Special Education and the Non-Public School Child: A Handicap is a Non-Sectarian Condition

Joyce Martin*

Wearing a green and blue school uniform and a bright smile, Missy Hogan,[1] waves good-bye to her dad and pushes her wheel chair to the front door of St. Jerome's Grade School. Missy's parents have chosen St. Jerome's because, like the parents of non-handicapped children at the school, they want a religious education for their child; they want what they perceive as a better education or a less disruptive learning environment for her.

But Missy has cerebral palsy and St. Jerome's cannot provide the occupational, physical, and speech therapy she needs. The neighborhood public school, which by law[2] must provide these services for Missy, can deliver them only at the public school or at a "neutral" site. Missy's parents both must work and cannot transport her to off-site special education during the day. They are torn between their desire to provide a religious education for their daughter and their desire to obtain the special education services she needs.

Missy is entitled to these services because she is a handicapped child.[3] Her attendance at a sectarian school does not alter her handicapped state and should not affect her right to the services. However, the only way she can have full access to these special educational services without forfeiting her right to a religious education is for the special services to be offered on-site at her parochial school.

Physically and mentally handicapped children face discrimination every day of their young lives.[4] The struggle to end this

---

* J.D. 1988, University of Minnesota.

1. Missy Hogan is a fictional child who represents the thousands of handicapped children who attend sectarian schools and do not receive special educational services.

2. Education for All Handicapped Children Act, 20 U.S.C. §§ 1400-1460 (1982 & Supp. 1987).

3. For a discussion of federal legislation (Rehabilitation Act; Education for All Handicapped Children Act), see *infra* notes 7, 9 and accompanying text.

4. In 1971, of seven million handicapped children, 60% were denied the special

discrimination has been long and difficult.[5]

Historically, it has been more convenient, both legislatively and socially, to remove handicapped children from the mainstream than to educate them in the public schools.[6] By necessity, parents or guardians of handicapped children have been forced to petition state and federal governments to ensure appropriate educational opportunities for their children.

For that minority within a minority who, like Missy, attend non-public schools, the need for special services from public funds is often precariously balanced against the first amendment's mandate of separation of church and state. Federal law requires that all handicapped children, regardless of the school they attend, "have available to them . . . a free appropriate public education . . . designed to meet their unique needs."[7] Parents may prefer to send their child with special needs to a private, sectarian school for reli-

---

education assistance they needed; one million were denied entry to public schools. Hundreds of thousands were committed to institutions. Frederick J. Weintraub, State Law Education of Handicapped Children: Issues and Recommendations 14-15 (1971).

Today, 4.3 million children receive special education services through the public schools. Christopher Connell & Lee Mitgang, *Special Education: U.S. Set World Standard*, L.A. Times, Nov. 15, 1987, at 2, col. 1. Today, however, uneven state standards and inadequate federal monitoring still result in inappropriate placements and missed educational opportunities for handicapped children. *Id.*

5. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1982) established the right of handicapped children to a free, appropriate, and publicly-funded education. Such an education is defined as special education plus related services necessary for a handicapped child to benefit from special education. 20 U.S.C. § 1400(c) (1982 & Supp. 1987). Related services may include transportation as well as developmental, corrective, and other supportive services. Both educational and related services must be provided at public expense. 20 U.S.C. § 1401(16)-(18) (1982 & Supp. 1987).

Handicapped children are defined as "mentally retarded, hard of hearing, deaf, speech or language impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, or children with specific learning disabilities, who by reason thereof require special education and related services." 20 U.S.C. § 1401(a)(1) (1982 & Supp. 1987).

The law guarantees the handicapped the right to a clean, healthy environment within state institutions, the right to receive fair, nondiscriminatory treatment when applying for a job, the right to barrier-free affordable housing and the right of access, barrier-free, to public buildings and institutions. 20 U.S.C. § 1401 (1982 & Supp. 1987). Commentators view the struggle for equality of the disabled as part of the general trend during the 1960s and 1970s to recognize the rights of several disadvantaged groups. One commentator noted that "[t]he symbols and rhetoric of the black civil rights movement came to be used by those advocating the cause of greater access for disabled people as well." Richard K. Skotch, From Good Will to Civil Rights 41 (1984).

6. *See* United States Commmission on Civil Rights, Accomodating the Spectrum of Abilities 27-29 (1983).

7. 20 U.S.C.§ 1400(c) (1982 & Supp. 1987). One typical state law is Minnesota Statute § 120.17 which states that "[e]very district shall provide special instruction and services, either within the district or in another district, for handicapped chil-

gious reasons, or because the public services offered for the child are not "appropriate" and do not meet the child's special needs. Parents such as Missy's should have this choice. A handicapped child should not be denied special services because that child does not attend a public school.

Legislation at the federal level and in most states now guarantees a "free[,] appropriate, public[ly-funded]" education to all handicapped children.[8] In addition, the federal government guarantees "civil rights" to handicapped individuals that are strikingly similar to those granted racial minorities.[9] Parents, however, still face the issue of whether the education must be provided at the site of a public school, or may be provided at a "neutral" site,[10] or at the religiously-affiliated school.

Congress designated a handicapped child's right to special education as a basic civil right, not as a discretionary frill.[11] Despite this congressional designation, the restrictive way in which these services are delivered to sectarian-school children often forces parents to choose between a guaranteed special education and the right to a religious education. This choice pits their first amendment free exercise right against a statutory entitlement.

Special education services are intrinsically different from other educational services provided by the state to sectarian school students. This difference stems from congressional treatment of special education for handicapped children. Unlike other educational services, special education for mentally and physically handicapped children is a congressional entitlement. Recent Supreme

---

dren of school age who are residents of the district and who are handicapped as set forth in section 120.03." Minn. Stat. § 120.17 (Supp. 1988).

8. 20 U.S.C. at § 1400(c) (1982 & Supp. 1987).

9. Section 504 of the Rehabilitation Act of 1973 states that "[n]o otherwise qualified handicapped individual in the United States, . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." 29 U.S.C. § 794 (1982).

This was a conscious mirroring of the language of Title VI of the Civil Rights Act, which states "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (Supp. 1987).

In broad terms, section 504 placed the rights of the handicapped to be free from discrimination on a par with those of racial minorities.

10. A neutral site is "a public center, a nonsectarian nonpublic school, a mobile unit . . . or any location off the nonpublic school premises which is neither physically nor educationally identified with the functions of the nonpublic school." Minn. Stat. § 5123.932, subd. 9 (Supp. 1988). Examples of neutral sites are hospitals, mobile trailer vans, United Way buildings, and government buildings.

11. For a discussion of section 504 of the Rehabilitation Act of 1973, see *infra* notes 69-72 and accompanying text.

Court opinions that limit the administration of other federally-funded educational programs on sectarian school premises[12] should not be extended to special education services. If removal to a "neutral site" would effectively deny the student his or her entitlement to these services, special education services should be offered on the parochial school premises. Handicapped children, therefore, should be exempted from the general requirement that publicly-funded educational services must be offered only at public schools or neutral sites.

