

**THE EDUCATIONAL & COMMUNICATION
NEEDS
OF DEAF AND HARD OF HEARING
CHILDREN:**

*A Statement of Principle
Regarding Fundamental
Systemic Educational Changes*

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PREFACE: *Statement of Principle*

The education of deaf and hard of hearing children should be a simple matter. By simple we do not mean artless or insignificant, but rather incontrovertible.

The provision of communication-rich education is at its heart a matter of immense consequence and beyond debate. We suggest in this Statement of Principle that all deaf and hard of hearing children are entitled to, and must have, a language-rich educational experience. They must have the opportunity to develop age-appropriate language skills, and to be in a classroom and school where communication is fully available, where there is a critical mass of communication peers, and where staff can communicate effectively and directly with them. In short, all deaf and hard of hearing children are entitled to an educational system that formally recognizes that communication is at the heart of human and academic growth.

The National Deaf Education Project, a collaborative project of the American Society for Deaf Children (ASDC), the Conference of Educational Administrators of Schools for the Deaf (CEASD), the Convention of American Instructors of the Deaf (CAID), Gallaudet University, the National Association of the Deaf (NAD), and the National Technical Institute for the Deaf (NTID) and funded by the Milken Family Foundation, was formed for the express purpose of suggesting that which is simple is also necessary.

The NDEP proposes that it is time that policy-makers and educators recognize that current law and policy have been, and will continue to be, inimical to the needs of deaf and hard of hearing children. It is time that deaf and hard of hearing children have an educational system that is communication-rich and communication-driven and in which programmatic and fiscal determinations are guided by that principle. A simple matter, undeniable and fair.

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Finally, the author wishes to thank the Milken Family Foundation. While others viewed the needs of deaf and hard of hearing children narrowly, the Foundation recognized the human rights issue at stake and provided the support necessary to transform a concept into reality.

ABOUT THE NATIONAL DEAF EDUCATION PROJECT

The National Deaf Education Project (NDEP) was established in 1998 to reform the current educational delivery system for deaf and hard of hearing children and has focused on two basic goals: creating an educational paradigm that is fundamentally communication-driven and assisting professional, consumer, and parent organizations to address local, regional, and state issues affecting deaf and hard of hearing children.

The NDEP is a collaborative project of the American Society for Deaf Children (ASDC), the Conference of Educational Administrators of Schools for the Deaf (CEASD), the Convention of American Instructors of the Deaf (CAID), Gallaudet University, the National Association of the Deaf (NAD), and the National Technical Institute for the Deaf (NTID). The NDEP Board is comprised of a representative of each of those organizations.

We welcome your comments and questions.

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Mr. Siegel has represented children in special education matters for more than twenty years and wrote the first deaf and hard of hearing child's educational Bill of Rights (South Dakota) which has been adopted in numerous other states. He is the author of Least Restrictive Environment: The Paradox of Inclusion (LRP Publishers, 1994), The Complete IEP Guide (NOLO.com), and numerous articles and has testified before state and federal legislative bodies regarding educational reform for deaf and hard of hearing children. Since 1994, he has served as a commissioner on the California Advisory Commission for Special Education. He was a member of the California Deaf and Hard of Hearing Education Advisory Task Force and helped write "Communication Access and Quality Education for Deaf and Hard of Hearing Children."

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I. INTRODUCTION: *The Need for a Fundamental Change*

In his 1862 message to the United States Congress, Abraham Lincoln stated that “...the dogmas of the quiet past are inadequate to the stormy present. The occasion is piled high with difficulty and we must rise with the occasion. As our case is new, so we must think anew, and act anew” (Abraham Lincoln: His Speeches and Writings, Da Capo Press, 1946, p. 668).

The words of Lincoln, president when Gallaudet University was established, are a timely challenge to the present educational system for deaf and hard of hearing children. Many of these children have the dubious distinction of being the only students in this nation who go to school without, and are not provided access to, the most fundamental of educational components: communication.

The right to communicate with others, to exchange ideas and thoughts, to ask a teacher about a math problem, to discuss the Russian Revolution (or the high salaries of professional athletes or one’s favorite author)—in short, the “right to language”—is necessary for any educational growth and central to the human experience.

Virtually everything an individual does or a society accomplishes has at its foundation communication. Society exists, as John Dewey suggested, in and through communication (Philosophy and Civilization, 1931, p. 87).

Without communication the individual is lost to the joys of human contact, the ability to connect thought and symbol into language, and the beauty of learning. The hearing children of this nation take for granted that they will travel through the school day in a rich and varied world of communication. Language is everywhere, and it is in that layered environment of communication that children have the chance to grow into healthy and productive citizens.

What parent of a hearing child would tolerate the placement of his or her child in a school where there were no language peers or where the teacher could not communicate directly with his or her child? What parent would tolerate the inability of the school system to teach basic reading and writing skills, even as we tolerate the system’s inability to develop and enhance a deaf and hard of hearing child’s communication skills?

It does not seem possible that there are children in America at the beginning of this millennium without communication. Many deaf and hard of hearing children have few or no language skills and limited communication access, both of which lead directly to social and linguistic isolation, and high rates of academic failure. The one unchanging and oft-repeated educational statistic continues to be that deaf and hard of hearing children leave school with 3rd grade reading skills. (See Raising and Educating a Deaf Child, Marc Marschark, Oxford University Press, 1997, p. 135.)

The reasons for this lack of communication and its academic consequences are complex, rooted in ignorance about hearing loss and communication development, lack of information and support for parents who have deaf or hard of hearing children, and the failure to provide early and effective communication for deaf and hard of hearing children. Of equal importance, our educational system does not provide quality, **communication-based** educational programs for deaf and hard of hearing

children. There is neither universal communication access nor constant, programmatic communication development in school.

There is no little irony here since the law and policy that should open doors for deaf and hard of hearing children does quite the opposite. Under the “least restrictive environment” (LRE) mandate of the Individuals with Disabilities Education Act (IDEA) (1975/1997), a rich language environment is not required, and indeed is often considered legally “segregated,” whereas a communication-poor environment is often viewed as legally “inclusive.” For many deaf and hard of hearing children education is, therefore, a kind of Alice-in-Wonderland experience, where up is down and inclusion means exclusion.

Some day there may be those who look back on this time and wonder how it was that a national educational system could not accommodate and foster communication. And yet, this is the case. Until there is a clear legal recognition of the primacy of communication, the educational system cannot serve deaf and hard of hearing children in an effective and broad way and we will lose another generation of those children.

The American ethic has been to recognize barriers placed before some American citizens, impediments that are so fundamentally harmful as to require a significant change in how our institutions function. Forty-six years after Brown v. Board of Education ended the de jure (if not the de facto) segregation of African American children, 27 years after the passage of the Rehabilitation Act of 1973, 25 years after IDEA was enacted to insure that a child’s “unique” needs were met, and 135 years after Gallaudet University was founded, deaf and hard of hearing children continue in an educational world where there is insufficient communication and therefore insufficient education.

The right and need to communicate and therefore benefit from education are beyond debate. This is fundamentally an issue of human rights. That a deaf or hard of hearing child must prove his or her right to communication, day by day, year after year, from one Individualized Education Program (IEP) to the next, is to reduce communication to a mere afterthought. Would a parent of a hearing child tolerate a system which required proof that his or her child needed to read? To impede communication, even unwittingly, is to harm the human spirit; to foster communication is to reveal all the possibilities of life. To witness the development and growth of communication in a child gives us boundless joy; the first expression of thought seems a miracle. What parent has forgotten those first signs of communication, or a child coming through the front door and expressing delight at some small moment at school?

The American educational system can and must become communication-driven for deaf and hard of hearing children. As it recognizes that children with disabilities have a fundamental right to a mainstreamed education, so too must the system recognize the fundamental importance of communication. This is a remarkably simple and fair proposition, one wholly in accord with other existing legal mandates, including IDEA’s inclusive purpose. The right to be included and the right to communication are mutually supportive.

The development of a communication-driven educational system is the central proposition of this Statement of Principle for it is time that deaf and hard of hearing children are included in the vibrant world of communication.

Accordingly this Statement of Principle will focus on four major issues:

1. Communication development and access is fundamental to educational and human growth.
2. The current “starting point” or underlying premise of IDEA does not effectively recognize or serve the communication needs of deaf and hard of hearing children, and in fact creates barriers for them. Of equal importance, fiscal and programmatic determinations flow from those legal mandates. Relying on existing IEP and due process mechanisms cannot resolve the larger, systemic problem facing deaf and hard of hearing children.
3. Until the system is communication-driven, the unique needs of deaf and hard of hearing children will not be fully understood and met, and those children will continue to enter adulthood without the necessary tools for success.
4. A new educational, communication-driven paradigm is required to effectively serve deaf and hard of hearing children. That paradigm recognizes that communication assessment, development, and access (critical mass of peers, language-proficient staff) are central to an effective educational delivery system. The paradigm also recognizes that there is not one way to communicate or one placement for all deaf and hard of hearing children. This is particularly true with technological advances and increased respect for the vibrancy of spoken and signed language. What is common for all these children is the importance of communication—an effective, communication-driven system will meet the needs of all deaf and hard of hearing children.

