SPECIAL EDUCATION IN ENGLAND AND WALES

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I

INTRODUCTION

The three most controversial aspects of special education law in the United States are the integration of special and regular children into a joint "mainstream" education, the formal procedural rights of parents to challenge education decisions, and the significant involvement of courts in reviewing decisions of professional educators. The British Parliament has recently enacted legislation that goes far in the direction of making the first two of these features an integral part of the law of England and Wales.¹ The new legislation, the Education Act 1981 (referred to in this article as "EA 1981"), has become effective too recently to generate sufficient experience from which to evaluate its actual implementation.² Therefore, this article will analyze the statute itself together with regulations and other government publications extending, elaborating or providing background to the legislative provisions.³ As interpretations of and questions arising under the new legislation in Britain may sometimes be more sharply brought into focus in the light of comparable provisions of American law, selective comparisons will be made to the Education for All Handicapped Children Act (EAHCA).⁴

Basic and pervasive differences between the United Kingdom and the United States and between the British and American legal systems must qualify and caution an American's understanding of the special education law

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1. Education Act, 1981, ch. 60, received Royal Assent Oct. 30, 1981. Separate, comparable, legislation that has been enacted for Scotland will not be considered here.

2. For most of its provisions, the new act became effective April 1, 1983.

3. In the spring and summer of 1983, I had the opportunity to discuss the background, meaning and anticipated implementation of EA 1981 with several British educators who were concerned with special education through the University of Durham, local educational authorities, private organizations and the Department of Education and Science. These people were extremely generous with their time and provided me with invaluable assistance.

4. Pub. L. No. 94-142, 89 Stat. 774 (1975) (codified as amended at 20 U.S.C. §§ 1400-1421 (1982)). Systematic comparative treatment would require consideration of § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and of state legislation as well.

Professor David Kirp has written a fascinating and provocative article which compares, generally unfavorably, the "professional" British approach with the American "legal" approach to special education decisionmaking. Kirp, *Professionalization as a Policy Choice: British Special Education in Comparative Perspective*, 34 WORLD POL. 137 (1982).

governing England and Wales.⁵ There is no Bill of Rights or Equal Protection Clause in the United Kingdom. There is no concept, in the American sense, of individual "constitutional" legal rights in British law.⁶ There is, accordingly, nothing in British law that can be compared to the United States Supreme Court's decisions dealing with equality and racial segregation⁷ or to decisions of lower federal courts dealing with the constitutional rights of handicapped students.⁸ Under the British constitutional system, individual interests are always, ultimately, subordinate to the legislative power. The paramount doctrine is Parliamentary sovereignty.⁹

There is also a fundamental difference between the unitary British system and the dual (federal) system of the United States. In the United Kingdom, *all* legislative power is vested in the "Queen in Parliament"; there is nothing comparable to the sovereignty of the several states in the United States. Therefore, if there is to be legislation dealing with special education in the United Kingdom, it will be enacted by the Parliament of the United Kingdom. In this respect, EA 1981 is not at all remarkable. By contrast, the conventional wisdom in the United States is that education is a subject for state legislation. A comprehensive piece of federal legislation, like the EAHCA, is an aberration. In the light of this apparent difference, one might conclude that there is a greater degree of comparability between the EAHCA and EA 1981 than would ordinarily be possible. In a sense, this is no doubt true. Yet the basic difference does remain. Unlike the situation in England and Wales under the new British legislation, the law of special education in the United States remains a complicated amalgam of federal and state legislation. That is true both in terms of the EAHCA itself and more generally in terms of the existence of overlapping state and federal law. There is little doubt that the Supreme Court's restrictive interpretation of the EAHCA in *Board of Education v. Rowley*¹⁰ was substantially influenced by "federalism" values and the persistent resistance to recognition of "undue" federal power in education.¹¹ No such consideration will influence the interpretation of EA 1981.

In one important way, a focus on the contrast between the American federal and the British unitary legal systems masks a significant common feature of the two educational systems. In both countries, there is a strong tradition of local control of education. No doubt, this means that positive legislation provides a less complete picture of reality in both systems than it first appears

5. Of course these grounds for caution are pointedly relevant for an American legal scholar writing about the British legal system's treatment of a difficult educational problem.

6. Under treaty commitments, however, individual rights claims of British subjects may be taken to the European Court of Human Rights. See S. BAILEY, D. HARRIS & B. JONES, *CIVIL LIBERTIES: CASES AND MATERIALS* 17-32 (1980); R. BEDDARD, *HUMAN RIGHTS AND EUROPE* (2d ed. 1980).

7. *E.g.*, *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

8. *E.g.*, *Mills v. Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972); *Pennsylvania Assoc. for Retarded Children v. Commonwealth*, 334 F. Supp. 1257 (E.D. Pa. 1971), 343 F. Supp. 279 (E.D. Pa. 1972).

9. See S. DE SMITH, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* 73-104 (4th ed. 1981).

10. 458 U.S. 176 (1982).

11. See Yudof, *Education for the Handicapped: Rowley in Perspective*, 92 AM. J. EDUC. 163, 173 (1984).

to do. Local authorities are the primary educational providers in both countries, and it is they who must directly put educational policy changes into effect. The variation in educational resources and preferences from area to area will inevitably qualify the implementation of educational policies set at national (or state) levels.

A fundamental difference of relatively recent vintage between the legal/educational systems of the United States and the United Kingdom concerns the role of the judiciary. The ubiquitously quoted observation of de Tocqueville that all issues in America eventually become legal issues is not a recent revelation. But it is widely accepted, with varying emotions, that there has been a quantum leap in litigation and judicial activism in the last quarter century in many areas of public policy, including education.¹² The situation in the United Kingdom could not be more different. In the leading text on education law in the United Kingdom,¹³ there is no index entry for "judicial review" or any comparable subject encompassing the action of the courts in enforcing British education laws. The omission is not a flaw of scholarship but an accurate reflection of the British system. Of course, education cases are occasionally litigated in the United Kingdom,¹⁴ and the British legal system provides for legal challenges to educational decisions. But judicial involvement has been rare indeed, and there is simply nothing in the British experience comparable to regular and extensive litigation of educational policy issues in the United States.¹⁵

The advent of comprehensive special education legislation in England and Wales should be deeply interesting to Americans. Despite all of the cultural, legal and political differences between the two countries, fundamental values are shared and fundamental similarities remain. Certainly, there is a very great similarity in the conditions and educational needs of handicapped children in the United States and the United Kingdom. The United States can learn from the successes and failures that emerge from the new legislative framework for providing special education in England and Wales. At this preliminary juncture one cannot say how the law will be carried out, but, by examining the legislative framework now, one can be in a better position to understand the actual implementation that is beginning to take place.

Consideration of EA 1981 in this article will focus on several questions:

- (1) Which children are entitled to a special education under the statute?
- (2) What is the nature of the procedural rights given to parents?
- (3) What enforcement mechanisms does the statute establish for assuring compliance by responsible officials?

12. But see Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 U.C.L.A. L. REV. 4 (1983).

13. G. TAYLOR & J.B. SAUNDERS, *THE LAW OF EDUCATION* (8th ed. 1976).

14. See, e.g., *Secretary of State for Educ. and Science v. Metropolitan Borough of Tameside*, [1976] 3 All E.R. 665; *Cummings v. Birkenhead Corp.*, [1971] 2 All E.R. 881.

15. Not everyone concedes that the British judiciary has stayed so clear of policymaking. See J.A.G. GRIFFITH, *THE POLITICS OF THE JUDICIARY* (2d ed. 1981) (includes subsection on "student" cases).

- (4) Is there any role for the courts in the implementation of EA 1981?
- (5) What, if any, content can be given to the special education required to be provided?
- (6) Specifically, what sort of integration (mainstreaming) is required and under what circumstances must it be provided?
- Although these questions are not totally separable, an attempt will be made to deal with them discretely as well as to note the interrelationships.

II

CHILDREN WITH A STATUTORY ENTITLEMENT TO SPECIAL EDUCATION

The Education Act 1981 makes important revisions in the law of special education in England and Wales, but it does not establish legal recognition of special education for the first time. Special education has been supported at some level of government in the United Kingdom since at least 1874¹⁶ and became an integral part of British education with the enactment of the Education Act 1944 ("EA 1944").¹⁷ Further enactments of education law in the 1970's have resulted in an educational policy under which all children are entitled to an education¹⁸ and which presumes, in principle, that special education should be provided on an integrated (mainstreamed) basis.¹⁹ Thus there was a substantial precedent of special education legislation in existence before the specific policy studies leading to EA 1981 were undertaken. Those studies which were immediate sources of EA 1981 were the "Warnock Report," *Special Educational Needs, a Report of the Committee of Enquiry into the Education of Handicapped Children and Young People*,²⁰ and the government "White Paper," *Special Needs in Education*,²¹ which followed the Warnock Report.

The Warnock Report had its beginning in 1973. At that time, Margaret Thatcher, MP, then Secretary of State for Education and Science, proposed to appoint a committee (not actually established until 1974)

To review educational provision in England, Scotland and Wales for children and young people handicapped by disabilities of body or mind, taking account of the medical aspects of their needs, together with arrangements to prepare them for entry into

16. See SPECIAL EDUCATION NEEDS, A REPORT OF THE COMMITTEE OF ENQUIRY INTO THE EDUCATION OF HANDICAPPED CHILDREN AND YOUNG PEOPLE, CMND. 7212, at 9-12 (1978) (London School Board established class for deaf in 1874) [hereinafter cited as Warnock Report, after the committee chairman, Mary Warnock]. Prior to government-supported education, which began with the Elementary Education Act in 1870, see H.C. DENT, EDUCATION IN ENGLAND AND WALES 9 (2d ed. 1982), there were private schools for disabled children and custodial institutions for "mentally defective" children. See Warnock Report at 8-9.

17. Education Act, 1944, 7 & 8 Geo. 6, ch. 31, §§ 8, 33, 34; see Warnock Report, *supra* note 16, at 18-25; S. TOMLINSON, A SOCIOLOGY OF SPECIAL EDUCATION 49-52 (1982).

18. Education (Handicapped Children) Act, 1970, ch. 52 (severely mentally retarded). See Warnock Report, *supra* note 16, at 28-29.

19. Education Act, 1976, ch. 81, § 10. By its terms, section 10 was to become operable on a date specified by the Secretary of State for Education and Science, *id.* § 10(3). This date was never set, and section 10 was eventually replaced by the provisions of EA 1981. See EA 1981, sched. 4 (repealing § 10).

20. See *supra* note 16.

21. SPECIAL NEEDS IN EDUCATION, CMND. 7996 (1980) [hereinafter cited as White Paper].

employment; to consider the most effective use of resources for these purposes; and to make recommendations.²²

The Committee received evidence from approximately 250 organizations and 120 individuals.²³ Published in May 1978, the committee's report consisted of 366 pages, excluding appendices and index, of extensive discussion on a wide variety of special education topics—history, assessment, placement (including mainstreaming), curriculum, children younger and older than compulsory attendance ages, parental involvement, voluntary organizations, transition to adult life, teacher education, staffing, role of health and social services, recordkeeping (including confidentiality), and research and development. The report's 220 recommendations, for which no cost estimates were prepared,²⁴ were almost entirely devoted to structural and procedural methods of delivering special education and were virtually silent about the details of the education that would be delivered.²⁵ Teacher training and educational provisions for children under five and for those over sixteen were listed as the "Three Areas of First Priority."²⁶ The report also placed considerable stress on the adoption of a noncategorical approach to educating children with special educational needs²⁷ and proposed substantial revision in the process of assessing and meeting these needs.²⁸

According to the White Paper, the government decided to reform the law in the light of the Warnock Committee's findings.²⁹ The White Paper summarized the government's position and its proposals for legislation. Although some specific Warnock recommendations were rejected, the White Paper accepted the substance of the Warnock Report. It proposed to adopt the major Warnock recommendations for replacing categories of handicap by a more open approach that identified children with special educational needs and arranged to meet those needs. In tension with the Warnock Report's assumption that meeting those needs would be expensive and that the required funds would be forthcoming, the White Paper was full of admonitions about the unavailability of funds and the necessity of making do within the limitations of the "current economic situation."³⁰

The statute that was enacted as an outgrowth of the work of the Warnock

22. See Warnock Report, *supra* note 16, at 1.

23. See Warnock Report, *supra* note 16, app. A.

24. See Warnock Report, *supra* note 16, at 325-26, 329. In part, the absence of cost estimates was claimed to be a calculated avoidance of what could have become a point of vulnerability in view of the difficulty and impeachment of most cost estimates. See *The Times* (London) Educational Supplement, May 26, 1978, at 1, col. 1.

25. See Kirp, *Professionalization as a Policy Choice: British Special Education in Comparative Perspective*, 34 *WORLD POL.* 137, 157 (1982).

26. Warnock Report, *supra* note 16, at 336-37. See also *id.* at 327-28, 329-34.

27. See *id.* at 42-49, 338.

28. See *id.* at 50-72, 339-41.

29. See White Paper, *supra* note 21, at 5 ¶ 1. The Warnock committee was established under one Conservative government, and the committee's work led to a White Paper and the enactment of EA 1981 under a different Conservative government. In between, the committee work and its report were completed during a Labor government.

30. *Id.* at 11 ¶ 28; see *id.* at 8-9 ¶ 20, 10-11 ¶ 25, 11-12 ¶ 31, 12 ¶ 34, 13 ¶¶ 36 & 38, 16 ¶¶ 47-48, 21 ¶ 65, 22 ¶ 70, 23 ¶ 73.

Committee and the government White Paper, EA 1981, bears a superficial resemblance to the EAHCA in its broad outline: it identifies children needing special education;³¹ it provides for a method to analyze and specify those special educational needs;³² and it then entitles the child to the education specified.³³ Both statutes impose various duties on the local educational unit³⁴ to determine and provide the required education. Both statutes give the child's parent (and also, under the EAHCA, the child) various rights to participate in the decisionmaking process and to challenge decisions of education officials. Both statutes subject the decisions of the local educational officials to review by other government authorities.³⁵ Both statutes include provisions requiring integration (or "mainstreaming") under specified conditions, and both statutes otherwise leave the substantive content of the education to be provided essentially free of any express prescription.

Under the approach of both statutes, each of which begins with a definition of which children are "special," there is an unavoidable linedrawing problem. A distinction must be drawn between children who are "regular" or "ordinary" and children who are "special." Some ordinary children, it is assumed, may have more difficulty in school than others—whether from mental, emotional, social, or physical causes—but they are not "special" until they have crossed a line separating differences in kind. In both the United Kingdom and the United States, much experience indicates that this line is often hard to draw and is often drawn erroneously.³⁶ This linedrawing is especially difficult and error prone when the handicapping category is one identified by symptoms without physiological or medical causes.³⁷ Nevertheless, very much of what is done, and what the law expects and permits to be done, assumes that these differences in kind exist. Rhetorically, the Warnock Report strongly resisted categorical distinctions between special and regular education. However, it was unable to escape from a conceptual framework based on the distinction between ordinary and special children.³⁸ EA 1981 follows Warnock in relying upon the distinction between children who need special education and children who do not.

31. "Handicapped child" under the EAHCA; child who has "special educational needs" under EA 1981.

32. In an "individualized education program," or "IEP," under the EAHCA; in a "statement" under EA 1981.

33. A "free appropriate public education" under the EAHCA; "special educational provision" under EA 1981.

34. "Agency" under the EAHCA; "authority" under EA 1981.

35. The EAHCA, but not EA 1981, expressly includes courts as one such reviewing body.

36. D. GALLOWAY & C. GOODWIN, *EDUCATING SLOW LEARNING AND MALADJUSTED CHILDREN: INTEGRATION OR SEPARATION?* 6-12 (1979); 1 *ISSUES IN CLASSIFICATION OF CHILDREN* vii, 159-317 (N. Hobbes ed. 1975); 2 *id.* at 502 *passim*; D. KIRP & M. YUDOF, *EDUCATIONAL POLICY AND THE LAW* 542 (2d ed. 1982); D. PRITCHARD, *EDUCATION AND THE HANDICAPPED* 214-16 (1963); Warnock Report, *supra* note 16, at 38 ¶ 3.7, 42-43 ¶ 3.23; Kirp, *Schools as Sorters: The Constitutional and Policy Implications of Student Classifications*, 121 U. PA. L. REV. 705, 719 (1973); Kirp, Buss & Kuriloff, *Legal Defense of Special Education: Empirical Studies and Procedural Proposals*, 62 CALIF. L. REV. 40, 43 (1974).

37. See S. TOMLINSON, *supra* note 17, at 65-72, 96.

38. The Warnock Commission was well aware of its dilemma. See Warnock Report, *supra* note 16, at 43, 69.

Despite the linedrawing difficulties, the general statutory scheme adopted by EA 1981 and the EAHCA seems to make sense. The remaining sections of this article consider some of the details of EA 1981 concerning the administrative and judicial roles in enforcing this statutory scheme and the procedural and substantive rights of parents and children. This section focuses on identifying the children who are given a right³⁹ to special education under EA 1981.

