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Implementation of Court Mandates Concerning Special Education: The Problems and the Potential

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At the time of the enactment of the Education for All Handicapped Children Act in 1975,[1] approximately 1.75 million handicapped students throughout the United States were receiving no educational services at all and 2.5 million were receiving inadequate services.[2] Presumably, the Act was designed to remedy this problem,

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[1] Information concerning the major cases considered in Part I of this article has been obtained from interviews with attorneys for the parties and from research conducted by the author and his partner, Arthur R. Block, Esq. as part of a project on educational policy making and the courts funded by the National Institute of Education, United States Department of Education. Information concerning the New York City special education cases discussed in Part III are based on the author's active involvement as lead counsel for plaintiffs in United Cerebral Palsy, et al v. Board of Education, 79 C. 560 (E.D.N.Y. 1979). 1. Pub. L. No. 94-142, 89 Stat. 773 (1975), 20 U.S.C. §1401 *et seq.* The detailed regulations promulgated under the Act are codified at 34 C.F.R. Part 300. For a general overview of the act, see Note, *Enforcing the Right to an 'Appropriate' Education: The Education for All Handicapped Children Act of 1975,* 92 HARV. L. REV. 1103 (1979); Colley, *Education for All Handicapped Children Act (EHA): A Statutory and Legal Analysis,* 10 J.L. & EDUC. 131 (1981); Note, *The Education of All Handicapped Children Act of 1975,* 10 U. MICH. J.L. REF. 110 (1976). For general discussions of the law in this area, see also, Note, *Accomodating the Handicapped: Rehabilitating §504 After Southeastern,* 80 COL. L. REV., 171 (1980); Note, *A Campus Handicap? Disabled Students and the Right to Higher Education,* 9 N.Y.U. REV. L. & SOC. CHANGE, 163 (1979-80), Note, *Defining the Rights of the Handicapped Under §504 of the Rehabilitation Act of 1973:* Southeastern Community College v. Davis, 24 ST. LOUIS L.J. 159 (1979), Bersoff, *Regarding Psychologist Testily: Legal Regulation of Psychological Assessment in the Public Schools,* 39 MD. L. REV. 27 (1979); Levinson, *The Right to a Minimally Adequate Education for Learning Disabled Children;* 12 VAL. U.L. REV. 253 (1978); Haggerty & Sacks, *Education of the Handicapped: Toward a Definition of an Appropriate Education* 52 TEMP. L.Q. 961 (1977); Krass, *The Right to Public Education For Handicapped Children: A Primer For the New Advocate,* 1976 U. ILL. L.F. 1016 (1976), Handel, *The Role of the Advocate in Securing the Handicapped Child's Right to an Effective Minimal Education,* 36 OHIO ST. L.J. 349 (1975); McClung, *Do Handicapped Children Have a Right to a Minimally Adequate Education?* 3 J.L. & EDUC. 153 (1974). See, also K. Hull, *THE RIGHTS OF PHYSICALLY HANDICAPPED PEOPLE* (1979).

[2] S. Rep. No. 168, 94th Cong., 1st session, p. 8, reprinted in [1975] U.S. CODE CONG. & ADM.

but since its enactment (and despite the expenditure of billions of dollars by local, state and federal authorities), major federal litigations have been instituted in every part of the country under the Act (and under the general provisions of §504 of the 1973 Rehabilitation Act banning discrimination against the handicapped)[3] in order to promote the educational rights of the handicapped.[4]

What is one to make of this phenomenon? Is judicial intervention a necessary or appropriate means for ensuring that local school districts provide legally mandated educational programs and services to handicapped children? If so, how effective have courts been in assuring implementation of orders designed to provide such programs and services?

NEWS 1425, 1432.

[3] 29 U.S.C. §794. These provisions provide as follows:

> "No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any programs or activities receiving Federal financial assistance or under any program or activity conducted by any Executive Agency or by the United States Postal Service."

Detailed regulations issued under §504, which deal specifically with rights to education, as well as to transportation, access to publicly funded programs, etc. are codified in 34 C.F.R. Part 104. See, also Cherry v. Mathews, 419 F. Supp. 922 (D.D.C. 1976); R. Clelland, Section 504: Civil Rights and the Handicapped (1978), Note, *Ending Discrimination Against the Handicapped or Creating New Problems? The HEW Rules and Regulations Implementing §504 of the Rehabilitation Act of 1973,* 6 FORD. URB. L.J. 399 (1977).

[4] *See, e.g.,* Southeastern Community College v. Davis, 442 U.S. 397 (1979), Kruse v. Campbell, 431 F. Supp. 180 (E.D. Va. 1977), *vacated and remanded,* 434 U.S. 808 (1977), Camenisch v. University of Texas, 616 F.2d 127 (5th Cir. 1980), dismissed as moot 49 U.S.L.W. 4468 (April 21, 1981), Battle v. Pennsylvania, 629 F.2d 269 (3d Cir., 1980), *cert. denied,* 49 U.S.L.W. 3954 (June 23, 1981), Rowley v. Board of Educ. 483 F. Supp. 536, 632 F.2d 945 (2d Cir. 1980), docketed, No. 80-827 (Nov. 20, 1980), S-1 v. Turlington 635 F.2d 342 (5th Cir., 1981), Concerned Parents and Citizens v. The New York City Board of Educ., 629 F.2d 751 (2d Cir. 1980), Stemple v. Board of Educ., 623 F.2d 893 (4th Cir. 1980), New York State Association for Retarded Children v. Carey 612 F.2d 644 (2d Cir., 1979), Lora v. Board of Educ., 456 F. Supp. 1211 (E.D.N.Y., 1978) *vacated and remanded,* 623 F.2d 248 (2d Cir. 1980), Riley v. Ambach, 508 F. Supp. 122 (E.D.N.Y. 1980), *Reversed* _ F.2d _ (2d Cir. May 19, 1981), Stanger v. Ambach, 501 F. Supp. 237 (S.D.N.Y., 1980), Mattie T. v. Holladay 3 EDUCATION OF THE HANDICAPPED REPORTER (EHLR) 551:109 (D. Miss. 1979), Larry P. v. Riles, 495 F. Supp. 926 (N.D. Calif. 1979), Boxall v. Sequoia Union H.S. Dist., 464 F. Supp. 1104 (N.D. Cal. 1979), Harris v. Campbell, 472 F. Supp. 51 (E.D. Va. 1979), North v. District of Columbia Board of Educ., 471 F. Supp. 136 (D.D.C. 1979), Sherer v. Waier, 457 F. Supp. 1039 (W.D. Mo. 1978), Howard S. v. Friendship Ind't School Dist., 454 F. Supp. 634 (S.D. Tex. 1978), Stuart v. Nappi, 443 F. Supp. 1235 (D. Conn., 1978), Eberle v. Board of Public Educ., 444 F. Supp. 41 (W.D. Pa., 1977), *aff'd* 582 F.2d 1274 (3rd Cir. 1978), Barnes v. Converse College, 436 F. Supp. 635 (D.S.C. 1977), Hairston v. Drosick, 423 F. Supp. 180 (S.D. W.Va., 1976); Tatro v. State of Texas, 625 F.2d 557 (5th Cir. 1980); Kruell v. New Castle Co. School Dist. ___ F.2d ___ (3d Cir. 1981).

