REPORT BY THE EDUCATION ADVOCATES COALITION ON FEDERAL COMPLIANCE ACTIVITIES TO IMPLEMENT THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT (PL 94-142)

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REPORT BY THE EDUCATION ADVOCATES COALITION

It is nearly six years since the Congress mandated specific educational rights for the nation's handicapped children, including procedural safeguards, nondiscriminatory evaluations and placements in the least restrictive environment. (See PL 93-380.) It is more than four years since the comprehensive Education for All Handicapped Children Act (PL 94-142) was enacted by the Congress to guarantee a free appropriate public education to all handicapped children and to ensure parents' participation in the development of their handicapped child's program. 1/ And two and one-half years have passed since PL 94-142 took effect. 2/

1 / PL 94-142 is a program providing nearly $1 billion in federal aid to the states for the education of handicapped children aged 3-18. It presently serves 3.85 million children. The Act requires that, inter alia:

a) all handicapped children, regardless of the severity of their handicapping conditions, be provided an appropriate public education, including special education and related services;

b) this education be provided at no cost to the parents;

c) each handicapped child be educated in the most normal and least restrictive environment appropriate to the child's needs;

d) the needs of each child be individually evaluated and an individualized educational program developed for the child;

e) the child's parents be involved in the development of the child's education program and provided procedural safeguards to challenge inappropriate educational decisions.

PL 94-142 also creates substantial monitoring and enforcement duties for the state education agencies and for the federal Office- of Education and Bureau of Education for the Handicapped.

2/ To give the states and the federal government extra time to gear up for full compliance, Congress provided two years' lead time before the Act went into effect.

Beginning with the enactment of PL 93-380 in 1973, the federal Bureau of Education for the Handicapped (BEH) in the Office of Education has had the responsibility for monitoring and enforcing implementation of these critical special education laws. But it has not proven adequate to perform the task.

Today 15,000 handicapped children in New York City are on a waiting list for evaluation and special education placement; more than 71,500 children in institutions or special schools receive totally segregated programming and an additional uncounted number of handicapped children are in segregated settings in local school districts; 900 handicapped students in the San Francisco area identified as needing individualized education programs (IEPs) do not have them; more than 200 mentally retarded children in Texas institutions are provided no education at all; and black students across the country are placed in classes for the educable mentally retarded at almost three times the rate for white students.

These disturbing facts and others led to the formation of the Education Advocates Coalition 3/ which undertook an intensive six-month investigation of the status of implementation of PL 94-142 and of BEH's compliance activities over the years. Based on its investigation, the Education Advocates Coalition has concluded:

3/ The Education Advocates Coalition is a nationwide coalition of advocacy groups that work with handicapped children and their parents to obtain full implementation of the Education for All Handicapped Children Act (PL 94-142) at the local, state and federal level. The Coalition membership includes state-based advocacy groups working in 11 different states and a number of national advocacy organizations. These organizations represent individual parents and children and/or attempt to redress systemic, class-wide violations of law.

1. State and local education agencies throughout the United States are depriving hundreds of thousands of handicapped children of their rights in 10 critical respects; and

2. The federal Office of Education and the Bureau of Education for the Handicapped (BEH) have failed to remedy this situation because of inadequate staff, policy-making, monitoring and enforcement activities.

The similarity of the reports from each of our target states strongly suggests that our conclusions reflect nationwide problems of great magnitude. 4/

4/ The state and federal data on which we rely are set forth in the discussion in this report and in appendices 1-10. The method for gathering and analyzing the data contained in this report followed these steps. First, at a meeting of advocacy groups from states throughout the nation, a list of major compliance problems was compiled. This list of 15 items was then circulated to a broader group to ascertain which problems were reflected significantly on advocates' caseloads, and which could be well documented. This produced the list of 10 compliance issues contained in this report.

Upon identification of the major compliance problems, the Advocates Coalition selected 11 states — California, Colorado, District of Columbia, Florida, Illinois, Mississippi, New York, Pennsylvania, Tennessee, Texas and Vermont — for in-depth study. The states were selected on the basis of a number of factors including geographic diversity, size and population density, so as to be as representative as possible of the country as a whole. Active and effective advocacy groups working in the education area were contacted in each of these 11 states and were asked to investigate one or more major implementation problems in their state. For each problem selected they were asked to describe the nature of state or local noncompliance, to summarize the consequences of noncompliance for handicapped children, to provide supporting documentation about impact and provide all correspondence, monitoring reports, Annual Program Plan reviews and other data concerning BEH's handling of the problem. Some of the data are statistical, others are anecdotal.

In addition, a detailed review of all of BEH's procedural manuals, interview checklists, Annual Program Plan checklist and other monitoring tools was conducted. Further, BEH policy statements and letters in response to requests for policy decisions touching on any of the identified areas of noncompliance were reviewed. Some follow-up conversations with BEH officials took place to clear up procedural questions.

These findings represent BEH activities through December 31, 1979, except where later dates are noted.

None of the specific deficiencies set forth below is an intrinsic part of the special education system. No change in the legislation or regulations is necessary. The key is a commitment to implement PL 94-142 with effective enforcement by responsible governmental agencies. We trust that the new federal Department of Education will take swift and strong steps to remedy this situation.

Major Areas of Noncompliance

* Tens of thousands of children who have been identified as handicapped and referred for evaluation and services are either on waiting lists or ignored altogether by school officials for months or even years.

* Institutionalized children and children in other placements outside their natural homes are routinely denied adequate and appropriate services or excluded from educational services altogether.

* Handicapped children are frequently denied related services, such as physical therapy, occupational therapy, school health services, and transportation, essential to enable them to benefit from special education.

* Many handicapped children remain unnecessarily segregated in special schools and classes for the handicapped.

* Black children are misclassified and inappropriately placed in classes for the "educable mentally retarded" at a rate over three times that of white children. Other minorities are frequently misclassified as well.

* Handicapped children are illegally suspended or expelled from school for periods ranging up to nearly two years.

* Many handicapped children still have not received an individual evaluation or an individualized education program (IEP). Often canned lEPs provide a substitute for truly individualized planning.

* Severely handicapped children are denied education in excess of the 180-day school year, even when such service is essential to the child's education.

* Most states have no system for identifying children in need of "surrogate parents" (i.e., PL 94-142 advocates) or for appointing surrogate parents; thus, many children in out-of-home placements go unrepresented in the PL 94-142 process and are effectively stripped of their rights.

* Inadequate notice of rights under PL 94-142 and unnecessary procedural hurdles are often used to discourage parents from fully participating in evaluation and placement decisions for their children.

The continued existence of such major problems, most of them the very problems Congress intended to address in enacting PL 94-142, demonstrates the need for aggressive and persistent compliance activities by BEH. But in the years since Congress lodged enforcement responsibilities with it, BEH has moved only very slowly from its historical role as a passive, grant-giving agency. Our examination of the agency shows BEH is floundering, lacking adequate compliance plans and activities. 5/ Neglecting its legal responsibilities, BEH has repeatedly failed to identify major violations of law and develop specific remedies, forcing courts, simultaneously examining the same state practices, to issue the necessary remedial orders. See, e.g., appendix 5.

This is a national disgrace -- a disgrace to the nation's millions of handicapped children and their parents who rely on enforcement of PL 94-142 to provide for their children the opportunity to become independent, self-sufficient adults. It is also a violation of the trust

5/ BEH's response when confronted with evidence of the kind contained in this report has been to acknowledge the existence of the problem and claim it is "working on a solution." However, as this report reflects, BEH has had years to generate adequate policies and monitoring and enforcement procedures and has failed to do so. It will indeed be ironic if the agency's response to this report is once again that the policies and procedures we seek are "being worked on."

of the United States Congress, which relies upon BEH to ensure that the Act is fully implemented and the nearly $1 billion appropriation for assistance to the states properly expended. And it is an affront to the nation's taxpayers who will ultimately bear the expense of these children's dependence and lack of skills.

Conclusions About BEH

The Education Advocacy Coalition concludes that (1) BEH's monitoring activities have repeatedly failed to identify and document serious statewide noncompliance with pivotal provisions of PL 94-142; (2) when serious noncompliance is identified, BEH has failed to take adequate steps to enforce PL 94-142 and bring states promptly into compliance with the Act; (3) BEH has failed to make clear federal policy decisions in a timely fashion, thereby fostering confusion and substantially delaying the efforts of parents and children to obtain needed educational services; (4) BEH staff assigned to monitoring, enforcement, policy development and technical assistance activities under PL 94-142 is too small and inadequately trained to fulfill the agency's compliance duties under the Act; and (5) BEH has failed to target its limited resources to resolve those implementation issues which are most critical to ensuring that handicapped children receive adequate educational services. 6/ A discussion of each of these conclusions follows.

6/ Recently, a new chief of the Aid to States Branch at BEH has begun to address some of the problems discussed in this report. However, these new efforts are a very small beginning which will fail without full agency support and the commitment of sufficient resources.

1. BEH's Monitoring Activities Are Inadequate.

In each of the 11 states studied by the Advocates Coalition, BEH has failed to document adequately and, in a number of instances, to identify at all the major noncompliance issues set forth in this report. Our investigation revealed several reasons for this:

(a) BEH does not collect the data essential for identifying implementation problems;

(b) BEH lacks fundamental methods of analyzing data that would allow it to focus on the states and issues that need attention;

(c) BEH does not adequately investigate complaints of widespread noncompliance made by advocacy or parent groups;

(d) BEH focuses its monitoring activities, even during on-site visits, almost exclusively on review of state and local policies and assurances of compliance. 7/

In short, BEH monitoring is devoted primarily to paper, not actual, compliance and paper, not actual, remedies.

The first principle of effective monitoring is the collection of quantitative and qualitative data. This allows agencies to target their resources on the most serious problems. However, BEH does not require state education agencies (SEAs) to collect and submit the data that are essential to identify the existence and nature of compliance problems. In some areas no data whatsoever are collected. 8/ For

7/ Although ensuring that state policy is consistent with the law is an important function, an effective monitoring agency must look beyond policy statements. The appendices to this report include numerous examples of state failure to comply with the law despite perfectly acceptable state policy positions on paper.

8/ As a consequence, most of the facts relied on in this report were generated by litigants across the country who collected data to support their claims in lawsuits brought to enforce PL 94-142.

example, BEH does not require the states to collect any data on the number of handicapped children suspended or expelled from school, or on the number of surrogate parents appointed. Appendices 6 and 9. In other areas, although BEH does require the states to compile data, its request is so ill-defined that no useful information is obtained. For example, although BEH ostensibly collects data on the number of children in segregated educational settings, the categories it uses are so unclear that BEH does not know how many children are in separate schools for the handicapped. Neither does it know how many children are educated full-time in self-contained classrooms. Appendix 4. Similarly, although BEH collects data on the number of "unserved" handicapped children, it does not know the number of handicapped children on waiting lists, nor does it know how long they have been waiting. Appendix 1. Lastly, while BEH is charged with insuring that evaluation procedures are racially nondiscriminatory and minority children are not misclassified as mentally retarded, BEH does not collect its own data nor does it analyze the extensive data collected by the Office for Civil Rights on this issue. Appendix 5. Thus, data which is essential both for enforcement of the law and for planning purposes is neither collected nor analyzed, and state education agencies are required to provide data which are not useful. Further, despite these longstanding and fundamental inadequacies in BEH's data collection, there is no indication at this time that the agency plans to improve the quality or expand the scope of the data it collects from the states.

A second major deficiency is BEH's failure to develop compliance "triggers" which would cause the agency to conduct a focused compliance review. One essential monitoring trigger consists of predetermined statistical measures of the existence of a problem, *i.e.*, statistical thresholds which indicate something systematic and inappropriate may be occurring. Agencies and courts often use such statistical triggers to place the burden on state and local agencies to come forward with much more extensive information than that collected initially to prove that the problematic triggering data do not show violations of law, but are really due to other factors affecting legitimate practices and procedures. BEH simply does not use such statistical triggers and subsequent in-depth analyses. Appendices 4 and 5. As a result, even when BEH does make a finding of noncompliance, its finding is often based on a few individual cases or on the subjective impressions of people interviewed when BEH conducts its on-site visit. 9/ BEH seldom documents the scope of a problem statewide or the underlying causes of the problem. 10/

17 BEH's on-site visits, Program Administrative Reviews (PARs), are discussed on p. 11 below.

10/ The findings of BEH's 1979 Pennsylvania PAR concerning state compliance with PL 94-142's IEP requirement provide an apt illustration. The BEH on-site review team notes:

> Most individuals interviewed expressed confidence that all IEPs have been completed and believed parent participation had been good. However, some teachers and parents expressed concern that some IEPs are being developed according to the availability of services.

Pennsylvania 1979 PAR. No overall data were collected by BEH to permit analysis of statewide compliance.

Third, although BEH claims to solicit the views of advocacy groups, monitoring teams often fail to contact active and knowledgeable advocacy organizations in each state. 11/ Even state Protection and Advocacy agencies, programs established in every state by federal law, report that they often are not contacted by BEH prior to an on-site visit. 12/ Complaints filed with BEH by advocacy groups often receive perfunctory responses 13/ or responses which rely solely on assurances BEH has received from the state education agency. 14/ Seldom do these complaints serve as a trigger for an in-depth independent investigation or compliance review by BEH to determine what is really happening. 15/

11/ Poll of Education Advocates Coalition members.

12/ Poll of Education Advocates Coalition members.