To identify the statutorily protected children, one must begin by looking at certain basic assumptions and recommendations of the Warnock Report. First, the Warnock Report determined that the number of children needing special education amounted to approximately 20 percent of school enrollment, rather than the 2 percent which had been reported in the past.⁴⁰ This dramatic increase in the estimated number of special children was based upon empirical studies of various school populations,⁴¹ and it was also a product of a revised and expanded concept of which children should be regarded as special.⁴²

Second, the Warnock Report recommended that the past practice within England and Wales of reporting "handicapped children" by specific categories of handicap be abandoned.⁴³ This approach was found to be undesirable for several reasons. First of all, the labels themselves were often stigmatizing. For example, the largest category was called "Educationally Subnormal (Moderate)" (ESN(M)).⁴⁴ Furthermore, the categorical approach was thought to be both rigid and inaccurate. It reduced an unlimited number of educationally disadvantaging conditions into a few categories. Correspondingly, it encouraged the creation of a relatively few, predetermined, educational treatments corresponding to the handicap categories. Thus, for example, if a child was diagnosed as an ESN(M), he was given the educational placement established for all children who were ESN(M)'s. Finally, a fundamental purpose of the Warnock recommendations was to wipe out "the sharp distinction between two groups of children—the handicapped and the non-handicapped."⁴⁵ A better system, according to the Warnock Report, would be to identify children who were in any manner in need of special education and then to determine what that need required without any predetermined programmatic restraints. The child's education was to be fitted to the child's needs rather than the child fitted to preexisting educational placements.

39. The statute does not talk about "rights" of children, and the U.S. concept of student rights or children's rights may not translate well into British thinking. However, the statute clearly does describe duties owed to certain children or their parents, and it characterizes certain parental safeguards as "rights." See, e.g., EA 1981, §§ 5(7), 7(9)(b). Both the Warnock Report and the White Paper do speak of "rights." See Warnock Report *supra* note 16, at 48 (rights of parents), 106 (children may use as of right the general facilities available at school); White Paper, *supra* note 21, at 18-19 ¶¶ 58-59. For convenience, the children to whom a statutory duty is owed under EA 1981 will sometimes be characterized as having "rights."

40. See Warnock Report, *supra* note 16, at 37-41.

41. *Id.*

42. See *id.* at 43-48.

43. See *id.* at 42-43.

44. Roughly corresponding to Educable Mentally Retarded (EMR) in the United States.

45. See Warnock Report, *supra* note 16, at 43.

Under a third basic assumption of the Warnock Report, "only a minority of children who have been ascertained as needing special education will be recorded."⁴⁶ The system of recording was expressly designed "to safeguard the interests of the minority of children with special educational needs who have severe and complex disabilities or difficulties."⁴⁷ (This group could be called the "narrow group" of children who need special education.) This recommendation obviously assumed that there is also a distinct and larger group of *unrecorded* children having special educational needs. (This group could be called the "wider group" of children who need special education.)⁴⁸ The Warnock Report recommended that this "wider group" of children having special educational needs receive appropriate statutory protection outside the formal recording process.⁴⁹

The general understanding is that all of these elements from the Warnock Report have found their way into EA 1981. There is room to question, however, whether any statutory status has been given to the Warnock Report's assumptions concerning the number of children needing special education or the division of those children into "narrow" and "wider" groups. It is also questionable whether the statute supports the recommendation that the "wider" group of children needing special education receive statutory protection. EA 1981 does clearly adopt the Warnock Report's recommendation to replace handicap categories by a more general yet more individualized approach to educational need. In fact, the resulting innocuous statutory definition of children with "special educational needs"⁵⁰ may be partly responsible for the confusion about what the statute does. The term, "special educational needs," has meaning, without definition, in a general, descriptive sense. But it also has a *different*—somewhat artificial—meaning as used in EA 1981. Broadly speaking, children who have "special educational needs" under the Act are children who are entitled to "special educational provision"; more narrowly, *at least some* children who have "special educational needs" are children for whom a statement specifying the special educational provision must be made and maintained.⁵¹ This statement-making process is what the Warnock Report called "recording."

As Warnock contemplated, and as it is now widely assumed,⁵² there may

46. See *id.* AT 48 ¶ 3.44; see also *id.* at 45 ¶ 3.31.

47. *Id.* at 45 ¶ 3.31; see also *id.* at 72 ¶ 4.79, 338 ¶ 4.

48. See *id.* at 45-48.

49. See *id.* at 48 ¶ 3.42, 338 ¶ 5.

50. EA 1981, § 1. "Special educational needs" are defined as needs of a child who has a "learning difficulty" which "calls for special educational provision." *Id.* § 1(1). "Learning difficulty" and "special educational provision" are themselves operationally defined terms: a child has a "learning difficulty" if he has "greater difficulty in learning than the majority of children his age," *id.* § 1(2)(a), or if he has a "disability which either prevents or hinders him from making use of educational facilities of a kind generally provided," *id.* § 1(2)(b). "Special educational provision" is educational provision "additional to" or "different from" the educational provision generally made available in regular schools. *Id.* § 1(3)(a).

51. See *id.* §§ 1, 5-7.

52. See Hannon, *The Education Act 1981: New Rights and Duties in Special Education*, 1982 J. Soc. WELFARE L. 275, 281; see also authorities cited *infra* note 66; Masters, *Cooperation—the Key to Success*, CONTACT, Winter 1982, at 56.

well be children who need special education in its general, descriptive sense but who do not go through the recording process culminating in a statement. The statute neither compels nor precludes that result. Under the statute, it is possible that all children who, descriptively, need special education could be identified as children who, definitionally, have "special educational needs" and receive a formal statement.⁵³ If, as seems likely, the statute is construed consistently with the Warnock Report to recognize a "wider group" of children who are not entitled to a statement, though in some sense need special education, an important interpretive question arises.

May some of these children come within the statutory definition of "special educational needs" and be entitled to special educational provision even though they are not entitled to a statement? Or do all children not entitled to a statement fall outside the definition of children who have "special educational needs"? At least in a narrow sense, the answer to this question turns on the language of sections 5(6) and 7(1) of EA 1981. According to section 7(1), where an assessment has been made,

the local educational authority . . . shall, if they are of the opinion that they should determine the special educational provision that should be made for [the child], make a statement of his special educational needs and maintain that statement . . .⁵⁴

Read literally, this language seems to say that the local educational authority has discretion to decide whether they "should" determine the special educational provision or not.

Nothing in EA 1981 provides the slightest suggestion of the standard for making this decision. The Warnock Report and the White Paper indicate that the statement process ("recording") should be reserved for those cases involving the most severe and difficult forms of handicap and thus justifying the administrative costs of the statement-making and -maintaining process.⁵⁵ So far as EA 1981 itself is concerned, however, the local authority is seemingly left with arbitrary power to select, from among children defined by Parliament to have "special educational needs," those who will receive the special statutory protection related to a statement. Furthermore, nothing in EA 1981 suggests what entity other than the local educational authority is to determine the special educational provision, and nothing in EA 1981 suggests any mechanism for making this determination.⁵⁶ The White Paper suggests, however, that this determination might be made informally through some combination of parent, teacher, school, and local educational authority.⁵⁷

53. The definitions of section 1, *see supra* note 50, may reveal an expectation that some difficulties in learning are not "significantly" greater than those of a majority of same-age children or that some disabilities do not "impede" or "prevent" use of educational facilities and thus do not implicate a statutory "learning difficulty"; or that a statutorily implicated "learning difficulty" need not "call for special educational provision" and thus will not bring into play the technical concept of "special educational needs." That the statute discloses such an expectation does not demonstrate that the expectation will be realized in the statute's application.

54. Section 5(6) covers the decision by an LEA that "they are not required to determine the special educational provision."

55. *See supra* text accompanying note 47; White Paper, *supra* note 21, at 10 ¶ 24.

56. *See* Hannon, *supra* note 52, at 281.

57. *See* White Paper, *supra* note 21, at 10-11 ¶¶ 25-28; 15 ¶ 45; 16 ¶ 47.

Under an alternative reading of section 7(1) (and section 5(6)), the local educational authority's responsibility is to decide whether the child has "special educational needs"; if the child has such needs, then the local authority "should determine the special educational provision that should be made" for the child, and must make and maintain a statement. Admittedly, the statutory words of section 7(1) are only awkwardly designed for such an interpretation.⁵⁸ Still, the words will bear that reading, and it seems a less problematic reading of the statute as a whole for reasons already given.

Under the literal reading of section 7(1) (and section 5(6)), the "wider group" of children would be within EA 1981, but EA 1981 would provide no mechanism for enforcing the duty owed to these children.⁵⁹ Under the alternative reading, the "wider group" of children would have no rights under EA 1981, but all children who had "special educational needs" would be entitled to a statement and the statutory protection associated with a statement. Neither reading is wholly consistent with the promise of the Warnock Report, which anticipated both that the "wider group" of children would be within the statute and that these children would have some meaningful statutory protection.⁶⁰

The generally accepted understanding, as well as the position of the Department of Education and Science,⁶¹ is that this "wider group" of children who need special education do have statutory protection even though they do not come within the formal protection of EA 1981 associated with the "statement." At first blush, it appears that there is support for this conclusion in section 2 of EA 1981, which seems to follow the recommendation of the Warnock Report⁶² in amending section 8 of EA 1944. According to the EA 1981 amendment, section 8 of EA 1944 (the basic education law of England and Wales) requires local educational authorities to see that *special educational provision* is made for pupils who have *special educational needs*.⁶³ Upon reflection, however, it can be seen that this provision merely begs the interpretive question just considered. If, taking the "literal" interpretation, section 7(1) requires a local educational authority to determine the special educational provision in *only some* of the instances involving children with special educational needs, then the "wider group" is covered by EA 1981's amendment of

58. The statutory language is not even designed well for the "literal" reading. A duty to decide whether or not a statement is required to meet a child's special education needs would have been clearer and more to the point. Cf. White Paper, *supra* note 21, at 14 ¶ 39.

59. See Hannon, *supra* note 52, at 281.

60. See Warnock Report, *supra* note 16, at 48 ¶ 3.42; see also *id.* at 338 ¶ 5.

61. Correspondence from representative of Division of Special Education, Dept. of Educ. & Science (Oct. 17, 1984). See also text accompanying notes 65 & 66; authorities cited note 66; Masters, *supra* note 52.

62. See *supra* note 60.

63. EA 1981, § 2(1). Section 8(1) of EA 1944 imposes a duty on LEA's "to secure" sufficient primary and secondary schools for their areas, specifically requiring that the schools afford opportunities for education in view of the student's ages, abilities and aptitudes. Prior to its replacement by the new provisions of EA 1981, § 8(2)(c) of EA 1944 provided that LEA's have regard "to the need for securing that provision is made for pupils who suffer from any *disability of mind or body* by providing, either in special schools or otherwise, special educational treatment, that is to say, education by special methods appropriate for persons suffering from that disability." (Emphasis supplied).

EA 1944. If the alternative interpretation is correct, however, the section 8 (EA 1944) duty applies only to children receiving the full, formal, statement-related protection of EA 1981, for only they have "special educational needs".⁶⁴

Does choosing between these interpretations concerning the "wider group" matter? It depends. If the widely accepted view is that the statute has adopted the policy recommended by Warnock, it may not matter at all—at least until such time as some person or government entity has a strong interest in arguing for a limited interpretation of EA 1981. The position of the Department of Education and Science is evidenced by its explanatory circular,⁶⁵ which treats students in the "wider group" as if they had statutory entitlement apart from their not receiving statement protection. According to the circular, EA 1981 "places a wider obligation on LEA's [local education authorities] to secure that adequate provision is made for children with special educational needs."⁶⁶ Perhaps revealingly, the circular goes on to describe the "general principles"—matters outside the direct mandate of the statute—which should apply for the children in the "wider group."⁶⁷

Whether the correct interpretation concerning the exclusion or inclusion of the "wider group" from EA 1981 matters also depends on exactly how large that group is. As already pointed out, the Warnock Report concluded that the school-age population of children who need special education at some time is nearer to 20 percent than the 2 percent previously recognized and treated as handicapped.⁶⁸ The Warnock Report implied that a substantial part of this additional 18 percent included children with less serious, temporary, or occasional difficulties⁶⁹ and implied that these children would make up the "wider group" who would not receive the formal ("recording") treatment.⁷⁰

The Warnock Report also contains conflicting signals about the relationship between the old 2 percent group and the new recommended narrow group of children who should be recorded and entitled to extensive statutory

64. Under section 8(1) of EA 1944, the LEA's general duty to educate children according to their "ages, abilities, and aptitudes," *see* note 63 *supra*, clearly survives EA 1981. The terms "abilities" and "aptitudes" could be construed broadly enough to cover any "wider group" of children who need special education but who are shut out of EA 1981. In that sense, there may be some statutory protection for the "wider group." But such protection in no sense stems from EA 1981. As a matter of statutory right, it is the protection that has existed since 1944. That is not what Warnock was talking about nor what EA 1981 is generally understood to do. *See also* EA 1981, § 21(2); *id.* sched. 3, § 6.

65. DEPARTMENT OF EDUCATION AND SCIENCE, CIRCULAR 1/83, ASSESSMENTS AND STATEMENTS OF SPECIAL EDUCATIONAL NEEDS (January 31, 1983) [hereinafter cited as DES CIRCULAR 1/83].

66. *Id.* at 1 ¶ 2. To the same effect, *see* ADVISORY CENTRE FOR EDUCATION, SPECIAL EDUCATION HANDBOOK 4-5 (1983); *cf.* DEPARTMENT OF EDUCATION AND SCIENCE, CIRCULAR 8/81, EDUCATION ACT 1981, 3 ¶ 9 (December 7, 1981) (characterizing the "wider" group as "children with special educational needs") [hereinafter cited as DES CIRCULAR 8/81].

67. DES CIRCULAR 1/83, *supra* note 65, at 1-2.

68. *See supra* note 40.

69. *See* Warnock Report, *supra* note 16, at 40, 47-48, 100; *see also* DES CIRCULAR 8/81, *supra* note 66, at 3 ¶ 9.

70. *See* Warnock Report, *supra* note 16, at 47-48, 72 ¶ 4.79, 100; *see also* White Paper, *supra* note 21, at 10 ¶ 24, 14 ¶ 39; DES CIRCULAR 8/81, *supra* note 66, at 3 ¶ 9.

protection. Children previously classified as ESN(M) and maladjusted were the two largest components of the old 2 percent group,⁷¹ and children previously given "remedial" instruction and children considered "disruptive" students were not "special" at all—in recognized statutory terms—prior to EA 1981.⁷² Yet the Warnock Report indicates ESN(M), maladjusted, remedial, and disruptive students are prime candidates for integrated education in ordinary schools.⁷³ At times, the Warnock Report seems to suggest that children educated in ordinary schools are part of the "wider group," not to be recorded and formally safeguarded.⁷⁴ But the Warnock Report also leaves no doubt that, for such integrated education, additional or different educational provision would be required in the form of supplementary resources and curricular adjustment.⁷⁵

Of course, it would be *possible* under the statute that some children receiving an integrated education would be entitled to statements, while others would be part of the "wider group" not entitled to statements.⁷⁶ Indeed, nothing in the vague statutory definitions of "special educational needs" and "special educational provision"—nor in the statutory procedures through which these labels are attached to particular children—forces the Warnock assumptions and the statutory operation to be congruent. Although the Warnock background is likely to influence the interpretation of the Act, it seems likely that the perceived consequences of interpretation will be even more influential. For example, if children without statements are found to be totally outside EA 1981, it is likely that more children will be found to be entitled to statements. Conversely, if all children who have special educational needs are entitled to statements, it is likely that "special educational needs" will be read narrowly to avoid an undue burden on the statement-making process.

It will be interesting to compare the total number of children brought within the statutory coverage with the Warnock figures or, for that matter, with the total number of children reported on the old categorical basis. It will also be interesting to learn just which children are within and without the new statutory scheme and how the identity of each group compares with the particular handicap categories covered under prior law. Following the Warnock Report and the more neutral terminology of EA 1981, the new forms used for collecting data no longer report children by the old handicap categories.⁷⁷ Instead, the new forms are divided by "curriculum types"—Mainstream Plus Support, Modified or Developmental—and call for additional information concerning children in each curriculum type on the basis of ten "aspects of disability." While these ten disability "aspects" are comparable to the old

71. See White Paper, *supra* note 21, at 8 ¶ 20.

72. See Warnock Report, *supra* note 16, at 46-47; S. TOMLINSON, *supra* note 17, at 63-64, 69.

73. See Warnock Report, *supra* note 16, at 219-20, 221-23.

74. See *id.* at 45 ¶ 3.31, 48 ¶ 3.44, 60 ¶ 4.35, 61 ¶¶ 4.39-40, 70 ¶¶ 4.71-72.

75. See *id.* at 108-14.

76. See White Paper, *supra* note 21, at 14 ¶ 41.

77. See DEPARTMENT OF EDUCATION AND SCIENCE, FORM 7M (1984).

handicap categories, they are subdivided somewhat differently.⁷⁸ Moreover, instead of reporting each student in one "aspect" (the pattern followed under the old handicap categories), each student can be reported in as many "aspects" as descriptively apply.⁷⁹

This new data collection approach obviously will give more complete relevant information than did the old approach. The very fact that a new approach has been adopted, however, will substantially limit any attempt to compare the particular educational provision being made available for students having a particular disadvantage under the old and new law. More generally, the lack of congruency of the old and new reporting approaches will impede any comparison of children included and excluded under the old and new statutory coverage. The system of collecting data under the new special educational law may create ambiguity in still one other aspect. In completing the new forms for this purpose, Head Teachers in ordinary schools are asked to report on students having "special educational needs." Nothing in the form itself is calculated to alert respondents to the specialized usage of that phrase under the statute. The directions to the Head Teachers, however, indicate that, after a transitional period, this term will refer only to those students "for whom a statement is maintained."⁸⁰ Consequently, if the instructions are heeded, the special students reported will not include those in the "wider group"—those who, in the common vernacular, have special educational needs (but do not qualify for a statement); there would be no systematic count of this group. Of course, if the directions are not understood or not followed for any reason, some reports may include special children in the "wider group" as well.⁸¹

One early indication of children who will be placed in the "wider group"

78. Compare the old handicap categories listed in DES FORM 7M (1983):

- (a) blind;
- (b) partially sighted;
- (c) deaf;
- (d) partially hearing;
- (e) educationally sub-normal;
- (f) epileptic;
- (g) maladjusted;
- (h) physically handicapped;
- (i) pupils suffering from speech defect;
- (j) delicate;

with new aspects of disability listed on DES FORM 7 (1984):

- (1) physical;
- (2) epilepsy;
- (3) communication: speech;
- (4) communication: language;
- (5) blind;
- (6) partially sighted;
- (7) deaf;
- (8) partially hearing;
- (9) behavioural/social;
- (10) emotional.