Part I of this article provides a short overview of the history of private schools and the history of the handicapped in the public schools. Part II describes legislation dealing with the handicapped. This article argues that Congress clearly intended that children in private schools receive direct special education services. Part III analyzes first amendment cases under the establishment clause and also examines first amendment cases which have been decided under the free exercise clause. Part IV surveys recent Supreme Court decisions dealing with the administration of other publicly-funded educational services within sectarian schools and distinguishes special education services from them. This article then concludes that because the differences between non-handicapped services and services for handicapped children are of such magnitude, those cases finding a constitutional conflict in providing state-funded services at sectarian schools should not apply to special education services.

I. Sectarian Schools and the Handicapped Student: A Historical Background

The history of American education has been intertwined with the tradition of sectarian schools. Private education has played an important role in educating a significant percentage of our nation's children.[13] From the moment the federal government established that handicapped children were entitled to a publicly-funded, appropriate education, parents and advocates have voiced concern about the role of sectarian schools in that education. The issue relates primarily to the individual child, her special educational needs and her entitlement to that education. Federal involvement through legislation and Supreme Court decisions should not stumble on the public/private distinction.

12. *See, e.g.*, Aguilar v. Felton, 473 U.S. 402 (1985); School District of Grand Rapids v. Ball, 473 U.S. 373 (1985). For a discussion of these cases, see *infra* notes 118-122.

13. *See infra* notes 14-20 and accompanying text.

A. *Private schools*

In colonial times, America's elementary and secondary system was exclusively private and Protestant-dominated.[14] After the Revolution it evolved into a public, non-sectarian system. The immigrants who arrived after 1840, the majority of whom were Catholic, established schools which reflected their religious backgrounds and offered alternatives to the emerging public education.[15]

In 1925, the Supreme Court recognized the right of parents to choose a religious education for their children instead of public education.[16] As the Court stated, "[T]he child is not the mere creature of the state. . . . [T]he fundamental theory of liberty . . . excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only."[17] Although this concept was formulated fifty-two years before the present issue arose, the theory has been consistently followed by the Court.[18]

Justice Powell, in a frequently quoted portion of *Wolman v. Walter*,[19] asserted that:

> [p]arochial schools, quite apart from their sectarian purpose, have provided an educational alternative for millions of young Americans; . . . and in some States they relieve substantially the tax burden incident to the operation of public schools. The State has, moreover, a legitimate interest in facilitating education of the highest quality for all children within its boundaries, whatever school their parents have chosen for them.[20]

Today, the courts and the American public view private schools ambivalently.[21] For some members of the Court and the general public, fear of excessive entanglement of state and religion

---

14. "In the first or colonial stage . . . [t]he churches controlled the only schools . . . and they were Protestant . . . . [F]rom the Revolution to about 1840[,] . . . American Protestantism, rather reluctantly, accepted the idea of the public school as the common training ground for the children of all faiths." Paul Blanshard, Religion and the Schools 6-7 (1963).

15. *Id.* at 7.

16. Pierce v. Society of Sisters, 268 U.S. 510, 523 (1925).

17. *Id.*

18. *See, e.g.*, Wollman v. Walter, 433 U.S. 229 (1977).

19. *Id.*

20. *Id.* at 262 (Powell, J. concurring in part, dissenting in part). In the case, the Court found an Ohio statute allowing expenditure of public funds for the purchase of textbooks, instructional materials, and health services for nonpublic students constitutional. Justice Powell maintained that except for the portions relating to instructional materials and field trip services, the state interest in assuring the highest quality education for all its children predominated, regardless of the type of school attended. *Id.*

21. *See* George Goldberg, Church, State and the Constitution 108-11 (1987).

outweighs the positive contributions of private schools.[22]

B. Special education

Before the mid-twentieth century most public schools did not allow handicapped children[23] to attend.[24] Handicapped children were either institutionalized or cared for by family members.[25] Historically, handicapped children and their parents received no benefits from the tax-supported public school system.[26]

Public schools rejected handicapped children for several reasons. They frequently were considered uneducable.[27] Public schools considered the costs of training teachers and delivering services to the handicapped prohibitive. The special needs of handicapped children, and the necessity of keeping teacher-pupil ratios low arguably raised the cost of educating and training the special child significantly above that of the normal child.[28]

Recent federal and state legislation, however, has attempted to correct some of the inequities this segment of the population has suffered. In 1975, Congress enacted the Education for All Handicapped Children Act (EAHCA)[29] which guarantees every handicapped child a "free, appropriate, public education."[30]

Courts have definitively decided that children, such as Missy, who attend private sectarian schools, are covered by the Act.[31] The Supreme Court has not addressed, however, the issue of where that education must be delivered. Despite Congressional action in enacting the EAHCA, individual states have adopted various interpretations of their responsibilities to handicapped children enrolled in sectarian schools.[32] States have developed a

22. *See Hearing on Voucher and Tuition Tax Credit Plans*, Senate Finance Committee (April 23, 1981); *Group Plans to Push for School Voucher System*, Mpls. Star & Tribune, Oct. 15, 1986, § B, at 8, col. 1.

23. *See supra* note 5.

24. *See* Stephen B. Thomas, Legal Issues in Special Education 1-3 (1985).

25. President's Committee on the Employment of the Handicapped, *Disabled Americans: A History*, 27 Performance 3 (1976).

26. *See* United States Commission on Civil Rights, *supra* note 6, at 71.

27. In 1893, a Massachusetts handicapped child was suspended from school because he was "so weak in mind as not to derive any marked benefit from school instruction." Watson v. City of Cambridge, 157 Mass. 561, 32 N.E. 864 (1893).

28. *See* Comment, *Toward a Legal Theory of the Right to Education of the Mentally Retarded*, 34 Ohio St. L.J. 554, 559 (1973).

29. Education for All Handicapped Children Act, 20 U.S.C. §§ 1400-1460 (1982 & Supp. 1987).

30. 20 U.S.C. § 1400 (1982 & Supp. 1987).

31. *See* Tilton v. Jefferson City Bd. of Educ., 705 F.2d 800, 804 (6th Cir. 1983); Walker v. Cronin, 107 Ill. App. 3d 1053, 438 N.E.2d 582 (Ct. App. 1982); Vander Malle v. Ambach, 673 F.2d 49 (2d Cir. 1982).