I - The Modern History of Mills and *PARC*

The most relevant point of departure for answering these questions would be to consider the history of the implementation process in the two landmark cases that began the modern era of legal involvement in enforcing the educational rights of the handicapped, *Pennsylvania Association of Retarded Children v. Commonwealth of Pennsylvania*[5] (hereinafter referred to as "*PARC*") and *Mills v. Board of Education,*[6] in both of which the basic court decrees were issued in 1972.[7] For present purposes, the most fascinating point about both *Mills* and *PARC* is that approximately nine years after entry of these decrees (and despite the passage of the Handicapped Children's Act in the interim), the federal courts are continuing their jurisdiction, and, at least according to the plaintiffs who have filed several contempt motions, effectuation of the basic rights of the handicapped still has not been achieved.

The *Mills* decree was issued by the Federal District Court in Washington, D.C. on August, 1972, following its finding that, on both constitutional and statutory grounds, the plaintiff class of handicapped students had been illegally excluded from public education facilities. The Court issued an extensive decree which provided procedures to assure basic access to school, and specific due process rights covering both special education placements and school suspensions. It also required the District of Columbia to formulate a "comprehensive plan" to assure that a "suitable" education is provided for all handicapped children.

By November 30, 1973, scarcely a year after the decree had been issued, the plaintiffs had already filed their first motion for contempt, claiming that the Board of Education was in violation of the decree, mainly because of inadequate notice to parents, improper hearing procedures and a failure to provide necessary funds to cover private school costs for students for whom there were no available appropriate public programs. These issues were discussed, negotiated and litigated by the parties for several years and agreements were reached on a number of issues. The plaintiffs, however, were still not satisfied and they filed a further contempt motion, which resulted, in March

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[5] 334 F. Supp. 1257 (E.D. Pa. 1971), *modified,* 343 F. Supp. 279 (E.D. Pa. 1972)).

[6] 348 F. Supp. 866 (D.D.C. 1972)

[7] The Congressional debates preceding the passage of Public Law 94-142, the Education for All Handicapped Children Act, was replete with references to these cases and, to a large extent, Pub. L. No. 94-142 may well be considered a legislative enactment of the basic requirements of the court decrees in these cases. Senate Report No. 94-168, *supra,* n.1 at 8: "The education amendments of 1974 incorporate the major principles of the right to education cases."

1975, in the issuance of a contempt order by the court, an action which courts rarely take.[8] At the hearing on this motion, the court found, three years after the decree had been entered, that at least 44 students were still being excluded from school and that the Board of Education was withholding necessary funding for them to attend private facilities.[9] The court specifically pointed to the fact that the Board of Education had come forward with the necessary funds only on the day of the final hearing on the contempt motion, after years of controversy; apparently viewing this dramatic eve of trial announcement not as an indication of the Board's persistence in trying to solve the problem, but as evidence of its recalcitrance in complying with the decree only after maximum judicial pressure had been exerted.

The major remedy that resulted from the 1975 contempt order was the appointment for a one year term of a Special Master to oversee various aspects of the implementation of the decree. The Master's major function, in fact, was to analyze the comprehensive plans for student identification, evaluation, placement and program development submitted by the Board of Education, which still were vigorously being contested three years after such plans had been called for in the initial decree. The Special Master's report on this plan, which included 180 underlying documents, found substantial problems in terms of evaluation and placement procedures, administration of tuition grants and monitoring and evaluation of program development. After the Master's tenure had terminated, the parties continued extensive negotiations over this plan, finally agreeing to certain basic stipulations which resulted in modifications of the decree in May 1978.[10]

Despite this agreement, however, the plaintiffs were back in court the next year with another contempt motion. This time, they alleged violations not only of the original 1972 order but also of the 1975 contempt order and the 1978 stipulations, (including the standards set forth in defendant's own planning documents). After holding hearings on this order, in June 1980, the court issued yet another contempt order against the Board of Education. Among the particular findings at this time were failures to meet time limits for handling administrative complaints and recommending placements, failure to

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[8] See e.g. findings in M. Rebell & A. Block, Education Policy Making and the Courts (University of Chicago Press, forthcoming), indicating that of 41 federal education policy cases studied over a seven year period in which remedial decrees were issued, formal contempt motions were filed in only four, and only in one (Mills) was it formally granted.

[9] Findings of Fact and Conclusions of Law, March 27, 1975.

[10] Stipulation and Order of May 3, 1978.

provide residential placements and a finding that "the defendants have done little to improve the overall special education program".[11]

The court recognized that full compliance with all of the detailed requirements of the decree may not have been possible, but if this were the case, Judge Penn held, defendants had an obligation to seek a modification of the decree from the court, which they did not do. Judge Penn has withheld ruling on the question of sanctions for the contempt he has found, pending further hearings. The plaintiffs have specifically requested, among other things, the appointment of a Special Master, this time with broad day-to-day enforcement authority, in contrast with the limited advisory role of the previously-appointed Special Master. Thus, nine years after the original entry of the landmark decree in *Mills* that established the rights of handicapped children to a suitable education, handicapped children in Washington D.C. — at least in the opinion of their attorneys — are far from having gained the benefits they thought they had won.

The *PARC* case presents a similar implementation history over the past nine years. In contrast to *Mills,* where the Board of Education actively resisted the court's involvement (primarily because of its fiscal implications), the *PARC* decree, highly similar in content to that in *Mills,* was entered as a consent judgment. Thus, in its initial stage, *PARC* presented less of an adverserial confrontation than had *Mills.* The plaintiffs and the defendant state and local school officials recognized the inaadequacy of existing services for handicapped students and jointly agreed on a decree to remedy these problems. As one commentator put it: "The Federal Court did not resolve a dispute between contesting parties, but instead ratified an agreement between advocates for children's services and professional service agencies to raid state treasuries for greater funds on behalf of their shared clientele".[12]

Given the initial amity between the parties, one might have expected a smooth, effective implementation process in Pennsylvania. But, as in Washington, D.C., (and this time scarcely three months after entry of the decree), a contempt motion was filed by the plaintiffs. Here the allegations were lodged against the City of Philadelphia, claiming broad failures to identify eligible children as required under the decree. The immediate relief sought was that the state education authorities assume responsibility for special education in the

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[11] Order of June 7, 1980, 3 Education of the Handicapped Law Reporter EHLR 551:643, 646.