13/ For example, a complaint from the Education Law Center in Philadelphia, informing BEH that handicapped Hispanic children in Philadelphia were being denied needed services and were being placed in classes for the mentally retarded because of language difficulties, failed to trigger any investigation by BEH. In fact, BEH did not even respond to the complaint. Appendix 5.

14/ For example, when the Texas Protection and Advocacy system complained about lack of adequate directives from the Texas state education agency on surrogate parent appointments, BEH responded by informing the advocacy group that it had been "notified by the Texas Education Agency that an 'instruction package' had been prepared... We understand that this 'instruction package' contains the necessary guidance and direction." (Emphasis added.) Appendix 9. No BEH review of the adequacy of the state's surrogate parent procedures was conducted at the time.

15/ What is more, interviews with BEH staff reveal that BEH's own administrative system makes it extremely difficult for BEH to get to know the problems of a state well and to establish good contacts with parent and advocacy groups in that state. No one BEH official has an overview of problem areas in a particular state. Different officials review the state plan, visit the state and respond to complaints from a state. Correspondence from a state is kept in several separate files. State groups must communicate with several different officials who often do not share information with each other.

Fourth, BEH's on-site visits, called Program Administrative Reviews (PARs), are not reasonably calculated to uncover compliance problems. They are mechanistically conducted, according to schedule, only once every other year in each state. 16/ No matter how serious the compliance problems BEH may have been informed about and no matter how large the population, the geographic area or the number of school districts in the state, BEH's basic monitoring visit is limited to five days. BEH Report, p. 73. 17/ Most importantly, the Interview Guides, on which BEH staff rely in conducting their on-site reviews, consist largely of questions about state policies, laws and regulations. Rather than focusing the PAR team on where things are going wrong at the practical level, many of the questions parallel or duplicate BEH's prior review of state policies (BEH's Annual Program Plan, a state submission for funding) and focus on "paper" issues. 18/ BEH's written findings following its on-site visits also reflect the monitoring team's focus on policy rather than practice.

16/ Progress Toward a Free Appropriate Public Education, A Report to Congress, HEW, Office of Education, January 1979 (BEH Report), pp. 72-73. Three states (California, New York and Massachusetts) were visited in two consecutive years 1976-1978. Id., p. 75.

17/ BEH has recently instituted pre-visit meetings and interviews so that the five days of on-site time can be better scheduled. This is a step in the right direction. However, we have been informed by BEH staff that in order to staff these pre-visit interviews, BEH has cut back on the number of states *it* will visit this year. BEH's "verification review" visit is discussed below in the next section of this report.

18/ For example, the first question in each substantive area in the State Education Agency Interview Guide is "Have State level policies regarding [the area in question] been formally adopted?" The questionnaire goes on to ask whether these policies have been included in the state's Annual Program Plan! Surely these questions could be answered prior to the site visit.

For example, each PAR analyzes whether the state has in place a right to education policy and a full educational opportunity goal. Seldom does the team look beyond these to determine whether children are actually being served. 19/ Appendices 1 and 2. Lastly, very few local school districts and institutional programs are visited in the course of BEH monitoring trips to the states. 20/

2. BEH Has Failed to Take Adequate Steps to Enforce PL 94-142 and to Bring States Into Compliance With the Act.

In each of the 11 states studied by the Education Advocates Coalition, BEH has failed to work effectively with state education agencies to enforce PL 94-142 and to remedy the serious instances of noncompliance identified in this report. Enforcement requires the use of a mixture of techniques to achieve compliance, including delay or partial withholding of funds, use of cease and desist orders, tough negotiations with state agencies, development of explicit remedial

19/ The 1978 PAR prepared following BEH's on-site visit to the District of Columbia provides an example of this problem. Despite evidence presented in federal court litigation shortly before the BEH on-site visit, showing that children in D.C. institutions were not receiving educational services, the BEH monitoring team reported only that "the District APP [Annual Program Plan], as well as the lack of definitive policies expressed in other agency facilities (DHR), led the BEH team to question the level of dissemination, implementation and monitoring of other agency programs by the SEA." Quite obviously, no monitoring of actual services in any D.C. institution was done by the BEH team.

20/ House Committee on Education and Labor, Subcommittee on Select Education, Oversight Hearings on PL 94-142, 1979 (House Oversight Hearings), Testimony of Edwin W. Martin, Jr. .

orders and. provision of guidance and assistance to state agencies. BEH has not developed an effective enforcement approach.

BEH has not used all of the enforcement avenues available to it. Although Congress gave BEH authority to issue enforceable cease and desist orders more than a year ago, 21/ BEH has yet to initiate a single cease and desist proceeding. Moreover, BEH has taken the position that it will initiate a cease and desist proceeding only when a state demonstrates that it is "unwilling or unable to come into compliance." 22/ This nonsensical approach is completely at odds with the statutory mandate and effectively ensures that cease and desist authority will never be used.

Similarly, BEH has not taken advantage of the additional resources for monitoring and enforcement which would be available to it through cooperation with other federal enforcement agencies. Cooperation between BEH and the Office for Civil Rights has been minimal, 23/ despite OCR's data collection and complaint resolution activities in

21/ 20 U.S.C. § 1234c. The statute was enacted November 1, 1978 and became effective March 1, 1979.

22/ Explanation of BEH's cease and desist authority by BEH officials at National Association of State Directors of Special Education conference, November 1979 and National Protection and Advocacy System conference, February 1980.

23/ For example, BEH found New York in full compliance with child location and evaluation requirements during the same period of time as an OCR investigation found thousands of children on waiting lists and other evidence of substantial noncompliance in New York City. Appendix 1.

the education area. 24/ Further, BEH has undercut its own negotiating posture by repeatedly announcing to state education agency officials at public meetings that the states need not worry about tough BEH enforcement action. 25/

The only enforcement mechanism BEH has used is a delay in funding prior to a state's making required changes in the Annual Program Plan. This "power of the purse" over the states has been useful in the agency's paper compliance activities. The prior-approval mechanism is also critical to the effectiveness of any future BEH enforcement activities to achieve implementation of PL 94-142. Yet it appears that BEH is yielding to the pressure of some chief state school officers 26/ and is jettisoning even this enforcement tool

24/ Although cooperation and coordination between the two agencies is essential, OCR enforcement is not a substitute for BEH monitoring and enforcement. OCR activities consist predominantly of responses to individual complaints about individual school districts or programs. OCR does not have the responsibility to ensure statewide implementation of PL 94-142. BEH's statutory mandate is far more detailed and extensive in the area of elementary and secondary school special education; and, unlike OCR, BEH must conduct annual reviews of each state. Lastly, OCR's enforcement tools are more limited. BEH can require compliance activities as a pre-condition for PL 94-142 funding, it can issue cease and desist orders and it can withhold part of a state's grant (including that designated for administration); OCR can only negotiate voluntary compliance or initiate a total cut-off of federal funds.

25/ A BEH official told state education officials at a public hearing in Texas that BEH's enforcement powers amounted to little more than a "water pistol." Public Hearing in Texas, February 1980. Similar assurances that enforcement would not be used were made by a BEH compliance officer in workshops for the National Association of State Directors of Special Education, November 1979.

26/ See Testimony of Wilson Riles, Superintendent of Education of State of California, Senate Subcommittee on Handicapped, March 3, 1980.

by moving this year from an annual to a three-year state program plan approval process. 27/ By approving funding for a three-year period without requiring a detailed compliance review prior to releasing each year's funds to the states, BEH will lose a potentially powerful negotiation tool and will shift the burden of proof of noncompliance from state agencies to the federal government. In the face of the major noncompliance problems demonstrated in this report, such a step would be disastrous. Instead of a prompt and efficient process of reviewing detailed state compliance reports, with a strong "carrot" of federal funds in its pocket to encourage necessary changes in state practices, BEH would now find itself embroiled in endless administrative hearings with the states in an effort to cut off already approved funding.

Another major problem with BEH's present efforts is its unwillingness (or inability) to devise appropriate remedies for those problems it does uncover. As part of its PAR process, BEH often requests that a state take a "corrective action." The Education Advocates Coalition found that most "corrective actions" sought by BEH are little more than vague admonitions to do a better job. Some are one or two sentence restatements of the requirements of the law and regulations; 28/ others add a standard coda requiring the state

27/ BEH Report, p. 58.

'28/ For example, in its June 1978 Illinois PAR, BEH found Illinois to be out of compliance with the private school requirements of the law. The state was ordered to "initiate immediate action to insure that public school children placed in private schools are provided with all the benefits and protections provided by PL 94-142." No additional guidance was provided.

to establish policy, disseminate that policy and monitor the results. 29/ The Education Advocates Coalition's 11-state review revealed not a single instance where BEH developed the type of remedial order or compliance plan, which sets out specific steps and procedures to be followed to achieve compliance, commonly used both by courts and by other compliance agencies. 30/

BEH claims that as a policy matter it will not impose specific requirements on the state agencies. 31/ Even when a state clearly fails to meet its deadline for compliance, BEH often responds by extending the deadline and reiterating the Act's requirements over and over again in the hope that the state will come a little closer to compliance each time. 32/ BEH's failure to impose specific compliance remedies from the beginning results in a costly, time-consuming process which normally ends in BEH accepting much less than full compliance. 33/

29/ See, e.g., 1978 Florida PAR, §§ 8 and 14.

30/ Review of PARs and BEH correspondence in the Coalition's 11-state sample.

31/ Discussion by members of the Education Advocates Coalition with a number of BEH officials over the past six years.

32/ California has had a backlog of hundreds of students without completed IEPs since 1977. BEH corrective actions have periodically repeated the law's requirement to develop IEPs for all students, and extended the deadline for compliance. Appendix 7.

33/ For example, funds continued to flow to Texas during a two-year period despite school board veto over hearing officers' decisions — a clear violation of the law. BEH continued its game of back-and-forth with the state throughout the entire period. Appendix 10.

Further, BEH has been unwilling to employ innovative remedies to solve persistent problems. For example, despite repeated requests by advocacy groups that BEH address school districts' chronic failure to involve parents in the IEP process by requiring state agencies to expend a portion of their discretionary funds under PL 94-142 for parent/advocate training, BEH has steadfastly refused to do so. This enforcement failure is particularly serious because parental involvement is the backbone of PL 94-142.

After a "corrective action" is required, BEH attempts to verify whether the action has been taken and the problem corrected. However, BEH's follow-up of the corrective actions taken by each state is inadequate. Verification reviews are largely done on paper; few on-site verification visits are made. 34/ Many of the failures highlighted in the discussion of BEH's monitoring techniques plague BEH's verification efforts as well. 35/ Thus, BEH usually does not have enough information to know whether a problem has been remedied and must rely on mere assurances of compliance.

3. BEH Has Failed to Issue Clear and Timely Policies.

Since the issuance of the PL 94-142 regulations in 1977, parents, advocates and state education agencies have been seeking clarifying guidelines and policy directives from BEH on issues left vague by the

34/ Supplement to BEH Report, August 1979, p. 58.

35/ See pp. 7-12, supra.

regulations. But critically needed policies in the following areas have not been forthcoming: 36/

* non-discriminatory evaluation procedures and the use of IQ tests (Appendix 5)
* criteria for placement of children in the least restrictive setting (Appendix 4)
* components of the IEP (Appendix 7)
* procedures and standards for surrogate parent programs (Appendix 9)
* use of exclusion (suspensions and expulsions) to discipline handicapped children (Appendix 6)
* criteria for provision of more than 180 days of programming (Appendix 8)
* definition of the scope of related services and criteria for the development of interagency agreements to ensure provision of these services (Appendix 3) 37/

BEH's inaction has produced confusion for all involved at the state and local levels. As the appendices demonstrate, parents and

36/ Although BEH repeatedly claims to be developing these policies, delay has followed delay. More than five years after the enactment of PL 94-142, not a single one of these policies is in place.

37/ Apparently BEH has now completed a policy on Clean Intermittent Catheterization as a related service. This is a good first step, but clarification of the scope of related services is still needed. BEH has also "drafted" an IEP policy, "studied" surrogate parent issues and is "discussing" a discipline policy. But drafts, studies and discussions are not a substitute for the issuance of policies on matters for which the agency has had responsibility for a number of years.

advocates seeking the services related to these policy concerns have been thwarted by local and state education agencies, which have taken an illegally narrow view of their federal obligations. BEH delay in policy development has forced children and their parents into time-consuming and costly administrative and litigative challenges to obtain necessary services and procedural rights. While this may be to BEH's advantage because it avoids some tough (and perhaps politically unpopular) decisions, these delays work to the detriment of the children who are supposed to be the beneficiaries of PL 94-142.

BEH's development of clear policies is as important for technical assistance as it is for enforcement. For example, states need to know what constitutes an adequate surrogate parent program; they need guidance on how to select, train, fund, supervise and appoint surrogate parents. In order to achieve compliance with PL 94-142, BEH should take a leading role in the development of models and the provision of technical assistance on the hard issues. BEH is not presently doing so in the areas set forth above.

4. BEH Compliance Staff Is Inadequate Both in Numbers and in Training.

Remedying the shortcomings in BEH's monitoring and policy-making functions will require both the training of existing BEH staff and the assignment of additional staff, either by reallocation from other offices within the Department or by creation and funding of new slots. Although most of BEH's state plan and compliance personnel have a strong education background, they have little training or

expertise in monitoring and law enforcement skills. BEH must develop, as have other federal enforcement agencies, a detailed staff manual to guide its monitoring staff in identifying and adequately documenting noncompliance. Further, it must train its staff in these monitoring techniques. BEH need not start from scratch; other federal enforcement agencies can provide model materials and can be of assistance in conducting training programs.

