{supra} note 122, at 533. The authors quote G. Orville Johnson's observation:

It is indeed paradoxical that mentally handicapped children having teachers especially trained, having more money (per capita) spent on their education, and being enrolled in classes with fewer children and a program designed to provide for their unique needs, should be accomplishing the objectives of their education at the same or lower level than similar mentally handicapped children who have not had these advantages and have been forced to remain in the regular grades.

\textit{Id.} (quoting G. Orville Johnson, \textit{Special Education for the Mentally Handicapped—A Paradox}, 22 EXCEPTIONAL CHILD. 62, 66 (1962)).


\textsuperscript{133} In 1974, EAHCA author Senator Robert Stafford expressed support for educating students in the "most normal possible and least restrictive setting, for how else will they adapt to the world beyond the educational environment and how else will the non-handicapped adapt to them." Goldman, \textit{supra} note 5, at 261-62 (quoting 120 CONG. REC. 58,438 (1974)).

\textsuperscript{134} For example, the \textit{Roncker} test considers: 1) the benefit to the child of special education placement versus regular education placement; 2) whether the child would disrupt the regular education class; and 3) the cost of inclusion or mainstreaming. See \textit{Roncker v. Walter}, 700 F.2d 1058, 1063 (6th Cir. 1983). The \textit{Daniel R.R.} test considers first whether the child could be successfully educated in the regular classroom with the use of supplemental aids and services. See \textit{Daniel R.R. v. State Bd. of Educ.}, 874 F.2d 1036, 1048 (5th Cir. 1989). If a court finds that the child must be placed outside the regular classroom, then it must also decide whether the school has mainstreamed the child to the maximum extent possible. See \textit{id.} The \textit{Greer} court adopted and built upon \textit{Daniel R.R.} by showing a strong preference for inclusion in the regular classroom. See \textit{Greer v. Rome City Sch. Dist.}, 950 F.2d 688, 697 (11th Cir. 1991). Under \textit{Greer}, school districts must consider all supplemental aids and services that would permit a child to be educated in the regular classroom. See \textit{id.} The Third Circuit also adopted a test similar to that in \textit{Daniel R.R.}, placing specific emphasis on the school district's obligation to take meaningful rather than cursory efforts to mainstream a child. See \textit{Oberti v. Board of Educ.}, 995 F.2d 1204, 1215-18 (3d Cir. 1993). The \textit{Oberti} court also directed that schools should consider the social and emotional benefits of mainstreaming as well as academic benefits. See \textit{id.} The Ninth Circuit adopted a four part test. See \textit{Sacramento
to justify removal of children from the general education environment, especially when the disability is mild to moderate. Schools must make more than a token effort to provide supplemental aids and services. However, costs and resource allocation can be considered.

For example, the Eighth Circuit's test does not require costs so great as to "significantly impact upon the education of other children in the district." Thus, LRE reflects a preference that, although strong, is subordinate to the provision of FAPE and can be limited by the burdens it imposes on schools.

D. The Move Toward Quality of Education and the 1997 IDEA Amendments

In reviewing the history of special education, a central question that
arises is what has been gained from the IDEA? Has the implementation of procedural safeguards and stringent requirements for FAPE and LRE, buttressed by federal funding, achieved the goals originally envisioned? The House Committee Report prepared for the 1997 reauthorization of the IDEA concludes that the Act has been very successful indeed.\textsuperscript{139} Since 1975, the number of disabled children in state institutions has declined by close to ninety percent; higher education for disabled young adults has tripled; and unemployment has been reduced.\textsuperscript{140} Yet, the report also notes that the IDEA is far from perfect: school officials and others complain that the current law is unclear and focuses too much on paperwork and process rather than on improving results for children.\textsuperscript{141} Furthermore, the number of disabled students who fail is disappointingly high, with twice as many dropping out of school as compared to non-disabled students.\textsuperscript{142} The report concludes that "the promise of the law has not been fulfilled for too many children with disabilities."\textsuperscript{143} It is interesting to note the House Committee's attention to outcomes as the measure of success for an Act that prescribes only input criteria. In parallel to the changing priorities of parents, as reflected in litigation, congressional attention has shifted from merely opening the doors of education to a more active inquiry into what happens within.

The 1997 amendments to IDEA (IDEA 97) provide a myriad of improvements to increase the quality of education for disabled children.\textsuperscript{144} Of great significance are congressional requirements that

\textsuperscript{140} See id. The reader is cautioned, however, not to over-interpret such observations without direct evidence of a causal relationship. For example, widespread deinstitutionalization of the developmentally disabled in California during the 1990s did not occur as a result of increased educational opportunities. See JAMES W. CONROY ET AL., THE COFFELT LONGITUDINAL STUDY: THE RESULTS OF FOUR YEARS OF MOVEMENT FROM INSTITUTION TO COMMUNITY, REPORT TO THE CA DEPT. OF DEVELOPMENTAL SERVICES (July 1998). Rather, the driving force was a lawsuit alleging harm to individuals in the care of large state-operated facilities. See id.
\textsuperscript{141} See H. REP. No. 105-95, at 85, reprinted in 1997 U.S.C.C.A.N. at 82.
\textsuperscript{142} See id. at 85, reprinted in 1997 U.S.C.C.A.N. at 82. The National Center on Educational Outcomes reports that disabled students who drop out are less likely to be competitively employed and more likely to be arrested than disabled students who do not drop out. See Geenen et al., supra note 11, at 17. Disabled youth are more likely than their non-disabled counterparts to be working at lower-status, menial jobs, and less likely to be attending post-secondary education or living independently. See id.
\textsuperscript{144} See Individuals with Disabilities Education Act Amendments of 1997, Pub. L. 105-17, 111 Stat. 37 (codified at 20 U.S.C. 1400 (Supp. III 1997)). In addition to those mentioned in the text, the IDEA 97 amendments make numerous other changes which are outside the scope of this Comment. See id. For a discussion of such controversial provisions as the new discipline rules under the IDEA 97, see generally Theresa J. Bryant, The Death Knell for School Expulsion: The 1997 Amendments to the Individuals with Disabilities Education Act, 47 AM. U. L. REV. 487 (1998); Dixie Snow Huefner, The Individuals with Disabilities Education Act Amendments of 1997, 122 EDUC. L. REP.
students with disabilities be included in statewide achievement tests.\textsuperscript{145} States must establish performance goals and indicators to judge progress of children with disabilities.\textsuperscript{146} Disabled students’ scores must now be reported to parents and the public, and beginning July 1, 2000, alternative testing must be in place for students unable to participate in standardized assessments.\textsuperscript{147} These provisions will enable parents and educators to begin measuring and assessing the effectiveness of education for disabled children, and track the progress individual students make. They demonstrate renewed congressional commitment to improving the quality of education for disabled students and improving outcomes. However, they are only a first step toward making actual improvements and holding schools accountable for educational quality.

In addition, Congress has re-emphasized its preference for the inclusion of disabled students with non-disabled peers. IEPs must now provide a statement of reasons when students are not educated in the regular classroom.\textsuperscript{148} This requirement shifts the burden to schools to demonstrate that they have considered all supports and services available to enable a child to be educated in the regular classroom. General education teachers must now participate in IEP teams for mainstreamed or included students, reenforcing the cooperative nature of general and special education.\textsuperscript{149} States must now make assurances that special education funding mechanisms are placement-neutral, consistent with educating disabled children in the least restrictive environment.\textsuperscript{150} Furthermore, language permitting general education students to receive incidental benefits from special education services has been added.\textsuperscript{151} Previously, schools were strictly prohibited from using IDEA funds for

\textsuperscript{1103} (1998); Christopher Kraus, Application of the “Stay Put” Provision of the Individuals with Disabilities Education Act (IDEA) to Students with Undetected Disabilities, KY. CHILDREN’S RTS. J., Fall 1997, at 1; Julie F. Mead, Expressions of Congressional Intent: Examining the 1997 Amendments to the IDEA, 127 EDUC. L. REP. 511 (1998); Eyer, \textit{supra} note 10.


\textsuperscript{146.} See id. § 612(a)(16) (codified at 20 U.S.C. § 1412(a)(16) (Supp. III 1997)).

\textsuperscript{147.} See id. § 612(a)(17) (codified at 20 U.S.C. § 1412(a)(17) (Supp. III 1997)).


\textsuperscript{150.} See id. § 612(a)(5)(B) (codified at 20 U.S.C. § 1412(a)(5)(b) (Supp. III 1997)).

\textsuperscript{151.} See id. § 613(a)(4) (codified at 20 U.S.C. § 1413(a)(4) (Supp. III 1997)).
general education purposes, and school districts were often reluctant to place a disabled child in the regular education classroom for fear of losing funding. 152

Nevertheless, the IDEA 97 amendments still fall short of establishing definitive educational standards for disabled children. Congress has failed to define appropriate education or provide guidance on Rowley. Thus, states remain charged with defining educational standards for disabled children and devising methods for their implementation. Furthermore, according to the National Center on Educational Outcomes, the compliance-based procedures of the IDEA do not address the real issue of accountability by ignoring the important question: "Is the student learning?" 153 Instead, the IDEA only asks: "Is the student getting the services written on the IEP?" 154

This Comment asserts that a central reason Congress has deferred to the states for substantive and qualitative elements of education may be found in constitutional principles—specifically, that education is primarily a state, rather than a federal responsibility. 155 We should expect that federal statutes will never ensure adequate education for disabled students nor will courts impose such a duty based on federal statutes, such as the IDEA. The result and relief that parents of disabled students truly seek—adequate educational outcomes for their children—is more appropriately addressed in the state forum. As detailed below, this Comment asserts that state constitutions, especially that of California, provide ample basis to support such demands.

III. GENERAL EDUCATION REFORM AND THE DEVELOPMENT OF ADEQUACY STANDARDS BASED ON STATE CONSTITUTIONAL PROTECTIONS

The Supreme Court’s decision in Brown v. Board of Education 156 heralded the beginning of modern reform in general education. In

152. See Margaret J. McLaughlin & Deborah A. Verstegen, Increasing Regulatory Flexibility of Special Education Programs: Problems and Promising Strategies, 64 EXCEPTIONAL CHILDREN 371, 378 (1998); see also Willard, supra note 61, at 1179-82 (discussing the impact of various funding formulas on the provision of special education and related services).


154. Id.

155. See discussion infra Part III.

rejecting the "separate but equal" doctrine announced in Plessy v. Ferguson, the Court dismissed arguments that the Fourteenth Amendment should be interpreted in light of the circumstances surrounding its adoption. Specifically, "[e]ducation of Negros was almost nonexistent" in the late nineteenth century, much as education of the disabled was virtually nonexistent in the mid-twentieth century. The Brown Court held that the educational segregation of children, solely on the basis of race, was indeed an unconstitutional denial of Equal Protection because "[s]eparate educational facilities are inherently unequal."

Thus, this landmark decision established a right to equal access to education under the United States Constitution. Yet in describing education as "perhaps the most important function of state and local governments," and further limiting the right to equal opportunity in education to circumstances where "the [S]tate has undertaken to provide it," the Supreme Court foretold of the limits it would subsequently impose on that right.

A. The First Wave: Equality

In San Antonio Independent School District v. Rodriguez, the Court declined to extend the Equal Protection guarantee to economically disadvantaged students. Texas students had successfully challenged

157. 163 U.S. 537 (1896).
158. See Brown, 347 U.S. at 489.
159. Id. at 490.
160. See discussion supra Part II.
162. Id. at 493 (emphasis added).
163. Id.
164. See discussion infra Part III.A.
165. Modern education finance reform has been described as consisting of three waves: the first wave focused on U.S. Constitutional Equal Protection; the second wave consisted of state equal protection challenges; and the third wave emphasizes state education clauses as the basis for reform efforts. See generally William E. Thro, Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model, 35 B.C. L. Rev. 597 (1994) (using Massachusetts as an example of the current third wave focus of education reform); William E. Thro, The Third Wave: The Impact of the Montana, Kentucky, and Texas Decisions on Public School Finance Reform Litigation, 19 J.L. & EDUC. 219 (1990) (describing trends in education reform since 1971 and characterizing, for the first time, the three successive "waves").
167. See id. at 1-59.
the state system of financing public education based on local property
tax revenues in the lower court. \textsuperscript{168} Plaintiffs had argued that educational
opportunities were limited by the wealth of the district in which a
student lived, unfairly depriving students residing in poor districts of
opportunities afforded wealthier students. \textsuperscript{169} The U.S. Supreme Court,
however, finding no explicit reference to education in the Constitution,
ruled that education was not a “fundamental right” deserving strict
judicial scrutiny of discriminatory state action. \textsuperscript{170} Citing historical
deffere to legislative control over economic issues, the Court also
declined to define wealth as a “suspect” classification. \textsuperscript{171} Thus, the
Texas system for financing education was subjected to a lesser, “rational
relationship” test. \textsuperscript{172} Since the school finance system was found to bear a
rational relationship to the legitimate state interest of promoting local
control over schools, it passed the test of constitutionality. \textsuperscript{173}

In \textit{Plyler v. Doe}, \textsuperscript{174} the U.S. Supreme Court conceded that a minimum
educational threshold exists for which federal protection will be granted,
even where express constitutional protection is absent. \textsuperscript{175} In \textit{Plyler},
undocumented alien children in Texas were completely denied public
education. \textsuperscript{176} Declining to reverse its earlier ruling that education was
not a fundamental right, \textsuperscript{177} the Court nevertheless overturned the Texas
education statute, finding that a total deprivation of education to one
group could not be justified by furthering a substantial state interest. \textsuperscript{178}

One commentator has argued that the \textit{Rodriguez} Court “virtually
abandoned any role for the federal courts in guaranteeing education rights
under the Federal Constitution.” \textsuperscript{179} Thus, plaintiffs would be forced

\begin{itemize}
\item \textsuperscript{168} See Rodriguez v. San Antonio Indep. Sch. Dist., 337 F. Supp. 280, 280-86
(W.D. Tex. 1971).
\item \textsuperscript{169} See id. at 281-82.
\item \textsuperscript{170} Rodriguez, 411 U.S. at 37; see id. at 28-39.
\item \textsuperscript{171} Id. at 28; see id. at 28-40. Justice Powell also noted the Court’s reluctance to
interfere in state education matters because of its “lack of specialized knowledge and
experience” regarding the “persistent and difficult questions of educational policy.” Id.
at 42. It is interesting to note that the Court cited the lack of agreement amongst scholars
and experts “[o]n even the most basic questions” in education as a reason for such
deferece, suggesting, perhaps, that a court’s interference might be considered less
“premature,” given a greater consensus on basic issues in the field of education. Id.
\item \textsuperscript{172} Id. at 40.
\item \textsuperscript{173} See id. at 55.
\item \textsuperscript{174} 457 U.S. 202 (1982).
\item \textsuperscript{175} See id. at 202-30.
\item \textsuperscript{176} See id. at 205.
\item \textsuperscript{177} See id. at 223. The Court also declined to extend suspect class status to
undocumented aliens because their presence in the United States, in violation of federal
law, was not a “constitutional irrelevancy.” Id.
\item \textsuperscript{178} See id. at 230.
\item \textsuperscript{179} Allen W. Hubsch, \textit{The Emerging Right to Education Under State
\end{itemize}
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"[in]to state courts . . . for the change they seek." Yet the Plyler decision confirmed the suggestion in Rodriguez that "some identifiable quantum of education" was constitutionally protected in order to "provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process." Furthermore, in directing plaintiffs away from federal courts and into state courts for relief, the Rodriguez and Plyler decisions also suggested the future direction such challenges might take: away from educational equality and into the arena of adequacy defined by the minimum quantum of education necessary to develop basic skills.