32. When the public schools have been unable to provide appropriate special ed-

variety of ways to offer instruction to non-public school handicapped children. One method, "on-site education", usually the most desirable to parents, consists of instruction offered at the site of the parochial school. Other states offer instruction at a "neutral site." This entails instruction off the sectarian school premises, but at reasonable proximity. Neutral sites include mobile trailers in school parking lots, nearby non-religiously affiliated hospitals, and United Way buildings.[33]

Neutral site or public school delivery of special education services effectively denies sectarian children services if families must arrange transportation for the children to and from the school special education site. Traveling exposes handicapped children to possible accidents or other harm. The children often miss a significant portion of religious education because of the time spent traveling to and from the neutral site. In either situation parents and guardians must choose between religious education and the safe delivery of special education services which are their children's entitlement under the EAHCA.[34] This choice, alone, is a violation of the free exercise of their religion.[35]

II. The Rights of the Handicapped

Congress has not ignored the special needs of the handicapped. It has instead definitively established the rights of the handicapped on a par with the rights of racial minorities. The Supreme Court has also addressed the responsibilities owed the handicapped by public entities.[36] These Supreme Court decisions

---

ucational services, for purely budgetary reasons, alternate arrangements for the child's education can be instituted. *See, e.g.*, Tilton v. Jefferson City Bd. of Educ., 705 F.2d 800, 805 (6th Cir. 1983). If the public schools offer satisfactory aid but parents have chosen a private education, tuition reimbursement has not been available. *See, e.g.*, Mountain View-Los Altos Union High School Dist. v. Sharron B.H., 709 F.2d 28 (9th Cir. 1983). If the withdrawal of the child is the result of long administrative delays, then the public educational unit may be held responsible for costs. *See, e.g.*, *Walker*, 107 Ill. App. 3d at 1060, 438 N.E.2d at 587. Therapy in some states has been available only at a "neutral site" or at the public school. *See, e.g.*, Bales v. Clarke, 523 F. Supp. 1366 (E.D. Va. 1981). Educational and support services have been offered on site in some states. *See, e.g.*, *Vander Malle*, 673 F.2d at 49.

33. The theory of the "neutral site" delivery springs from Meek v. Pittenger, 421 U.S. 349, 367-73 (1975). This case indicated that the mere presence of a public school teacher on sectarian school grounds could lead to an impermissible entanglement of state with religion. *Id.* at 359.

34. 20 U.S.C. §§ 1400-1460 (1982 & Supp. 1987).

35. *See infra* notes 100-107 and accompanying text.

36. *See, e.g.*, Burlington School Comm. v. Department of Educ., 471 U.S. 359 (1985) (court may order school authorities to reimburse parents for private special education services for child if it determines such placement is appropriate). *See also* Smith v. Robinson, 468 U.S. 992, 1019 (1984).

under the fourteenth amendment have established the right to special education as a basic civil right.[37]

A. Fourteenth Amendment Protection

The fourteenth amendment of the United States Constitution guarantees that no state shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[38] The Civil War experience and the need to protect the rights of Blacks throughout the country provided the impetus for passage of the fourteenth amendment in 1868.[39] Currently, the Supreme Court interprets the fourteenth amendment as imposing a duty on state governments to treat all citizens equally.[40] Its protections are not confined to minorities, but have been extended to other disadvantaged groups as well.[41]

The Supreme Court has concluded that classifications which are based on suspect criteria are subject to a strict equal protection standard of review. Classifications that disadvantage racial minorities are the clearest examples of suspect classifications. A suspect class has traditionally been defined as one that is disadvantaged by

---

37. "Congress also recognized that in a series of 'landmark court cases,' the right to an equal opportunity for handicapped children had been established." Smith v. Robinson, 468 U.S. 992, 1010 (1984).

38. U.S. Const. amend. XIV, cl. 1.

39. *See* James Mussati, The Constitution of the United States 195-98 (1960).

40. The Court has identified certain classifications—race, alienage, and nationality—that are entitled to special protection under the fourteenth amendment. The Court applies the "strict scrutiny standard of review" to legislation which classifies these groups. Such legislation must be justified by a compelling state purpose apart from its discriminatory purpose in order to pass this standard of review. Classifications based on race are subject to strict scrutiny. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967) (Virginia's miscegenation statute held unconsitutional); Brown v. Board of Educ., 347 U.S. 483 (1954) ("separate but equal" held to have no place in public education); Palmore v. Sidoti, 466 U.S. 429 (1984) (race cannot be a factor in custody decisions). The Court has granted intermediate status to classifications based on illegitimacy and gender. *See, e.g.*, Trimble v. Gordon, 430 U.S. 762 (1977) (Act allowing illegitimate children to inherit by intestate succession from their mothers but not from their fathers held a violation of Equal Protection); Craig v. Boren, 429 U.S. 190 (1976) (gender is not sufficiently related to traffic safety to warrant differential treatment in the law); Lalli v. Lalli, 439 U.S. 259 (1978) (upheld New York law forbidding intestate inheritance by illegitimate children unless there was judicial finding of paternity during father's lifetime); Reed v. Reed, 404 U.S. 71 (1971) (law giving preference to men in appointment of administrators of estates struck down as forbidden by equal protection); Frontiero v. Richardson, 411 U.S. 677 (1973) (sustained equal protection challenge to federal law requiring servicewomen to prove husbands were dependent while giving automatic dependency allowance to wives of servicemen).

41. *See, e.g.*, Graham v. Richardson, 403 U.S. 365 (1971) (fourteenth amendment extended to alienage classifications); Korematsu v. United States, 323 U.S. 214 (1944) (fourteenth amendment extended to nationality classifications).

characteristics which are solely an accident of birth; or one which has been subjected to a history of unequal treatment; or a group which has been relegated to a position of political powerlessness such that extraordinary protection from the majority is necessary.[42]

The Supreme Court recently refused to grant the handicapped suspect status in *City of Cleburne v. Cleburne Living Center*.[43] The Court stated that "[o]ur refusal to recognize the retarded as a quasi-suspect class does not leave them entirely unprotected from invidious discrimination."[44] The Court, although purporting to use a rational basis review, concluded that "requiring a permit in this case appears to us to rest on an irrational prejudice against the mentally retarded."[45]

The fourteenth amendment guarantees the right of equal opportunity to educational resources. In the past, the handicapped have suffered discrimination and have been offered inferior educational opportunities. Although the *Cleburne* Court appeared somewhat ambivalent about the status of the handicapped, the entitlement language of federal legislation for the handicapped and the close analogy of handicapped discrimination to racial discrimination imply that handicapped children should be afforded an equal opportunity to be educated to their full potential.

While the rights of handicapped children to a free appropriate education emerged gradually on the national conscience,[46] the Supreme Court acted boldly in an analogous area—that of educational discrimination based on race. In 1954 the Supreme Court decided *Brown v. Board of Education*,[47] which declared that sepa-

42. *See* United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938).

43. 473 U.S. 432 (1985). The city of Cleburne required builders of group homes for the retarded and the aged to acquire permits. The Cleburne Learning Center challenged the ordinance as unconstitutional after being denied a permit. The Court struck down the ordinance but not on grounds that the retarded are a suspect classification.

Several factors, however, warrant granting the handicapped suspect status. The handicapped meet the definition of a discrete and insular minority. The Court first used the concept of a "discrete and insular minority" to identify questionable classifications based on race. *See Carolene Products Co.*, 304 U.S. at 152-53 n.4. The handicapped evoke stereotypes that carry the stigma of inferiority. *See* Charles Black, *The Lawfulness of Segregation Decisions*, 69 Yale L.J. 421, 424-25 (1960). They often suffer from conditions that are immutable. *See* Weber v. Aetna Casualty & Ins. Co., 406 U.S. 164, 174-75 (1972). Finally, the handicapped have been subjected to a history of purposeful unequal treatment. *See* Pennsylvania Association for Retarded Citizens v. Commonwealth of Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971).

