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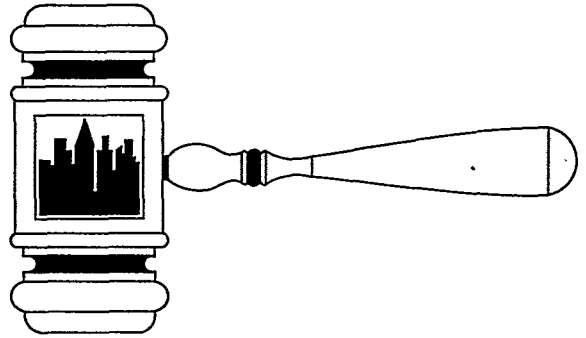
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Recommended Citation

Patrick A. Keenan & Celeste M. Hammond, The Institutionalized Child's Claim to Special Education: A Federal Codification of the Right to Treatment, 56 U. Det. J. Urb. L. 337 (1979).

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The Institutionalized Child's Claim to Special Education: A Federal Codification of the Right to Treatment

Someday, maybe, there will exist a well-informed, well-considered, and yet fervent public conviction that the most deadly of all possible sins is the mutilation of a child's spirit; for such mutilation undercuts the life principle of trust, without which every human act, may it feel ever so good and seem ever so right, is prone to perversion by destructive forms of consciousness.

Erik Erikson¹

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The various threads of the American social welfare/family service system of the past three quarters of a century have tied themselves into a Gordian knot of "long term adolescent psychiatric treatment

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1. *INEQUALITY IN EDUCATION*, March 1972, Vol. 11 at 56 (Harvard Center for Law and Education).

centers” which generally belie the fifth word of their ponderous title. Perhaps fifty to one hundred thousand juveniles are presently institutionalized across the United States.² The inmate population slice of the nation’s unfortunates writ smaller and younger betrays the same spectrum of human characteristics and foibles that appears outside of these institutions. In contrast to the diversity of these inmates, a few generalizations can be made:

- The great majority of the child inmates are confined because a court decided that “they needed help;”³
- Virtually all child inmates could benefit from appropriate education;
- The amount and quality of “help” provided ranges from occasionally adequate to abysmally inhuman;
- Attempts, usually through litigation, to secure and vindicate the young inmates’ “right to treatment” have enjoyed less than spectacular success; and
- The right-to-special-education movement is much more lively and legally viable than its right-to-treatment counterpart.

This article proposes to analyze and advocate a change in perception of these children and to suggest an accompanying strategy to secure the best possible educational and special educational services for these children. This proposal is based on two assumptions:

1. Institutionalized children are exceptional; and
2. If the operators and cooperators of the institutional services recognize, or are forced to recognize, the legal claim exceptional children have to special educational services, then these children will receive more valuable and better quality “treatment” than they have heretofore been able to demand or get courts to order.

2. See AMERICAN CORRECTIONAL ASSOCIATION, *DIRECTORY OF JUVENILE AND ADULT CORRECTIONAL DEPARTMENTS, INSTITUTIONS AGENCIES AND PAROLING AUTHORITIES* (1977) (listing all juvenile facilities, their agencies and census). The *U.S. Department of Justice, Sourcebook of Criminal Justice Statistics* (1976) reported 45,694 juveniles in detention in 1963, p. 672.

3. A frightening exception is the group of young people confined to institutions for the mentally ill. These children don’t even get the due process of a court hearing before being locked up. The word of their parents and the concurrence of a neutral examiner—the admitting psychiatrist—is enough. *Parham v. J.L. and J.R.*, 47 USLW 4740 (1979) ____ U.S. ____, 99 S. Ct. 2493, June 20, 1979, *reversing* 412 F. Supp 112 (M.D. Ga. 1976). (Editors’ Note: The parallel West’s cites for the Supreme Court cases are included for the convenience of practitioners who may not have the Official Reports in their offices. The cases and literature cited in this Article are current through June, 1979.) See also *Kremens v. Bartley*, 402 F. Supp. 1039, 1046-47 (E.D. Pa. 1975), *vacated*, 431 U.S. 119, 97 S. Ct. 1709 (1977).

We hope, but do not assume, that these services will be provided voluntarily.⁴ In the event they are not, we offer to attorneys and other advocates who represent these young citizens a few ideas and tools to sneak the American ideal of universal public education and the recent doctrine of universal access to special education or appropriate education over the walls and into the compounds.

The first part of this article contains an overview of the problem from the perspective of the children, and of the differences in vocabularies and categories we face in solving the institutionalized child's plight. The second part contains an approach to a solution which emphasizes the need and right to special education services. The third part analyzes recent federal legislation and regulations which mandate the provision of special education services to all institutionalized children, all of whom, we maintain, are "handicapped" as the law defines that term. Finally, we propose some political administrative and legal strategies child advocates may wish to consider to hasten the process of changing perceptions of the institutionalized child. While the authors have directed this article to the rights of institutionalized children, advocates of children who can benefit from special education generally may find it of interest.

I. PROBLEM STATEMENT: AMERICA'S INSTITUTIONALIZED CHILDREN

The estimates of the number of children who have been institutionalized as a result of juvenile court orders are less than precise.⁵ As of June 30, 1973 some 45,694 children were held in juvenile facilities. Of these, 33,385 were adjudicated delinquent; 4,551 were persons in need of supervision; 6,397 were held pending disposition; 460 were waiting for transfer to another jurisdiction; 373 were voluntary commitments; and 528 were dependent or neglected.⁶

The apparent precision of these official government figures is misleading. It is common juvenile court practice to give guardianship and custody of a child to the State Guardianship Administrator or child welfare agency which then places the child in "foster care" or "institutionalized foster care" without notice to the court.⁷ Unfor-

4. The willingness to provide services voluntarily may be greater if operators of institutions are faced with criminal contempt charges for failure to provide the special education services the children need.

5. The vogue word used by child advocates is that the children are "banished" to the institutions.

6. See UNITED STATES DEPARTMENT OF JUSTICE, SOURCEBOOK ON CRIMINAL JUSTICE STATISTICS 672-73 (1976).

7. In Illinois and Michigan the juvenile court delegates custody and guardianship to the Directors of the Illinois Department of Children and Family Service and Department of Social Services respectively. These departments in turn place the children in vendor foster care facilities, but there is generally no notice to or participation on the part of the court, save for

unately, no one knows how many of the nation's young citizens are living in institutions. The number may be in the range of one hundred thousand or more.⁸

The inaccuracies are somewhat understandable. Unlike pointing proudly to the number, quality, and aesthetic value of public works projects such as new sewage treatment plants, the nation's governors do not care to talk about the number of young citizens locked up in their states. The child welfare, family service and foster care machines, often euphemistically described as the "Juvenile Justice System," run to serve a variety of political and more than a few economic interests which are not likely to be advanced by accurately publicizing the mess, though the system's immunology functions very well in the face of chronic exposé and epidemic scandal.⁹

Despite the fact that the overwhelming majority of incarcerated children are at least partially maintained by some federal categorical or medical assistance program, there is no federal official who knows the number of federally funded institutionalized children. Nor can any federal official in the Department of Health, Education and Welfare say how many children are maintained in institutions through the use of Social Security funds.¹⁰ In most states there is no official in each of the three or four departments that take guardianship¹¹ of the court's children who can or will state the numbers and whereabouts of the wards.

The tale of the quality of treatment, and incidentally of the quality of education in the institutions, has been oft told elsewhere. We mean neither to overcondemn, overgeneralize, nor to beg the question that surely somewhere there exist a few good institutions. There are enough bad ones, and enough has been written about them¹² to establish that the quality of treatment in a number of the

a pro-forma report every six months on each child's progress. Presumably "progress" means how well the Department and the child are progressing toward amelioration or cure of the home environment problem which was the "cause" of the original removal from the home. See, e.g., 42 U.S.C. §§ 601, 608 (1976). In fact many placements tend to be permanent, i.e., until the child turns eighteen.

8. See K. WOODEN, *WEeping IN THE PLAYTIME OF OTHERS* 6 (1976). Interview with Robert Hirschberg of the President's Commission on Government Reorganization, May 5, 1978.

9. See note 12 *infra*.

10. Testimony of Kenneth Wooden. *Hearings on the Interstate Shipment of Juveniles Before the House Subcomm. on Select Education and Senate Subcomm. on Children and Youth*, 94th Cong., 2d Sess. (1976). Interview with Robert Hirschberg of the President's Commission on Government Reorganization, May 5, 1978.

11. Usually these are the Departments of Corrections, (Youth Division), Welfare and Family Services, and Mental Health (Youth Division). Sometimes the state's Departments of Labor or Vocational Rehabilitation are included.

12. The stories of the abuse, atrocities, and psychological and sexual humiliation to which institutionalized adolescents and pre-adolescents are subjected are repetitiously numb-

nation's juvenile institutions is simply abominable and that the response of the state is often grossly inadequate. The places continue to get licenses and a steady flow of placements and government funds.

Nowhere in the government is the doctrine of separation of powers observed more scrupulously than in the field of corrections. While the sentencing judge in both the adult and juvenile criminal justice systems is omnipotent to incarcerate and to fix the length of sentence, the same judge is virtually impotent when it comes to the ability to affect or even oversee the "rehabilitation."¹³ So the juvenile judge, the one government official most informed about and most responsible for the child's rehabilitation and treatment plan, is unable to check up or follow up on the question of whether such a plan even exists.¹⁴

Juvenile institutions can be neatly divided into two classes: the "publics," operated by government, usually the juvenile corrections department; and the "privates," which sell child care rehabilitation and treatment to the government units responsible for the children. The "privates" can be divided into two sub-classes: non-profit,

ing. See generally P. KEENAN, AN ILLINOIS TRAGEDY (1973) (copy available at the University of Detroit School of Law); R. LLOYD, FOR MONEY OR LOVE (1976); M. MENDELSON, TENDER LOVING GREED (1974); P. MURPHY, OUR KINDLY PARENT—THE STATE (1974); K. WOODEN, WEEPING IN THE PLAYTIME OF OTHERS (1976). For a frightening governmental account of such atrocities see *Hearings on the Defense Department's CHAMPUS [Civilian Health and Medical Program of the Uniformed Services] Program Before the Permanent Subcomm. on Investigations of the Senate Government Operations Comm.*, 93rd Cong., 2d Sess. (1974). In this report are detailed, among many other horrors, such accounts as: "mock funerals held for 14 year olds who were required to dig a grave and sleep in it for three nights as 'treatment.'" *Id.* at 210. This government report, unlike most, makes extraordinarily compelling reading.

A few month's sampling of each newspaper and magazine headline reveals similar incidents and a similar problem. See, e.g., *Child Beating Unchecked as Agents Feud*, Detroit Free Press, Dec. 14, 1977, §A, at 3, col. 6; 15 MEN HELD, MORE HUNTED IN BOSTON CHILD SEX RING, *id.*, Dec. 9, 1977, §A, at 1, col. 4; *Camp for Delinquents Under Court Fire*, *id.*, Aug. 18, 1974, §A, at 1, col. 1; *Michigan Fights to Halt Epidemic of Child Abuse*, Detroit News, Dec. 27, 1977, §A, at 1, col. 2; *Brothers' 5-Year Nightmare*, *id.*, July 21, 1975, §A, at 1, col. 2; Velie, *Is Anybody Watching?*, READERS DIGEST 114 (March 1976); Velie, *Oliver Twist USA*, READERS DIGEST 155 (Oct. 1975). The above list is not exhaustive, but merely representative, reflective of the rhetoric of the headline writers. Examination of any week's papers will reveal similar titles, and similar accounts followed by similar inaction.

13. See, notes 86-88 & accompanying text *infra*. Perhaps more important than the judge is the probation officer or court clinic worker who prepares the pre-sentence report which is usually given great deference.

14. See KEENAN, *supra* note 12, at 166-67. It is curious that every single child that Illinois sent to Wimberly Camp in Texas in 1971-73 needed the same treatment plan: rigorous outdoor exercise, physical activity, work discipline, and no formal school program. *Id.* This type of treatment was uniformly provided because of a lack of sufficient dormitory space. See also *Inmates of Boys Training School v. Affleck*, 346 F. Supp. 1354 (D.C.R.I. 1972) See text accompanying note 39; see generally K. WOODEN, WEEPING IN THE PLAYTIME OF OTHERS (1976).

often operated by a church-affiliated foundation or umbrella organization,¹⁵ and proprietary or profit-making ones which are run as businesses. The distinction between these sub-classes is often blurred.

Regardless of label, the primary function of all these facilities is to provide custodial care—a bed, food, and “a secure setting” or “maintenance” for children who for one reason or another cannot live at home. These institutions serve a variety of secondary purposes. They provide employment for their staffs. They supposedly rehabilitate fledging criminals. They cure adolescent mental illness. They handle an embarrassing societal problem—what to do with the children who are “failures”—by hiding it. From the primacy of the “maintenance” function follow certain economic realities. Treatment, therapy, counseling, schooling, social activities, and rehabilitation all stand in second line to claim financial and human resources. Often they get short, token, or no shrift at all,¹⁶ as the stream of court opinions on inadequate and inhuman institutions for children so aptly demonstrates.¹⁷ The children, who are institutionalized in order to get “treatment” of some kind, do not get the quality testing, evaluation, diagnosis, custom program design, counseling, physical, psychiatric and occupational therapy, and home support services that they need and are entitled to receive.¹⁸

15. Non-profit “privates” are often brokered through Catholic charities, Jewish Childrens Bureau, Lutheran Family Services, etc. The Detroit Baptist Children’s Home and Methodist Children’s Village are examples with which the authors are familiar.

16. See K. WOODEN, *WEeping in the Playtime of Others*, 240-46 (1976). M. KLEIN, *THE JUVENILE JUSTICE SYSTEM 173* (1976) (mean state expenditure per year in 1974 was 6.2 million).

17. See, e.g., *Frederick L. v. Thomas*, 557 F.2d 373 (3d Cir. 1977); *Wilson v. Coughlin*, 472 F.2d 100 (7th Cir. 1973); *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1967); *Long v. Powell*, 388 F. Supp. 422 (N.D. Ga. 1975); *Collins v. Bensinger*, 374 F. Supp. 273 (N.D. Ill. 1974), *aff’d*, 506 F.2d 1405 (7th Cir.), *cert. denied*, 422 U.S. 1058, 95 S.Ct. 2683 (1975); *Welsh v. Likins*, 373 F. Supp. 487 (D. Minn. 1974); *Morales v. Turman*, 364 F. Supp. 166 (E.D. Tex. 1973); 383 F. Supp. 53 (E.D. Tex. 1974), *vacated*, 535 F.2d 864 (5th Cir. 1976), *rev’d and remanded*, 430 U.S. 322; 562 F.2d 993 (5th Cir.) *rehearing denied*, 430 U.S. 988, 97 S.Ct. 1689 (1977); *New York State Ass’n. for Retarded Children, Inc. v. Rockefeller*, 357 F. Supp. 752 (E.D.N.Y. 1973); *Nelson v. Heyne*, 355 F. Supp. 451 (N.D. Ind. 1972) *aff’d*, 491 F.2d 352 (7th Cir.), *cert. denied*, 417 U.S. 976, 94 S.Ct. 3183 (1974); *Martarella v. Kelley*, 349 F. Supp. 575 (S.D.N.Y. 1972); 359 F. Supp. 478 (S.D.N.Y. 1973); *Burnham v. Dept. of Public Health of Georgia*, 349 F. Supp. 1335 (N.D. Ga. 1972), *rev’d and remanded*, 503 F.2d 1319 (1974); *Inmates of Boys Training School v. Affleck*, 346 F. Supp. 1354 (D.R.I. 1972); *Jones v. Wittenberg*, 323 F. Supp. 93 (N.D. Ohio 1971); *Lollis v. New York State Dept. of Social Service*, 322 F. Supp. 473 (S.D.N.Y. 1970); *State v. Owens*, 197 Kan. 212, 416 P.2d 259 (1966); *In re J.E.C.*, 225 N.W.2d 245 (Minn. 1975); *In re P.*, 34 App. Div. 2d 661, 310 N.Y.S.2d 125 (1970); *In re Lofft*, 86 Misc. 2d 431, 383 N.Y.S. 2d 142 (1976); *In re I.*, 64 Misc. 2d 878, 316 N.Y.S.2d 356 (1970); *In re G.H.*, 218 N.W.2d 441 (N.D. 1974).

18. See, e.g., *ILL. REV. STAT. ch. 37, § 701-2* (1973):

(1) The purpose of this Act is to secure for each minor subject hereto such care and guidance, preferably in his own home, as will serve the moral, emotional, mental and

Meanwhile these same young citizens are often virtually ignored by the educational establishment. Sometimes they are noticed, but the establishment's response is to deny responsibility for them. "Unable to benefit from a public school education" is the suspiciously self-serving label that the public schools place on some of their failures.

There are two main reasons why these children are ignored. First, they are an embarrassment, and once the juvenile justice system performs its duty of processing them out of the environments which led to the maladjustment, *i.e.*, homes, schools, and neighborhoods, the problem is solved. Once out of sight, the children are out of the public conscience. Second, the United States educational system is permanently and inevitably a local government monopoly. The mystique of autonomous local control of schools by resident trustees is a social value held very dear and never subjected to much scrutiny or criticism. Even the use of intermediate districts that embrace several local school districts, in order to achieve economy of scale and diversity of specialized services, is suspected to be a form of creeping centralization or socialism. The local school trustees attend to their students, and a child whom the court removes from the district evokes an audible sigh of relief in the principal's office and at the board meeting: "We got rid of another trouble-maker."

The proposition that the student who exits the local district by

physical welfare of the minor and the best interests of the community; to preserve and strengthen the minor's family ties whenever possible, removing him from the custody of his parents only when his welfare or safety or the protection of the public cannot be adequately safeguarded without removal; and, when the minor is removed from his own family, to secure for him custody, care and discipline as nearly as possible equivalent to that which should be given by his parents, and in cases where it should and can properly be done to place the minor in a family home so that he may become a member of the family by legal adoption or otherwise.

(2) In all proceedings under this Act the court may direct the course thereof so as to ascertain the jurisdictional facts and fully to gather information bearing upon the current condition and future welfare of persons subject to this Act. This Act shall be administered in a spirit of humane concern, not only for the rights of the parties, but also for the fears and the limits of understanding of all who appear before the court.

(3) In all procedures under this Act, the following shall apply:

(a) The procedural rights assured to the minor shall be the rights of adults unless specifically precluded by laws which enhance the protection of such minors.

(b) Every child has a right to services necessary to his proper development, including health, education and social services.

(c) The parents' right to the custody of their child shall not prevail when the court determines that it is contrary to the best interests of the child.