II. THE NEED FOR A FUNDAMENTAL SYSTEMIC CHANGE:

The General Argument for a Paradigm Shift

The Need for the Educational System in this Nation to Develop a Fundamental “Starting Point” for Deaf and Hard of Hearing Children. At the core of any effective institution is a fundamental concept or “starting point.” That starting point speaks of purpose and a systemic vision. For governance it is the concept of democracy. For education it is the concept of knowledge. Deaf and hard of hearing children have been caught in a series of debates that go back to the 19th century and which have perpetuated an ineffective educational system based on erroneous “starting points.” These debates involved the method of teaching deaf and hard of hearing children, what one communication mode would be used for all deaf and hard of hearing children, and more recently under IDEA, where the program is located rather than what communication opportunities are available.

We can no longer debate whether it is better for a deaf or hard of hearing child to learn sign language or to develop spoken receptive and expressive skills. Discussions about whether American Sign Language (ASL) or an English-based signing system should be used will certainly continue. But arguments supporting one or another should not be used as rationales for a one-dimensional institutional approach to educating deaf and hard of hearing children.

Similarly, arguments about whether a deaf or hard of hearing child should be mainstreamed or placed in a school for the deaf are not dispositive of making the system communication-driven.¹ Historically, any institutional effort to provide only “one way” to educate or place these children has not worked, and to think that an effective system will require and provide for only one kind of communication or one kind of placement is foolish at best. The issue before the American educational system is the need for a communication-rich environment for all its students, not the more narrowly drawn and confining notion of generic placement. The issue is not what communication mode is best, but that all communication needs must be addressed.

Deaf and hard of hearing children have one thing in common: their universal need for communication, from which all programmatic, fiscal, and educational determinations should flow. The burden should not be on differing camps to resolve understandable differences, but rather on our institutions to accept **and** accommodate those differences.

Without a fundamental, systemic, and clearly articulated formal recognition of the importance of communication for deaf and hard of hearing children **and** an educational delivery system based on that “starting point,” too many deaf and hard of hearing children will continue to sit alone in crowded classrooms and face adulthood without the tools to be successful. Until the law, and until the programmatic and fiscal determinations that flow from that law reflect the unequivocal importance of communication, the system will not be able to effectively address those communication needs.

Given the manner in which federal law and educational policy have limited options for deaf and hard of hearing children, the need for a paradigm shift is essential and long overdue. We are a pluralistic society. The new paradigm must honor and provide for what is common for our children—the need for communication—and what is different—the wondrous varieties of communication and language.

The Present Educational Model is Not Constructed to Effectively and Fundamentally Serve the Unique Needs of Deaf and Hard of Hearing Children. In 1975, Congress enacted the IDEA, and therefore sought, among other things, to bring previously excluded children into the “mainstream” of education. Prior to the enactment of IDEA, millions of children with disabilities were either denied an educational program or significantly separated from other children.

The provision of an education in the “least restrictive environment” was and remains the heart of IDEA. It is the conceptual “starting point,” reinforced by numerous judicial decisions, the “inclusion” movement, which sought to close the gap between the promise and the reality of IDEA, and finally the re-authorization of IDEA by Congress in 1997, in which the central goal of providing regular classroom educational opportunities was strongly re-stated:

Over 20 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by...ensuring their access in

¹ There are many kinds of programs for deaf and hard of hearing children, including day and residential public and private schools. These schools are designated in many ways. In California, for example, the state schools in Fremont and Riverside are referred to in law as “state special schools,” or commonly as “state schools for the deaf.” We use the broad term “center schools for deaf and hard of hearing children” or simply “center school” to refer to the excellent public and private state or center schools throughout the country. Reference to more specific programs will be made as necessary.

the general curriculum [and] providing appropriate special education and related services and aids and services in the regular classroom....

20 U.S.C. § 1400(c)(5)

That this “starting point” is necessary, valuable, and inviolate is beyond debate. Even as this statement of principle suggests that the communication needs of deaf and hard of hearing children have been ignored, we fundamentally believe in the continued strengthening of IDEA’s inclusive nature. These two concepts are not mutually exclusive. Indeed, a truly equitable and effective system can and will provide for an inclusive and communication-driven education.

As currently written, however, IDEA emphasizes the inclusion requirement with no corresponding focus on communication development and access.² A communication “starting point” for deaf and hard of hearing children is sadly in direct conflict with the inclusion requirement. To raise this fundamental issue is not to question whether or not opportunities to be with non-disabled children are of significant value or crucial to some or even many deaf and hard of hearing children’s educational and communicational well-being.

It is to say, however, that the unique communication needs of all deaf and hard of hearing children, whether they use spoken or signed language, or whether they are mainstreamed or in a school for the deaf, have been at odds with the purpose of IDEA. It is time inclusion and communication become educational siblings, diverse but equally vibrant, valuable, and supported.

III. THE CONCEPTUAL BASIS FOR EDUCATING DEAF AND HARD OF HEARING STUDENTS: *A General Description of the Paradigm*

The new paradigm will require two basic components: a recognized communication-driven “starting point” **and** an effective, communication-based delivery system to serve deaf and hard of hearing children. Although that paradigm is discussed in detail in Part 6, broadly speaking it must include:

Quality, Communication-Based Program. All deaf and hard of hearing children deserve a quality, communication-driven program which is formally articulated in law and requires:

- communication **assessment** of the child’s communication language, mode, and skill level.
- communication **development**, including a fundamental and clear requirement that all programs assist the child in developing age-level language skills in the child’s native language and corresponding skills in English.
- communication **access**, including programs that provide a “critical mass” of communication, age, and cognitive peers; language-proficient teachers and staff who can communicate directly and at an adult level; administrators who understand the unique

² A detailed discussion of why IDEA, even with changes made in 1997, is an impediment to the provision of a communicationally appropriate education for deaf and hard of hearing children is found in Part 5.

needs of deaf and hard of hearing children; deaf and hard of hearing role models; and access to extra curricular and other important school activities.

These three components must become equal to any other legal mandate under federal and state law. They must drive all fiscal, programmatic, and personnel-development determinations. The concept of critical mass requires special mention since all children should have an educational environment in which there are enough age, language, and cognitive peers to allow for effective social, linguistic, and educational growth. Given that deafness is a low incidence condition, the availability of a critical mass of peers is particularly important and historically vexing.

Critical mass can and must mean different things for different students. For a child who is “oral,” his or her neighborhood school with other children who use spoken language provides that child with the necessary critical mass. For a profoundly deaf child who uses sign language, an area-wide program or school for the deaf will provide the necessary critical mass.³

In either case, it is the child’s communication needs that should drive the system. It is well past time to apply simple and one-dimensional concepts when they do not fit and ultimately harm children. A new, appropriate, and effective system will recognize this in law, policy, and program development. A communication-driven program will provide a variety of communication options, all of which are by their very nature least restrictive, whether that program is in a regular neighborhood school or a school for the deaf, and whether the predominant language is ASL or spoken language.

An Effective, Communication-Based Delivery System. Because of the unique needs of deaf and hard of hearing students, a communication-driven system will require the following:

- A state structure, based on clear federal and state law, with a definitive “communication starting point” for which an appropriate funding model is established to ensure a state-wide, communication-driven delivery system.⁴
- A state structure that establishes clear program standards and monitors communication-based, quality programs that provide for communication **assessment, access, and development.**

³ For too long, center schools for deaf and hard of hearing children have been viewed under the “least restrictive environment mandate of the IDEA as “segregated” and restrictive when in reality, with their rich language environment and critical mass of peers and language proficient teachers, they are “least restrictive” in the most fundamental way. The paradox is evident, for that which may be truly valuable, inclusive and least restrictive is, in fact, legally “most restrictive.” (See Part 5)

⁴ Other nations have looked closely at the relationship between communication development, educational growth, and the need for a communication-driven system. In 1981, for example, the Swedish Parliament enacted a law stating that deaf children had the right to be come fluent in both Swedish Sign Language and spoken Swedish (Denmark developed similar policies). As a result, the delivery system in those countries focused initially and fundamentally on the development of a child’s native language:

The identity of the deaf is based on sign language constituting their primary language and vision their principal means of communication, whereas the hearing-impaired have Swedish as their primary language and hearing—often with the support of technical aids—as their principal means of communication.... The pupils’ ability to understand and use sign language and Swedish is to be developed.... A person’s language is closely connected with his personality and situation in life. If that connection is severed, the development of both language and personality is blocked. (Swedish National Board of Education, “Special School Curriculum,” Ma7y, 1985, pp. 4, 6, 7, 8.)