79. See Instructions accompanying DES FORM 7 (1984).

80. *Id.*

81. In one part of the form, students in "special classes" (as designated by the local authority—

has been provided by the Department of Education and Science. In its Circular 1/83, DES has advised that local educational authorities may exclude from formal protection children for whom "additional tuition and remedial provision" is provided from ordinary schools' "own resources"; children attending "a reading centre"; children attending "a unit for disruptive pupils"; children having only a need "of short duration"; children placed "for a short period" in a special school for assessment with the parent's agreement; and children placed temporarily in a hospital special school as a result of admission to the hospital on medical grounds.⁸² It would be very difficult to conclude that none of these children are children who have "special educational needs." They are apparently designated as children with special educational needs who are nonetheless not entitled to statement protection.⁸³ Perhaps this designation is understandable as to those whose handicapping condition or status may be of short duration. It is much more difficult to understand as to disruptive children and children with remedial problems.

This difficulty points up the darker underside of the uncertainty about the "wider group" excluded from all or some of the EA 1981 protection. The preceding discussion has proceeded on the unstated assumption that parents of handicapped children would not want their children to be part of the "wider group" if the wider group receives no protection under EA 1981. It is common knowledge, however, that parents often regard it as a bane rather than a boon to have their children assigned to "special education." Professor Tomlinson has criticized Warnock and EA 1981 on the ground that a larger special education net would be cast for children, who would be mainly working class and who would be dragged down by stigmatizing labels and inferior education.⁸⁴ Parents who share this concern might welcome placement of their children in the "wider group" if that meant, in effect, that these children would be left alone—left without "special" labels and special treatment. It is possible, as Tomlinson evidently fears, that from the perspective of such parents, these children may have the worst of both worlds: a special label and different education but no meaningful statutory protection.⁸⁵ The possibility of such a result would be enhanced by a reading of the statute under which certain children can be categorized and treated differently as children with "special educational needs," yet not protected under the statutory provisions concerning statements.

but not the school) must be reported, and there is no warning direction here tying the reported students to the statement.

82. DES CIRCULAR 1/83, *supra* note 65, at 4 ¶¶ 15, 16.

83. Letter from representative of Div. of Special Educ., Dept. of Educ. & Science (Oct. 17, 1984); see also DES CIRCULAR 1/83, *supra* note 65, at 4 ¶ 15. *But see id.* at 3 ¶¶ 12, 13 (suggesting that these students are not children with [special] "needs" requiring "special educational provision").

84. See S. TOMLINSON, *supra* note 17, at 68-72, 177.

85. See Hannon, *supra* note 52, at 281.

III

PARENTAL RIGHTS AND PROCEDURAL DUE PROCESS

There may be some uncertainty about which children receive what protection under EA 1981. There can be no question that EA 1981 provides very extensive procedures through which parents may participate in determining the statutory coverage. In this respect, EA 1981 is comparable to the EAHCA. The EAHCA contains two distinct procedural features. The first conforms to the classic procedural due process model—full-blown administrative hearing before an impartial tribunal.⁸⁶ The second, more innovative, procedural feature of the EAHCA is the right of parental (and sometimes student) participation in the development and preparation of the student's "individualized education program."⁸⁷ EA 1981 contains both of these procedural features, although the statutory provisions differ considerably in detail from their American counterparts.

The right of parents to participate meaningfully in the control of their children's education reflects a long-standing principle of the British educational system. Local educational authorities are enjoined by the basic education statute in England and Wales, EA 1944, to follow the general principle that, consistent with efficiency of instruction and avoidance of unreasonable expenditures, "pupils are to be educated in accordance with the wishes of their parents."⁸⁸ That general principle is given multiple application through the several distinct rights of participation given to parents of special education children by EA 1981. The full flavor of the statute in this respect can best be seen by viewing the assessment process chronologically.

(1) At the threshold stage, when the authority is of the opinion that a child either has special educational needs or probably has such needs, the first thing the authority must do is inform the parent that the authority proposes to make an assessment of the child's special needs. In addition to announcing the proposed assessment, the notice must inform the parent of the procedure to be followed, the name of the officer of the authority from whom the parent may obtain information, and the parent's right to make representations and submit written evidence within a specified period.⁸⁹

(2) Next, the authority must take into account any parental representations or submissions and decide whether, given that consideration, it is "appropriate" to make the assessment.⁹⁰ Whichever way it decides, the parents must be notified in writing of the decision.⁹¹

(3)(a) If the authority decides not to make an assessment at this juncture, it apparently has no further obligation to explain its actions to the parents con-

86. 20 U.S.C. § 1415 (1982).

87. *Id.* § 1401 (1982).

88. Education Act 1944, § 76; *cf.* *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (constitutional right of parents to influence children's education); *State ex rel. Kelley v. Ferguson*, 95 Neb. 63, 144 N.W. 1039 (1914) (common law right of parents to control children's education).

89. EA 1981, § 5(3).

90. *Id.* § 5(4).

91. *Id.* § 5(5), (7).

cerning that decision. Quite independently of the process just described, however, the parents have a right to request an assessment at any time, and "the authority shall comply with the request unless it is in their opinion unreasonable."⁹² (b) If the authority, following the described process of proposing an assessment, notifying parents, and considering parent submissions, decides to go forward with the assessment, the written notice of the decision must include the "reasons for making it."⁹³ The statute gives the parent no forum for challenging this affirmative decision, but presumably the reasons supplied to the parent in writing may be relevant to subsequent proceedings in which parents do have procedural rights.

(4) When, during the assessment stage, an examination of the child takes place, the parents must be notified in advance of the purpose of the examination, the name of the officer of the authority from whom the parent may obtain information, and the parent's right to be present during the examination and to submit information.⁹⁴

(5) Following the assessment, the authority must decide, in the somewhat obscure statutory words, whether they are "required" to (or "should") determine the special educational provision that should be made for the child with special needs.⁹⁵ If the decision is *not* to determine the required "provision," the parent must be notified of a right of appeal from this (negative) decision,⁹⁶ and the parent may take an appeal to the Secretary of State.⁹⁷ As in the case of a decision to assess, an affirmative decision to proceed to determine the required special educational provision is not subject to appeal.

(6) At the penultimate stage, just short of making the statement specifying the required special educational provision, another round of procedural rights comes into play. The authority is required to serve on the parent (i) the proposed statement and (ii) an explanation of the parent's procedural rights.⁹⁸ Specifically, if the parent "disagrees" with any part of the proposed statement, the parent may (i) "make representations" about the content of the proposed statement and (ii) meet with an officer of the authority to discuss the statement.⁹⁹ If, following this meeting, the parent disagrees with any part of the assessment, the authority is required to arrange one or more meetings between the parents and the persons who have given advice in connection with the assessment and any other "appropriate" persons,¹⁰⁰ "as they con-

92. *Id.* § 9(1).

93. *Id.* § 5(5).

94. *Id.* sched. 1, pt. I, § 2(2), (3). Apparently, the parent has no right to submit information in the unlikely event the child is not examined during the assessment, since the statute only mentions the submission of information in conjunction with the examination.

95. *Id.* §§ 5(6), 7(1); *see supra* note 50.

96. EA 1981, § 5(7).

97. *Id.* § 5(6). The Secretary of State may only direct the local authority to "reconsider." *Id.* § 5(8). A reconsidered and *unreasonably* reaffirmed decision might lead to a reversal under a second appeal taken outside EA 1981, pursuant to EA 1944, §§ 68 or 99. *See* discussion of *Tameside* case, *infra* part V.

98. EA 1981, § 7(3).

99. *Id.* § 7(4).

100. *Id.* § 7(5), (6). "Appropriate person" means the person who gave the relevant advice or

sider will enable the parents to discuss relevant advice.”¹⁰¹ The statute does not suggest a limitation on the number of appropriate persons with whom these advisory discussions could be requested, but it does require that the request for such meetings be made within fifteen days of the preceding meeting with an officer of the authority.¹⁰²

(7) Following the previously described consultation process, final decision is at hand. The authority must (i) make a statement “in the form originally proposed” or (ii) make it in modified form or (iii) “determine not to make a statement.”¹⁰³ If choice (ii) is adopted, there would evidently be a new round at the penultimate stage, presumably with parent input limited to the modifications and their effect. If choice (iii) is adopted, it is arguable that the case would be like any other determination by the authority not to follow an assessment with a statement, and consequently, the parent would have a right of appeal to the Secretary of State.¹⁰⁴ This might seem an odd result at first, since the parents would seem to be given a right to appeal the very decision that they would want. The parents might object to the statement proposed, however, while desiring some different statement that the local authority did not offer.

(8) Choice (i), the making of a statement, actuates a new duty by the authority to notify the parents. This time the notice encompasses a copy of the statement (which must include the advice and other details concerning assessment and the determination of what the child’s needs require);¹⁰⁵ the name of the person to whom the parent may apply for information and advice concerning the child’s needs; and information concerning the parent’s right of appeal “against the special educational provision specified in the statement.”¹⁰⁶ Up to this point, the very considerable rights of parental participation consist of consultation and requests for review by the Secretary of State. The parental appeal against the specified special educational provision triggers a very different set of rights to a hearing before a local appeal committee.

These hearing rights cannot be easily traced to the Warnock Report. Professor Kirp reports that a delegation from the Warnock Committee was appalled by what they saw in the United States of the conversion of professional judgments about special education into adversarial combat.¹⁰⁷ The Warnock Report contained many recommendations concerning parental par-

any other person who, in the opinion of the authority, is the appropriate person to discuss it with the parent. *Id.* § 7(6).

101. *Id.* § 7(5), (6).

102. *Id.* § 7(7).

103. *Id.* § 7(8). The statute says those options are available “[w]here any such representations are made.” *Id.* There is no reason to suppose that an authority would be precluded from modifying or retracting a proposed statement simply because the parents had not activated the consultation process and made no representations.

104. See *supra* text accompanying notes 96 & 97.

105. Education (Special Educational Needs) Regulations 1983, § 10, STAT. INST. 29 (1983).

106. EA 1981, § 7(9).

107. See Kirp, *supra* note 25, at 160. Kirp quotes Mrs. Warnock (from the Times (London) Educational Supplement) as saying, “There is something deeply unattractive about the spectacle of someone demanding his own rights.” *Id.*; see also *id.* at 151.

ticipation and cooperation,¹⁰⁸ but only a single recommendation concerning parental legal rights to contest a child's special education.¹⁰⁹ That was the right to appeal to the Secretary of State for Education and Science¹¹⁰ from a decision of the local educational authority *not* to require special education (in addition to the already existing right to appeal a decision requiring special education).¹¹¹ The recommendation evidently intended to authorize a broader appeal than the one that already existed on the general ground that the local authority had acted unreasonably.¹¹²

Between the issuance of the Warnock Report in 1978 and the enactment of EA 1981, however, Parliament enacted the Education Act 1980 ("EA 1980").¹¹³ Under this statute, procedures were established for facilitating parent appeals from school assignment decisions of local education authorities.¹¹⁴ EA 1980 expressly excluded special education decisions from this procedural framework.¹¹⁵ This exclusion was, perhaps, no more than reasonable since the introduction of legislation to implement the recommendations of the Warnock Report and of the related government White Paper on special education was clearly imminent. When that legislation was introduced, however, the issue could hardly be avoided. Under EA 1981 parents were given identical hearing rights ("procedural due process") to challenge special education decisions to an appeal committee, constituted substantially like the appeal committees under EA 1980.¹¹⁶

It is not easy to imagine the nature and degree of formality of the proceedings before an appeal committee under EA 1980 and EA 1981. Appeal committees must be created by each local authority. The committees consist of three, five or seven persons with membership limited in various respects to achieve a degree of neutrality and impartiality.¹¹⁷ The appeal committees of EA 1981 (and EA 1980) come under the supervision of the Council of Tribunals, which has issued a Code of Practice to provide advisory guidance for the operation of these appeal committees.¹¹⁸ The statute requires that the parent have an opportunity to make "oral representations"¹¹⁹ and the Code of Prac-

108. See Warnock Report, *supra* note 16, at 150-61 ("Parents as Partners").

109. See *id.* at 71 ¶ 4.74, 341 ¶ 31. The report also recommends parental rights of access to student records. See *id.* at 70-71 ¶¶ 4.70, 4.73.

110. See *id.* at 71 ¶ 4.74.

111. See EA 1944, § 34(6); see also Hannon, *supra* note 52, at 279 & n.38.

112. EA 1944, § 68; see *infra* part V of this article.

113. Education Act, 1980, ch. 20.

114. EA 1980, §§ 6-7; *id.* sched. 2, pt. I, § 1.

115. EA 1980, § 9(2).

116. The composition is not changed by statute but the Secretary of State "expects" an appeal committee under EA 1981 to include members with "relevant knowledge of special education." DES CIRCULAR 1/83, *supra* note 65, at 11 ¶ 54.

117. EA 1980, sched. 2, pt. I, § 1. The government representatives (members of authority or education committee) may not outnumber the nongovernment members (persons "with experience in education," persons acquainted with educational conditions in the area, or parents) by more than one, *id.* § 1(4); a teacher may not be on a committee considering admission of a child to that teacher's school, *id.* § 1(7); no person who made or discussed a decision may be on an appeal committee considering that decision, *id.* § 1(6).

118. See ADVISORY CENTRE FOR EDUCATION, SPECIAL EDUCATION HANDBOOK 29-30 (1983).

119. EA 1980, sched. 2, pt. II, § 6.

tice assumes that the parents will be permitted to present expert witnesses.¹²⁰ The statutory schedule provides that an appeal committee may allow a parent to be accompanied by a friend or to be represented.¹²¹ The Code of Practice indicates that committees should ordinarily grant this permission but "legal representation will seldom be necessary or appropriate."¹²² No doubt that bit of advice in the Code of Practice would bring a smile to the faces of American critics of "proceduralization." The appeal committee's decision is required to state the grounds on which it is made.¹²³ The appeal is to be held in private "except when otherwise directed by the authority."¹²⁴ Also, the Code of Practice recommends that the clerk of the committee "should keep brief notes . . . as the authority may agree is appropriate" and states that "such documents will not be public."¹²⁵

If EA 1980/EA 1981 hearings stay fairly close to the letter of the law, the "due process" afforded will be substantially less than what is required under the EAHCA. Under the EAHCA parents have an express right to submit evidence, obtain compulsory process for the attendance of witnesses, cross-examine witnesses, be represented by counsel, obtain a verbatim transcript, and obtain judicial review.¹²⁶ None of these procedural safeguards are clearly and fully guaranteed under EA 1980 and EA 1981. The absence of a clear right to counsel in appeal committee proceedings probably reflects the general pattern in informal administrative proceedings in the United Kingdom.¹²⁷ But it also seems to reflect, as does the conclusion of the Code of Practice, that legal representation would seldom be necessary or appropriate, the commitment to a "professional" approach that Professor Kirp saw in the Warnock Report.

The American and British statutes have also adopted different approaches to impartiality. The EAHCA requires an independent and impartial hearing officer, and that requirement has been construed to insulate the hearing officer from any control by either the state or local educational officials.¹²⁸ By contrast, EA 1980 and EA 1981 leave a dominant role to the local authority in the appeal committee process. The appeal committees are appointed by the local authority and are likely to have majorities which are members of the authority or the education committee of the authority.¹²⁹ Thus, despite the

120. See SPECIAL EDUCATION HANDBOOK, *supra* note 118, at 30.

121. EA 1980, sched. 2, pt. II, § 6.

122. See SPECIAL EDUCATION HANDBOOK, *supra* note 118, at 30.

123. EA 1980, sched. 2, pt. II, § 9.

124. *Id.* sched. 2, pt. II, § 10. But a member of the local authority and a member of the Council on Tribunals may attend as observers. *Id.*

125. See SPECIAL EDUCATION HANDBOOK, *supra* note 118, at 30.

126. See 20 U.S.C. § 1415(d), (e) (1982).

127. See M. BELOFF & G. PEELE, THE GOVERNMENT OF THE UNITED KINGDOM 354 (1980); T. HARTLEY & J. GRIFFITH, GOVERNMENT AND LAW 340 (2d ed. 1981).

128. See 34 C.F.R. §§ 300.506, .507, .510 (1984); *Grymes v. Madden*, 672 F.2d 321 (3d Cir. 1982); *Robert M. v. Benton*, 634 F.2d 1139 (8th Cir. 1980); *Vogel v. School Bd. of Montrose*, 491 F. Supp. 989 (W.D. Mo. 1980).