(4) This Act shall be liberally construed to carry out the foregoing purpose and policy.

expulsion, dropout, pushout, or court-ordered institutionalization has a continuing claim on educational services valued at a per-capita or proportionate share of the state subsidy and local tax receipts is practically heretical. Even though the special education districts are usually organized as co-op or county-wide districts, they are still very much subject to local geography. The fiscal focus of each child served is still the local district whose board remains primarily responsible for the child's free, high quality public education.¹⁹ The current popularity of statewide "child-find" programs²⁰ and the various court orders mandating special education²¹ have not changed the underlying economic relationship.

The juvenile justice or child-caring and treating system operates apart from the educational system. Entry into the former is seen as exit from the latter. While relatively few argue that institutionalized children have no right to education, the lack of parental and local administrative involvement effectively excludes such children from the free, high quality public education appropriate to their needs and guaranteed by their state constitution.²² An argu-

19. For the statutory duty of a local school board see the Illinois School Code for a representative formulation. ILL. REV. STAT. ch. 122, § 10-20.12 (1973):

To establish and keep in operation in each year during a school term of at least the minimum length required by Section 10-19, a sufficient number of free schools for the accommodation of all persons in the district over the age of 6 and under 21 years, and to secure for all such persons the right and opportunity to an equal education in such schools; provided that children who will attain the age of 6 years by December 1 after the first day of a school term shall be entitled to attend school upon the commencement of such term, and that in schools having mid-year promotions those children attaining the age of 6 years by May 1 after the first day or the second semester shall be entitled to attend school upon the commencement of such semester. In any school district operating on a full year basis children who will attain age 6 within 30 days after the commencement of a term shall be entitled to attend school upon the commencement of such term. The school district may, by resolution of its board, allow for a full year school plan.

20. See 20 U.S.C. § 1412(2)(C)(1976); 45 C.F.R. § 121a.128 (1977) (state-plan requirement); 20 U.S.C. § 1414(a)(1)(A)(1976); 45 C.F.R. § 121a.220 (1977) (local educational agency requirement). For a report of the spotty success of the child-find program in Michigan see PROJECT CHILD FIND IN MICHIGAN: AN EFFORT IN EFFECTIVE PLANNING (1978) (Progress Report, Jan. 1978, Special Education Office, Michigan Department of Education).

21. See, e.g., Reid v. Board of Educ., 453 F.2d 238 (2d Cir. 1971); Mills v. Board of Educ., 348 F. Supp. 866 (D.D.C. 1972); Pennsylvania Ass'n for Retarded Children v. Commonwealth of Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1972).

22. See, e.g., ILL. CONST. art. 10, § 1:

A fundamental goal of the People of the State is the educational development of all persons to the limits of their capacities.

The State shall provide for an efficient system of high quality public educational institutions and services. Education in schools through the secondary level shall be free. There may be such other free education as the General Assembly provides by law.

ment is commonly advanced that persons found by the court to be delinquent minors (*i.e.*, convicted) forego their right to public education—a curious Orwellian formulation that denies education and rehabilitation to the most needy.

To date, the main strategic thrust of the children and their advocates has been to try to find, and then to demand a constitutionally guaranteed right to treatment. In a sense, the dilettante bar has largely accepted the separation between the educational system and the juvenile justice/placement system.²³ The success of this approach has been spotty, and in the aggregate, underwhelming.

A strategy which relies on the equal protection clause of the fourteenth amendment to guarantee a fundamental right to rehabilitative or therapeutic treatment for incarcerated children has yielded mixed results. Since this theory parallels the mental health model, its persuasiveness becomes questionable where the comparison ends. The argument that psychiatric treatment is the *quid pro quo* for the mental patient's loss of freedom is not totally applicable to the situation where a juvenile is in custody not because he is ill, but because he has done something that if committed by an adult would be a crime. Since the trend in adult corrections is generally toward the punitive and away from the rehabilitative model,²⁴ any reasoning which advocates the adult-type penal system for the institutionalized juvenile basically calls for more punishment and less treatment. Because the present United States Supreme Court has been hesitant to recognize any new fundamental rights which require the "strict scrutiny" test for equal protection, the courts have had to look at individual state statutes, legislative intent, and the local political climate to discover a basis for appropriate treatment

The State has the primary responsibility for financing the system of public education.

Education may be a right guaranteed by the federal constitution in California and Connecticut. *See Serrano v. Priest*, 18 Cal.3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1977) (court reaffirms *Serrano v. Priest*, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971) that education is to be treated as a "fundamental interest"); *Horton v. Meskill*, 172 Conn. 615, 376 A.2d 359 (1977) (elementary and secondary education is a "fundamental right" in Connecticut).

23. With the exception of a very few institutional right to treatment cases that include a count based on the Rehabilitation Act of 1973, Pub.L.No. 93-112, § 504, 83 Stat. 394 (1973), the attack has not historically included a right to education or right to special education component. The complaints usually cite the inadequacy or lack of schooling as an indicator of the improper or cruel treatment of the juveniles. In a curious departure, Michigan Attorney General Frank Kelley has opined that intermediate school districts have the authority to establish schools for juvenile court wards residing therein. [1975-1976] MICH. ATT'Y GEN. BIENNIAL REP., at 532-34. Not much has resulted from this opinion.

24. *See generally* MINIMUM STANDARDS FOR CRIMINAL JUSTICE, ABA: STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES (1967).

for an institutionalized child. Often the only right the Court recognizes is based on the eighth amendment right to be free from cruel and unusual punishment, or outrageous mistreatment.

In addition to the theoretical problems in demanding a constitutional right to treatment, institutional limitations make it difficult, if not impossible, to guarantee the fruits of such a right even where it is acknowledged. With few exceptions, juvenile court judges lack the authority to order non-court personnel to do anything. Once the court has "disposed" of the juvenile and entrusted him to either a public guardian or the department of corrections, its power is limited to a review of progress reports and to vacating or dismissing its earlier dispositional order if not satisfied with the treatment plan and progress of the individual. The court has little power to supervise and no power to compel the executive correctional agencies. Again, the separation of powers doctrine precludes any effective court-based guarantee of treatment even if the judge has ruled that such a right exists.²⁵ Where the juvenile court fails to find such a right, the institutionalized child has no hope of obtaining appropriate, ameliorative care unless the system voluntarily provides it, or unless some other court orders it through appropriate equitable relief, a remedy generally foreclosed to the juvenile court.

The legal argument on behalf of institutionalized juveniles heretofore couched under the rubric of a right to treatment has resulted in an inadequate legal response. The historical development of this right under the doctrine of *parens patriae* featured a close analogy between the involuntary commitment of the mentally ill and the incarceration of juveniles. But the substantive difference between the two situations has effectively assured the breakdown of the *quid pro quo* argument where the juvenile is viewed as a danger to the community. In the mental health context, a harmless patient is discharged from commitment for either the absence, or inadequacy of treatment. The automatic release of a potentially harmful juvenile under these circumstances is not so sanguine.

A. *History of the Right to Treatment Concept*

An examination of the pre-*Gault*²⁶ juvenile case law suggests that the justification for the lack of procedural due process in juvenile courts was the right or privilege of "treatment" the child was supposed to receive.²⁷ Due process was historically waived under the

25. See text accompanying notes 42-46 *infra*.

26. 387 U.S. 1, 87 S.Ct. 1428 (1966).

27. *Id.* at 15-16.

philosophy of *parens patriae*.²⁸ The specific case reference to the right to treatment *per se* is a rather recent development. One of the earliest examples arose in the District of Columbia in 1954 in *White v. Reid*.²⁹ A sixteen year old successfully sought a writ of habeas corpus to test the legality of his detention in jail. The court addressed the special character of the juvenile court's jurisdiction:

Proceedings against juveniles brought in the Juvenile Court are not criminal and penal in character, but are an adjudication upon the status of a child in the nature of a guardianship imposed by the state as *parens patriae* to provide the care and guidance that under normal circumstances would be furnished by the natural parents.³⁰

The fundamental requirement placed on the facility by this difference between criminal and juvenile proceedings was made explicit:

Unless the institution is one whose primary concern is the individual's moral and physical well being, unless its facilities are intended for and adapted to guidance, care, education and training rather than punishment, unless its supervision is that of a guardian, not that of a prison guard or jailor, it seems clear a commitment to such an institution is by reason of conviction of crime and cannot withstand an assault for violation of fundamental Constitutional safeguards.³¹

Another decade passed before the courts looked beyond the general conditions at a juvenile institution to the adequacy of the actual treatment provided for an individual child. Interestingly enough in light of the ever present, unspoken goal of the juvenile system to keep "dangerous kids" off the streets,³² the court of ap-

28. *Id.* at 16-17.

29. 125 F. Supp. 647 (D.D.C. 1954).

30. *Id.* at 649.

31. *Id.* at 650. The right to treatment has been assumed in *Kent v. United States*, 383 U.S. 541, 86 S.Ct. 1045 (1966) and *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428 (1967). *In re Gault*, however, focused on the adjudicatory rather than the dispositional state. McNulty & White, *The Juvenile's Right to Treatment: Panacea or Pandora's Box?*, 16 SANTA CLARA L. REV. 745, 749 n. 30 (1976). The Supreme Court referred to "the opportunity during post adjudicatory or dispositional hearing for a wide-ranging review of the child's social history and for his individualized treatment . . ." *In re Winship*, 397 U.S. 358, 366 90 S.Ct. 1068, 1074 (1970).

32. The use of preventive detention is common, almost universal in juvenile delinquency cases. The key question at a juvenile's arraignment is not whether he or she will make the next court appearance, but whether there is an immediate and pressing danger that the juvenile will harm himself, another, or someone's property. See, e.g., ILL. REV. STAT. ch. 37, § 703-6(2)(1973). Often such a danger exists, and consequently the child is held in custody apparently in direct violation of the eighth amendment. The Supreme Court disagrees that

peals in *Creek v. Stone*³³ revealed no hesitancy at releasing a juvenile on a writ of habeas corpus. In a per curiam opinion the court hypothesized that a child who complained of a lack of needed psychiatric care at the receiving home where he was detained had a right to "release on habeas corpus if the core injustice cannot be resolved in any other way,"³⁴ since "in general habeas corpus is available not only to an applicant who claims he is entitled to be freed of all restraints, but also to an applicant who protests his confinement in a certain place, or under certain conditions, that he claims vitiate the justification for confinement."³⁵ Three weeks later in the case of *In re Elmore*,³⁶ the same court interpreted its rule in *Creek* to require "the Juvenile Court to fashion a dispositional decree tailored to meet the peculiar needs of a particular child."³⁷

Despite the progress which the *Creek* and *Elmore* opinions reflect, those cases were limited by the fact that the authority for the right to treatment was the District of Columbia statute. Although the *Gault, Kent, Winship* triad offers a sound conceptual basis for finding treatment to be a fundamental constitutional right, the Supreme Court's comments on the right to treatment are *obiter dicta*.³⁸ The essential recognition by the courts of the right to treatment occurred in several important federal district and appellate decisions where the courts provided guidelines and plans for at least minimal treatment for the plaintiffs.

*Inmates of Boys' Training School v. Affleck*³⁹ was brought as a class action on behalf of five juvenile offenders who were transferred from the usual Rhode Island juvenile institution to either an adult maximum security institution, a resuscitated former women's

detention under these circumstances violates the constitutional right to bail.

33. 379 F.2d 106 (D.C. Cir. 1967) (per curiam). See also *Hamilton v. Love*, 328 F. Supp. 1182 (E.D. Ark. 1971). In *Hamilton* the court explicitly dealt with the lack of resources to provide minimum standards in institutions and concluded:

If the state cannot obtain the resources to detain persons awaiting trial in accordance with minimum constitutional standards, then *the state simply will not be permitted to detain such persons*. The final decision may, indeed, rest with the qualified voters of the governmental unit involved. This Court, of course, cannot require the voters to make available the resources needed by public officials to meet constitutional standards, but it can and must require the release of persons held under conditions which violate their constitutional rights . . .

328 F. Supp. at 1194 (emphasis added).

34. 379 F.2d at 110.

35. *Id.* at 109.

36. 382 F.2d 125 (DC. Cir. 1967).

37. *Id.* at 127.

38. See note 31 *supra*.

39. 346 F. Supp. 1354 (D.R.I. 1972).

prison, or the wing of a medium security adult facility.⁴⁰ These transfers occurred after plaintiffs failed to respond well to their confinement in the Boys' Training School and became runaways and disciplinary problems.⁴¹ In the statement of facts, the opinion describes conditions which clearly constitute violations of the eighth amendment ban on cruel and unusual punishment. These conditions included a "bug-out" room where suicidal children were kept in solitary confinement for days without medical or psychiatric attention;⁴² cells without lights and with broken out windows;⁴³ and painfully few or no provisions for personal hygiene, exercise, recreation, reading, social services or any other resources to meet human needs.⁴⁴ Moreover, the court further held that because these conditions were anti-rehabilitative, the use of the facilities violated the equal protection and due process provisions of the fourteenth amendment:

If a boy were confined indoors by his parents, given no education or exercise and allowed no visitors, and his medical needs were ignored, it is likely that the state would intervene and remove the child for his own protection . . . Certainly, then the state acting in its *parens patriae* capacity cannot treat the boy in the same manner and justify having deprived him of his liberty. Children are not chattels.⁴⁵

Despite awareness of the abominable conditions in the *Affleck* situation and a recognition of the *quid pro quo* argument for a juvenile's right to treatment,⁴⁶ the court limited its order in many respects to equalizing conditions under which plaintiffs were confined with the treatment at the Boys' Training School⁴⁷ and refused to go very far toward requiring affirmative treatment.⁴⁸

40. *Id.* at 1357.

41. *Id.*

42. *Id.* at 1360.

43. *Id.*

44. *Id.* at 1359-62.

45. *Id.* at 1367.

46. It is clear that the state does not consider these minimal conditions of confinement to be 'privileges' for adults, nor does this Court consider them to be 'privileges' for juveniles. Society has bargained with these juveniles and it should be an honest bargain . . . [T]hey may not now be treated worse than the adult inmates are. Defendants are ordered to provide these minimum conditions of confinement.

Id. at 1373.

47. *Id.* at 1370.

48. The court would not require vocational training as a part of rehabilitation or order that a drug rehabilitation program be available to all inmates. *Id.* at 1374.

The district court in *Martarella v. Kelley*⁴⁹ applied the principles of the eighth amendment expansively. It held that the state's failure to provide adequate treatment was cruel and unusual punishment, particularly since the state invoked the *parens patriae* doctrine, and accordingly reduced due process safeguards.⁵⁰ Perhaps more significant than the theoretical underpinnings that the opinion enunciates for a constitutional right to treatment was the court's conclusion that an order specifically outlining a "constitutionally adequate standard of treatment"⁵¹ was necessitated by the facts of the case and by the history of reform of juvenile institutions.⁵² The court's definition of "treatment" reflects the requirement of more than a minimal absence of abuse:

"Treatment" is defined as a therapeutic living situation for a child, including his grouping with other children; the adequacy and competency of staff members dealing with him or his case; diagnosis of his emotional and psychological needs and on the basis of such diagnosis and all other information about the child that is available, and the provision of appropriate mental health, case work, educational, recreational and medical services for him.⁵³

Later in the same order the court provided: "Each child held in long term detention shall have the right to implementation of such long range treatment plan to the fullest possible extent."⁵⁴

In comparison the district court in *Morales v. Turman*,⁵⁵ straightforwardly found a separate right to treatment, though characterized as "certain limitations upon the conditions under which

49. 349 F. Supp. 575 (S.D.N.Y. 1972) *opinion and order following remand*, 359 F. Supp. 478 (S.D.N.Y. 1973).

50. 349 F. Supp. at 585.

51. 359 F. Supp. at 482.

52. "[W]e rehearsed . . . the sad history of ignored reports over a period of generations . . . all urging reform and improvement of juvenile detention facilities, and all being largely, if not altogether disregarded and treated as mere pious sentiment." *Id.* It is interesting to note the unusual willingness of state and federal judges in New York to become involved in setting and enforcing standards; this phenomenon is considered more fully *infra* at notes 93-100.

53. 359 F. Supp. at 484.

54. *Id.* at 485. It is curious to note the parallels between the several courts' formulations of an individual, updated, monitored rehabilitation plan, and the Individual Education Program (IEP) mandated by 20 U.S.C. § 1401(19) (1976), *as amended* by the Education For All Handicapped Children Act of 1975, Pub.L.No. 94-142, § 4(a)(19), 89 Stat. 775 [hereinafter cited as PL 94-142].

55. 364 F. Supp. 166 (E.D. Tex. 1973), *enforced*, 383 F. Supp. 53 (E.D. Tex. 1974), *vacated*, 535 F.2d 864 (5th Cir. 1976), *rev'd and remanded*, 430 U.S. 322, 97 S.Ct. 1189 (1977), 562 F.2d 993 (5th Cir. 1977), *rehearing denied*, 430 U.S. 988, 97 S.Ct. 1690 (1977).

the state may confine the juveniles,"⁵⁶ based on the due process clause of the fourteenth amendment. The *Morales* court was as specific as the court in *Martarella* had been as to the violations of this right, including the "withholding or neglecting to provide case-work, nursing, and psychological or psychiatric services to juveniles confined in solitary confinement,"⁵⁷ the failure to provide an ombudsman to hear complaints, and the failure to have a person on the staff who is qualified to superintend the rehabilitation process.⁵⁸ Disappointingly, the court order, which enjoined the Texas Youth Council from operating its facilities in any way inconsistent with the court's detailed provisions, concentrated on practices which amounted to mistreatment and, similarly to most courts which seem to enunciate a constitutional right to treatment, failed to require any affirmative programs.⁵⁹

A final case that must be included in any history of the right to treatment concept established the constitutional dimensions of an affirmative right to treatment in the Seventh Circuit. In *Nelson v. Heyne*,⁶⁰ a class action was brought on behalf of inmates at the Indiana Boys School seeking declaratory and injunctive relief from practices which allegedly violated the first, eighth, and fourteenth amendments to the Constitution.⁶¹ The objectionable practices and policies included beatings with a wooden paddle, intramuscular administration of tranquilizing drugs without adequate medical supervision, and lengthy solitary confinement. These were held by the district court to constitute cruel and unusual punishment.⁶² The district court also enunciated an affirmative right to treatment⁶³ that the Seventh Circuit Court of Appeals citing *Martarella* and the district court's opinion in *Morales* affirmed.⁶⁴ But in its formulation of a "right to rehabilitative treatment," the circuit court went further than the other circuits:

56. 364 F. Supp. at 175.

57. *Id.*

58. *Id.*

59. The headings of the court order include: Use of Physical Force, Solitary Confinement, Security, Ombudsman, Communication, Visitation Rights, and Screening of Prospective TYC Personnel. *Id.* at 176-80.

60. 355 F. Supp. 451 (N.D. Ind. 1972), *aff'd*, 491 F.2d 352 (7th Cir. 1974), *cert. denied*, 417 U.S. 976, 94 S. Ct. 2378 (1974).