Follow-up studies of the Swedish system revealed more effective early language acquisition, as well as improved educational performances. (Shawn Davies, The Transition Toward Bilingual Education of Deaf Children in Sweden and Denmark: Perspectives on Language, 1991, Washington, DC: Gallaudet Research Institute)

- A clear interface between the educational system, the medical institutions of the state, and other state entities regarding at-birth detection of hearing loss.
- The provision of medical, educational, linguistic, and other services for deaf and hard of hearing children and their parents.

The importance of the earliest possible identification of hearing loss and the earliest possible provision for appropriate language modeling and development cannot be over-emphasized. The National Institutes of Health (1993) concluded that “all infants should be screened for hearing impairment.”

Early identification of hearing loss and early intervention “are highly related to normal language development of deaf and hard of hearing children.... Results indicate that language development is significantly delayed when identification of hearing loss and intervention occur later than 6 months.” “The Development of Deaf and Hard of Hearing Children Identified Early Through the High-Risk Registry,” Christine Yoshinaga-Itano and Mah-Rya L. Apuzzo, American Annals of the Deaf, December 1998, vol. 143, pp. 416, 423.⁵

IV. THE IMPORTANCE OF COMMUNICATION TO THE EDUCATIONAL EXPERIENCE

The ability to comprehend and produce language stands as a defining characteristic of human cognition and enables the transfer of knowledge and culture within human society. (“Studies of Neural Processing in Deaf Signers: Toward a Neurocognitive Model of Language Processing in the Deaf,” David P. Corina, Journal of Deaf Studies and Deaf Education, Oxford Press, Winter, 1998, vol. 3, no. 1, p.35)

If communication goes awry it affects the intellectual growth, social intercourse, language development, and emotional attitudes, all at once, simultaneously, and inseparably. (Oliver Sacks, Seeing Voices, 1989, pp. 62-63)

The deaf or hard of hearing child is fully capable of becoming a productive citizen, and has the ability to be, among other things, a good parent, teacher, or doctor. But without communication, human growth is inexorably impeded. Because the opportunity and ability to communicate is so basic, the hearing world rarely thinks about the consequences of its absence. Its significance becomes most obvious when it is not there.

In a world where it may be difficult to argue the differences between so-called “disabilities,” the unique nature and consequence of hearing loss separates deaf and hard of hearing children from all others.⁶ To determine whether a child in a wheelchair has greater or lesser burdens to overcome

⁵ The Newborn and Infant Hearing Screening and Intervention Act of 1999 (S 956) established a system of grants for states to begin newborn screening, a hopeful sign that early identification of hearing loss might go hand-in-hand with early communication development.

⁶ A deaf or hard of hearing child is, to some degree, without hearing. And yet the term “disabled” may be a misnomer. That same child is fully capable of developing language—spoken or manual—and becoming a complete person. A communication difference is not the same as a communication disability.

than a deaf or hard of hearing child (or a learning disabled, autistic, or emotionally troubled child) is an effort in futility. To say, however, that a hearing loss is like any of the other conditions is to lose distinctions of epic consequence for our “capacity to communicate meaningfully with others is inextricably tied to our capacities for survival.” They Grow in Silence, Eugene D. Mindel and McCay Vernon, the National Association of the Deaf, 1971, p. 19.

Even as we acknowledge the commonality of all children, we can, without doing any damage to that ethic, note how different a deaf or hard of hearing child can be from other children. Indeed, such a child may be “unique” among the “unique.” To understand that difference is to increase the chances of serving deaf, hearing, and hard of hearing children.

Early or At-Birth Hearing Loss Has a Profound and Life-Long Impact on the Individual Child. In their important work, They Grow in Silence, Eugene D. Mindel and McCay Vernon (1971), noted that with “profound hearing loss, the child will be virtually excluded from information and human contact...” p. 18.

Mindel and Vernon described how hearing loss affects the child and parent relationship and noted the linguistic, psychological, and social isolation that follows:

A more profound progressive isolation from the hearing world begins at the point when the child begins to depend upon auditory stimulation for the development of language and general knowledge.... A diminished capacity [to communicate] renders one compromised; a nonexistent capacity to communicate renders one impotent. (pp. 18-19)

Deaf and hard of hearing children are denied communication opportunities precisely when they are most needed: between birth and 3 years of age, even though “social and emotional intercourse, intellectual intercourse, too, starts from the first day of life.” Seeing Voices, Oliver Sacks, pp. 61-62. The rate of human learning and development is “most rapid during the early childhood years...[when] the nervous system of the very young child is still malleable and responsive...” Achieving full “intellectual and academic potential depends on early detection of hearing loss....” “Giving Children a Sound Beginning: The Promise of Universal Newborn Hearing Screening,” Gary W. Mauk & Karl R. White, Volta Review, vol. 97, 1995, p. 7.

Children with a profound hearing loss, especially those born to hearing parents, frequently lack exposure to early and appropriate language. The reasons for this are varied and include failure to detect the hearing loss early enough, reluctance to accept that the child won’t be “like other children,” the desire to “make” the deaf child into a hearing child, or, even after the parents have accepted the hearing loss, an unwillingness, in many cases, to provide sign language. The lack of early language opportunities is life-altering:

The first years of life are when basic language skills develop, and the first two to three years are generally recognized as a critical period for language

learning. There is no substitute for natural language learning, and language acquisition that begins at three or four is not natural (Raising and Educating a Deaf Child, Marc Marschark, Oxford University Press, 1997, p. 15).

Many children without hearing “arrive at school age with very limited language ability.... For most hearing impaired children, school is a place where language, including conversational skills as well as academic lessons, **remains to be learned.**” [emphasis added] “If Teaching is Conversation, Can Conversation Be Taught?: Discourse Abilities in Hearing Impaired Children,” Penny L. Griffith, Harold A. Johnson, and Sondra L. Dastoli, reprinted in School Discourse Problems, D.N. Ripich and F. M. Spinellie (Eds.), pp. 149, 150, College-Hill Press, 1985.

The lack of early communication is further impeded because:

- 95% of deaf and hard of hearing children lose their hearing **before** they develop language, e.g., at birth;
- 90% of deaf and hard of hearing children have hearing parents (Toward Equality, A Report of the Commission on Education of the Deaf to the President and the Congress of the United States, February 1988, p. 15); and
- although lip or speech reading provides some cues to language, at most 40% of the sounds produced by English are visible on the lips; for many deaf children even with intense auditory training, they may learn only 5% of what is said to them (Toward Equality, p. 15).

The National Association of State Directors of Special Education (NASDSE), in its 1994 “Deaf and Hard of Hearing Students Educational Service Guidelines,” reported that:

Most hearing children enter school with the ability to process and integrate verbal information. They have a basic command of the language and an extensive vocabulary. **School systems establish programs and services and develop curricula based on the assumption that all children enter school with basic language skills.** The schools then proceed to teach children to read, write, and develop computational skills. With these tools, children are ready for the acquisition of information in content areas. Educational systems, in general, help students reach the goals of self-realization, development of proper human relationships, attainment of economic sufficiency, and assumption of civic responsibility. The goals for educating children with hearing loss are identical. However, children with hearing loss seldom bring to their educational experience the same extensive language background or the same breath of language skills as do hearing children. [emphasis added] (p.2)

The Educational and Health Consequences of Failed Communication are Significant and Life-Altering. What is the personal and societal cost of failed communication and an inadequate educational system? Deaf and hard of hearing children are at high risk for outcomes far below their potential, poor academic achievement, school dropout, and delays in language and critical thinking skills.

For example, the “effect of early sensory deprivation” has “far-reaching consequences on central nervous system functioning,” particularly in terms of language. Hearing in Children, Jerry L. Northern and Marion P. Downs, (1974), p. 74. The “language experience can grossly alter cerebral development [specifically] left hemisphere specialization,” which in turn can “delay the maturation of the brain....” Seeing Voices, Oliver Sacks (1989), pp. 109-110.

The educational consequences of failed communication are reflected in individual frustration and isolation, which in turn affect society as a whole. Statistics do not tell of the child sitting alone in a class struggling to form ideas and feelings into language, but they do reveal the educational consequence of that isolation:

- Deaf and hard of hearing children graduate from high school with 2.8 to 4.5 grade reading skills (hearing children graduate with 10th grade reading skills).
- Between the ages of 8 and 18, deaf and hard of hearing children gain 1.5 years in reading skills. T.E. Allen, “Patterns of Academic Achievements Among Hearing-Impaired Students,” A.N. Schildroth & M.A. Karchmer (Eds.), Deaf Children in America (College Hill Press, 1986) and “Annual Survey of Hearing Impaired Children and Youth,” Center for Assessment and Demographic Studies (Gallaudet University, 1991-1992).
- 30% of all deaf and hard of hearing children leave school functionally illiterate. The Deaf School Child, R. Conrad (Gallaudet University, 1974).
- 57% of deaf and hard of hearing children exhibit academic deficits; 60% are unprepared for college. Toward Equality, 1988, pp. x, 18.