129. EA 1980, sched. 2, pt. I, § 1.

checks designed to increase the level of impartiality,¹³⁰ it is difficult to see the committees as truly independent entities.

Approximately 9000 appeals were taken in the first year of implementation of EA 1980.¹³¹ About 3000 of these appeals resulted in decisions by an appeal committee reversing the original assignment decision of the local educational authority.¹³² A reversal rate of 1 in 3 and 3000 total reversals are surprising figures. These results may suggest that the appeal committees are far more impartial than they appear to be. These results, however, may not be accurate predictors of special education appeals under EA 1981. It is possible that the results of the EA 1980 appeals are explainable on the basis of the kind of issues involved in those cases. When it comes to deciding which ordinary school regular students should attend, the appeal committees may operate very much as a jury of peers despite the authority's potentially controlling position. For regular school placement cases, the issues are not complicated, committee members can readily identify with complainants, and there is no reason to defer to anyone's professional expertise.

Despite the substantial similarity of appeal committee procedures under EA 1980 and EA 1981, there is a fundamental difference between the two when it comes to the effect of the appeal committee's decision. Under EA 1980, the decision of the appeal committee is binding upon both the local education authority and the parent. In the incorporation of the local appeal committee process into EA 1981, an interesting compromise was struck. An appeal committee decision adverse to the local education authority is advisory only.¹³³ It requires the local authority to reconsider its decision, but it is not binding on the authority.¹³⁴ If the local authority rejects the committee recommendation, however, the parents may appeal to the Secretary of State.¹³⁵ The parents may also appeal to the Secretary of State from an appeal committee decision confirming the decision of the local authority.¹³⁶ The government defended the bill that became EA 1981 on the ground that special education parents received two appeals while the "ordinary" parents, under EA 1980, received only one.¹³⁷

It seems questionable whether many parents would exchange an appeal to a local hearing panel with final authority for an appeal to an advisory hearing panel followed by a second appeal to the Secretary of State. Obviously, the advantage of that trade-off depends entirely upon the substance of the appeal that will be available from the hearing panel and from the Secretary of State. In EA 1980's first year of application, 3000 out of 9000 appeals to local appeal

130. *Id.* sched. 2, pt. I, § 1(3).

131. See DEPT. OF EDUCATION AND SCIENCE PRESS RELEASE #76/83, NEW ARRANGEMENTS FOR SCHOOL ADMISSION HAVE WORKED WELL, SAYS EDUCATION SECRETARY (March 16, 1983) [hereinafter cited as DES PRESS RELEASE #76/83].

132. *Id.*

133. See EA 1981, § 8(4), (5).

134. See *id.* § 8(5).

135. See *id.* § 8(6)(b).

136. See *id.* § 8(6)(a).

137. See, e.g., SPECIAL EDUCATION HANDBOOK, *supra* note 118, at 15.

committees were successful. Although EA 1980 itself provided no means of further review of the appeals that were unsuccessful at the local level, an appeal to the Secretary of State was available under sections 68 and 99 of EA 1944. Of the 6000 unsuccessful local appeals under EA 1980, 313 complaints were taken to the Secretary of State under these general provisions. None were successful.¹³⁸ These results, on the surface, suggest that the special education parents did not get a great bargain in the two-level appeal.

It would be simplistic, though, to conclude from these figures that meaningful review by the Secretary of State under EA 1981 will not be available.¹³⁹ In the first place, the bare statistics of appeals under EA 1980 tell us nothing about the merits of any claim brought to the Secretary of State under that statute. Secondly, the cases that came to the Secretary of State under EA 1980 had already lost once. Even assuming a substantial variety of conditions and attitudes from area to area, one has to assume that a large part of the strongest parent claims had already succeeded at the local hearing panel and did not reach the Secretary of State. Their poor success rate is probably not relevant to cases under EA 1981 in which a parent claim has been upheld by the appeal committee but rejected again on reconsideration by the local authority. Under EA 1981, these potentially strongest cases will be the ones most likely to go to the Secretary of State. When they do, they will arrive with the support of their own merits plus a favorable committee recommendation.

Appeals under EA 1981 are likely to be viewed differently for still a third important reason. The EA 1980 complainants who failed to convince a local panel were forced to rely upon the general appeal provisions of EA 1944. Under those provisions, the local authority's decision can be reversed only if it is unreasonable. Under the *Tameside* decision, that means *objectively* unreasonable—not simply unreasonable in the Secretary of State's best judgment.¹⁴⁰ EA 1981 presents an entirely different situation. It not only expressly authorizes the appeal from the adverse local decision, but it also expressly gives the Secretary of State broad discretion in the review. An in-between case will be presented under EA 1981 when parents who have lost at the appeal committee level exercise their statutory right to obtain an appeal from the Secretary of State. They will be coming as two-time losers, and without the advantage of a favorable appeal committee action, but the statutory provisions expressly giving the Secretary of State broad power to consider appeals will still be applicable.

At this writing, because EA 1981 has so recently gone into effect, there is little experience under that statute to form a basis of comparison between the effect of the respective appeals under EA 1980 and EA 1981. Of the few appeals taken thus far under EA 1981, the parents have already had some success.¹⁴¹

138. See DES PRESS RELEASE #76/83, *supra* note 131.

139. See *supra* note 138.

140. See discussion of *Tameside*, *infra* part V.

141. Out of 18 appeals from the Local Educational Authority's decision rejecting a hearing committee recommendation, the LEA's decision was confirmed by the Secretary of State in five cases, the

The statute specifies that the parent's appeal under EA 1981 is "against the special educational provision specified in the statement."¹⁴² It would seem quite unreasonable to attempt to isolate the "educational provision specified" from the assessment of the student's needs and the expert advice or other basis of the determination of the special educational provision. This conclusion is strongly reinforced by the breadth of the reviewing power of the Secretary of State. The Secretary of State not only has the power to direct the local authority to cease to maintain the statement at all, but also has the power to amend the statement "as he considers appropriate."¹⁴³ Although the Secretary of State's power of review is exercisable only "after consulting" with the local authority, every aspect of the statement is open on appeal to the Secretary of State. It would take very unambiguous statutory language to suggest that the advisory appeal to the appeal committee is more restrictive. The characterization of the parent's appeal as "against the special educational provision" is not such language.

There is one surprising twist in the appeal committee framework of EA 1981. As discussed in the preceding section, children who do not have "special educational needs" within the narrow statutory terminology are not the subject of a statement, even though they may need special education. Therefore, these children are entitled to none of the procedural rights before an EA 1981 appeal committee (or, subsequently, to the Secretary of State). These children thereby fall back under the 1980 act and its appeal structure.¹⁴⁴ EA 1980, as amended by EA 1981, excludes from its appeal provisions "children in respect of whom statements are maintained" under EA 1981.¹⁴⁵ So, children not entitled to statements under EA 1981 are not within the exclusion of section 9 of EA 1980. Accordingly, children who need special education but for whom statements are not maintained under EA 1981 are entitled to appeal to EA 1980 committees. An appeal under EA 1980 is limited to the question of correct school placement in ordinary schools¹⁴⁶ for which the Act gives explicit parental preference and imposes certain other specified limitations.¹⁴⁷ EA 1980 certainly was not drafted with the intention of accommodating special education assignments that fell through the cracks of the anticipated special education legislation that became EA 1981. Nevertheless, EA 1980 does give these children a right to appeal their ordinary school assignment to a local appeal committee, and the circumstances producing special educational needs for them would seem to be relevant to the committee's school assign-

appeal committee's recommendation was accepted by the Secretary of State in six cases, and seven cases were unresolved as of December 18, 1984. There have also been 26 appeals to the Secretary of State from LEA decisions not to assess a student under § 5(6); 15 cases were remitted to the LEA for reconsideration. Telephone conversation with representative of the Division of Special Education, Department of Education and Science (Dec. 18, 1984).

142. EA 1981, § 8(1).

143. *Id.* § 8(7).

144. See White Paper, *supra* note 21, at 16 ¶ 50.

145. EA 1981, sched. 3, § 14 (amending EA 1980, § 9(2)).

146. See EA 1980, § 7.

147. *Id.*

ment decision. Of course, whereas the generally more extensive protection of EA 1981 yields only an *advisory* local committee decision, the children relegated to EA 1980 appeal committees for protection of their special needs will receive a committee decision *binding* on the local education authority.

Whatever limitation or weaknesses one may find in particular provisions concerning the procedural rights of parents under EA 1981, it seems indisputable that their rights of participation in various phases of the process of assessment and provision of special education are extensive. Still, the basic question remains whether this participation will have utility. Will it lead to better special education? Will it, at least, lead to special education more nearly in line with parental wishes? At the very least, will it give parents a positive feeling of meaningful participation? In the first instance the answer to those questions will turn on whether parents know and understand their rights and believe that they matter.¹⁴⁸ The effectiveness of the parental participation will be influenced by such variables as what they know; how articulate they are; and how comfortable they feel in their relationships with school officials, teachers, advisors and other participants.

One factor which may significantly influence the extent and effectiveness of parental involvement concerns the availability and activity of voluntary organizations concerned with children's rights or education.¹⁴⁹ Such organizations were involved in the legislative process that produced EA 1981.¹⁵⁰ EA 1981 itself requires that, when an Area or District Health Authority working with a child under five believes the child has or probably has "special educational needs," the authority has a duty to inform the parent or a particular voluntary organization "likely to be able to give the parent advice or assistance."¹⁵¹ There is no other requirement to bring such voluntary organizations to the parent's attention.

Still, a number of such organizations appear to be taking an active interest in the implementation of EA 1981, particularly its integration features. For example, the Advisory Centre for Education (ACE) publishes a monthly periodical and other literature dealing with student rights.¹⁵² ACE has published a heavily used handbook explaining EA 1981¹⁵³ which includes, among other things, a list of addresses and telephone numbers of other organizations and offices that might have relevant information; a checklist of special educational needs; tactical advice to parents in dealing with local or central education

148. In the United States, where parental legal rights are more prevalent, it is generally assumed that a selective group of middle class parents are the dominant users of such rights. See generally Clune & Van Pelt, *A Political Method of Evaluating the EAHCA and the Several Gaps of Gap Analysis*, LAW & CONTEMP. PROBS., Winter 1985, at 7. Professor Tomlinson is very skeptical that the mainly working class parents affected by special education decisions will exercise their rights under EA 1981. See S. TOMLINSON, *supra* note 17, at 108-18.

149. See Kirp, Buss & Kuriloff, *Legal Reforms of Special Education: Empirical Studies and Procedural Proposals*, 62 CALIF. L. REV. 40, 96, 114 (1974). See generally Warnock Report, *supra* note 16, at 309-17.

150. Rosenberg, *In On the Act*, presented on *Sunday Evening*, (BBC Radio, 1981) (tape on file with the author).

151. EA 1981, § 10(2).

152. WHERE (published ten times a year).

153. SPECIAL EDUCATION HANDBOOK, *supra* note 118.

authorities, including sample letters for parents to use in various situations; and examples of integrated education schemes actually in existence. A division of the Spastics Society, the Centre for Studies on Integration in Education, has been created for the express purpose of monitoring the process of integration. Among other activities, this organization has compiled a list of professional experts who might be available to assist parents in presenting their own point of view.¹⁵⁴ The value of such organizations may be found not simply in their technical assistance but also in their helping parents to feel a sense of common enterprise rather than individual isolation.

The impact of parental procedural rights will depend also on whether the Secretary of State assumes an active role. If the parent viewpoint is never advanced through appeals to the Secretary of State or through effective informal action by the Secretary of State, the procedural rights of parents will obviously be less valuable. The ultimate question is whether local authorities will listen to and be influenced by parents—or, more accurately, to what extent they will listen and be influenced. No doubt it will depend on the parent and on the authority, as well as the merit of the parents' particular views, the quality with which they are presented, the supporting contribution of voluntary organizations and the position which the Secretary of State carves out for his office under EA 1981. So, in the end, the answer to the question about the value of creating parental rights depends on circularly interacting considerations: The parents will become more active if they are having an impact, and their impact will depend upon their activity, and so on and so on.

The use and utility of parental procedural rights may be indirectly affected by their cost. It seems clear that the statutory procedures put in place for parents are expensive. Totally without parental involvement, the assessment procedures required by EA 1981 demand heavy expenditures of time by local authorities and their expert advisors. The burden is significantly increased as a result of conferring rights on parents. In the absolutely minimal situation in which the affected parent makes no submissions, asks for no meetings and takes no appeals, the local authority still has the burden of preparing and sending the proper notices and of structuring the administrative operations of the school to anticipate parental involvement.¹⁵⁵ At the other end of the spectrum, if the parent takes the opportunity to participate extensively at every stage of the process, the expenditure of time and other resources would be truly massive. Plainly, there would be a point at which innumerable meetings between every parent and every school official and every advisor involved in the assessment process of every child would tend to bring the system to a halt.¹⁵⁶ However convincing the case for procedures to achieve the best possible education of children with special educational needs and to afford par-

154. *See id.* at 18.

155. Notices must be sent in a language that will facilitate understanding by the parent. DES CIRCULAR 1/83, *supra* note 65, at 14 ¶ 70.

156. Even though only those students for whom the formal process ends with a statement are entitled to special education, most of the parental procedural rights take hold at various stages prior to the actual making of a statement.

ents their proper role in controlling the education of their children, it remains true that these procedures can create a substantial drain on always limited educational resources. The very generosity of the procedures could contribute to their inutility. The local education authorities could perform their duties, and the Secretary of State could exercise his powers, in a way that discouraged parents from exercising their rights. Such discouragement might result if parental "overuse" is feared. Again, an element of circularity is involved, because apprehension of excessive resort to parental procedural rights might well be influenced by what parents actually do. Only experience will disclose whether the implementation of EA 1981 achieves a golden mean in which parental rights are used effectively and prudently.

IV

ADMINISTRATIVE ENFORCEMENT

As just outlined, one striking feature of the administrative machinery created by EA 1981 is its elaborate procedural detail, an important ingredient of which is the extensive rights of parents. In this important respect, EA 1981 strongly emulates and, in places, surpasses the EAHCA. In contrast to their shared penchant for procedural profusion, EA 1981 and the EAHCA have adopted enforcement provisions that are generally quite different. Under the terms of the EAHCA, federal funds to support special education are made available to state and local education agencies on the condition that the requirements of the national law are satisfied. Compliance by state and local recipients is enforceable by withdrawal of federal funds¹⁵⁷ or by action culminating in judicial review and judicial decree.¹⁵⁸ As a practical matter, a substantial part of the enforcement effort is left to the supervisory and monitoring actions of the responsible state education agency, the direct recipient of federal funds.¹⁵⁹

The administrative framework of EA 1981 differs from that of the EAHCA in at least three important respects. First, EA 1981 provides no funding incentive. Second, under the British system, there is no administrative enforcement by an intermediate government unit—between national and local authorities—comparable to the role of the fifty states in the American federal system. Consequently, the instrument of educational authority of the national government in England, the Secretary of State for Education and Science, is given a central enforcement role under EA 1981. Third, EA 1981 itself contains no provision for judicial review and enforcement. Despite the absence of statutory provisions in EA 1981, however, the courts are not clearly denied a role in enforcing the special education law. This potential role will be considered in the following section. The present section will concentrate upon the role of the central educational authority in enforcing the

157. 20 U.S.C. § 1416 (1982).

158. *See id.* § 1415(e)(2) (1982).

159. *See id.* §§ 1412-1413 (1982).

requirements of EA 1981, one element of which is the lack of any funding component under the new law.

EA 1981 imposes primary responsibility on local education authorities to implement its requirements. In this respect, EA 1981 is wholly like the EAHCA. In England and Wales, as in the United States, local education authorities are the primary providers of educational services by government. Under EA 1981, it is the local authorities that must, in the first instance, identify children who may have special educational needs;¹⁶⁰ decide whether to assess those children;¹⁶¹ appoint expert advisors;¹⁶² provide required information to these advisors;¹⁶³ consider the advisors' advice;¹⁶⁴ decide after assessment whether a statement should be maintained;¹⁶⁵ decide when to reassess children and revise statements;¹⁶⁶ establish appeal committees;¹⁶⁷ engage in the hearing process before these committees;¹⁶⁸ reexamine a previous determination in light of the appeal committee recommendations;¹⁶⁹ serve notices on parents;¹⁷⁰ consider parental representations and submissions;¹⁷¹ and arrange for the special educational provision to which a child is entitled.¹⁷²

The enforcement of EA 1981 will largely depend upon the competence, manner and spirit with which these responsibilities are carried out. Despite the availability of parental appeals and review by the Secretary of State, it seems reasonable to suppose that parental acquiescence will be the rule and parental challenge the exception. It seems likely that only a small portion of the actions of local authorities will be scrutinized by administrative hearings and still fewer will be reconsidered by the Secretary of State. Consequently, the most thorough compliance can be expected to take place where the local authorities have the greatest commitment to the policies reflected in the Warnock Report and EA 1981, where the local authorities have the most resources, and, perhaps, where there is the greatest involvement of voluntary child-support organizations that influence local decisionmaking.

While the statute places the primary task of implementation on the local education authority, it reserves the last word on most important questions to the Secretary of State for Education and Science. Furthermore, unlike the U.S. system under the EAHCA, there is no intermediate authority like the state governments to provide substantial opportunity for independent goals

160. EA 1981, §§ 2(1), 4(1).

161. *Id.* § 5(1)-(5).

162. *Id.* sched. 1, pt. I, § 1.