Further, even with adequate training of existing staff, BEH must acquire additional compliance staff. BEH is currently overseeing PL 94-142's nearly $1 billion program with a staff of approximately 20 people. 38/ The Bureau has no regional office staff whatsoever, despite the nationwide scope of its program. In comparison, OCR has 1,770 employees charged with implementing similar rights provisions. OCR has offices both in Washington and in 10 regional offices around the country. Adequate oversight of a nationwide program affecting thousands of local school districts around the country simply cannot be done with current BEH staffing levels.

5. BEH Has Failed to Target Its Resources on the Most Serious Implementation Issues.

No matter how large and well-trained an agency's policy-making, monitoring and enforcement staff, targeting of resources is a necessary component of a plan of compliance activities. With a minuscule

38/ Education for the Handicapped Law Report, Vol. I at 10:21, 22.

staff to oversee compliance in the 50 states and territories, it is essential that BEH's enforcement efforts begin with the identification of those issues which affect the greatest number of children nationwide and result in the most serious harm to these children. This targeting must be dictated by the needs of handicapped children, not by the politics and administrative convenience of state and federal agencies.

BEH has failed to take this fundamental step. BEH's on-site Program Administrative Review (PAR) of education policies and practices in each state covers 30 major topics. 39/ No attempt is made to weight these topics in order of importance to handicapped children. Therefore, a cursory review takes the place of an in-depth analysis of state and local practices in selected problem areas. BEH misses the forest of noncompliance for the trees.

Rather than continuing to address a broad spectrum of issues inadequately and ineffectively, BEH must focus its compliance resources at this time on the 10 critical implementation problems identified in this report on pp. 4-5. As already discussed, these implementation problems are recognized by advocates working with parents throughout the country as the most serious, both in harm to individual children and in number of children affected. At meetings this past year held by BEH for representatives of teachers, parents, school administrators, advocates, professionals and others involved in

39/ BEH Report, p. 75.

the education of handicapped children, these 10 issues were raised again and again as issues of critical importance to the enforcement of the Act. 40/ Similarly, during the PL 94-142 oversight hearings held in both the House and the Senate this year, the testimony of witnesses and the questioning by the members of Congress focused predominantly on the 10 issues raised by the Education Advocates Coalition. 41/

Next Steps

1. The Education Advocates Coalition would like to meet with the Secretary of the Department of Education to obtain a firm commitment that:

a. BEH will become a compliance agency with a strong chief administrator committed to compliance activities;

b. necessary and appropriate policies will be developed and issued within three months in each of the seven policy areas set forth on p. 18 of this report;

40/ See, for example, minutes of the Washington, D.C. meeting of 60 national associations held on June 27, 1979.

41/ House Oversight Hearings, testimony of: Edwin W. Martin, Jr., National Association for Retarded Citizens, Office for Civil Rights, Epilepsy Foundation of American, Children's Defense Fund, American Foundation for the Blind and others. See also statements and questions from the members of the committee.

Senate Labor and Public Welfare Committee, Subcommittee on the Handicapped, Oversight Hearings on PL 94-142 (Senate Oversight Hearings), 1979, testimony of Susan Kendrick, Sonya Mawhorter, Sylvia Evans, Donna Carpenter, Norma Bork, Jane Wolfe, Keith Smith, Roger Brown, Robert Scanlon, Jose Pagan, Hector Alvarez. See also statements and questions from the members of the subcommittee.

c. sufficient data will be gathered from the states during the 1980-81 school year to determine the status of compliance in each of the 10 areas of major noncompliance set forth on pp. 4-5 of this report. This data-gathering plan, to be specified and approved within three months, will also include specific arrangements to share data and coordinate monitoring and enforcement activities with other offices within the Department, including the Office for Civil Rights;

d. statistical and other techniques for analyzing the data collected will be included in the data-gathering plan, with clear "triggers" specified which will cause in-depth compliance reviews in each area;

e. a comprehensive enforcement and monitoring plan, linked to the collection and analysis of the data, will be developed and will include timelines, procedures and criteria for conduct of on-site visits and use of cease and desist orders, partial withholding of funds and other enforcement powers. This plan, to be developed and approved within four months, will include a procedure by which the federal government must determine that a state is operating in compliance with PL 94-142 before funds are released each year;

f. at least for the next several years, enforcement activities will be targeted primarily on the 10 noncompliance areas set forth on pp. 4-5 of this report;

g. sufficient staff will be assigned (either by reallocation from other agencies within the Department or by creation and funding of new positions) and trained within six months to carry out an effective compliance program to implement PL 94-142.

2. The Education Advocates Coalition intends to seek congressional oversight hearings to present the findings of its report.

APPENDIX 1

Tens of Thousands of Children Who Have Been Identified as Handicapped and Referred for Evaluation and Services Are Either on Waiting Lists or Ignored Altogether by School Officials for Months or Even Years.

Excessive delays in the evaluation and placement of children identified as handicapped have been acknowledged to be a widespread problem by the Bureau of Education for the Handicapped (BEH). In his testimony at the October 24, 1979, House Oversight Hearings, the head of BEH informed Congress that approximately 15,000 children in New York City alone are awaiting evaluation or placement. Some have been waiting for as long as two years. Further, he explained that the length of the waiting lists has discouraged teachers from recommending children for needed evaluations. 1/

The problem of excessive delays in evaluation and placement has been well-documented in New York City. Between 1973 and 1978, the New York State Commission of Education issued four directives about waiting lists for evaluation and placement in special education classes. The Office for Civil Rights (OCR) conducted a further compliance review which ended with a finding of noncompliance in the spring of 1978. In December 1979, a federal court, finding thousands of children still awaiting services, held that the local and state education agencies were out of compliance with PL 94-142. 2/

Similar problems have also been identified over the past several years in Washington, D.C. Evidence presented to the federal court in Mills v. Board of Education, 348 F. Supp. 866 (D.D.C. 1972), demonstrates problems of excessive delay in evaluation and placement from at least 1976 to the present. The court-appointed special master reported in 1976 that children identified as handicapped, did not receive a prompt evaluation and an individualized education plan, but were shunted instead into a lengthy "pre-referral" system. This

1/ House Committee on Education and Labor, Subcommittee on Select Education, Oversight Hearings on PL 94-142, September-October 1979 (House Oversight Hearings), Testimony of Edwin W. Martin, Jr.

2/ Jose P. v. Ambach, No. 79-C-270 (E.D.N.Y., Dec. 14, 1979).

pre-referral system substantially delayed, often for up to a year or more, the evaluation to which these children were entitled. In 1977, affidavits filed with the federal court again documented delays of well over a year following a request for an evaluation. Further, a report prepared by the Division of Special Education of the D.C. Public Schools admitted that 91.6% of handicapped children identified during the 1978-79 school year were not being assessed and placed within the timelines established by the federal court. Most recently, extensive testimony in January 1980 once again pointed out children who had been waiting for evaluation and/or placement for periods ranging up to two years. 3/

BEH

BEH does not collect data on either the number of children on waiting lists or on the length of the delays faced by these children. 4/ One of the tables which states are required to complete and submit to BEH does seek the number of handicapped children in the state "not receiving an education." 5/ However, states report in this table the number of handicapped children they believe would be identified through continued child find efforts. In other words, this is based upon the expected prevalence rate of handicapping conditions in the population. Children on waiting lists are not separately tabulated. 6/

Although the New York State education agency has known since 1973 that large numbers of children in New York City are subjected to long delays in evaluation and placement, BEH has taken little action to remedy this problem. BEH's March 1978 Program Administrative Review (PAR) 7/ of New York State's special education services made no mention whatsoever of any problem with delays in evaluation and placement. The state was found to be in full compliance

3/ Mills v. Board of Education of D.C, supra, Motion for Contempt and Enforcement, No. 1939-71, filed December 1979.

4/ When asked by Congressman Simon for national figures on the number of children awaiting evaluation and placement and on the average time period they are required to wait, the director of BEH reported that those figures were not available. House Oversight Hearings, Testimony of Edwin W. Martin, Jr.

5/ Table 3, Data Requirements, Directions and Tables, OE Form 9055, 7/79, OMB No. 51-R 1195.

6/ Progress Toward a Free Appropriate Public Education, A Report to Congress, HEW, Office of Education, January 1979, at 164.

7/ This is BEH's term for its on-site monitoring visit to a state.

with the child identification, location and evaluation requirements of PL 94-142. Further, adequate policies were found to be in place, promising a free appropriate education to all.

BEH's PAR was conducted at the same time as the OCR compliance review which led to findings of noncompliance and to an OCR remedial agreement with New York City in June 1978. 8/ BEH's findings of full compliance in March 1978 graphically illustrate the ineptness of BEH monitoring and the lack of coordination and cooperation between OCR and BEH.

Neither has BEH assisted the State of New York in bringing the City into compliance. According to New York State Commissioner of Education Gordon M. Ambach, BEH undercut the State's effort to enforce PL 94-142 requirements in New York City. In testimony before the Senate Oversight Committee in October 1979, Ambach explained that BEH released additional funds to New York City at a time when the State was withholding the City's funds in an attempt to negotiate a compliance agreement.

> As Public Law 94-142 requires, New York State withheld flow-through funds from the New York City School district when the City was out of compliance. The State and the City worked to develop a plan to bring the City into compliance with the many requirements of Public Law 94-142. While this planning was in progress, the USOE Bureau of Education of the Handicapped awarded a direct discretionary grant under PL 94-142 to the non-compliant City. As our Department attempted to enforce compliance with the law, the federal agency responsible for compliance granted Public Law 94-142 monies to the non-compliant district. The New York State Education Department was not consulted — or even informed --

8/ OCR enforcement is not a substitute for BEH monitoring and enforcement. OCR activities consist predominantly of responses to individual complaints about individual school districts or programs (although the action described in the text arose out of a rare compliance review). OCR does not have the responsibility to ensure statewide implementation of PL 94-142. BEH's statutory mandate is far more detailed and extensive in the area of elementary and secondary school special education; and, unlike OCR, BEH must conduct <u>annual</u> reviews of each state. Lastly, OCR's enforcement tools are more limited. BEH can require compliance activities as a pre-condition for PL 94-142 funding, it can issue cease and desist orders, and it can withhold any part of a state's grant (including the part allowed for state administrative costs); OCR can only negotiate voluntary compliance or initiate the drastic step of cutting off all federal funds received by the program from all sources.

> about this direct funding. The grant was discovered during discussions with the City Board of Education.

Testimony of Gordon M. Ambach, Senate Labor and Public Welfare Committee, Subcommittee on the Handicapped, Oversight Hearings on PL 94-142, October 3, 1979.

A similar pattern is characteristic of BEH's monitoring and enforcement efforts in Washington, D.C. Despite pending court proceedings focusing in part on excessive delays in evaluation and placement, BEH's May 1978 PAR in the District makes no findings regarding delay nor does it order any corrective action. The PAR finds the District's identification, location and evaluation procedures to be "consistent with Federal requirements." 9/

9/ Not until a much publicized hearing in federal court in January 1980, did BEH attempt to obtain adequate information on the District's illegal practices in this area.

APPENDIX 2

Institutionalized Children and Children in Other Placements Outside Their Natural Homes Are Routinely Denied Adequate and Appropriate Services or Excluded From Educational Services Altogether.

Lack of necessary educational services for institutionalized children is a serious problem nationwide. Preliminary results of the 1978-79 Special Purpose Facilities Civil Rights Survey collected by the Office for Civil Rights reveal that at least 6,000 children in residential institutions receive no education of any kind. BEH's efforts to address both the problem of lack of services and of inadequacy of services available to institutionalized children in the District of Columbia, Tennessee, Colorado and Texas are examined in this appendix. In some of these states, BEH's monitoring efforts have failed to identify the problem. Even where BEH is aware of a state's failure to provide institutionalized children a free appropriate public education, its enforcement actions have been wanting.

In Washington, D.C, evidence presented in two federal court cases in 1976, 1977 and again in 1980 reveals that children in D.C. institutions were not then and are not now receiving adequate educational services. In a deposition in Evans v. Washington, No. 76-0293 (D.D.C. 1976), the Superintendent of Forest Haven, D.C.'s institution for the mentally retarded, testified that Forest Haven simply "does not meet minimal [education] standards." (Deposition of Roland Queene, Nov. 4, 1976, p. 16.) In Mills v. Board of Education of the District of Columbia, 348 F. Supp. 866 (D.D.C. 1972), evidence submitted to the court in 1977 and again in 1980 discloses inadequate educational services in a number of D.C. institutions. For example, at St. Elizabeths Hospital, an institution operated by the federal government, handicapped children, many of whom remain hospitalized for a full school year or longer, were deprived of an education altogether or served by an inadequate program at the hospital. According to affidavits presented to the court, D.C. public schools refused to accept responsibility for serving these children. At Glen Dale Hospital, an institution operated by the D.C. government, only 7 out of 42 handicapped children received any educational services whatsoever in 1977. At the D.C. facility for detained juveniles, handicapped children were not evaluated, Individualized Education Programs were not prepared, and PL 94-142 procedures were not followed.