And if failed communication leads to failed education, then failed education leads to a failed adulthood:

- Only 8% of deaf and hard of hearing students graduate from college. Toward Equality.
- Approximately 1/3 of all deaf adults rely on some form of governmental assistance and the average income of deaf adults is 40-60% of their hearing counterparts.
- Approximately 40% of deaf adults are unemployed and 90% are underemployed. (Northern California Center on Deafness Report [NORCAL], 1998).

Failed communication affects all aspects of life. For example, deaf and hard of hearing adults have a higher rate of mental illness and have more concurrent health difficulties than their hearing counterparts. (See Sound and Sign: Childhood Deafness and Mental Health, Dr. Hilde Scheslinger,

1972, University of California Press). Approximately 40,000 deaf Americans suffer from serious psychopathology. American Psychologist, vol. 51, April 1996, p. 389.⁷ These statistics reveal the devastating and wasteful impact on national and individual resources when deaf and hard of hearing children fail to develop educational and communication skills.

The Provision of Early Communication Opportunities Helps Deaf and Hard of Hearing Children Develop into Healthy Adults. Research increasingly shows that the “nature of cognitive development is essentially the same for deaf and hearing children” and that the differences in academic achievement and intellectual testing reflect deficiencies in linguistic development and not inherent capabilities. “Learning Disability, Neuropsychology, and Deaf Youth: Theory, Research, and Practice,” Rosemary Calderon, University of Washington, Journal of Deaf Studies and Deaf Education, id. at p. 1.⁸

The development of fundamental academic skill is inexorably linked to early language development:

The best deaf readers appear to be those who receive early exposure to sign language and exposure to the language in which they will eventually learn to read. Raising and Educating a Deaf Child, *supra*, p. 15.

Deaf children of deaf parents who are exposed to early sign language perform better academically than deaf children of hearing parents where language development was compromised. Similarly, deaf children of deaf parents exposed to early language developed better speech skills than deaf children of hearing parents (They Grow in Silence, *supra*, pp. 75-76).

Studies, including those by the National Institutes of Health, indicate that deaf children of deaf parents develop higher reading skills than deaf children of hearing parents. Dr. Marc Marschark, director of the Center for Research, Teaching, and Learning at the National Technical Institute for the Deaf at the Rochester Institute of Technology, reviewed 30 years of studies regarding reading skills among deaf children and found similar results. What is of note here is not necessarily the deaf parent-deaf child construct or even what the best way to learn language is (aurally/orally or visually), but rather the fact that those children are provided early, appropriate, and rich language exposure. As Dr. Marschark (1997) has written:

Regardless of whether their parents are deaf or hearing...deaf children who are better readers turn out to be the ones who had their hearing losses diagnosed earlier,

⁷ But see Raising and Educating a Deaf Child, by Marschark, at pp. 179-182 for a discussion of studies which indicate deaf people are less likely to suffer from certain mental disorders, e.g., depression. Dr. Marschark's discussion underscores the importance of recognizing how incomplete communication and attitudes about, and approaches to, deaf people can impact a person's well-being rather than some innate individual or group characteristic.

⁸ Historically many deaf and hard of hearing children have been mis-diagnosed as having serious psychological, emotional, cognitive, and physiological delays. In this “pathological” model, deaf and hard of hearing people fail because of their hearing loss, not because they are “languageless.” Deaf people have the “same distribution of intelligence scores as hearing people on tests in which language skills are not related to success or failure.” “Learning Disability, Neuropsychology, and Deaf Youth: Theory, Research, and Practice,” Rosemary Calderon quoting Sisco and Anderson (1978), Journal of Deaf Studies and Deaf Education, Vol. 3, number 1, Winter 1998, p. 1.

had early access to language (usually via sign language), **and** were exposed to English. Raising and Educating a Deaf Child, pp. 140-141.

Dr. Christine Yoshinaga-Itano and Dr. Mah-Rya L. Apuzzo reported in late 1998 that children identified with a hearing loss between birth and 6 months of age had a receptive language of 200 words and expressive language of 117 words, whereas those identified between the ages of 7 and 18 months had a receptive language of 86 words and expressive language of 54 words. When tested at 26 months, infants who were identified between birth and 6 months had “significantly higher” measures of language growth and personal-social development. “The Development of Deaf and Hard of Hearing Children Identified Early Through the High-Risk Registry,” Christine Yoshinaga-Itano and Mah-Rya L. Apuzzo, American Annals of the Deaf, December 1998, vol. 143, pp. 416, 421-422.

It has become increasingly clear that “the nature of cognitive development is essentially the same for deaf and hearing children, allowing that slight developmental delays or differences may result from secondary effects of deafness (e.g., communication abilities, environmental factors).” “Learning Disability, Neuropsychology, and Deaf Youth: Theory, Research, and Practice,” supra at p. 1.

The importance of communication is reflected in both the consequences of its absence and the profound benefit of its early and effective development. Any evaluation of the current educational system and consideration of a change in that system must begin with an understanding of the role of communication in helping a child evolve into a healthy and productive adult.

V. THE CURRENT EDUCATIONAL SYSTEM CANNOT PROVIDE AN APPROPRIATE EDUCATION FOR DEAF AND HARD OF HEARING CHILDREN

We have known for a long time that the American educational system has not worked for many deaf and hard of hearing children. In 1965, the U.S. Department of Health, Education and Welfare established the Babbidge Committee which concluded that the educational system had limited success in preparing deaf children for full participation in society. Twenty-three years after the Babbidge report and 13 years after the passage of IDEA, the Commission on Education of the Deaf (COED), established by the Education of the Deaf Act of 1986, reported to Congress and the President in Toward Equality its “primary and inescapable conclusion” that the “status of education for persons who are deaf in the United States is unsatisfactory....Unacceptably so.” p. viii. Low academic achievement levels for deaf and hard of hearing students were “well known both to legislators and educators” which lead to the creation of the COED and NASDSE Guidelines, supra at p. 6.

In 1992, the U.S. Department of Education issued the “Deaf Students Education Services Policy Guidance,” in which the Secretary of Education reported that “students who are deaf have

significant obstacles to overcome in order to have access to a free appropriate public education that meets their unique educational needs, particularly their communication and related needs.” Federal Register, vol. 57, no. 211, October 30, 1992, p. 49274.

The Secretary noted that the “reading skills of deaf children reflect perhaps the most momentous and dismal effects...of the education system’s struggle to effectively teach deaf children...” Ibid.

The Secretary concluded that the “unique communication and related needs” of deaf and hard of hearing children have “not been adequately considered in the development” of their educational programs. Id. at 49275.

The growing frustration of parents, children, deaf and hard of hearing adults, and educators led to a movement to assert the unique rights of deaf and hard of hearing children. In 1993, South Dakota became the first state to pass a deaf child’s “Bill of Rights.” Other states, including California, Louisiana, Colorado, and Rhode Island, passed similar legislation.

The South Dakota “Bill of Rights” (SB 219, effective July 1, 1993) provided that

Deafness involves the most basic of human needs, the ability to communicate with other human beings. Many deaf and hard of hearing children use, as their primary communication mode, American Sign Language while others express and receive language through English-based sign language, or orally and aurally, with or without visual signs or cues. Still others, typically young deaf and hard of hearing children, lack any significant language skills. Deaf and hard of hearing children require educational programs that provide appropriate, ongoing, and communicationally accessible educational opportunities.

...deaf and hard of hearing children shall have an education in which their unique communication mode is respected, utilized, and developed to an appropriate level of proficiency...in which their special education teachers, psychologists, speech therapists, assessors, administrators, interpreters, and other personnel understand the unique nature of deafness and are specifically trained to work with deaf and hard of hearing children...in which their special education teachers and interpreters are proficient in the primary language mode of those children...in which [they] have an education with a sufficient number of language mode peers who are of the same or approximately the same age and ability level and with whom [they] can communicate directly or as appropriate through the use of qualified interpreters...That a determination of the least restrictive environment as used in state and federal law takes into consideration the unique communication needs of deaf and hard of hearing children.

Despite the incipient “Bill of Rights” movement, the existing system remains essentially unchanged. In 1999, the California Superintendent of Public Instruction, responsible for special education in the state, reported that educational programs for deaf and hard of hearing children were

to a “significant degree, ineffective,” the problem being not one of “individual failure, but rather of systemic inadequacies: school districts do not have an understanding of the unique communication needs of deaf and hard of hearing children or the resources to meet those needs.” The Superintendent recognized that the system **must become “communication-based”** and concluded that we cannot “continue to perpetuate the isolation of deaf and hard of hearing children and to accept unacceptable education failure rates.” [emphasis added] “Communication Access and Quality Education for Deaf and Hard of Hearing Children: Communication Access and Quality Education,” California Department of Education, pp. 4, 21, 1999.