[12] Robert Burt, quoted in Kirp, Buss and Kuriloff: *Legal Reform of Special Education: Empirical Studies and Procedural Proposals* 62 CALIF. L. REV. 40, 61 (1974).

city school district of Philadelphia because the city Board of Education had allegedly proved itself totally incapable of carrying out the requirements of the decree. Apparently, the core of the real issue involved here were funding disputes between the defendants, with the city indicating that it was prepared to implement the judgment only if it received sufficient state funding.

The court's initial response was to require the defendants to prepare a plan for educating retarded children in Philadelphia. It then referred most of the specific issues to the two Special Masters who had been appointed for one-year terms under the original decree.[13] The Masters' mediation efforts on these issues were largely successful and the immediate issues were, at least tentatively, resolved.[14] One of the agreements reached established an interesting concept of compensatory education. Plaintiffs claimed that because the city and the state had dragged their heels for at least a year, many children who should have received immediate services had been denied them. The parties agreed, therefore, to create a special summer public education program to provide compensatory services for these youngsters.[15]

By January 1974, according to the fourth and final report of the Special Masters, initial compliance resistance by the Philadelphia school district had been overcome. The system for locating, testing and placing children (known as "COMPILE") was expeditiously being put into place, and virtually all members of the plaintiff class were receiving some form of instruction. The Masters, however, concluded "compliance in procedural and quantitative matters proceeded at a rate in excess of substantive and qualitative issues".

For the next two years, the court docket in *PARC* revealed only minor skirmishes. In March, 1977, however, another major contempt motion was filed by the plaintiffs. This wide-ranging document essentially attacked every major aspect of special education services in Philadelphia, including the alleged inadequacy of the evaluation process, the lack of related services and support services in many pro-

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[13] The Masters were Dennis E. Haggerty, an attorney, and Dr. Herbert Goldstein, a university professor with expertise in special education issues.

[14] The court extended the term of the Masters to January 1974 and asked them to file monthly reports on defendants' compliance efforts.

[15] Similar programs were established in later cases on a consent basis: Frederick L. v. Thomas, 419 F. Supp. 760 (E.D. Pa., 1976), aff'd 557 F.2d 373 (3rd Cir. 1977); Lopez v. Salida School District, Civ No. C-73078, (D.Ct. Denver Co. Jan. 20, 1978); and, apparently over defendants' objections in Allen v. McDonough Civ. No. 14948 (Super. Ct., Mass., May 25, 1979). The issue has also recently been raised by the plaintiffs in the New York City special education cases discussed in Part III, *infra*. *Cf.* United States v. Jefferson Co. Board of Education, 372 F.2d 877, 900 (5th Cir. 1966) aff'd on rehearing, 380 F.2d 385, 394.

grams, ineffective mainstreaming, inadequate transportation, lack of vocational programs for the mentally retarded, insufficient numbers of teachers, etc.

Judge Becker, who had now been assigned to handle the case, decided to deal with this contempt motion in a rather unique way. Instead of following traditional judicial procedures based on the presentation of evidence at adverserial hearings, culminating in a judicial decision favoring one side or the other, he began, in essence, to play the role of a mediator. Accordingly, he initiated regular monthly sessions where the attorneys and other representatives of the various parties could come together around a conference table and discuss the various problems and their implications. This process, which has continued for the past several years, has been opened to the general public. The agenda for the meetings has branched out beyond the original contempt claims so that pressing issues of the day, as they arise, tend to be considered in addition to the original concerns. Typically, at the end of each session, members of the public are permitted to raise any specific items of concern with the conferees and the judge.

Through this process, the attorneys for the parties have apparently reached basic agreement on many of the issues raised in the original contempt motion.[16] Standing in the way of conclusion of a final agreement at this time are enforcement questions, especially the role of a Special Master, which the plaintiffs are pressing. As in *Mills,* plaintiffs here are seeking the appointment of a Special Master who would have greater authority than the advisory role of previous masters in the case. Specifically, they believe the master should have authority to issue orders and to require the Board of Education to take immediate actions.

II - Measuring "Successful" Implementation

This brief overview of the history of *Mills* and *PARC* raises troublesome questions. If the two landmark cases, those upon which Congress based the extensive statutory scheme which is presently being implemented in almost every state in the union,[17] have had a nine

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[16] Those members of the original class who constitute a sub-class of severely and profoundly retarded students apparently are not satisfied with the tentative agreements on the "access" issues. They intend to pursue at trial in the near future issues concerning the substance and quality of programs being offered to them. Many of these concerns had originally been raised in a separate action which had been ordered to be joined with the basic PARC proceedings. See Fialkowski v. Shapp, 405 F. Supp. 946 (E.D. Pa. 1975).

[17] The only state which at the present time seems to have refused federal funding and hence

year history of continuing litigation and contempt motions, what can be the prognosis for successful implementation of special education reform elsewhere?[18]

Assessing the "success" of court decrees in this area is not, however, an easy task.[19] To some extent, of course, assessment depends on one's vantage point. From the perspective of a forceful advocate of the rights of handicapped students, the fact that the court decrees, which merely lay out basic rights to educational opportunity and fair procedures, have not been fully implemented after nine years seems outrageous. On the other hand, from the defendants' perspective, the results seem impressive, given the necessity to reverse centuries of neglect in educational programming for the handicapped, at a time of general fiscal stringency.

Is there, in fact, any "objective" way to assess the results in special education cases? To date, there have been few comprehensive studies of special education implementation. The one major reported effort was the study of the *PARC* case conducted by Professors Kuriloff, Kirp and Buss for the National Institute of Education.[20] They found that a significant increase in the number of programs available to retarded children in Pennsylvania had resulted from the implementation of the court decree. They also concluded that, by and large, the educational authorities had complied with the letter of the law, but it

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federal requirements under Pub. L. No. 94-142, is New Mexico. See New Mexico Assn. for Retarded Children v. New Mexico, 495 F. Supp. 391 (D.N. Mex. 1980).

[18] Indeed, other special education cases also appear to be resulting in a plethora of contempt motions, compliance negotiations, stipulations, etc. For example, in *Frederick L.* v. *Thomas, supra,* note 15, contempt motions were filed two years after entry of the decree and have led to three separate stipulations between the parties, covering vocational education programs, Individual Education Plans, staff recruitment and improvements in the screening and identification plans. 3 EHLR 551:569.

[19] See M. Lipsky, STREET LEVEL BUREAUCRATS (1980) for an insightful consideration of the more basic questions as to how "success" can be measured or even conceptualized in any social policy area involving direct services to citizens.