61. 355 F. Supp. at 454.

62. *Id.* at 456. This holding was affirmed by the Seventh Circuit Court of Appeals. 491 F.2d at 357.

63. 355 F. Supp. at 458-61.

64. 491 F.2d at 360.

In our view the "right to treatment" includes the right to minimum acceptable standards of care and treatment for juveniles and the right to *individualized* care and treatment. . . . When a state assumes the place of a juvenile's parents, it assumes as well the parental duties, and its treatment of its juveniles should, so far as can be reasonably required, be what proper parental care would provide. Without a program of individual treatment the result may be that the juveniles will not be rehabilitated but warehoused, and that at the termination of detention they will likely be incapable of taking their proper places in free society; their interests and those of the state and the school thereby being defeated.⁶⁵

B. *Parens Patriae Antimonies*

Even as the concept of a constitutional right to treatment is developing, there are serious philosophical limitations in the very notion of *parens patriae* as it has been applied in American juvenile justice. There is a trend afoot to deal with juvenile delinquents in the same punitive manner as adult criminals, leaving little room for a separate rehabilitation oriented juvenile justice system.

Perhaps the fundamental antimony⁶⁶ between the notion of *parens patriae*, originally the king's parental concern for dependent classes,⁶⁷ and that doctrine's application to *delinquent* as well as *dependent* children is at the base of the theoretical problem. This misapplication allowed those involved with the juvenile reform movement to "mask any element of societal fear of the child and to concentrate on hopes of rehabilitation."⁶⁸ The growing acknowledgment that the other societal goal in incarcerating a juvenile offender

65. *Id.* at 360 (emphasis added); See also *Collins v. Bensinger*, 374 F. Supp. 273 (N.D. Ill. 1974) (action for compensatory and punitive damages for deprivation of constitutional right to treatment held moot because plaintiff had been released before the constitutional right to treatment was established in the Seventh Circuit in *Nelson*; *Id.* at 276).

66. Antimony, which is of Kantian origin, "refers to a necessary and inevitable conflict in the laws of reason, a paradox which must present itself as the ultimate resolution of each dialectical process. Here the term suggests an unrecognized, yet existing, contradiction." Curtis, *The Checkered Career of Parens Patriae: The State as Parent or Tyrant*, 25 DEPAUL L. REV. 895, 899 n.15 (1976). See generally P. MURPHY, *OUR KINDLY PARENT—THE STATE* (1974).

67. Curtis, *supra* note 56, at 898. Generally, this royal prerogative was applied to three groups: children, mental incompetents and charities.

68. *Id.* 899. See *Kent v. United States*, 383 U.S. 541, 86 S.Ct. 1045 (1966). The Supreme Court in commenting on the role of the juvenile justice system found that "[t]he objectives are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment." 383 U.S. at 554, 86 S.Ct. at 1054.

is to protect the community from a threat to its safety⁶⁹ has resulted in a change in the focus of the juvenile court to meet the demands of due process which are guaranteed whenever the liberty of the individual is at stake.⁷⁰

A more disturbing reaction to the increasing emphasis on the threat to the community that delinquency poses is reflected in standards promulgated by the Joint Commission on Juvenile Justice Standards under the direction of the American Bar Association (ABA) and the Institute of Judicial Administration⁷¹ which minimize the uniqueness of youth and emphasizes the reduction of juvenile crime as the primary goal: "The purpose of the juvenile correctional system is to reduce juvenile crime by maintaining the integrity of the substantive law proscribing certain behavior and by developing individual responsibility for lawful behavior."⁷² This approach changes the responsibility of the prosecutor from primarily the "best interests of the child" to protection of the people and the state by removing the malefactor from society.⁷³ Indeed, the erosion of the treatment rationale may destroy the reason for a system of juvenile justice separate from the adult version, at least for the delinquency jurisdiction of the juvenile courts.⁷⁴

In summary, the courts' pronouncements on a substantive right to treatment are complicated and confusing. The historical comparison to commitment in the mental health area arises from a misapplication of the *parens patriae* doctrine to situations where juvenile's conduct constitutes a threat to the community. The public's recent and growing acknowledgement of juvenile delinquency's near congruence with adult criminal activity, at least in terms of its effect on community welfare, has led to the conclusion that control

69. Lipsitt, *Due Process as a Gateway to Rehabilitation in the Juvenile Justice System*, 49 B.U.L. REV. 62 (1969). "The judge cannot merely represent the healer; he must reflect social goals of constraints and limits, and it is necessary that these be couched in terms of justice and fairness." *Id.* at 65 (footnote omitted).

70. Curtis, *supra* note 66, at 903 (referring to *Kent v. United States*, 383 U.S. 541, 86 S.Ct. 1045 (1966) and *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428 (1967)).

71. INSTITUTE OF JUDICIAL ADMINISTRATION AND AMERICAN BAR ASSOCIATION, JUVENILE JUSTICE STANDARDS PROJECT (Tent. Draft 1977) [hereinafter cited as STANDARDS].

72. MCCARTHY, *Delinquency Disposition Under The Juvenile Justice Standards: The Consequences of Rationale*, 52 N.Y.U. L. REV. 1014, 1099 n.38 (1977); See STANDARDS, *supra* note 71, Dispositions 1.1.

73. See STANDARDS, *supra* note 71, Prosecution 1.1.

74. At least one comment has noted a discrepancy between the STANDARDS' rejection of the "concept of therapeutic intervention as the cornerstone for delinquency jurisdiction," the retention of a juvenile's right to rehabilitative services, and the "almost total failure to acknowledge directly the social interest in protecting society from crime." Wizner & Keller, *The Penal Model of Juvenile Justice: Is Juvenile Court Delinquency Jurisdiction Obsolete?* 52 N.Y.U. L. REV. 1120, 1125 (1977).

of the dangerous activity has highest priority in any system of justice,⁷⁵ especially since the rehabilitative ideal seems to have failed to reduce either juvenile or adult crime. If the right of an individual child to a meaningful level of positive, rehabilitative treatment—something more than the absence of cruel and unusual punishment—is to be recognized, its recognition must be based on something other than *parens patriae* and the procedural *quid pro quo*.⁷⁶

C. Institutional Limitations

In addition to the theoretical problems that make unlikely the judicial recognition of a Constitutional right to treatment, there are certain institutional limitations which more seriously restrict the practical guarantee of any such right. The simple recurrent fact is that the juvenile court judge does not have the power to order non-court employees to provide treatment.⁷⁷ As in the adult penal system, once the child is handed over to the Department of Corrections (DOC)⁷⁸ or even in some instances to the Adult Corrections Agency, the court has no power other than to dismiss its order and receive reports.⁷⁹ There is little power to supervise and none to compel. The Illinois situation is typical. Once a youth is judged a ward of the court, the court is limited to several specific orders of disposition.⁸⁰ The court may place the minor with his parents, in a foster home, or commit him to the Department of Children and Family Services (DCFS), the DOC⁸¹ or the Department of Mental Health and Devel-

75. For an analysis of the changes wrought by the STANDARDS, see McCarthy, *Delinquency Dispositions Under the Juvenile Justice Standards: The Consequences of a Change of Rationale*, 52 N.Y.U. L. Rev. 1093 (1977).

76. The need for further consideration of the interrelationship between the mental health treatment process and the juvenile delinquency process is well-recognized. See, e.g., Bezanson, *Toward Revision of Iowa's Juvenile Commitment Laws: Thoughts on the Limits of Effective Governmental Intervention*, 63 IOWA L.R. 561, 601 (1978). See generally REPORT OF THE COMPTROLLER GENERAL TO CONGRESS, LEARNING DISABILITIES: THE LINK TO DELINQUENCY SHOULD BE DETERMINED, BUT SCHOOLS SHOULD DO MORE NOW, CGD-76-97 (GAO) (March 4, 1977).

77. In *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1967), the trial court judge, as indicated in the trial transcript, questioned the appropriateness of a court becoming involved in the administration of its order. Judge Holtzhoff stated: "My jurisdiction is limited to determining whether he has recovered his sanity. I don't think I have a right to consider whether he is getting enough treatment or not enough treatment . . ." *Id.* at 461 (Fahy, J. dissenting).

78. This is comparable to "sentencing" in the adult system.

79. Kittrie, *Can the Right to Treatment Remedy the Ills of the Juvenile Process?*, 57 GEORGETOWN L.J. 848 (1969). Many judges have been advocating a much more active judicial role in supervising treatment since *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1967). *Id.* at 876.

80. ILL. REV. STAT ch. 37, § 705-2 (1973).

81. *Id.* § 705-2(1)(a)(5). The court may commit the minor to the DOC if the minor is

opment Disabilities (DMH-DD). Significantly, the Council on the Diagnosis and Evaluation of Criminal Defendants⁸² suggests that the juvenile courts' order of commitment to DCFS or to the DMH-DD is permitted only if these agencies *accept* the commitment; the court has no direct authority over the department.

In further frustration of the courts' ability to oversee treatment, orders that attempt to supervise the legal custodian or guardian to whom the ward has been committed have been reversed on appeal. In the case of *In re Owen*,⁸³ an attempt by a Cook County Juvenile Court Judge to establish detailed procedures for the administration of intramuscular drugs and for the discipline of wards of the DOC was reversed by the Supreme Court of Illinois.⁸⁴ The court recognized that while sections 5-8 of the Juvenile Court Act⁸⁵ confers certain powers of supervision over wards of the court, it does not "authorize the court to establish detailed procedures for the care and discipline of its wards . . ." ⁸⁶ In the case of *In re Washington*,⁸⁷ Chief Judge William Sylvester White of the Cook County Circuit Court, Juvenile Division, enjoined certain practices of the DOC regarding disciplinary isolation and gave declaratory relief in the form of detailed procedural guidelines to be followed prior to the imposition of solitary confinement.⁸⁸ The Illinois Supreme Court reversed, citing its reasoning in the *Owen* holding that the juvenile court lacks authority to grant any relief other than that specified in the Juvenile Court Act; *i.e.*, removal of the custodian and appointment of another in his stead or the restoration of the minor to the custody of his parents or former guardian.⁸⁹ "Neither this section nor any other provision of the Act authorizes the court to prescribe procedures for the care and discipline of its wards, and thereby intrude upon traditional matters of internal institutional adminis-

over thirteen years of age and if the DCFS certifies that "no fitting and proper facility is available for the minor and that he and society would be best served by commitment to the Department of Corrections." ILL. ANN. STAT. ch. 37, § 705-2(1)(a)(5), at 102 (Council Commentary, Smith-Hurd Cum. Supp. 1978).

82. The Council prepared a commentary on the relationship between the Juvenile Court Act and the Unified Code of Corrections. ILL. ANN. STAT. ch. 37, § 705-2, at 101 (Smith-Hurd Cum. Supp. 1978).

83. 54 Ill. 2d 104, 295 N.E.2d 455 (1973).

84. *Id.*

85. ILL. REV. STAT. ch. 37, § 705-8 (1973).

86. 54 Ill. 2d at 109, 295 N.E.2d at 458.

87. 65 Ill. 2d 391, 359 N.E.2d 133 (1977).

88. *Id.* at 394-95, 359 N.E.2d at 135.

89. ILL. REV. STAT. ch. 37, § 705-8(1) (1973).

tration.”⁹⁰ As indicated,⁹¹ the active judicial intervention evident in *Nelson* and *Morales* is a recent development, occurring in few jurisdictions.⁹²

When viewed as a separation of powers problem, the judiciary has power to decide whether the child should be institutionalized; it has no jurisdiction over the daily activities of executive agencies. Thus, it is necessary for legislation to supply the basis for juvenile court advocacy. Almost one of a kind, section 255 of the New York Family Court Act⁹³ is explicit in granting the family court jurisdiction to actively enforce its order of wardship “as may be required,” and the act provides the authority to require the assistance of other branches of government:

It is hereby made the duty of and the family Court or judge thereof may order, any agency or other institution, to render such information, assistance and cooperation as shall be within its legal authority concerning a child who is or shall be under its care, treatment, supervision or custody as may be required to further the objects of this Act. The Court is authorized to seek the cooperation of, and may use . . . the services of all societies or organizations, public or private, having for their object the protection or aid of children or families . . . to the end that the Court may be assisted in every reasonable way to give the children and families within its jurisdiction such care, protection and assistance as will best enhance their welfare.⁹⁴

The breadth of power which section 255 is perceived to provide the family court is reflected in the case of *In re Edward M.*⁹⁵ In addition to delineating the procedure to be followed in considering an application, the court ordered the Commissioner of Social Services to submit a plan to the court that would “meet each and every readily foreseeable contingency involved in the placement of a juvenile delinquent or person in need of supervision in foster care including an ongoing training program for foster parents. The plan

90. 65 Ill. 2d at 398, 359 N.E.2d at 137.

91. See text accompanying notes 55-64 *supra*.

92. Judge William Sylvester White, the trial judge, whose decisions were reversed in *In re Owen* and *In re Washington*, has co-authored an article which complains about this lack of authority. See McNulty & White, *supra* note 31, at 769.

93. N.Y. Judiciary-Court Acts § 255 (McKinney 1975).

94. *Id.*

95. 76 Misc. 2d 781, 351 N.Y.S.2d 601 (Fam. Ct. St. Lawrence Co. 1974).

must contain a time schedule for its implementation."⁹⁶ Other cases⁹⁷ demonstrate the court's demands on the Housing Authority,⁹⁸ the public schools,⁹⁹ and the Department of Mental Hygiene.¹⁰⁰

Unless juvenile courts are specifically granted authority from the legislature to broadly enforce the spirit of parental concern behind the doctrine of *parens patriae*, or until the juvenile court's supervising orders are upheld by appellate courts on some other basis, the court may be able to recognize the right to treatment yet will be unable to guarantee such treatment.

In most instances, juvenile court judges lack the power to force delivery of services. Authority to confer services for the benefit of juveniles may rest in government child welfare agencies and institutions. These entities are supposed to provide the children committed to them with not only the "care, custody, control, education and nurturing substantially equivalent to what they would receive in their own homes,"¹⁰¹ but also rehabilitation and treatment should be provided. These services must be implemented so that juveniles can be molded into productive citizens. In the case of institutionalized children supported in part or in whole by social security or federal foster care funds, these services are necessary so that the children may be returned to their own homes as soon as possible.¹⁰²

96. *Id.* at 791, 351 N.Y.S.2d at 612.

97. See McNulty & White, *supra* note 31, at 770. The cases cited therein provide a detailed report of § 255 and recent case law developments under it.

98. See, e.g., *In re Robin O.*, 80 Misc.2d 242, 362 N.Y.S.2d 688 (Fam. Ct. Kings Co. 1974).

99. See, e.g., *In re Foster*, 69 Misc.2d 400, 300 N.Y.S.2d 8 (Fam. Ct. Kings Co. 1972) (Family Court judge ordered New York City public school to admit a child not residing inside its boundaries); *In re Carlos P.*, 78 Misc.2d 851, 358 N.Y.S.2d 408 (Fam. Ct. Kings Co. 1974) (ordered a local school board to admit a juvenile delinquent to a vocational school).

100. See, e.g., *In re Leopoldo Z.*, 78 Misc.2d 866, 358 N.Y.S.2d 811 (Fam. Ct. Kings Co. 1974). The court ordered that the New York State Department of Mental Hygiene will be responsible for finding a suitable facility in which an emotionally disturbed juvenile may be placed. *Id.* at 868, 358 N.Y.S.2d 814.

101. See note 14, *supra*.

102. See 42 U.S.C. § 601 (1976). The statute reads:

For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independent consistent with the maintenance of continuing parental care and protection, there is authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this part. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary, State plans for aid and services to needy families with children.

If the institutions are the only source for the services needed by their inmates, then the children will remain basically untreated and unserved. The present cost picture is such that, at prevailing *per diem* maintenance rates, the vast majority of "child care" institutions can provide only two services: custodial care and a diagnostic decision.¹⁰³ The follow-up on the diagnosis is uniformly inadequate. There are five main reasons for this inadequacy.

First, despite the popularity of law-and-order rhetoric in recent election campaigns, the prevailing attitude of the public is to cut taxes rather than to increase expenditures for juvenile corrections or care of neglected children.¹⁰⁴ This problem is compounded in institutions which have an interest in generating the highest income against the lowest costs. Minimum wage custodial workers are cheaper than psychologists and persons holding a masters in social work. Labeling an institution as non-profit does not necessarily make it so and certainly does not make it immune from inflation.¹⁰⁵

Second, the rehabilitative ideal has fallen out of vogue in both professional and popular perception. The idea that sentences ought to be mainly punitive is popular among sentencing judges, including a good number of those who sit on the nation's juvenile courts. The ABA Standards on Sentencing, the accepted text used in Continuing Judicial Education "How to Sentence" seminars, now include four objectives: punishment of the offender; protection of the public; rehabilitation of the criminal; and deterrence of others from commission of similar criminal acts.¹⁰⁶ The order is significant. While this formulation may not be applied quite so rigorously to the juvenile delinquent as to the adult felon, many juvenile judges aspire to move up and off the low-status juvenile bench; thus, for these judges it is acceptable and sometimes necessary, to be tough on crime no matter how criminogenic or destructive of the human spirit are the places to which the juveniles are sent.¹⁰⁷ It is unfortunate

103. M. KLEIN, *THE JUVENILE JUSTICE SYSTEM* 173 (1976). The annual per-offender costs for institutions, camps and ranches averaged \$11,657 in 1974. The annual cost per offender in a community based program was \$5,501. *Id.*

104. One exception to the rule of restricted expenditures is in the field of child abuse reporting and emergency child (not family) care. This is the one corner of the juvenile justice maze where appropriations always seem to go up. It is also the only corner which is the object of a consistent and organized nationwide lobbying campaign.

105. The process by which per-diem support rates are set is rather arcane and probably irrational. The rates ultimately depend on whatever the traffic will bear in the context of government appropriations for foster care and youth corrections. See KEENAN *supra* note 12, at 124-34.

106. See note 24 *supra*, at 61-63.

107. Y. BAKAL, *CLOSING CORRECTIONAL INSTITUTIONS* 4 (1973). Statistics compiled by the FBI show a recidivism rate of 74% among imprisoned adults. The same pattern is found

that the dependent and neglected children suffer the deleterious consequences of the public appetite for retribution. It is not unusual for dependent or neglected kids, who are by legal definition not culpable for their status, to be placed in the same institution, subjected to the same rules, and thereby punished in the same way as their delinquent counterparts.¹⁰⁸

The third reason the child caring and child storing institutions lack the resources needed for any meaningful level of treatment is that they are institutionally and geographically separate from the educational and special educational systems that are, under pre-

among youths, and it seems the deeper a child is brought into the juvenile justice system the less his chances are for rehabilitation. A Massachusetts study done in 1972 showed that institutional placements resulted in a recidivism rate of 80%. *Id.* 144.