The BEH monitoring team which visited Washington in 1978 failed to identify any problem with the education of handicapped children in D.C. institutions, despite the extensive evidence submitted to the federal court shortly before the visit showing that institutionalized children were not receiving educational services. The 1978 Program Administrative Review (PAR) 1/ reports only that "the District [Annual Program Plan], as well as the lack of definitive policies expressed in other agency facilities (DHR), led the BEH team to question the level of dissemination, implementation and monitoring of other agency programs by the SEA." The on-site monitoring team quite clearly never looked beyond policy statements and policy dissemination to see whether, in practice, children in D.C. institutions were receiving an education.

Two years after BEH's on-site visit, a January 1980 hearing in the Mills case revealed hundreds of children in District institutions continuing to be denied appropriate educational services. According to this testimony, as many as 250 residents in the District's complex for detained juveniles have not been adequately assessed as to their possible need for special education programs. Those services provided are inadequate; classes, overcrowded and understaffed; and teaching materials, not readily available. While housing more than 40 school-aged severely handicapped children, Glen Dale Hospital provides only two special education teachers and only three children receive any special training related to their handicaps whatsoever. Thirty-one of the 40 children typically receive less than one hour of programming per day, although they require all-day schooling. Thus, little or no improvement in services to these children occurred between 1977 and 1980. And no BEH enforcement activities have been initiated. 2/

Similar problems were found in Tennessee. The May 1979 Program Evaluation of Education of Handicapped Children and Youth by the Tennessee Comptroller of the Treasury (Comptroller's Evaluation) reported that the State's Division of Education of the Handicapped did not provide adequate program assistance to state institutions and agencies offering special education services to children. Of particular import was the failure of the Division to coordinate services with the Department of Corrections and with the Department of Mental Health and Mental Retardation. The Comptroller reported that "the Division neither formulated procedures nor established a monitoring system for local school systems to use in evaluating and determining if children in private institutions were, indeed, receiving appropriate educational programs and services." The audit revealed that some private insti-

1/ See appendix 1, note 7.

2/ Following extensive publicity in the Mills case, BEH is reviewing evidence submitted to the federal courts in Mills as part of its 1980 PAR process.

tutions serving handicapped children offered few if any, quality education programs. 3/

After visiting institutions operated by the Department of Corrections, the Comptroller's office found inadequate identification and assessment procedures, no provision for multidisciplinary team meetings or IEPs, and lack of adequate communication between the institutions and the Department's central office staff. Accordingly, incarcerated handicapped youths remained largely unidentified and/or inappropriately served.

Although BEH's June 1979 on-site review in Tennessee did discover problems with educational services for some institutionalized children, required corrective actions were nominal. BEH basically admonished the state to provide these children a free appropriate education. No specific recommendations as to how to accomplish this were provided, nor remedies ordered. This non-directive approach fails to put the state on notice of what steps are expected to achieve compliance and results in excessive delay in services to children as one minimal response after another is put forward.

The Legal Center for Handicapped Citizens, Colorado's designated Protection and Advocacy System for developmentally disabled persons, is representing six handicapped children at the state home and training school at Ridge, Colorado (Ridge State School), a state-run institution for the mentally retarded, administered by an agency other than the state educational agency. These six children, and more than 300 similarly situated, are educated in an unaccredited program on the institution grounds. Many receive less than two hours of education a day. Requests for educational services made by these children during this school year to the local education agency where their parents reside, to the local education agency where the institution is located, and finally to the state education agency failed to identify any agency which would accept responsibility for meeting their educational needs.

In a letter dated July 23, 1979, the Legal Center asked BEH to require Colorado to adopt interagency agreements sufficient to place the responsibility on the state education agency for insuring that these children receive an adequate education. The Legal Center's request to BEH explained that such agreements "have been in the mill for about two years and have yet to be signed." Further, the Legal Center asked that BEH require the Colorado state education agency (SEA) to supplement its Annual Program Plan with assurances regarding the implementation of PL 94-142 provisions for institutionalized children. The SEA had earlier rejected the proposal "on the basis that the needs of these children would hopefully be considered in the interagency agreements which will be attempted to be consummated

during FY 1980." Finally, the Legal Center requested that BEH not approve the State Plan until the needs of institutionalized children were clearly addressed. Although the Colorado Annual Program Plan submitted to BEH made no provision for the education of children in institutions and, in fact, stated that "attempts will be made to facilitate the development of administrative agreements with all agencies providing education to handicapped children during fiscal year 1980" (emphasis added), BEH approved the plan and allowed federal funds to flow to the state. 4/

In Texas, the state's failure to provide adequate educational services for its institutionalized handicapped children has been a documented problem since 1969. In September 1978 the Commissioner of the Texas Department of Mental Health and Mental Retardation reported to a Texas senate study committee on special education that the funds spent for educational programs for institutionalized children in Texas are 1/3 of the per capita amount spent on each handicapped child in public school. The Commissioner concluded that "Funding... has not been adequate to provide a comprehensive special education program to meet the needs of every resident as mandated by...PL 94-142." 5/

Despite these major problems in Texas institutions, BEH's 1978 PAR failed to report on the inadequate services these children were receiving. In fact, the PAR does not contain any reference to any aspect of educational programming for institutionalized children. 6/ At a hearing held in February 1980, preparatory to BEH's 1980 on-site visit, a teacher at one of the State's mental retardation institutions testified that children at the institution receive on the average less than half a day of education. Thus, BEH has done nothing at all to redress the continued denial of services to institutionalized Texas children.

Affidavits presented to the Texas State Education agency in January 1980 documented that over 200 mentally retarded and multiply

4/ After extensive negotiations between the Legal Center and the Colorado state education agency, interagency agreements were finally signed in January 1980. It remains to be seen whether these agreements are adequate to insure the provision of appropriate educational services to children.

5/ Letter to Senator Nelson from John Kavanagh, Commissioner, Texas Department of Mental Health and Mental Retardation, September 26, 1978, p. 2.

6/ Typically, the extent of the 1978 PAR inquiry was limited to state procedures, i.e., whether the Texas Education Agency had in effect any procedure for monitoring institutions and state-operated programs. It did not.

handicapped children living in intermediate care facilities were not receiving any education whatsoever. At the BEH hearing prior to its on-site visit to Texas in February 1980, BEH compliance officials refused to schedule monitoring activities designed to determine the scope and cause of this problem. Further, BEH scheduled no monitoring to determine if other children in similar settings outside their homes might also be denied educational services in Texas.

In response to a visit to BEH in Washington, D.C. by the director of Texas' Advocacy, Inc., the head of the BEH Division of Aid to States acknowledged the seriousness of the problem and promised that BEH would do what it could to monitor this problem. The official explained, however, that it was too late to reschedule the on-site visit to include intermediate care facilities and other similar placements. 7/

BEH's 1980 PAR for Texas has not yet been released. A follow-up check of one intermediate care facility in March 1980 by the Texas advocacy group revealed that children were still not receiving an education.

In sum, the problem is massive. BEH's on-site review schedule permits visits to only a few institutions at most in any state. 8/ Correctional facilities for children are not monitored at all. 9/ Further, the PL 94-142 requirement that SEAs assume responsibility for the education of all handicapped children in the states is not enforced by BEH even when monitoring provides evidence of clear noncompliance.

7/ Although the efforts of this BEH official are commendable, this example illustrates the need for a systematic approach to monitoring by BEH.

8/ Testimony of Edwin W. Martin, Jr., House Oversight Hearings, October 24, 1979.

9/ Interview with a BEH compliance officer. The names of BEH officials interviewed are not included in this report. The Advocates Coalition does have this information on file.

APPENDIX 3

Handicapped Children Are Frequently Denied Related Services, Such as Physical Therapy, Occupational Therapy, School Health Services and Transportation, Essential to Enable Them to Benefit From Special Education.

PL 94-142 requires that "related services" be provided whenever necessary to assist handicapped children in benefiting from special educational services. 1/ Because many of the related services have not historically been provided by school districts and because provision of these services now requires either some expense for districts or coordination with other public and private sector agencies which are available to provide the services, two major problems have arisen:

1. school districts and states improperly narrow the definition of related services so as to exclude many essential and legally required services from children's individualized education programs (IEPs),

2. school districts and states fail to work out sufficient interagency agreements to purchase or arrange for the provision of related services by other public or private agencies; thus, in school districts which do not provide the services directly themselves, many children "fall through the cracks" and do not get needed services.

While examples of this situation are not hard to find, composite data on the number of children needing, but not receiving, related services is hard to pin down, especially since BEH does not collect or analyze such data. And, since at this point many parents do not know of their right to related services, they do not contact advocacy groups for help in sufficient numbers to allow statistical counts. We

1/ The regulations implementing PL 94-142 describe related services as developmental, corrective and other supportive services including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services. Also included are transportation, school health services, social work in schools, and parent counseling and training. 45 CFR 121a. 13. As the comment to this section makes clear, the listed services are "not exhaustive and may include other developmental, corrective, or supportive services...if they are required to assist a handicapped child to benefit from special education."

can say, however, that this is a problem of large dimension since the states reported to BEH in their 1977-78 and 1978-79 Annual Program Plans a tremendous need for personnel in such related services as occupational therapy, school health, social work, counseling, etc. 2/ For example, the Mississippi Annual Program Plans (APPs) for 1977-78 and 1978-79 reveal, inter alia, a 44% shortfall in diagnostic staff, 45% shortfall in psychologists, and 70% shortfall in school social workers. To make up this shortfall, states and local districts must purchase private services or arrange for free services from other public agencies. This is where the two barriers described above result in the denial of services to large numbers of children.

Several examples will illustrate this problem and BEH's failure both to enforce clear policies and to require implementation of interagency agreements.

In Illinois a special board was established by state statutes for the purpose of approving the costs of private special education facilities for state reimbursement. 3/ This body, known as the Governor's Purchased Care Review Board ("GPCRB"), issued a regulation which forbids state and local education agencies from paying private schools for the cost of social work, psychological counseling and therapy, and recreation services, regardless of whether such services are mandated by a child's IEP. 4/ Especially for more seriously handicapped children, purchase of these services from the private sector is essential since many school districts do not offer them. This illegal state policy has resulted in the denial of related services to hundreds of emotionally disturbed and other handicapped children who have been sent by their districts to private schools or institutions at public expense 5/ and whose parents are too poor to pay for the needed services.

2/ While Tables 2A and 2B reflect the number of personnel needed to service children aged 0-21, and thus are overbroad for our purposes (0-3 year-olds are not mandated under the Act), the shortfall is so immense in most states that we can conclude large service gaps exist. Data Requirements, Directions and Tables, OE Form 9055, 7/79, OMB No. 51-R 1195. It is typical of BEH to collect information in this manner, preventing an accurate assessment of what is really being provided, or not provided, for children covered by the Act. See discussion of data-collection in Appendix 4.

3/ 122 Ill. Rev. Stat. § 14-7.02.

4/ GPCRB rule 3.21, October 1979, Illinois Register, pp. 211-215; effective October 5, 1979; issued initially as an emergency rule in May 1979.

5/ PL 94-142 provides that children who are in need of specialized or residential programs which school districts cannot (or do not) provide, must be provided such programs at public expense.

Although" this regulation has been in effect for nearly one year and BEH has known of its existence from the outset through complaints by the Better Government Association, BEH has taken no action to enforce the related services requirements in Illinois. This is particularly disheartening since <u>local school officials</u> have specifically complained to BEH about the actions of the GPCRB and asked for assistance. 6/ As a result of BEH inaction, a lawsuit had to be filed by Illinois parents and students on December 21, 1979, challenging this regulation. 7/

Lack of clear BEH policy defining required school health services has resulted in the denial of other needed children's services. In 1978, two Mississippi school districts refused to diaper or provide Clean Intermittent Catheterization (CIC) for children who were incontinent due to physical handicaps. These services were necessary to allow these children to attend a public school. Although the BEH monitoring team was informed of this problem by advocates in Mississippi, BEH's 1978 Mississippi Program Administrative Review (PAR) failed to address the problem at all. Only after litigation had been filed by a Mississippi advocacy group did Mississippi change its policy and include both diapering and CIC as health services. Similarly, parents have had to resort to litigation in Texas in an effort to obtain CIC for their handicapped child. Although a copy of the parents' complaint to the state education agency was sent to BEH, BEH took no enforcement action, nor did it prepare a policy defining CIC as a health service. 8/

Serious inadequacies exist even in areas in which policy is clear, such as transportation services for handicapped children. 9/ In Tennessee, handicapped children in three counties (Davidson, Wilson and Maury) spend up to five hours a day on buses going to and from

6/ See, for example, letter of Vernon Frazee, Executive Director of Niles Township Department of Special Education, dated August 30, 1979, to Jerry Vlasak, Chief Administrative Review Section, State Policy and Administrative Review Branch, BEH. ("At the very least, I would think you would conduct an emergency site visit to review our files, consult with our staff, meet our parents____Personally, I do not see how you can continue to accept various apologies and excuses from the Illinois Office of Education on this issue. The truth of the matter is that the problem lies totally within the Office of the Governor by virtue of his control of the Purchased Care Review Board.")

7/ <u>Gary B. v. Cronin</u>, No. 79-C-5883 (N.D. 111., filed Dec. 21, 1979).

8/ BEH has finally prepared a draft policy on CIC. However, this policy has not yet been released. Further, the draft addresses only CIC and does not provide a comprehensive definition of school health services.