B. The Second Wave: State Courts

The first step in this direction was to move the controversy from the federal to the state arena—from the United States Constitution to the constitutions of individual states. Unlike the U.S. Constitution, the constitutions of each of the fifty states contain direct references to education.

The foundational controversy for state constitutional protection of education was that of Serrano v. Priest. In Serrano I, the California Supreme Court struck down state education financing substantially similar to that of Texas on the grounds that it violated Fourteenth Amendment Equal Protection guarantees, and thus ordered the legislature to revise appropriate statutes. Subsequent legislative efforts were found inadequate by the trial court and the California Supreme

182. Id. at 37.
184. See Jensen, supra note 180, at 3; see also MARTHA M. MCCARTHY & PAUL T. DEIGNAN, WHAT LEGALLY CONSTITUTES AN ADEQUATE PUBLIC EDUCATION? A REVIEW OF CONSTITUTIONAL, LEGISLATIVE, AND JUDICIAL MANDATES 120 app. B (1982) (listing education clause language from all 50 state constitutions).
186. See Serrano I, 487 P.2d at 1265-66. Note that Serrano I was decided two years before the U.S. Supreme Court's 1973 decision in Rodriguez.

239
Court again reviewed this case. Conceding that Rodriguez undercut the Serrano I decision insofar as it relied on the Equal Protection Clause of the Fourteenth Amendment, the Serrano II court nevertheless held that the children of California were guaranteed a fundamental right to education under the California Constitution. The court further held that wealth was a suspect classification and applied a standard of strict judicial scrutiny to determine whether the educational reforms enacted by the Legislature pursuant to Serrano I complied with state equal protection provisions. Finding such reforms insufficient, the Legislature was compelled to reduce educational expenditure disparities per pupil to insignificant levels.

Following the success of equal protection arguments in Serrano II, similar challenges to education financing were raised in a number of other states, with varying degrees of success. Although a limited number of state supreme courts have struck down educational financing based primarily on state constitutional guarantees of equal protection, the majority of decisions have looked unfavorably on arguments based solely on equality. Yet, having found entry at the courthouse door through state constitutions, education reformers persisted.

C. The Third Wave: Adequacy

The “third wave” of education reform has seized upon the U.S. Supreme Court’s suggestion that a minimum quantum of education might be constitutionally protected. Rather than relying on implicit guarantees of federal law, however, the third wave focuses on explicit provisions of state constitution education clauses. Such arguments assert that state constitution education clauses demand a qualitative level of educational offering. Terms such as “efficient,” “thorough,” and “uniform” have been interpreted as standards against which adequacy is

188. See id. at 949.
189. See id. at 950-51.
190. See id. at 950-53.
191. See id. at 953, 957-58; see also Serrano v. Priest (Serrano III), 226 Cal. Rptr. 584, 620 (Ct. App. 1986) (subsequently finding that the California Legislature had met its constitutional burdens with newly passed education finance legislation by reducing wealth-related disparities to insignificance).
192. See Jensen, supra note 180, at 9-18 (comparing the successes of challenges to state education financing systems).
193. See id.
194. See Heise, supra note 183, at 1152-53 (describing how third wave litigation concentrates on state education clauses instead of equal protection clauses).
195. See id.
measured.197
Among the first states to interpret an adequacy standard in its state constitution’s education clause was West Virginia. In *Pauley v. Kelly,*198 the West Virginia Supreme Court sought to define “thorough and efficient” as found in article XII, section I of the West Virginia Constitution.199 Following an extensive legal and lexical analysis, the *Pauley* court adopted the following definition of a thorough and efficient education system: “It develops, as best the state of education expertise allows, the minds, bodies and social morality of its charges to prepare them for useful and happy occupations, recreation and citizenship, and does so economically.”200 The court then enumerated areas of education that a thorough and efficient system should develop to full potential: 1) literacy; 2) mathematical ability; 3) knowledge of government sufficient to equip the individual to make informed choices as a citizen; 4) self-knowledge sufficient to intelligently choose life work; 5) vocational or advanced academic training; 6) recreational pursuits; 7) creative interests; and 8) social ethics.

Judicial interpretations in more than a dozen states have now read quality assurances into the education clauses of their respective state constitutions.202 Yet none has had a greater impact than the Kentucky

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199. Id. at 861. “The legislature shall provide, by general law, for a thorough and efficient system of free schools.” W. VA. CONST. art. XII, § 1.
201. See id.
202. See Opinion of the Justices No. 338, 624 So. 2d 107, 107 (Ala. 1993) (holding state provision of substantially equitable and adequate educational opportunities to schoolchildren is constitutionally required); Roosevelt Elementary Sch. Dist. No. 66 v. Bishop, 877 P.2d 806, 812-15 (Ariz. 1994) (holding constitutional requirement of the State to provide general and uniform public school system that must be adequate); Idaho Sch. for Equal Educ. Opportunity v. Evans, 850 P.2d 724, 734-35 (Idaho 1993) (holding constitutional requirement that Legislature provide for a thorough system of education that meets standards established by the State Board of Education); Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 211 (Ky. 1989) (holding constitutional mandate to provide an efficient system of common schools requires equal opportunity for children to have an adequate education); McDuffy v. Secretary of the Executive Office of Educ., 615 N.E.2d 516, 548, 554-55 (Mass. 1993) (holding constitutional obligation of Commonwealth to provide all public school students with adequate education); Claremont Sch. Dist. v. Governor, 635 A.2d 1375, 1376 (N.H. 1993) (holding duty of the State to provide a constitutionally adequate education to every educable child in the
Supreme Court's decision in *Rose v. Council for Better Education, Inc.* 203 The plaintiffs in *Rose* comprised a non-profit corporation whose membership consisted of sixty-six local school districts from economically poor areas of Kentucky, a number of individual school districts, and twenty-two individual students on behalf of a class of similarly situated students. 204 The original complaint was based on state equal protection grounds, but also maintained that the entire system of education in Kentucky was not "efficient" as required by the Kentucky Constitution. 205 The Kentucky Supreme Court, however, found for the plaintiffs exclusively on the ground that the Kentucky school system failed to meet the efficiency standard. 206

In defining efficiency, the court rejected interpretations requiring only that schools operate "as best as can be with the money that was provided." 207 Efficient education was found to have the goal of developing at least seven specifically enumerated capacities. 208

public schools); Abbott v. Burke, 643 A.2d 575, 579 (N.J. 1994) (holding school children of State entitled to constitutionally-prescribed quality of education); Leandro v. State, 488 S.E.2d 249, 254 (N.C. 1997) (holding state constitution guarantees every child of the State the opportunity to receive a sound basic education); Bismarck Pub. Sch. Dist. 1 v. State, 511 N.W.2d 247, 259-63 (N.D. 1994) (holding fundamental right to education establishes goal of equal educational opportunities as measured by qualitative standards); DeRolph v. State, 677 N.E.2d 733, 740-46 (Ohio 1997) (holding state constitution mandates a thorough and efficient education which will provide each student basic quality education); Tennessee Small Sch. Sys. v. McWherter, 851 S.W.2d 139, 150-51 (Tenn. 1993) (holding education clause of state constitution is an enforceable standard for education that the Legislature must meet); Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist., 826 S.W.2d 489, 527 (Tex. 1992) (holding constitutional mandates for efficient schools prescribe a minimally adequate education for all Texas school children); Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 96-97 (Wash. 1978) (holding Legislature has mandatory constitutional duty to provide basic education); Pauley v. Kelly, 255 S.E.2d 859, 878 (W. Va. 1979) (holding thorough and efficient clause of state constitution requires Legislature to establish and meet high quality education standards); Campbell County Sch. Dist. v. State, 907 P.2d 1238, 1279 (Wyo. 1995) (holding the opportunity for quality education is the Legislature's paramount priority).

203. 790 S.W.2d 186 (Ky. 1989).

204. 790 S.W.2d 186 (Ky. 1989).

205. *See* id. at 190.

206. *See Rose,* 790 S.W.2d at 215.

207. *Id.* at 211. The court reasoned that such a definition "could result in a system of common schools, efficient only in the uniformly deplorable conditions it provides throughout the state." *Id.*

208. *See* id. at 212. The capacities the court listed were:

(i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of
Furthermore, the minimum characteristics of an efficient system of schools required:

1) The establishment, maintenance and funding of common schools in Kentucky is the sole responsibility of the General Assembly.
2) Common schools shall be free to all.
3) Common schools shall be available to all Kentucky children.
4) Common schools shall be substantially uniform throughout the state.
5) Common schools shall provide equal educational opportunities to all Kentucky children, regardless of place of residence or economic circumstances.
6) Common schools shall be monitored by the General Assembly to assure that they are operated with no waste, no duplication, no mismanagement, and with no political influence.
7) The premise for the existence of common schools is that all children in Kentucky have a constitutional right to an adequate education.
8) The General Assembly shall provide funding which is sufficient to provide each child in Kentucky an adequate education.
9) An adequate education is one which has as its goal the development of the seven capacities recited previously.\(^\text{209}\)

Given this definition, the Kentucky Supreme Court determined that the system of education was not efficient.\(^\text{210}\)

In reaching this decision, the court relied on three areas of information: first, the overall inadequacy of educational outcomes for students in Kentucky as compared to national standards; second, the disparity in educational opportunities throughout the state; and third, both the geographic disparity and overall inadequacy of education financing throughout the state.\(^\text{211}\) Failing constitutional efficiency, the entire statutory system of education was declared unconstitutional.\(^\text{212}\)

The Rose court rejected arguments that the Legislature had acted with the intent to provide adequate education and had been making progress in that direction.\(^\text{213}\) The critical issue for the court was a finding that the

his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.

\(\text{Id. at 212-13.}\)

\(\text{Id. at 215.}\)

\(\text{Id. at 213.}\)

\(\text{Id. at 215.}\)

\(\text{Id. at 195-99 (acknowledging that although the General Assembly had}\)
effect of Kentucky education law was an unconstitutionally inefficient system of education. Recognizing the separation of powers required under Kentucky law, the court ruled that its duty was fulfilled by determining the constitutional validity of the education system—it was then the duty of the Legislature to enact a constitutionally valid system of education.

D. The Appeal of Adequacy

Arguments based on state constitutional claims of inadequate education have been remarkably successful. In a 1997 analysis of state supreme court decisions, Robert Jensen found that arguments based solely on adequacy had a one hundred percent success rate. Those that focused on poor educational quality in combination with equal protection guarantees were sixty-six percent successful, while those that relied solely on equality of spending succeeded only twenty-six percent of the time. In some cases, courts have even found a constitutional duty of adequacy where such a claim was not asserted by the plaintiffs.

In *Bismarck Public School District v. State*, for example, plaintiffs challenged North Dakota’s statutory method for distributing funding to public schools as violating state equal protection guarantees. The made substantial efforts to improve education, education in Kentucky was still inadequate and inefficient in spite of, and in some cases exacerbated by, legislative efforts.

214. See id. at 215.
215. See id. at 212-14. The court stated “Our job is to determine the constitutional validity of the system . . . . We have done so . . . . It is now up to the General Assembly to re-create, and re-establish a system of common schools within this state which will be in compliance with the Constitution.” Id. at 214.
216. See Jensen, supra note 180, at 20, app. at 47.
217. See id.
218. See, e.g., Idaho Sch. for Equal Educ. Opportunity v. Evans, 850 P.2d 724, 730 (Idaho 1993) (noting that plaintiffs’ alleged claims of inadequacy would have entitled them to relief, although only an equal protection claim was litigated); Thompson v. Engelking, 537 P.2d 635, 640-41, 652-53 (Idaho 1975) (mandating that a minimal level of basic education be supported when faced with an equal spending claim); Gould v. Orr, 506 N.W.2d 349, 353 (Neb. 1993) (finding that although plaintiffs alleged unequal education funding, they did not prove that as a result of alleged unequal funding students were deprived of constitutionally required adequate education); see also Hubsch, supra note 179, at 1336 (“[S]ome state supreme courts have expressed surprise that the plaintiffs pursued equality rather than quality claims under the education articles.”); Jensen, supra note 180, at 19-21 (discussing courts’ preference for qualitative arguments over quantitative arguments); Joshua S. Wyner, *Toward a Common Law Theory of Minimal Adequacy in Public Education*, 1992/1993 ANN. SURV. AM. L. 389, 401-02 (1994) (remarking that it was “curious” for the *Engelking* court to read an adequacy standard into the state constitution when that issue was not before it).
220. See id. at 248.
North Dakota Supreme Court, however, focused its analysis on education quality as measured by student opportunities and outcomes. Finding educational quality inadequate, the Bismarck court ruled that "the existing system of educational funding needs fixing."

The appeal of adequacy and its concomitant success in state courts has been attributed to a number of factors. The explicit source of adequacy claims found in state constitution education clauses at once imposes both a specific duty upon states and a limitation to that duty. Because adequacy arguments flow directly from constitutional mandates in state education clauses, they do not threaten a "spill-over" effect into other areas of governmental responsibility. It is unlikely that demands based on constitutional references to some basic quantum of educational quality would lead to similar demands to provide roads or sewers or police protection of similar quality in all districts. State equal protection arguments, however, have raised such concerns.

Furthermore, challenges based on the education clauses of state constitutions are considered fully within state supreme courts' competence. Quality lawsuits require that courts directly address the question of whether a state's education system fulfills its constitutional mandate. Although some courts have elaborated specific criteria for educational adequacy, others consider their obligations met by simply determining whether state education programs are constitutional or unconstitutional. In contrast, education finance lawsuits ask courts to

221. See id. at 261-62.
222. Id. at 262.
223. See Enrich, supra note 196, at 166-70 (arguing adequacy's superiority over equality); Jensen, supra note 180, at 34-40 (discussing problems with equality arguments and the advantages of quality arguments).
224. See Enrich, supra note 196, at 166; Heise, supra note 183, at 1158; see also Enrich, supra note 196, at 168 (asserting that the limited scope of education clause arguments is less threatening than broader equal protection-based arguments).
225. Enrich, supra note 196, at 166; see also Wyner, supra note 218, at 393 (arguing that the reluctance of many courts, including the U.S. Supreme Court in Rodriguez, to impose a duty to fund education equally resulted from fears that such decisions could lead to similar assertions in other areas of government).
226. See Enrich, supra note 196, at 166-68.
227. See, e.g., Enrich, supra note 196, at 171-72; Jensen, supra note 180, at 34-35; Wyner, supra note 218, at 404-07.
228. See Enrich, supra note 196, at 166-67 (asserting that construction of education clause adequacy requirements is simple in contrast to the "interpretive heroics" that are necessary to "navigate the elaborate doctrinal structures that have evolved to contain equality's disruptive potential").
229. Compare, for example, Rose v. Council for Better Education, Inc., 790 S.W.2d
pass judgment on legislative spending decisions, from which they frequently retreat on separation of powers grounds.\textsuperscript{230}

Adequate education describes the basic floor of opportunity that a state must provide to students rather than the ceiling.\textsuperscript{231} The State is free, in times of financial excess, to improve education beyond the minimum required level. Similarly, local communities retain the ability to dedicate additional resources to schools, provided the State has ensured a reasonable quality of education for all its residents. Thus, adequacy claims do not require “levelling” of resources in such a way that the “worse off can only be improved at the expense of the better off.”\textsuperscript{232}

The test for adequacy is whether the education provided is sufficient for its intended purpose. In this regard, it is closely aligned with the primary governmental purposes for providing education: to ensure a productive populace that is fully capable of participating in society, thereby promising economic and social gains for all members of that society.\textsuperscript{233}

By focusing on outcomes, adequacy obviates the debate over measuring, comparing, and objectively equalizing inputs.\textsuperscript{234} Moreover, the success of such arguments reflects a realization that students’ opportunity to learn encompasses factors in addition to the resources allocated to their education.\textsuperscript{235} More simply stated, adequacy promises to

\textsuperscript{230} See Wyner, supra note 218, at 404-07; see also Jensen, supra note 180, at 2 (observing that although all education litigation is inevitably financial in nature, and thereby “legislative” to some extent, quality lawsuits can untangle education without requiring courts to legislate school finance issues).