108. See, e.g., ILL. REV. STAT. ch. 37, § 702-2 to -5 (1973):

Delinquent Minor. Those who are delinquent include any minor who prior to his 17th birthday has violated or attempted to violate, regardless of where the act occurred, any federal or state law or municipal ordinance; and (b) prior to January 1, 1974, any minor who has violated a lawful court order made under this Act.

Id. § 702-2

Minor Otherwise in Need of Supervision. Those otherwise in need of supervision include (a) any minor under 18 years of age who is beyond the control of his parents, guardian or other custodian; (b) any minor subject to compulsory school attendance who is habitually truant from school; (c) any minor who is an addict, as defined in the "Drug Addiction Act"; and (d) on or after January 1, 1974, any minor who violates a lawful court order made under this act.

Id. § 702-3

Neglected Minor. (1) Those who are neglected include any minor under 18 years of age

(a) who is neglected as to proper or necessary support, education as required by law, or as to medical or other remedial care recognized under State law or other care necessary for his well-being, or who is abandoned by his parents, guardian or custodian; or

(b) whose environment is injurious to his welfare or whose behavior is injurious to his own welfare or that of others.

(2) This section does not apply to a minor who would be included herein solely for the purpose of qualifying for financial assistance for himself, his parents, guardian or custodian.

Id. §702-4.

Dependent Minor. (1) Those who are dependent include any minor under 18 years of age (a) who is without a parent, guardian or legal custodian;

(b) who is without proper care because of the physical or mental disability of his parent, guardian or custodian; or

(c) who has a parent, guardian or legal custodian who with good cause, wishes to be relieved of all residual parental rights and responsibilities, guardianship or custody, and who desires the appointment of a guardian of the person with power to consent to the adoption of the minor under Section 5-9.

(2) This section does not apply to a minor who would be included herein solely for the purpose of qualifying for financial assistance for himself, his parents, guardian or custodian.

Id. §702-5.

vailing statutory funding schemes, better geared to provide certain diagnostic, counseling, therapeutic, and tutorial services than the youth correction/youth welfare systems.

The fourth reason treatment resources and delivery of treatment services falter in the institutions is that in many cases, particularly in the delinquency situation, the stays are relatively short, often uniformly short, and unrelated to any fictional "individualized treatment plan." Because of the scarcity of juvenile correction funds, beds are usually assigned for six months to one year, at the end of which they must be emptied to make room for the next youthful offender.¹⁰⁹ Release is not conditioned upon completion of any particular therapy or achievement of any particular educational or rehabilitation goal—the institutions just need the space.

Finally the state systems set up to inspect, license, and monitor both the "publics" and the "privates" are grossly ineffective. They are, perhaps, designed to be so.¹¹⁰ The state licensing/monitoring agency has only a lukewarm interest in administering standards which will have the politically embarrassing result of closing down places and beds the state needs, or in requiring the expenditure of greater amount of scarce public funds to serve coddled teenage troublemakers.¹¹¹

In sum, the juvenile institutions now operating are mainly custodial, lacking in resources in the form of adequate funds and qualified professional staff, subject to weak and sporadically applied licensing and monitoring, and geographically invisible.¹¹²

So long as present attitudes, funding, and institutional arrangements prevail, the status quo seems safely preserved and guaranteed by the employment interests of the present staffs of the child-

109. In Michigan the average stay in a juvenile corrections institution is six to eight months. Interview with Sylvia Gwyn, Delinquency Prevention Specialist, Michigan Department of Social Services (March 23, 1978). In Illinois the authors' clients rarely spent over six months in the Department of Corrections Youth Division.

110. In Detroit, since 1977, two major governmental operated juvenile residential care facilities, the Wayne County Youth Home and the Plymouth Center for Human Development, both failed to comply with the Michigan licensing standards for juvenile institutions. Both required stringent corrective action, and one, the Plymouth Center, is still operating under Federal Court Supervision as a result of a suit filed by the parents of the child inmates. Although the facilities were not minimally fit to care for human beings, neither has been shut down. Conversations with J. McPhillips, Division of Child Welfare (Licensing), Michigan Dept. of Social Services, March 30, 1979.

111. See KEENAN note 12, *supra*, at 40-50.

112. It is coincidental that the best treatment milieus are always where the air is fresh and clean, where lack of public transportation makes regular visits burdensome, and where we never have to see them.

care institutions and their parent state bureaucracies. The occasional press expose followed by the mandatory federal lawsuit will endure as a form of token social criticism, an entertaining literary genre, but absent a serious attitudinal change and new and serious tactics, the average bad places will likely endure and, in a way, flourish at the present funding and population levels.

The prescription proposed by the authors is therefore a change in attitude—a different public and legal perception of the children in institutions, ideally developed with the help of new, highly visible and more politically acceptable tactics. Having noted the reluctance of the courts to declare a clear right to treatment¹¹³ and the unwillingness and fiscal inability of the present system to provide serious, effective treatment, we propose to explore: (1) whether the nation's institutionalized children are "exceptional" or "handicapped," so as to require special educational services; and (2) the means to secure and force the delivery of such services.

II. Toward Finding a Solution—A New Perception

If the underlying assumption is correct that the societal attitude toward the institutionalized juvenile will, at best, maintain the status quo¹¹⁴ then a change in the systematic perception of such a child from a criminal-delinquent to a handicapped or disabled person in need of special education may achieve the same goals which elude the unsuccessful proponents of a constitutional right to treatment. To the extent that a right to education exists and that the right is described in terms of its capacity to prepare the child for life,¹¹⁵ the institutionalized child will benefit from additional and diverse sets of rights and claims.

Historically, the argument for a right to education has been based on state statutes and constitutions¹¹⁶ and on the Federal Constitution's guarantees of the freedom of speech and the right to vote.¹¹⁷ Although universal compulsory education is a basic feature

113. The authors by no means abandon the concept of a legal or constitutional right to treatment as a strategic tool or as an article of faith. We merely argue that the right to education is a more acceptable and effective means to force the delivery of the needed services.

114. More likely is the conclusion that delinquents at least, will be treated more harshly in the future. See note 12 *supra*.

115. *Wisconsin v. Yoder*, 406 U.S. 205, 222, 92 S.Ct. 1526, 1536 (1972).

116. The first state compulsory education law was passed in Massachusetts in 1852. MASS. LAWS ch. 240 §§ 1, 2, 4 (1852) (currently MASS. ANN. LAWS ch. 76, § 18 (Michie/Law Co-op, Supp. 1978)). Since 1918 all states have had compulsory education laws which typically require regular attendance at either private or public schools. Woltz, *Compulsory Attendance at School*, 20 LAW & CONTEMP. PROB. 3, 4 (1955).

117. Diamond, *The Constitutional Right to Education: The Quiet Revolution*, 24

of the American way of life, it is unclear what demands the individual citizens can make of the system.¹¹⁸ The courts have increasingly been called upon to resolve the disputes which arise when individuals demand greater access to the benefits of public education than the state is willing to provide.¹¹⁹

In *San Antonio Independent School District v. Rodriguez*¹²⁰ the Supreme Court held that the Texas method of taxing property was constitutional even though it resulted in unequal per pupil spending from one school district to another.¹²¹ Responding to plaintiff's argument that a fundamental right to education was guaranteed by the Constitution's freedom of speech¹²² and right to vote,¹²³ the Court found that the Texas School system gave each pupil an "opportunity to acquire the basic minimal skills necessary for the enjoyment of the right of speech and of full participation in the political process"¹²⁴ and implied that there is a fundamental right to such basic education.¹²⁵ The Court, however, refused to hold that there is a fundamental right to education—at least education beyond this basic level.¹²⁶ The effect of the *San Antonio* decision has

HASTINGS L.J. 1987, 1104-05 (1973).

118. For example, in *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729 (1975), the Supreme Court characterizes the right to education as a property right once the state has taken action. *Id.* at 574, 95 S.Ct. at 736.

119. See, e.g., *Lau v. Nichols*, 414 U.S. 563, 94 S.Ct. 786 (1974) (remedial language instruction); *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278 (1973) (monetary expenditures per pupil); *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686 (1954) (racially integrated public schools); *Mills v. Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972) (admission of, and special instruction for the mentally retarded in public schools).

120. 411 U.S. 1, 93 S.Ct. 1278 (1973).

121. *Id.* at 54-55, 93 S.Ct. at 1307-08.

122. The Court emphasized plaintiff's argument: "In asserting a nexus between speech and education, appellees urge that the right to speak is meaningless unless the speaker is capable of articulating his thoughts intelligently and persuasively. The 'marketplace of ideas' is an empty forum for those lacking basic communicative tools." *Id.* at 35, 93 S.Ct. at 1297-98.

123. In regard to the right to vote, the Court reviewed plaintiff's contention: Exercise of the franchise, it is contended, cannot be divorced from the educational foundation of the voter. The electoral process, if reality is to conform to the democratic ideal, depends on an informed electorate: a voter cannot cast his ballot intelligently unless his reading skills and thought processes have been adequately developed.

Id. at 35-36, 93 S.Ct. at 1297-98.

124. *Id.* at 37, 93 S.Ct. at 1299.

125. *Id.*

126. Yet we have never presumed to possess either the ability or the authority to guarantee to the citizenry the most *effective* speech or the most *informed* electoral choice.

Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either right, we have

been to define the right to education as only the right to attend public schools,¹²⁷ and even that right is based upon the state compulsory education statute¹²⁸ and not any requirement of the federal equal protection clause.

Advocates have been more successful in achieving judicial recognition of a right to an appropriate and effective education where a court has been provided with a state or federal statute to guide its decision.¹²⁹ For example, in *Lau v. Nichols*,¹³⁰ the Supreme Court specifically avoided the equal protection argument and relied solely on section 601 of the Civil Rights Act of 1964 in holding that the State of California had an affirmative duty to ensure that 1800 Chinese speaking children residing in San Francisco receive a meaningful education.¹³¹ By being able to point to HEW regulations that required federally funded school districts (such as California's) to rectify the linguistic deficiencies of its students so that the instruction offered to these students was meaningful,¹³² the Court was again able to protect individual interests in obtaining an effective education without extending the doctrine of state action that is required in finding an equal protection rationale.

But the area of education for physically and mentally handicapped children—regularly excluded from any access to an education—has seen the development of a legal theory to secure judicial recognition of the substantive right to an appropriate education. Often commented upon, both *Pennsylvania Association for Retarded Children v. Pennsylvania*¹³³ and *Mills v. Board of*

no indication that the present levels of educational expenditures in Texas provide an education that falls short. Whatever merits appellees' argument might have if a State's financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved and where—as is true in the present case—no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of free speech and of full participation in the political process.

Id. at 36-37, 93 S.Ct. at 1298-99.

127. *Id.* at 36, 93 S.Ct. at 1297-98.

128. See Project, *Education and the Law: State Interests and Individual Rights*, 74 MICH. L. REV. 1373, 1404 (1974).

129. In states where there is a provision for some educational opportunity, the federal constitutional analysis may be surplusage, an unnecessary basis for relief.

130. 414 U.S. 563, 94 S.Ct. 786 (1973).

131. *Id.* at 566, 94 S.Ct. at 788. See also Legislative Notes, *Education of All Handicapped Children Act of 1975*, 10 U. MICH. J. L. REF. 110, 130 (1976).

132. 414 U.S. at 566, 94 S.Ct. at 788 (1973).

133. 334 F. Supp. 1257 (E.D. Pa. 1971).

*Education*¹³⁴ are recognized as overcoming the exclusion of handicapped children from public education in cases where such education has been previously offered to non-handicapped children. In *Pennsylvania Association for Retarded Children (PARC)* a three judge panel approved a consent decree which acknowledged that all mentally retarded children could benefit from a program of education¹³⁵ which afforded full due process protections to a child before the label of retarded could be imposed by the school.¹³⁶ In *Mills*, the court extended the principles of *PARC*, and found an equal protection prohibition against the practice of excluding the handicapped children from public education¹³⁷ since the distinction drawn in compulsory education statutes between handicapped and non-handicapped children lacked a rational basis.¹³⁸

Moreover, courts in New York and North Dakota have ignored or distinguished *San Antonio* in order to prevent the exclusion of handicapped children from public schools. A New York court has held that statutory provisions that allowed school districts to charge parents for the cost of educating a handicapped child while providing a free education to the non-handicapped were violations of the equal protection clause.¹³⁹ Likewise, the state's failure to reimburse parents for private school tuition for their handicapped children where no adequate public school program was available was held to be an equal protection violation.¹⁴⁰ In the case of *In re G.H.*¹⁴¹ the Supreme Court of North Dakota predicted, perhaps optimistically, that the United States Supreme Court would use the strict scrutiny test in reviewing any case involving handicapped students because the handicapped are an inherently suspect class.¹⁴² It read *San Antonio* narrowly as applying to situations where some minimum education was provided.¹⁴³

The notion of a right to an appropriate education has been

134. 348 F. Supp. 866 (D.C. Cir. 1972).

135. 343 F. Supp. 279, 302 (E.D. Pa. 1972).

136. *Id.* at 302-03.

137. 348 F. Supp. at 875.

138. *Id.*

139. *In re Kirschner*, 74 Misc.2d 20, 24, 344 N.Y.S.2d 164, 168 (Fam. Ct. 1973).

140. *In re Arthur K.*, 74 Misc.2d 872, 875, 347 N.Y.S.2d 271, 273 (Fam. Ct. 1973). *See also In re Lofft*, 86 Misc.2d 431, 438, 383 N.Y.S.2d 142, 147 (Fam. Ct. 1976) (school district ordered to locate or develop educational program for physically handicapped children).

141. 218 N.W.2d 441 (N.D. 1974) (held that a physically handicapped child is constitutionally entitled to an equal educational opportunity and that the school district is financially responsible for providing education even though the child's parents have moved to another state).

142. *Id.* at 447.

143. *Id.* at 446.

advanced in support of successful complaints against the functional exclusion of children who are included in the public education system in name only.¹⁴⁴ In *Fialkowski v. Shapp*,¹⁴⁵ handicapped children claimed a denial of equal protection because they would not benefit from the educational programs offered by the school system.¹⁴⁶ The District Court for the Eastern District of Pennsylvania distinguished *San Antonio* in its holding that equal educational opportunity is not determined by comparing levels of financial expenditure and the claim in *Fialkowski* that equal educational opportunity means equal access to a minimum level of education.¹⁴⁷

The same court subsequently extended the *Fialkowski* principles in *Frederick L. v. Thomas*¹⁴⁸ by implying that an inappropriate education could be the same as an exclusion for learning disabled children.¹⁴⁹ The court indicated that strict scrutiny, or something like it, is the appropriate level for evaluating state action in some circumstances.¹⁵⁰

The barriers¹⁵¹ to judicial acceptance of such a right remain. Justice Powell explained some of the reasons for judicial restraint in the *San Antonio* case: the complexities of "local fiscal schemes,"¹⁵² the presence of the "most persistent and difficult questions of educational policy,"¹⁵³ and the "potential impact on our federal system"¹⁵⁴ which examination of state action by the Court threatens.¹⁵⁵ Generally, advocates have been unable to overcome

144. See, e.g., *Lau v. Nichols*, 414 U.S. 563, 94 S.Ct. 786 (1973) (San Francisco school system found to have violated § 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d), by failing to provide 1800 Chinese speaking students an adequate opportunity to participate in the educational process).

145. 405 F. Supp. 946 (E.D. Pa. 1975).

146. *Id.* at 948.

147. *Id.* at 957-58.

148. 408 F. Supp. 832 (E.D. Pa. 1976) (denied motion to dismiss a civil rights suit that alleged a failure on the part of the Philadelphia Board of Education to provide an adequate education for children with specific learning disabilities).

149. *Id.* at 835.

150. *Id.* at 835-36 (terming education a "quasi-fundamental" interest and noting that disabled children have some characteristics of a suspect class, the court surmised that the appropriate equal protection test would be "the as yet hard to define middle test of equal protection, sometimes referred to as 'strict rationality.'" *Id.*). See also Project, *Special Education: The Struggle for Equal Educational Opportunity in Iowa*, 62 IOWA L. REV. 1283, 1350-53 (1977) (A survey of how various federal and state courts have responded to situations similar to those in *Fialkowski* and *Frederick L.*).

151. See Legislative Notes, *supra* note 131, at 132 for a discussion of these barriers.

152. 411 U.S. at 41, 93 S. Ct. at 1301.

153. *Id.* at 42, 93 S. Ct. at 1301.

154. *Id.* at 44, 93 S. Ct. at 1302.

155. See Frug, *The Judicial Power of the Purse*, 126 U. PA. L. R. 715, 743 (1978) (examines the nature of possible limitations on the federal judiciary's power to remedy consti-

these barriers with the several different approaches they have presented.¹⁵⁶

The Education for All Handicapped Children Act of 1975¹⁵⁷ (PL 94-142) may provide the statutory basis for the guarantee of a right to a free, appropriate, public education for all whom the legislation encompasses. It is seen as the culmination of the "revolution" in the educational opportunities for these children.¹⁵⁸ It has the virtue of containing provisions which substantially curb the need for judicial activism in defining the goals of education and structures any questions about the content of educational programs in terms with which the courts feel comfortable: the court needs only to determine whether the state and its local school districts have functioned within statutory and administrative guidelines.

Our thesis is that the overwhelming majority of, or all institutionalized juveniles fit the definition of "handicapped persons" in PL 94-142 and in the implementing regulations.¹⁵⁹ Accompanying the development of our thesis is a growing call for investigations of a possible link between juvenile delinquency and learning disabilities or severe emotional disorders that make regular classroom education inappropriate for the children classified as having such traits.¹⁶⁰

tutional violations by mandating increased government expenditures; Note, *Implementation Problems in Institutional Reform Litigation*, 91 HARV. L. REV. 428, 435 (1977) (provides an analysis of the judicial role in implementing institutional reform).

156. See Handel, *The Role of the Advocate in Securing the Handicapped Child's Right to an Effective Minimal Education*, 36 OHIO ST. L.J. 349 (1975). The author notes that "equal educational opportunity should not be confused with identical opportunity," and for constitutional purposes equal education should be defined as including "both equal access to appropriate services and equal minimal results." *Id.* at 354-55. He also suggests that a minimal education is that which would allow one a "meaningful exercise of first amendment rights." *Id.*; McClung, *Do Handicapped Children Have a Legal Right to a Minimally Adequate Education?*, 3 J.L. & EDUC. 153 (1974). Since schools try to provide a minimally adequate education for normal students (which would constitute at least some proficiency in reading, writing, and arithmetic), the author suggests that equal protection would require schools to also provide a minimally adequate education for the handicapped "even though the definition of minimally adequate education will differ for these children." *Id.* at 159-61. See also Dimond, *supra* note 117, at 1119. Dimond offers the *quid pro quo* argument that has been associated with the right to treatment for incarcerated criminals and institutionalized mentally ill persons and urges that the "innocent child committed to a minimum ten year sentence of school should be entitled to a benefit: an adequate education regardless of different abilities and capacities." *Id.* at 1123-24.