All of these reports recognized that the current system is simply not equipped to assist deaf and hard of hearing children in the development of communication and language. That is not to say that there are not excellent teachers and even excellent programs that serve deaf and hard of hearing students in this nation. That is not to say that there are not dedicated and knowledgeable administrators and support staff. That is not to say that some programs don’t attempt to provide for communication needs.

There are school districts throughout the country and even state departments of education that have recognized the important COED and NASDSE recommendations regarding communication and language development. For example, Pennsylvania has recognized the role of “preferred mode of communication” and “linguistic needs” for deaf and hard of hearing children. “Pennsylvania Department of Education Guidelines for Students with Hearing Loss,” p. 44, 1995.

But the difference between recognizing linguistic and communication needs **and** the system-wide, legally mandated, and programmatic provision for communication needs is profound. Provision of those needs is left to individual school districts, which cannot as a general rule translate the importance of communication needs into system-wide programs and must, in any case, work within the confines of IDEA. Moreover, the dictates of IDEA, as well as the inertia of a long-standing system, are fixed in fiscal and programmatic structures that are not communication-driven.

The system is, at best, hit or miss for, as the California task force noted, there is an unmistakable thread [that] runs through these reports, policies, and laws:

deaf and hard of hearing children have been denied—but nonetheless need—a quality, communication-based education. This schooling must include a critical mass of language and age peers, language proficient teachers and other professionals, administrators certified and knowledgeable in deaf and hard of hearing education and appropriate support services...there has been a substantial inability—for too many years—to convert the best thinking of parents, professionals, deaf and hard-of-hearing adults, and legislators into concrete action. “Communication Access and Quality Education for Deaf and Hard of Hearing Children: Communication Access and Quality Education,” California Department of Education, p. 4, 1999.

The Reasons the Existing System Cannot Serve Deaf and Hard of Hearing Children are Complex. The reasons the current system is not communication-based, and

therefore “unacceptable,” are complex and multi-faceted. The specific consequences of that failure were vigorously noted by the COED:

- There are significant variations in age, cognitive skills, and language among children in existing classes for deaf and hard of hearing children.⁹
- Many teachers, administrators, interpreters, psychologists, and other support staff are not adequately trained in, or knowledgeable about, deafness and the educational and communication needs of deaf and hard of hearing children. Many are not proficient in the child’s communication mode/language. In addition, there is an insufficient number of professionals available to serve deaf and hard of hearing children.
- There is inadequate parent support and training.
- There are no universal programmatic and professional standards applied by state departments of education.
- Evaluation/assessment of deaf and hard of hearing children is not always carried out by trained personnel and/or those knowledgeable about the unique needs of these children.
- There is a lack of cultural/linguistic awareness and a failure to provide deaf and hard of hearing adult role models.
- There is insufficient access to extra-curricular and other non-classroom activities.
- There is insufficient technology.
- There is little or no coordination between early education, medical, and other state resources to ensure early identification of hearing loss and early access to, and provision of, support for families and children in order to develop early language skills.

The Population and Geographic Distribution of Deaf and Hard of Hearing Children Fundamentally Affect the Kind and Quality of an Educational Program. The low incidence of deafness coupled with its unique ramifications means the needs of children who are deaf are easily and frequently neglected. Toward Equality, p. 20.

Because a critical mass of age, cognitive and language peers is fundamental to an effective educational system, the number of deaf and hard of hearing students and their geographic and age distribution have a fundamental impact on program quality and availability. The current system has not effectively addressed this need.

The low-incidence deaf and hard of hearing population and the manner in which the school system addresses the geographic distribution results in frequent isolation of these children through

⁹ The paucity of communication opportunities for deaf and hard of hearing children is systemic. Dr. Steven Nover of the University of Arizona has found that in classrooms in which there are hearing and deaf students and sign language interpreters, the hearing students were exposed to 15 times more English words than were the deaf students. “Full Inclusion for Deaf Students: An Ethnographic Perspective,” Steven M. Nover, Conference Proceedings: Defining Quality Education for Deaf and Hard of Hearing Students, Gallaudet University, 1995, pp. 42-43.

inappropriate grouping of students with vastly different language abilities, academic skills, and ages. See Toward Equality pp. 29-31.

In 1996, Wyoming reported to the U.S. Department of Education that it served 164 students with a hearing impairment, while California served 8,643. In that same year, Illinois served 2,982 while Nevada served 325. To Assure the Free Appropriate Public Education of All Children with Disabilities, U.S. Department of Education, 19th Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act, p. A-2 (1997). In 1997, Arkansas served 433, while New York served 4,979 deaf and hard of hearing children. American Annals of the Deaf, April 1998, vol. 143, no. 2, pp. 123, 137-139.¹⁰

But, ultimately, it is how the numbers break out within individual school districts or educational areas that reveals the true numeric isolation. For the 1996-97 school year, of 500 California school districts, approximately 360 reported 10 or fewer deaf and hard of hearing children. Eighty percent of those districts had 20 or fewer deaf and hard of hearing students. Of the 74 school districts or agencies reporting on deaf and hard of hearing students in New York, 35 reported 0-10 total students, while 52 districts had 50 or fewer students with a hearing loss. Annals, pp. 137-139. In Alabama, 24 out of 35 school districts reporting deaf and hard of hearing children had 10 or fewer students. Of the remaining 11 districts, 7 had between 11 and 30 students and the remaining 4 districts had respectively, 39, 65, 75, and 181 students. Annals, p. 122. Of the 30 educational units reporting deaf and hard of hearing students in Ohio, 16 had 30 or fewer students. Annals, p. 140.

Eleven years after the passage of IDEA, of those schools with deaf and hard of hearing children, 52% had one deaf or hard of hearing child while 24% had 2 to 3 deaf or hard of hearing children. Between 1979 and 1986, the number of programs in which there was **one** deaf or hard of hearing student increased from 1,797 to 4,412 programs. "Recent Changes in the Educational Placement of Deaf Students," Arthur Schildroth, American Annals of the Deaf, April 1988, pp. 61-62.

Age distribution also affects the quality and availability of programs, exacerbating the geographic spread. In California, the age distribution between 1st and 12th graders throughout the state was relatively uniform from a low of 462 in the 12th grade to a high of 771 in the 3rd grade. California Department of Education, Special Education Division, Research, Evaluation, and Outcomes Unit, December 1996 statistics. Age range uniformity adds additional pressure in terms of forming appropriate classes for these students. Since IDEA requires that children between the ages of 3 and 22 be served and given standard age distribution, the number of deaf and hard of hearing children in any one age group will be quite small. Forming age-appropriate classes therefore becomes problematic.

There are other equally significant factors complicating this picture. Deaf and hard of hearing children, like all other children, have varying developmental, cognitive, and, of course, linguistic and communication abilities. A deaf child who uses ASL, and who is cognitively and

¹⁰ The differences within individual states are also significant. For example, in 1996, the Los Angeles Unified School District served 1,903 deaf and hard of hearing students, while the Alpine Union Elementary School District in the rural, northeastern section of California served 1 deaf child. California Department of Education, Special Education Division, Research, Evaluation, and Outcomes Unit, December, 1996 statistics.

educationally at grade level, is significantly different from a deaf child who uses an English-based sign language and who is cognitively and educationally several grades behind his or her peers. These two children are themselves significantly different from a child who uses spoken language. Despite these differences, many deaf and hard of hearing children are placed in one generic program.

As COED (1988) noted with alarm, many classes that serve deaf and hard of hearing children have:

- significant age span in one class (up to 10 years);
- cross-categorical grouping (deaf children placed with children with other “disabilities,” e.g., autistic and developmentally delayed children); and/or
- significant cognitive and linguistic differences (both among deaf and hearing students **and** among deaf children). Toward Equality, pp. 28-29.

Clearly, the distribution of deaf and hard of hearing children throughout an educational area reveals both the importance of critical mass and the difficulties inherent in providing it. Ultimately, the system must choose between developing low pupil-teacher ratio and high-cost programs **or** mixing low-incidence populations into fewer classes with greater student numbers and wider characteristic ranges.

When the choice is between bringing a significantly diverse group of children together into one class and developing a number of smaller classes in order to provide deaf and hard of hearing children classes with age, language, and cognitive peers, the fiscally appealing decision often prevails. With historic fiscal limitations and concerns that special education costs have encroached on general education budgets, it is not surprising that administrative decisions are not normally based on the communication needs of deaf and hard of hearing children.

Consider a district with 35 deaf and hard of hearing students. Assume further that there are two to three students in each age group (i.e., 3-4, 4-5, 5-6). Even without factoring in different language and cognitive qualities within each age group, the need for 10 to 15 classes and an equal number of teachers is apparent. The alternative is to mix children with different ages, languages, and cognitive skills into fewer classes, which is, of course what happens. As a result, a communication-driven system is not available.