9/ Transportation is expressly listed as a "related service" in PL 94-142.

schools in order to obtain necessary special education services. Although PL 94-142 clearly lists transportation as a related service, these Tennessee children's transportation needs are not being met. In fact, transportation is not even addressed in their IEPs.

BEH's 1979 Tennessee PAR confirms that "[i]n some sites various related services such as appropriate transportation, occupational therapy and physical therapy were not being made available." However, the corrective actions required by BEH to resolve this problem offer no guidance to the state on the steps to be taken. The PAR simply requires state agency monitoring and generally asserts:

> The State must take steps to resolve the remaining problems of facilities, personnel and services (including all related services) to insure that all handicapped children within the state's mandated ages are provided a free appropriate public education.

Without BEH enforcement, the state has failed to take these steps, and inadequate physical and occupational therapy and long and circuitous bus rides remain a problem in Tennessee.

In California, a significant proportion of the 10,000 handicapped children in need of occupational therapy and physical therapy (OT/PT) are being denied appropriate services. The Center for Independent Living has documented that 130 out of 150 children for whom specific complaints were filed with the California Department of Education and/or BEH are still not receiving OT/PT services in accordance with PL 94-142.

This situation arises out of both policy and interagency failings. For a period of time California illegally ruled that OT/PT provided by the Crippled Children's Service (CCS) were "medical services" (which are specifically excluded from the federal definition of "related services") and could not be included in IEPs. This effectively foreclosed provision of OT/PT since CCS was providing the vast majority of all OT/PT services in California. While that policy has now been reversed, the state education agency (SEA) has as a matter of practice (as opposed to policy), still left the provision of OT/PT largely to CCS, a division of the State Health Department which has very narrow eligibility requirements, incompatible with PL 94-142. Further, the SEA has failed to fulfill its written commitment to BEH that parents would be informed of their children's OT/PT rights and that OT/PT evaluations and services would be provided according to prescribed timelines.

Under intense pressure from California parents, advocates and state legislators, members of Congress and the Children's Defense Fund, BEH has begun to play an appropriate role in mandating that California <u>policies</u> be in compliance with PL 94-142. However, BEH

has hot yet followed through on the state's implementation of those policies; and, until that happens, children continue to be denied services.

APPENDIX 4

Many Handicapped Children Remain Unnecessarily Segregated From Other Children in Special Schools and Classes for the Handicapped.

PL 94-142 clearly requires that handicapped children be educated in the least restrictive environment:

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

20 U.S.C. § 1412(5)(B). Yet evidence demonstrates that local education agencies (LEAs) are failing to provide placements for children in the least restrictive environments and that both state education agencies (SEAs) and BEH have failed to develop policies, monitoring, procedures and enforcement activities to ensure compliance with the Least Restrictive Environment (hereinafter LRE) requirement. Preliminary results of the 1978-79 Special Purpose Facilities Civil Rights Survey conducted by the federal Office for Civil Rights reveal that at least 71,500 children in institutions and special schools are in totally segregated programs of unspecified quality and quantity. An uncounted number of other handicapped children are in segregated settings in local school districts.

A number of lawsuits around the country further document the serious problem of segregation and LRE noncompliance. Not surprisingly, minority children are most heavily affected. In Lora v. Board of Education of City of New York, 456 F. Supp. 1211 (E.D.N.Y. 1978), plaintiffs presented the court with numerical evidence of the separation from the "mainstream" of public education of large numbers of minority students placed in New York City's special schools for the so-called emotionally handicapped (i.e., those children with alleged behavior problems). The court found the segregation to be illegal. On the basis of the evidence submitted to it, the court concluded:

> an in-house training program [for educators] to obtain bias-free consistency in approach and policy with respect to mainstreaming appears to be necessary. Disparity in percentages of mainstreaming among the various day schools and lack of knowledge of any policy by principals and others reflects absence of control by top administrators.

Id. at 1294 (emphasis added).

In the 1978 PAR 1/ for New York, BEH confirmed the existence of LRE problems, but focused solely on the state education agency's failure to monitor compliance of LEAs and state-operated programs. However, BEH neither mandated nor recommended specific policies, data-collection, methods of analyzing the data, nor remedial actions to bring New York into compliance with the LRE requirement. This has had disastrous consequences. Advocates for Children in New York reported to the Education Advocates Coalition that as of the end of 1979, 95% of the children in special education classes in New York City were in self-contained classes, segregated from nonhandicapped children.

A recent lawsuit filed in Vermont further demonstrates BEH's inaction and the attendant consequences for children. In Clark v. Withey, No. 75-158 (D. Vt., filed July 29, 1979), plaintiff handicapped children challenge their placement in a segregated residential training school for handicapped children. Of the approximately 100 children residing in the school, 9 are now bused to self-contained classrooms in integrated public schools, 40 are bused to separate, completely segregated facilities, and 50 remain on the grounds at all times — and the fact that any children attend even self-contained programs located in a public school is only a consequence of plaintiffs' negotiation efforts. The problem exists, plaintiffs maintain, in spite of specific state policy commitments to educate handicapped children with nonhandicapped children to the maximum extent possible.

The Vermont Developmental Disabilities Advocacy Project, counsel for the plaintiffs in the Clark case, contacted BEH about the problems in implementing PL 94-142's LRE requirement and explained that much of the problem stemmed from the state's failure to supply adequate supplemental services for children placed in less restrictive environments (see letter from Whit Smith to Cindy Chambers, 1/24/79). BEH responded weakly by recommending in the 1979 PAR that

> The SEA should encourage LEAs to be able to insure that a child will benefit from a less restrictive environment and will be provided adequate service before movement from one setting to a less restrictive setting takes place.

This hardly addressed the issue and failed to remedy the problem. As a result, the children have turned from the federal agency to the federal judiciary for help.

The denial of placement in the least restrictive environment and BEH's failure to adequately respond to the problem are also documented in Mississippi. Mattie T. v. Holladay, No. DC-75-31-S (N.D. Miss., July 28, 1977) was filed against officials of the Mississippi Department of Education and seven local school districts on behalf of all handicapped children in the state whose educational rights were being violated. In granting plaintiffs' motion for summary judgment in 1977, the court specifically held that the state had violated plaintiffs' rights by denying them "educational programs which are in normal school settings with non-handicapped children to the maximum extent appropriate, pursuant to 20 U.S.C. § 1413(a)(13)(B) [now codified at § 1412(5)(B)]."

Before and after the filing of the Mattie T. case, the attorney for the plaintiffs sought BEH's assistance in addressing the extensive segregation in Mississippi. BEH was repeatedly provided documentation from discovery in the case which demonstrated that handicapped children were placed in trailers outside the regular school building or in totally separate buildings in districts throughout the state. In addition, large state institutions failed to provide resident children the opportunity to attend day programs in regular public schools. As a result of these efforts, BEH's PARs over the years acknowledge the LRE violations in Mississippi, but:

(1) No specific remedies or monitoring approaches to LRE violations were proposed by BEH in the last five years;

(2) Significant state policy and monitoring changes occurred only in the February 22, 1979 consent decree entered in the Mattie T. case;

(3) Documents recently submitted to the plaintiffs by the state indicate that segregated programs persist in very large numbers in Mississippi; and

(4) BEH has no plan to attack this situation for the children in Mississippi.

As these examples from New York, Vermont and Mississippi reveal, BEH's track record on LRE is a poor one, indeed. BEH's problem begins with its method of collecting LRE data from the states. The instrument created for this purpose, "Table 4 - Least Restrictive Environment," 2/ completely fails to accomplish its purpose. BEH requires districts to report to the states, who in turn report to BEH, each child's special education placement in one of four categories.

2/ Data Requirements, Direction and Tables, OE Form 9055, 7/79/ OMB No. 51-R 1195.

However, the definitions of the different categories mix programs with widely varying degrees of segregation and fail to adequately specify the nature of the programs described. For example, Category B is "Total Receiving Special Education in Separate Class." The children to be included within this count are those in

> 1) Self-contained Special Classrooms with Part-time Instruction in a Regular Class,
>
> 2) Self-contained Special Class Full-Time on a Regular School Campus, and
>
> 3) Self-contained Special Class in a Special Public Day School Facility.

Definitions for Table 4, Least Restrictive Environment, APP Amendment for Part B of PL 94-142. No useful information is communicated for purposes of evaluating compliance with the least restrictive environment requirement because BEH has combined together in the same category children in self-contained special education classes in segregated schools and children receiving part-time instruction in regular classes in regular schools.

The confusion in the data collection can easily be eliminated by creating rational categories for the collection of data. The plaintiffs in the Mattie T. case created such a system and, in fact', discussed it with BEH. Now the State of Mississippi is collecting information on children in segregated settings by the revised categories set forth in the Mattie T. consent decree. Mentally retarded pupils are reported as being either in

(1) Regular classes
(2) Resourced by ADA Definition, 3/ or
(3) Self-contained classrooms.

With such useful information, the data can then be evaluated to determine the degree of compliance and focus on problem LEAs or SEAs. BEH has not altered its definitions, however.

3/ Clarification is provided in the consent decree definition:

> "Resource room services" shall mean those services which supplement, but do not replace, the basic core academic program received by the student in a regular class and shall include such activities as tutoring and special skill development, relating to the academic needs of the student and necessary to assist in regular instructional activities.

Section 13(a), Consent Decree, Mattie T. v. Holladay, supra.

BEH must also develop a method of analyzing the data that will trigger in-depth reviews of local practices. The <u>Mattie T.</u> consent decree created such a mechanism:

> The Department [of Education] shall initiate the procedures set forth in this paragraph whenever it has reason to believe that a local school district is not placing handicapped children in the least restrictive environment. The Department shall have reason to believe this is occurring whenever the Department determines from the information collected pursuant to paragraph 13 of this decree or from other sources that 1) the number of handicapped children being educated with non-handicapped children is "too low" [defined as more than 20% of all EMR students in self-contained classes], 2) [special education] is being provided in a segregated or isolated location within the regular school building, or 3) [special education] is being provided in a structure separate from the regular school building.

Section 13, id. At such a time as the district exceeds these qualitative and quantative triggers, the burden shifts to the district to justify in writing to the Department the validity of its practice. Following its justification, a series of checks and examinations is set into motion. The decree also specified general policies to guide the state in evaluating the LEAs' justifications. 4/

The advantage and necessity of such a system for BEH is evident given the nature of the problem and its scope. At this time BEH collects useless data in irrational categories, does not have any analytic approach with which to assess compliance, and lacks adequate policies on which to base remedies.

4/ The policies specified in the <u>Mattie T.</u> decree are the result of a negotiated process; thus they are not as strong as they could be to insure adequate guidance to the LEAs and clear evaluation criteria for the SEA.

APPENDIX 5

Black Children Are Misclassified and Inappropriately Placed in Classes for the "Educable Mentally Retarded" at a Rate Over Three Times That of White Children. Other Minorities Are Frequently Misclassified as Well.

On October 24, 1979, OCR testified before the House Subcommittee on Select Education that on the basis of the Elementary and Secondary School Survey for 1976-77, and the preliminary unedited 1978-79 school survey, there are significant differences in special education enrollment patterns on the basis of student race and ethnicity. The rate of participation for blacks in Educable Mentally Retarded (EMR) classes was 3.4 times greater than the rate for whites in 1976-77 and 3.5 times greater according to the 1978-79 survey. In both surveys, the black rates of participation in trainable mentally retarded programs (TMR) and severely emotionally disturbed (SED) programs were twice and 1.5 times, respectively, the rates for whites.

OCR further testified that "school districts have placed children with English language difficulties or cultural differences in special education programs without properly evaluating their skills." Between FY 1975 and FY 1979, OCR investigated 148 school districts with an overrepresentation of minority students in special education classes and found that the special education placements could not be justified educationally. They further found that "many of the students assigned to Educable Mentally Retarded (EMR) classes had never received an examination to detect visual or auditory problems. In some cases, assignment was based, in part, on outdated I.Q. scores. Also many students were assigned to EMR classes even though their IQ test scores were above the EMR range." EMR classes house by far the greatest proportion of black children in special education.

These national data indicate that a very serious problem is occurring on a substantial scale. Large numbers of black and other minority children are getting pushed out of regular education and placed in EMR and other "special" classes which are not appropriate to their learning needs. In addition, these children are made to suffer the stigma of being labeled mentally retarded, perhaps for the rest of their lives. Lastly, they are denied other fundamental educational and constitutional rights because many EMR classes are segregated, isolated, and have few resources. Black children with learning problems get pushed into EMR classes. The OCR data also show that white children with learning problems are served in "learning

disabilities" classes at rates far exceeding blacks. These classes are more integrated and higher-resource than EMR classes.

These findings are fully corroborated by a number of court cases arising in a range of states.

In Mississippi, the United States District Court for the Northern District ruled that Mississippi had violated the children's federal rights by misclassifying thousands of black children as mentally retarded and placing them in inappropriate and often segregated EMR classes. Mattie T. v. Holladay, No. DC-75-31-S (N.D. Miss., July 28, 1977). The data provided to the court showed that black children were placed in EMR classes at a rate over three times that of white children. Conversely, white children were placed in higher resource and more integrated "specific learning disabilities" classes at a rate more than double that for black children. The court-approved consent decree, entered on February 22, 1979, requires a significant reduction in the disparities by 1982, establishes a means of targeting state monitoring and technical assistance on the districts with the worst disparities, and sets up a process for development of new placement procedures.