163. See Education (Special Educational Needs) Regulations 1983, § 4(4), STAT. INST. 29 (1983).

164. See EA 1981, § 7(5), (6); *id.* sched. 1, pt. I, § 1; Education (Special Educational Needs) Regulations 1983, §§ 4-7, 8(b), STAT. INST. 29 (1983).

165. EA 1981, § 7(1).

166. *Id.* §§ 7(10), 9(2); *id.* sched. 1, pt. II, § 5.

167. *Id.* § 8(1), (2); EA 1980, sched. 2, pt. I, § 1.

168. EA 1980, sched. 2, pt. II (implication).

169. EA 1981, § 8(5).

170. *Id.* §§ 5(3), 5(5), 5(7), 7(3), 7(9), 8(5); *id.* sched. 1, pt. I, § 2.

171. *Id.* §§ 5(4), 7(8).

172. *Id.* §§ 7(2), 2(4); *cf. id.* § 2(2).

of the state—or simply bureaucratic inefficiencies—to intervene and deflect national policies. The absence of such an administrative encumbrance in England and Wales means that the Secretary of State is in a much stronger position to see to the implementation of national educational policy.

The Secretary of State exercises his powers by issuing general regulations that elaborate and define the legislation and by reviewing individual decisions of local authorities. Under the rulemaking power, the Secretary of State prescribes or elaborates the frequency of assessments for children for whom statements are maintained;¹⁷³ identifies the advice which a local authority must seek in making assessments;¹⁷⁴ describes the manner of conducting such assessments and other matters relating to assessments;¹⁷⁵ specifies the requirements for qualification as a special school;¹⁷⁶ and specifies the requirements for qualification as an independent school¹⁷⁷ approved to educate children with special educational needs.¹⁷⁸

The Secretary of State's adjudicatory authority over decisions of local authorities empowers him to review¹⁷⁹ all decisions concerning requests of parents to remove a child from a special school;¹⁸⁰ approval of independent schools;¹⁸¹ placement of students in unapproved schools;¹⁸² and closing of special schools.¹⁸³ Under these provisions, the Secretary of State would make decisions affecting the kind and quality of special education provided in the schools in which a child with special educational needs could be placed. Bearing even more directly upon a child's special education is the Secretary of State's power under EA 1981 to review local decisions affecting assessment, statements and determination of a child's special educational provision.¹⁸⁴

173. *Id.* § 7(10).

174. *Id.* sched. 1, pt. I, § 1(1), (2).

175. *Id.* sched. 1, pt. I, § 1(3).

176. *Id.* § 12(1), (2).

177. In American terms, a "private" or fee-receiving school.

178. EA 1981, § 13(1), (2).

179. Although none of the statutory provisions cited in this paragraph use the term "appeal," it seems doubtful that that variation in wording alone alters the nature of the Secretary of State's reviewing power. For example, EA 1981, § 11(2) states that a parent, aggrieved by a local authority's refusal to consent to the withdrawal of a student from a special school, "may *refer* the question to the Secretary of State, who shall give such direction thereon as he thinks fit" (emphasis added). Section 18(1), a miscellaneous provision, authorizes the Secretary of State to examine the child concerned "[w]here any question arising under this Act is *referred* to the Secretary of State" (emphasis added). It would be unsound to construe this language to cover only those questions which involved a "reference" and not questions which involved an "appeal."

However, the Secretary of State's decisions concerning approval of independent schools and consent to placement in unapproved independent schools appear to be initial decisions rather than reviews of local authority decisions.

180. EA 1981, § 11(2).

181. *See id.* § 11(3)(a).

182. *Id.* § 11(3)(b).

183. *Id.* § 14(1).

184. The Secretary of State has plenary power to confirm, modify or reverse the ultimate decision of the local authority concerning the educational provision to be made for the student. EA 1981, § 8(7). But, on an appeal from a local decision, following assessment, *not* to determine the special educational provision, i.e., not to maintain a statement, the Secretary of State's power is to "direct" the local authority to "reconsider." *Id.* § 5(8).

The decision of the local authority *not* to assess, upon request, is left to its discretion. In the case

Although the statute gives the Secretary of State the power to adjudicate these various issues on review, the Secretary of State may defer to local decisions already made. It is even arguable that some deference is legally required. It seems unmistakable, however, that the statute confers considerable independent authority on the Secretary of State; most unmistakable is the Secretary of State's power, after consultation, to revise any part or all of the local authority's statement specifying a child's special educational provision.¹⁸⁵

In their book on education law, Taylor and Saunders write, "Students of the Education Acts 1944-75 can be in no doubt as to who is the senior partner in the educational system."¹⁸⁶ They mean the Secretary of State for Education and Science. Arguably, the eight judges on the bench of the Court of Appeals and the House of Lords showed that they had not learned this elementary lesson when they resolved a national-local controversy in favor of the local education authority in their judgments in *Secretary of State for Education and Science v. Metropolitan Borough of Tameside*.¹⁸⁷ Nevertheless, whatever may have been true under other legislation, and whatever should have been true in the *Tameside* dispute, it is difficult to resist the conclusion that the Secretary of State is indeed the senior partner under EA 1981.

If the Secretary of State is the senior partner, there is a junior partner as well, one that the Secretary of State will not ignore. Rather than exercising his significant power under EA 1981 in a coercive manner, the Secretary of State for Education and Science is likely to encourage local decisionmakers to adopt particular views of educational policy under EA 1981 through persuasion. For example, although Department of Education and Science circulars have no binding legal effect, they are likely to carry substantial weight in shaping the views of local authorities about the requirements of EA 1981. DES Circular 1/83, in particular, seems destined to influence significantly the views of local authorities about their obligations under EA 1981.

The Secretary of State has a variety of ongoing contacts with educational officials at all levels and a variety of means of disseminating the department's views. One important contact between the Secretary of State and local authorities is Her Majesty's Inspectorate (the Inspectorate).¹⁸⁸ The Inspectorate has no power to direct local decisions and, strictly speaking, it is not

of a child for whom no statement is maintained, the authority is to assess unless to do so is "in their opinion unreasonable," *id.* § 9(1); in the case of a child for whom a statement is maintained, the authority is to assess unless "they are satisfied that an assessment would be inappropriate." *Id.* § 9(2). Even in this situation, the Secretary of State has regulatory power over the frequency of assessments, *see id.* § 7(10), and it is arguable that there would still be an appeal under the Secretary of State's general authority to reverse unreasonable local actions. *See* EA 1944, § 68. *See generally* discussion of *Tameside* case, *infra* part V.

There is no specific provision in the act for appeal from the local *affirmative* decisions to assess or, following assessment, to make a statement. Those actions of the local authority would merge into the determinations of what educational provision should be specified in the statement and thus would be indirectly subject to appeal as part of the appeal against the educational provision specified.

185. EA 1981, § 8(7); *see also* the Secretary of State's power "to examine the child concerned" in connection with any question referred to the Secretary of State, *id.* § 18(1).

186. G. TAYLOR & J.B. SAUNDERS, *THE LAW OF EDUCATION* 4 (8th ed. 1976).

187. [1976] 3 All E.R. 665. *See* discussion of *Tameside* case, *infra* part V.

188. *See generally* H.C. DENT, *EDUCATION IN ENGLAND AND WALES* 63-64 (2d ed. 1982).

part of the administrative machinery under the Secretary of State. Rather, it is an independent body that serves as a consultant to both central and local education authorities. The Inspectorate is likely to have a centralizing effect on the application of the act: despite its independent position, it can understand and support the central authority's position; despite its lack of directive power, it can influence opinion at the local level because of the stature and status of its personnel.

In the preceding section, it was suggested that the cost of procedural rights under EA 1981 might prove to be a built-in deterrent to their use. Obviously, that tendency would be minimized if EA 1981 included a substantial commitment of funds to pay for expensive procedures. In fact, the opposite is true. There is no funding component in EA 1981. The Warnock Report assumed that carrying out its recommendations would require the commitment of substantial resources.¹⁸⁹ It is not surprising that the enactment of Warnock policies in EA 1981 without the concomitant financial support has been subject to criticism.¹⁹⁰ In the United States, the EAHCA has been criticized for imposing duties on local education authorities that are greatly in excess of the federal subsidy provided.¹⁹¹ The absence of any commitment of national funds could significantly weaken the position of the Secretary of State in enforcing EA 1981. The failure to provide the resources needed to support EA 1981 may give the appearance that the national government is really not serious about special education after all. This weakness in the national policy will be felt by local authorities on whom the economic burden will fall and by the staff of the Department of Education and Science responsible for implementation. The Department will find it more difficult to press for expensive solutions under EA 1981 when the national purse is empty for such purposes. For their part, the local authorities will be in a position to question the obligation to adopt costly special education programs for which no national revenues have been committed. In this bargaining posture, it will be easy for each side to fall back on the view that EA 1981 leaves very much to local discretion.

The general lack of resources to implement EA 1981, and the corresponding subversion of administrative enforcement, is qualified in two respects. First, the Secretary of State has allocated some of his discretionary funds to provide supplementary funding of in-service special education training of teachers.¹⁹² Such training was one of the specific purposes for

189. See Warnock Report, *supra* note 16, at 106-14, 325-26, 329.

190. See The Times (London) Educational Supplement, Mar. 6, 1981, at 6, col. 1; *id.* Feb. 27, 1981, at 6, col. 1. The criticism was foreshadowed in comments on the Warnock Report, see The Times (London) Educational Supplement: Scotland, Oct. 6, 1978, at 2, col. 3; The Times (London) Educational Supplement, May 26, 1978, at 5, col. 1, 6, cols. 1-2.

191. See, e.g., Pittenger & Kuriloff, *Educating the Handicapped: Reforming a Radical Law*, PUB. INTEREST, Winter 1982, at 86-89, 94-96.

192. See Education Act, 1962, 10 & 11 Eliz. 2, ch. 12, § 3(a) (authorizing the Secretary of State to make grants for teacher training). Approximately £1.2 million were provided by the Secretary of State to local authorities in the 1983-84 academic year, and £2.2 million in 1984-85—a small part of the total funds spent on in-service training by local authorities. In addition, £2.25 million has been made available for the purchase of microelectronic equipment for special education in 1985-86 under the Education (Grants and Awards) Act, 1984, ch. 11. Correspondence with representative of

which the Warnock Report anticipated the need for funds.¹⁹³ The total amount of money involved is relatively small, especially compared to the need for teacher preparation to provide special education as fully as contemplated by Warnock.

Second, resources are being made available indirectly as a result of the declining school-age population in Britain. The Warnock Report¹⁹⁴ and the White Paper¹⁹⁵ both noted this phenomenon.¹⁹⁶ Falling enrollments result in inefficiently used educational resources—teachers, buildings, equipment—which could be diverted to meet the additional demands on educational suppliers created under EA 1981. This transfer of resources would work well in some situations but not others. For example, to the extent that special equipment is needed, existing equipment is not likely to do the job, although any available funds for replacement of the existing equipment could be used instead for the needed special equipment. Teachers unneeded in ordinary schools may not be prepared, qualified or able to teach in special schools; unneeded special schools cannot supply the access ramps needed by the handicapped to use ordinary schools—but, in both instances, funds allocated for support of unneeded teachers or maintenance of unneeded schools may be released for teacher training or ramp construction. Excess space in separate special and ordinary schools is less costly to maintain if the children from two schools are “integrated” and one of the schools is discontinued.¹⁹⁷

By subsidizing some teacher training for special education, the government has demonstrated at least a symbolic commitment to special education. Through the resources made available as a result of demographic change, the local education authority's capacity to meet burdensome obligations under EA 1981 is improved. In both respects, the power—and perhaps the likelihood—of the Secretary of State for Education and Science to enforce EA 1981 is strengthened. However much the natural mode of enforcement may be to proceed through accommodation, realization of the promise of the Warnock

Div. of Special Educ., Dept. of Educ. & Science (Oct. 17, 1984). See also DEPARTMENT OF EDUCATION & SCIENCE PRESS RELEASE #284/82, PRIORITY AREAS ANNOUNCED FOR IN-SERVICE TEACHER TRAINING GRANTS (Dec. 6, 1982).

193. See Warnock Report, *supra* note 16, at 108 ¶ 7.23, 112 ¶¶ 7.36-.37, 226-45, 332-34.

194. See *id.* at 326 ¶ 19.6.

195. See White Paper, *supra* note 21, at 9 ¶ 20.

196. See The Times (London) Educational Supplement, May 26, 1978, at 2, col. 3.

197. The Secretary of State's powers under EA 1981 include considerable control over the use of special schools. See, e.g., EA 1981, § 14; see also *id.* § 11(2) (approval of parents' removal of student from special school); *id.* § 12(1) (approval of special schools).

The possibility of obtaining school-use efficiencies through integration is suggested by figures supplied by the Special Education Division of the Department of Education and Science. From January 1981 to January 1983, the number of special students enrolled in ordinary classes increased from 10,369 to 22,592; during the same period, the number of special students enrolled in separate units in ordinary schools decreased from 16,456 to 15,378. During the same period, the number of children in special school decreased by 2376. These figures seem to show a net increase in children in ordinary schools of 11,145 and suggest that some of the increase represents a shift from separate to integrated classes. Of course, it is impossible to determine how much of the enrollment changes were a result of demographic changes, a shift in attitude by parents and educators toward integrated education, or some combination of these and other factors.

Report and EA 1981 may well depend on the Secretary of State's determination to override local decisions when meaningful enforcement so requires.

V

THE ROLE OF THE COURTS

One cannot wholly separate the question of administrative enforcement by the Secretary of State for Education and Science from the question of judicial enforcement through judicial review of administrative action. The power of the Secretary of State under EA 1981 is ultimately dependent upon what the statute is read to mean by the courts. As a close alternative, a controlling reading could be provided by the joint perception of the Secretary of State and local education authorities of what the ultimate judicial determination would be. If the Secretary of State and the local authorities assumed there would be no judicial review of administrative action, they would have to work out their views of powers and duties under EA 1981 within a very different framework. As long as judicial review is a possibility, the anticipated judicial position is an important determinant of the national-local allocation of power.

In the last thirty years, we have become accustomed to the fact that American courts often take a very active role in deciding controversial issues of public policy in enforcing both constitutional and statutory rights. The EAHCA encourages this role by assigning courts important responsibilities in connection with a student's right to a "free appropriate public education." Under the EAHCA any party aggrieved by the decisions made through a specified administrative process is entitled to bring an action in a state or federal district court, which is given power by the statute to receive the administrative record, hear additional evidence and grant such relief as it determines is appropriate.¹⁹⁸

In *Board of Education v. Rowley*,¹⁹⁹ the Supreme Court held that this provision does not authorize the federal courts "to substitute their own notions of sound educational policy for those of the school authorities."²⁰⁰ The court's responsibility, rather, is to determine whether the education authorities have complied with required statutory procedures and whether they have developed an educational program "reasonably calculated to enable the child to receive educational benefits."²⁰¹ Although the importance of judicial review under the EAHCA has been somewhat diminished by the *Rowley* case, a significant statutory responsibility for the courts remains. One somewhat ambiguous Supreme Court decision is not likely to bring about an abrupt change in judicial behavior.²⁰²

198. 20 U.S.C. § 1415(e)(2) (1982).

199. 458 U.S. 176 (1982).

200. *Id.* at 206.

201. *Id.* at 207.

202. For examples of post-*Rowley* cases refusing to defer to educational decisionmakers, see *Roncker v. Walter*, 700 F.2d 1058 (6th Cir.), *cert. denied*, 104 S. Ct. 196 (1983); *Doe v. Anrig*, 692 F.2d 800 (1st Cir. 1982).

In contrast, under EA 1981, no role whatsoever is created for the courts. Perhaps the best indication of the general lack of expectation of any involvement of the British judiciary in connection with special education comes from the handbook on EA 1981 prepared by the Advisory Centre for Education (ACE). Written for the express purpose of advising parents of their rights and tactical approaches possible under the new Act, the handbook refers to possible judicial relief only once, in a passing comment that parents might consider going to the European Court of Human Rights.²⁰³ It does not contain one word concerning any British court.

Despite these strong indications to the contrary, there is a judicial role in interpreting EA 1981, and it could turn out to be significant. While there has not been judicial activism of the magnitude of that in the United States, British courts have experienced a shift toward a more active role in many areas. Perhaps the clearest example of this change is in the judicial review of administrative action.²⁰⁴ Administrative action is presumptively subject to judicial review to prevent action beyond the statutory power of the administrative body.²⁰⁵ There are available procedures—such as mandamus or injunction or declaratory judgment—for invoking judicial review of the action of the Secretary of State.²⁰⁶ In a number of cases the courts have interceded to reverse the exercise of administrative discretion that, until recently, would not have been thought subject to judicial review.²⁰⁷ One can point specifically to relatively recent examples of significant judicial decisions in the area of education: upholding a race discrimination charge of a student;²⁰⁸ reversing the exercise of discretion of the Secretary of State for Education and Science;²⁰⁹ and enjoining the closing of a school by a local education authority.²¹⁰

No doubt the most famous of these cases, and apparently the case most relevant to education, is *Secretary of State for Education and Science v. Metropolitan Borough of Tameside*.²¹¹ Lord Denning, Master of the Rolls, succinctly stated what the case was about:

There is a controversy on this question: should the grammar schools be turned into comprehensive schools? Most educationalists and parents know what the controversy is all about, but for others who do not know the background perhaps I may say a word. The difference lies in the way the children are selected on and after the age of 11. In order to go to a grammar school, a boy or girl of age 11 has to show some marked

203. SPECIAL EDUCATION HANDBOOK, *supra* note 118, at 20.

204. See S. DE SMITH, CONSTITUTIONAL AND ADMINISTRATIVE LAW 560-68, 582-93 (4th ed. 1981); H.W.R. WADE, CONSTITUTIONAL FUNDAMENTALS 41-46 (1980).