[20] Kuriloff, Kirp and Buss, WHEN HANDICAPPED CHILDREN GO TO COURT: ASSESSING THE IMPACT OF THE LEGAL REFORM OF SPECIAL EDUCATION IN PENNSYLVANIA (National Institute of Education, June, 1979). A Special Task Force on Equal Educational Opportunity for Handicapped Children, established by the Secretary of Education, recently acknowledged serious shortcomings in compliance with the requirements of Pub. L. No. 94-142 and §504 of the 1973 Rehabilitation Act by states and localities — and of compliance monitoring by the Office of Special Education and the Office of Civil Rights. Problem areas addressed included long waiting lists, inadequacy in basic program offerings and in the provision of related services, and explusion of handicapped children. This report was apparently issued in response to a report detailing compliance problems in eleven states and lack of federal enforcement efforts which had been submitted by 13 advocacy organizations. Report by the Education Advocates Coalition on Federal Compliance Activities to Implement the Education for all Handicapped Children Act (P.L. 94-142)(April 16, 1980). The main findings of the report and proposals for improvements in federal compliance efforts are reported in 4 EHLR AC 67 (Oct. 31, 1980).

was also their impression that there was not full compliance with the "spirit of the laws".[21] More specifically, they noted that school psychologists, the main subjects of the study, saw significant role changes for themselves in assessment practices, but fewer changes in consultation services and "mainstream" activities. The authors also analyzed the due process hearing procedures. They found that parents in these hearings tended to seek less severe diagnostic classifications, and looked for placements in regular education public school programs or for special education placements in private schools. Parents won approximately one-third of the hearings, with the rate of success being higher in larger school districts than in smaller districts.

Such findings are informative, but are hardly conclusive. They indicate that the *PARC* decree has apparently expanded program offerings and has directly impacted on at least some behavior of professional staff members. Also, one may presume that those parents who emerged successfully from the due process hearings would consider the *PARC* reforms, or at least the procedural opportunities they provide, to be effective. Over-all, however, despite a number of interesting insights, the limited focus of this study, and its general conclusion that there was compliance with "the letter but not the spirit" of the law, actually raises more questions than it answers.

In order to approach judicial reform issues from a more comprehensive perspective, it is necessary to consider the insights provided by the emerging field of social science research known as "implementation analysis." Traditional policy analysis focuses on the processes of policy formulation and assumes that after enactment, a policy position will be — or should be — promptly put into effect. Implementation analysis, by way of contrast, assumes that implementation will invariably impact on so many complex variables that the original goals or expectations will necessarily be subject to substantial on-going modifications.[22] Implementation analysts imply, in essence, that "the process is the purpose." Thus, an initial policy decision tends to

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[21] Similar conclusions have been reported as major findings of the first year of a four-year, federally funded nationwide study of local implementation of Pub. L. No. 94-142. See INSTITUTE FOR RESEARCH ON EDUCATIONAL FINANCE AND GOVERNMENT, POLICY NOTES 7-8 (Stanford, Calif., Winter, 1981).

[22] See generally, A. Widavsky and J. Pressman, IMPLEMENTATION (1973), E. Hargrove, THE MISSING LINK (1975), W. Williams and R. Elmore, eds. SOCIAL PROGRAM IMPLEMENTATION (1976), E. Bardach, The Implementation Game (1977), Berman, *The Study of Macro and Micro Implementation*, 26 PUB. POLICY 15 (1978), Elmore, *Organization Models of Social Programs of Implementation*, 26 PUB POLICY 185 (1978), Van Meter and Van Horn *Policy Implementation Process*, 6 ADMIN & SOCIETY 445 (1975).

be viewed as a stimulus which begins a process that will be affected by numerous influences and whose ultimate outcome cannot be predicted in any specific way.[23]

The implementation analysts' approach would seem especially apt in regard to special education, where the basic applicable legal standard is a right to an "appropriate education," a term that has never been defined with any precision by Congress or the courts.[24] The goal of assuring "appropriate education," like the goal in other contexts of providing "equal opportunity," provides no concrete benchmark for assessing progress. Rather, it provides a "stimulus" around which those having a stake in social policy processes can "carry on politics" by another means.[25]

Do courts provide an appropriate forum for such an endeavor? My colleague Arthur Block and I have considered this issue in depth in another work and have concluded that in certain situations, courts can combine a comprehensive mobilization of requisite programmatic resources with focused decision making, so as to stimulate effective policy implementation, especially in areas involving newly-articulated rights and principles.[26] The courts' performance to date in the major

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[23] "The political and institutional relationships in an implementation process on any but the smallest scale are simply too numerous and adverse to admit of our asserting law-like proposition about them. It is the fragmentary and disjunctive nature of the real world that make 'a general theory of the implementation process . . .' (which has been urged upon by some readers of the draft manuscript) unattainable and indeed, unrealistic." Bardach, *supra,* note 22 at 57.

[24] "Although the Act sets forth general requirements states must meet in order to qualify for the receipt of federal funds, it does not prescribe the specific educational programs local schools must make available in order to fulfill those requirements . . . In effect, the Act guarantees procedures whereby parents may challenge the appropriateness of their child's educational program, but provides only the most general guidelines for resolving substantive questions such challenges may present." Note, *Enforcing the Right to an Appropriate Education: The Education for All Handicapped Children Act of 1975, supra* note 1 at 1103. See also Battle v. Pennsylvania 629 F.2d 269 (3rd Cir. 1980); Rowley v. Board of Education, 632 F.2d 945 F.2d (2d Cir. 1980).

[25] Bardach, *supra,* note 22 at 36-37. See also, A. Wildavsky, SPEAKING TRUTH TO POWER: THE ART AND CRAFT OF POLICY ANALYSIS (1979).

[26] EDUCATIONAL POLICY MAKING AND THE COURTS ("EPAC"), *supra.* note 8. Specifically, our empirical investigation of 67 federal District Court education policy cases decided between 1970 and 1977 found that in almost all instances where wide-ranging "reform" decrees were issued (13 of 15), defendants or related public agencies substantially participated in formulating or negotiating the policy contents of the decree, and that such decrees were often modified in response to unforeseen developments. Thus, we concluded that "although the judiciary lacks large staff resources of its own, if the basic content of the decrees and supervision of its implementation are established by the parties themselves, then all of the implementation tools and mechanisms available to the parties also automatically become available to the court." What the court uniquely adds to the implementation process is an institutional structure which provides focused compulsion that pressures the parties to resolve policy and implementation problems they might otherwise delay or ignore, cf. R. Lehne, QUEST FOR JUSTICE (1979). Our

special education cases would appear to meet these criteria. In most of these, the courts have created novel implementation mechanisms such as special masters, task forces and regular compliance monitoring sessions.[27] They have included virtually all affected interests and groups in the policy making process, and have induced the parties to engage in extensive negotiations that have resulted in pragmatic and often innovative solutions to immediate problems. The broader issues are never fully resolved and new issues seem to arise almost as quickly as the old ones seem to be put to rest. But the important point is that problems are being addressed—and through mechanisms devised by the parties themselves. From this point of view, the fact that the parties are still coming to the court to resolve major impasse issues nine years after entry of the decrees in *PARC* and *Mills* may be an indication of judicial success and not of judicial failure. Under the courts' auspices, the systems are progressing, perhaps more slowly than some would like or more quickly than others would prefer. Undoubtedly, at some point judicial involvement should be terminated. But when the implementation of fundamental system-wide reforms is

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study also found substantial judicial capability to engage in fact-finding on social policy issues and to include diverse perspectives of numerous affected groups in its processes, at least from the comparative perspective of the functioning of state legislatures. Although we thus concluded that, *contra* many critics, the courts have substantial capacity to engage in social policy making processes, the troublesome, normative questions concerning the "legitimacy" of their doing so could not, of course, be definitely resolved by the type of empirical research we undertook.