\textsuperscript{231} See Enrich, supra note 196, at 168-70.

\textsuperscript{232} Id. at 168.

\textsuperscript{233} See id. at 168-69.

\textsuperscript{234} See id. at 145-55, 168-70 (discussing the many ways, other than strict equality of spending, in which educational equality can be measured, and suggesting that the simplicity of adequacy is less threatening to governmental bureaucracies than the complexities of equality).

\textsuperscript{235} See id.
generate sought-after change where school finance lawsuits have failed.236

Adequacy arguments are especially appealing for special education. They place the duty where it should be—on individual states rather than the federal government. The IDEA intended to further national interest in the education of disabled children, but never intended to supplant the authority of states in providing such education.237 It was intended to encourage specific aims, not mandate a particular method of instruction or guarantee outcomes.238 The IDEA anticipates that states will adopt standards and procedures not simply because the federal statute provides funds if they do, but because it is ultimately their responsibility to do so.239

In comparison to equal protection, adequacy is also superior for disabled students. Strict and absolute equality, especially equality of funding, rings hollow for the disabled student. Varying degrees of disability and the unique needs of each child necessarily require different levels of attention and spending.240 To require that schools spend equal amounts on each student would clearly not produce equality of opportunity nor basic adequacy of education for many disabled students.

In addition, adequacy is a collective rather than an individualized obligation. By comparison, the IDEA focuses on the specific needs of each individual child. It must necessarily be limited to inputs and procedure; requiring a state or local education agency to achieve competence from every child or from any given child would be an


237. See Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, sec. 3, § 601(b)(8)-(c), 89 Stat. 773, 775 ("State and local education agencies have a responsibility to provide education for all handicapped children . . . . It is the purpose of this Act to . . . assist States and localities to provide for the education of all handicapped children . . . .").


239. See id. at 208 (noting that IDEA specifically charges states with such responsibilities and that it was not Congress's intention in passing the Act to "displace the primacy of [s]tates in the field of education").

240. See Heise, supra note 183, at 1169 (noting that students with different educational needs impose varying costs on school systems that states typically accommodate with weighted funding formulas).
impossible burden to impose. To require that the State ensure student outputs that collectively achieve a given level of competence, as limited by statistically normal distribution, however, is an entirely reasonable expectation.

This is not to suggest that we should discard the tenets of the IDEA in favor of a lesser standard, or that adequacy would diminish the procedural safeguards the IDEA established. Indeed, in its highest form, adequacy would make the IDEA obsolete. Adequate education would necessarily be appropriate to the child’s needs or it could not possibly achieve the requisite outcome. By focusing on quality, local school districts and state agencies would be compelled to cooperate with parents to achieve an acceptable result rather than conflict over services provided and methodologies used. The ambiguous “some benefit” would be replaced by a more tangible, measurable standard of sufficient benefit to meet concrete state standards. Least restrictive environment would be seen as a substantive component of a child’s education designed to enable him to function as a productive member of society. In short, parental objectives and state constitutional duties would be more closely aligned under the substantive protection of an adequacy standard than under the procedural safeguards of the IDEA as currently implemented.

Thus, parents of students in special education should begin to look not to the United States government for high quality education, but to the service provider. They should direct their concerns for quality to the source of educational obligations—the states and their respective constitutions.

IV. DOES THE CALIFORNIA CONSTITUTION REQUIRE EDUCATIONAL ADEQUACY?

In analyzing the educational obligations of a state to its

241. Courts have generally rejected individual students’ claims of educational negligence and malpractice against school districts and educators on public policy grounds. See Frank D. Aquila, Educational Malpractice: A Tort En Ventre, 39 CLEV. ST. L. REV. 323, 342-46 (1991); Catherine D. McBride, Note, Educational Malpractice: Judicial Recognition of a Limited Duty of Educators Toward Individual Students; A State Law Cause of Action for Educational Negligence, 1990 U. ILL. L. REV. 475, 483-87. Courts cite their unwillingness to interfere with school administration, the lack of standards of care for educators, the difficulty in distinguishing between the many factors that can affect students outcomes, and the burden of increased litigation as reasons for denying a private cause of action by an individual for failure to educate. See Aquila, supra, at 342-45; McBride, supra, at 483-87. Note, however, the authors would establish an exception to this rule in the case of special education situations because the EAHCA/IDEA obviates many of these concerns. See Aquila, supra, at 345-51; McBride, supra, at 487-93.
school children, the first question that must be addressed is whether a state constitution requires the provision of adequate education. This section explores the Education Clause of the California Constitution for qualitative promise.

Before a duty to provide adequate education can be interpreted into a state's constitution, courts must find a duty to provide education—they must generally find that education is a fundamental state right. It is also necessary for courts to define the role of the Legislature in fulfilling its state constitutional obligations. Finally, it is useful for the state court to hold that education must be provided essentially equally to all children, and to define circumstances under which it could or could not be denied.

California enjoys the enviable position that many of these threshold questions surrounding a duty to provide adequate education have already been addressed. Education has been held a fundamental interest under the California Constitution, thus guaranteeing students equal protection under strict judicial scrutiny. In addition, wealth has been held to be a suspect classification requiring the state's school financing plan to distribute funds for education in a substantially equal manner. Although declining to mandate a particular formula for educational spending, the California Supreme Court has found no problem with the legitimacy of ordering the Legislature to effect a constitutionally valid funding system.

In recent years, the California Supreme Court has neither retreated from its Serrano decisions nor hesitated to impose even greater duties on the State in furtherance of education. In Butt v. State, the court

242. Most courts that read an adequacy standard into their state's constitution have found that the right to education is fundamental. See cases cited supra note 202. The Idaho Supreme Court, however, found that the State Legislature had a duty to provide a thorough and uniform system of schools, although citizens of the state did not have a corresponding affirmative right to receive education. See Thompson v. Engelking, 537 P.2d 635, 647-48 (Idaho 1975).

243. See supra Part III.B (discussing Serrano litigation).


245. See id.

246. See id. at 939-40, 957-58.

247. 842 P.2d 1240 (Cal. 1992). In Butt, the Richmond Unified School District announced it would close schools six weeks before the scheduled end of the 1990-1991 school year due to a lack of funds caused by local mismanagement. See id. Plaintiffs asserted that the State of California was responsible for ensuring that Richmond schools remained open, on the grounds that closure would deprive them of equal protection of
reaffirmed education as a “uniquely fundamental personal interest,” but also stressed that “the State’s responsibility ... extends beyond the detached role of fair funder or fair legislator.” Thus in Butt, when the Richmond Unified School District was threatened with closure six weeks before the end of the school year, the State had a duty to take remedial action despite the fact that Richmond’s fiscal insolvency was caused by local mismanagement. The court based its decision on the right of Richmond’s students to “basic educational equality,” which would be compromised by the qualitative and quantitative reductions in instruction that a truncated school year would entail.

Furthermore, the Butt court dismissed arguments that policy considerations of local control should absolve the State of ultimate responsibility for individual school districts. Citing more than one hundred years of precedent, the court noted that “plenary” power over education has always vested in the State, rather than local school districts. The Butt court also pointed to “the pervasive role the State itself has chosen to assume in order to ensure a fair, high quality public education for all California students.” One scholar noted that “[t]he court strained to avoid casting the issue in adequacy terms,” notwithstanding the fact that the plaintiffs had not framed their complaint in those terms. Thus, the California Supreme Court has already come precipitously close to interpreting adequacy into the state constitution, arguably awaiting only the appropriate challenge.

In interpreting constitutional education clauses, courts have relied on a number of indicators, including the plain meaning of the language, historical analysis of constitutional framers’ intent, and other states’ interpretations of similar language. The specific provision of the California Constitution that gives rise to an adequacy claim states, “A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall

the basic right to education afforded other California students. See id. at 1243-44.
248. Id. at 1249.
249. Id. at 1253.
250. See id. at 1264. The court indicated that a constitutional violation would occur when the actual quality of a district’s program falls fundamentally below prevailing statewide standards. See id. at 1252. Evidence presented at trial convinced the court that a significant reduction in educational quality would result from a shortened school year. See id. at 1252-53.
251. Id. at 1253.
252. See id. at 1247-56.
253. See id. at 1249-51.
254. Id. at 1254.
255. Id.
256. Enrich, supra note 196, at 114.
257. See Thro, supra note 197, at 25.
encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement." This clause is one of the strongest in the nation, containing both a "purposive preamble" and a "stronger and more specific educational mandate." Noted education scholar William E. Thro asserts that courts should look to the plain meaning of such strong clauses, which reflect a deep public commitment to education. "Essential" describes the fundamental interest California places in education, while "suitable" can clearly be interpreted as adequate. The purpose for which education must be suitable or adequate is found in the phrase "preservation of the rights and liberties of the people." This phrase indicates that California's interest in education is more than merely academic—it reflects the need for the populace to be educated in order to participate in a democratic society.

Other state court interpretations of the education clauses in their constitutions provide ample persuasive authority upon which to base interpreting an adequacy requirement into the California Constitution. As discussed above, more than a dozen state supreme courts have construed their state constitution education clause to require adequacy. Their analyses have considered the intentions of constitutional framers, historical commitment to education, and other typical tools for

258. CAL. CONST. art. IX, § 1.
260. Id. (quoting Gershon M. Ratner, A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills, 63 TEX. L. REV. 777, 815 (1985)). Thro adopts Ratner's classification of state education clauses, dividing them into four categories. See id. at 22-25. Category I clauses are the weakest, merely mandating free public schools, while category IV clauses are described as the strongest, expressly making education an important duty of the State. See id. at 23-25. California's education clause falls into category III, which is the second strongest. See id. at 24 & n.31. Together, categories III and IV consist of education clauses from a total of 10 states. Id. at 24-25.
261. See id. at 28-31 (arguing that such an analysis most closely approaches framers' intent as to the magnitude of a state's duty to educate).
262. The dictionary definition of "essential" includes: "of the utmost importance: basic, indispensable, necessary." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 425 (1986) (emphasis omitted).
263. The definition of "adequate" includes "suitable to the case or occasion." BLACK'S LAW DICTIONARY 39 (6th ed. 1990).
264. CAL. CONST. art. IX, § 1.
265. See cases cited supra note 202 and discussion supra Part III.C; see also Enrich, supra note 196, appt. at 185-94 (summarizing 51 cases on a state-by-state basis); Jensen, supra note 180, app. at 44-47 (tabulating the results of adequacy and equality decisions in 61 cases).
constitutional construction. Similar analyses were used in support of constitutional protection for education in \textit{Butt} and \textit{Serrano}. But scholars further suggest that state court decisions are based largely on the inherent value of education and the intuitive appeal of a quality standard. Some go so far as to suggest that courts \textit{want} to hear adequacy-based arguments and will craft supporting decisions on any available facts.

Finally, law professor and education reformer Peter Enrich suggests that the contemporary political context significantly influences a state court’s interpretation of the education clause in that state’s constitution. Specifically, at the same time that state courts in Washington, Kentucky, and Massachusetts were reading quality requirements into their respective state constitutions, the legislatures in these states were in the process of reforming education. Thus, the judicial decisions in these states can be “understood as part of a broader political effort pointing in the same general direction.” According to Enrich, the issue of competency was obviated by courts acting in their capacity “not to displace the legislative function . . . but rather to serve as a goad or as a backstop to the [L]egislature’s accomplishment of that task.”

In California, the quality of education is at the forefront of political issues for 2000. Newly-elected Governor Gray Davis ran on a platform of educational reform. Davis’s plans focus on key components of

\begin{footnotes}
\item 266. See \textit{Rose} v. \textit{Council for Better Educ., Inc.}, 790 S.W.2d 186, 205-11 (Ky. 1989) (considering constitutional framers’ intent, Kentucky legal precedent, and education clause analysis of the West Virginia Supreme Court); \textit{McDuffy} v. \textit{Secretary of the Executive Office of Educ.}, 615 N.E.2d 516, 523-48 (Mass. 1993) (including an extensive review of Massachusetts’ history dating back to the 1600s); Tennessee \textit{Small Sch. Sys. v. McWherter}, 851 S.W.2d 139, 148-52 (Tenn. 1993) (extensively comparing similar cases in other states and reviewing constitutional debates); \textit{Pauley v. Kelly}, 255 S.E.2d 859, 865-69 (W. Va. 1979) (comparing the West Virginia constitutional debates with those in other states that have adopted similar education clause language).
\item 268. See \textit{Jensen}, supra note 180, at 21-42. Jensen suggests that “[i]n effect, the courts are taking judicial notice of the prominent value of education and using the mere existence of the education clause to advance education.” \textit{Id.} at 42.
\item 269. See \textit{Jensen}, supra note 180, at 21-26 (giving examples of cases in which courts have explicitly stated that they are looking for arguments based on the qualitative language of constitutional education clauses).
\item 270. See \textit{Enrich}, supra note 196, at 175-79.
\item 271. See \textit{id.}
\item 272. \textit{Id.} at 176.
\item 273. \textit{Id.} (footnotes omitted).
\item 274. See, e.g., Nick Anderson, \textit{Davis Promises Fast Starts on Sweeping Education Agenda}, \textit{L.A. Times}, Nov. 5, 1998, at S1; see also John Jacobs, \textit{Davis Invests Heavy}}
quality education including literacy, basic skills, and the accountability of schools for better results. To address these issues, he called a special session of the legislature dedicated to education. Furthermore, California citizens consider education a top priority and expect significant improvement.

Nevertheless, during his first year in office, Governor Davis has been criticized as "painstakingly . . . middle-of-the-road," paralyzed by fear of the "tax and spend label." Although his education initiatives have pushed forward bold change on the accountability front, Davis's refusal to increase education spending has led to calls for a statewide ballot initiative aimed at raising California's level of education support to the national average, including a proposal from the politically powerful California Teachers Association (CTA).

Fiscal and political concerns also appear to be behind the Governor's October 1999 vetoes of six special education bills sent to his desk by the Legislature. These bills...
would have, among other things, permitted foster parents to participate in the IEPs of their foster children, required evaluations of the special educational needs of children placed in protective custody, and brought California law into conformity with the federal requirements of the IDEA.

In the face of overwhelming support for the vetoed legislation, a "no" vote by the "Education Governor" can only be taken as a sign of unwillingness to take the steps necessary for real and lasting reform.