157. 20 U.S.C. §§ 1401-61, as amended by the Education for All Handicapped Children Act of 1975, Pub.L.No. 94-142, 89 Stat. 773-96.

158. See Dimond *supra*, note 117 at 1088 (predicts the revolution); Project, *supra* note 150, at 1337-38 (revolution is acknowledged).

159. 45 C.F.R. §§ 121.-121m.10 (1977).

160. See COMPTROLLER GENERAL *supra*, note 76 at 16-22. See generally Robbins, A Preliminary Report on the Neuropsychological Development of a Group of Clinic Referred Juve-

Notwithstanding the passage of PL 94-142 and the heightened legal awareness of the rights of handicapped children, the change in the public's and the educational and juvenile justice establishments' perception of the institutionalized exceptional child is far from complete. Blind spots amounting to veritable gulfs remain, and will likely endure for a while longer. Local school trustees who often regard themselves as the last defenders of the American ideal are sometimes slow to embrace new concepts. Some trustees may be even slower when the concepts entail greater expenditures, some surrender of autonomy to larger cooperative districts,¹⁶¹ and greater visibility of heretofore dropout children whose very presence stands as an indictment of the ideal. There are some children that the various boards of education, though duty-bound to try, have failed to educate. Included in this class are: all exceptional children who are unserved or underserved in terms of what is appropriate for their needs or handicaps; all dropouts; and, all resident children removed from their homes and institutionalized outside the school district and for whom the local school board assumes no financial responsibility. This latter group of children usually removed by court order are the ones who, along with the expellees, have somehow "forfeited their right to attend public school."¹⁶²

Similar traditionalist attitudes prevail among state legislators who are faced with public demands for tax limitation, statewide declining enrollments, system-wide inflationary cost increases, and a natural resistance to the apparently federally imposed or occasional court imposed requirements to spend more money on fewer children, especially in the case of special education. In what should be only an apocryphal story, a few years ago the Utah legislature became the archetypal case of this syndrome when that state's citi-

nile Delinquents (Paper on the Cambridge, Mass. Court Clinic Learning Disabilities Project delivered to the American Psychological Ass'n Annual Meeting, August 28, 1978). Ms. Robins is the Chief Research Psychologist at the Cambridge Court Clinic, 40 Thorndike St., Cambridge, Mass. 02141.

161. The very word "cooperative" is sometimes translated into "collective" in the minds of a number of conservative school board members.

162. The forfeiture of the right does not always occur as a result of the child's action. The school board or juvenile court often decides for the child that he has forfeited his right to attend school.

Larger school districts (Chicago, Detroit, Los Angeles, San Francisco, etc.) generally take the position that a student can be expelled from his local school but not from the district. See, e.g., UNIFORM CODE OF STUDENT CONDUCT FOR DETROIT PUBLIC SCHOOLS, at 6 (1978-79). Thus was born the "disciplinary transfer," possibly to a social adjustment school. The reasons for this enlightenment are probably the existence of alternatives, greater heterogeneity of the district's student population (which must be scrupulously bused together), and perhaps the fact that most of the lawyers who represent indigent plaintiffs are concentrated in big cities.

zens enacted a new constitution which included a statewide requirement for and a universal right to special education services.¹⁶³ The legislature ignored the constitutional mandate and refused to make law, whereupon the parents of the children successfully sought a writ of mandamus against the entire Utah legislature.¹⁶⁴

The other prevailing and countervailing public attitudes which have slowed the special education movement, and have to date outright stopped it at the gates of the institutions, are those evinced by the juvenile law and order advocates. Since it has become fashionable to speak against coddling these child felons, law and order advocates contend that these children should be treated punitively with determinate sentences served in higher-security, more prison-like institutions. By their anti-social acting-out behavior these children forfeit almost all their rights, just as adult felons do. They have no remaining claim to public education or publicly-paid special education.

Simultaneously, the system has acquired greater sophistication about the root causes of anti-social and delinquent behavior, the psychic and social costs of lack of educational achievement, and the forced exposure to inappropriate education.¹⁶⁵ With this advanced state of the art and a greater appreciation and advocacy of special education comes a realization of the larger economic picture—one that must transcend local millage, the state's common school fund, and federal subsidy formulae. Both the educational and juvenile justice cognoscenti believe that a dollar spent in pre-primary or primary special education diagnosis, services, support therapy, and parent education can in a few years save many dollars in high-school security, juvenile court personnel, police patrols, and even operation of the adult corrections department.¹⁶⁶ This argument may prevail

163. UTAH CONST. art. X, § 10 (1971).

164. *Wolf v. State Legislature of Utah*, No. 182646 (3d Judicial District, Utah Jan. 8 1969). Unfortunately the case is not reported, but its existence says something about public resistance to the required changes in attitudes.

165. This curious schizophrenia—a harder law and order line along with better tools to understand delinquent behavior—runs through the twenty-eight standards for the administration of juvenile justice. See generally NATIONAL ADVISORY COMMITTEE ON CRIMINAL JUSTICE STANDARDS AND GOALS, *JUVENILE JUSTICE AND DELINQUENCY PREVENTION* (1976).

166. LEVINSON, *THE RIGHT TO A MINIMALLY ADEQUATE EDUCATION FOR LEARNING DISABLED CHILDREN* 253, 271-72 (1978). The author states:

Although the likelihood of a learning disabled child ending up in an institution is not great, such a child may very well drop out of school and join the ranks of the unemployed and the recipients of public aid. Studies have already begun to show a high correlation between learning disabled children and school drop-outs. They have also found a disproportionately high number of the learning disabled among juvenile delinquents and criminals. For example, a 1965 survey of 277,649 juvenile arrests in

in the long run. A number of political, institutional, and fiscal adjustments will be necessary before the process is complete—before our intervention resources and techniques are directed at the pre-school and primary school age children. The extent to which such allocations are provided will ultimately be reflected in literally incalculable savings in adolescent crisis treatment or incarcerative placement services.¹⁶⁷

We submit that both the attitude changes and reallocation of resources needed can be somewhat hastened by drawing public attention to existing legislation through some creative litigation, and by logical extensions and expansion of social and political processes already far advanced. The special education "movement" has strongly taken hold nationwide contemporaneous with the growing public distrust and despair of the juvenile court and juvenile corrections institutions as the "cure" for delinquency. This is not to say that the juvenile court will become superfluous and eventually wither away as a result of better special education services. We will always have a certain number of neglectful and abusive parents, and other diverse cases which will not fit the prescriptions of the educational system and must therefore come before the juvenile court. To the extent that we collectively accept and act upon the established truisms that a good deal of delinquent behavior is founded in the frustrations, weak ego development, and need for acting out to get attention which are born of various kinds of social, familial, and academic deprivations, the closer we will be to making a quantum reduction in the juvenile court's caseload and the institutional occupancy rate. How many school disciplinary transactions in the sixth grade and thereafter can be attributed to boredom, anger, and being "turned off" by school? How much parental animosity or indifference can be attributed to "poor" performance by the children and the accompanying adverse reflection on the parent's egos? We do not propose better special education as a panacea, but do advocate it as an effective, even dramatic treatment which is grossly underused, particularly in the context of the institutionalized child.

California, found over 55,000 children evidencing symptoms of learning disabilities. The study revealed that such children are often unable to read by fourth or fifth grade and, consequently, drop out of school. Their lack of education, coupled with their emotional problems, often leads them to juvenile delinquency. *Id.*

167. The reader's attention is called to a new and provocative periodical called *INSTITUTIONS, ETC.*, published monthly by the Center for Action on Institutions and Alternatives, 1346 Connecticut Ave., N.W., Wash., D.C. 20036.

If a good deal of the behavior that brings older children to the attention of the juvenile court can be attributed to the failure, often by the public school system, to apply, or to have at the opportune time applied, appropriate special education screening, diagnosis and teaching techniques, then it follows that the failure is extremely costly, both to the society at large and in terms of the damage and lost opportunities suffered by the student victims of the public educational machinery's systematic malpractice. We also accept and advocate the proposition that the generous and enlightened application of compensatory special education services can facilitate remarkable progress toward remedying the damage. This is particularly true if the special education is provided in a positive and non-punitive setting.¹⁶⁸

In bringing all of the above philosophical discussion back to the practical problem posed in this article—how to get worthwhile treatment for institutionalized juveniles—we return to the previously cited need for concrete, accurate, and to whatever extent possible, non-politicized studies in two areas. First, the incidence of learning disabilities and educational deprivation specifically among institutionalized children should be determined. Second, the effectiveness of the application of special education services to these children should be ascertained. If these attempts are made in good faith, then remarkable progress in the children's socialization, improved self-concepts, overall adjustment, reduced alienation, and increased ambition should result. Thus we believe it is possible to achieve, through a conscientious, thoroughgoing, and humane application of state-of-the-art special education techniques and services to institutionalized children, a good portion of the rehabilitative ideal that has eluded the nation's juvenile corrections institutions. The proof that the current juvenile storage establishments have avoided capturing the ideal is in the reports of decisions of the federal district courts and in the overwhelming conclusion reached in the literature on the topic.¹⁶⁹

The need for these studies and for more work generally on these topics has been recognized by no less august a source than the

168. Compensatory education was included as part of the district court's order in the PARC case. 343 F. Supp. at 302. It has generally been provided for in the state special education plans. The concept of special education services appropriate to the child's needs in order to allow realization of the child's full potential contains an inchoate compensatory education concept, at least for those children diagnosed later than age three or five. The argument is pointed up by the occasional press accounts of the dyslectic, or hearing-handicapped child who spends the first seven grades in the Trainable Mentally Handicapped class before his true I.Q. of 110 is finally discovered.

169. See notes 12 & 17 *supra*.

Controller General and the General Accounting Office (GAO). The GAO ran a sample test of institutionalized delinquents in 1976 and determined that something in excess of one quarter had primary learning problems, *i.e.*, learning disabilities.¹⁷⁰ Similar, but more dramatic are the initial findings of a study conducted by the Cambridge (Juvenile) Court Clinic.¹⁷¹ The study found that over eighty percent of the sample delinquent children tested exhibited symptoms compatible with learning disabilities.

The foregoing is not presented as dispositive or conclusive proof that *all* institutionalized children and incarcerated delinquent children will be successfully rehabilitated by the application of special education. To maintain our advocacy position it is sufficient to accept the GAO position that the link is there, that there is a probability of high correlation between institutionalization and learning disabilities and a need for special education, and that the remedy—conscientious provision of top quality special education diagnosis and services to children in the institution—is likely to be cost-effective, particularly in comparison with the limited success of current treatment modes and levels and prevailing rates of recidivism. In fact, the professional day-to-day observers of troubled children and institutionalized children know perfectly well that a substantial amount of adolescent acting-out behaviors, including the ones that are the basis for the incarceration, are traceable to poor school adjustment, and failure to provide special educational or enrichment services during early years.

Perhaps the most weighty and persuasive proof of the desirability and cost-effectiveness of special education generally is its growing public acceptance, despite attitudinal gaps, and particularly the legislative codification of the phenomenon over the past dozen years or so.¹⁷² The growth and spread of the phenomenon followed traditional lines. First, advocacy by the education professionals working in conjunction—conspiring, some might say—with select representatives of the medical, legal, and government service professions. Next, a few forward looking solons got the laws passed, usually as riders or amendments to the current school codes. Along the way a few highly visible lawsuits were successfully prosecuted. A few, and then many dramatic results appeared and were documented and verified. Then, in 1975, Congress passed PL 94-142 and special edu-

170. See COMPTROLLER GENERAL *supra*, note 76 at 8.

171. See generally Robbins *supra* note 160.

172. See text accompanying note 193 *infra*. The trend is very much a national phenomenon, and it is irreversible.

cation became a de facto prerequisite for collecting federal education dollars.¹⁷³

Currently the great majority of school administrators conversant with the vocabulary of special education are accustomed to filing the reports, planning the budgets, trading off personnel, and even to some extent, willingly cooperating with the intermediate and co-op districts and state boards on matters educationally special. The movement has become bureaucratized and entrenched. Furthermore, as the movement grows, parents become educated, sophisticated, and a few become militant in demanding services for their children who fifteen, even ten years ago would have been embarrassments to be hidden as dropouts. The special education vogue has not approached the point of orthodontics where reception of "treatment" is a minor status symbol. Nevertheless, it is no longer socially unacceptable to have an "exceptional" child.¹⁷⁴

Finally, to come full circle, training in techniques to identify pupils who can potentially benefit from special education is creeping into traditional methods courses in the schools of education. The specialty courses and degrees have been around some time. State boards routinely give special certificates in learning disabilities, education of the handicapped, vocational education for the "slow learners," etc. In addition to becoming bureaucratized, the phenomenon has become professionally self-perpetuating.

The purpose of the above is not to belabor the obvious. From the perspective of the legal advisor/advocate, tactician, and strategist, whether operating in the litigation arena or in several political forums, the above is pertinent. All of the people associated with the special education effort—the entire population of the special education establishment—and all of the fellow travelers (parents, journalists, academicians, legislative committee chairpersons, lobby groups for mental health, "rights for the handicapped" and the ubiquitous "consultants") can be enlisted as very respectable allies, comrades in arms, in the battle to extend quality special education services to institutionalized children.¹⁷⁵

173. For an excellent history of special education laws see Project, *supra* note 160.

174. Congress' choice of the pejorative word "handicapped" was perhaps unfortunate, when compared to the more natural and enlightened "exceptional," the preferred term of the professionals and some legislatures. See, e.g., PA. CONS. STAT. ANN. §§ 13-1371 to -1382 (Purdon 1962). The word "handicapped" was already fixed in the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-94 (1976), and PL 94-142.

175. Of course, it is unlikely that anyone will directly advocate diversion or reallocation of resources from his or her own program to the institutionalized children (sometimes called the "lost causes" or "end-of-the-liners"). But in a period of expansion of a certain speciality in a generally contracting industry, the specialists may be relied upon to advocate further

The respectability of special education folk is worth comment. Experienced advocates of the interests of institutionalized (*i.e.*, "delinquent") children are relatively unwelcome in a law and order society. Pleading the cause of the sixteen year old murderer, purse snatcher, multiple burglar, or just plain "incurable" is a lonely pastime not particularly conducive to increased popularity. Presently, the rush to pour public resources into quality treatment for institutionalized children has been more like a saunter, and in some institutions, a dead stop. A few states have shifted into reverse.

The help of an allied special education establishment (willing or unwilling) may alter the public, social, legislative, and judicial perceptions from the present negative view to a more enlightened posture. This posture would project institutionalized children as having specialized educational needs and coming to the attention of the unified child educating, caring, and rehabilitating pipelines of the government¹⁷⁶ a little late, through the wrong intake valve, but by no means too late. This approach will initially work best on behalf of the incurables, dropouts and petty delinquents, and may take longer to extend to felony delinquents currently incarcerated primarily for punishment rather than rehabilitation.

Lurking within this approach is a not very well camouflaged variant of the old liberal "delinquency is society's fault, not the kids' fault" chorus. While it is a fact that the greatest influences on any child's personality are the family and early home experiences, it is also true that education is enormously important, and can affect family relationships, expectations, and the student's self-growth.¹⁷⁷ In addition, the impact of special education has been slower to take hold in the geographic and demographic sectors that produce the largest number of juvenile court wards and orders for institutionalization.¹⁷⁸

expansion as consistent with self-interest. None of this commentary is meant to sound particularly unsavory or devious. The authors are dedicated to special education. All this is included only for its possible value in strategy development and coalition building.

176. We characterize the machinery as unified, knowing that it is anything but. See text accompanying notes 10-23 *supra*. The rhetoric may be tactically useful in breaking down the separation of powers ploy and bringing the juvenile justice and special education establishments into communication with each other.

177. J. HOLT, *HOW CHILDREN FAIL* (1964); J. KOZOL, *DEATH AT AN EARLY AGE* (1967).

178. This conclusion is intended as neither another indictment nor polemic against big city schools. Both the Detroit and Chicago public school systems are fraught with problems, mainly financial and busing, and both have in the past tended to give higher priority to concerns such as union demands, security maintenance, repair of vandalism, etc., than to special education testing and programming. The juvenile courts in both these cities are essentially black courts. The incidence of educational maladjustment—dropouts—is higher in Detroit and Chicago than in the more affluent cities of Bloomfield Hills, Michigan, and

Currently, acceptance of the concept that special education is a legal right¹⁷⁹ (as opposed to a funded reality) is sufficiently widespread, and clearly enough established to warrant and to predict its extension to institutionalized children. Litigation is one traditional method to catalyze the extension. And whatever strategies are employed, the attorney/advocate who is well informed about the current law and reasonably informed about the prevailing professional politics and federal/state funding can be of significant service in the design, formulation, and execution of the campaign to get treatment qua special education services delivered to any state's incarcerated children.

The prevailing social and legal perceptions of institutionalized children fall into either of two, or perhaps both, of the following categories:¹⁸⁰

- 1) "Bad kids:" those who have committed crimes and who should therefore be punished; and
- 2) "Losers:" unfortunate children more or less destroyed by neglectful parents, the system, etc., who are a societal embarrassment and must be kept in institutions outside the mainstream.

An occupant of these categories is naturally labeled and pejoratively perceived to be inferior.

These general views lack any perception that these children might be "exceptional" in the educational or therapeutic sense. "Exceptional" has become a non-pejorative, relatively neutral term, and the phrase "receiving special educational services" generates a generally positive public response: self-improvement, overcoming a handicap, fighting the odds, and serving the child's best interests. Traditionally, children in juvenile corrections institutions received treatment by the reform school model: a combination of an

Evanston, Illinois. The quality of and access to special education services and other kinds of professional crisis intervention and solutions to human problems is greater in these affluent areas and most other suburbs than in the big cities. In other, fewer words, wealthy children get more help sooner, outside the juvenile court. They generally do not get banished to institutions, at least by the court, though sometimes by their parents. See note 3, *supra*.

179. For the basis of the right to special education see text accompanying notes 193-226 *infra*, and Project, *supra* note 150.