205. See S. DE SMITH, *supra* note 204, at 560-68.

206. See *id.* at 594-607.

207. See *Laker Airways Ltd. v. Department of Trade*, [1977] Q.B. 643; *Congreve v. Home Office*, [1976] Q.B. 629; *Anisminic Ltd. v. Foreign Compensation Comm'n*, 1969 2 A.C. 147; *Padfield v. Minister of Agriculture, Fisheries & Food*, 1968 A.C. 997.

208. *Mandla (Sewa Singh) v. Dowell Lee*, 1983 2 A.C. 548, [1983] 2 W.L.R. 620 (private school).

209. *Secretary of State for Educ. & Science v. Metropolitan Borough of Tameside*, [1976] 3 All E.R. 665.

210. *Legg v. Inner London Educ. Auth.*, [1972] 3 All E.R. 177.

211. [1976] 3 All E.R. 665.

ability or aptitude. When he gets there, he or she will mingle with other bright youngsters and be taught there right through until the age of 18. But a comprehensive school takes any boy or girl of age 11 without reference to his or her ability or aptitude. The bright and the dull start together in classes, but they are divided into different streams as they develop in ability or aptitude. They remain at the comprehensive school until they are 16. Most of them then leave to go to work. But those who wish can go on for two more years at a sixth form college where they are given more advanced teaching. That is from 16 to 18.²¹²

At the time of the *Tameside* litigation, the Labor government in power in the United Kingdom was strongly supportive of comprehensive education. The control of the local education authority of Tameside, however, had just changed from the Labor Party to the Conservative Party. While they had local control, the Labor Party had developed and begun to implement a plan for the replacement of the grammar-secondary modern system by the comprehensive system. Under the Conservatives, who had campaigned against the elimination of grammar schools, an attempt was being made to delay implementation of that part of the approved plan that called for the conversion of certain grammar schools into comprehensive schools.

The Secretary of State directed the local authority to implement the plan according to schedule. When the local authority refused, the Secretary of State applied for, and received, an order of mandamus ordering the authority to go forward with the plan. On appeal, the Court of Appeals, affirmed by the House of Lords, decided that the mandamus should not have been issued and discharged the order. Three judges on the Court of Appeals and five judges of the House of Lords all agreed with this decision, largely for the same reason. For simplicity, this article refers to their several judgments as the judgment of the "court." The legal issue in the case centered on the Secretary of State's power under section 68 of EA 1944, which provides:

If the Secretary of State is satisfied, either on complaint by any person or otherwise, that any local education authority . . . have acted or are proposing to act unreasonably with respect to the exercise of any power conferred or the performance of any duty imposed by or under this Act, he may . . . give such directions as to the exercise of the power or the performance of the duty as appear to him to be expedient.²¹³

The court had little difficulty in rejecting the contention that the word "satisfied" in the first line of section 68 meant that the Secretary of State had an essentially unbridled "subjective discretion" to decide that the local authority had acted "unreasonably" and thus, without more, the power to direct the authority to implement the pending plan for comprehensive secondary schools. On the contrary, the court decided, the Secretary of State must have an objective basis for a determination that the local authority "have acted or are proposing to act unreasonably."²¹⁴

It was the Secretary of State's position that the delay in implementing a plan already well advanced would be disruptive to the education of children in the area affected. The local authority argued just the opposite—that going

212. *Id.* at 667.

213. E.A. 1944, § 68.

214. [1976] 3 All E.R. 665, 670-71.

forward on schedule would be disruptive. Much of the controversy, in the court's treatment of the problem under section 68, turned on one narrow factual issue. There were 783 pending applications for grammar school at a time when, because of the implementation of the plan to that point, there were only 240 places. The Secretary of State argued that it would not be educationally feasible to select the 240 out of 783 applicants in the time available. The local authority disagreed. The court concluded that, at most, this was a disagreement between reasonable points of view and that there was no objective basis for the Secretary of State to characterize the disagreement as evidence of unreasonableness.²¹⁵

The court was evidently influenced by several considerations. First, it was dealing with two distinct administrative bodies, each having a legitimate claim for discretion and respect. Second, local education authorities have broad primary responsibility for educating children in their respective areas. Third, there was no general legal duty for local authorities to adopt the comprehensive system. Fourth, apart from the legal framework, there was no objective basis for choosing one of the two fundamentally different approaches to education represented by the Secretary of State's and the local authority's positions. Fifth, there was no objective basis for concluding that the local authority would not be able to select the 240 places in an orderly manner in the time available; in fact there was a basis in the record for believing that the authority would be able to do so. Sixth, upholding the Secretary of State would have entailed a judgment that the local authority had acted improperly. In the court's view, it was no small matter to charge public officials with acting unreasonably with respect to the performance of any duty imposed on them by the Education Act.²¹⁶ For those who believe there is a conservative political bias to the British judiciary,²¹⁷ two other factors would very likely be mentioned: In a case embracing fundamental differences over political and educational philosophy, the court came down on the side of the Conservative party and the elite system of education.

For purposes of construing EA 1981, there are many messages one can read in the *Tameside* judgments. One series of messages might suggest that the role of the Secretary of State for Education and Science is far more limited than it appears on the face of the statutes. Very broadly, *Tameside* may indicate that, where significant policy issues are implicated, the courts may intervene in unpredictable ways. More narrowly, *Tameside* seems to demonstrate that judicial intervention into educational policy in a nondeferential fashion is a reality, not just a remote possibility. *Tameside* certainly can be read to suggest judicial bias in favor of decentralization and local control. And, of course, in its reading of the phrase, "If the Secretary of State is satisfied," to pose an objective rather than a subjective test, the court indicated that statutory language may be construed in surprising ways. These are sobering thoughts.

215. *Id.* at 672, 676.

216. *Id.* at 671.

217. See J.A.G. GRIFFITH, *THE POLITICS OF THE JUDICIARY* 236-40 (2d ed. 1981).

They suggest not only that the courts might have a role under EA 1981 but that the judicial role might drastically limit the power that EA 1981 seems to confer on the Secretary of State for Education and Science.

Although *Tameside* is plainly a significant precedent, it does not support a restrictive view of the Secretary of State's power under EA 1981. In *Tameside*, the real dispute was a political dispute between groups representing two distinct philosophies of educational policy. In that case, the Secretary of State represented the Labor Party and the new comprehensive education; the managers of the local authority represented the Conservative Party and the old hierarchical approach to education. Special education has not been a partisan issue in Britain. Not only did *Tameside* involve a dispute over educational policy, it involved a dispute in which the real parties in interest were the state and local governments. Within the affected educational community, there were parents (and perhaps students) who cared about the outcome of the policy struggle. But these parents were in no sense litigants or grievants or "parties."

In sharp contrast, under EA 1981 the parents (and students) will be asserting individual claims for statutory entitlements. *Tameside* does not offer any clue to how the British judiciary might respond to an attempt to invoke judicial review involving an individual claim of right—either in the situation where the individual's and Secretary of State's positions are together or in the situation where the individual and the Secretary of State take opposing positions. Finally, under EA 1981, unlike the situation in *Tameside*, there will be a recommendation by an appeal committee, a third administrative body to which some deference might or might not be given by the courts.²¹⁸

All of these considerations indicate that *Tameside* may be an inconclusive precedent from which to evaluate the power of the Secretary of State under EA 1981. However, the most persuasive argument that the *Tameside* decision will not limit the Secretary of State's power under EA 1981 is based on its fundamentally different statutory scheme. The statute involved in *Tameside*, section 68 of EA 1944, creates a general supervisory power in the Secretary of State over any and every action of local education authorities. The controlling standard of section 68 is whether the local authority has or will act "unreasonably." As construed by the *Tameside* court, this vague standard requires a finding that the local authority has failed to perform a duty. EA 1981 seems sharply different. The central statutory provision, section 8(7), gives the Secretary of State power, "after consulting with the local education authority," to:

- (b) amend the statement so far as it specifies the special educational provision and make such other consequential amendments to the statement as he considers appropriate; or
- (c) direct the local education authority to cease to maintain the statement.

This provision applies to only one quite specific educational matter: the local

218. Compare the Administrative Law Judge under the National Labor Relations Act. See *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

authority's statement of the child's special education provision. It does not entail any requirement of a pejorative finding such as a suggestion that the local authority has violated its duty. On the contrary, section 8(7) of EA 1981 gives the Secretary of State plenary power to substitute his or her judgment for that of the local authority. It is the Secretary of State's own conception of the statute that is to be enforced under EA 1981.

Although the *Tameside* decision provides no basis for nullification of the apparently significant power given to the Secretary of State for Education and Science by EA 1981, *Tameside* remains important for EA 1981. As seen in the preceding discussion, *Tameside* reveals that there is a potentially significant role for the courts in the enforcement of education legislation. That role would seem to include affirmatively enforcing the Secretary of State's exercise of statutory power, and it might include requiring a reluctant Secretary of State to use that power. Specifically, it might include requiring the Secretary of State to consider an individual claim of right under EA 1981. It is even possible, though far less likely, that the court might reverse the Secretary of State's rejection of such an individual claim. That is, it would be possible for a court to conclude that the Secretary of State need not defer to local judgments and, at the same time, to conclude that the Secretary of State must recognize statutory rights. Such an exercise of judicial power would be partly dependent upon a determination that EA 1981 creates substantive rights, a question to be explored in the next two sections of this article.

EA 1981 does clearly create procedural rights. The courts might be requested to enforce either the parental consultation rights established at various stages of the EA 1981 assessment process or the hearing rights before an appeal committee at the final stage of development of a statement of special educational provision. These rights are akin to the rights recognized under the rules of "natural justice," the British counterpart of American procedural due process.²¹⁹ In the absence of any specific statutory authority, the rules of natural justice extend to any person or body deciding issues affecting the rights or interests of individuals where a reasonable citizen would have a legitimate expectation that the decisionmaking process would be subject to some rules of fair procedure. That would cover decisions affecting a student's special education. But the availability of natural justice, like procedural due process, is riddled with qualifications. It is usually thought to be unavailable where the decision in question involves expertise or professional judgment,²²⁰ and therefore it is arguably not applicable to special education in the absence of the specific statutory authority contained in EA 1981.

Since EA 1981 has brought natural-justice-like procedures into the special education area, the courts might be influenced by the principles of natural justice in construing and enforcing those procedures. As usually stated, the rules of natural justice include the right to a fair hearing²²¹ and the rule

219. See P. JACKSON, *NATURAL JUSTICE* (2d ed. 1979); S. DE SMITH, *supra* note 204, at 569-82.

220. See P. JACKSON, *supra* note 219, at 126-28.

221. See *id.* at 60-83; S. DE SMITH, *supra* note 204, at 572-77.

against bias.²²² Although neither branch of natural justice would require a fixed set of predetermined procedures,²²³ natural justice might influence the courts' determination as to whether parents have been given an adequate opportunity to present their position to an appeal committee under EA 1981²²⁴ and whether the appeal committee was sufficiently impartial.²²⁵

EA 1981 plainly relies upon the specified procedures as an important means of protecting the right to receive the "special educational provision" appropriate for each child's "special educational needs." It would be an important contribution to the achievement of the statutory promise for the court to enforce these guaranteed procedural rights, whether or not influenced by natural justice principles. Although there is a strong British distaste for judicial activism, the prospect of judicial enforcement of specific statutory rights does not seem merely an American fantasy.²²⁶ It does seem extremely unlikely that the British courts would act in other than a deferential manner or in other than extraordinary instances of statutory violation. But even rare judicial intervention and the existence of potential judicial enforcement could go far in strengthening parent claims for meaningful procedural involvement and in stiffening the Secretary of State's will to insist that local authorities recognize those rights.

VI

CONTENT OF THE SPECIAL EDUCATION ENTITLEMENT

Whether the rights and duties created by EA 1981 are enforced by the courts or left to be enforced entirely by the Secretary of State and local educational authorities, the ultimate question about required special educational entitlement is the same: What substance, if any, is encompassed by the right to "special educational provision"? On the surface, the answer is disarmingly circular: A child with "special educational needs" is entitled to the "special educational provision" which is specified in the "statement"; the "provision" so specified is what the local education authority decides, following assessment, the child "needs."²²⁷ Professor Kirp has contrasted the Warnock

222. See P. JACKSON, *supra* note 219, at 26-59; S. DE SMITH, *supra* note 204, at 569-72.

223. See P. JACKSON, *supra* note 219, at 1-25; S. DE SMITH, *supra* note 204, at 569.

224. Compare *Regina v. Deputy Indus. Injuries Comm'r*, [1965] 1 Q.B. 456, 490 (per Lord Diplock, dictum, cross-examination required); *Pett v. Greyhound Racing Ass'n Ltd.*, [1969] 1 Q.B. 125 (right to counsel) with *Kavanaugh v. Chief Constable of Devon and Cornwall*, [1974] Q.B. 624, 633 (no right to cross-examination); *Regina v. Race Relations Bd.*, *ex parte Selvarajan* [1975] 1 W.L.R. 1686, 1694 (per Lord Denning, Master of the Rolls, dictum, no right to counsel).

225. Compare *Hannam v. Bradford Corp.*, [1970] 1 W.L.R. 937 (contrary to natural justice for school governors to sit as members of subcommittee of local education authority in teacher dismissal case) with *Ward v. Bradford Corp.*, 70 Knight's Local Gov't R. 27 (1971) (permissible despite language to contrary for school governors to initiate charges and make decision in student expulsion).

226. See cases cited *supra* notes 207-09 & 222-23; authorities cited *supra* notes 204, 212.

227. It is well known that the same sort of circularity characterizes the EAHCA. A handicapped child is entitled to a "free appropriate public education"; this appropriate education is what the child's "individualized education program" ("IEP") calls for; the IEP specifies an educational program for the child on the basis of a meeting, the purpose of which is to evaluate the child's needs and determine how those needs should be met.

Report's "professional" approach to the American "legal" approach.²²⁸ Despite this difference, the Warnock Report and, in its wake, EA 1981 are like the EAHCA in substituting procedure for substance. As previously outlined, EA 1981 contains elaborate procedures relating to the process of assessment and determination of a child's special needs and special educational provision. The statute itself specifies no educational content for what should be provided.²²⁹

The implicit claim of EA 1981 (like the EAHCA) is that if one follows the specified procedures, the correct educational program will be found for each child having a special educational need.²³⁰ Accepting that claim, to say the least, requires an act of faith. The Warnock Report was notably lacking in description or analysis of the educational program to be provided for the broad array of children who, according to the report, will need special education.²³¹ Surely, this absence must reflect the state of knowledge—or lack thereof—concerning the curriculum for special education.

It does not quite follow that EA 1981 should be construed to contain no substantive constraints whatsoever. There are glimmerings in the Warnock Report and in EA 1981 and related regulations indicating that it is not quite correct to conclude that "whatever is [procedurally correct] is right."²³²

First, regulations issued under express statutory authority indicate that special students are to receive *educational benefits*.²³³ No doubt that is a bland standard, and perhaps it is also a self-evident one. But it very clearly says that, however unblemished the procedural path followed, a special student has not received his statutory entitlement if the statement calls for a provision yielding no educational benefit.²³⁴ Merely providing custody or care would not satisfy this standard. Arguably, the question is not actual benefit but rather whether the statement is *designed* to produce an educational benefit.²³⁵ Even if the focus is on the statement rather than the delivery of services, the

228. Kirp, *supra* note 25.

229. EA 1981 does require that the education be provided in ordinary schools if statutorily specified conditions are met, EA 1981, § 2(2), (3), (7), but it is arguable that the policy objectives served by integration are social rather than educational. See *infra* discussion in part VII.

230. It is at least arguable that EA 1981 makes a stronger claim that the correct ("professional") decision will result than does the EAHCA; with its greater emphasis on legality, the EAHCA may be more agnostic about a "right answer" and often more willing to settle for giving parents what they want. See Kuriloff, *Is Justice Served by Due Process?: Affecting the Outcome of Special Education Hearings in Pennsylvania*, LAW & CONTEMP. PROBS., Winter 1985, at 89.

231. See Warnock Report, *supra* note 16, at 205-25; Kirp, *supra* note 25, at 157; S. TOMLINSON, *supra* note 17, at 134-54.

232. See A. POPE, ESSAY ON MAN, Epistle I, line 294. Professor Kirp's charge would be that, according to Warnock, whatever the professionals say is right. See Kirp, *supra* note 25, at 157.

233. Education (Special Educational Needs) Regulations 1983, §§ 4(2)(c), 10(1)(c)(ii), STAT. INST. 29 (1983).

234. The claim that a special student must receive education that benefits him is consistent with the assumption, characterizing British law since at least 1971, that all special students are educable. See Education (Handicapped Children) Act, 1970, ch. 52, § 1(1)(a).