A team of court-mandated experts in Mattie T. filed a written report in August 1979 stating that the racial disparities were occurring at three stages of the EMR placement process: (a) teacher referrals of children for EMR classes, (b) the evaluation and IQ testing that follows referral, and (c) program placement. But the state has yet to implement remedial steps at each of these stages and the experts' report and the defendants' most recent compliance report indicate that the racial disparities and mis classification are continuing and, in fact, getting worse.

Similarly, in Larry P. v. Riles, No. C-71-2270 RFP (N.D. Cal., October 11, 1979), a federal court ruled that black children were being misclassified as EMR in California's school districts. The court affirmed its 1974 preliminary ruling and found that the rate of enrollment of black children in classes for the educable mentally retarded is two to four times that of nonblack students in the districts which account for 80% of California's black population. Based on this evidence, the court concluded that there was less than a one in a million chance that the over-enrollment of blacks and the under-enrollment of whites in California EMR classes would have resulted from a color blind placement system. This held true even if an unwarranted assumption were made that the incidence of mild retardation was 15% higher for blacks.

The court in Larry P. focused on the IQ tests used in the evaluation process and determined they were a major reason for the racial disparity. These tests were then prohibited because they produce a racially discriminatory impact and have not been validated for the purposes of making EMR placement decisions.

In New York, a federal court struck down New York City's procedures for placing minority children in segregated special day schools for so-called emotionally handicapped children, citing the "striking racial disparity" in placement in these schools over the past 15 years. Lora v. Board of Education of City of New York, 456 F. Supp. 1211 (E.D.N.Y. 1978). As in Mattie T., the Lora court recognized that the discrimination occurs at several stages: referral, evaluation and re-evaluation.

In Chicago, minority students and parents filed a lawsuit in 1974 against the Chicago Board of Education charging violations similar to those found in the cases discussed above. Parents in Action on Special Education v. Hannon, No. 74-C-3586 (E.D. I11. 1974). Although the court has not yet issued its decision, the statistical evidence mirrors that in Mississippi, California and the nation. Black students are placed in classes for the educable mentally retarded at almost three times the rate of white students citywide.

BEH

Although discriminatory treatment of minority students in special education has been a recognized problem for a great many years, BEH has not conducted an investigation into possible remedies, such as appropriate evaluation methods, teacher training procedures or other policy guidance. BEH's monitoring and enforcement has been equally inadequate.

BEH neither collects statistical data on the race or ethnic composition of special education classes, nor does it routinely use the data collected by OCR. 1/ Further, BEH has refused to adopt necessary methods of data analysis, such as OCR's policy of shifting the burden to the state to justify significant statistical disparities in the racial or ethnic composition of special education classes. Instead, so long as general PL 94-142 procedures are followed, BEH will not require a state to justify or explain statistics showing large racial disproportions. Some examples of BEH's responses to problems documented in Pennsylvania, California, Illinois, New York and Mississippi graphically illustrate the lack of adequate monitoring, guidance and enforcement by BEH.

1. Despite a Pennsylvania complaint of system-wide discrimination against handicapped Hispanic students filed with BEH by the Education Law Center in March 1979, BEH's July 1979 Program Administrative Review (PAR) 2/ for Pennsylvania "found appropriate eval-

1/ Data Requirements, Directions and Tables, OE Form 9055, 7/79, OMB No. 51-R 1195; Testimony of BEH and OCR officials at House Oversight Hearing, Oct. 24, 1979.

2/ See appendix 1, note 7.

uation designs in all applications that were reviewed." It further found that Pennsylvania's policy for protection in evaluation procedures appeared consistent with federal requirements. In addition, BEH found Pennsylvania's system of personnel development to be consistent with federal requirements and ordered no corrections nor made recommendations, despite the fact that on February 21, 1978, the Philadelphia school district reported having only three bilingual psychologists, eight bilingual special education teachers, two bilingual aides and one bilingual speech therapist for approximately 800 handicapped Hispanic children. BEH has never even responded to the Education Law Center's complaint.

2. In a similar vein, the California PAR dated January 6, 1978, found that the state had established policies and procedures in compliance with all federal statutory and regulatory requirements for protection in evaluation procedures. The PAR notes, however, that some respondents had expressed concern that the state education agency (SEA) had not monitored the implementation of its evaluation policies and procedures and that an insufficient number of evaluators had been hired to adequately assess children whose primary language was other than English.

"Corrective actions," lacking any specificity, required the SEA to "monitor all applicable agencies to review procedures which will determine the level of compliance with all provisions of this requirement." BEH also "recommended" (1) that inservice training be provided to assure that nondiscriminatory assessment procedures are used and (2) that the SEA review the needs assessment to determine whether additional personnel are necessary to comply.

Nowhere was the gross disparity documented in Larry P. addressed. Despite the Larry P. data, BEH reported after its on-site verification visit conducted March 27-29, 1979, that no further corrective actions were required as regards California's "protections in evaluation procedures." Judge Broderick's 100-page indictment of the California system over the past 10 years came down just seven months later.

3. In November 1977, BEH officials were informed by advocacy groups of the misclassification of black children in Chicago. As in California, BEH's June 1978 PAR for Illinois was silent concerning disparate statistics and the legality of racially discriminatory testing instruments for placement of students in classes for the mentally retarded.

4. The March 1978 New York PAR does not mention the misclassification problem. Evaluation protections are found to be in full compliance with the law. The ruling in the Lora case was made the same year.

5. 'In Mississippi," BEH has been continually informed of the problems relating to misclassification by the plaintiffs' attorneys and by the court's record and findings in the Mattie T. case. Both before and after the court's July 28, 1977 finding of the state's violation of the evaluation procedures mandated in PL 94-142, the plaintiffs' attorneys had provided BEH factual material filed with the court. Yet in a December 1977 letter, a BEH compliance officer found no problems with protection in evaluation procedures in his on-site verification visit to Mississippi. A July 1978 letter from another BEH compliance officer notes only minor technical problems with Mississippi's evaluation procedures. In the January 18, 1979 PAR, BEH notes no problem with misclassification in spite of the fact that the state's reports to the Mattie T. court indicate that the disparities in black and white EMR rates persist unabated.

In short, BEH has shut its eyes to the misclassification of minority children for many years. Repeated requests for assistance from advocates and plaintiffs' attorneys in a number of cases have been ignored. 3/ Critical time during which BEH could have utilized its considerable research resources to propose remedies has been lost. BEH has no policies, monitoring procedures or remedies to address this complex manifestation of racial discrimination in the schools. BEH merely requires states to show they have used more than one assessment instrument. The validity of the instruments and the relative weight assigned to tests are not monitored. Enormous over- and under-representation of minority children in particular programs are not deemed violative of PL 94-142. Alternative criteria for identifying discrimination have not been established. BEH is starting from scratch in this critical area.

3/ While BEH's very recent interest in this problem is welcomed, it must be noted that the agency's activities picked up only after serious criticism was leveled at BEH by the House Subcommittee on Select Education in oversight hearings in October 1979.

APPENDIX 6

Handicapped Children Are Illegally Suspended or Expelled From School for Periods Ranging up to Nearly Two Years.

School districts throughout the country are suspending and expelling handicapped children in violation of these children's right under PL 94-142 to an appropriate public education in the least restrictive setting. Many children are denied educational services for substantial periods of time, in some cases ranging up to two years. Further, school districts are expelling handicapped children without affording the children any of the procedural and substantive protections of PL 94-142. The number of cases being litigated in the courts concerning expulsion of handicapped children provides some indication of the scope of the problem.

On July 18, 1977, Donnie R., a 13-year-old child with emotional, social and mental handicaps filed suit against officials of Lexington County School District No. 2, South Carolina, challenging his exclusion from adequate educational services. He contended that his expulsion arose from the school's failure to address his handicapping conditions. Donnie R. v. Wood, No. 77-1360 (D.S.C., August 22, 1977). A consent decree was entered requiring defendants to evaluate Donnie immediately to determine his educational needs and then to provide those services deemed necessary. The school was prohibited from expelling Donnie anymore. It agreed to treat any behavior problems programmatically.

On January 4, 1978, the U.S. District Court in Connecticut issued a preliminary injunction to enjoin the Danbury Board of Education from expelling plaintiff, a high-school student with learning disabilities. Stuart v. Nappi, 443 F. Supp. 1235 (D. Conn. 1978). The court ruled that PL 94-142 guaranteed public educational programs in the least restrictive setting to all handicapped children and that the Act's substantive and procedural protections took precedence over local disciplinary rules. Thus, the court ruled out expulsions of handicapped children for any reason and limited suspensions to situations of emergency or danger and even then for no more than 10 days. The court ruled that these children's behavior must be addressed through appropriate educational and other programs, not exclusion.

On June 15, 1979, the U.S. District Court for the Southern District of Florida issued a preliminary injunction ordering, inter alia, that seven mentally handicapped children who had "irretrievably lost" almost two years of education due to expulsion for alleged misconduct be provided the educational services and procedural rights required

by PL 94-142. S-l v. Turlington, C.C. No. 78-8020-CW-CA WLB (1979)

The Tennessee State Planning Office, a member of the Education Advocates Coalition, reported on an emotionally disturbed child with behavior disorders whose parents had been trying to get an appropriate program designed for him for over a year. He had been suspended from school numerous times and finally was expelled. At the expulsion hearing a local special education teacher informed the Board of Education that it was contrary to federal law to expel a student who was certified as handicapped. The local agency agreed the child was handicapped but expelled him anyway. He was expelled on January 1, 1979 and was out of school for the remainder of the school year.

The report prepared in August 1979 for the federal court by a court-mandated team of experts in Mattie T. v. Holladay, C.A. No. DC-75-31-S (N.D. Miss., Feb. 22, 1979), reveals that

> expelled and suspended children [in Mississippi] are considered almost universally as discipline problems, and little (if any) consideration is given to a possible etiology related to special education, and which might help change the behavior producing the discipline problem. There is no monitoring or 'flagging' system in place anywhere that might bring these children to the attention of school authorities as anything other than behavior problems. Thus, while under suspension or expulsion, the child is in a kind of 'limbo' or 'holding pattern' not only with respect to his or her total educational program, but also with respect to the possibility of receiving special help. Evidence was also found of a deliberate encouragement of these children to leave school when they get older, to get them out of the system to which they have become such a burden.

In June 1978, the U.S. District Court for the Southern District of Texas concluded that the Friendswood Independent School District violated plaintiffs' federal rights by repeatedly disciplining the handicapped child for behavior caused by his handicap. When he was hospitalized for treatment, the school dropped him from its rolls and refused to provide any further education. The court enjoined this illegal exclusion. Howard S. v. Friendswood Independent School District, 454 F. Supp. 634 (1978).

BEH

Despite the widespread confusion on the part of both parents and schools regarding suspensions and expulsions of handicapped

children, BEH has issued no policy statement on the issue. 1/ None of BEH's Annual Program Plan and Program Administrative Review checklists mention suspensions or expulsions. Accordingly, BEH has not monitored the extent of the problem, nor has it examined state and local policies for dealing with behavior difficulties.

Further, BEH has not even required state education agencies to develop a statewide policy. Thus each local school district throughout the country has been left free to develop its own policies and procedures.

Without the enforcement of a clear policy on suspension and expulsions of handicapped students, local school systems will continue to deal with behavior problems in any manner they choose and many children will be denied a free appropriate public education under the guise of "discipline."

1/ In late September 1979, the Office for Civil Rights and BEH were working on draft policy interpretations on suspensions and expulsions of handicapped children from elementary and secondary schools. As of this writing, no final policy interpretation has been issued.

APPENDIX 7

<u>Many Children Still Have Not Received an Individual Evaluation or an Individualized Education Program (IEP). Often Canned IEPs Provide a Substitute for Truly Individualized Planning.</u>

Widespread noncompliance with the IEP requirements of PL 94-142 has been noted by advocates, parent groups, state agencies, and BEH itself. Perhaps the most blatant example is the continued failure of many states even to prepare IEPs for many handicapped children. New York City's Advocates for Children reports that many of the 500 handicapped students it represents each year do not have an IEP in place, have an incomplete IEP, or have an IEP written without parental participation. Similarly, the draft report of the BEH on-site verification visit conducted in March 1979 in California reported that many children receiving special education had no IEPs. A San Francisco district publication entitled "Special Education - District Instructional and Support Services: A Status Report," March 1979, reported a backlog of some 900 handicapped students in the San Francisco area without completed IEPs. The Bay Area Coalition for the Handicapped of Saratoga, California, informed the Education Advocates Coalition that the most significant problems with placements arise because of the absence of adequate IEPs.

Quite often the IEPs which are prepared are improperly developed, designed, and implemented. The Tennessee Comptroller's Report on Education of Handicapped Children and Youth, May 1979 (Comptroller's Report) concluded that

> Multidisciplinary teams designed as leadership bodies for placing handicapped children in appropriate educational settings were, in many instances, just approving boards. These activities were often performed only to comply with the law, thus not always aiding in meaningful planning and placement. Identification and verification procedures for children and youth with handicapping conditions were also weak.. .certification of handicapping conditions by an appropriate specialist was evident only in a few local school systems. In some systems, children were classified as having learning problems without considering other conditions. Also, adequate justification for program placement was not evident.

A common cause for the noted inadequacies is the states' failure to ensure that qualified and competent personnel administer the assessment instruments. A 1979 study prepared for the federal court by a team of experts in Mattie T. v. Holladay, No. DC 75-31-S (N.D. Miss., July 28, 1977), found only minimal participation by school psychologists in the assessment of children referred for placement.