What parents of a hearing child would (or should) tolerate a placement in which their six-year-old child is in a class with nine-, eleven-, and sixteen-year-olds? What parents of a hearing child with mild learning disabilities would (or should) tolerate placement in a class with behaviorally troubled children?

The same fiscal factors have an impact on those deaf and hard of hearing children who are mainstreamed; necessary 1:1 services (whether a sign language or oral interpreter or a speech therapist) are often not available or mainstreaming is discouraged because of its high cost-per-individual-pupil ratio.¹¹

¹¹ While much has been said and written about the “segregated nature” of center schools for deaf and hard of hearing children, recent studies underscore the complications of inappropriate or inadequately supported mainstreaming. Michael S. Stinson of the National Technical Institute for the Deaf and Shirin D. Antia of the University of Arizona reported in the Summer 1999 edition of the Journal of Deaf Studies and Deaf Education that deaf and hard of hearing students who are mainstreamed do not, broadly speaking, score

Whether a deaf or hard of hearing child is included in a regular classroom or placed in a separate class or school, the low incidence of hearing loss and the manner in which the system establishes programs for those children results in a sparse communication environment which in turn affects educational development.

Existing Law Inhibits Rather than Enhances a Communication-Based Educational System for Deaf and Hard of Hearing Children.

The least restrictive environment concept [of IDEA] has not been appropriately applied by federal, state, and local educational agencies for many children who are deaf. Toward Equality, p. 24.

[T]he heart of IDEA—its inclusionary spirit—is controversial and inherently paradoxical. Least Restrictive Environment: The Paradox of Inclusion, Lawrence Siegel, LRP Publishers, 1994, p. 7.

The term itself—“least restrictive environment”—conveys a negative perspective on an ostensibly positive goal. It asks that one determine what is the “least” restricted rather than what is the most “open” or “positive” placement. And thus, while a communication-rich class or program is in every sense of the concept most open or positive (or if IDEA prefers, least restrictive), it is legally viewed as neither open nor positive and certainly more or most restrictive because it is not a regular classroom. Under IDEA most environments that are communication-rich, and therefore fundamentally “least restrictive,” for deaf and hard of hearing children have no legal imprimatur.

This poses a legal and philosophical barrier which cannot be breached. As long as current law views a communication-rich environment as more restrictive and that which isolates such a child as “least restrictive,” that child will continue to be ill-served. It is as simple and daunting as that.

IDEA is Fundamentally a Paradoxical Law. The need to bring children with disabilities into the “mainstream” of education touches emotional chords, making it difficult to distinguish between, and give proper attention to, the unarguably valid mainstreaming purpose of IDEA, **and** those portions of the law that create significant statutory and educational barriers for deaf and hard of hearing children.

IDEA is a remarkable law, enacted in 1975 to end the “segregation” of children with disabilities. The importance of that charge and its subsequent reinforcement through Congressional re-authorization and national movements to increase the inclusion of children with disabilities cannot be gainsaid. And it is because of this unquestionably important and fundamental concept that the debate as to how IDEA serves or mis-serves deaf and hard of hearing children remains complex and troubling.

higher than those who are not mainstreamed, but do face significant barriers to regular classroom participation and social interaction. These students engage in less linguistic interaction and are more frequently neglected or rejected by their hearing peers. “Considerations in Educating Deaf and Hard of Hearing Students in Inclusive Settings,” pp. 163-170. There can be little doubt that both regular and nonregular educational environments must be communication-driven for deaf and hard of hearing students.

As structured, IDEA is not currently capable of making LRE and communication compatible so that program options, standards, fiscal allocations, and delivery systems effectively serve deaf and hard of hearing children.

This is so for a variety of reasons, the first being that the law itself is inherently contradictory. Even without reference to the unique needs of deaf and hard of hearing children, IDEA reflects a larger paradox, long recognized by academicians, advocates, and many courts that have been asked to explain the meaning and reach of IDEA. IDEA requires the provision of a “free appropriate public education” [FAPE] to meet the “unique” needs of the individual child (20 U.S.C. §1401(8)(25)) **and** that the child be placed in the “least restrictive environment [LRE].” The tension between these two basic concepts can be profound.

On one hand, FAPE requires an educational program that is designed to meet the “unique needs” of the individual child, which may require non-regular placements. On the other hand, LRE is defined as the right of a child to be placed “to the maximum extent appropriate” with “children who are not disabled” and that the “removal of children with disabilities occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily” (20 U.S.C. §1412(a)(5)).

The re-authorization of IDEA in 1997 strengthened the removal language, requiring that the IEP include “an explanation of the extent, if any, to which the child will not participate with non-disabled children in the regular class” (20 U.S.C. §1415(d)(A)(iv)).

It is clear that school districts have a heavy burden when it comes to removing a child from a regular classroom. But as one comes closer to concluding that the LRE requirement is both clear and superior to all other mandates, the inherent paradox of IDEA re-appears. Courts have readily concluded that FAPE can trump LRE.

In addition, IDEA also requires that every school district or educational agency provide for a “continuum of placement options” from a regular classroom to a special day class to a special school to institutional and hospital placements (34 C.F.R. §300.551; 20 U.S.C. §1412(a)(5)). There are, in short, other viable and required placement options. But rather than clarify the paradox, this merely increases the uncertainty. Historically the continuum has been viewed as linear, that is, as going from the “least restrictive” (regular classroom) to the “most restrictive” (a center school). Thus as IDEA enlarges on its mandates, it ultimately seems to convey the LRE/FAPE dilemma into deeper waters.

A sample of court opinions reflects the tension and uncertainty between “unique” needs and LRE:

[We must give] proper respect for the strong preference in favor of mainstreaming while still realizing that some handicapped children simply must be educated in segregated facilities....

Roncker v. Walter, 700 F.2d 1058 (6th Cir. 1983).

IDEA's "preference for mainstreaming was so strong that it might be considered as a **presumptive requirement** of a free appropriate education and not merely as a balancing factor." [emphasis added]

Thornack v. Boise Independent School District No. 1, 115 Idaho at 466 (1984).

Congress has made a clear choice among competing educational philosophies [opting for a mainstreamed approach].

Campbell v. Talladega Board of Education, 518 F. Supp. 47 (N. D. Alabama 1981).

There is an "explicit" presumption in favor of mainstreaming under IDEA. Board of Education v. Holland, 786 F. Supp. 874 (E. D. California 1992).

Mainstreaming is a "means not an end" and IDEA did not "require" a child to "sink or swim in an ordinary classroom." Therefore "mainstreaming that interferes with the acquisition of fundamental language skills is foolishness mistaken for wisdom."

Visco v. School District, 684 F. Supp. 1310 (W. D. Pennsylvania 1988).

As to the requirement that handicapped children be placed in the least restrictive environment possible, we believe that this determination must include consideration of the particular handicap a student has...the goal of placing children in the least restrictive environment **does not trump all other considerations**...for some pupils a residential placement may very well be least restrictive. [emphasis added]

Geis v. Board of Education, 774 F.2d 575 (3rd Cir. 1985).

More recently (and two years **after** the re-authorization of IDEA), the U.S. District Court in Doe v. Arlington County School Board, 882 F.2d 876, 878 (4th Cir. 1999), stated that "[m]ainstreaming is 'ultimately a goal **subordinate** to the requirement that disabled children receive educational benefit.'" [emphasis added] (30 IDELR 362, 364).

To quote Doe is not to argue that its conclusion is right or wrong, but to underscore the ongoing push-pull of LRE and FAPE. Similarly, to quote Doe does not provide additional succor for deaf and hard of hearing children. Even as one might argue that legal decisions in which "educational benefit" trumps placement serve a child's communication needs, the unavoidable truth is that Doe merely illuminates the uncertainty of IDEA, giving as much as it takes away.

Clearly there are times when unique needs require a different setting and the LRE requirement is secondary to the FAPE mandate. There are times when LRE is superior to FAPE. Given the "FAPE/LRE to-and-fro," it is not likely that a legal imprimatur ensuring a communication-rich system will be forthcoming. IDEA works against any attempt to establish communication needs as

fundamental to LRE. Its core purpose or “starting point” is off center for deaf and hard of hearing children, which means they must fight for communication, case-by-case, unaided by a clear and legal commitment to it. Ultimately, this lack of clarity makes any broad, systemic reform very difficult indeed.

Courts Have Been Clear in Ruling that Mainstreaming is the Core Value of IDEA.