44. *Cleburne*, 473 U.S. at 446.

45. *Id.* at 450.

46. *See infra* notes 52-61 and accompanying text.

47. 347 U.S. 483 (1954). The Court repudiated the "separate but equal doctrine"

rate educational facilities for Black students were inherently unequal.[48] The decision heightened awareness among school administrators, the judicial system, and the public at large to the issues of various kinds of discrimination within the public schools. In *Brown*, the Court relied on psychological and sociological studies analyzing the effects of segregated education.[49] Researchers found that even when separate instruction was provided in facilities equal to those provided for white students, the education was inherently unfair.[50] Such an education inhibited Black children's educational and social development enough to deny them basic rights.[51]

Brown, although aimed at redressing educational inequities based on race, arguably also applies to those who face educational discrimination based on handicap. Early cases dealing with the rights of the handicapped to an education relied on and stretched the concepts employed in *Brown*.[52] Recently, parents have attacked the use of mobile units parked in parochial school lots (units used as "neutral sites" for providing education to the handicapped) as both "stigmatizing" and a violation of the *Brown* mandate of desegregated schooling.[53]

In 1971, *Pennsylvania Association for Retarded Citizens v. Commonwealth of Pennsylvania* (hereinafter *PARC*),[54] applied the *Brown* precedent to the controversy created by exclusionary and discriminatory practices in public schools against handicapped children. The consent decree in *PARC* guaranteed educational programs for all of Pennsylvania's mentally retarded children prior to the passage of federal legislation guaranteeing certain educational rights to handicapped children.[55] Despite settlement, *PARC* established that mentally retarded persons are capable of benefitting from an education; that the state must provide retarded persons with a free publicly financed program of education and training appropriate to their capacity; that the *mentally re-*

---

which had dominated the treatment of public facilities for Blacks and whites since 1896. Plessy v. Ferguson, 163 U.S. 537 (1896). *Brown* established that children could not be segregated in essentially "equal" schools solely on the basis of race.

48. 347 U.S. at 495.

49. *Id.* at 493.

50. *Id.* at 494.

51. *Id.* at 495.

52. *See infra* notes 54-58 and accompanying text.

53. Conversation with Kathy Boundy, Attorney, Center for Law and Education, Cambridge, Massachusetts, January 7, 1987.

54. 334 F. Supp. 1257 (E.D. Pa. 1971), *aff'd on rehearing* 343 F. Supp. 279 (E.D. Pa. 1972) (Approving and adopting amended stipulation, amending consent agreement and issuing injunction).

55. 29 U.S.C. §§ 1400-1460 (1982 & Supp. 1984).

tarded child is entitled to these benefits even if he attends a private school; and that placement in the regular classroom is preferable to segregated facilities.[56]

In *Mills v. Board of Education*,[57] decided in 1972, the D.C. District Court expanded the right to an appropriate public education to children labelled "emotionally disturbed", "mentally retarded", "hyperactive" or as having "behavior problems".[58]

The success of the plaintiffs' claims in *PARC* and *Mills* prompted the filing of a myriad of related claims, ranging from the right of institutionalized children to receive treatment to an acknowledgement that the compulsory education laws also applied to the handicapped.[59] The plaintiffs were generally successful.[60] As a result, courts provided plaintiffs with programs designed to meet the unique needs of special children.[61]

B. Federal Legislation

Absent action prompted by litigation, public schools continued to segregate or exclude handicapped children.[62] A tireless advocate or enlightened state legislature could win significant rights for handicapped children within a specific locale. Federal legislation was needed, however, to provide uniform services to handicapped children in every state in the nation. The Rehabilitation Act of 1973[63] was the first step toward a guarantee of basic civil rights for the handicapped, including the right to an education. The Act was crucial, indicating the basic philosophical commitment of Congress to educational equality for the handicapped. To implement this goal, Congress enacted the Education for Handicapped Children Act (EAHCA)[64] in 1975. EAHCA provided specific guidelines and timetables for achieving equality for handicapped children.[65]

---

56. *PARC*, 343 F. Supp. at 290.

57. 348 F. Supp. 866 (D.D.C. 1972).

58. *Id.* at 881.

59. *See, e.g.*, Maryland Ass'n for Retarded Children v. Maryland, Eq. No. 1001 (Cir. Ct. Balt. City 1976): Wolf v. Legislature of the State of Utah, No. 182646 (3d Jud. D. C. Utah, Jan. 8, 1969).

60. *See* Frederick J. Weintraub, Bruce A. Ramirez & Joseph Ballard, *Introduction: Bridging the Decades*, in Special Education in America: Its Legal and Governmental Foundations 3 (1982).

61. *See* H. Rutherford Turnbull III, Legal Aspects of Educating the Developmentally Disabled 14, 30-31 (1975).

62. *See* Weintraub, Ramirez & Ballard, *supra* note 60, at 14.

63. 29 U.S.C. § 794 (1982).

64. *See* 20 U.S.C. §§ 1400-1460 (1982 & Supp. 1987).

65. *Id.*

1. The Rehabilitation Act

The earliest efforts to secure rights for the handicapped were made by Senator Hubert Humphrey and Congressman Charles Vanik, both of whom introduced legislation to extend the benefits of the Civil Rights Act of 1964 to handicapped individuals.[66] Although the effort failed, civil rights for the handicapped became a legislative agenda item for several liberal legislators.

In 1972, the Senate Committee on Labor and Public Welfare included several legislators concerned with civil rights for the handicapped. They formed one of the most liberal and activist committees in Congress.[67] The Committee was charged with the renewal of the vocational rehabilitation program.[68] That group drafted the Rehabilitation Act of 1973 to expand and improve the program to serve disability groups with special problems.[69] The most significant portion of the Rehabilitation Act was section 504 which stated:

> "[n]o otherwise qualified handicapped individual in the United States, . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."[70]

The language of section 504 was taken directly from the Civil

66. Richard K. Skotch, From Good Will to Civil Rights 43 (1984). Senator Humphrey introduced a bill on January 20, 1972 to "amend the Civil Rights Act of 1964 in order to prohibit discrimination on the basis of physical or mental handicap in federally assisted programs." S. 3094, 92d Cong., 2d Sess. (1972). Congressman Vanik used similar language in the House bill he introduced. H.R. 12154, 92d Cong., 2d Sess. (1972). The bills were referred to the respective judiciary committees. No hearings were held on the bills and neither was brought to a vote in committee or on the floor of either house. Although no record exists regarding what happened within the two judiciary committees, one authority suggests that the bills were probably "killed" by committee liberals. Skotch, *supra*, at 44. Opposition may have come from those who were committed to protecting the groups already covered by Title VI of the Civil Rights Act. *Id.*

67. Skotch, *supra* note 66, at 45-46.

68. 29 U.S.C. § 794 (Supp. IV 1986) (regulations implementing the legislation are at 34 C.F.R. § 104.1-.61 (1987)). "Handicapped" is defined in 29 U.S.C. § 706 (8)(A) (1985 & Supp. 1987) as "any individual who (i) has a physical or mental disability which for such individual constitutes or results in substantial handicap to employment or (ii) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services."