235. Rowley strongly suggests that, under the EAHCA, the emphasis should be on the IEP rather than actual benefit, see Board of Educ. v. Rowley, 458 U.S. 176, 203-04 (1982), but the Rowley opinion is ultimately ambiguous on this point. See *id.* at 200-01.

extensive provisions in the act for reassessment and statement revision²³⁶ substantially reduce the significance of that difference. When experience demonstrates that the education specified in the statement is producing no benefit, it can no longer be thought that the statement is calculated to produce benefits.²³⁷ Determining the *level* of benefit needed to satisfy EA 1981 is likely to be problematic.²³⁸

A second standard giving content to "special educational provision" under EA 1981 is the Warnock Report's view that a special student is entitled to individualized education. The essence of the Warnock Report, and of the White Paper and EA 1981 following it, is that each child having special educational needs is to have an educational program tailored to meet *that child's* particular educational needs. It does not follow that each special student's educational program must be different from that of every other student. EA 1981 plainly contemplates that special students will commonly be educated in schools, and any form of "school education" contemplates some group process under which students are treated jointly much of the time. The shift from selective to comprehensive schools in England and Wales further reflects an educational judgment favoring common rather than atomized education for children within a broad range of ability.²³⁹ A comparable preference for mixing educationally differing children is evidenced by the mainstreaming provisions in EA 1981.²⁴⁰

However paradoxical, the clear educational policy against isolation must be reconciled with the mandate of EA 1981 to shape a child's education in accordance with the child's individual needs. The Warnock Report's condemnation of a categorical approach has been adopted as national policy by EA

236. EA 1981, §§ 2(4), 7(10), 9(2); *id.* sched. 1, pt. II, §§ 5-6.

237. See DES CIRCULAR 1/83, *supra* note 65, at 11-12; *cf.* Castenada v. Pickard, 648 F.2d 989, 1010 (5th Cir. 1981) (failure of educational program to overcome language barriers would demonstrate program to be inappropriate).

238. In this respect, the history of litigation under the EAHCA is instructive. See Board of Educ. v. Rowley, 458 U.S. 176 (1982). The equal protection background of the EAHCA had suggested that the EAHCA contained an equality principle under which an "appropriate" education was measured by comparison to the education of "regular" or "ordinary" children. See Rowley v. Board of Educ., 483 F. Supp. 528, 534 (S.D.N.Y.) (handicapped child must have opportunity to achieve his or her full potential commensurate with the opportunity provided to other children), *aff'd*, 632 F.2d 945 (2d Cir. 1980), *rev'd*, 458 U.S. 176 (1982); Buchholtz v. Iowa Dep't of Pub. Instruction, 315 N.W.2d 789, 793 (Iowa 1982) (equality requires a "parity of educational opportunity" between handicapped and nonhandicapped children); Note, *Enforcing the Right to an "Appropriate" Education: The Education for All Handicapped Children Act of 1975*, 92 HARV. L. REV. 1103, 1126-27 (1979) (concept of appropriateness requires "equal opportunity for individual development"). But, in *Rowley*, the Supreme Court rejected this approach and substituted a reading of appropriate education that required a "benefit" to the handicapped child. Although the Court concluded that the benefit need not be the maximum possible, the question whether "any" benefit or "some" benefit or, indeed, a "substantial" benefit is required was pointedly left open. Noting that the child in *Rowley* was receiving "substantial specialized instruction and related services and . . . performing above average," the Court wrote, "[w]e do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act." 458 U.S. at 202.

239. See generally E.S. CONWAY, GOING COMPREHENSIVE (1970); A. GRIFFITHS, SECONDARY SCHOOL REORGANIZATION IN ENGLAND AND WALES (1971); W.K. RICHMOND, EDUCATION IN BRITAIN SINCE 1944, 94-112 (1978); N. WRIGHT, PROGRESS IN EDUCATION ch. 4 (1977).

240. See *infra* part VII.

1981, and the elimination of handicap categories would seem to entail more than a difference in terminology. The Warnock recommendations should preclude a process by which a student can be assigned to a school or an educational program of a particular kind simply because the student can be characterized by the same general label as other students so assigned. The student's individual statement must, somehow, be designed to accommodate the exigencies of school and the unique needs of the individual child. Broad discretion will undoubtedly be permitted, but a clear failure to exercise the judgment required to achieve an accommodation should entail a failure to satisfy EA 1981.

A third standard for determining the content of a "special educational provision" follows from EA 1981's requirements concerning the ingredients on which a special student's statement is based. The statute requires that parents have the opportunity to submit evidence and make representations.²⁴¹ The statute also requires that the local education authority obtain advice from medical, psychological and educational experts, and it authorizes the authority to obtain advice from others designated by regulation or selected by the authority.²⁴² Furthermore, those giving advice must take into account other information called to their attention.²⁴³ The statute does not say, in so many words, that the authority's decision must be based upon the advice received or on the resulting record. However, it would be hard to square unbridled local discretion with a statutory pattern that constantly interweaves specific decision and information gathering, makes education authorities consult advisors, makes advisors consult persons with specified knowledge or information, directs the authority to make its decision concerning educational provision "after considering" parental representations and subjects the local decision to a broad review by the Secretary of State. Furthermore, the Secretary of State's regulations expressly require an education authority to consider various factors contributing to the assessment,²⁴⁴ and they require that the evidence, advice and information considered be made part of the statement.²⁴⁵ Finally, DES Circular 1/83 seems to assume that the advice on the record imposes limitations on the authority's discretion, at least as a practical matter, when it warns consultants that they should avoid discussion of "eventual placement" so as not to preempt the LEA's decision.²⁴⁶

The DES circular also indicates that the local authority's decision is circumscribed to some degree by the record it is obligated to compile.²⁴⁷ If the advisors say that the child is mildly retarded and well adjusted, it will not do to provide the child with home education and braille textbooks. There will nec-

241. EA 1981, §§ 5(3), 7(4).

242. *Id.* sched. 1, pt. I, § 1(2).

243. See Education (Special Educational Needs) Regulations 1983, § 4(3), STAT. INST. 29 (1983); see also *id.* § 7(2) (psychologist advisor must consult other psychologists thought to have information).

244. See *id.* § 8 (representations made by and evidence submitted by parents; professional advice; health and welfare information submitted by any district health or social services authority).

245. See *id.* § 10(1)(d).

246. DES CIRCULAR 1/83, *supra* note 65, at 7 ¶ 35.

247. *Id.* at 8 ¶ 39.

essarily be considerable room for judgment in determining whether statement and advice are compatible,²⁴⁸ but the findings of the assessment process should impose some constraint on the range of permitted content of the resulting statement.

As stressed throughout this article, the local education authorities will have the main responsibility for implementing EA 1981. This conclusion is underscored by the tradition of local control in British education, the primary obligation placed on local authorities by EA 1981 to determine "special educational provision,"²⁴⁹ and the specific suggestions in EA 1981 that local variation is contemplated.²⁵⁰ DES Circular 1/83 states that "the Secretary of State for Education and Science hopes that appeals will seldom prove necessary."²⁵¹ Although that hope may suggest that local authorities will be given considerable discretion to work things out with parents, it certainly does not suggest that the Secretary of State will fail to enforce the act when appeals do "prove necessary." All local authorities in England and Wales are subject to the *same* statutory standard to provide "special educational provision," and the local determinations are subject to a broad, seemingly discretionary, national review by the Secretary of State for Education and Science.²⁵²

Thus, it would seem that there is a national dimension to the standard governing the required special educational provision. Requirements that a special student receive educational benefits, individualized education and educational provision based on the assessment process would permit a range of local variation but would also set limits to such variation. It is to be expected that the Secretary of State will be slow to assert that such limits have been reached, but the Secretary of State presumably has the power and duty to refuse to tolerate a breach of the statutory limits. For example, if the Secretary of State believed that research had established that autistic children should be educated in segregated settings, the Secretary of State might reverse a local decision that disregarded that research and called for integrated education of an autistic child in an ordinary school. Or, if the Secretary of State were convinced that catheterization of a special student is a simple, inexpensive, easy-to-learn procedure,²⁵³ the Secretary of State might reverse a local decision which refused to include catheterization in the applicable statement.²⁵⁴

248. The Secretary of State has expressly stated that "Where it has not proved possible to reconcile differences in the advice submitted," the local authority must decide "the weight to be given to different kinds of advice." *Id.* at 8 ¶ 39.

249. See *supra* notes 160-72 and accompanying text.

250. See EA 1981, § 1(2)(b) (kind of facilities "generally provided in schools, within the area of the local authority"); *id.* § 1(3)(a) (educational provision made generally "in schools maintained by the local education authority"); *id.* §§ 2(3), 2(7) (conditions for integration evidently dependent on peculiar facts of each school such as available resources). Of course, separate appeal committees will be established for each authority, and each authority will obtain its own professional advice. See *supra* part III.

251. DES CIRCULAR 1/83, *supra* note 65, at 10 ¶ 54.

252. See *supra* pp. 138-40.

253. See *Irving Indep. School Dist. v. Tatro*, 104 S. Ct. 3371 (1984).

254. The Secretary of State's Regulations require the statement to specify educational "facilities

The Secretary of State might also override a local decision that appeared to be inconsistent with national norms established by the letter or spirit of a law other than EA 1981. For example, official action that results in a disproportionate racial impact can violate the Race Relations Act of 1976.²⁵⁵ The Secretary of State might conclude that a violation of the Race Relations Act was implicated by a statement specifying a particular educational provision,²⁵⁶ if information available to the Secretary of State indicated that a significantly higher proportion of West Indian children than of white children in the area received that particular special educational provision.²⁵⁷

As pointed out in an earlier section, EA 1981 included no funding component despite the Warnock Report's assumption that its proposals would be expensive to implement. Consequently, the central government's inclination to press for changes in special education and the inclination of local education authorities (as well as their capacity) to adopt expensive changes are probably weakened. It would seem an extreme position to argue that absence of funding should mean that the duties imposed by the act have been nullified. EA 1981 was enacted, and its duties imposed, with full awareness that the revenues needed to facilitate implementation were not to be provided.²⁵⁸ Still, as a practical matter, the absence of national funding can be expected to increase local variation in the substantive content given to the act's requirements.

and equipment" and "staffing arrangements," Education (Special Educational Needs) Regulations 1983, § 10(1)(a), STAT. INST. 29 (1983), and noneducational provision of which "advantage should be taken if the child is properly to benefit from the special educational provision," *id.* § 10(1)(c)(ii).

255. § 1. Racial Discrimination:

(1) A person discriminates against another . . . if—

(b) he applies to that other a requirement or condition which he applies or would apply equally to persons not of the same racial group as that other but— (i) which is such that the proportion of persons of the same racial group as that other who can comply with it is considerably smaller than the proportion of persons not of that racial group who can comply with it; and (ii) which he cannot show to be justifiable irrespective of the colour, race, nationality or ethnic or national origins of the person to whom it is applied.

Race Relations Act, 1976, ch. 74, § 1.

The act was patterned on the theory of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), a case involving employment discrimination under Title VII of the Civil Rights Act of 1964. This theory has been applied to special education situations. See *Larry P. v. Riles*, 495 F. Supp. 926 (N.D. Cal. 1979), *aff'd*, 1983-84 EDUC. HANDICAPPED L. REP. (CRR) 555:304 (9th Cir. 1984).

256. The Race Relations Act applies to education, see Race Relations Act §§ 17-19 (Current Law Statutes Annotated, 1976 Vol. 2). It may be arguable that this application would be negated by § 35, which says that Parts II-IV (including §§ 17-19) do not render unlawful "any act done in affording persons of a particular racial group access to facilities or services to meet the special needs of persons of that group." However, this section appears to be talking about racially conscious "affirmative action"—for example, as the statutory annotation suggests, to satisfy special language needs of "groups whose first language is not English." *Id.*, Part VI, § 35, General Note.

257. The critical inquiry in applying the Race Relations Act would probably focus on the question of whether discriminatory impact was "justifiable irrespective of . . . race," § 1(1)(b)(ii); see *supra* note 255. See generally B. COARD, *HOW THE WEST INDIAN CHILD IS MADE EDUCATIONALLY SUBNORMAL*; D. GALLOWAY & C. GOODWIN, *EDUCATING SLOW-LEARNING AND MALADJUSTED CHILDREN: INTEGRATION OR SEGREGATION?* 9, 23-24 (1979); S. TOMLINSON, *supra* note 17, at 155-71.

258. Nevertheless, critics of the White Paper, which anticipated the lack of funding, did argue that implementation of the Warnock Report without national financial support would permit local authorities to do what they wanted to do. See *The Times* (London) Educational Supplement, Aug. 22, 1980, at 6, col. 6.

Furthermore, in determining what the act's standards require, the cost of providing special education will inevitably be a consideration. The expense of proposed special education could influence judgments about the required level of benefit to be provided, the extent to which individual needs should be accommodated, the extent to which the advice contained in the statement should be followed or the relevance of local resources in determining permissible departures from national norms. Conceptually, the cost might be considered a defensive factor, justifying a failure to provide the special educational provision otherwise mandated by EA 1981. Or, assuming EA 1981 to be an enactment of a pragmatic compromise to meet special needs to the extent it was feasible to do so, cost might be treated as a factor integrally involved in the determination of the special educational provision required by EA 1981. However conceptualized, cost considerations will necessarily have a bearing on what "special educational provision" EA 1981 is determined to require.²⁵⁹ The difficult problem will be in finding a formula that concedes the relevance of cost but does not make cost a consideration that overwhelms all others.²⁶⁰

Plainly, EA 1981 leaves the initial determination of "special educational provision" to local decision, subject to the constraints produced by procedural safeguards, parental involvement and administrative review by the Secretary of State. As argued in this section, special educational provision mandated by the act seems to entail some minimal national substantive content concerning educational benefit, individualization and record-relatedness—presumably all somehow discounted by cost considerations. If substantive standards do exist, they govern both the initial decision of the local education authority and the reviewing decisions of the Secretary of State for Education and Science. Those standards would also apply in the instance of review by the courts, which might uphold the Secretary of State's application of the governing substantive standards as well as require such application by the Secretary of State.

VII

MAINSTREAMING

The Warnock Report advocated the education of children with special education needs in ordinary schools and ordinary classrooms whenever condi-

259. Although American courts applying the EAHCA have often seemed to treat cost as immaterial to the requirements of an "appropriate" education, *see, e.g.*, *Board of Educ. v. Rowley*, 458 U.S. 176, 203-04 (1982), cost has inevitably affected decisions, *see, e.g.*, *Lora v. Board of Educ.*, 456 F. Supp. 1211, 1293 (E.D.N.Y. 1978), *vacated and remanded*, 623 F.2d 248 (2d Cir. 1980); *Darlene L. v. Illinois State Bd. of Educ.*, 568 F. Supp. 1340, 1345 (N.D. Ill. 1983). The courts have commonly phrased their consideration of costs in terms of the need to allocate resources among competing special educational needs. *See* *Age v. Bullitt County Pub. Schools*, 673 F.2d 141, 145 (6th Cir. 1982); *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir.) (instructions in remanding), *cert. denied*, 104 S. Ct. 196 (1983); *Stacey G. v. Pasadena Indep. School Dist.*, 547 F. Supp. 61, 78 (S.D. Tex. 1982).

260. *See* Bartlett, *The Role of Cost in Educational Decisionmaking for the Handicapped Child*, *LAW & CONTEMP. PROBS.*, Spring 1985, at 7.

tions made it possible to provide quality education in that setting.²⁶¹ The Warnock Committee recognized that the integration of special education reflected a movement that reached well beyond British shores (including, of course, the EAHCA in the United States) and that it was not new in Great Britain. The principle of integration had long been accepted in aspirational terms.²⁶² As the Warnock Report explained it, integrated education reflected a "consensus of public feeling that handicapped people should, so far as possible, be enabled to take their place in the general community."²⁶³ In 1976, while the Warnock Committee was conducting its enquiry, the principle was enacted into law.²⁶⁴ This law, generally referred to simply as "section 10," left the implementation date to be set by the Secretary of State for Education and Science, a step that was never taken.²⁶⁵ The Warnock Committee, however, assumed that section 10 was the law. As a consequence, the Warnock Committee treated the integration issue as a given rather than something to be addressed, and as a result, its treatment of the issue in its report appears to reflect a noncommittal position.

The Warnock Report's approach to integration, or "mainstreaming," might best be described as cautious. The principle of integration was endorsed, but considerable emphasis was given to the difficulties and burdens of integrating special education. The Warnock Report expressly concluded that certain conditions—teacher training, financial support, suitable facilities—must all be fulfilled in order for special education in ordinary schools to be successfully achieved.²⁶⁶ The White Paper also subscribed to integration in principle, but the Government's position reflected caution and perhaps skepticism about integration.²⁶⁷

Without any provision expressly addressed to integration in EA 1981, the "special educational provision" required to be made available for children with "special educational needs" might well have been construed to require education in an ordinary school or classroom for particular children, possibly for many such children. Such an application of EA 1981 would have seemed especially likely in view of the Warnock Report's general approval of integrated education.²⁶⁸ In fact, EA 1981 includes an express duty to educate children with "special educational needs" in ordinary schools,²⁶⁹ subject to

261. See Warnock Report, *supra* note 16, at 99-120.

262. See *id.* at 32-35.

263. *Id.* at 115 ¶ 7.46.

264. EA 1976, § 10, amending EA 1944, § 33(2).

265. EA 1981, sched. 4 (repealing § 10); see White Paper, *supra* note 21, at 13 ¶ 36, 14 ¶ 41.

266. Warnock Report, *supra* note 16, at 120 ¶ 7.61.

267. See White Paper, *supra* note 21, at 13, 14 ¶ 41.

268. At least such an application would seem reasonable in the absence of an unexplained repeal of § 10.

269. Where a local education authority arrange special educational provision for a child for whom they maintain a statement under Section 7 of this Act it shall be the duty of the authority, if the conditions mentioned in subsection (3) below are satisfied, to secure that he is educated in an ordinary school.