Thus, the political climate in California appears ripe for

282. See A.B. 1020, 1999-2000 Leg., Reg. Sess. (Cal. 1999) (Corbett, as amended Sept. 3, 1999), available at California Legislative Counsel, Bill Information (visited Jan. 15, 2000) <http://www.leginfo.ca.gov/pub/bill/asm/ab_1001-1050/ab_1020_bill_19990910_enrolled.html>. This bill was vetoed over fears that it would "drive up the number of referrals [for special education] at taxpayers' expense." Governor's Veto of A.B. 1020, 1999-2000 Leg., Reg. Sess. (Cal. Oct. 10, 1999), available at California Legislative Counsel, Bill Information (visited Jan. 15, 2000) <http://www.leginfo.ca.gov/pub/bill/asm/ab_1001-1050/ab_1020_vt_19991010.html>. However, Governor Davis's interpretation of state obligations are misguided as this bill would only reach children the state is already obligated to provide special education to, but who are currently falling through the cracks. If costs would increase, they are only those already owed.


Assembly Bill 1020, for example, passed unanimously through both Committee and Floor votes and found widespread support from such organizations as the Juvenile Court Judges of California and the County Welfare Directors Association. See SENATE RULES COMM., ANALYSIS OF CAL. A.B. 1020, 1999-2000 Leg., Reg. Sess. (Cal. 1999) (prepared for Sept. 7, 1999 Senate floor vote), available at California Legislative Counsel, Bill Information (visited Jan. 15, 2000) <http://www.leginfo.ca.gov/pub/bill/asm/ab_1001-1050/ab_1020_cfa_150627_sen_floor.html>.

The Governor's veto messages indicate his unwillingness to impose reimbursable local mandates, no matter how small, or to exceed the requirements of federal law by an even insignificant degree. See supra note 281. His actions were likely influenced by pending negotiations between the State and local school districts over $1.9 billion in reimbursable special education costs. See Amy Pyle, Davis Asked to Help End Special Education Funding Dispute, L.A. TIMES, Nov. 1, 1999, at A3. In 1992, an appeals court found the State liable for the costs it imposed on local schools to provide
judicial prodding in the form of a decision interpreting an adequacy requirement into the state constitution.

Taken together, these factors suggest that a court challenge would likely result in the California Supreme Court holding that a minimum level of educational quality is guaranteed by the state constitution. Clearly, the political climate is favorable for change in education. Thus, one would hope that legislative and administrative actions would make litigation unnecessary. Yet, regardless of the means for accomplishing change, the question that must next be addressed is whether change is required: Is California's current system of education constitutionally adequate?

V. IS EDUCATION IN CALIFORNIA'S SCHOOLS ADEQUATE?

This section explores the adequacy of California's education system by applying a hypothetical constitutional standard. This Comment does not assert that a constitutional challenge should be initiated in the California courts. Indeed, a lengthy court battle would be counterproductive by draining resources from the pursuit of educational objectives. However, this Comment does propose that the State look to the duty imposed by the California Constitution in making legislative and policy decisions, rather than relying solely on optional federal initiatives, such as the IDEA.

Inasmuch as state constitutional questions are addressed by the California Supreme Court, it is appropriate to examine educational adequacy from the perspective that the court might take. This section examines similar analyses performed by the high courts of other states in predicting the content and context of educational requirements that the California high court might impose on state schools. California schools are then examined to see whether they would pass such a test.

Special education is at once part of the larger system of education in California and separate from, or parallel to, general education. Disabled students are, first and foremost, students—who are entitled to the same constitutional protections as non-disabled students. If the entire system of education is inadequate, then special education will be found lacking. However, specific programs for disabled students may be deficient even services in excess of those required by federal law. See id. The Commission on State Mandates, charged with deciding how the money would be repaid, has asked the Governor to negotiate a settlement to this nearly twenty year legal battle. See id.
if general education is sufficient for the majority of non-disabled students. Such a system could be attacked as failing on both adequacy and equal protection grounds. Thus, this section looks at both the overall quality of California’s education system and the specific quality of education provided handicapped students.

Cases involving claims of constitutionally inadequate public schools have focused on three areas of inquiry: the definition of adequacy, including goals and standards; the resources available for the pursuit of these goals; and the outcome of the educational process as measured by achievement. Of these three, outcomes have proven most dispositive for a determination of constitutional adequacy. Nevertheless, outcomes depend on standards against which they can be measured, and the provision of sufficient resources to achieve them. In this section, each of these areas will be analyzed independently.

A. Goals and Standards

1. The Test

State courts emphasize the constitutional duty of their respective legislatures to define the boundaries of adequate education. Adequacy implies sufficiency for a particular purpose, and that purpose must be clearly articulated. Courts recognize their limited competence and lack of expertise in this arena. Thus, courts frequently define adequate education in broad terms and charge their respective legislatures with providing details.

In Leandro v. State, for example, the North Carolina Supreme Court ruled that the minimum standard of quality guaranteed by the North
Carolina Constitution was a "sound basic education." At a minimum, "sound basic education" provides students:

(1) sufficient ability to read, write, and speak the English language and a sufficient knowledge of fundamental mathematics and physical science to enable the student to function in a complex and rapidly changing society; (2) sufficient fundamental knowledge of geography, history, and basic economic and political systems to enable the student to make informed choices with regard to issues that affect the student personally or affect the student's community, state, and nation; (3) sufficient academic and vocational skills to enable the student to successfully engage in post-secondary education or vocational training; and (4) sufficient academic and vocational skills to enable the student to compete on an equal basis with others in further formal education or gainful employment in contemporary society.

In remanding the case for further factual determinations, the Leandro court instructed that the lower court could consider whether the goals and standards adopted by the Legislature were consistent with providing a "sound basic education." Courts in a number of other states have enumerated similar qualities against which education should be measured. The Kentucky Supreme Court, for example, defined nine characteristics of adequate schools and enumerated seven areas such schools must develop. Alabama schools must similarly promote nine enumerated abilities. Massachusetts adopted Kentucky's list of seven capabilities, while New Jersey deferred elaboration of such standards to the Legislature.

Thus, a key factor that courts look to when determining whether state legislatures have fulfilled their constitutional duty to provide adequate education is whether they have established goals and standards for students. In the absence of such standards, courts may either impose them, adapt them from other sources, or order the Legislature to adopt them.

292. Id. at 254.
293. Id. at 255.
294. See id. at 259.
296. See supra notes 208-10 and accompanying text.
297. See Opinion of the Justices No. 338, 624 So. 2d at 107-08.
298. See McDuffy, 615 N.E.2d at 554.
2. General Education Programs

California is currently in the process of adopting rigorous academic standards for elementary and secondary education. Legislation introduced during the 1995-1996 term directed the California State Board of Education (State Board) to adopt content and performance standards in core curriculum areas. Previous California law governing curriculum and assessment, including the controversial California Learning Assessment System, sunsetted in 1995. As of January 2000, content standards in various disciplines had been adopted by the State Board and performance standards were in preparation. The State of California cannot, therefore, assert that it has currently fulfilled its obligation to articulate standards as part of a state constitutional duty to provide adequate education. Nevertheless, the significant progress in this direction would likely bode favorably on the State in any court challenge.

3. Special Education Programs

The standards articulated by the State Board, however, may be criticized for failure to address the needs of students with disabilities. Official policy of the California Department of Education (CDE) holds all students to these standards, but evidence suggests that disabled students were not contemplated when state standards were proposed or adopted. Indeed, it appears that disabled students were only

303. See id. at 35-37; see also Curriculum & Instructional Leadership Branch, California Dep’t Educ., Curriculum Development and Supplemental Materials Comm’n (last modified Jan. 10, 2000) <http://www.cde.ca.gov/cilbranch/eltdiv/cdsmc.htm> (linking to timelines for completion and adoption of standards in such areas as science, history-social science, and foreign language).
305. See CALIFORNIA DEP’T EDUC., SPECIAL EDUC. DEP’T, IMPROVING SPECIAL EDUC. THROUGH COMPLIANCE: FINAL REP. OF THE A.B. 602 WORKGROUP TO THE LEGIS. AND GOV. (1999) [hereinafter A.B. 602 REPORT]. The recommendations of the Committee to the Legislature for resolving unmet state needs include:
   The superintendent shall develop and the State Board shall adopt goals and standards for the performance of individuals with exceptional needs that
considered in assessment and curriculum plans subsequent to the federal requirements of the IDEA 97. Further evidence suggests that California continues to exclude students with disabilities in the development of statewide curriculum, standards, and assessments.

One expert asserts that academic standards should at least contemplate three categories of students: 1) those who are capable of meeting academic standards given the general education curriculum; 2) those who can meet standards with special instruction and services (i.e., special education); and 3) those who are not capable of meeting academic standards. Some argue that such a framework is insufficiently broad if failure is expected from identifiable groups of students, while others view high standards merely as goals that need not be achieved by the entire population to be valid. Yet, most agree that are consistent with goals and standards for all pupils in the public education system. The superintendent shall develop and the State Board shall adopt content standards developed by the Commission Establishing Academic and Performance Standards and performance indicators that will be used to assess progress toward achieving established goals. Id. at 28. These recommendations suggest that, in the A.B. 602 Workgroup's view, existing standards are neither applicable to, nor appropriate for, disabled students. See also id. at app. 5 (proposing statutory language to establish standards and goals for exceptional students); CALIFORNIA DEP'T EDUC., SPECIAL EDUC. DIV., STATE OF CAL. IMPROVEMENT PLAN 20-25 (1998) [hereinafter STATE IMPROVEMENT PLAN] (detailing the need to form a special committee to address the requirements of the IDEA 97 amendments, including academic standards and education reform coordination for students with disabilities).

306. See A.B. 602 REPORT, supra note 305, at 25-29. In 1997, two years after the enactment of Assembly Bill 265 directing the State Board of Education to adopt content and performance standards, see supra text accompanying notes 300-01, the Advisory Commission on Special Education recommended that statutory changes would be needed in California to conform state law to the IDEA 97 mandates regarding standards and assessments as applied to disabled students. See A.B. 602 REPORT, supra note 305, at 25-29. This analysis suggests that neither the Legislature that enacted Assembly Bill 265 nor the State Board of Education implementing the statute had contemplated that statewide standards would apply to disabled students.

307. See CALIFORNIA DEP'T EDUC., SPECIAL EDUC. DEP'T, CALIFORNIA ADVISORY COMM'N ON SPECIAL EDUC. ANNUAL REP. 1997-98, at 17-19 (Patricia Winget & Elissa Provance eds., 1998) [hereinafter CACSE REPORT] (recommending that in the future, the California Department of Education actively include the concerns of special needs children in the development of statewide curriculum, standards, and assessment tests).


appropriate policy guidance is required for interpretation and that all stakeholders should be included during planning, adoption, and implementation of an accountability system.\textsuperscript{310} To the extent that guidance is unavailable, confusion will remain as to what level of achievement is expected of students with disabilities. For example, Vanderbilt Law School Professor Alex J. Hurder asserts that high academic standards are inconsistent with the \textit{Rowley} “some benefit” standard.\textsuperscript{311} Instead, he argues that high standards require schools to provide any and all related services that are necessary for children who lack the potential to pass the regular curriculum to reach his or her own maximum individual potential.\textsuperscript{312}

Thus, although California has recently made progress in defining educational expectations, it lacks academic standards that were thoughtfully designed and can be meaningfully applied to all students, including those with disabilities. Therefore, California’s system of education is not constitutionally adequate for special education students and the Legislature has not fulfilled its constitutional duty to them.

\subsection*{B. Resources}

\subsubsection*{1. The Test}

In determining whether students receive adequate education, courts also look to the availability of resources for pursuing educational goals.

\begin{flushright}
\textit{Elliot & Thurlow, Standards].}
\end{flushright}


\textsuperscript{311} See Hurder, supra note 308, at 17.

\textsuperscript{312} According to Hurder:

A child with a disability who has the potential to graduate from the regular education program should have a right to an IEP with the goal of graduating . . .

A child who does not have the potential . . . should have a right to an IEP with the goal of reaching his or her maximum educational potential. No other goal would be rational.

\textit{Id.}
Included in this inquiry are such input provisions as: per pupil expenditures; state and local facilities and durable equipment; textbooks and curriculum; and qualified educational personnel. In *Rose*, the Kentucky Supreme Court found a "definite correlation between the money spent per child on education and the quality of the education received." The *Rose* court held that Kentucky schools, which then ranked forty-fifth nationally in per pupil expenditures, were underfunded and inadequate. Similarly, the Massachusetts Supreme Court viewed crowded classes, neglected libraries, the inability to attract and retain high quality teachers, and the lack of teacher training as indicators of inadequacy.

The consolidated cases of *Alabama Coalition for Equity v. Hunt, Inc.* and *Harper v. Hunt* are unique in that the court was asked to evaluate the educational mandate both for children in general and for disabled children in particular. The court "emphasize[d] that schoolchildren with disabilities have the same constitutional right to an equitable and adequate education as all other schoolchildren." Furthermore, the court recognized that strict per pupil spending allowances were not an adequate means of providing for disabled and disadvantaged students whose needs differ from those of the general education population. Thus, the court overturned the State's total enrollment method of funding special education because it did "not take into account the

314. *Rose*, 790 S.W.2d at 198.
315. See id. at 197.
316. See *McDuffy*, 615 N.E.2d at 553.
318. See id. at 112.
319. Id. at 162.
320. See id. at 125-26.
321. The total enrollment method bases state funding for special education on total pupil counts in a school district, regardless of the percentage of students with special needs or the nature and severity of their disabilities. See id. at 125.
number or the cost of educating those children," and failed to provide sufficient staffing, monitoring, or special education teacher training.

Thus, an adequate state system for education must have sufficient facilities and provisions for students to learn, achieve, and eventually participate in society. Both general and special education programs must be funded at a level sufficient to achieve these goals for the public school system to pass state constitutional muster.

2. General Education Programs

In terms of the resources allocated for education, California schools paint a dismal picture. In a recent report, California ranked dead last among states for adequacy of expenditures, spending only $4789 per pupil in 1997. California received similarly low marks for other indicators such as the number of students per available computer, teacher salaries, and school buildings in disrepair. U.S. Department of Education statistics indicate that California had the second highest ratio of students to teachers in elementary and secondary schools among states from 1990 to 1994, and the highest ratio in 1995. During 1998, school districts across the state were forced to raise funds by referendum to repair deteriorating facilities. San Diego Unified School District, for example, requested local taxpayers approve a $1.51 billion bond measure to fix leaky roofs, crumbling walls, hazardous lead pipes, and faulty wiring in the state's second largest school district. Clearly, the

322. Id.
323. See id. at 126.
324. See Craig D. Jerald et al., Quality Counts '99: The State of the States, EDUC. Wk., Jan. 11, 1999, at 106, 120. California expenditures were more than $1100 less per pupil than the national average and almost half that of the highest spending state, New Jersey, with an average expenditure of $8436 per pupil (note that these figures are adjusted for regional cost differences). See id. In 1996, California spent only $30.78 per $1000 in state wealth (gross state product). See id. at 121. Only six other states spent less. See id.
325. See id. at 121. In 1998, California tied for the second highest number of students per multimedia computer. See id. Only two states in 1994 reported a greater percentage of schools in inadequate condition. See id. In 1997, California teachers' salaries were nearly $1200 less than the national average. See id.
328. See School Bond Issues, SAN DIEGO UNION-TRIB., Oct. 12, 1998, General Election Voter's Guide (Special Section), at A22; see also Maureen Magee, Repairs to
resources available to general education programs in California are insufficient to provide adequate education to the children of the state.