180. In fact, the distinction between the two categories blurs into the delinquency perception, and there develops a public view that all children in institutions are delinquent (bad) and should be treated accordingly. This observation finds support in the history of orphanages. It is curious that of the 800 plus children that the state of Illinois sent to "long term psychiatric treatment centers" in Texas, none were in the delinquent category, though all were treated like delinquents. Those children were dependent and neglected. See KEENAN, *supra*, note 12 at 35.

army bootcamp and state penitentiary or prison farm. Children in storage institutions should be neither seen nor heard, and toughened up with survival skills, never coddled.¹⁸¹

What then are the legal rights and claims owned by the institutionalized and incarcerated delinquent child? Theoretically, all institutionalized children have a right to support, maintenance, and services as nearly equivalent as the circumstances permit, as they would receive in their own homes.¹⁸² At minimum this means food, clothing, shelter, and necessary medical care. Universally, the purpose of the placement must be to serve the "best interests of the child."¹⁸³ For incarcerated juvenile delinquents this generally means "rehabilitative services" or a "rehabilitative program," the supposed purpose of which is to persuade the child not to commit future crimes, and encourage him to become a normal, non-criminal, productive member of society.

For children who are institutionalized for reasons other than a finding of delinquency, the placement is presumed to be therapeutic, at least to the extent that the personal or family condition that led to the court order for institutionalization must be treated, talked out, or perhaps cured.¹⁸⁴ If the child is in any way supported or partially supported by federal categorical assistance funds,¹⁸⁵ there is a requirement usually honored only in the breach, that the child and his family receive social services designed to return him to his own home.¹⁸⁶

Institutionalized children theoretically enjoy the same right to a free public education as other similarly aged children in the state. But since they do not reside in their home districts, and are often past, or at least fairly close to the truancy/mandatory attendance cut-off age, no one gets overly excited about their schooling. The institutional schools generally emphasize some form of vocational training, and do not always conform to the state's secondary school accreditation and curricular requirements.¹⁸⁷ Often the staffs are not

181. See text accompanying notes 103-112 *supra*.

182. See note 12 & accompanying text *supra*.

183. The purpose clause of most states' juvenile codes contain this language. See, e.g., ILL. REV. STATS. ch. 37, § 701-2 (1973), note 18 *supra*.

184. *Id.*

185. 42 U.S.C. §§ 601-660 (1976). This includes all Aid to Families with Dependent Children (AFDC) and AFDC-foster care funds. 42 U.S.C. § 608(b)(1) (1976).

186. 42 U.S.C. §§ 601, 625 (1976).

187. A suggestion of a few years back that went nowhere was to incorporate the Illinois DOC (Youth Division) as a regular school district with trustees, personnel, and a claim on the state per-capita public subsidy. It is perhaps time to revive some variant of the concept in light of PL 94-142 and the state's special education laws. See, e.g., ILL. REV. STAT. ch. 122

certified. It is often convenient—and cheaper—to label the kids as “dropouts” and forego the formal traditional public schooling portion of the “therapy.”¹⁸⁸ In fact a good number of the nation’s institutionalized children get little more than diagnostic services and custodial care. “T.V. therapy” is a popular treatment modality.

Unfortunately the promise of what the child (and his family) can expect in return as the *quid pro quo* for the court’s taking guardianship from the parent and devolving it upon a state agency or its contracted vendor is too often not kept. Recall that the juvenile court judge who enters the order that removes the child from the family and moves him into the institution has practically no power of follow up supervision or enforcement.¹⁸⁹ The actionable rights of the institutionalized child become little more than a variant of the *O’Connor v. Donaldson*¹⁹⁰ partial right not to go completely untreated when there are no benefits from the incarceration.¹⁹¹ This right becomes the subject of legal action only in the most egregious cases of nontreatment/mistreatment, and then only if the child-victims have access to dedicated and creative counsel who can secure the appropriate injunctions without a high degree of reliance on a clearly defined legal or constitutional right to treatment.¹⁹²

§§ 14-1.01 to 14-14.01 (1973). Perhaps the department should incorporate as, or join up with a special education co-op district. See also note 23 *supra*.

188. Occasionally, a small institution will send its residents to the local district’s schools on a nonresident tuition basis. As the institutions get larger, state-operated, further out in the country, and more punitive, this phenomenon disappears.

189. See text accompanying notes 13-25 *supra*.

190. 422 U.S. 563, 95 S.Ct. 2486 (1975).

191. *Id.* at 569. The authors consider incarceration without treatment of persons not convicted of crimes to be gross, actionable mistreatment.

192. The current movement to decriminalize some of the juvenile status offenses (truancy, incorrigibility, drug addiction, pregnancy, runaway) that often result in institutionalization may serve to revise the foregoing gloomy taxonomy. See, e.g., ABA JUVENILE JUSTICE STANDARDS PROJECT (1977); TASK FORCE TO DEVELOP STANDARDS AND GOALS ON JUVENILE JUSTICE AND DELINQUENCY PREVENTION (1976); NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS (1973). A revised Michigan Juvenile Code that would according to some of the various draft versions, abolish status offenses has been held up in various legislative committees, mainly the Conference Committee, for about two years. The sweeping changes in the Michigan Juvenile Code were originally proposed in 1975 as House Bill 4704 and Senate Bill 1097. The Michigan Probate Judges Association responded with a more conservative reform, House Bill 6034, also introduced in 1975. An advisory group, the Ad-Hoc Committee on Juvenile Code Reform worked a couple years and drafted a compromise version, House Bill 6184, introduced by 25 co-sponsors on March 16, 1978. The bill still languishes. The changes proposed while rational are not exactly revolutionary. For a narrative of the recent reform movement see Zeman, *Juvenile Code Revision*, 46 DET. LAW. 7 (1978).

III. RIGHTS OF HANDICAPPED CHILDREN UNDER THE FEDERAL STATUTORY SCHEME

In contrast to the gloomy picture of legally enforceable treatment rights of incarcerated children, consider the more expansive claims of children labelled as "handicapped."

A. *The Federal Education for all Handicapped Children Act (PL 94-142) and Regulations*

In contrast to the rather restricted rights of incarcerated delinquents and other children to treatment, the rights of the handicapped child to special education services are expansive and constantly expanding. In 1975 Congress passed PL 94-142.¹⁹³ There is no ambiguity about the purpose or desired result of the Act:

It is the purpose of this Act . . . to assure that all handicapped children have available to them, within the time periods specified in [612(2)(B); section 1412(2)(B) of this title; *i.e.*, Sept. 1, 1978 for persons up to age 18, Sept. 1, 1980 for persons up to age 21], 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 state, and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children.¹⁹⁴

PL 94-142 conditions a state's sharing in federal funding for special education upon its ability and discharge of its duty to assure that:

(A) there is established (i) a goal of providing full educational opportunity to all handicapped children, (ii) a detailed timetable for accomplishing such a goal, and (iii) a description of the kind and number of facilities, personnel, and services necessary throughout the State to meet such a goal;

(B) a free appropriate public education will be available for all handicapped children between the ages of three and eighteen within the State not later than September 1, 1978,

193. 20 U.S.C. §§ 1401-61 (1976), *as amended* by the Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773-96.

194. PL 94-142 § 3(c). The purpose is repeated almost verbatim in the regulations. 45 C.F.R. § 121a.1. (1977).

and for all handicapped children between the ages of three and twenty-one, within the State not later than September 1, 1980, except that, with respect to handicapped children aged three to five and aged eighteen to twenty-one, inclusive, the requirements of this clause shall not be applied in any State if the application of such requirements would be inconsistent with State law or practice, or the order of any court, respecting public education within such age groups in the State;

(C) all children residing in the State who are handicapped, regardless of the severity of their handicap, and who are in need of special education and related services are identified, located, and evaluated, and that a practical method is developed and implemented to determine which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services.¹⁹⁵

The Act has been often summarized and widely commented upon in the literature,¹⁹⁶ and is therefore not summarized here. The recently enacted regulations are comprehensive and compendious,¹⁹⁷ and set out in extraordinary and, according to some state educational administrators, burdensome detail, the contents of state plans and programs, the procedures that most followed, the records that must be kept, and the rights the handicapped children and their parents must be afforded.

In order to participate in the federal funding, the state (or its political subdivision) must first identify, locate, and evaluate all

195. 20 U.S.C. § 1412(2)(A), (B), (C) (1976). This section and the one following set out the statutory requirements a state must follow in development of its plan for special education. *Id.* § 1413. The parallel regulations are found at 45 C.F.R. §§ 121a.110-.151 (1977). Advocates of incarcerated, handicapped, and other "exceptional" children will find a study of the state plan, 20 U.S.C. § 1413 (1976), along with these sections to be a provocative experience.

196. See generally Note, Haggerty & Sacks, *Education of the Handicapped: Towards a Definition of an Appropriate Education*, 50 TEMP. L. Q. (1977). Krass, *The Right to Public Education for Handicapped Children: A Primer for the New Advocate*, 1976 U. ILL. L.F. 1016 (1976); Note, *Coercive Behavior Control in the Schools: Reconciling "Individually Appropriate" Education with Damaging Changes in Educational Status*, 29 STAN. L. REV. 93 (1976); Note, *Education for All Handicapped Children Act: Opening the Schoolhouse Door*, 6 N.Y.U. REV. L. & SOC. CHANGE 43 (1976); Comment, *Handicapped Child Has a Right to Appropriate Education*, 55 NEB. L. REV. 637 (1976); Legislative Note, *Education of All Handicapped Children Act of 1975*, 10 U. MICH. J.L. REF. 110 (1976); Project—*Special Education: The Struggle for Equal Educational Opportunity in Iowa*, 62 IOWA L. REV. 1283 (1977).

197. The Regulations on Assistance to State for Education of Handicapped Children, 45 C.F.R. § 121a.1-.754 (1977), cover some 57 pages of text and 27 pages of appendices and incorporate all revisions through October 1, 1977.

handicapped children within the state. It must then devise, in consultation with the parent, an individually planned program designed to ensure that every handicapped child receives a free, appropriate public education and related support services at public expense.¹⁹⁸

The argument we advance essentially depends on the answer to the question: Do institutionalized children, or at least a significant proportion of them, fall within the category of "handicapped children" as defined in PL 94-142? We maintain the answer is "yes" and set out the following definitions from PL 94-142 in support of our position. United States Code, Title 20, section 1401 reads in pertinent part:

(1) The term "handicapped children" means mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired or other health impaired children, or children with specific learning disabilities who by reason thereof require special education and related services.

(2) The term "children with specific learning disabilities" means those children who have a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. Such disorders include such conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. Such term does not include children who have learning problems which are primarily the result of visual, hearing, or motor handicaps, of mental retardation, of emotional disturbance, or of environmental, cultural or economic disadvantage.

(3) The term "special education" means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.

(4) The term "related services" means transportation and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychologi-

198. 20 U.S.C. §§ 1412(2)(c), 1414(a)(1)(5) (1976).

cal services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.

The regulations expanded the statutory definition of handicapped children. In addition to children who exhibit traditional physical symptoms of retardation, the regulations provide that:

(a) . . . the term "handicapped children" means those children evaluated in accordance with §§121a.530-121a.534 as being . . . emotionally impaired, . . . or as having specific learning disabilities, who because of those impairments need special education and related services . . .¹⁹⁹

Subsection (b)(8) of this same definitional section of the regulation reads:

(8) "Seriously emotionally disturbed" is defined as follows:

(i) The term means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree, which adversely affects educational performance;

(A) An inability to learn which cannot be explained by intellectual, sensory, or health factors;

(B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;

(C) Inappropriate types of behavior or feelings under normal circumstances;

(D) A general pervasive mood of unhappiness or depression; or

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.

(ii) The term includes children who are schizophrenic or autistic. The term does not include children who are so-

199. 45 C.F.R. § 121a.5(a) (1977). These regulations also prescribe the procedures by which states must conduct initial screening and evaluation programs, including specific provisions for the protection of the children evaluated. *Id.* §§ 121a.530-534.

cially maladjusted, unless it is determined that they are seriously emotionally disturbed.²⁰⁰

And subsection (b)(9) of the same section reads:

(9) "Specific learning disability" means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations. The term includes such conditions as perceptual handicaps, brain injury, minimal brain disfunction, dyslexia, and developmental aphasia. The term does not include children who have learning problems which are primarily the result of visual, hearing, or motor handicaps, of mental retardation, or of environmental, cultural, or economic disadvantage.²⁰¹

In following the Congressional mandate to enact regulations to ensure the universal availability of special education services to "All Handicapped Children," the Commissioner of Education added²⁰² a specific definition of the word "include" as used in the definition of handicapped children to clearly indicate that all categories of handicapped should be broadly construed: "As used in this part, the term 'include' means that the items named are not all of the possible items that are covered, whether like or unlike the ones named."²⁰³

The combination of the broadly inclusive definitions of "handicapped children" and "emotionally disturbed" is probably not much contracted by the slight caveat in the regulations that the latter term "does not include children who are socially maladjusted unless it is determined that they are seriously emotionally disturbed."²⁰⁴ There are very, very few legitimate juvenile sociopaths, *i.e.*, children who are seriously socially maladjusted with no element or overlay of emotional disturbance. Failure, rejection, punishment, and guilt tend to create emotional upset in teen-aged humans.

Placement in the category "emotionally disturbed" is determined by the screening procedures prescribed in the regulations, during which the parent or guardian or other person standing in the

200. *Id.* § 121a.5(b)(8).

201. *Id.* § 121a.5(b)(9).

202. For the Commissioner's rule-making authority see 20 U.S.C. § 1417(b) (1976).

203. 45 C.F.R. § 121a.6 (1977).

204. *Id.* § 121a.5(b)(8)(ii).

place of the parent—a juvenile court judge who orders a state wardship for example—has considerable opportunity to offer information and argument that the child is handicapped in that he is emotionally impaired.²⁰⁵

There is almost a *prima facie* test. The fact that a child has been removed from his home and school environment for his own protection, for society's protection or for whatever other reason the applicable juvenile code advances to justify placement,²⁰⁶ should be taken as proof that the child suffers from: "(A) An inability to learn which cannot be explained by intellectual sensory or health factors; [or] (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers."²⁰⁷

Parenthetically, state school codes often define expellees and dropouts as students unable to make constructive use of the public school experience or some such formulation.²⁰⁸ These definitions seem to be very close to what the Commissioner of Education has defined to be "emotionally impaired," or "seriously emotionally impaired."²⁰⁹ In the authors' experience, the incidence of dropouts, pushouts, and expellees in the juvenile delinquent and storage institutions is extremely high.²¹⁰ If there is any doubt, ask any director

205. *Id.* §§ 121a.532(c), .532(a), .500-.514.

206. For the Illinois definitions of "delinquent," "dependent," "neglected minor," and "minor in need of supervision" see ILL. REV. STAT. ch. 37, § 702-2 to -5 (1973).

207. 45 C.F.R. § 121a.5(8)(i)(A), (B) (1977).

208. See, e.g., ILL. REV. STAT. ch. 122, § 10-22.6(a) (1973); MICH. COMP. LAWS § 304.613 (1970). See generally Keenan, *Current Issues in Illinois School Law: The Consumer's Perspective*, 23 DE PAUL L. REV. 402 (1973).

209. 45 C.F.R. § 121a.5(8) (1977); 20 U.S.C. § 1401(1) (1976). Review once again the Congress' findings and statement of purpose. See text accompanying note 187 *supra*. See also 20 U.S.C. § 1401 (1976), in which the Congress found that:

(3) more than half of the handicapped children in the United States do not receive appropriate educational services which would enable them to have full equality of opportunity;

(4) one million of the handicapped children in the United States are excluded entirely from the public school system and will not go through the educational process with their peers;

(5) there are many handicapped children throughout the United States participating in regular school programs whose handicaps prevent them from having a successful educational experience because their handicaps are undetected;

(6) because of the lack of adequate services within the public school system, families are often forced to find services outside the public school system, often at great distance from their residence and at their own expense . . .

210. Here is another point where child advocates should heed the call of the Controller General and the GAO to develop this data readily collectible under the state Freedom of Information Acts or some other guise of academic or programmatic research. See note 153 *supra*. The Michigan Freedom of Information Act is a representative one. MICH. COMP. LAWS ANN. § 15.231-.275 (West Supp. 1978). School districts are specifically included in the list of government units that must divulge information. *Id.* § 15.232(b)(iii).

of any type of residential institution for juveniles how many of the charges were not regularly attending school at the time of their placement.

So there is no mistake about the inclusion of institutionalized children in the category, both Congress and the Commissioner make several specific references to children in institutions as being part of the target population. There is no question but that the rights and services secured by PL 94-142 to *all* children in a participating state include the children in the state's public and private institutions.²¹¹ The federal statute, the federal regulations, the requirements of the state plan, and the legislative history all make it unimpeachably clear that Congress did not intend to allow state officials to sweep their unserved special education cases under the rug of a "residential" institution where they can get "psychotherapy" instead of going to school.

The provisions that establish the universality of special education for institutionalized children are generally contained in the "Least Restrictive Environment" parts of the law.²¹² This concept, and "mainstreaming," are cornerstones in the intent of Congress, particularly when read in context of other recent laws that establish or clarify the rights of handicapped persons, in particular section 504 of the Rehabilitation Act of 1973.²¹³ Congress recognized that handicapped people have been excluded from numerous opportunities and programs simply because they are handicapped, and are perceived of as being different and less able to participate. The prescription to counteract this is to ensure their eligibility to be included in and to ensure their access to every "normal" education,

211. While it seems obvious that when Congress says "all" it means "all," it does so happen that state officials and the attorneys general representing them will attempt to circumvent or circumscribe the federally established eligible categories by arguing that words in federal statutes mean the opposite of what they say. It has been necessary several times for the federal courts to state the obvious: that Congress means what it says. In *Shea v. Vialpando*, 416 U.S. 251, 94 S.Ct. 1746 (1974), the Court construed section 402(a)(7) of the Social Security Act. The Court stated:

By its terms, § 402(a)(7) requires the consideration of "any" reasonable work expenses in determining eligibility for AFDC assistance. In light of the evolution of the statute and the normal meaning of the term "any," we read this language as a Congressional directive that no limitation, apart from that of reasonableness, may be placed upon the recognition of expenses attributable to the earning of income.

Id. at 260.

212. 20 U.S.C. §§ 1412(5)(B), 1414(a)(1)(C)(iv) (1976); 45 C.F.R. § 121a.550-556 (1977).

213. *Cf.* Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970, 29 U.S.C. § 794 (1976) Pub. L. No. 91-616, 84 Stat. 182 (1970); Drug Abuse Office and Treatment Act of 1972, Pub. L. No. 92-255, 86 Stat. 78 (1972). *See also* 45 C.F.R. §§ 84.1-61 (1977); U.S. Const. amend. XIV.

training, and employment program in which full and meaningful participation is possible. Congress has, over the past five years, brought handicapped people out of the closet in which American society had locked them.²¹⁴

In order to qualify for assistance under PL 94-142, a state has to meet the following conditions:

(1) The State has in effect a policy that assures all handicapped children the right to a free appropriate public education.

(2) The State has developed a plan pursuant to section 1413(b) of this title

. . . .