69. Skotch, *supra* note 66, at 46.

70. Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 394 (codified at 29 U.S.C. § 794). The Committee on Education and Labor in the House was also examining the Rehabilitation Act. Congress designed the Rehabilitation Act of 1977 to improve and expand the existing vocational rehabilitation program. Section 504 provided "the one unifying key to mainstreaming of the disabled population into the general community. " Skotch, *supra* note 66, at 53 (quoting Frank G. Bowen, Handicapping America 205 (1978)).

Rights Act of 1964.[71] This language meant that handicapped people, like Blacks, would not be excluded from participation in or denied benefits of any program or activity receiving federal financial assistance because of their condition.[72]

Programs for the handicapped could not be isolated from those of non-handicapped students unless segregation was necessary for the program's effective functioning. Section 504, however, failed to provide for any public expenditures to guarantee those rights. Although the section directed schools to provide for their handicapped students' needs, it failed to specifically outline the application of its principles to the school setting. However, Congress' greater specificity and higher level of commitment embodied in the statute elevated the right to education for the handicapped above the minimum set forth by compulsory education laws.[73]

2. The Education for Handicapped Children Act

To further promote equal education for handicapped children, Congress enacted the Education for Handicapped Children Act (EAHCA) in 1975.[74] EAHCA (known also as the Bill of Rights for Education for Handicapped Children)[75] guaranteed every handicapped child a "free appropriate public education."[76] Such an education is defined as "an education provided at public expense . . . that meets the standards of the state educational agency."[77]

EAHCA extended section 504 and clarified its application to private schools. This appropriate, publicly-funded education must be provided to all handicapped children regardless of the school they attend.[78] The statute gave the handicapped child a direct entitlement to educational services. The sectarian or non-sectarian nature of the school the child attended was irrelevant.[79]

The Act failed, however, to specify where a handicapped child must receive special services. Thus, parents of a handicapped child enrolled in parochial school continued to have legitimate concerns about issues such as the child's entitlement to special educa-

71. The section uses the exact language of the Title VI, § 601 of the Civil Rights Act of 1964, substituting the word "handicap" for the words "race, color or national origin". 42 U.S.C. § 2000d (1982 & Supp. 1987).

72. *See* Skotch, *supra* note 66, at 51-52.

73. 20 U.S.C. § 1400.11 (1982 & Supp. 1987).

74. 20 U.S.C. §§ 1400-1460 (1982 & Supp. 1987).

75. Thomas, *supra* note 24, at 13.

76. 20 U.S.C. § 1400(c) (1982 & Supp. 1987).

77. 20 U.S.C. § 1401(d) (1982 & Supp. 1987).

78. 20 U.S.C. § 1413(a)(4)(B)(i) (1982 & Supp. 1987).

79. *See* 20 U.S.C. §§ 1412, 1413(d) (1982 & Supp. 1987).

tion services when he was enrolled in a sectarian school; the availability of services on-site when transportation would be dangerous; and the availability of compensation for expenses if the parents chose to provide private transportation to the public facility.

An amendment to the Act in 1983[80] provided for direct federal intervention where individual states were not providing special programs for handicapped children enrolled in private schools. The amendment authorized the Secretary of Education to bypass the State Educational Agency (SEA) to provide services to those children if state law prohibited the SEA from providing special programs for the handicapped children enrolled in non-public school.[81] Congress was straightforward in stating its intent to include handicapped children enrolled in private schools in its coverage under the bill. Section 1413 states that:

> handicapped children in private schools and facilities will be provided special education and related services . . . at no cost to their parents or guardian, . . . as the means of carrying out the requirements of this subchapter or any other applicable law requiring the provision of special education and related services to all handicapped children within such State . . . .[82]

The successful implementation of this provision depends greatly on the individual state's commitment to providing costly transportation between the child's home school and the neutral or public school site where services are delivered. In practice, transportation is frequently not offered or is inadequate.[83] When transportation is not available, parents are faced with three options: providing the transportation themselves, allowing the child to walk to the site where services will be offered, or foregoing the special education services. Parents who work, do not own a car, or have other responsibilities are unable to choose the first option. If the child's disability involves motor coordination, retardation, or perceptual difficulties, the obvious dangers of allowing such a child to cross streets unassisted precludes the second option. Similarly, because of transportation and scheduling conflicts, a child may be

---

80. 20 U.S.C. §§ 1401-1461 (1982 & Supp. 1985). The amendment which was enacted in 1983 extended the fiscal authorization of the EAHCA discretionary programs to respond to emerging needs in the education of the handicapped.

81. 20 U.S.C. § 1413(d)(1) (1982 & Supp. III 1985). This provision was intended to rectify a problem in Missouri where the state's constitution had been interpreted to preclude the state from providing services to students enrolled in private schools. Cong. Res. Serv. Rep., Amendment to EAHCA, Act of 1975 (1983).

82. 20 U.S.C. § 1413(a)(4)(B)(i) (1982 & Supp. III 1985).

83. Interview with Elizabeth Hennessey, parent advocate, Association for Retarded Citizens, Rochester, Minnesota, October 27, 1986 (on file with Law & Inequality).

forced to miss valued religious training at the sectarian school she attends. Parents may be faced with the choice of educating the child with the religious values they desire without the special education services, or transferring the child to a public school where the services to which she is entitled are readily available.

III. Freedom of Religion and the First Amendment

This choice between religious education and special education inhibits the rights of handicapped children and their parents to the free exercise of religion. Providing publicly-funded services at religious schools, however, also raises issues concerning the establishment of religion.

The Supreme Court has dealt with religious education under the two clauses of the first amendment concerning religion: the establishment clause, "Congress shall make no law respecting an establishment of religion . . . " and the free exercise clause, "or prohibiting the free exercise thereof . . . . "[84]

In its attempts to prohibit the establishment of religion, while simultaneously promoting the free exercise of religion, the Court has had to draw fine lines and create tortuous tests to avoid violating either clause.

Parents of handicapped children in sectarian schools also face both clauses concurrently. Should their attempt to secure the special in-school educational services guaranteed their children by law be construed as an attempt to establish their religion by entangling the public school teacher in a religious institution? Or should the insistence that the education take place on public school or neutral property be viewed as a violation of their free exercise of religion because it forces a choice between the entitled services and religious conduct?

A. The Establishment Clause

The establishment clause has been invoked to deny services to sectarian schools[85] when publicly-funded assistance is viewed as aid to the school, rather than as direct assistance to children or parents. Congress' intent, in enacting section 504 of the Rehabili-

84. U.S. Const. amend. I.

85. *See, e.g.*, Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973) (tax benefits to parents of sectarian schools impermissibly advance religion); Lemon v. Kurtzman, 403 U.S. 602 (1971) (salary supplement to nonpublic school teachers entangled government in religion); Levitt v. Committee for Pub. Educ., 413 U.S. 472 (1975) (test prepared by public school teachers for use in sectarian schools has the primary effect of advancing religion); Meek v. Pittenger, 421 U.S. 349 (1975) (auxiliary services, except textbooks, advance religion when provided by public schools).

tation Act and the Education for All Handicapped Children Act, however, was clearly to entitle all handicapped children to these benefits regardless of the school attended.[86] The Supreme Court has not addressed the specific issue of handicapped services in the sectarian school setting, but has decided a number of establishment clause cases which dealt with other aid received by sectarian schools.