3. Special Education Programs

The picture for special education students in California is equally bleak. The Education Finance Statistics Center of the U.S. Department of Education reports that there are no recent, comprehensive, and accurate data for public school expenditures on special education. Voluntary, informal reporting of 1993-1994 expenditures revealed that California spent close to the median amount (in actual dollars) of twenty-four participating states. Yet these expenditures have been insufficient to provide such essential components of special education instruction as adequate staffing—according to CDE statistics, the state faces a critical shortage of qualified special education teachers.

The method of funding special education in California is also suspect. In 1997, the state revised the method by which it reimburses local education agencies, called SELPAs, for the costs of special education. Assembly Bill 602 changed the funding formula from one

San Diego Schools Launched, SAN DIEGO UNION-TRIB., Nov. 5, 1998, at B1 (reporting on the passage of the San Diego bond measure and the repairs that will be completed with the additional funds).


330. See id. at tbl.1. The figure of $5580 was reported with only marginal confidence and may overestimate relative expenditures because data were not adjusted for regional cost variations. See id.

331. See STATE IMPROVEMENT PLAN, supra note 305, at 8-12. During the 1996-1997 school year, there was an unmet demand for more than 6000 additional special education teachers in California. See id. at 9. Nearly a third of all special education teachers were not fully qualified, relying instead on emergency permits and waivers. See id.

332. SELPAs are Special Education Local Plan Areas. See CAL. EDUC. CODE § 56195.1(d) (West 1998). Large school districts of "sufficient size and scope" are coextensive with their corresponding SELPAs. Id. § 56195.1(a). Smaller school districts are required to consolidate their programs under a joint local plan to provide special education services. See id. § 56195.1(b). Thus, the smaller school districts in a geographic area are consolidated as a SELPA to jointly provide services to their collective students. See id.

based on personnel costs to one based on total pupil counts. Although the current system is designed to provide more equitable reimbursement throughout the state, it is still a capitated system that funds only a percentage of the costs of services, rather than the actual cost of special education or the added cost for disabled students’ education relative to non-disabled students. According to the Center for Special Education Finance (CSEF), state funding must reflect the real costs of providing special education and related services in order to pass state constitutional muster. Thus, the current system in California, which is based on neither the actual number of special education students in a SELPA nor the actual costs of providing services to those students, is an inappropriate and inadequate method for funding special education under CSEF’s analysis.

334. See id. at 4789-90. Total pupil counts include a census of all students, not just students with disabilities. See id. at 4790. Thus, under Assembly Bill 602, SELPAs will be reimbursed for funding special education as a function of the number of students served in all education programs rather than the number served in special education. See id. at 4790-91. Such a funding formula, which arbitrarily determines that only a specified percentage of students will be funded for special education regardless of the actual percentage identified, can provide a disincentive to identifying students who genuinely need services if the total number of students in need exceeds state limits. See Thomas B. Parrish & Jay G. Chambers, Financing Special Education, FUTURE CHILDREN, Spring 1996, at 121, 132. The California special education funding system is substantially similar to the total enrollment funding method found unconstitutional in Alabama. See supra notes 317-23 and accompanying text. See generally FRASER, supra note 310, at 24 (detailing the five most common formulas states use for special education reimbursements to school districts).

335. The Legislature found that the disparity between school districts in funding special education was as high as five-fold under the existing personnel-based system. See Poochigian and Davis Special Education Reform Act, ch. 854, 1997 Cal. Legis. Serv. at 4792. The existing system also was found to under-fund special education and provided inappropriate fiscal incentives for special education placements. See id. However, critics of the new funding system say it makes denying services to save money more attractive to school administrators. See Gittelsohn & Kelleher, supra note 63, at A1. One parent called schools “the HMOs of education” under the revised state financing plan. Id.

336. CSEF is one of three national research centers funded by the Office of Special Education Programs in the U.S. Department of Education to conduct and disseminate the results of policy, resource, and cost analyses in special education at the federal and state levels. For more information about CSEF, see Center for Special Educ. Fin., About CSEF (last modified Oct. 15, 1999) <http://csef.air.org/about.html/>.

337. See Deborah A. Verstegen, Landmark Court Decisions Challenge State Special Education Funding, CSEF BRIEF No. 9, Feb. 1998, at 1, 1-4 (Ctr. for Special Educ. Fin., Am. Insts. for Research, Palo Alto, Cal.) (reviewing recent state court decisions in Alabama, Wyoming, and Ohio that affect special education funding). Verstegen concludes that courts require special education financing systems to be equitable in that they are uniform across a state, cost-based, and legitimately justifiable as determined by research studies. See id. at 4.

338. For a comprehensive review of criteria that should be considered when evaluating special education funding formulas, see Parrish & Chambers, supra note 334, at 133-35. Parish & Chambers discuss the political and fiscal concerns as well as the
Compliance issues underscore the inadequacy of special education resources in California. Although compliance is not necessarily dispositive of state obligations under the constitution, non-compliance is an indication that needs are not being met and services are not being provided.

In 1995, the Office of Special Education Rehabilitation Services (OSERS) of the U.S. Department of Education found California out of compliance with six general areas of federal law. The Corrective Action Plan (CAP) developed by the state promised improvements in the provision of services identified on IEPs, guaranteeing a continuum of placement options necessary for LRE requirements, improved staff training, and increased vigilance in identifying and remediating non-compliant school districts. Yet in 1998, a legislative task force reported that “[i]n recent years, three LEAs in California have experienced systemic, persistent noncompliance that led to major federal and state monitoring efforts or litigation.” The report also concluded

legal requirements for special education funding. See id. The authors suggest that special education funding mechanisms should be designed with fourteen goals in mind. See id. at 134-35. These goals are: 1) understandability and avoidance of unnecessary complexity; 2) equity of distribution between districts in a state; 3) adequacy of funds to support services; 4) predictability; 5) flexibility in implementation of programs; 6) identification neutrality; 7) reasonableness of reporting burden; 8) fiscal accountability; 9) link of funding to cost-based differences in providing services; 10) placement neutrality; 11) cost-control such that growth is stabilized; 12) outcome accountability; 13) conceptual connection to general education funding; and 14) political acceptability to minimize disruptive effects of implementation. See id.

339. Compliance, in the context of special education, refers to conformity with federal and state laws and regulations governing the provision of education to disabled students. See generally BACK TO SCHOOL, supra note 10 (describing the compliance/enforcement scheme under the IDEA). Generally, these consist of the provisions of the IDEA and the regulations that implement the Act. See id. Under the Rowley test, school districts that do not follow the procedures of the IDEA (i.e., are non-compliant) are not providing appropriate education to disabled children. See Board of Educ. v. Rowley, 458 U.S. 176, 206-07 (1982).

340. See STATE IMPROVEMENT PLAN, supra note 305, at 15-16. The areas of non-compliance were general supervision (i.e., state monitoring of local district compliance), LRE, transition, FAPE, due process, procedural safeguards, and evaluation. See id. In short, the State demonstrated deficiencies with the full spectrum of IDEA provisions. See id.

341. A CAP is the vehicle by which a state ensures that it will come into compliance with areas of federal special education law upon a finding of non-compliance. See generally BACK TO SCHOOL, supra note 10 (describing compliance-monitoring, complaint-handling, and enforcement functions of the federal government). CAPs are also used by a state to ensure compliance of local school districts.

342. See STATE IMPROVEMENT PLAN, supra note 305, at 15-16.

343. A.B. 602 REPORT, supra note 305, at 49. LEAs are local education agencies,
that California was ill-equipped to address such cases. 344 The San Diego Unified School District, for example, remains out of compliance despite repeated CAPs for nearly ten years and the implementation of a state-appointed special education monitor. 345 The Los Angeles Unified School District currently operates under a consent decree. 346 In a 1999 letter accompanying the follow-up monitoring report on CDE, conducted by the U.S. Department of Education’s monitoring arm, the Office of Special Education Programs (OSEP), Assistant Secretary of Education Judith E. Heumann and OSEP Director Thomas Hehir detailed their concerns:

Although the California Department of Education has made some progress in correcting some of the deficiencies noted in those earlier monitoring reviews, . . . [OSEP] is deeply concerned about continuing noncompliance, most notably the California Department of Education’s continuing failure to exercise its general supervisory responsibility over local school districts in the [s]tate, including ensuring that local school districts correct identified deficiencies in a timely manner. As a result of this failure . . . serious deficiencies have been allowed to exist for a number of years, impacting services for children with disabilities. . . . [OSEP] has documented many of these continuing deficiencies in its prior monitoring reports . . . of 1988, 1992, and 1996. The June 1998 follow-up visit documented that many previously identified problems remain uncorrected. 347

See id. at 7.

344. See id. at 37-45.


346. See Amy Pyle, Judge’s OK Opens Door to Overhaul of Special Education, L.A. TIMES, Apr. 16, 1996, at B3 (reporting that the school district, which acknowledged breaking federal and state special education laws and thereby violated the rights of 65,000 disabled children, moved to settle the case fearing a drawn-out legal battle similar to that waged for 17 years in New York City); see also Mary Lou Aurelio, Special Education, CITY NEWS SERVICE, Oct. 20, 1997, available in LEXIS, News Library, Arcnws File (detailing specific provisions of the settlement); Dan Lee, LAUSD Board Approves Consent Decree; Court Hearing Next, CITY NEWS SERVICE, Mar. 14, 1996, available in LEXIS, News Library, Arcnws File (noting that the settlement calls for a massive overhaul of L.A. special education programs to provide the requisite continuum of program options).

Parents statewide continue to report dissatisfaction with special education provided to their children and complaints to CDE continue to increase.\footnote{348} Overall, the resources provided to both general and special education students in California are constitutionally inadequate because they are insufficient to fund the facilities, staff, and programs necessary for students to achieve academic success and become productive members of society. Under the conditions present in California schools, it is difficult to see how any student can be educated on par with national expectations. Clearly, California must provide additional resources in order to fulfill its constitutional mandate.

C. Outcomes

1. The Test

Perhaps the single most important factor that courts consider in adequacy decisions is student achievement. The North Carolina Supreme Court suggested that “‘output’ measurements may be more reliable than measurements of ‘input,’”\footnote{349} inasmuch as “education that does not serve the purpose of preparing students to participate and compete in the society in which they live and work is devoid of substance and is constitutionally inadequate.”\footnote{350} According to William Kent Packard, the court was particularly persuaded by plaintiff-parties’ argument that absent a right to adequate educational outcomes, “the State could fulfill its constitutional duties by providing children with mandatory, tuition-free access to ‘warehouses’... where no real learning occurred.”\footnote{351}

\footnote{348} See A.B. 602 REPORT, supra note 305. at 49. During the past three years alone, complaints to the CDE have doubled. See id. An estimated 700 complaint were expected for the 1998-1999 school year. See id.


\footnote{350} Id. at 254.

\footnote{351} William Kent Packard, Note, A Sound, Basic Education: North Carolina Adopts an Adequacy Standard in Leandro v. State, 76 N.C. L. REV. 1481, 1502 (1998). Packard also cites reports that Chief Justice Mitchell interrupted the defense attorney during his oral testimony to ask: “Shouldn’t there be something at the end of the bus ride?” Id. at 1503 (quoting Steve Ford, A Sound, Basic Step Toward Better Schools,
Student achievement on standardized tests has played a key role in assessing outcomes.\textsuperscript{352} But in lieu of or in addition to test results, courts also look to independent indicators of student success including dropout rates, college attendance, and preparation for the workforce.\textsuperscript{353}

In short, students' outcomes are the definitive measure of adequate education. Adequate education must prove sufficient to prepare students for life as productive citizens. Comparisons of tests scores and other indicators with expected norms provide the best means for determining whether education has provided meaningful preparation for life.

2. \textit{General Education Programs}

California students' performance has been consistently low in recent years compared to other states. In 1994, California ranked thirty-eighth of thirty-nine states participating in a national test for fourth grade reading ability.\textsuperscript{354} 1996 scores for both fourth grade and eighth grade math ability were similarly poor.\textsuperscript{355} Among other indicators, California recently ranked forty-second among the states for highest school dropout rates.\textsuperscript{356} In 1996, California ranked fifth nationally in its juvenile violent crime index.\textsuperscript{357}

These data indicate that outcomes for California students are well below the national average. Even the state's own legislative analyst acknowledges the "wide range evidence of poor student achievement."\textsuperscript{358}

\textsuperscript{352} See, e.g., Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 197 (Ky. 1989) (noting low scores of Kentucky students on the ACT scholastic achievement test); Leandro, 488 S.E.2d at 259-60; DeRolph v. State, 677 N.E.2d 733, 762 (Ohio 1997) (finding that in 1993, 17,000 Ohio high school seniors had not passed their ninth grade proficiency exam, after at least six opportunities to do so).

\textsuperscript{353} See, e.g., Opinion of the Justices No. 338, supra note 317, at 136-37 (stating that Alabama ranked 49th in its ability to graduate students after 12 years of school; most of those who then attended college required remedial courses); Rose, 790 S.W.2d at 197 (noting that only 68.2\% of Kentucky's ninth graders were reported to eventually graduate high school).

\textsuperscript{354} See Jerald et al., supra note 324, at 111. Only 18\% of students were proficient by the National Assessment of Educational Progress (NAEP) test and more than half were reading below a basic level of competency. See id. NAEP is commonly known as "the nation's report card." GRADING THE NATION'S REPORT CARD 1 (James W. Pellegrino et al. eds., 1999).

\textsuperscript{355} See Jerald et al., supra note 324, at 110. Less than twenty percent of students tested were proficient at math. See id. Fifty-four percent and forty-nine percent of fourth and eighth graders, respectively, were performing below a basic level of competency. See id.


\textsuperscript{357} See id. at 9-7.

\textsuperscript{358} PAUL WARREN ET AL., OFFICE OF THE CAL. LEGISLATIVE ANALYST, A SPECIAL SESSION GUIDE TO K-12 REFORM 16 (1999).
Based on these results, students in California have not been provided education that is adequate to meaningfully prepare them for life in California or any other state.

3. Special Education Programs

Data for the outcomes of special education students are far less available for the simple reason that disabled students, both nationally and in California, are overwhelmingly excluded from standardized tests.\textsuperscript{359} 1998 was the first year that California included disabled students in standardized testing.\textsuperscript{360} Inclusion of disabled students was clearly an afterthought, compelled by the IDEA 97 reforms.\textsuperscript{361} California selected a testing instrument, the Stanford 9 Achievement Test, which was not designed for students with disabilities and has not been validated for administration to students given “non-standard” accommodations.\textsuperscript{362} As a result, comparative test results have not been reported for special education students.\textsuperscript{363} Furthermore, at least ten percent of disabled students are not able to participate in the Stanford 9 Achievement Test—even when non-standard accommodations are used.\textsuperscript{364}

Longitudinal follow-up of special education students’ postsecondary education or employment status is not performed in California.\textsuperscript{365} However, data on high school graduation and dropout rates are available. In 1997, only 20.7\% of the total potential graduates with disabilities left high school with either a diploma or certificate of differential

\textsuperscript{359} See RONALD N. ERICKSON & MARTHA THURLOW, STATE SPECIAL EDUCATION OUTCOMES, 1997: A REPORT ON STATE ACTIVITIES DURING EDUCATION REFORM (Nat’l Ctr. on Educ. Outcomes, Univ. of Minn., Minneapolis, Minn., 1997), microformed on ERIC, Fiche ED 415 626 (ERIC Document Reprod. Serv., Computer Microfilm Int’l Corp.).