(5) The State has established (A) procedural safeguards as required by section 1415 of this title, (B) procedures to assure that, to the maximum extent appropriate, handicapped children, *including children in public or private institutions or other care facilities*, are educated with children who are not handicapped, and that special classes, special schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily, and (C) procedures to assure that testing, evaluation materials and procedures utilized for the purposes of evaluation and placement of handicapped children will be selected and administered so as not to be racially or culturally discriminatory. Such materials or procedures shall be provided and administered in the child's native language or mode of communication, unless it clearly is not feasible to do so, and no single procedure shall be the sole criterion for determining an appropriate educational program for a child.

(6) The State educational agency shall be responsible for assuring that the requirements of this subchapter are carried out and that all educational programs for handicapped children within the State including all such programs administered by any other State or local agency will be under the general supervision of the persons responsible for educational programs for handicapped children in the State edu-

214. See Comment, *The Least Restrictive Environment Section of the Education for All Handicapped Children Act of 1975: A Legislative History and Analysis*, 13 GONZAGA L. REV. 717 (1978).

cational agency and shall meet educational standards of the State educational agency.²¹⁵

From the perspective of the institutionalized children, the critical language appears in paragraph (5): "including children in public or private institutions or other care facilities" There is an obvious underlying assumption that all institutionalized children must participate in the state's special education programs. If possible they should attend school in the mainstream programs, but to the extent this is not appropriate (this probably means, to the extent this is not feasible) they must be provided with separate schooling or services.

Additional key language appears in the statute that fixes responsibility in one state agency for overall supervision and coordination of all the educational programs in the state.²¹⁶ This provision was necessary to avoid the penchant of state officials who enthusiastically seek federal funding for their own particular programs, but who when faced with a harder job of educating children in DOC institutions respond: "It's not my job—those kids don't belong to us; they're DOC kids." To this the corrections official may counter: "I'm a corrections officer, not a high school principal, and I have enough problems. Most of these kids are over sixteen anyway."

The Secretary of HEW anticipated the argument that otherwise responsible or apparently responsible parties would take the position that the new PL 94-142 and regulations would relieve other providers of the duty to pay for services, including room and board for the child. The applicable regulation reads:

- (a) Each State may use whatever State, local, Federal, and private sources of support are available in the State to meet the requirements of this part. For example, when it is necessary to place a handicapped child in a residential facility, a State could use joint agreements between the agencies involved for sharing the cost of that placement.
- (b) Nothing in this part relieves an insurer or similar third party from an otherwise valid obligation to provide or to pay for services provided to a handicapped child.²¹⁷

215. 20 U.S.C. § 1412 (1976) (emphasis added).

216. *Id.* §§ 1412(a)(B), 1401(18).

217. 45 C.F.R. § 121a.301 (1977). The comment to 45 C.F.R. § 121a.302 (1977) reads: "This requirement applies to placements which are made by public agencies for educational purposes, and includes placements in State-operated schools for the handicapped such as a State school for the deaf or blind." The question arises: are juvenile court wards placed in institutions for educational purposes? Or more negatively are juvenile court wards who are

The regulations are similarly clear as to who does not have to pay:

If placement in a public or private residential program is necessary to provide special education and related services to a handicapped child, the program, including non-medical care and room and board, must be at no cost to the parents of the child.²¹⁸

The implementing regulations are clear about the necessity of including under the scope of PL 94-142 those children in public and private institutions.

[T]he provisions of this part apply to all political subdivisions of the State that are involved in the education of handicapped children. These would include: (1) The State educational agency, (2) local educational agencies and intermediate educational units, (3) other State agencies and schools (such as Departments of Mental Health and Welfare and State schools for the deaf or blind), and (4) *State correctional facilities*.²¹⁹

The Secretary has made it clear. No longer are children in juvenile detention and correction facilities the forgotten outcasts of the special education system, at least in states that accept federal funds under Part B²²⁰ of 94-142.

Similarly, with respect to the "privates"—vendor institutions which contract to care for the state's dependent, neglected, out-of-control, occasionally delinquent, orphaned, or mentally ill juvenile court wards—the regulations are similarly clear:

Each public agency in the State is responsible for insuring that the rights and protections under this part are given to

institutionalized primarily for correctional or therapeutic purposes exempt? The answer to this last question is negative, because of the universality requirement of 20 U.S.C. §§ 1402, 1412 (1976). There is an additional argument, not too attenuated, that all juvenile residential placements are at least in part for "educational" purposes—whether under the rubric of rehabilitation, adjustment to the home environment, mental health treatment, vocational training, etc. Also review the "best interest" language in the purpose clauses of the states' juvenile codes. See note 18 *supra*.

218. 45 C.F.R. §121a.302 (1977).

219. *Id.* § 121a.2(b) (emphasis added). The comment to section 121a.2(b) makes clear that the regulations apply across the board in any state that receives the funds. The private or public institutions need not itself receive any of the funds to fall within the ambit of the regulations.

220. 20 U.S.C. §§ 1411-20 (1976).

children referred to or placed in private schools and facilities by that public agency.²²¹

A public agency is any political subdivision of the state that is responsible for providing special education or related services to handicapped children.²²² Since it is universally the duty of the guardian to provide for the ward's care, custody, control, and education, and since, by definition, all the institutionalized children are juvenile court wards, it is then the duty of the court, or of the state agency appointed by the court to be guardian, to secure any special education services the child needs—regardless of where he is placed.²²³

There is a specific regulation that spells out the responsibility of the state to handicapped children placed in a private school or facility by a public agency:

Each State educational agency shall insure that a handicapped child who is placed in or referred to a private school or facility by a public agency:

(a) Is provided special education and related services;

(1) In conformance with an individualized education program which meets the requirements under §§121a.340-121a.349 of Subpart C.

(2) At no cost to the parents; and

(3) At a school or facility which meets the standards that apply to State and local educational agencies (including the requirements in this part); and

(b) Has all of the rights of a handicapped child who is served by a public agency.²²⁴

The duty to disseminate and enforce the state's standards for special education programs in private agencies that sell services to the state is also fixed in the regulations.²²⁵ The state educational

221. 45 C.F.R. § 121a.2(c) (1977). See also 20 U.S.C. §§ 1401(7), 1412(b) (1976).

222. 45 C.F.R. § 121a.11 (1977).

223. *Id.* § 121a, app. A, at 513. See also *id.* § 121a.110-149. For a representative formulation of the duties of the public guardianship administrator, see ILL. REV. STAT. ch. 37, § 701-11 (1973).

224. 45 C.F.R. § 121a.401 (1977). Sections 121a.340-.346 specify the requirements, contents, and procedures to be followed in developing an Individual Education Program for an eligible student. See 20 U.S.C. § 1413(a)(4)(B) (1976) (requisite features of state plans).

225. 45 C.F.R. § 121a.402 (1977). It was precisely the lack of such a requirement combined with the refusal of the state child welfare agency to undertake this duty that led to the tragic waste of public resources and Illinois children's lives in a variety of Texas institutions in 1963-73. See generally KEENAN *supra* note 12; MURPHY *supra* note 12. In these instances

agency must also perform this duty.

The regulation that is the counterpart to the statutory requirement of a "Least Restrictive Environment" embodies a similar guarantee to institutionalized children. The regulation provides:

- (a) Each State educational agency shall insure that each public agency establishes and implements procedures which meet the requirements of §§121a.550-121a.556²²⁶
- (b) Each public agency shall insure:
 - (1) That to the maximum extent appropriate handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and
 - (2) That special classes, separate schooling or other removal of handicapped children from the regular educational environment, occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.²²⁷

The legislative history of PL 94-142 provides consistent authority that special education programs, screening, benefits and services must be provided to institutionalized children. The definition of special education recommended by the Committee on Education and Labor is noteworthy:

H.R. 7217 defines "special education" to mean specially designed instruction to meet the unique needs of a handicapped child as set forth in the individualized educational program, including physical education, home instruction, classroom instruction, and instruction in hospitals and institutions. The Committee understands the importance of providing educational services to each handicapped child according to his or her individual needs. These needs may entail instruction to be given in varying environments, *i.e.*, hospital, home, school, or *institution*. The Committee urges that where possible and where most beneficial to the child, special educational services be provided in a classroom sit-

each state (Illinois and Texas) deferred to the other to do the monitoring. Of course, neither did the monitoring with the result that there were private child care institutions in Texas which virtually were not subject to inspection. These institutions were populated exclusively by out-of-state children, usually court wards from Illinois and CHAMPUS referrals.

226. 45 C.F.R. § 121a.550 (1977). See 20 U.S.C. § 1413(a)(4)(B) (1976).

227. *Id.*

uation. An optimal situation, of course, would be one in which the child is placed in a regular classroom. The Committee recognizes that this is not always the most beneficial place of instruction. No child should be denied an educational opportunity; therefore, H.R. 7217 expands special educational services to be provided in hospitals, in the home, and *in institutions*.²²⁸

The Senate Report takes a similar, even stronger position:

The Education Amendments of 1974 incorporated the major principles of the right to education cases. That Act added important new provisions to the Education of the Handicapped Act which require the States to: establish a goal of providing full educational opportunities to all handicapped children; provide procedures for insuring that handicapped children and their parents or guardians are guaranteed procedural safeguards in decisions regarding identification, evaluation, and educational placement of handicapped children; establish procedures to insure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped; and that special classes, separate schooling, or other removal of handicapped children from the regular education environment occurs only when the nature of severity of the handicapped is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily; and, establish procedures to insure that testing and evaluation materials and procedures utilized for the purposes of classification and placement of handicapped children will be selected and administered so as not to be racially or culturally discriminatory.²²⁹

The state plan requirements that call for in-service training of persons who "are engaged in the education of handicapped children" give several examples of the groups that should receive in-

228. H.R. REP. No. 94-332, 94th Cong., 1st Sess. 9 (1975) (emphasis added). H.R. 7217, 94th Cong., 1st Sess. (1975), is the counterpart of S.6, 94th Cong., 1st Sess. (1975) which the conference adopted as P.L. 94-142. The resolution and the bill are similar in substance.

229. S. REP. No. 94-168, 94th Cong., 1st Sess. 8 (1975), *reprinted in* [1975] U.S. CODE CONG. & AD. NEWS 1432. In addition to the sources quoted above the other reports in the legislative history of P.L. 94-142 are: H.R. REP. N. 94-664, 94th Cong., 1st Sess. (1975) S. REP. N. 94-455, 94th Cong., 1st Sess. (1975), *partially reprinted in* [1975] U.S. CODE CONG. & AD. NEWS 1480-1508.

service training. While youth corrections officers are not specifically mentioned as examples, the statutory and regulatory language and intent clearly suggest that they should be, and perhaps must be, included in that part of the state's plan that details in-service training.²³⁰

The final point in the argument that PL 94-142 must apply to institutionalized wards of the juvenile court (delinquent, dependent, neglected) and that these children *prima facie* meet one or more of the definitions of handicapped²³¹ is the following language used by the Congress in its Findings and Declaration of Purpose: "[I]t is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of handicapped children *in order to assure equal protection of the law.*"²³²

The implications of the equal protection language may suggest Congressional disapproval of the Supreme Court's position in *San Antonio Independent District v. Rodriguez*²³³ that held the applicability of the equal protection clause to matters educational will be in the context of traditional "minimal scrutiny analysis."²³⁴ One effect of the congressional pronouncement in PL 94-142 and similar declarations in the recent spate of federal legislation to establish the rights of handicapped persons to equal access, equal opportunity, and by extension equal protection of law, might be to make handicapped persons a suspect class. Any state attempt to limit their rights or benefits would therefore be subject to "strict scrutiny" or at least "sliding scale stricter scrutiny"²³⁵ and might therefore be constitutionally infirm, in addition to being in violation of section 504 of the Rehabilitation Act of 1973.²³⁶ All of these equal protection arguments have been thoroughly developed and explored in the

230. 20 U.S.C. § 1413(a)(3) (1976). The examples specifically mentioned as requiring training are groups "such as special teachers, regular teachers, administrators, psychologists, speech-language pathologists, audiologists, physical education teachers, therapeutic recreation specialists, physical therapists, medical personnel, parents, volunteers, hearing offices, and surrogate parents . . ." 45 C.F.R. § 121a.383(f)(3) (1977).

231. See text accompanying notes 202-211 *supra*. See 20 U.S.C. § 1401(1)(15) (1976); 45 C.F.R. § 121a.5-.6 (1977).

232. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, § 3(b)(9), 89 Stat. 775 (printed in Historical Note to 20 U.S.C.A. § 1401 (West Ed. 1976).

233. 411 U.S. 1, 93 S.Ct. 1278 (1972).

234. *Id.* at 18.

235. See generally Gunther, *Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

236. 29 U.S.C. § 794 (1976). See text accompanying notes 239-249 *infra*.

“Right to Treatment” case opinions and briefs.²³⁷ In general, the judicial response has been unenthusiastic.

*B. Claims of Institutionalized Children Under Section 504 of the Rehabilitation Act of 1973*²³⁸

In addition to rights and claims they may own pursuant to PL 94-142, institutionalized children and their advocates should claim a right to participate in and to receive services as handicapped persons pursuant to section 504 of the Rehabilitation Act of 1973 which reads:

No otherwise qualified handicapped individual in the United States, as defined in section 706(6) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.²³⁹

Section 706(6), Title 29 of the United States Code states:

The term “handicapped individual” means any individual who (A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (B) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to subchapters I and III of this chapter. For the purposes of subchapters IV and V of this chapter, such term means any person who (A) has a physical or mental impairment which substantially limits one or more of such person’s major life activities, (B) has a record of such an impairment, or (C) is regarded as having such an impairment.²⁴⁰

On April 28, 1976, President Ford signed Executive Order No. 11914²⁴¹ which authorized the Secretary of HEW to draft the main implementing regulations and further instructed the Secretary to coordinate the enactment of regulations by all federal funding departments and agencies.²⁴² The order instructed each federal funding department and agency to issue its own rules, regulations, and

237. See text accompanying notes 29-62 *supra*.

238. Pub. L. No. 93-112, 87 Stat. 335 (1973) (codified at 29 U.S.C. §§ 701-94 (1976)).

239. 29 U.S.C. § 794 (1976). See Amendments following 29 U.S.C. § 706 (1976). See generally *Kennedy v. Jones*, 412 F. Supp. 353 (D.D.C. 1976).

240. 29 U.S.C. § 706(6) (1976).

241. 41 Fed. Reg. 17, 871 (1976), reprinted in 29 U.S.C. § 794 (1976).

242. *Id.* § 1.

directives to assure compliance.²⁴³ It also provided for a sanction;²⁴⁴ suspension or termination of federal financial assistance if the state refuses to comply,²⁴⁵ and for hearing procedures to be employed in seeking compliance or termination.²⁴⁶

On April 28, 1977, former Secretary Joseph Califano promulgated the final regulations²⁴⁷ for HEW that are, by the terms of the executive order, the model for all federal agencies and departments to follow.²⁴⁸ The definitions used in these regulations are, if anything, more inclusive than those of PL 94-142 and the special education regulations.²⁴⁹ After making a specific cross reference to PL 94-142 in the definitional section,²⁵⁰ the regulation provides the following definitions, set out in their entirety to buttress the argument that any child institutionalized as a result of a juvenile court order meets the definitions of "handicapped persons" and "qualified handicapped person," and therefore falls within the class of individuals protected by PL 94-142 and section 84, subpart D of Title 45, Code of Federal Regulations. The key definitions in section 84.3 are:

(j) "Handicapped person." (1) "Handicapped person" means 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.

(2) As used in paragraph (j)(1) of this section, the phrase:

(i) "Physical or mental impairment" means (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, geni-

243. *Id.* § 2.

244. *Id.* § 3(b).

245. *Id.*

246. *Id.* § 3(c). Of course the reach of section 504 goes far beyond recalcitrant state or local government units. The Rehabilitation Act of 1973 likewise applies to all government contractors in any way paid by federal funds, insofar as requiring employment or at least a policy favoring employment of handicapped persons. 29 U.S.C. § 793 (1976). It appears, though, that section 793 may not create a private right of action by a handicapped person fired by a government contractor. *See Rogers v. Frito-Lay Inc.*, 433 F. Supp. 200 (D.C. Tex. 1977).

247. The regulations appear in 45 C.F.R. § 84 (1977).

248. Exec. Order No. 11, 914, 41 Fed. Reg. 17, 871 (1976), *reprinted in* 29 U.S.C. § 794 (1976).

249. 45 C.F.R. § 121a. (1977). *See* 20 U.S.C. §§ 1401-61 (1976); note 193 *supra*.

250. 45 C.F.R. § 84.3(c) (1977).

tourinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(ii) "Major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.

(iii) "Has a record of such an impairment" means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(iv) "Is regarded as having an impairment" means (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) has none of the impairments defined in paragraph (j)(2)(i) of this section but is treated by a recipient as having such an impairment.

(k) "Qualified handicapped person" means:

(1) With respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question;

(2) With respect to public preschool, elementary, secondary, or adult educational services, a handicapped person (i) of an age during which non-handicapped persons are provided such services, (ii) of any age during which it is mandatory under state law to provide such services to handicapped persons, or (iii) to whom a state is required to provide a free appropriate public education under §612 of the Education of the Handicapped Act; and

(3) With respect to postsecondary and vocational education services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity;

(4) With respect to other services, a handicapped person who meets the essential eligibility requirements for the re-

cept of such services. (1) "Handicap" means any condition or characteristic that renders a person a handicapped person as defined in paragraph (j) of this section.²⁵¹

Subpart D of the regulation defines the application and effect of section 504 of the Rehabilitation Act of 1973 on "preschool, elementary, secondary and adult education programs and activities that receive or benefit from Federal financial assistance and to recipients that operate, or that receive or benefit from Federal financial assistance for the operation of, such programs or activities."²⁵²

Some analysts may see a potential problem in the limited definition of Federal financial assistance in that it refers only to "any grant, loan, contract . . . , or any other arrangement by which the Department [or HEW] provides or otherwise makes available assistance in the form of: (1) Funds; (2) Services of Federal personnel; or (3) Real and personal property or any interest in or use of such property" ²⁵³ In other words, perhaps only HEW-supported programs are subject to section 504 and the corresponding regulations, while, for example, Law Enforcement Assistance Agency (LEAA) supported programs would be exempt from the law. This concern is a red herring, since the statutes and Executive Order 11,914 mandate that all Federal financial assistance programs are covered by, and all agencies must enact, HEW-type regulations.²⁵⁴ This item bears mention since it is likely that every single child institutionalized as a result of court order, whether placed in a public or private setting, is at least partially supported by a federal subsidy.²⁵⁵

Section 504 regulations pertaining to preschool, elementary, and secondary education in general mesh quite neatly with PL 94-142 regulations.²⁵⁶ One of the differences is in the definition of "free appropriate public education:"

251. *Id.* § 84.3.

252. *Id.* § 84.31.