The test currently employed by the Court to evaluate establishment of religion claims was first espoused in *Lemon v. Kurtzman*.[87] The *Lemon* test states that: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . .; finally, the statute must not foster an excessive government entanglement with religion."[88]

The Court has carefully limited certain types of aid that meet all three prongs - "purpose", "effects" and "excessive entanglement."[89] Tax deductions for educational expenses[90] and secular textbooks[91] have been allowed when they directly benefited the child and not the sectarian school. When, however, the Court has determined that state aid to sectarian education has the principle effect of advancing a religion, or that the method by which that aid was administered has excessively entangled the state in a religion, the Court has not hesitated to find that practice in violation of the establishment clause.[92]

---

86. See *supra* note 31 and accompanying text.

87. 403 U.S. 602 (1971).

88. *Id.* at 612-13 (citations omitted).

89. The first prong of the *Lemon* test is referred to as the "purpose test" because "the statute must have a secular purpose." 403 U.S. at 612. The "effects test" forms the second prong; "[the statute's] principal or primary effect must be one that neither advances nor inhibits religion." *Id.* The final prong is the "entanglement test"; "the statute must not foster and excessive government entanglement with religion." *Id.*

90. In Mueller v. Allen, 463 U.S. 388 (1983), the Court allowed Minnesota to retain a tax deduction for educational expenses incurred by parents of nonpublic school children. The case was carefully distinguished from Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973), in which tuition grants to parents were only a cover for maintenance and repair grants directly to the schools. *Mueller*, 463 U.S. at 394, 398. The Minnesota tax deductions, in contrast, aided individual parents NOT the sectarian schools. *Id.* at 398-402.

91. The Court permitted the loan of secular textbooks to public schools in Board of Educ. v. Allen, 392 U.S. 236 (1968). In Elbe v. Yankton Indep. School Dist. No. 1, 714 F.2d 848 (8th Cir. 1983), the Eighth Circuit viewed those services as being provided to the children and not to the sectarian school, thus avoiding any "excessive entanglement" of the state with religion. Similarly, the Court regards publicly funded bus transportation or bus fare to nonpublic sectarian school children as a permissible use of funds to assist children and not their schools. Everson v. Board of Educ., 330 U.S. 1 (1947).

92. In *Lemon*, the Court concluded that the state's reimbursement to non-pub-

The Court's decisions have confused many commentators. Justice White, the lone dissenter in *Lemon*, articulated one facet of this confusion:

> The Court thus creates an insoluble paradox for the State and parochial schools. The State cannot finance secular instruction if it permits religion to be taught in the same classroom; but if it exacts a promise that religion not be taught, a promise the schools and its teachers are quite willing and on the record able to give and enforce, it is then entangled in the "no entanglement" aspect of the Court's jurisprudence.[93]

For parents of a handicapped child who desire a religious education for their children, Justice White's paradox has often resulted in a painful choice - the choice between neglecting their child's religious needs or her special educational needs.

Allowing a handicapped child such as Missy to receive special services within her sectarian school does not violate the establishment clause. Under the *Lemon* test, the *purpose* of providing such services on site must be secular. Here, the purpose is to provide the child with special educational services to which she is entitled. This is a secular purpose and one explicitly found by Congress.[94] Under the second prong of *Lemon*, the *effect* of this course of action must be analyzed for either the advancement or inhibition of religion. Like transportation subsidies[95] and tax deductions for textbooks,[96] allowing a handicapped child to receive special educational services at her sectarian school would directly benefit the child, not the religious school. Since such schools do not ordinarily provide such services, this action would not benefit the school by relieving them of an expense. Rather, it would permit children to receive the services to which they are entitled. Finally, providing special education at sectarian schools would not violate the third prong of *Lemon* because the state would not be excessively entan-

---

lic schools for the cost of teachers' salaries, textbooks, and instructional materials resulted in excessive entanglement of church and state. *Lemon*, 403 U.S. at 620. In Levitt v. Committee for Pub. Educ., 413 U.S. 472 (1975), the Court struck down a state program reimbursing nonpublic schools for the cost of teacher-prepared examinations. Common to both cases was prolonged supervision and administration of the nonpublic school by the state agent, the public school system. *Id.* at 480.

In Meek v. Pittenger, 421 U.S. 349 (1975), the Court struck down the direct loan of general instructional materials to nonpublic schools. The direct loan of textbooks to individual students, however, was upheld in Wolman v. Walter, 433 U.S. 229 (1977).

93. 403 U.S. at 668 (White, J., concurring).

94. 20 U.S.C § 1400 (1982 & Supp. 1987). *See supra* notes 29-31 and accompanying text.

95. The Supreme Court regards publicly funded bus transportation or bus fare to nonpublic sectarian school children as a permissible use of funds to assist children and not their schools. *See* Everson v. Board of Educ., 330 U.S. 1, 18 (1947).

96. *See* Mueller v. Allen, 463 U.S. 388 (1983).

gled in religious education; the services themselves are religiously neutral and any religious symbols could be eradicated from the site prior to its use for special education. The arguments against providing the sectarian child with special education services at the parochial school focus on the cost of providing such individualized services,[97] and the fear that such on-site services would result in the establishment of religion.[98] It is also argued that the student's free exercise of religion is not violated by requiring the child to travel to a public school or neutral site for the services.[99]

The *Lemon* test, however, has been the Court's primary framework for deciding such cases. Under this rationale, providing special education services to handicapped children is not a violation of the establishment clause.

B. Free Exercise of Religion Cases

The second half of the constitutional concept of freedom of religion is the free exercise clause. The tension of the establishment clause with the free exercise clause has led to confusion about predicting the Supreme Court's stand on a particular religious issue. As Justice Harlan stated, "[I]t is far easier to agree on the purpose that underlies the First Amendment's Establishment and Free Exercise Clauses, than to obtain agreement on the standards that should govern their applications."[100]

An early case interpreting the free exercise clause, *Pierce v. Society of Sisters*,[101] established the right of parents to educate their children in religious schools. Parents of handicapped children seek the same free exercise right without being deprived of their children's entitlement to a free, appropriate special education.

Cases analyzing the free exercise clause are split between those protecting only verbal expression[102] and those that also protect religious conduct.[103] This distinction was a recognition of the

---

97. *See* Thomas, *supra* note 13, at 24.

98. *See supra* notes 85-93 and accompanying text.

99. *See infra* notes 118-25 and accompanying text. Although *Aquilar* decided the establishment clause consequences of Title I services to economically deprived children in sectarian schools, the same arguments with respect to handicapped children could be raised.

100. Walz v. Tax Comm'n, 397 U.S. 664, 694 (1970) (Harlan, J., concurring).

101. 268 U.S. 510 (1925).