\textsuperscript{360} See STATE IMPROVEMENT PLAN, supra note 305, at 5.

\textsuperscript{361} See A.B. 602 REPORT, supra note 305, at 25-27.

\textsuperscript{362} See CACSE REPORT, supra note 307, at 18-19; STATE IMPROVEMENT PLAN, supra note 305, at 5. Non-standard accommodations include Braille, revised test formats, and flexible scheduling. See CACSE REPORT, supra note 307, at 18. Most students taking the Stanford 9 with non-standard accommodations were special education students. See STATE IMPROVEMENT PLAN, supra note 305, at 5.

\textsuperscript{363} See CACSE REPORT, supra note 307, at 18-19; STATE IMPROVEMENT PLAN, supra note 305, at 5.

\textsuperscript{364} See Memorandum from Dr. Alice D. Parker, Director, Special Education Division, California Department of Education, to Special Education Local Plan Area Directors et al. (Mar. 20, 1998) (on file with author).

\textsuperscript{365} See STATE IMPROVEMENT PLAN, supra note 305, at 6.
proficiency.\textsuperscript{366} By comparison, 66.3\% of general education students graduated with a diploma during the same time.\textsuperscript{367} The percentage of 1997 high school graduates who had been in special education was only 4.4\% compared to more than 11\% of the total statewide enrollment.\textsuperscript{368}

Although these data reveal little about the comparative national outcomes of California's special education students, it is clear that regular education students do poorly in California and disabled students do worse. Outcomes for neither group can be described as adequate.

In summary, the State of California fails in every aspect of its duty to provide a minimum quantum of education to students in both general and special education programs. The current system of schools can thus be characterized as unconstitutional by virtue of its inadequacy. Parents and students should demand that the Legislature fulfill its constitutional obligation by making statutory changes necessary to remedy deficiencies in standards, resources, and outcomes for all students.

\section*{VI. IMPROVING SPECIAL EDUCATION IN CALIFORNIA}

This section suggests strategies that might be taken to improve the quality of special education in California. It is not intended to be an exhaustive survey. Rather, it is intended to highlight promising approaches that have been or could be implemented in pursuit of high quality special education.

The specific examples presented in subsection B are intended as stand-alone suggestions that can be effectively applied in the absence of more sweeping and comprehensive education reforms. Such provisions should, nevertheless, be considered as only part of an overall effort to improve educational quality in California. This section, therefore, begins with a consideration of special education reform in the context of system-wide changes in education.

\subsection*{A. General Considerations}

California is well-known for frequent change in education policy, with dramatic shifts from one extreme to another.\textsuperscript{369} Perceived deficiencies

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366. See id. at 5. A certificate of differential proficiency indicates attainment of goals and standards established by the child's IEP. See CACSE REPORT, supra note 307, at 17-18.
367. See STATE IMPROVEMENT PLAN, supra note 305, at 5.
368. See id.
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are addressed by legislative, regulatory, and/or policy swings that often create as many problems as they solve.\textsuperscript{370} For example, the 1988 decision to implement a whole-language reading approach, to the exclusion of phonics-based instruction, is commonly viewed as the cause of current widespread student failure.\textsuperscript{371} It has taken California nearly a decade to correct this mistake.\textsuperscript{372}

Similar education disasters can only be avoided by cautious and reasoned decision-making by the State Legislature and administration. However, California must also recognize that policy implementation at the local level can be a major obstacle to effective state actions.\textsuperscript{373} Policy can be “remade” at various levels of the California education apparatus.\textsuperscript{374} Policy that is too broad or unclear sets the stage for failure through a frustrating cycle in which

legislation, regulations or court decisions are met at the local level by confusion, resistance, or painfully slow and half-hearted compliance; judges, agencies, and regulators eventually respond by tightening rules and toughening enforcement; and local institutions ultimately “comply” by adhering narrowly and legallyistically to the letter of the law, which has become by then exceedingly intricate.\textsuperscript{375}

\textsuperscript{370.} See id.; see also Richard Lee Colvin & Elaine Woo, \textit{No One Knows if Money Is Well Spent}, L.A. TIMES, May 19, 1998, at R1 (highlighting some of the more than 40 different versions of education reform California has attempted during the past 20 years, and concluding that the absence of any “real measures for accountability” has resulted in low student achievement and uncertainty about the effectiveness of instruction); Duke Helfand, \textit{California Ranks Second to Last in U.S. Reading Test}, L.A. TIMES, Mar. 5, 1999, at A1 (noting California’s troubling tendency to embrace fads and that “California has flip-flopped from one assessment to another, leaving no consistent measure of progress”).


\textsuperscript{373.} See FULCHER, \textit{supra} note 2, at 3 (discussing the tendency for “gaps” to develop between policy and practice as a major cause of policy failure).

\textsuperscript{374.} Id. at 116 (emphasis omitted).

\textsuperscript{375.} Id. (quoting P. Berman, \textit{From Compliance to Learning: Implementing Legally Induced Reform}, in \textit{SCHOOL DAYS, RULE DAYS: THE LEGALIZATION AND REGULATION OF EDUCATION} 46, 54 (D. L. Kirp and D. N. Jensen eds., 1986)).
An additional impediment to effective reform can come from political posturing during negotiations between various stakeholders. Resistance by teachers, for example, has impeded the development of stiff accountability measures in Vermont where political bargaining has played a key role in the complex negotiation of that state’s education reforms.

Kentucky, on the other hand, is one of the few states that has successfully implemented tough accountability measures, including explicit rewards and punishments for educators, based on student outcomes. In contrast to Vermont, Kentucky’s reforms were the product of a court order rather than political bargaining in the legislative or administrative branch.

The effects of radical, non-cooperative strategy can also be seen in the PARC case. Attorneys for the plaintiffs viewed school officials as unwilling to develop, fund, and provide appropriate education for disabled students in Pennsylvania. Instead of negotiating, the plaintiffs adopted a confrontational posture and prevailed in court, effectively achieving their goals without conceding to school officials’ concerns. Thus, those opposed to special education reforms would be well-advised to consider the risks of exerting excessive political pressure: perceived opposition may provide the impetus for a lawsuit, which ultimately can result in more dramatic, systemic reform than political cooperation.

The reasoned approach to education reform will consider the broadest possible scope of competing interests while advancing the primary goal of improving outcomes for disabled students. A comprehensive framework of considerations has been set forth by researchers from the

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376. See Cohen, supra note 369, at 117-19.
377. See id. at 117.
378. See id. 379. See id. Researchers and reformers have, nevertheless, expressed concerns about whether Kentucky’s reforms will be sustained over time. See Jacob E. Adams, Jr., School Finance Policy and Students’ Opportunities to Learn: Kentucky’s Experience, FUTURE CHILDREN, Winter 1997, at 79, 89-94. They have identified five challenges to the systemic reforms in that state: (1) to create capacity at all levels of the educational system, (2) to implement the various components of reform in a reasonable sequence, (3) to avoid re-creating a stifling top-down bureaucracy, (4) to foster the public and professional support needed to sustain change over time, and (5) to develop mechanisms for continuous learning and adaptation. Id. at 91.
381. See id.
382. See id.
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Education and Public Sector Finance Group. Although the criteria developed by this group were intended primarily to address special education finance issues, the authors outline the following principles, which are broadly applicable to all policy concerns related to special education:

- **Adequacy**: Resource allocation and program development should have the provision of a basic level of quality education to all students as their main goal.
- **Outcome accountability**: A statewide system for demonstrating satisfactory progress of all students should be developed; monitoring should be based on measures of student outcomes.
- **Connection to general education**: Policy should support a clear conceptual link between special education and general education; integration of funding will likely encourage integration of services.
- **Equity**: Resources should be distributed to ensure comparable program quality throughout the state.
- **Placement neutrality**: A continuum of program options must be available to students throughout the state; general policy and funding mechanisms should not be based on the type of educational placement.
- **Fiscal accountability**: Accounting procedures should ensure funds are used appropriately while containing excessive or inappropriate costs.
- **Cost-based**: State support should reflect actual costs of providing services.

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383. See Parrish & Chambers, supra note 334, at 133-35. Parrish and Chambers are the co-directors of the Education and Public Sector Finance Group, a private, non-profit division of the American Institutes for Research, which is involved in research addressing the national agenda for special education finance and the conduct of federal and state studies of the impact of special education finance reform. See Center for Educ. Fin., About CSEF (visited Oct. 18, 1999) <http://www.air.org/csef_hom/tom.html>.
384. See Parrish & Chambers, supra note 334, at 133-35.
385. See id. at 134.
386. See id. at 135.
387. See id.
388. See id. at 134.
389. See id. at 135.
390. See id. at 134.
391. See id.
• Cost control: Patterns of growth should be stabilized over time.\textsuperscript{392}
• Identification neutrality: Policy should not provide inappropriate incentives to either label students for special education or to arbitrarily contain special education populations.\textsuperscript{393}
• Understandability: The system and its underlying policy should be easily understood by concerned parties; regulation should avoid unnecessary complexity.\textsuperscript{394}
• Flexibility: Local agencies should be given a degree of flexibility to deal with unique local conditions in an appropriate and cost-effective manner; maximum latitude in resource use should be permitted in exchange for outcome accountability.\textsuperscript{395}
• Reasonable reporting burden: Record keeping and its resultant cost should be kept to a reasonable level.\textsuperscript{396}
• Predictability: Policy should allow local education agencies time to plan for the provision of services over both the short- and long-term.\textsuperscript{397}
• Political acceptability: Implementation of policy should avoid disruption of existing services and major short-term losses in funds.\textsuperscript{398}

This Comment suggests that the State of California should employ the criteria enumerated above, or a similar checklist, when developing special education policy and law. Such a list would go far to avoid the untoward effects of "knee-jerk" policy making and remaking that has characterized contemporary education practices in California by forcing policymakers to consider competing interests and objectives that affect education in both the short- and long-term.

B. Specific Suggestions

1. Including Special Education Perspectives

Special education and general education have developed as parallel systems, each with their own policies, management, and evaluation systems.\textsuperscript{399} Disabled students have generally not been considered during

\textsuperscript{392} See id. at 135.
\textsuperscript{393} See id. at 134.
\textsuperscript{394} See id.
\textsuperscript{395} See id.
\textsuperscript{396} See id.
\textsuperscript{397} See id.
\textsuperscript{398} See id. at 135.
\textsuperscript{399} See Geenen et al., supra note 11, at 5.
general education reform. When students with disabilities are excluded from consideration and participation in standards, curriculum, and testing development, they are disempowered; they become invisible to the system. Exclusion during development stages often results in exclusion from reform initiatives designed to improve outcomes, as well as exclusion from accountability for outcome failures. Adequate education can only be provided if special education is considered an integral part of state education at all stages of planning, development, and implementation. Thus, the first step in ensuring adequacy for special education students is to include these students and their needs in all statewide and local decisions regarding education.

A few states have made progress toward including disabled students' perspectives in education reforms. For example, special educators participated in curriculum and standards development committees in Kentucky, Vermont, and Nebraska. In New Jersey, special educators are helping to develop assessments to make sure that disabled students' needs are taken into account while tests are being created. General and special education teachers in Colorado are looking together at ways to assist students with diverse needs in meeting state standards.

400. See id. at 5-7. For example, although 50% of states indicate that educational standards are applicable to "all" students, only 8% of these define "all" as including disabled students. See id at 7. Even when disabled students are included in state and local testing, their scores are often discarded and they are, therefore, excluded from accountability and reform efforts. See id.

401. See ELLIOTT & THURLOW, ASSESSMENT AND ACCOUNTABILITY, supra note 153, at 11; Thurlow et al., supra note 310, at 3; see also ELLIOTT & THURLOW, STANDARDS, supra note 309, at 9 (listing professional education standards setting groups and noting that most have not been very concerned with including disabled students, which they consider a "special interest group," when developing test instruments). See generally JAMES E. YSSELDYKE ET AL., ACCOUNTABILITY FOR THE RESULTS OF EDUCATING STUDENTS WITH DISABILITIES: ASSESSMENT CONFERENCE REPORT ON THE NEW ASSESSMENT PROVISIONS OF THE 1997 AMENDMENTS TO THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (Nat'l Ctr. on Educ. Outcomes, Univ. of Minn., Minneapolis, Minn., 1998), microformed on ERIC, Fiche ED 425 588 (ERIC Document Reprod. Serv., Computer Microfilm Int'l Corp.).

402. See YSSELDYKE ET AL., supra note 401, at 2; Thurlow et al., supra note 310, at 1-3.


404. See FRASER, supra note 310, at 19.

405. See id. at 20.

406. See id. at 19.
If California is to provide adequate education, it must follow these states’ lead in replacing the rhetoric of including all students in educational policy with actual practice and commitment.

2. Standards

Some stakeholders fear that adapting standards to meet the needs of students with disabilities will “dumb down” or reduce the overall quality of education. Furthermore, a paradox exists between the individualization of special education and the generalization implied by standards.

Several approaches to the problem of designing standards to include special education students have been implemented by other states. Some states have expanded their standards to encompass the spectrum of disabled students’ potentials. Alternative standards, including life skills, have also been used. Another approach is to provide a single set of high standards, but describe various levels of proficiency. Thus, the college-bound student might strive for the highest level of proficiency, while the cognitively-impaired student may be directed to a lower level of proficiency within the same range of content areas.

407. Elliott & Thurlow, Standards, supra note 309, at 11; Geenen et al., supra note 11, at 6.
408. See Elliott & Thurlow, Standards, supra note 309, at 13-16; Ysseldyke et al., supra note 401, at 6; see also Educating One and All, supra note 403, at 151-52 (describing current approaches to standards-based education reform and the complexities of including students with IEPs).
409. See Elliott & Thurlow, Standards, supra note 309, at 13-16 (discussing the merits of various approaches to standard setting that include disabled students).
410. See Educating One and All, supra note 403, at 137; Elliott & Thurlow, Standards, supra note 309, at 14-16; Fraser, supra note 310, at 8.
412. Elliott & Thurlow, Standards, supra note 309, at 13-14; Geenen et al., supra note 11, at 7.
413. The use of individual student’s IEP goals has been suggested both as standards and as measures of achievement. See A.B. 602 REPORT, supra note 305, at 27; see also Elliott & Thurlow, Standards, supra note 309, at 14-15 (arguing some of the merits and limitations of IEP-based standards). However, this Comment strongly urges against using IEP goals for either accountability or monitoring of curriculum and instruction efficacy. Goals and standards must be independent and objective. In contrast, IEPs are intended to be individualized, not standardized. Furthermore, the IEP team must be able to design and implement a child’s educational program free from the conflicts that may arise from team members’ accountability concerns. To suggest that instructional personnel on an IEP team should design the standards against which their own performance may be assessed is much like suggesting that law students should compose,
Experts suggest that direction is needed to avoid the “dumbing down” of standards to accommodate disabled students; it is essential to provide handicapped students the opportunity to learn and achieve their potential.414 They also suggest that insufficient data exist to accurately predict the full potential of many disabled students.415 Yet guidelines and standards need not be static—they can and should reflect changing knowledge about education.