While it is clear that IDEA is significantly paradoxical, its mainstreaming ethos still has remarkable force. All the federal Circuit Courts of Appeal agree that IDEA reflects Congressional preference for mainstreaming. See, for example, Daniel R.R. v. State Board of Education, 874 F.2d 1036 (5th Cir. 1989); Oberti v. Board of Education, 995 F.2d 1204 (3rd Cir. 1993); Greer v. Rome City School District, 950 F.2d 688 (11th Cir. 1991); Roncker v. Walter, 700 F.2d 1058 (6th Cir. 1983); A.W. ex rel N.W. v. Northwest R-1 School District, 813 F.2d 158 (8th Cir. 1987); Lachman v. Illinois State Board of Education, 852 F.2d 290 (7th Cir. 1988); Wilson v. Marana Unified School District, 735 F.2d 1178 (9th Cir. 1984).

The Rowley Decision and the “Educational Benefit” Standard. The U.S. Supreme Court in Board of Education v. Rowley (1982), 458 U.S. 176, established a standard that governs disagreements between a parent and a school district, notably that a school district will prevail in any dispute if it can show that: 1) it followed the procedures under IDEA, and 2) the child received some “educational benefit” from the IEP and offered services or program. “Educational benefit” was defined as passing from grade to grade. If a school district could meet these two requirements, courts would not become involved in educational disputes.

The Rowley standard has been viewed, certainly by many parents and advocates, as setting the bar of “benefit” so low as to give school districts significant discretion in determining what services and programs are available to special education children. In regards to deaf and hard of hearing children, the Rowley standard has been consistently read to mean that a school district need only show—whether the issue was the quality of the interpreter, the signing efficiency of the teacher, the communication mode available in the school, or the location of the program—that the child gained some educational benefit. Communication development and access were not only inferior to a vaguely defined notion of educational growth, but in fact had little if any legal import.

The Rowley Court concluded that although Amy Rowley missed 40% of classroom communication without the interpreter, she was still passing her classes and was not entitled to an interpreter and therefore nearly half of the classroom communication. That is not to say that courts have not ruled in favor of a particular kind of language environment. In Poolaw v. Bishop (1995), discussed below, the court ruled that the child’s language deprivation required immersion in a full-time ASL environment. But while individual cases may go the way of Poolaw, the force of Rowley is over-riding; if the child can benefit from the offered IEP, the lack of full or even partial communication is acceptable under IDEA.

Language as “Methodology”: Downgrading Communication. Since the enactment of IDEA in 1975 and in addition to Rowley, there have been a wide variety of legal decisions involving deaf and hard of hearing children interpreting the meaning of IDEA. These decisions underscore the paradox and restrictions inherent in IDEA.

Cases involving deaf and hard of hearing children touch upon issues of placement (from mainstreaming to center schools for the deaf), related services (the right to, and type of, interpreter services, speech therapy, and other support services), and communication disputes often referred to by courts as “methodology” disagreements (whether cued speech, oral communication, or ASL should be used). That communication becomes merely “methodology” illuminates the limitations of IDEA for deaf and hard of hearing children.

The decisions are varied, represent individual not collective resolution, and ultimately do not take IDEA beyond its bounds—the provision of a “free appropriate public education” in the “least restrictive environment,” and the mixed messages those two core purposes send out. Those cases involving placement and communication or methodology are the most significant in terms of revealing what IDEA can and cannot do for deaf and hard of hearing children.

Some courts have ruled that communication is the most important thing for a deaf or hard of hearing child; others have viewed it as merely one item to be considered among many others. Some courts have viewed center schools for deaf and hard of hearing children as the LRE; others have ruled that they are presumptively more restrictive, placing a heavy burden on parents to prove that a local or mainstreamed program is inappropriate. Most have ruled that a deaf or hard of hearing child has no right to a communication-rich educational environment.

Ultimately, whether these decisions are “right” or “wrong” is not the point or really relevant to this inquiry, for one must assume that evidence supported the individual decisions within the narrow confines of IDEA. These decisions enlighten us as to how IDEA may be applied to an individual child when the facts are persuasive, but do not establish a broad rule that communication is the most important or even a significant issue in an IEP determination.

One could rightfully argue that since IDEA is an individual law, there should be no one rule for all children. Such a position is absolutely correct, for IDEA should never mean that one kind of placement or one kind of communication is appropriate for all children.

But the importance of an “individual” determination of program and communication mode is entirely different from a recognition that the communication needs of deaf and hard of hearing children—whatever they may be and whatever kind of communication placement is appropriate—is paramount and should not be rendered less important than the general concept of LRE. The quarrel is not with the individual decisions, but with IDEA’s inability to accept the importance of communication.

The ruling in Poolaw v. Bishop, 67 F.3d 830 (9th Cir. 1995), represents perhaps the most dynamic judicial analysis of the importance of communication for a deaf child within the context of IDEA and its LRE mandate. In 1995, the Court of Appeals for the 9th Circuit affirmed the decision of the Federal District Court (D. Arizona 1994, 21 IDELR 1, [Individuals with Disabilities Law Report]).

The parents of a profoundly deaf child with insufficient language skills wanted him to continue in a mainstreamed program with an interpreter; the school district felt he needed a rich language environment and wanted to place him in the Arizona School for the Deaf and Blind. At the age of 4, the child was two years behind in language skills and by age 11 his primary mode of communication was a “gestural-based” form of sign language with significant limitations in expressive and receptive language skills.

The court ruled in favor of the school district and placement at the Arizona School for the Deaf and Blind, concluding that given the child’s age and “his severe language delay,” the “benefits of a mainstreamed placement are minimal” and are “significantly outweighed” by the benefits of the center school. Poolaw v. Bishop, 67 F.3d 830 (9th Cir. 1995)

The court found that the child needed “intensive language instruction” to remedy “extremely limited” American Sign Language (ASL) skills; therefore, placement in a mainstreamed class with one “teacher for the hearing-impaired” and no other deaf students would be “isolating and inadequate.” Poolaw v. Bishop, 67 F.3d 830 (9th Cir. 1995)

The court found the situation an “urgent one” for a bright child who would never become a “self-sufficient adult unless he acquires a language base and learns to read and write.” Therefore, he needed a “language-rich environment in which the students...are his own age and have similar language skills” and “are constantly using sign language....” Poolaw v. Bishop, 67 F.3d 830 (9th Cir. 1995)

Poolaw (1995) represents a welcome but ultimately frustrating decision. The case was not resolved until the child went through an administrative hearing and two federal court proceedings.¹² Moreover, Poolaw had already “failed” in numerous mainstreaming programs, thus the court was willing to find mainstreaming benefits less important than language growth. Ultimately, the child had to endure years of failure to satisfy difficult LRE mandates under IDEA.

One can only wonder how the Poolaw argument would be received for a younger child who needs language, but has yet to show severe communication lags. As it is, the court decision may have been too late for Lionel Poolaw. That one literally must be at the doorstep of the Supreme Court whenever such a fundamental need is in question reveals how limiting IDEA is.

In Brimmer by Brimmer v. Traverse City Area Public Schools, 872 F. Supp. 447 (W. D. Michigan 1994), 22 IDELR, 5, a local school district proposed to remove two siblings from the school for the deaf and return them to a local program. The court ruled that the children should remain at the center school because, while IDEA “prefers” mainstreaming, the “marginal” benefits from mainstreaming are sometimes outweighed by the benefits from a “segregated” [sic] placement such as a center school.

While the court ruled in favor of the center school, it did not resolve the larger debate about mainstreaming “on the one hand, and segregated living on the other” which is an “ongoing philosophical debate,” with their “relative advantages and disadvantages vigorously controverted.”

¹² That IDEA is a highly “individual” law, focusing as it does on developing an “individualized” plan to meet the “unique” needs of the individual child, limits the applicability of any one court decision. While Rowley and other court decisions establish broad procedural rules, the specific factual findings of any one court are not readily transferable to other cases. That one court may rule in favor of a rich communication environment is not necessarily dispositive of any other dispute.

Brimmer by Brimmer v. Traverse City Area Public Schools, 872 F. Supp. 447 (W. D. Michigan 1994), 22 IDELR, 5

In Brougham by Brougham v. Town of Yarmouth, 823 F. Supp. 9 (D. Maine 1993), 20 IDELR 12, the court ruled against parents who wanted their child placed in the Massachusetts Clarke School (an “oral” program) and upheld the school district’s offer of partial local mainstreaming and placement in the Maine School for the Deaf. The court concluded that the issue between the school district and family was a “question of methodology and parental preference”:

The Supreme Court [in Rowley] was...clear about its preference that courts not get involved in making what are primarily decisions about educational theory and methodology.... The [Rowley] Court clearly stated that “once a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the States....” Rowley and its progeny leave no doubt that parents, no matter how well motivated, do not have the right under the [IDEA] to compel a school district to provide a specific program or employ a **specific methodology**...the only proper focus of this Court’s analysis continues to be whether the proposed IEP is reasonably calculated to provide Travis with **educational benefits**. [emphasis added] Brougham by Brougham v. Town of Yarmouth, 823 F. Supp. 9 (D. Maine 1993), 20 IDELR 12.