102. In the Mormon polygamy case, Reynolds v. United States, 98 U.S. 145 (1879), the Court decided that behavior such as polygamy enjoyed no first amendment protection when it extended beyond the expression of religious opinion to become an act hostile to good civil order. The distinction between freedom of religion and freedom of speech was not a bright line. *Id.* at 166.

103. *See* Cantwell v. Connecticut, 310 U.S. 296 (1940), in which the Court struck

Framers' view that religious opinion and expression were entitled to greater protection than religious conduct.[104] Only recently, the Court has seen that religious conduct, such as the decision to enroll one's children in a religious school, is deserving of protection also. The case which established that religious conduct is entitled to protection under the first amendment is *Sherbert v. Verner*.[105] In *Sherbert*, a member of the Seventh-Day Adventist Church, which prohibits work on Saturdays, faced losing her unemployment benefits when she refused to accept a job requiring her to work Saturdays. The Court ruled that the state's disqualification of her benefits clearly imposed a burden on her free exercise of religion because it "force[d] her to choose between following the precepts of her religion and forfeiting benefits, . . . and abandoning one of the precepts of her religion to accept work."[106]

Parents of handicapped children who wish to educate their children in their religious traditions are forced to choose between the free exercise of their religion and critical services to which their children are entitled. Federal law guarantees the right of all handicapped children to special educational services.[107] If the

---

down a state law requiring a group of Jehovah's Witnesses to purchase a license before soliciting support for their views. The decision was based not on freedom of speech, but rather on the fact that the license "amount[ed] to a prior restraint on their religion." *Id.* at 304. The Court was developing the concept of free exercise of religion beyond a mere corollary to freedom of speech. In cases following *Cantwell*, the Court invalidated state laws which forced the individual to make a choice of either violating his or her conscience or foregoing a state benefit to which he or she is entitled. *See, e.g.*, American Communications Ass'n. v. Douds, 339 U.S. 382, 390 (1949) (requirement of affidavit stating nonassociation with Communist party held valid under Constitution in part because it did not forbid nonsigners from holding office or require their discharge); Wieman v. Updegraff, 344 U.S. 183, 191-92 (1952) (Court struck down state loyalty oath which required employees to deny past or present affiliation with any subversive organization).

104. Madison was deeply involved in the writing and creation of the final form of the Bill of Rights. He played a central role in the debate on the first amendment. *See* Elwyn Smith, Religious Liberty in the United States 247 (1972). Madison's primary concern was for the freedom and autonomy of conscience. Irving Brant, 3 James Madison 271 (1961).

Although Madison and his fellow statesmen believed fine distinctions between the establishment and free exercise clauses were unnecessary, subsequent Supreme Courts have faced a host of problems in applying both portions simultaneously. *See* Smith, *supra*, at 248.

Thomas Jefferson established the guidelines: "[T]o suffer the civil magistrate to intrude his powers into the field of opinion . . . is dangerous fallacy . . . . It is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order." Thomas Jefferson, *Act for Establishing Religious Freedom*, in 2 The Papers of Thomas Jefferson 305 (1950).

105. 374 U.S. 398 (1963).

106. *Id.* at 400.

107. 20 U.S.C. § 1412 (2)(B) (1982 & Supp. 1987).

child's disabilities mean that he or she cannot safely make the commute to the public facility, the child's parents are forced to choose between the religious education or the special education services. If the scheduling of special education means that a child must routinely miss religious instruction, children are again forced to choose between religious and special education. These children, like the plaintiff in *Sherbert*, are entitled to the free exercise of their religion. Forcing children to forego necessary services violates the free exercise clause.

IV. Recent Supreme Court Decisions

Although it seems clear that providing special education services to handicapped children on sectarian school sites does not violate either the free exercise clause or the establishment clause,[108] recent Supreme Court decisions have held that providing some non-handicapped services at religious schools does violate the establishment clause.[109]

School administrators might be tempted to extend these decisions to entitled handicapped services because of a possible establishment clause violation. The radical distinction between the basic civil rights language of special educational services and those of other educational programs, however, must be noted in distinguishing the recent cases from those of children in need of special education.[110]

In 1974, the Supreme Court in *Wheeler v. Barrera*,[111] held that Title I services could be administered on private school sites if local law allowed the services at private sites.[112] Title I is a federally funded program which allocates grants to school districts where three percent of elementary and secondary students are from families with income less than $2,000. Children from private schools are figured into the formula to determine the total disadvantaged population of the district.[113] The program is aimed at meeting the needs of impoverished children, not those who are handicapped.

---

108. *See supra* notes 94-96, 107 and accompanying text.

109. *See infra* notes 115-17 and accompanying text.

110. *See supra* note 9.

111. 417 U.S. 402 (1974).

112. *Id.* at 419.

113. 20 U.S.C. §§ 3805(a); 3806(a) (1965). Title I is officially known as the Elementary and Secondary Education Act of 1965. Title I has been superseded by the Financial Assistance to Meet Special Educational Needs of Disadvantaged Children Act, Ch. 1 95 Stat. 464 (codified at 20 U.S.C. § 3801 (1982)).

Title I funds were to be used in meeting the needs of educationally-deprived children who were not necessarily handicapped.

In *Wheeler*, the Court permitted remedial instruction by public school teachers on parochial school premises. The Court noted that it "intimated no view as to the Establishment Clause effect of any particular program."[114] Public and parochial school administrators relied on the permissive language in *Wheeler* to provide Title I services at sectarian school sites. Then, in 1985, the Court issued two decisions which ruled on the issue of the proper delivery site for programs to non-handicapped parochial school children.

In *School District v. Ball*,[115] the Court invalidated two state-funded programs conducted on private school property - Shared Time and Community Education.[116] The Court affirmed the district court decision that the "Shared Time and Community Education programs ha[d] the 'primary or principal' effect of advancing religion, and, therefore, violate[d] the Establishment Clause of the First Amendment."[117]

In *Aguilar v. Felton*,[118] decided on the same day as *Grand Rapids*, the Court defined the state's responsibility to provide Title I services to children attending sectarian private schools. New York City had provided Title I programs to parochial school children in private school buildings. The city used funds received under the program to pay the salaries of public school employees who taught in the parochial schools.[119] A city taxpayers' group challenged the administration of the Title I program, claiming that

114. 417 U.S. at 426.

115. 473 U.S. 373 (1985).

116. Shared Time and Community Education programs were instituted in Grand Rapids, Michigan in the 1976-77 school year and provided classes to nonpublic school students at public expense in classrooms located in and leased from the local nonpublic schools. The Shared Time program offered classes during the regular school day that were intended to be supplementary to the "core curriculum" courses required of an accredited school program in Michigan. Remedial and enrichment math and reading, art, music and physical education were among the offerings. *Id.* at 375-76.

The Community Education Program was offered in Grand Rapids schools and on other sites, for children as well as for adults. Courses were taught in the nonpublic schools after the regular day. Among the courses offered were: Arts and Crafts, Home Economics, Spanish, Dramatics, Gymnastics, Yearbook Production, Newpaper, Humanities, Chess, Model Building, and Nature Appreciation. *Id.* at 376-77.