Standards are only one part of a systematic, coordinated effort of curriculum development, teacher training, and methodological improvement.417 Standards should set the stage for instruction.418 Standards should define what is to be taught and instruction should be tailored to those standards.419 It is senseless to have standards without giving students the tools to achieve them; students must be taught what is considered to be important.420
3. Research and Coordinated Development Strategies

Standards, curriculum, and measurements of achievement should be in a constant state of communication. To this end, objective research on instructional methods and education policy is a central component of effective education reform. Although some researchers suggest that education is not amenable to scientific methods because of the complexities involved in applying theory to real-life situations, most others disagree. Indeed the need to account for variability forms the basis for compelling arguments supporting the use of scientific methods. Leading education activist Ed Martin suggests: “Where we’ve gone wrong in special education is that we haven’t followed how kids have done. We have not interpreted ‘appropriate’ as empirically derived by student outcomes. We have used argument instead of data...” Without data,” Martin asserts, “all we have are assumptions.”

Kentucky has made enormous strides in the area of research and educational policy development. The decision in Rose required that aligning and integrating the content of the assessment within the daily routine of instruction.

421. See, e.g., Deborah J. Gallagher, The Scientific Knowledge Base of Special Education: Do We Know What We Think We Know?, 64 EXCEPTIONAL CHILDREN 493, 493-500 (1998). Gallagher asserts that special education research has failed to provide law-like generalizations essential to explaining, predicting, and controlling the objects of study. See id. at 495-59. The author contrasts such results from special education research with principles of scientific knowledge, which she characterizes as cumulative, progressive, and able to reach resolutions about problems. See id. Since special education does not conform to the principles of scientific inquiry, the author concludes that special education cannot be addressed scientifically and should, therefore, be addressed within a different ideological frame of reference. See id. at 499-500.

422. See, e.g., Judith Stephenson & John Imrie, Why Do We Need Randomized Controlled Trials to Assess Behavioural Interventions?, 316 BRIT. MED. J. 611, 611 (1998); Joan Beck, Education ‘Reform’: Schools Shouldn’t Be Subjected to Unconfirmed Theories. DALLAS MORNING NEWS, Mar. 8, 1998, at 53 (“Standards for what passes as acceptable research often are inadequate. Too often, fads based on little but theory or political expediency are pushed on powerless teachers while proven techniques... are discounted and research about the neurological development of the brain is ignored.”); Robert Holland, Editorial, Would You Trust Your Life to Ed-Faddists?, RICHMOND TIMES-DISPATCH, Dec. 30, 1998, at A11, available in 1998 WL 2054819. According to Brookings Institute fellow and education analyst Diane Ravitch, “education should be more like medicine in relying on canons of scientific reliability to protect the innocent from specious theories and unproven remedies.” Id.

423. See Stephenson & Imrie, supra note 422, at 611. The authors consider controlled experimentation as the only way to minimize bias, avoid false conclusions, and account for the known and unknown factors that influence outcomes. See id.


425. Id.

426. For a detailed discussion of Rose v. Council for Better Education, Inc., 790 S.W.2d 186 (Ky. 1989), see supra Part III.C.
Kentucky re-work its entire system of education.\textsuperscript{427} The Kentucky Education Reform Act (KERA)\textsuperscript{428} implemented a coordinated system of research, teacher training, curriculum development, assessment, and reporting.\textsuperscript{429} Key components of KERA include the development of content standards and the alignment of goals through implementation of the Kentucky Instruction Results Information System (KIRIS).\textsuperscript{430} KERA also established the Kentucky Institute for Education Research Board to coordinate the study of education reform and its implementation.\textsuperscript{431} During the first six years of implementation, KERA resulted in substantial improvements in academic achievement and increased opportunities for inclusion of disabled students in academic programs and assessments.\textsuperscript{432}

Although the jury is still out on many aspects of education reform in Kentucky, KERA provides a framework for the continual monitoring and refinement of programs designed specifically to provide adequate education. Thus, when certain aspects of the KIRIS testing system were recently called into question, the whole process did not need to be scrapped.\textsuperscript{433} Because the overall progress of KERA has been carefully

\textsuperscript{427} See Chris Pipho, Re-Forming Education in Kentucky, 71 PHI DELTA KAPPAN 662, 662 (1990).
\textsuperscript{428} Kentucky Education Reform Act of 1990, 1990 Ky. Acts § 476 (H.B. 940) (codified at KY. REV. STAT. ANN § 158 (Banks-Baldwin 1996)).
\textsuperscript{430} See LINDLE ET AL., supra note 429, at xv-xxxv. KIRIS is a system of reporting student achievement and rewarding teachers and schools for student performance. See id. at xviii, 3-50.
\textsuperscript{431} See KY. REV. STAT. ANN. § 158.646 (Banks-Baldwin 1996). The mission of the Board is to act as a stimulus and clearinghouse on KERA-related research. See id. The Board is also charged with effecting research on the impact of KERA on students, schools, and educators; assessing the validity of KIRIS assessments; and implementing a comprehensive educational data information system. See id. The Institute on Education Reform at the University of Kentucky is a central component of KERA-related research activities, studying the impact of education reform, publishing research studies, and informing and impacting educators. See Institute on Education Reform, About the Institute and Its Future Goals (visited Mar. 30, 1999) <http://www.uky.edu/Education/IER/instit.htm>.
\textsuperscript{432} See LINDLE ET AL., supra note 429, at 3-50. Kentucky was one of only three states in the United States to make statistically significant gains from 1992 to 1998 on the NAEP 4th grade reading test. See Jim Parks, Kentucky Reading Scores Move Up in National Rankings, KENTUCKY DEP'T OF EDUC. NEWS RELEASE, Mar. 4, 1999. Kentucky showed a six percent increase in the number of proficient fourth grade readers, while the number reading below a basic level decreased by five percent. See id.
\textsuperscript{433} See Andrea Tortora, Education Reform Example for Others; Ky. Lauded for Tackling Problems, CINCINNATI ENQUIRER, Jan. 10, 1999, at C1.
monitored, deficiencies were quickly recognized. Coordinated research efforts suggested progressive, rational steps that could then be implemented to correct the problem.

It is not necessary for California to reconstruct its entire education system to reap similar benefits. State-sponsored institutions of higher education, including the University of California and the California State University systems, already conduct world-class research in education. The California Department of Education is equipped to apply that research to policy, instruction, and curriculum implementation, while the students in California's public schools provide a living laboratory for assessing the efficacy of promising methods and strategies. The central pieces that are missing, however, are the testing and reporting of exceptional students' outcomes; the accumulation, coordination, and analysis of resulting data; and its application back into subsequent policy and instructional decision making. Until California commits to a process by which actual student outcomes drive future change, special education will fall short of its promise.

434. See id. "Kentucky had its program monitored and it has turned up positive and negative findings." Id. "Kentucky is ahead of the game . . . because it is not afraid to fix problems in its education reform system." Id.

435. See id. A new testing system was scheduled for implementation in the Spring of 1999. See id.

436. This Comment does not suggest that California should indulge in the wholesale administration of unsound or unproven educational methods in order to test the theory that such methods might be effective. Rather, a cautious, incremental, carefully controlled, and monitored approach should be taken. This is the only true path to valid scientific progress. It is exemplified by current national regulation of new pharmaceutical drugs for medical use. Under Food and Drug Administration (FDA) regulations, manufacturers must demonstrate both the safety and efficacy of potential new drugs through a series of rigorous clinical trials with volunteer subjects before unleashing their wares on the public at large. See, e.g., Nancy K. Plant, Adequate Well-Controlled Clinical Trials: Reopening the Black Box, 1 WIDENER L. SYMP. J., 267, 269-73 & n.24 (1996) (providing a concise overview of the drug approval process). Each successive "phase" of clinical trials in a new drug application study involves a larger and more diverse population with expanded variables, such as dosage and frequency of administration. See id. Only after careful scrutiny of extensive data supporting a purported therapeutic use will a drug be approved for the general population. See id. In limited circumstances, such as "a serious or immediately life-threatening disease condition in patients for whom no comparable or satisfactory alternative drug or therapy is available," experimental use is available at earlier stages in the process to a wider range of individuals. Id. at 279 (quoting 21 C.F.R. § 312.34(a) (1998)); see id. at 277-284. This Comment asserts that the basic conceptual framework embodied by the FDA could be applied to education and would ensure that California's investment in future generations of children are guided by sound, perhaps even outstanding, practice.

437. See Ed Mendel, Lack of Data May Limit Schools Accountability Program, SAN DIEGO UNION-TRIB., Mar. 29, 1999, at A3 (reporting that the lack of a sophisticated data-collection and information system in California limits attempts to understand what is happening in the state's 8000 schools and may compromise education reform efforts).
4. Inclusion of Students with Disabilities in Statewide Assessments

Studies indicate that, nationally, as few as fifty percent of students with disabilities are included in statewide assessment. A number of factors are thought to contribute to this low overall participation rate. Most are amenable to state intervention in the form of policy and guidance, regulation, and legislation. For example, lack or vagueness of guidelines for including students can be overcome by providing guidelines and staff development. Fear that assessment will cause undue stress to a disabled child could be overcome by designing new tests or providing accommodations that limit stressful conditions, as well as educating parents and teachers on the importance of assessments in school accountability. The misconception on the part of educators and administrators that they are not responsible for the meaningful education of disabled children can only be overcome by clear state and local directives to the contrary.

Particular insights may be gleaned from states that have the highest participation rates in the nation, such as North Carolina, Maryland, and Kentucky, which report that virtually all students participate in statewide assessments. Each has created policies aimed at removing inappropriate incentives for the exclusion of disabled students. North Carolina, for example, assigns a random score to any student excluded

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438. See Elliott & Thurlow, Assessment and Accountability, supra note 153, at 10-15 (reporting estimates that as many as 85% of the nearly five million special education students in the United States could take part in standardized, large scale assessments with or without accommodations).
439. See id. at 12.
440. See id.; Thurlow et al., supra note 310, at 17.
441. See Elliott & Thurlow, Assessment and Accountability, supra note 153, at 14, 23-24.
442. See id. at 17-18; Thurlow et al., supra note 310, at 17, 23-24.
443. See Elliott & Thurlow, Assessment and Accountability, supra note 153, at 11.
444. See id. at 21-22.
445. See id. at 22. Examples of inappropriate incentives for exclusion include systems of personal high-stakes accountability for overall student performance in a school or district without a requirement for assessing all students. See id. at 11-12. Such a system encourages exclusion of lower performing students, including those with disabilities. See id. In some cases, this can even lead to inappropriate referral for special education in order avoid accountability. See id.; Ysseldyke et al., supra note 401, at 10.
from testing, while Maryland assigns a "zero" for reporting purposes.\textsuperscript{446} Kentucky simply does not permit exemption from statewide assessment.\textsuperscript{447} Such measures provide every incentive to test \textit{all} students. In addition, Kentucky has identified a desired target percentage of students for inclusion in assessments.\textsuperscript{448} Schools that fall below the target percentage trigger an investigation into the reasons for exclusion.\textsuperscript{449}

Although the IDEA 97 and state policy require inclusion of students in standardized testing whenever possible,\textsuperscript{450} California would undoubtedly benefit from strategies designed to maximize participation. Furthermore, a general policy of carefully considering the incentives and unintended consequences of education agency actions should be implemented.

5. \textit{Improving Outcomes for Students with Disabilities: Accountability}

Accountability for educational outcomes is arguably the hottest topic in education today. Much of the discussion has focused on holding schools and teachers accountable for the outcomes of their students. The California Legislature has been considering several measures along these lines during the current legislative term.\textsuperscript{451}

\textsuperscript{446} See ELLIOTT \& THURLOW, ASSESSMENT AND ACCOUNTABILITY, \textit{supra} note 153, at 22.
\textsuperscript{447} See Geenen et al., \textit{supra} note 11, at 7.
\textsuperscript{448} See id. at 21-22.
\textsuperscript{449} See id. A state auditing process is activated when more than 2% of a school population is not administered standard tests. See id. Kentucky's non-participation rate is less than 0.5%. See id.
\textsuperscript{450} See Memorandum from Dr. Alice D. Parker to Special Education Local Plan Area Directors et al., \textit{supra} note 364. The State has issued guidelines that encourage school districts to "maximize the participation of students with disabilities in assessment[]." Id. Nevertheless, students can be exempted from participation by the IEP team. See id. This practice can be seen as an escape valve for schools that do not want to be accountable for students with disabilities.
\textsuperscript{451} See Terri Hardy, \textit{Rush for Reform: Davis' Ambitious Package of Education Proposals Prompts Districts to Call for More Time to Adjust}, L.A. DAILY NEWS, Feb. 21, 1999, at V1. One bill enacted in 1999 requires students to pass an examination before graduating high school. \textit{See} Act of Mar. 29, 1999, ch. 1, 1999 Cal. Legis. Serv. 28, 28-30 (West) (S.B. 2, O'Connell) (codified at scattered sections of CAL. EDUC. CODE (West 2000)). Another bill imposes a system of rewards and sanctions, including heightened monitoring for low-performing schools. \textit{See} Public Schools Accountability Act of 1999, ch. 3, 1999 Cal. Legis. Serv. 44, 44-46 (West) (S.B. 1, Alpert) (codified at CAL. EDUC. CODE §§ 52050-52058 (West 2000)). If improvement is not seen in two years, the State Superintendent of Public Instruction will be \textit{required} to take action in the form of reassigning employees, renegotiating collective bargaining agreements, assigning school management to an outside agency, reorganizing the school (including allowing parental conversion to a charter school), or closing the school entirely. See id.
Care must be taken, however, to avoid the unintended consequences of such "high stakes" accountability. Undue pressure on special education teachers for the outcomes of their students has been cited as a factor in their decisions to leave the profession. In a state suffering critical shortages of qualified special education personnel, teacher retention must be a high priority. Although accountability is considered essential to adequate outcomes, steps should be taken to mitigate its negative effects.

Texas's accountability system dramatically demonstrates just how powerful a balanced approach can be. In that state, a system of rewards and punishments for student outcomes has been implemented; in exchange, schools and teachers have been given great flexibility in their programmatic choices for achieving state standards. As a direct result of this system, Texas's students rank near the top in academic achievement despite low teacher salaries, high poverty rates, and per pupil spending well below the national average.

at 52-53.

452. ELLIOTT & THURLOW, ASSESSMENT AND ACCOUNTABILITY, supra note 153, at 11; Langenfeld et al., supra note 419, at 1. Tests or assessments "can be considered high stakes if the results . . . have perceived or real consequences for students, staff, or schools." Id. Consequences range from explicit rewards and sanctions to more subtle pressures, such as possible embarrassment. See id. at 17-18.

453. See M. David Miller et al., Factors that Predict Teachers Staying in, Leaving, or Transferring from the Special Education Classroom, 65 EXCEPTIONAL CHILDREN 201, 204-05 (1999). Other factors include high caseloads, insufficient resources, unsupportive environments, and excessive paperwork mandated by federal and state laws. See id.

454. See STATE IMPROVEMENT PLAN, supra note 305, at 8-14.

455. See Miller et al., supra note 453, at 201.

456. See id. at 216. Miller's study suggests a number of approaches to reduce teacher stress, including professional development activities, improving leadership, and inclusion of teachers in collaborative decision making. See id. at 214-15.