In addition to the inadequacies found in the evaluation of children, the Mississippi expert team noted that IEPs were often "canned" and were too confusing to be useful to teaching staff. According to the Mattie T. experts' report, the IEP in Mississippi is not

> a statement of the child's program but the document in which a series of computer generated behaviors and performances are written down (by the number to save time) so that any future use of the IEP document will require an accompanying book to decode it. Furthermore, a review of more than 200 IEPs indicated that the vast majority of them were no more than an exercise in repetition.

The problems noted by the Mississippi court-appointed expert team were long-standing problems. Many had been noted by BEH itself in 1977.

The Tennessee Comptroller's Report also made findings concerning problems in the assessment of children similar to those made by the Mississippi expert team. Wide variations among districts throughout Tennessee were found in the quality of evaluations and the qualifications of staff who perform evaluations.

BEH

A review of BEH's monitoring efforts shows that some of the serious problems with IEPs noted here have not been identified by the BEH monitoring process. For example, although the BEH 1978 Program Administrative Review (PAR) for New York State noted that there were "a few cases of no IEPs on children," it concluded that "New York's level of implementation is so high that it is difficult to say that the state is not in compliance with this requirement." 1/ Large numbers of children in New York City without IEPs, with incomplete or inadequate IEPs were not noted. Although BEH did order corrective actions in New York (New York was ordered to undertake monitoring activities and have all IEPs in place by June 30, 1978), the lack of documentation of the problem and the high praise offered to the state in the face of findings of noncompliance, under-

1/ Section 6, 1978 New York PAR.

score the inadequacy of BEH's effort. Further, New York State policy does not require the preparation of an IEP until 30 days after the child is placed in a special education placement, a clear violation of the PL 94-142 requirement that an IEP be developed before placement. Although this policy was clearly admitted in New York's 1979 Annual Program Plan submission to BEH, the Plan was approved by BEH!

Even when major compliance problems have been laid at BEH's feet, as by the Tennessee Comptroller's Report, BEH's "corrective actions" merely place the burden of compliance on the state education agency without delineating any specific remedies. See Tennessee PAR (June 6, 1979). This allows the state to make numerous minor modifications in policies and practices and results in great delay in achieving actual implementation.

Similarly, BEH's own letters and reports document that the problems with IEPs in Mississippi have been going on for years with little BEH response. In a November 1977 letter, a BEH state plan officer wrote the Superintendent of Education for Mississippi about serious problems in the state's IEP policy. Eight months later, the same BEH state plan officer again described multiple problems with the state's IEP procedures. Several months after that, in a meeting with the plaintiffs' attorney in Mattie T., the head of BEH promised that the agency would begin working with Mississippi immediately to train sufficient personnel to evaluate children and write IEPs because of the seriousness of the inadequacies in IEPs throughout the State. No such activities have occurred. Again in the January 1979 Mississippi PAR, BEH found that in half of the sites visited, the IEPs examined were incomplete. While BEH has documented problems with Mississippi state policies and practices in regard to IEPs over the years since PL 94-142 was implemented, it has failed to enforce the requirements of the law, either by mandating specific remedies or by providing extensive technical assistance. Thus, children in Mississippi continue to be denied adequate individualized education programs.

The California PAR of December 5-9, 1977, likewise found that the local education agencies (LEAs) did not comply with federal requirements. The SEA was required to notify all LEAs and state-operated programs no later than February 15, 1978, of their responsibility to meet IEP requirements. The draft report of the on-site verification visit conducted March 27-29, 1979, indicated that the SEA notified all agencies, but as noted above, a district publication in San Francisco dated March 5, 1979, reported a backlog of 900 handicapped students without completed IEPs. Moreover, the BEH verification crew found that short-term objectives were often developed after the children entered special education, and only occasionally in conjunction with the parents. Despite these serious violations of law, BEH once again provided neither a clear, specific remedy, guidance, nor technical assistance on how California's problems were to be solved.

Indeed, BEH "corrective actions" merely reiterated the regulations, requiring proof by October 1979 that actions had been taken. Our information indicates the problems remain unresolved.

The problems with IEPs throughout the country are exacerbated by the absence of BEH policies on IEPs. BEH stated in DAS Bulletin #5 that when it issued final regulations, it chose "to adopt substantially verbatim the statutory language on IEP content and to delete additional details that were included in the proposed rules." (The proposed rules required each IEP to include a statement of specific educational services needed by the child and contained additional details beyond the wording of the statute.) The reasons given for the deletions included a belief that "these requirements were unnecessarily burdensome," the fear "that agencies could be faced with a deluge of inappropriate needs for which they would be bound to provide services," and a concern "that the additional details could have a negative effect on the implementation of the IEP requirement." Thus, BEH decided "to allow some experience and research on how agencies implement the IEP requirement before deciding whether more detailed regulations would be needed."

Experience has shown that this approach to the regulations has caused considerable confusion about the IEP process and content and has prompted perhaps the most common complaint of teachers, state education agencies, local school districts and parents alike. 2/ Yet virtually no clarification has come from BEH. For example, in response to a January 1978 inquiry questioning whether the "IEP content standards" required both a statement of the present level of a child's educational performance and a set of carefully defined short-term instructional objectives, BEH responded with the general pronouncement that the contents should be "as complete as required by the child's needs." Similarly, in DAS Bulletin #9, April 19, 1978, BEH merely stated that evaluations must be made by a multidisciplinary team or group of persons including at least one teacher or other specialist with knowledge of the area of the suspected disability. This statement simply repeats the requirements of the Act without clarification as to how the multi-disciplinary team should be constituted for reviewing the needs of children with specific types of disabilities. 3/

2/ See testimony in House and Senate Oversight Hearings.

3/ BEH has clarified one important issue, however. In DAS Bulletin #5, BEH explained that IEPs must be written to address each child's needs without regard to the current availability of services.

BEH has also written a draft policy paper on IEPs (Nov. 5, 1979), which has not yet come out in final form. While this policy provides some needed guidance, it suffers from two typical BEH

[Footnote 3 continued on next page.]

The states continue to violate PL 94-142 IEP requirements. Though BEH repeatedly finds widespread noncompliance, it has yet to issue a more detailed policy statement, require extensive teacher training, specify particular steps essential to remedy the situation, or provide (or require the states to provide) widespread assistance to parents to help them address the problem. Instead, BEH orders uninstructive, insufficient corrective actions, revising the timelines more than the actions. It has failed to enforce compliance.

[Footnote 3 continued.]

problems. It addresses issues superficially and it fails to recognize the relationship between policy, actual implementation and enforcement. Thus, despite all the evidence of the IEP process running roughshod over parents, the draft policy states:

> NOTE: No major policy clarification issues concerning parent participation have been raised over the past two years. Instead, the concerns have dealt with (1) enforcement (e.g., parents being asked to sign IEPs that were written before the fact) or (2) implementation (e.g., parents needing more knowledge about their rights and more training in how to be active participants at IEP meetings).

These problems must be addressed by policies tied to proven noncompliance. The purpose of policies is to help resolve noncompliance problems by explaining what the law expects of school personnel and by proposing real remedies whenever possible. Policies must do more than merely general principles that barely go beyond the regulations.

The draft policy leaves the following issues unresolved:

a. interagency responsibilities for IEPs when children are institutionalized by other than the LEA,
b. proper methods to determine the adequacy of the IEP at the end of each year,
c. information to be provided parents before the IEP meeting,
d. proper methods for establishing a child's "short-term goals,"
e. timelines for evaluation and subsequent implementation of IEPs,
f. qualifications of substitutes for evaluation team members at the IEP meeting.

Lastly, two of the policy proposals are wrong. First, the decision on whether a child may participate in the IEP meeting must be the parents', not the school's. Second, the draft policy paper suggests that schools may avoid providing services needed by a child simply by changing the IEP. This policy undermines the fundamental premise of PL 94-142 — that the school must provide a program designed to meet the child's needs.

APPENDIX 8

Severely Handicapped Children Are Denied Education in Excess of the 180-day School Year, Even When Such Service Is Essential to the Child's Education.

BEH has failed to enunciate a policy regarding the provision of year-round educational services to children who require them.

The issue of year-round education (or more specifically, education in excess of 180 days per year) has been dealt with extensively by the Education Law Center in Philadelphia, Pennsylvania, which obtained a federal court order requiring the Pennsylvania Department of Education to provide a free, appropriate program of special education and related services in excess of 180 days per year for handicapped plaintiffs in Armstrong v. Kline, 476 F. Supp. 583 (E.D. Pa. 1979).

Prior to the lawsuit, a hearing examiner appointed by the Pennsylvania Department of Education had determined that 12-month education was necessary to prevent regression in a named plaintiff because of his serious handicapping condition. The Pennsylvania Department of Education and the Philadelphia school district issued a policy refusing to fund programs beyond 180 days, and hearing officers were denied authority by the State to order it to do so. Resort to BEH proved futile, as BEH failed to respond to requests from both the plaintiffs and the defendant state education agency for an interpretive ruling on whether federal statutory law requires the provision of continuous education to a handicapped child who needs such services.

In court, expert testimony led to the factual conclusion that some severely and profoundly impaired (SPI) children and some severely emotionally disturbed (SED) children lose a significant amount of their skills during breaks in their programs. Judge Newcomer further found that:

> interruptions in programming, because of regression and the length of time it takes to regain lost skills and behaviors, render it impossible or unlikely that they [some SPI and SED children] will attain that state of self-sufficiency that they could otherwise reasonably be expected to reach.

In short, the court concluded that if some children are not provided special education in excess of 180 days, it is unlikely that they will reach the otherwise possible goal of living outside an institution.

Though neither PL 94-142 nor the regulations specifically mention education in excess of 180 days, Judge Newcomer confirmed that it is required under the Act for those handicapped children who need such services. Examining both the regulations requiring free appropriate public education and the legislative history behind PL 94-142, the court concluded that the purpose of the Act was to achieve equal educational opportunity and to allow handicapped children to achieve, at a minimum, self-sufficiency and independence from caretakers. Since special education is defined as "specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child," 45 C.F.R. 121a. 14, and the unique needs that must be met include those allowing students to become self-sufficient, the 180-day limit was ruled violative of the Act.

Litigation or administrative proceedings dealing with an extended school year are currently pending in Oregon, Georgia, Texas, Michigan, Ohio, Mississippi, and South Carolina. In addition, litigation is contemplated in California. Children in Virginia, Maine, the District of Columbia, Maryland, Illinois, Nebraska and Oklahoma have also reported difficulty in obtaining needed services in excess of 180 days per year. Further, the Education Law Center in Philadelphia, a group providing assistance on the issue of education in excess of 180 days per year, reports that parents, local education agencies, and advocacy groups from 29 states have contacted it since September of 1979.

The absence of a clear federal policy that schools must provide education in excess of 180 days to handicapped children who need such services has resulted in confusion and the denial of needed services. In California, the problem was publicized in "The Enterprise," a Riverside newspaper. In response to advocates for 12-month education programs for disabled persons, the Superintendent of the Riverside Unified School District was quoted as saying, " I will not be recommending [the inclusion of] summer school in IEPs until such time as <u>the law allows</u> that we shall include summer programs in IEPs." 1/ (Emphasis added.)

Inland Legal Services of California, in an attempt to clarify California policy regarding year-round education for handicapped children, sent a letter to Wilson Riles, Superintendent of Public Instruction, California Department of Education, on June 25, 1979, requesting that the state education agency issue a directive to all superintendents responsible for the education of handicapped children, stating that superintendents should comply with the California Administrative Code, §§ 3106.5, 6(e) and 3306, 6(e) which require that extended school year service, when needed, be documented in the IEP.

On August 3, 1979, the staff attorney from the Department of Education finally responded to the request.

> I agreed that your concern should be addressed by a statewide communication from Wilson Riles to the district and county superintendents. I drafted a letter making clear the requirement that extended year services should be included in the IEP where appropriate.
>
> Unfortunately, the letter was not sent due to difficulties in process ~ not because anyone disagreed with it. At this point it seems a useless gesture....

BEH

That BEH is aware of the problem is well documented. As noted in Armstrong, both plaintiffs and defendants sought an interpretive ruling on the issue from BEH prior to bringing suit. BEH replied that a 12-month education policy was in draft form and would be issued soon.

On January 25, 1979, Janet Stotland, counsel in Armstrong, wrote to BEH in regard to Armstrong, informing the Bureau that Education Law Center had been receiving calls on a daily basis from attorneys in the above-mentioned states who were litigating or preparing to litigate the issue. Stotland offered to provide any additional information needed to expedite a policy directive in hopes of mitigating the time and expenses of litigation.

On March 6, 1979, BEH finally replied. After expressing appreciation for her concern, the letter explained, "as you are aware, we are working co-jointly with the Office for Civil Rights (OCR) in developing a policy interpretation on this major topic for release in the very near future."

On May 24, 1979, BEH responded to a mother's inquiry about the school district's responsibility to provide a summer-school program for her daughter as follows:

> To date, the Bureau of Education for the Handicapped has not fully developed a policy statement on the issue of extended school year programming for handicapped children in relation to the provisions of the Education of the Handicapped Act____

> Until such time as the Bureau has adopted a position on this issue it will not be possible for us to comment on the provision of any summer educational activities.
>
> I am sorry that we are unable to assist you now; we do thank you for your inquiry.