[27] See *id.*, chap. 5. For a good discussion of the role played by special masters, court-appointed panels and other implementation mechanisms in desegregation cases see H. KALODNER and J. FISHMAN, THE LIMITS OF JUSTICE (1977). Kalodner and Fishman's largely negative conclusions concerning the role of masters in desegregation cases appear to be related more to the highly controversial nature of the controversies at issue in those cases than to any inherent institutional deficiencies of the courts. These points are discussed in more detail in EPAC, Chap. 10.

Aside from special education and desegregation, courts have created new remedial mechanisms in a variety of cases dealing with a wide range of institutional settings. *See, e.g.*, Wyatt v. Stickney, 344 F. Supp. 373, 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd sub nom.* Wyatt v. Aderholdt, 503 F.2d 1305 (5th Cir. 1974) (mental health facility--human rights committee with investigative powers); N.Y. State Ass'n for Retarded Children v. Rockerfeller, 357 F. Supp. 752 (E.D.N.Y. 1975) (Institution for mentally retarded--expert review panel to promote deinstitutionalization); Miller v. Carson, 401 F. Supp. 835 (M.D. Fla. 1975), *aff'd*, 563 F.2d 741 (5th Cir. 1977) (Penal facility--ombudsman to enforce court decree); Todaro v. Ward, 431 F. Supp. 1129 (S.D.N.Y. 1976), *aff'd* 565 F.2d 48 (2d Cir. 1977) (Pretrial detention center--outside auditors hired to monitor compliance); Knight v. Board of Educ. 48 F.R.D. 115 (S.D.N.Y. 1969) (School suspensions--committee of educational experts to conduct due process hearings and present findings to the court). *See also*, Note, *Implementation Problems in Institutional Reform Litigation*, 91 HARV. L. REV. 428 (1977); Note, *The* Wyatt *Case: Implementation of a Judicial Decree Ordering Institutional Change*, 84 YALE L.J. 1338 (1975); Comment, *Confronting the Conditions of Confinements: An Expanded Role for Courts in Prison Reform*, 12 HARV. C.R.-C.L.L.R. 367 (1977).

involved, especially in regard to newly articulated rights whose implications can be understood only as the process unwinds, extended judicial oversight is to be expected.[28]

III - The New York City Special Education Cases

Further illustration of these points is provided by a consideration of the current New York City special education cases, generally known by the title of the first of three related cases, *Jose P. v. Ambach.*[29] *Jose P.* is especially important because it represents one of the first of what might be termed the "second generation" of special education decrees. *PARC* and *Mills* were concerned with establishing the basic legal rights of handicapped children to an appropriate education. In *Jose P.*, these rights were assumed; the issue here was assuring compliance with these rights by the nation's largest school system. In short, the focus in *Jose P.*, from the outset, has been on implementation *per se.*

The complaint in the *Jose P.* case was filed in February, 1979. At that time, the latest available statistics indicated that there was a waiting list for special educational placement in New York City of approximately 13,000 students. Six years earlier, the State Commissioner of Education had found the New York City Board of Education in violation of applicable state statutes because of waiting lists which then totalled approximately 5,000.[30] Now, with the waiting list increased by approximately 250%, there seemed little doubt that the federal District Court would find violations of the Handicapped Chil-

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[28] Compare on this point the impatience with lengthy judicial involvement in the implementation process expressed by the U.S. Court of Appeals for the Second Circuit in its (fourth) decision in Chance v. Board of Examiners, 561 F.2d 1079 (2d Cir. 1977). The Court ordered the termination of federal court jurisdiction as of June 30, 1978, even though the parties had not yet formulated a permanent licensing system for school principles and supervisors to replace the traditional examination system which had been enjoined on grounds of racially discriminatory impact by the Court in 1970. Three years after termination of the Court's decree, the parties (left to their own devices and various state court skirmishes), have still not implemented a permanent licensing plan. *See also*, Pennhurst State School and Hospital v. Halderman, 49 U.S.L.W. 4363, 4377 (April 20, 1981) (White, J. dissenting in part). Another potential limit on the effectiveness of the judicial process is the refusal of state legislatures to appropriate the funds necessary for implementation of court decrees. Cf. New York State Association for Retarded Children v. Carey, 631 F.2d 162 (2d Cir. 1980).

[29] The three cases involved are Jose P. v. Ambach, 79 C 270, 3 EHLR 551:245 (E.D.N.Y. 1979), United Cerebral Palsy v. Board of Educ., 3 EHLR 551:251 (E.D., N.Y. 1979) and Dyrcia S. v. Ambach, 79 C 2562 (E.D.N.Y.). They have been consolidated for all essential purposes, although retaining separate captions, and have resulted in issuance of decrees containing identical substantive provisions.

[30] Matter of Riley Reid, 13 N.Y. Ed. Dept. Rep. 117 (1973), 1 N.Y. Ed. Dept. Rep. 127 (1977).

drens Act and of §504, in addition to violations of state law. The critical issue at this point was to determine what type of decree could be entered by the court to deal with a problem which had been acknowledged for years, but which the ordinary administrative processes seemed incapable of resolving.