457. See Tyce Palmaffy, The Gold Star State, POLICY REV., Mar.-Apr. 1998, at 30; Ed Mendel, Education Reformers Study Texas, SAN DIEGO UNION-TRIB., Mar. 20, 1999, at A1 (citing sources that call Texas "the poster-child state for accountability reform"). Mendel notes the striking similarities between Texas in the early 1990s, at the start of its education reforms, and California today, as it embarks on a major education overhaul under Governor Gray Davis. See id.

458. See Palmaffy, supra note 457, at 30-35.

459. See id. at 30. White fourth-graders in Texas had the highest math scores in the nation on a recent test; black and hispanic students had similarly high scores. See id. These results are remarkable considering that Texas has the 4th highest national percentage of children living in poverty and pays teachers the 35th (lowest) salary in the country. See id. It should be noted, however, that some fear schools may be "hiding poor students by placing them in special-education classes." Id. at 31. Texas is only beginning to include special education students in statewide accountability. See
Another unintended consequence of accountability is inappropriate placement or dumping. Low performing students may be diverted to more restrictive placements, specialized schools, or non-public placements to avoid the threat that their test performance will negatively impact school or teacher evaluations.460 Students with discipline problems may even be subject to false arrest in order that they will become the problem of the juvenile justice system rather than the school district.461

Kentucky has obviated this problem by mandating that students' assessment data are reported to their home schools, regardless of placement.462 This policy encourages local schools to take responsibility for all students, including those with special needs. When local schools recognize that they will be held accountable for the outcomes of students placed off-site, they seek such placements only when a better outcome is the likely result. As a bonus, this policy encourages schools to create

Accountability: Revisions Needed to TAAS Edict from Education Agency, DALLAS MORNING NEWS, Feb. 27, 1998, at 9A.

460. See, e.g., ELLIOTT & THURLOW, ASSESSMENT AND ACCOUNTABILITY, supra note 153, at 12; Geenen et al., supra note 11, at 7. This effect has been observed in Texas where some schools have exempted more than 20% of the student population from testing by labeling them "special ed." Palnaffy, supra note 457, at 37. According to disability rights attorney Diane J. Lipton, "the knee-jerk reaction is to move the kids out, which is only moving a problem someplace else." Peter Appleborne, Push for School Safety Led to New Rules on Discipline, N.Y. TIMES, May 14, 1997, at B8. One way to mediate these effects is to require testing, reporting, and public disclosure, but also to disaggregate data on students with disabilities. See Geenen et al., supra note 11, at 7; Thurlow et al., supra note 310, at 13-16. Such practices also permit better comparisons of disabled students' progress to be made between schools and districts. See id.

461. See Interview with Joan Derebery Landguth, L.C.S.W., in San Diego, Cal. (Aug. 30, 1998); see also Joan Derebery Landguth, Complaint Against the San Diego County Office of Education, the San Diego Unified School District, the San Diego County Department of Mental Health, and the San Diego County Juvenile Probation Department (filed jointly with the U.S. Department of Education, Office for Civil Rights, and the California State Department of Education, Compliance Unit), July 19, 1998 (alleging a systemic pattern of discrimination exemplified by seven specific case histories, including failure to provide appropriate education and related services to San Diego County children, and facilitating arrests of these children upon manifestation of behavior problems associated with their unaddressed disabilities) (on file with author); California Department of Education Compliance Report # I-0044-98/99, Jan. 14, 1999 (sustaining 11 of 12 allegations and finding agencies out of compliance with 20 provisions of state and federal law) (on file with author); Leslie Sowers, The Mental Health of Children Part III: Too Late for Help?, HOUSTON CHRON., Aug. 9, 1998, at 1 [hereinafter Sowers, Too Late for Help?] (noting that it is easier to "take a child and lock them [sic] up and throw away the key" than to deal with violent behavior); Leslie Sowers, The Mental Health of Children; The Little Ones, HOUSTON CHRON., May 17, 1998, at 6 [hereinafter Sowers, The Little Ones] ("[Children] need intervention. Not at the time they spray Jonesboro with gunfire, but way before that.") (quoting Congresswoman Sheila Jackson Lee (D-Houston)).

462. See ELLIOTT & THURLOW, ASSESSMENT AND ACCOUNTABILITY, supra note 153, at 22.
high-quality, inclusionary education in local schools while balancing inappropriate, cost-based incentives to place students in public schools that are unable to provide adequate education. Finally, it normalizes data on outcomes within the state since individual school assessment results are not skewed by artificially high or low percentages of students at the low end of performance scales.463

6. Student Outcomes and Special Education Costs

The costs of special education have recently received widespread media attention, along with calls for cost-containment and more rational policies comparing the costs to the benefits.464 Highly publicized examples of pricey court-awarded private school placements have fostered a public perception that too much money is spent on special education.465 Although $100,000 placements are rare, they lead to the conclusion that the education of special needs children encroaches on the education of other children in the state.466 The public may believe that the social benefits of education are minimal in comparison to the costs.467 Exorbitant costs are rightfully a concern of California residents, but media reports minimize the role that state and local education agencies play in controlling such costs. Under California Law, special education students are only placed in private schools when an appropriate education has not been made available in the public schools.468 As the United States Supreme Court noted in Florence County School District Four v. Carter:469

[P]ublic educational authorities who want to avoid reimbursing parents for the private education of a disabled child can do one of two things: give the child a free appropriate public education in a public setting, or place the child in an appropriate private setting of the State’s choice. This is IDEA’s mandate, and

463. See Thurlow et al., supra note 310, at 1, 13-14.
464. See Zirkel, supra note 54, at 122.
465. See id.
466. See id. at 123 (citing news reports charging that special education awards cause “hemorrhaging” of public money to pay for private tuition).
467. See generally Nezver Stacey, Social Benefits of Education, 559 ANNALS AM. ACAD. POL. & SOC. SCI. 54 (1998) (suggesting that the wide range of benefits from education are either underestimated or are not clearly understood).
468. See CAL. EDUC. CODE § 56365 (West 1998).
school officials who conform to it need not worry about reimbursement claims.410

These observations underscore the fact that education is an artificial economic system in which the benefits of education, as well as the consequences of its inadequacies, are not brought to bear on those within the system. Modern economic theory calls such benefits and consequences “externalities,” and would suggest a remedial approach in which the externalities are directly imposed upon the system.411 Under such a theory, the cost of private school tuition may be conceived as an externality that should rightfully be imposed on the school system. However, this interpretation imposes the penalty on innocent victims (schoolchildren) rather than on those who are responsible (school officials).

Another problem with the economic analysis of education as a policy device is that the direct costs of education are immediate and easily quantifiable, while the benefits are long-term and can only be estimated.412 The prospective nature of educational benefits make them difficult to sell to policymakers faced with today’s bottom line.

A prime example of the external costs of inadequate education is the resulting effect on the criminal justice system. Recent studies of juvenile delinquents indicate that forty to eighty percent have undetected and unaddressed learning disabilities.473 Within three to five years out of

470. Id. at 15.
473. See Clyde A. Winters, Learning Disabilities, Crime, Delinquency, and Special Education Placement, 32 ADOLESCENCE 451, 451-60 (1997) (summarizing recent research on the link between learning disabilities and criminal activity of youth and adults). According to Winter’s research, special needs students in correctional facilities have often not been diagnosed and served in the public schools. See id. at 460. He asserts that it is “imperative” to identify “at risk” students and provide the special education services that they need. Id. Juvenile court justice Francis T. Murphy suggests that students who are not properly helped may “explode” into aggressive or antisocial behavior.” Francis T. Murphy, Learning Disabilities and the Courts: Taking a Stand Against Indifference, N.Y.L.J., Jan. 24, 1996, at S1 (citing estimates that at least 40 percent of the population in juvenile detention facilities suffers from learning disabilities and such youths are 220% more likely to be adjudicated delinquents than non-disabled youths); see also NOEL DUNIVANT, THE RELATIONSHIP BETWEEN LEARNING DISABILITIES AND JUVENILE DELINQUENCY 9-18 (1982) (describing both cross sectional and longitudinal studies demonstrating higher first time and re-arrest rates for learning disabled youths); JOHN B. SIKORSKI & THOMAS P. MCGEE, LEARNING DISABILITIES AND THE JUVENILE JUSTICE SYSTEM 13-14 (1986) (describing the results of the Link Study commissioned by the National Institute of Juvenile Justice and Delinquency Prevention,
high school, thirty-one percent of learning disabled youths will be arrested.\textsuperscript{474} Other studies indicate a high proportion with emotional and mental disturbances.\textsuperscript{475} According to the California Department of Corrections, the cost of housing such delinquents in California prisons and juvenile facilities exceeds $20,000 per year.\textsuperscript{476} By comparison, special education is cheap at less than one third that cost.\textsuperscript{477}

Promising studies indicate a positive correlation between educational interventions and reduced recidivism for juvenile offenders.\textsuperscript{478} Even
more promising are studies suggesting that early interventions can significantly reduce the number of first time offenders.\textsuperscript{479}

If delinquency is the result of inadequate special education, economists would suggest that measures be taken to force schools to "internalize" the "external costs" they create.\textsuperscript{480} Alternatively, schools could be permitted to "internalize" the benefits to society for providing adequate special education.\textsuperscript{481} In such a system, excess costs avoided by the juvenile justice system would be available to schools for special education.

Although statutory prohibitions and regulatory bureaucracy may prevent the direct transfer of funds from one agency to another,\textsuperscript{482} the same effect could be achieved through cooperation and coordination of services between agencies. A model for such a service delivery system is the Heartbeat program in San Diego, California.\textsuperscript{483} The Heartbeat model provides emotionally disturbed students with the coordinated services of various stakeholders including: the Departments of Social Services, Health Services, Mental Health, Alcohol and Drug Services;
the school districts; and the juvenile court. According to Heartbeat Director Sharon Kalemkiarian, "The idea is to let the dollars follow the kids instead of the other way around." Rather than passing off students (and the financial responsibility for their education and treatment) to another agency, Heartbeat encourages shared responsibility and early identification of at-risk youth. Although programs such as Heartbeat are in their infancy, they hold great promise for efficient resource utilization, improved efficacy, and enhanced recognition of the role of all stakeholders in accountability toward children.

7. Compliance

Laws and regulations are only effective to the extent that they are followed. As detailed above, California has a significant problem with special education compliance. Among the barriers to compliance is the lack of effective means for enforcing special education laws. For this reason, future regulatory efforts should be tailored to maximize incentives for compliance. Such self-implementing regulations would obviate the need for enforcement.

Yet, to the extent that this type of regulation is not possible, penalties

484. See Robles-Gordon, supra note 483. Heartbeat was designed in response to the need to stretch scarce service dollars and, at the same time, to make sure that emotionally disturbed children do not slide into a life of crime. See Brooks, supra note 482, at A1; Editorial, Put Children First: Details Shouldn't Deny Help for Disturbed Kids, SAN DIEGO UNION-TRIB., Dec. 22, 1998, at B6 [hereinafter Put Children First].

485. Put Children First, supra note 484, at B6 (noting that up until now, children have had to fit the mold of government services).

486. See Brooks, supra note 482, at A1; Lau, supra note 483, at B1; Robles-Gordon, supra note 483.

487. For an interesting analysis of societal compliance with legal rules, see generally Emily Sherwin, Legal Rules and Social Reform, 36 SAN DIEGO L. REV. 455 (1999).

488. See discussion supra Part IV.C.3.

489. See A.B. 602 REPORT, supra note 305, at 36-45. For example, the Assembly Bill 602 Workgroup noted, among other things, the lack of specific authority in California state law for CDE to enforce special education compliance. See id. at 50.

490. The Assembly Bill 602 Workgroup recommends, for example, assessing the investigation costs of sustained complaints against the offending school district as "an incentive for compliance." Id. at 48. School districts could avoid such costs by resolving complaints locally within 60 days, or by avoiding complaints altogether. See id. The proposed scheme is flawed, however, because the sanction of withheld funds will likely impact the adequacy of education provided to local schoolchildren. In order for incentives to have the desired impact, they must target the financial, political, and/or other concerns of individuals who are directly responsible for non-compliance, including local educators, administrators, and school board members.
should be imposed on responsible parties rather than innocent victims (i.e., students). The IDEA provides for the withholding of funds from local school districts for non-compliance. However, this penalty is rarely imposed because services must be provided to students despite the failures of local school districts. For an individual student, services can be provided directly, or contracted by the State when the local school district fails. In the context of systemic non-compliance, however, the State would be required to take over and run an entire school district. Thus, there are currently no practical and effective penalties for school districts that habitually refuse to comply with special education laws.

A regulatory solution to this problem could include the imposition of intermediate sanctions on responsible parties. Instead of relying on the ultimate penalty of withholding funds, the Workgroup established by California Assembly Bill 602 recommends a series of clearly defined, tiered consequences for failure to implement federal and state laws. The Workgroup's suggestions include improved measures for tracking patterns of non-compliance, increased state oversight when districts are found out of compliance, awards of compensatory education to students deprived of free appropriate public education, withholding of the local superintendent's salary for repeated violations, and in cases of persistent non-compliance, appointment of an individual authorized by the State to bring the school district into compliance. California would go a long way toward ensuring that its laws and policies are implemented by adopting the recommendations of its own legislative workgroup.

VII. CONCLUSIONS

The purpose of education is to prepare schoolchildren for the future—to provide the skills and knowledge necessary for life, work, and participation in society. Parents should be able to trust that the system

492. See A.B. 602 REPORT, supra note 305, at 54 (noting that when the State of California has attempted to sanction local school districts by withholding funds in the past, it has resulted in delays in delivering services to students and imposed an unsustainable administrative burden on California Department of Education staff).
493. See id. at 50, 54 (suggesting, however, that the state providing direct services to local schoolchildren is both impractical and of questionable public policy).
494. Systemic non-compliance refers to the failure of a local education agency to provide entire groups of students one or more of the essential elements of special education specified in federal or state law. See id. at 59.
495. See id. at 44.
496. See, e.g., A.B. 602 REPORT, supra note 305, at 49-50.
497. See id.
498. See id. at 40-47, 54-62.
of education in California serves that purpose for each and every child. When they drop off their children each day at the schoolhouse door, parents should not need to question whether the professionals within are following the best practices, utilizing appropriate strategies, or receiving sufficient support to enable learning. Yet far too often, even the extensive procedural safeguards that are in place under the IDEA fail to ensure that special education students are learning. Parents become impatient with a system that seems to have buried the vision they hold for their children's future under layers of statute and administrative bureaucracy. As it has in the past, impatience may lead parents to call for a more decisive, if not swifter, form of justice from the courts.

It is time for California to do the right thing. Whether held by a court, or simply implied from observation, disabled students in California are not receiving adequate education. The State Legislature and education agencies should take a proactive approach to remedy this situation and thereby avoid unnecessary litigation. The discussion above provides a framework for addressing key components of adequate education: standards, resources, and outcomes. This Comment suggests that creative solutions should be devised to adequately educate disabled students. Such solutions should consider special education students' needs during every stage of the development and implementation of coordinated and well-planned reform efforts. They may draw upon innovative strategies that have been implemented in other contexts or devise new ones, but should carefully consider the incentives, benefits, and consequences created by their actions.

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