On January 18, 1980 the Office for Civil Rights issued a policy interpretation pursuant to § 504 of the Rehabilitation Act of 1973, requiring school districts to provide summer programs for handicapped children who need such programs. 2/

Despite a federal court interpretation of PL 94-142 and an OCR interpretation of § 504 of the Rehabilitation Act of 1973, BEH has yet to issue and disseminate to the states a policy statement on this important issue, thus necessitating a state-by-state battle in the courts. 3/

2/ New Hampshire letter of January 18, 1980.

3/ It is ironic that BEH has been unable to issue and disseminate this policy when the Justice Department, supposedly representing HEW, has filed a brief in the Third Circuit appeal of Armstrong v. Kline, supra. The brief takes the position that PL 94-142 requires that education in excess of 180 days per year be provided to those handicapped children who need such services.

APPENDIX 9

Most States Have No System for Identifying Children in Need of "Surrogate Parents" (i.e., PL 94-142 Advocates) or for Appointing Surrogate Parents; Thus, Many Children in Out-of-Home Placements Go Unrepresented in the PL 94-142 Process and Are Thereby Effectively Stripped of Their Rights.

Because so many of the protections of PL 94-142 depend on adequate representation, PL 94-142 provides for the appointment of surrogate parents to represent children who are without parents or who are placed out of their homes. In the regulations implementing PL 94-142, public agencies are charged with the duty of developing "a method (1) for determining whether a child needs a surrogate parent and (2) for assigning a surrogate parent to the child." 45 C.F.R. § 121a.514(b). Examination of state plans, correspondence between BEH and public agencies, and correspondence between BEH and local advocates reveals a failure on the part of state and local education agencies to develop adequate methods for setting up a surrogate parent program. Consequently, large numbers of children go unrepresented. The vast majority of children affected are wards of the state in foster care homes or institutions.

BEH accepts any policy by the state education agencies (SEAs) relating to identification of children in need of surrogates and assignment of surrogates and relies on state assurances of compliance with both federal and state law. No investigation is made as to the actual existence of a program of surrogates and no statistical data is collected to assess the adequacy of state implementation efforts. For example, BEH does not ask the states to report on the number of surrogate parents appointed.

The Child Advocacy Project of the Better Government Association reports that Illinois has assigned only four surrogate parents in the years since PL 94-142 went into effect. Advocates for Children, a New York City organization which represents more than 500 handicapped children annually, reports that to its knowledge only two surrogate parents have been appointed in New York City since the passage of PL 94-142. The court-appointed consultants in Mattie T. v. Holladay reported that of the two state schools which they visited, neither "institution had any kind of surrogate program." Report, p. 21. Further, the Mattie T. expert team concluded:

> There is currently no provision in Mississippi for finding, training, and assigning surrogate parents for handicapped children who are without advocates in the special education process.

General Finding #13, Findings and Recommendations of the court-appointed consultants in Mattie T. v. Holladay, No. DC-75-31-S (N.D. Miss., Feb. 22, 1979), p. 21.

When a Texas advocacy group wrote BEH concerning problems with the SEA's failure to give local education agencies (LEAs) adequate guidance on the provision of surrogate parents, BEH responded:

> We have been notified by the Texas Education Agency that an "instructions package" has been prepared for Local Education Agency use. We understand that this "instruction package" contains the necessary guidance and direction for the provision of surrogate parents. Further we understand that all Local Education Agencies are required to follow the requirements of Bulletin #711 which is presently being revised and will include the requirements for surrogate parents.

Letter from Charles G. Cordova, State Plan Officer, BEH, to Dr. James. E. Payne, President, Texas Association for Retarded Citizens, 3/7/78. BEH's reliance on its "understanding" of Texas education agency activities is no doubt frustrating to groups who are dealing with first-hand knowledge of Texas education agency's practices. But even worse than the frustrations for groups dealing with BEH are the consequences for children. Advocacy, Inc., an Austin-based group, reported:

> In at least one case which has come before the Texas Education Agency the local school district when asked to appoint a surrogate parent did not know what a surrogate parent is, had never been told by the Texas Education Agency that surrogate parents must be appointed in certain circumstances, and refused to make an appointment.

Review and Comments Regarding TEA Rule 226.71.05 Hearing Concerning Handicapped Students by Advocacy, Inc., 10/17/78 for M. L. Brockett, Commissioner, TEA.

The surrogate parent provisions of Colorado's Annual Program Plan submitted to BEH refer only to Colorado statutes governing the appointment of guardians ad litem, a procedure in which a court appoints a guardian for the purpose of protecting a child's rights in a particular case pending before it. The plan provides no explanation as to how this procedure is to be adapted to the PL 94-142

procedure, which occurs completely independently of any pending litigation. The Legal Center reports that state officials have informed them that the state is awaiting further direction and guidance from BEH to clarify its obligation under the procedures mandated by PL 94-142. In the meantime, Colorado children who need surrogate parents remain unrepresented in the PL 94-142 process.

The absence of surrogate parents in states across the country is caused by a lack of understanding on the part of SEAs and LEAs in their efforts to implement PL 94-142, as evidenced by their questions for clarification and the vagueness of their state plans. BEH needs to provide leadership and guidance in clear policy statements. 1/ As acknowledged by BEH, in a July 1979 letter from a BEH state plan officer to a Tennessee state official, "there are still many unanswered questions in the area of surrogate parents as required by 94-142." BEH has commissioned several studies of the problem, but efforts to study the problem are not enough when the study fails to be translated into useful information for SEAs and LEAs.

1/ While BEH policy letters issued in November 1978 and October 1979 clearly state that an employee of a public agency which is involved in the education or care of the child is ineligible to be a surrogate parent, the agency has failed to develop directives which would instruct a state in the appropriate process for identifying children in need of surrogate parents and for appointing and training surrogate parents. These are the critical issues.

APPENDIX 10

Inadequate Notice of Rights Under PL 94-142 and Unnecessary Procedural Hurdles Are Often Used To Discourage Parents From Fully Participating in Evaluation and Placement Decisions for Their Children.

PL 94-142 provides for the participation of the parents of a handicapped child in the development of their child's education program. The active involvement of a child's parents plays a crucial role, ensuring that the child obtains adequate and appropriate services and safeguarding the child's rights under PL 94-142. State education agencies (SEAs) are violating the mandates of PL 94-142 by not giving proper prior notice to parents; not informing parents of the procedures by which they can participate in or challenge educational decisions concerning their children; and not adhering to required timelines.

PL 94-142 has two separate requirements for "prior notice" to be given to parents of handicapped children. First, 45 C.F.R. § 121a.345 requires the school to notify parents prior to their child's IEP meeting and to take steps to encourage their attendance and participation. Second, 45 C.F.R. § 121a.504 and 45 C.F.R. § 121a.505 require the school to notify parents of their due process rights and procedural safeguards before any actions are taken or refused with regard to any aspect of the educational program of the handicapped child.

There is evidence that both requirements are being violated by school districts. Indeed, it is not clear that a distinction is being made at either the SEA or local education agency (LEA) level between these two types of notice. In addition, even where state policies on their face meet the requirements of PL 94-142, proper notice is not actually being given to many parents. Finally, the procedural safeguards, themselves, are used to frustrate parents.

In California, the Children's Advocacy Center reports that in the Oakland area, parents rarely receive more than two days' prior notice to attend IEP and placement meetings. In several cases, parents have been handed the notices upon arriving at the meeting, although last-minute phone contact had been made. Essentially the same problem is faced by the Metropolitan Riverside Uniserve Unit in Riverside County. There, parents are often called the day before the meeting. Adequate notice is imperative for parents who need to make arrangements for missing work, for child care, or for transportation.

This serious lack of notice to parents prior to IEP meetings was reported to BEH early in the spring of 1979. The Children's Advocacy Center included documentation of the problem and informed BEH that more information could be obtained from the state education agency. BEH has failed to investigate or to take any action on this problem. In fact, when the Advocacy Center contacted BEH, the Center was told "there would be no follow-up on this issue."

Inadequate notice, which is a violation of both the federal regulations and the California Administrative Code's 15-day prior notice requirement, can work a real hardship on children and parents who are interested in being involved in the preparation of the IEP. If parents who are unable to attend IEP or placement meetings because of the lack of notice, later determine that the services and placement are inadequate or incorrect for their child, they may have no alternative but to initiate an impartial due process hearing, a lengthy and difficult way of remedying a problem easily resolved at an IEP meeting. In addition, depriving parents of notice prevents them from preparing adequately for the meetings they do manage to attend. This undercuts their role as partners with school districts in PL 94-142 procedures.

School districts also fail to disseminate information to parents explaining the procedures for participating in or challenging school district decisions.

Advocacy, Inc. of Austin documents a problem in Texas regarding notice to parents concerning procedural safeguards. On page 25 of the FY 1980 Annual Program Plan (APP), reference is made to a booklet prepared by the Texas Education Agency entitled "Educational Rights of Your Handicapped Child" which was distributed to schools in late January 1979. Although the APP states that this booklet is provided in English, Spanish, Braille, and English and Spanish audio casette tapes, this fact is not mentioned either in the booklet itself or in the cover letter accompanying the booklet to the schools. Problems with the booklet include using technical language that is difficult for many parents to comprehend; using "terms of art" without explanatory comments; stating that parents have a right to know certain "categories of information" without ever giving actual, substantive information that is included within these categories; and omitting many of the procedural safeguards required by the regulations (i.e., the right to be represented, to present evidence and to cross-examine witnesses). And nowhere in the booklet is it mentioned that the child has the right to remain in the current educational placement throughout the hearings and appeals procedures. See 45 C.F.R. § 121a.513.

Since this booklet was the Texas education agency's means of meeting the notice requirements of PL 94-142, it becomes clear that regardless of what the APP states, many parents are not being properly informed of the procedures which are open to them. Even when

parents do receive a copy of the procedures, unless some of the difficult language and "terms of art" are explained fully, parents are often left unaware of rules of procedures which may prevent the exercise of their rights.

For example, Advocacy, Inc. reports that many parents do not understand what a hearing entails. One parent said, "I thought all you had to do was show up and tell your story." In actuality, these hearings differ very little from formal civil trials, in that the Texas Rules of Civil Procedure and the Texas Rules of Evidence are applied. Advocacy, Inc. reports one case where the unrepresented parents were unable to present any of their evidence, due to objections they did not comprehend. Even where an attorney is involved, there may be problems with little-known procedures such as the five-day disclosure of evidence rule, see 45 C.F.R. § 121a.508(a)(3), which is not known by most attorneys. Since this requirement is not expressly addressed in the Texas education agency procedures, it is sometimes overlooked, with disastrous results for the child.

Over a two-year period, BEH has received numerous letters from Advocacy, Inc., describing in great detail problems with the Texas booklet and the notice violations. BEH has responded only by indicating its awareness of the situation, and giving repeated assurance that it would "continue to work with [the Texas education agency]" to reach a suitable agreement. Yet the notice problems in Texas continue.

Another serious problem found by Advocacy, Inc. in its examination of the Texas FY 1980 APP involves the role of the impartial hearing officer with respect to issuance of final decisions. Texas is one of several states which persists in attempting to circumvent the hearing officer requirements of 45 C.F.R. § 121a.507 (which prohibit local school board members from conducting hearings and deciding their outcomes). The Texas education agency originally planned that the hearing officer's role would be limited to gathering facts and presenting a recommendation to the local school board which the board could accept or reject. Such an arrangement is clearly in violation of PL 94-142.

After nearly two years of efforts by advocacy groups, an "agreement" was finally reached between the Texas agency and BEH wherein the mandatory first-stage hearing was characterized as a "mediation or negotiation." The net result of this characterization seems to be the addition of another level of proceedings which must be exhausted by parents before a final decision can be reached. More valuable time and effort must be expended in what must seem an interminable, discouraging process to parents, since according to Advocacy, Inc., the timelimes set out by the state already grossly exceed the permissible timelines of the federal regulations, 45 C.F.R. § 121a.512.

In other states, as well, the inadequacy of notice and lack of due process information have a deterrent effect on parental IEP and placement challenges.

In Illinois, the BEH Program Administrative Review (PAR) dated June 14, 1978 stated that "[n]otification and availability of due process safeguards varied at different sites. It was clear that the requirement for written prior notice was not being actively carried out in all LEAs." The PAR reported an extremely low number of due process hearings in major metropolitan areas, and stated "It appeared that this was the result of the lack of notification to parents as [to] the availability of their due process rights or because of an apparent process of forced mediation before allowing a due process hearing, or possibly both." The PAR reported the state to be in non-compliance with several sections of the regulations, including 45 C.F.R. §§ 121a.504 and 121a.505, which spell out the notice and content-of-notice requirements. However, the PAR "corrective action" stated only that the state must initiate immediate action in its state regulations to bring the regulations into compliance and establish procedures to ensure that all agencies advise parents of their due process rights prior to any action taken. There was no further BEH follow-up. Predictably, the 1980 APP submitted to BEH by Illinois shows that with one very minor change, the section on Procedural Safeguards is identical to that in the 1978 plan. The problems persist in Illinois.

Despite the absence of proven parental participation in the IEP process, BEH refuses to invoke remedies which could help overcome this situation. For example, advocates have requested for years that BEH _require_ states to use a portion of their PL 94-142 funds for parent/advocate training whenever notice failures are demonstrated. But BEH resists steps that might help, and instead merely asks the states to follow the law.