The *United Cerebral Palsy* (hereinafter referred to as *UCP*) case was filed in March, 1979 with the avowed purpose of directly raising these implementation issues. The first cause of action in this complaint essentially repeated the allegations concerning evaluation and placement delays that had been set forth in the *Jose P.* papers. But in the second through fifth causes of action, the plaintiffs; headed by United Cerebral Palsy (UCP), an advocacy organization for the rights of the physically handicapped; set forth broad-based allegations concerning operational shortcomings which affected both the system's ability to evaluate and place children and the quality of the education they were receiving. Among these "quality education" issues were such items as the lack of individualized placement procedures, inadequate preparation of Individual Education Plans ("I.E.P's"), unavailability of "mainstreaming" opportunities and related services, lack of facilities accessibility for the non-ambulatory, and inefficiencies in contracting procedures for placement in private school. In short, the *UCP* plaintiffs were advising both the defendants and the court that solutions to the long standing evaluation and placement problems in New York City would require structural reform of the entire system.[31]

Given the clarity of the applicable legal standards and the indisputability of the conceded facts concerning the waiting lists, it was not surprising that U.S. District Court Judge Eugene Nickerson quickly issued a ruling in May, 1979, barely four months after the case had first been filed, finding the city and state education officials in violation of numerous federal and state statutes relating to the educational rights of the handicapped. Perhaps more surprising is that less than six months later, in December 1979, the court issued a detailed, 45 page decree outlining comprehensive procedural reforms and structural changes for the entire special education system. Virtually all the terms of this decree had been negotiated by the parties in

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[31] The complaint was filed in the *Dyrcia S.* case in September 1979 on behalf of a class of non-English speaking students who needed special educational services. Although deficiencies in bilingual services had been alleged in both the *Jose P* and *UCP* cases, the new complaint placed increased emphasis on the entire area of the provision of bilingual special education services.

response to the issues raised in all three cases.[32]

Briefly stated, the *Jose P.* decree covers the following areas. First, it sets specific deadlines for the elimination of the various waiting lists, and requires the hiring of specified numbers of evaluation personnel to meet these deadlines.[33] Second, the decree outlines a new structure for providing most evaluation and educational services at the local school level through "school-based support teams", largely (though not completely) replacing the prior, regionalized committee on the handicapped system.[34]

Third, it outlines procedures to assure parental due process rights, including the right to attend the initial case conference, and the promulgation of parental rights booklets. Fourth, a new method for the preparation of IEPs was created, with certain long range goals to be specified by the original evaluation teams, and updated short term goals to be prepared by the teacher in consultation with the parent. Fifth, a detailed plan for facilities accessibility was devised which requires accessibility for all present programs for the physically handicapped by September 1980 and a long range plan for full building accessibility of at least one elementary and one junior high school in each of the city's 32 community districts.[35] Sixth, the decree sets forth a specific outline for a continuum of special education services and for staffing and "mainstreaming" opportunities relevant to each such program. Finally, detailed reporting requirements are provided, which require the Board of Education, on a monthly basis, to provide the court and the plaintiffs with specific information concerning the status of waiting lists, staffing needs, assessment of availability of classroom space for particular programs, etc.[36]

Thus, within less than six months, the parties in *Jose P.* negotiated

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[32] The decree is reported at 3 EHLR:551,412 (E.D.N.Y. 1979).

[33] If the Board of Education cannot meet the deadlines for elimination of waiting lists because of an inability to hire sufficient staff, it is obliged to enter into contracts with private facilities to conduct whatever number of evaluations may be necessary to eliminate the waiting lists.

[34] Consistent with implementation of the new school based support team system was a rapid expansion of resource rooms for learning disabilities and other mild handicapping conditions. Under the decree, on a phased-in basis, every public school in New York City was to provide a resource room no later than February 1981.

[35] The decree also requires all of the locations of the "Committees on the Handicapped", to be fully accessible no later than April, 1981. Incredibly, it was discovered in the course of negotiations that many of these Committees, which undertake basic diagnostic evaluations of physically handicapped children, are located on the fourth floors of buildings which have no elevators.

[36] Special provisions relating to the specific needs of non-English speaking children with handicapping conditions are included in most of the decree's areas.

a comprehensive reform plan which included many of the areas that had been the subject of the contempt motions filed in the *PARC* and *Mills* cases over their nine year history, (some of which are still being negotiated and litigated by the attorneys in these cases). To what can the apparent relative efficiency of the negotiating process in *Jose P.* be attributed? One obvious factor, of course, is the precedent provided by *PARC, Mills,* and other prior cases themselves. Since plaintiffs in *Jose P.* did not need to litigate the basic issues of the rights of the handicapped, from the first they could concentrate on the complex implementation problems. A second factor was undoubtedly the appointment in the summer of 1979 of a new executive director of the division of special education, Dr. Jerry Gross, a professional committed to reforming the system. Dr. Gross early on appeared to have decided to view the court mechanism as an opportunity to promote reforms in the system, rather than an outside intervener to be resisted at every turn.

The third, and perhaps the most significant factor, was the decision of Judge Nickerson to appoint a Special Master at the outset of the case, rather than after the decree had been issued (as in *PARC*), or, at a later stage, after contempt proceedings had been brought (as in *Mills*). The Special Master was originally appointed in this case for the purpose of advising the court on the content of the basic decree that should be entered to remedy the legal violations Judge Nickerson had found.[37] As the process unfolded, however, the Master

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[37] Judge Nickerson's charge to the Master contained in his original liability decision, 3EHLR 551:245, was broad and comprehensive. It read as follows:

> "The Master shall have all powers set forth in Rule 53 except as circumscribed by the order. However, he will not be limited to receiving and reporting evidence. He will be permitted to consult informally with the parties and with outside experts and others and to receive materials not in evidence.
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> Proceedings before the master may be conducted as informal working sessions, with trial counsel, officials of the various concerned public and private agencies, and members of the public present. Informal private consultations without the presence of counsel are permitted but the fact that such meetings were held shall be made known to all counsel by the master keeping a record of them and making the record available. Findings of fact and conclusions of law under Rule 53(e)(1) are not required.
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> The Master shall evaluate the plans promulgated by the Board and shall make such recommendations as he deems appropriate as to what decree the court should enter to provide the requisite public education to handicapped children in the City of New York.
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> The master shall report at appropriate intervals to the court on his activities. He shall consult with the parties and be reasonably available to the parties for informal discussions and to exchange suggestions.
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> The master may engage legal, administrative and clerical aides, as he deems necessary, subject to the approval of the court. He may consult other experts, but he may not retain experts without an order obtained on forty-eight hours notice to the par-

never had occasion to draft the details of proposals for a decree on his own, since from the outset he was able to induce the parties to negotiate virtually all aspects of the decree. Since the entry of the original decree in December 1979, the process of negotiation, monitored by the Master, has continued as the parties have drafted hundreds of pages of detailed plans and procedures called for under the negotiated decree to provide specific mechanisms for its implementation.

As with any other reform process which achieves a measure of success, it is difficult in this instance to separate the institutional aspects of the *Jose P.* implementation mechanisms, and their precedential significance, from the personal attributes of the main actor in the process, in this case the Special Master, Marvin E. Frankel, a recently retired federal judge.[38] Judge Frankel brought to this task substantial stature because of his past judicial reputation, as well as specific knowledge of the complex workings of the Byzantine New York City school system accumulated from his experience as the judge in the New York bilingual education case several years earlier.[39] He also brought an unusual skill in promoting successful negotiations on complex issues.

Both the initial negotiations which led to formulation of the basic decree, and the follow-up negotiations to implement the decree and

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ties. Wherever possible expense shall be minimized by calling on experts available from government to prepare necessary material, reports or studies.