253. *Id.* § 84.3(h).

254. See notes 241-47 and accompanying text *supra*.

255. The most common sources of federal support are: the AFDC-FC (foster care) program; CHAMPUS; occasional LEAA-supported demonstration programs in youth corrections; AFDC; Supplemental Security Income (SSI) and National Institute of Mental Health (NIMH) supported programs in mental health care. All categories of AFDC and SSI are authorized by the Social Security Act and supervised by the Social Security Administration under the direction of the Secretary of HEW. The argument likewise applies to children in mental hospitals who no longer need to be committed pursuant to a court order after *Parkham v. J.L.*, note 3 *supra*.

256. The first section of Appendix A to 45 C.F.R. § 121a (1977) describes the relationship between § 84 and § 121a, and explains their similarities and disparities. See *id.* § 121a, app. A at 500-501.

It should be noted that the term "free appropriate public education" (FAPE) has different meanings under Part B and section 504. For example, under Part B, "FAPE" is a statutory term which requires special education and related services to be provided in accordance with an individualized education program. However, under section 504, each recipient must provide an education which includes "the provision of regular or special education and related aids and services that (1) are designed to meet individual educational needs of handicapped persons as adequately as the needs of non-handicapped persons are met . . ."²⁵⁷

Thus while the special education law and regulations are somewhat more specific, speaking in terms of an Individualized Education Plan (IEP) and conferring specific due process rights for children and parents engaged in developing the IEP, the definition under the section 504 regulations simply requires that: "A recipient that operates a public elementary or secondary education program shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap."²⁵⁸ The regulations then specifically define the term "appropriate education" as:

- (1) For the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of non-handicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of §§84.34, 84.35 and 84.36.
- (2) Implementation of an individualized education program developed in accordance with the Education of the Handicapped Act is one means of meeting the standard established in clause (b)(1)(i) of this paragraph.²⁵⁹

These definitions contain an implicit benefit for the institutionalized child. Although the child may not meet the special education definition of "handicapped" in the strictest sense, he may, nevertheless, be considered to possess a "mental impairment which substantially limits one or more major life activities [namely, living at

257. *Id.* 500.

258. *Id.* § 84.33(a).

259. *Id.* § 84.33(b)(1)(2).

home and attending local schools, and have] . . . a record of that type of impairment [in the court transcript and placement file]. . . .²⁶⁰ Thus the child will have a claim to a free appropriate public education, special or not, under the section 504 regulations. By demanding educational services, including support services such as physical education, school counseling, medical examinations, and extracurricular activities equal to the service available in a good quality school district in the recipient state, the institutionalized child could greatly improve the value and humanity of his "treatment."

The authors believe it unlikely, however, that there are any children currently institutionalized as a result of a juvenile court order who do not fit both the PL 94-142 and section 504 definitions of "handicapped children." Note that the definitions are inclusive rather than exclusive, and that the presumption of the entire federal scheme is in favor of providing the special education services and of extending equal treatment and opportunity to the "handicapped" applicant.

One of the many subjects where the two sets of regulations are congruent is their clear applicability to children living in institutions. The general sections of the section 504 regulations spell out the prohibited acts, and significantly there are no exceptions. These sections read:

(a) *General.* No qualified handicapped person shall on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives or benefits from federal financial assistance.

(b) *Discriminatory actions prohibited.* (1) A recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap;

(i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit or service;

(ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit or service that is not equal to that afforded others;

(iii) Provide a qualified handicapped person with an aid, benefit or service that is not as effective as that provided to others;

260. *Id.* § 121a, App. A, at 500. See also *id.* § 84.3(j).

- (iv) Provide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons unless such action is necessary to provide qualified handicapped person with aid, benefits, or services that are as effective as those provided to others;
 - (v) Aid or perpetuate discrimination against a qualified handicapped person by providing significant assistance to any agency, organization, or person that discriminates on the basis of handicap—in providing any aid, benefit, or service to beneficiaries of the recipient's program;
 - (vi) Deny a qualified handicapped person the opportunity to participate as a member of planning or advisory boards;
- or
- (vii) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit or service.²⁶¹

In other words subpart D of Part 85²⁶² that contains the specific rules for school programs through high school is written to be both consistent and cumulative with the special education laws and regulations.²⁶³ But even in the absence of adequate special education funding in a particular state, or in the unlikely event a state chooses not to participate, or if for any other reason special education services are not available, section 504 mandates access for handicapped students to all general education programs.²⁶⁴ Thus, even if no special education is available, or even if an incarcerated child's representative or advocate cannot get him classified as "handicapped" under the special education laws and regulations, the section 504 claims are still available. The argument is that so long as there is some physical or mental condition that substantially interferes with a major life activity, such as living at home and attending a local school, that child possessing these traits cannot be excluded from any federally supported education program, special or general.

The comments to Part 84 of the regulations specifically anticipate the dangerous and disruptive child argument:

[W]here a handicapped student is so disruptive in a regular classroom that the education of other students is signifi-

261. *Id.* at 84.4.

262. *Id.* § 84.31-.39.

263. *Id.* § 84, App. A, at 384. *See, e.g.,* *Lebanks v. Spears*, 60 F.R.D. 135 (E.D. La. 1973).

264. 45 C.F.R. § 84.33(b), 134(2) (1977).

cantly impaired, the needs of the handicapped child cannot be met in that environment. Therefore regular placement would not be appropriate to his or her needs and would not be required by §84.34.²⁶⁵

But the negative pregnant is obvious—and terminal. The child must be placed, if all else fails, in an institution where he will receive an appropriate education.²⁶⁶

Similar to the special education rules, the section 504 regulations contain a provision for shared support of an institutionalized child so that the state's educational system is financially responsible for his schooling, and the guardianship system (DOC, DMH, or the state's institutional foster care setup) is responsible for his support and "nonacademic" services.²⁶⁷ For the institutionalized child, the shared support requirement provides an answer to and remedy for the disavowal of responsibility by the public education system once he is institutionalized.²⁶⁸

The remedies for violation of section 504 or the implementing regulations are spelled out in considerable detail in Title 45, Code of Federal Regulations, section 80 (Compliance Determination Procedures) and in Part 81 that sets out an extremely detailed procedure for administrative hearings under section 504 and Title VI of the 1964 Civil Rights Act.²⁶⁹

A detailed analysis of the status of the conformity of a particular state's special education laws to the federal schemes described above is outside of the scope of this article. Institutionalized children's advocates should analyze the local education laws in detail, secure a copy of the state plan,²⁷⁰ special education regulations, and information on collateral sources of education and services that are either educational or vocational. For tactical purposes the state plan is of critical importance because its contents provide a basis for a

265. *Id.* § 84, App. A, at 386. This definition of disruptiveness is the traditional catch-all definition of gross misconduct in many state expulsion statutes. *See, e.g.*, ILL. REV. STAT. ch. 122, § 10-22.6 (1973). The federal law appears absolute, at least in the sense that under section 504 and 45 C.F.R. § 84 (1977), children can no longer be expelled from the state (state-financed, federally subsidized) public education system.

266. *See* 45 C.F.R. § 84.33(a)(b) (1977); *See also* text accompanying notes 258 & 259 *supra*.

267. *Id.* § 84.37.

268. *See* note 18 & accompanying text *supra*.

269. 45 C.F.R. § 84.61 (1977) incorporates § 80.6-.10 & § 81 into the section 504 regulations. It appears that the administrative remedy may not be exclusive. *See, e.g.*, Lloyd v. Regional Transit Auth., 548 F.2d 1277 (7th Cir. 1977). Compare to Rogers v. Frito Lay, note 246 *supra*.

270. 20 U.S.C. § 1413 (1976); 45 C.F.R. § 121a.110-151 (1977).

demand for special education screening, services, and for a cause of action on behalf of the institutionalized child denied special education services. The regulations read:

(a) Each annual program plan must include information which shows that the State has in effect a policy which insures that all handicapped children have the right to a free appropriate public education within the age ranges and timetables under Sec. 121a.122.

(b) The information must include a copy of each State statute, court order, State Attorney General opinion, and other State document that shows the source of the policy.

(c) The information must show that the policy:

- (1) Applies to all public agencies in the State;
- (2) Applies to all handicapped children;
- (3) Implements the priorities established under Sec. 121a.127(a)(1) of this subpart; and
- (4) Establishes timelines for implementing the policy, in accordance with Sec. 121a.122.²⁷¹

If the Attorney General has issued opinions and certifications consistent with the inclusive and expansive intent of the federal law, it may be somewhat embarrassing for the state to deny services to any particular group. Furthermore, if the state statutes attached to the plan include any part of the juvenile code or if the list of "public agencies" includes the Department of Corrections Juvenile Division, or any other guardianship agencies, the advocate has additional arguments.

If the state laws are wider in scope or more generous in benefits provided than the federal scheme,²⁷² the children will naturally

271. 45 C.F.R. § 121a.121 (1977). The timetables referred to are to insure that all handicapped persons in the state between ages 3 and 18 are served by Sept. 1, 1978, and between ages 3 and 21 by Sept. 1, 1980. *Id.* § 121a.122. The priorities referred to require that handicapped students that received no service to date be given first priority over students presently receiving full or partial service. *Id.* § 121a.320.

272. Illinois, for example, provides for and mandates special education services for "educationally handicapped" children (*e.g.*, those with a language handicap because they were raised in homes where a language other than English was spoken) or "exceptionally gifted" children (those with an exceptionally high I.Q. or learning potential in particular subjects). See ILL. REV. STAT. ch. 122, §§ 14A-1 to -8, 14B-1 to -8 (1973). While it is conceivable that a handicapped institutionalized child might overlap these categories, it is unlikely that current diagnostic methods would accommodate these subtleties. This is, of course no barrier to children's advocates demanding the more expansive state services, but our advice remains to base the claim on the federally-protected rights, including, equal protection of the law found in the legislative history.

Many advocates will not face this problem as the state of the law in most states is less

claim the greatest amount of the highest quality of special education possible. But it is suggested that such a claim be kept consistent with, and perhaps pendent to, the claims for services required by the federal scheme because of the stronger and clearer remedies available thereunder.

Parenthetically, in suggesting various litigation and political tactics, we do not mean to impute any bad faith or lack of cooperation to any state government, juvenile court, or local school officials. To do so would be uselessly cynical.²⁷³ On the contrary, there are a good number of these people who are marching in step with, or even at the point of, the special education phalanx. We assume that once a courteous and legally correct demand for special education diagnosis, programming, and services is made upon the responsible officials, the services will be provided. On the chance they are not, it is naught but prudent lawyering to have the case plenty ripe, and to keep an eye toward securing relief for groups or classes.

IV. TOWARD A NEW PERCEPTION OF THE INSTITUTIONALIZED CHILD

The most commonly felt emotion by the public official about to decide to "place" a child in an institution is probably frustration. The attitude second most commonly adopted is probably avoidance. Frustration is fairly uniform among juvenile court judges, probation officers, "placement specialists," and foster-care workers. It arises from the lack of decent alternatives and the extremely narrow range of the often indecent alternatives that are available. The attitude of avoidance is likewise uniform. It arises because the activity is inherently distasteful and likely to be in some ways damaging to the child, albeit in his best interests. This attitude is facilitated by the way the decision is divided up. The judge rarely "sentences" a child to a particular institution; rather, he remands the child to the custody of the corrections department, or public guardian, who makes the placement. But the public guardian feels that the judge made the *real* decision, and his or her role is just a small, ministerial extension of it.

If, on the other hand, the placing official's view of the child

complete and sophisticated than PL 94-142 demands. Among several states with highly developed special education schemes are: Illinois (ILL. REV. STAT. ch. 122, §§ 14-1 to 14.01 (1973)); Michigan, MICH. COMP. LAWS § 338.621-622 (1970); Iowa, IOWA CODE § 281.1-.11 (1971); and Pennsylvania, 24 PA. CONS. STAT. ANN. §§ 13-1371 to 1382 (Purdon 1962). It should be noted that the enactment of state special education laws and regulations may not resolve all the problems. *See, e.g.,* Frederick L. v. Thomas, 419 F. Supp. 960 (E.D. Pa. 1976), *aff'd*, 557 F.2d 373 (3d Cir. 1977).

273. Any cynicism of the authors is based on experience as educational rights advocates in Chicago and Detroit. But the regulations are now in effect, and perceptions are changing.

began with an inquiry about what type of specialized education could benefit the child, and then developed into how to get a special education evaluation done, and how to develop and put into practice an Individualized Education Program, the whole exercise could be much more upbeat, hopeful, infected with the rhetoric surrounding PL 94-142, and less frustrating.

From the advocate's standpoint, the special education perspective, if accepted by the system within and against which the advocacy is practiced, opens up all the tools, techniques, ploys, rhetoric, and allies that have been developed in special education and school financing litigation and politics. There is much more to work with, to talk about, than there is in the narrow limits and language of institutional alternatives and right to treatment.

If the perspective is accepted and espoused by the institutional operators and staff, it could improve the entire "therapeutic relationship,"²⁷⁴ and lead to less institutional isolation if the mainstreaming directives were followed. Also regular contacts between the folk from the special education providers and the institutional caretakers might have a useful cross-pollination effect—more adults interested in children generally and in a particular child's progress.

Finally, most importantly (and symbolically mentioned last), is the child's self-perception. Whatever the reasons for the decision to institutionalize, and for the continued status of being institutionalized, the adolescent response is uniformly rejection, anger, rebellion, and withdrawal. All of these are common symptoms of handicapped children, and all respond well to the special education treatment. The story of the rebellious troublemaker who hates school and later develops an affinity for education once the right key is discovered is not entirely fictional. Some of the compensatory education studies indicate that dramatic results, both objectively in terms of improved reading skills, and achievement test scores, and subjectively, in terms of improved self-perception, ego integration, and academic aspirations, are possible and even quite predictable.²⁷⁵ The likely overall result would be a greater "success" rate, in the sense that institutionalized children really would be better suited to cope with life, have better self-perception, and perhaps even be

274. In some places the "therapeutic relationship in the specialized treatment milieu" means little more than a storage and maintenance contract in a locked compound.

275. Note the emphasis placed on compensatory education in the final consent order entered by the trial court in *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 334 F. Supp. 1257, 1359 (E.D. Pa. 1971). It is not uncommon for reading levels to jump the equivalent of three years in as many months with exactly the right curriculum and high student and teacher motivation.

"rehabilitated," at least to the extent of being better equipped to find and hold onto regular employment.²⁷⁶

V. SUMMARY AND CONCLUSION

Special education, even high quality state-of-the-art special education, will not magically empty out juvenile institutions. The "treatment" presently afforded institutionalized juveniles is often, probably most times, not adequate. Attempts to establish a constitutional right to treatment have been somewhat, but not uniformly successful, and have been and will continue to be fraught with theoretical and practical problems, including the prevailing views of the United State Supreme Court on the topics of equal protection, state autonomy, the rights of children, and the abysmal level of mistreatment that must occur before the courts will intervene on a right to treatment or cruel and unusual punishment theory.

The current public perception of institutionalized children, particularly those incarcerated for delinquent acts, is quite negative. A good portion of the public would apply the popular punitive correctional approach to juveniles as well as adults. Children who are institutionalized for reasons other than criminal (delinquent) behavior tend to get lumped together in the public mind with juvenile delinquents, and are generally regarded to be losers. The inmates of the institutions pick up, and to an extent share, these perceptions, with the predictable negative reinforcing effect. Courts are not immune from these attitudes.

The special education movement has made remarkable strides in the past dozen years for a variety of reasons, mainly the successes it can achieve. The success and heightened public awareness of special education is in part due to the landmark court decisions in the *PARC* and *Mills*²⁷⁷ cases and their progeny. A few of the states enacted comprehensive special education codes in the late sixties and there has been some form of federal subsidy for educating handicapped children since 1966.²⁷⁸

In 1973 Congress passed the Rehabilitation Act, section 504²⁷⁹ of which forbids exclusion of any handicapped person from partici-

276. Suited for employment in some position other than an adult felon. There are those observers who say that the only skills to be acquired in some juvenile corrections institutions are better, more ambitious criminal techniques.

277. *Pennsylvania Ass'n of Retarded Children v. Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972); *Mills v. Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972). A few of the other leading cases are: *Panitch v. State of Wisconsin* 390 F. Supp. 611 (E.D. Wis. 1974); *Lebanks v. Spears*, 60 F.R.D. 135 (E.D. La. 1973); *In re G.H.*, 218 N.W.2d 411 (N.D. 1974).

278. See note 257 *supra*.

279. 29 U.S.C. § 794 (1976).

pation in any program or activity which is in any way supported by federal financial assistance. In 1975 Congress passed the Education for All Handicapped Children Act that conditions a state's participation in federal education funding on the state's assurance that all of its handicapped children up to age eighteen will be receiving a free appropriate public education services that might be necessary by September 1, 1978. The law includes extensive procedural protections, and guarantees that parents or guardians can and must participate in the special education programming for their children. In 1977 the Secretary of HEW promulgated final and compatible implementing regulations under both of the above statutes. We are now well past the September 1, 1978 deadline.

The definitions of "handicapped children" contained in the above laws and regulations are extremely broad. It is the authors' position that every single institutionalized child in the country falls within these definitions. More conservative opinions hold that the vast majority of institutionalized children fall within the definitions. Many of these children receive relatively little by way of treatment, education, or special education. Special education and related services of the intensity and quality equal to the best offered anywhere is probably better "treatment" than most institutionalized children get. Accordingly the children, their parents, guardians, surrogate parents and other advocates, including their lawyers, ought to establish the child's classification as "handicapped," and then stake and pursue the claim to the services guaranteed all handicapped persons by the federal laws and state plans.

In doing so they will have as philosophical allies a large contingent of the special education establishment, and will don a mantle of respectability, since special education is viewed positively in prevailing public and political perceptions. Also in perfecting their claims to special education services, the children and their advocates will generate pressure to change the public, legal, institutional, and self-perception of the children from the prevailing negative and unsympathetic one to a more positive one associated with handicapped children trying to better themselves. To the extent that this positive perception takes hold, and that useful "treatment" in the form of special education and related services are actually provided to the children, the institutions and the people who lock children in them might reduce the destructive spirit and criminogenic character of the places, and actually make progress toward turning out better adjusted, rehabilitated and educated products.

Attorneys for children who are or might be institutionalized or

incarcerated should become familiar with section 504 and PL 94-142 and investigate their state's compliance therewith. The advocates should analyze the precise scope of the treatment and rehabilitative services guaranteed by the particular state's juvenile code, and blend them with the special education services required by the federal statutes and assured by the state law, the state plan, and the Attorney General's opinion. Utilizing the formidable procedural rights required in the federal scheme, the children should seek to be classified as handicapped, and then stake and doggedly pursue their claims to first priority free high quality appropriate education. The result of so doing might be the mutilation of fewer children's spirits.