117. *Id.* at 397. Justices O'Connor and Burger disagreed with the Court's decision to invalidate the Shared Time program. Both Justices asserted that statistical evidence showed that the program did not cause excessive entanglement of church and state. *Id.* (O'Connor J., and Burger C.J., concurring in part and dissenting in part).

118. 473 U.S. 402 (1985).

119. *Id.* at 406-09.

it violated the establishment clause of the first amendment.[120]

The Supreme Court held in a 5-4 decision that Title I programs could not be provided on the sectarian site.[121] The Court determined that Title I public school teachers were "performing important educational services in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained."[122]

Justices Burger, Rehnquist and O'Connor all wrote separate dissenting opinions.[123] The dissenting Justices pointed out the "inconsistencies in our Establishment Clause decisions can be ascribed to our insistence that parochial aid programs with a valid purpose and effect may still be invalid by virtue of undue entanglement."[124] Further, the dissents asserted that New York City's administration of the Title I program had practical advantages as well.[125]

---

120. The district court upheld the program's constitutionality. *Id.* at 407. The Court of Appeals for the Second Circuit reversed. Aguilar v. Felton, 739 F.2d 48 (2d Cir. 1984).

121. 473 U.S. at 414.

122. *Id.* at 412 (quoting Meek v. Pittenger, 421 U.S. 349, 371 (1975)). The majority opinion rested on the impermissible "excessive entanglement of church and state . . . As in *Lemon*, [the Court concluded] the amount of supervision necessary to insure that teachers were not conveying religious messages to their students would constitute the excessive entanglement of church and state . . . ." *Aguilar*, 473 U.S. at 410.

123. 473 U.S. at 419-31. Chief Justice Burger spoke of denying countless children Title I services and criticized the Court's "obsession" with the *Lemon* test. *Id.* at 419. He concluded that the decision shows "nothing less than hostility toward religion and the children who attend church-sponsored schools." *Id.* at 420 (Burger, C.J., dissenting).

Justice Rehnquist discussed the "Catch 22" paradox the Court created "whereby aid must be supervised to ensure no entanglement but the supervision itself is held to cause an entanglement." *Id.* at 421 (Rehnquist, J., dissenting).

Justice O'Connor questioned the usefulness of entanglement as a separate establishment clause standard. In New York City, "public school teachers offer[ed] Title I classes on the premises of parochial schools solely because alternative means to reach the disadvantaged parochial school students . . . were unsuccessful." *Id.* at 423 (O'Connor, J., dissenting). She did not see why "a remedial reading class offered on parochial school premises is any more likely to supplant the secular course offerings of the parochial school than the same class offered in a portable classroom next door to the school." *Id.* at 426. She viewed as extreme the majority reasoning that state supervision of the program was necessary to ensure that public school teachers do not inculcate religion. O'Connor stated that the logical conclusion of the majority's reasoning would "require us to close our public schools, for there is always some chance that a public schoolteacher will bring religion into a classroom, regardless of its location." *Id.* at 429. Like the Chief Justice, she concluded that for the children in need of Title I services, "the Court's decision is tragic." *Id.* at 431.

124. *Id.* at 429 (O'Connor, J., dissenting).

125. *Id.* at 419-29. Chief Justice Burger predicted that the intent of Title I, "to prevent a generation of children from growing up without being able to read"

While *Aguilar* determined that delivery of Title I services on sectarian school grounds was impermissible, it did not address services to handicapped children under EAHCA. Title I targets children from low income families. Although there may be some overlap, handicapped children are not necessarily from low income families and many low income children are not physically or mentally handicapped. Programs for each group are separately legislated and administered.[126] Congress' express intention in section 504 and EAHCA was to confer a "civil right" for handicapped children to appropriate educational services.[127] Title I legislation, however, does not contain the entitlement language and is perceived as a benefit rather than an entitlement to low income children.[128]

Department of Education regulations implementing *Aguilar* specifically state that the decision applies narrowly to Title I programs.[129] Although no case has challenged *Aguilar's* application to programs involving handicapped children, administrators of handicapped programs in many states rely on the Department of Education regulations and continue to offer handicapped services on sectarian school sites.[130]

The close decision (5-4), coupled with the strong dissents filed by "the conservative coalition" and the changing make-up of the Court suggest that the *Aguilar* decision does not restrict special education services to handicapped children. More importantly, the right to handicapped services has been specifically designated by Congress as a civil rights entitlement for handicapped children. While Title I services and the Michigan Shared Time and Community Education programs provide valuable services to poor children and those enrolled in sectarian programs, they have not been afforded the unique designation of an entitlement. The handicapped child who is owed special education service is, thus, distinctly different from the child of *Aguilar* or *Grand Rapids*. The handicapped child's situation is much more closely aligned to that of the Seventh-Day Adventist in *Sherbert*. The right to handicapped

would be circumvented by the Court's decision. *Id.* at 419 (Burger, C.J., dissenting). Justice O'Connor dissented from the belief that Title I has not resulted in "public teachers proseletizing at public expense." *Id.* at 427 (O'Connor, J., dissenting). Justice Rehnquist argued that "such sorely needed assistance" should not be denied because of the establishment clause. *Id.* at 421 (Rehnquist, J., dissenting).

126. *See supra* notes 62-83, and accompanying text.

127. *See supra* notes 66-73 and accompanying text.

128. For an explanation of Title I legislation, see *supra* note 113 and accompanying text.

129. 34 C.F.R. § 222 (1986).

130. Conversation with Kathy Boundy, Center for Law and Education, Cambridge, Massachusetts, January 7, 1987.

services, as an entitlement, poses the constitutional question of requiring a choice between those services and the free exercise of religion. *Grand Rapids* and *Aguilar* did not address this issue.

VI. Conclusion

Special education services are not an educational "frill." The school system which would attempt to define a Black child's right to an integrated education as a "frill" would face not only parental displeasure but an almost certain lawsuit. Congress has also enacted legislation that mandates the right of a handicapped child to a "free, appropriate public education" as part of that child's civil rights. The very language of section 504 elevates this right of handicapped children above the social welfare educational programs which rise and fall with the availability of funding.

Handicapped children do not forfeit these rights because of their attendance at a sectarian school. The Court has not yet faced this issue specifically. Its recent decisions have dealt only with the constitutionality of offering Title I and other enrichment programs on sectarian sites. *Aguilar* and *Grand Rapids* were decided solely on establishment clause conflicts. They dealt with Title I services which have not been identified as entitlements. Special education, however, has been identified as a unique entitlement of handicapped children.[131] When the state forces a choice between the first amendment right to free exercise of religion and the civil rights entitlement to an appropriate education it requires an improper, impermissible and illegal choice.

A handicapped child, such as Missy Hogan, is effectively denied her entitlement to an appropriate education if her parents must choose between the safe and efficient delivery of that entitlement or the free exercise of their religion. The only workable solution is to offer services on the premises of Missy's school. The benefit of such an arrangement flows directly to the child, not to her school. Thus, the arrangement would not violate the establishment clause while ensuring the handicapped child and her parents the free exercise of their religion.

---

131. *See supra* notes 66-73 and accompanying text.