The master shall have full access to reports, statistics, computer studies, and all information about all phases of the school system and services that may be necessary to prepare plans or reports. He shall be supplied with any studies and plans for meeting the statutory requirements that the defendants or others in the government may have. Governmental agencies shall provide the master with full, professional technical, and other assistance required in familiarizing himself with the school systems and the various problems to be solved in providing free appropriate public education to handicapped children.

The master shall hear the views of various community and parent groups. He shall also consult with other private groups and organizations involved in providing educational and related services to the handicapped.

The Clerk of this Court shall provide such office, courtroom, and conference room space as the master shall require.

Any party or person may apply to this Court on notice to the master and parties for a protective order against any activity of the master. The master may apply to this court for assistance."

[38] Judge Nickerson had originally asked the parties to propose nominees for this position. The names of a number of well-known professors, administrators, and attorneys experienced in special education matters were submitted. The choice of a former federal judge came as a surprise to all concerned.

[39] Aspira v. Board of Educ. 72 Civ. 4002 (S.D.N.Y., 1974) (unreported memorandum and order); see also 58 F.R.D. 62 (S.D.N.Y., 1973).

monitor compliance over the past eighteen months, have followed a consistent pattern. After the parties had negotiated for a number of weeks on certain issues, a status report would be given to Judge Frankel at a conference attended by attorneys for all parties, as well as representatives of interested groups and individuals.[40] (Attendance at these conferences seems analogous to the attendance at the *PARC* conferences held by Judge Becker). The parties would list the dozen or so issues on which negotiating impasses or major problems had surfaced. Judge Frankel would talk these issues through with the parties, usually covering each in no more than fifteen or twenty minutes, focusing insightfully on the heart of the issue, and usually proposing ways to resolve the critical problems. By the end of the sessions, the outlines of solutions acceptable to all parties would tend to emerge, and the negotiating process would continue, without any need for formal decisions from the Special Master or the court.[41]

In the course of approximately two years of continuous negotiations on hundreds of complex legal and educational issues in this case, only two issues have not been resolved by the parties through this negotiating process.[42] Considering the fact that the basic *Jose P.* decree called for systematic reform of the entire special education system in the City of New York, and required negotiation and elaboration of complex procedures and standards for carrying our these reforms (which have now been issued in a so-called "January Plan"

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[40] Two major education reform organizations, Advocates for Children and the Public Education Associaton, were granted status as *amici curiae* at the outset of the cases; their participation has been virtually as active in all phases of the case as that of the main parties. Other organizations such as the United Federation of Teachers and representatives of the U.S. Justice Department and the Office of Special Education of the U.S. Department of Education have attended many of the conferences with the Special Master, but few of the negotiating sessions.

[41] These solutions were seen as being "satisfactory" by all parties either because new approaches to the problem had been proposed, or because in discussing the issues, Judge Frankel had indicated a "common sense" initial reaction as to how he would be inclined to decide the issue if it were pressed to litigation. Of course, if an issue did go to litigation, full opportunities for briefing, and presenting witnesses and evidence would be provided and these initial "impressions" might be subject to change.

[42] These issues were the scope of the responsibility of the State Education Department for any possible future compliance failures by the Board of Education (on Judge Frankel's recommendation the court decided that the state would be held responsible for the ultimate assurance of the provisions of special education services; the state's appeal on this issue, joined with its appeal of its liability to pay 20% of the attorneys fees and Special Master's costs, as ordered by the Court, is currently pending); and the question of whether "preventive services" for children who had not been diagnosed as being handicapped was a mandatory aspect of the continuum of services described in the decree (Judge Frankel recommended that, under the terms of the decree, some amount of such preventive services was contemplated. Judge Nickerson, however, rejected this recommendation and decided "for the present to allow the City the flexibility it seeks." (Memorandum and Order of January 9, 1981, p. 4)).

document of approximately three hundred pages length) the record of negotiating progress is impressive.[43]

What, however, does all this mean in terms of assessing the degree of "success" in terms of actual achievement of reform goals? By quantitative indicators, *Jose P.* provides a substantial data base for objectively analyzing the extent of reform brought about by the court's intervention.[44] At the time the suit was initiated, approximately 50,000 students were enrolled in special education programs in the City of New York. By January 1, 1980, this number had risen to approximately 60,000 and by September 1, 1980 to approximately 75,000.[45] In terms of the most critical waiting list categories, when the suit was initiated, approximately 2,500 students were awaiting evaluation more than sixty working days (the time limit prescribed by state law for completing the entire evaluation and placement process); in September 1980, this number was reduced to approximately 600. On the other hand, in early 1979, the number of students who had been diagnosed but were awaiting the offering of a specific placement site totalled 2,765; in September 1980 the number on the analogous placement waiting list was 7,500. These figures would appear to indicate that the most severe backlog caused by delays in evaluation processing have been substantially improved; on the other hand, it could also be said that the bottle neck has merely been shifted to the placement phase of the operation.[46]

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[43] Judge Frankel gave great credit to the role of the parties and their counsel in promptly negotiating the major issues of the decree. His transmittal report to Judge Nickerson included the following comments:

> [The decree] represents primarily the results of earnest, creative, good faith labors by counsel for the parties and *amici*, as well as their clients, to evolve lawful and feasible programs for the achievement of the purposes to which this lawsuit is addressed. Throughout their frequently difficult discussions and disagreements, the participants appear to have kept steadily in view a shared concern for the ultimate goal, the effective and caring education of handicapped children. Thus motivated, they have fashioned the recommended judgment with relatively minimal participation by the special master. The result, one may be permitted to say, is gratifying. It gives ground to believe that the adversary techniques of modern class actions, when employed fairly by competent professionals, may actually serve large social purposes. (Special Master's Report No. 2, pp. 1-2 (December 5, 1979).

[44] Because of the extensive reporting requirements built into the decree, as well as the city defendants' willingness to cooperate in providing detailed discovery information to plaintiffs on a periodic basis, the court files in *Jose P.* probably provide a more extensive data base for assessing the extent of implementation of special education than is available in any other city in the nation.

[45] The Board projected a register by May 1, 1981 of almost 90,000 youngsters.