EA 1981, § 2(2).

several specified conditions.²⁷⁰

There is no clear statutory duty to integrate *classrooms* under EA 1981. Section 2(2) of EA 1981, like its predecessor, section 10, prescribes only education in an ordinary *school*. EA 1981 supplements this requirement by adding a duty to see that a child who has special educational needs and who is being educated in an ordinary school “engages in the *activities* of the school together with children who do not have special educational needs.”²⁷¹ On one occasion the Warnock Report referred to the importance of regular and special children sharing “experience through both curricular and extra-curricular activities.”²⁷² By their use of the word “activities” in section 2(7), it is possible that the drafters of EA 1981 meant to incorporate the Warnock Report’s reference to activities both within and outside the classroom, and thus to include integration of the educational process in ordinary classrooms. That interpretation would be supported by the White Paper, which expressly criticized section 10 because it “merely place[d] a handicapped pupil in an ordinary school, which does not by itself guarantee that the child will be educated in association with children who are not handicapped.”²⁷³ A contrary view is suggested by the fact that the Warnock Report does not generally talk about classroom integration as the joint participation in “activities.”²⁷⁴ Furthermore, neither the Warnock Report nor the White Paper convey an unqualified enthusiasm for mainstreaming, as already pointed out. It is possible that sections 2(2) and 2(7) will be read together to require classroom integration when the statutory conditions are satisfied.²⁷⁵ Even if such a reading is not adopted, classroom integration might still be required as part of the special educational provision determined through the assessment process.²⁷⁶

Section 2(3) of EA 1981 contains four conditions controlling the duty to

270. The conditions are that account has been taken, in accordance with Section 7, of the views of the child’s parent and that educating the child in an ordinary school is compatible with —

(a) his receiving the special educational provision that he requires;
 (b) the provision of efficient education for the children with whom he will be educated; and
 (c) the efficient use of resources.

Id. § 2(3).

271. Where a child who has special educational needs is being educated in an ordinary school maintained by a local education authority it shall be the duty of those concerned with making special educational provision for that child to secure, so far as is both compatible with the objectives mentioned in paragraphs (a) to (c) of subsection (3) above and reasonably practicable, that the child engages in the *activities* of the school together with children who do not have special educational needs.

EA 1981, § 2(7) (emphasis supplied).

272. Warnock Report, *supra* note 16, at 106 ¶ 7.15.

273. White Paper, *supra* note 21, at 13 ¶ 36.

274. See Warnock Report, *supra* note 16, at 101 ¶ 7.9, 102-05.

275. By contrast to the ambiguity of EA 1981, the EAHCA clearly requires handicapped children to be educated with children who are not handicapped “to the maximum extent appropriate.” Special classes, separate schooling or other “removal from the *regular educational environment*” may occur only when, by reason of the nature or severity of handicaps, “education in *regular classes* with use of supplementary aids and services cannot be achieved.” 20 U.S.C. § 1412(5)(B) (emphasis added).

276. It is possible that the draftsmen of the statute, having in mind such a voluntary understanding, drafted the statute in a way that excluded certain students from the class of students having statutory rights with the hope that they would be so integrated but without giving them any right to demand classroom integration.

integrate: (1) account must be taken of the views of the parent; (2) education in an ordinary school must be "compatible with" the child's receiving "the special educational provision that he requires"; (3) integration must be compatible with "efficient education" for the other children; and (4) it must be compatible with the "efficient use of resources." Under section 2(2), the duty to educate children with "special educational needs" in ordinary schools exists if the conditions of section 2(3) are satisfied. Under section 2(7) the integration duty includes a subordinate duty to ensure that the special child engages in school activities with ordinary children so far as is compatible with the conditions of section 2(3) and reasonably practicable. Read literally, these subsections indicate that the basic duty to integrate students depends on the answer to either/or questions: Is each condition satisfied or not? By contrast, the subordinate duty to integrate activities depends on the answer to a question of degree: How much integration is consistent with the statutory standards?

Why distinct approaches should be adopted for EA 1981's integration provisions is not clear,²⁷⁷ and it may be that a literal reading will be rejected. In any event, the seeming rigidity of the section 2(2) approach is softened by the vague conditions of section 2(3) on which it depends.

Of greatest practical importance in relieving section 2(2) of its rigidity is the fact that the same decisionmakers who decide a child's special educational provision also decide whether the conditions of section 2(3) have been satisfied. If they conclude that under no circumstances can special education in an ordinary school satisfy all of the statutory conditions, they must of course reject integration. However, in all other cases, they are in a position to write the child's statement in a way that will encompass such integration as is consistent with the statutory conditions.²⁷⁸

The four conditions of section 2(3) are variously traceable to section 10, the Warnock Report and the White Paper. Only the White Paper directly focused on the importance of giving an "opportunity for the expression of parental preference."²⁷⁹ The Warnock Report emphasized parental involvement generally in the assessment/placement process. The parent's view seems a plainly relevant consideration in evaluating the desirability of pro-

277. The mainstreaming duty of the EAHCA clearly operates along a continuum. The "regular educational environment" is the ideal, but achievement of that ideal is a *relative* matter; integration must be achieved to the "maximum extent appropriate." These notions have been encapsulated in the nonstatutory phrase, "least restrictive environment," and in detailed regulations under the EAHCA. 34 C.F.R. §§ 300.550-.556 (1984).

278. The statutory wording of section 2(2) seems to indicate that the duty to decide whether the conditions for integrated education are satisfied arises at the point of *arranging* special educational provision—that is, after the educational provision has been determined and the student's statement prepared. This would suggest that integration is distinct from the process of assessment and determination of the special educational provision that is required. But that construction is so totally at war with the Warnock Report and common sense that it should be rejected in the absence of a clearer statutory mandate. Also, the regulations clearly contemplate that the statement will specify the kind of school and, if possible, the particular school recommended. Education (Special Educational Needs) Regulations 1983, § 10(1)(b)(i), STAT. INST. 29 (1983).

279. White Paper, *supra* note 21, at 13 ¶ 36.

viding special education in an ordinary school. In particular, mainstreaming is likely to fail without parent support under some circumstances and likely to succeed only with it in other circumstances. EA 1981 does not give the parent a veto over integration, nor does it answer the question of how much weight the parent's views should carry.²⁸⁰

Under the second condition set out in section 2(3), education in an ordinary school is not required if it would be incompatible with the special educational provision the child requires.²⁸¹ The White Paper had criticized section 10 for failing to take sufficient account of the individuality of needs and the possibility that some children would do better in segregated schools.²⁸² Yet section 10 had conditioned integration on practicability and compatibility with "efficient instruction,"²⁸³ and the Warnock Report had construed these provisions to present difficult decisions for some children as to where the "balance of advantage lies" between integration and segregation.²⁸⁴ EA 1981 purports to make this consideration more explicit, but the resulting provision is not free from ambiguity. The wording of sections 2(2) and 2(3)(a), requiring a child to be educated in an ordinary school if that is compatible with the child's receiving the required special educational provision, suggests that education is one thing and integration is something entirely different.²⁸⁵ If integration is treated as serving values other than education (and even if integration is regarded as one aspect of special educational provision), it is arguable that EA 1981 leaves unanswered an important question about trade-offs. Integration might be regarded as such an important value that its availability would justify some decline of quality in the education otherwise available.²⁸⁶ Whether, and to what extent, section 2(3) permits or requires such a balancing of incommensurate values is unclear. Presumably, more weight would be given to integration if it were thought to be an educational component which enhanced educational quality directly.

The third condition of section 2(3) is that integrated education must be

280. The principle of parental control of a child's education in British law may push in the direction of giving the parents' view considerable weight. *But see* Cumings v. Birkenhead, [1971] 2 All E.R. 881, 884 (parent preference only one consideration).

281. Under the EAHCA the duty to integrate is excused "only when" integrated education "cannot be achieved satisfactorily." 20 U.S.C. § 1412(5)(B) (1982).

282. White Paper, *supra* note 21, at 13 ¶ 36.

283. Under section 10, integration was not required "[w]here the education of the pupils in such schools as aforesaid— (a) is impracticable or incompatible with the provision of efficient instruction in the schools; or (b) would involve unreasonable public expenditure." EA 1976, § 10(1).

284. Warnock Report, *supra* note 16, at 115 ¶ 7.47; *see id.* at 116-18.

285. *See, e.g.,* The Times (London) Educational Supplement, Dec. 11, 1981, at 8, col. 1. Such a connotation would include an ironic twist. The Warnock Report, and even more, Mrs. Warnock herself, attempted to deflect criticism of and concern over integration by focusing attention on "how" students were educated rather than "where." *See* Warnock Report, *supra* note 16, at 115 ¶ 7.47 ("Parliament's concern with QUALITY of special education as well as its LOCATION"); The Times (London) Educational Supplement, May 19, 1978, at 1, col. 5.

286. Some American cases have seemed to assume that a trade-off is available and that an integrated education is sometimes to be preferred to a nonintegrated—though otherwise superior—education. *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir.), *cert. denied*, 104 S. Ct. 196 (1983); *Springdale School Dist. #50 v. Grace*, 693 F.2d 41, 43 (8th Cir. 1982), *cert. denied*, 103 S. Ct. 2086 (1983).

compatible with efficient education for the *other* children. This condition was a significant concern of the Warnock Report;²⁸⁷ it was explicitly anticipated by the White Paper;²⁸⁸ and, according to Warnock, it was part of what section 10 embraced in conditioning integration on compatibility with "efficient instruction."²⁸⁹ Once again, the question of how the interest of the other children is to be balanced against the interest in integration is an open question under the statute. Just what effects will be "compatible" with integration? Or, when will an effect be regarded as compromising "efficient education"? It cannot be contradicted that bringing "special" children into ordinary schools and especially ordinary classrooms is likely to change the educational milieu. That change may include adverse effects. One might say that such potential adverse effects are an inevitable concomitant of mainstreaming special students and thus a factor necessarily to be considered.²⁹⁰ Yet by singling out this factor expressly, EA 1981 may be understood to give a negative thrust to integration that would not be inevitable, and to put a thumb on the side of the scales disfavoring integration. Certainly, if some isolated statements in the Warnock Report are taken to express the meaning of section 2(3),²⁹¹ it may be difficult indeed to satisfy the condition that integration be compatible with efficient education of other children.

The fourth condition on which the duty to integrate depends is cost: integration must be compatible with "the efficient use of resources."²⁹² There are direct antecedents of this condition in section 10,²⁹³ the Warnock Report,²⁹⁴ and the White Paper.²⁹⁵ The Warnock Report spelled out the cost implications of special education, and especially of integrated special education, in

287. See Warnock Report, *supra* note 16, at 116-17.

288. See White Paper, *supra* note 21, at 14 ¶ 41.

289. See Warnock Report, *supra* note 16, at 116 ¶ 7.50.

290. The question whether the effect on "other" children may be a proper consideration in deciding "appropriate" education or mainstreaming issues under the EAHCA has not been decided by American courts but has been noted in passing by commentators. See Turnbull, Brotherson, Wheat & Esquith, *The Least Restrictive Education for Handicapped Children: Who Really Wants It?*, 16 FAMILY L.Q. 161, 190 (1982); Note, *supra* note 238, at 1123; see also 34 C.F.R. § 300.552, comment (1984); *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir.), *cert. denied*, 104 S. Ct. 196 (1983).

291. For example:

It follows that the arrangements must not work to the disadvantage of any group of pupils in the school, for example in the allocation of resources or amenities, or in the range of academic or social opportunity. Further, we read "efficient instruction" as encompassing the "wholeness" of need which individual pupils may have, their need, for example, for the companionship of children of like age, condition and background, or in some cases for the intimate community that a small school is especially able to provide.

Warnock Report, *supra* note 16, at 116-17.

292. The reported American cases reveal that the courts have been surprisingly grudging in making any concession to arguments based on the out-of-pocket cost of mainstreaming. *Springdale School Dist. #50 v. Grace*, 693 F.2d 41, 43 (8th Cir. 1982) (ordered mainstreaming although more expensive), *cert. denied*, 103 S. Ct. 2086 (1983); *Yaris v. Special School Dist.*, 558 F. Supp. 545, 559 (E.D. Mo. 1983), *aff'd*, 728 F.2d 1055 (8th Cir. 1984); *Espino v. Besteiro*, 520 F. Supp. 905 (S.D. Tex. 1981) (ordered mainstreaming although more expensive).

293. Integration is not required if it "would involve unreasonable public expenditure." EA 1944, § 33(2)(a), added by EA 1976, § 10(1).

294. See Warnock Report, *supra* note 16, at 118 ¶ 7.55.

295. See White Paper, *supra* note 21, at 14 ¶ 41.

detail.²⁹⁶ The absolute indispensability of being able to provide those things which money must buy to make integration work was stressed. Consequently, when it became clear that no new money would accompany the enactment of EA 1981, great anxiety about the emasculation of the Warnock recommendations was expressed.²⁹⁷ Some feared that integration without the needed support would be carried out with disastrous educational results.²⁹⁸ Others feared that the decision to integrate or not would be left to local choice, which, in many cases, would mean no integration.²⁹⁹ At the very least, it was understood that the absence of funding would place the burden of integration on local education authorities and, because of the substantial variation in means, would result in considerable unevenness in the process of integration.³⁰⁰

My discussions with educators in the spring in 1983, just prior to EA 1981's implementation, and my review of the written reactions to EA 1981 left me with the impression that EA 1981 was *perceived* to contain a far more forceful integration requirement than the act or its background seems to justify. There seems to be little doubt that EA 1981 contains only a mild duty to mainstream children who need special education; when combined with the empty budget, that duty may become very attenuated indeed. Yet, integration in England and Wales does seem to have increased in recent years.³⁰¹ Perhaps, as the Warnock Report observed, movement in that direction is likely to continue.³⁰² Perhaps mainstreaming special education is simply an idea whose time has come.³⁰³ Whether, and to what extent, EA 1981 contributes to the integration of special education in England and Wales will probably depend far more on its winning the support of the education community, especially teachers,³⁰⁴ and on the perceived success or failure of integration in the near future than it will depend on the statutory mandate.

VIII

CONCLUSION

A discussion of a statute at the very beginning of its implementation is

296. See Warnock Report, *supra* note 16, at 118 ¶ 7.56.

297. See The Times (London) Educational Supplement, Oct. 16, 1981, at 12, col. 5; *id.* Mar. 6, 1981, at 6, col. 1; *id.* Feb. 27, 1981, at 6, col. 1.

298. See The Times (London) Educational Supplement, Feb. 29, 1980, at 1, col. 1; *id.* July 14, 1978, at 7, col. 1 (risk of an "unholy alliance" between those "doctrinaire enough to support integration for its own sake" and those "who wanted to cut public expenditure"); *id.* Oct. 9, 1980, at 5b, col. 2; *id.* Apr. 12, 1980, at 3f, col. 4.

299. See *id.*, Aug. 22, 1980, at 6, col. 6; The Times (London) Educational Supplement: Scotland, Oct. 13, 1978, at 3, col. 1.

300. See Warnock Report, *supra* note 16, at § 119 ¶¶ 7.59-60. See generally *id.* at 114-20; The Times (London) Educational Supplement, Dec. 11, 1981, at 8, col. 1; *id.* Mar. 6, 1981, at 6, col. 1.

301. See Warnock Report, *supra* note 16, at 99 ¶ 7.2, 119 ¶ 7.59; *supra* note 197.

302. See *id.* at 99 ¶ 7.2, 120 ¶ 7.61.

303. See *id.* at 99.

304. See The Times (London) Educational Supplement, Oct. 16, 1981, at 12, col. 5 (survey and guidelines sent to Head Teachers by membership association); The Times (London), Oct. 9, 1980, at 5b, col. 2; *id.* Apr. 12, 1980, at 3f, col. 4; Daily Telegraph, Mar. 26, 1979, at 10, col. 4.

necessarily inconclusive. At this stage questions of meaning and interpretation depend largely on future experience. Speculation aside, and even "true meaning" aside, what will the statute be interpreted to mean *in fact*? Which children will actually be covered and afforded special education under the Act? What procedures will actually be made available to parents and followed in the appeal committees? Will the Secretary of State read the statute as affording parents meaningful appeals on the merits of individual cases or will the appeals merely rubber stamp local decisions? Will the courts be called upon to enforce provisions of the act? If so, to what extent will they do so in a deferential manner—and deferential to which administrative body? What content, if any, will be given to the "special educational provision" that these children are entitled to receive? Which children will be integrated in ordinary classrooms and/or in ordinary schools?

Beyond these questions that focus on interpretation, there are questions concerning the implementation of the policy embodied in the new statute. Will special education, along with education generally, continue to be starved for adequate resources? Will the change in labeling emphasized so strongly by the Warnock Report affect attitudes of educators, parents and children in a salutary fashion? Will voluntary organizations attain a level of vitality and durability that will make them a significant (or a more significant) political force in the administration of special education at the school level? What changes, if any, will be made in the educational programs and services provided to children with special needs? To what extent will parents use the appeal committee procedures? What effect will the process of administrative hearings have on educational provision and on the parent's sense of participation in educational decisionmaking? If the court's jurisdiction is invoked successfully, will judicial involvement enforce or undermine the best spirit of the Warnock Report?

Of course, beyond these questions, is the ultimate empirical question: will these statutory changes, however implemented, enhance the quality of the education of children with special educational needs and the quality of the lives they are helped by education to lead? For all of these questions, the conclusion must be that we must wait and see.