[46] One is tempted to conclude, based on the foregoing statistics, that 2,500 youngsters have been speeded through the evaluation process only to add to the waiting list at the placement end of the spectrum. Of course, it must be noted that the number of students going through the

The statistics on staffing are consistent with these waiting lists trends. The decree called for 450 evaluation teams to be in place by September 1980 (compared with approximately 225 actually on staff the prior year). As of September 30, 1980, the Board had in fact hired approximately 420 such teams. In terms of teachers, however, the Board's projections had called for an increase from the 1979 - 1980 school year to the 1980 - 1981 school year from approximately 7,750 to approximately 9,550; as of September, 1980 however, only 8,809 such teachers were in place. Clearly, this shortfall of approximately 700 teachers was a substantial factor in the buildup of a placement waiting list.[47]

What should one make of these statistics? Clearly, hundreds of additional staff personnel have been hired, and thousands of additional students are now receiving services (Board officials have estimated that more than $67 million has been added to the special educational budget because of the impact of this decree). On the other hand, at the time of this writing, thousands of students are still awaiting placement, and, by its own admission, the Board of Education has failed to fill hundreds of teacher slots which it admits are necessary to provide appropriate services. Thus, ample facts obviously exist to support both the traditional defendant arguments that superhuman efforts have been made and the traditional plaintiff's perspective that necessary services are being denied on a wide-ranging basis and the system remains in violation of the law.[48]

But these same facts can be looked at from a different, more comprehensive perspective. Clearly, much has been done, but much more remains to be done. In any event, there is a well-functioning process in place, a process which has promoted much of what has been accomplished and has the potential to continue to do so future.[49] For at

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entire process has substantially increased over the course of the past eighteen months.

[47] The Board of Education sought to deal with this problem of increased placement waiting lists and teacher shortages by requesting from the State Commissioner of Education a temporary increase in average class size for those special education programs experiencing such shortages. Although plaintiffs originally vigorously opposed this approach (and defendants contested the courts' authority), the parties eventually reached an accommodation which 1) increased the number of paraprofessionals in these classrooms, 2) provided for a new intensive teacher recruitment plan, and 3) limited the variances to the current school year.

[48] On other, less "quantitative issues," it should be noted that substantial progress has been made to date in such areas as establishing school based support teams, inclusion of parents in the placement process, and improving accessibility of existing programs for the physically disabled. On the other hand, serious problems still exist in such areas as adequate preparation of IEP's, provision of mainstreaming opportunities, and availability of related services such as occupational therapy and physical therapy.

[49] At the time of this writing, Dr. Gross, the Executive Director of the Division of Special

least four years before the court's intercession in the *Jose P.* case, the Board of Education had been on notice that it was in violation of applicable legal requirements concerning the education of handicapped children. Until the court's decree was issued, little progress had been made to implement the fundamental reforms which were necessary to begin to grapple with these problems; since 1979, however, no one can deny that the system has begun to respond to these problems in a dramatic way.

The implementation process in *Jose P.* is now reaching its most difficult stage. Since the basic decree and the detailed procedures and standards to put it into effect have been established, substantive implementation issues concerning staffing ratios, instructional methodologies, the provision of related services, expansion of mainstreaming opportunities and architectural accessibility have now come to the fore. In addition, serious compliance problems are beginning to develop. If the Board claims that despite good faith efforts it is unable to hire sufficient staff to meet the needs upon which all have agreed, what alternative plans or additional resources can be called into play?

Thus, it would appear that the *Jose P.* case is moving from a first stage of implementation involving the articulation of legal requirements and procedural standards to a second stage involving the actual marshalling of educational resources to put the plan into effect. So far, the court-supervised negotiating process, originally established only to outline the basic legal provisions of the court's decree, has continued to function, largely in the manner described above,[50] in grappling with these grass roots programmatic issues. The original decree had anticipated that by the Spring of 1980 a comprehensive "April Plan" agreed to by the parties, would resolve the major staffing, programming, and implementation issues. Such an "April Plan" is, in fact, almost complete and is about to be incorporated into the judgment (in May of 1981, however, rather than, April of 1980). A skeptic might note that most of the major areas of controversy are dealt with in that document by agreements to take partial steps toward compliance at the present time while continuing to consider and test new long-range approaches, all of which would be subject to

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Education and many of his top deputies had recently resigned. While the search for a new director got underway, a vacuum had been created in the making of long-range and even short range policy in the Division of Special Education. The detailed requirements the *Jose P.* decree appear to have played an important role during this period in providing clear structure, direction and continuity in a time otherwise marked by substantial flux and upheaval.

[50] See p. 348-501, *supra.*

further negotiation by the parties, (and further review by the Special Master and the Court)[51] if agreement is not reached. But the larger point is that progress toward agreed ends continues, albeit, perhaps, by inches and centimeters, instead of leaps and bounds. And a structure is in place which serves to promote mediation and resolution of unforseen problems which inevitably will arise during any process of institutional reform.[52]

It may be that during this second stage, if the court's supervision of special educaton implementaton is accepted as an ongoing reality, new institutional mechanisms will need to be devised to meet changing needs. For example, the suggestion has been made that most programmatic issues should be negotiated in the first instance directly by educational professionals selected by the parties, subject to the approval of the attorneys, for consistency with legal requirements of the decree, rather than, as in the past, by the attorneys with consultative input by their educational advisors.[53]

Consistent with the tenets of implementation theory, of course, it is impossible to predict with any assurance the final outcome of the implementation process in *Jose P.* Given the history of *PARC, Mills,* and other such cases involving system-wide educational reforms, it is likely that the court's involvement in this case will be of substantial duration. Not all of the participants — among both plaintiffs as well as the defendants — seem pleased by this prospect. Impatience with "interminable judicial interference" is beginning to surface. If, however, continued court involvement is, in fact, inevitable for the imme-

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[51] Thus, for example, instead of a comprehensive mainstreaming plan that would assure immediate placement of all children in the "least restrictive environment", (see 20 U.S.C. §§1412(5)(B), 1414(a)(1)(C)(iv)), the parties have agreed on a plan for the 1981-82 school year that should guarantee integration with non-handicapped children at lunch, assemblies and other special events for all special education students (with rare individual exceptions where such "mainstreaming" would not be appropriate). Based on the experience of this program, a "comprehensive" mainstreaming plan, which will focus upon integration in classroom settings, should be devised and implemented by the next year. For a comprehensive review of the literature and available studies on the difficulties of effectuating adequate mainstreaming programs, see Gresham, *Social Skills Training with Handicapped Children* 51 REV EDU RESEARCH 139 (1981). Similarly, the issue of the adequacy of the Board's staffing plans to meet anticipated need for related services has been deferred for development of a new computer assisted system for identifying related service needs and staffing capabilities to meet them.

[52] See, *e.g.* discussion of class size variance issue, *supra,* note 47.

[53] Mr. Edward Reitman, Associate Executive Director of UCP has suggested such a plan for an "educational panel" to the Special Master. Several of the parties have expressed support for the plan, but so far for the Board of Education is opposing it. A suggestion has also been made by the "Paragraph 58 Steering Committee" (a consultative panel of representatives of non-public institutions providing services to handicapped children, which was created pursuant to paragraph 58 of the Jose P. judgment) for the creation of an "expediter" of "ombudsman" to handle individual complaints and monitor compliance on a day-to-day basis.

diate future, the parties — not only in this case, but in similar "new model"[54] cases — might well be advised to accept the reality of an active judicial role and to concentrate their efforts both on solutions to immediate programmatic issues and on creation of new institutional mechanisms that might maximize the potential for successful utilization of the judicial process.

[54] See Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).