One sentence in this quote underscores the remarkably daunting impact of IDEA on deaf and hard of hearing children—“Rowley and its progeny leave no doubt that parents...do not have the right to compel a school district to provide a...specific methodology.” Methodology—the euphemism for communication—is simply not significant enough to create a right to it. This is both a remarkable conclusion—a child has no right to communicate with peers or develop communication skills—and fully consistent with existing law.

In French v. Omaha Public Schools, 766 F. Supp. 765 (D. Nebraska 1991), parents of a profoundly deaf child wanted him mainstreamed; the school district recommended the Nebraska School for the Deaf (NSD). The court ruled that the mainstreaming benefits were outweighed by the services that were only available at NSD, particularly given that the child’s primary “handicap” was a language delay. Not only did the child need to improve his signing skills, which could only be accomplished in an all-signing environment, but the court also noted that the cost (at that time) of educating the child at NSD was \$4,000 compared to a mainstreamed cost of \$67,000 (the child would need an extra teacher for the local program). Ironically, but not surprisingly given the law, NSD was closed in 1998.

In Grkman v. Scanlon, 528 F. Supp. 1032 (W. D. Pennsylvania 1981), the parents of a deaf child sought placement in a private institute, while the school district proposed a local program. The court ruled in favor of the child, noting that the private program, unlike the district’s program, had language, age, and cognitive peers and was specialized in educating deaf children. The court ruled

that placement in the district's program would not encourage the socialization and communication skills "necessary for a deaf person":

If [mainstreaming] is undertaken prematurely, when the pupil has not sufficiently acquired necessary communication skills, it might have traumatic consequences or result in regression.... Championship prowess will sooner be attained if [the student] concentrates on intensive training and learning to swim before she plunges into the turbulent mainstream. When her strokes are stronger she will be able to make better headway in the water. Grkman v. Scanlon, 528 F. Supp. 1032 (W. D. Pennsylvania 1981).

In O'Toole v. Olathe Dist. Schools, 963 F. Supp 1000 (D. Kansas 1997), 25 IDELR 1061, the parents of a deaf child in Kansas wanted the child placed in a center oral school in Missouri. The parent wanted no signing and no mainstreaming, while the local Kansas school district offered a local special day class in which there was some signing and some mainstreaming.

The U.S. District Court ruled in favor of the school district, noting, consistent with Brougham, that IDEA does "not require the defendant [school district] to utilize one proven teaching method [communication mode] over another." O'Toole v. Olathe Dist. Schools, 963 F. Supp 1000 (D. Kansas 1997), 25 IDELR 1061. Therefore, the Court concluded the school district's "decision to continue utilizing a signing teaching method, as opposed to the totally oral teaching method...is also not a violation of IDEA." O'Toole v. Olathe Dist. School, 963 F. Supp 1000 (D. Kansas 1997), 25 IDELR 1061. The significant issue here is not that the Court recognized the school district's desire to use sign language, but rather its ruling that IDEA does not require a specific kind of communication. This decision was confirmed by the 10th Circuit Court of Appeals in 1998 (28 IDELR 177):

the fact that [the student] made more progress and...was happier at the [center school] does not compel the conclusion that the [center school] was the appropriate placement for her under IDEA...as the Second Circuit recently acknowledged, "[a] disabled child is 'not entitled to placement in a residential school merely because the latter would more nearly enable the child to reach his or her full potential.'" O'Toole v. Olathe Dist. Schools, 963 F. Supp 1000 (D. Kansas 1997), 25 IDELR 1061.

In Petersen v. Hastings Public Schools (8th Cir. 1994), 21 IDELR 377, the parents of a deaf child sought the use of SEE II—a signing system—100% of the time, while the school district offered 85% usage of SEE II. The 8th Circuit Court of Appeals ruled that the Americans with Disabilities Act (ADA) did **not** require an exact signing system and that IDEA:

requires the school district to implement a signing system that is reasonably calculated to confer educational benefit on the hearing-impaired child....Were we to conclude that parents could demand that their children be taught with a specific signing system, we would be creating the potential that a school district could be

required to provide more than one method of signing for different students whose parents had differing preferences.... Petersen v. Hastings Public Schools (8th Cir. 1994), 21 IDELR 377.

The Petersen court captured, perhaps unwittingly, the very problem with IDEA for deaf and hard of hearing children. Without the right to demand that a child has an appropriate communication system, the right to an appropriate education is significantly undercut.

Finally, in Lachman v. Illinois Board of Education (U.S. Dist. Court, N.D. Illinois 1987), 559 EHLR 101, parents of a deaf child preferred one communication system over another to which the court concluded:

Once it is shown that the Act's requirements have been met, questions of methodology are for resolution by the responsible authorities.

IDEA clearly provides, and courts have consistently confirmed, that once the Act's formal "requirements" are met (which do not include any communication mandates), fundamental issues of communication are left entirely to school authorities.¹³ Communication is merely a methodology and its value therefore debased.

Policy Positions. While it is clear that neither the language of IDEA nor interpretation of that language by the courts establish any right to communication, there have been federal policy statements and other declarations that have acknowledged (without mandating) the importance of communication. Some of these statements support, consistent with cases like Poolaw (1995), the value of communication, but these policies do not have the authority or reach of law. In addition, there have been federal policies and statements which stress that placement in a regular classroom is the driving force under IDEA and trumps all other considerations. A sampling of those statements reflects both the promise and frustration of current law and policy.

In 1990, the U.S. Department of Education's Office of Special Education Programs confirmed that IDEA did **not** dictate or require specific rules regarding class size, class composition, critical mass, or language needs. While the Department stated that IDEA regulations should not be changed to clarify the needs of deaf and hard of hearing students, it did say that

communication needs must be addressed in order that an appropriate IEP can be developed and implemented for students who are deaf or hearing impaired.

it is critical that state and local educators address the communication needs of children whose handicapping conditions require different modes of communication, such as sign language.

¹³ See also Logue by Logue v. Shawnee Mission Pub. Sch. Unified Sch. Dist. No. 512, (D. Kansas 1997), 25 IDELR 1587, in which the court ruled that "parents—no matter how well-motivated—do not have the right under IDEA to compel the school district to provide a specific program or employ a specific methodology for the education of their disabled child." See Dreher ex rel. Dreher v. Ampitheater Unified Sch. Dist. (9th Cir. 1994), 20 IDELR 1449, in which the Federal Circuit of Appeals upheld a lower court decision, relying on the Rowley (1982) standard, that a school district was not required to provide for the parents' choice of methodology, provided the district had offered the child a "free appropriate public education (FAPE)."

We believe that good practice regarding the education of children who are deaf or hearing impaired should facilitate the development of social interaction with communication peers and participation in classroom discussion in the mode of communication appropriate to the child.

...it is essential that staff who can communicate in a mode of communication appropriate for the children who are deaf or hearing impaired are made available in a range of placement options.

16 EHLR 797

This letter has no force in law.

In 1992, the U.S. Department of Education issued its “Deaf Students Education Services: Policy Guidance” 57 Fed. Reg. 49274 (1992), which concluded as follows:

...the Secretary believes that the unique communication and related service needs of many children who are deaf have not been adequately considered in the development of the IEP...it is important that state and local education agencies, in developing an IEP for a child who is deaf, take into consideration such factors as:

1. Communication needs and the child’s and family’s preferred mode of communication
2. Linguistic needs
3. Social, emotional, and cultural needs, including opportunities for peer interactions and communication....

Any setting, including a regular classroom that prevents a child who is deaf from receiving an appropriate education that meets his or her needs, including communication needs, is not LRE for that individual child.

This Guidance has no force in law.

Under the Clinton administration, the U.S. Department of Education reissued the Guidance and subsequently re-emphasized the importance of communication needs in determining what constitutes a FAPE and LRE:

Meeting the unique communication and related services needs of a child who is deaf is a **fundamental** part of providing FAPE.... (U.S. Department of Education, Office of Special Education Programs [OSEP] OSEP Letter (1994), 21 IDELR 72 [emphasis added]).

At the same time, however, federal IDEA policy regarding broader issues of LRE reveal the underlying inconsistency of policy. As noted, IDEA and its LRE mandate states clearly that a child can be “removed” from a regular classroom “only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” (20 U.S.C. §1412(a)(5)). This language places a heavy burden on those deaf and hard of hearing children who would seek a communication-rich, non-traditional classroom environment.

Federal attempts to clarify this “fail-first” mandate are neither consistent nor ultimately encouraging for deaf and hard of hearing children. On the one hand, the U.S. Department of Education stated in 1993 that:

It is not the Department’s position that children must fail in the regular classroom before other educational settings can be considered. In fact, one of the reasons the Department published the notice of policy guidance [the 1992 Davila policy] was because of concerns that some public agencies were misapplying the LRE provisions by presuming that placements in or closer to the regular classroom were required for children who are deaf without taking into consideration the range of communication....

OSEP letter, 20 IDELR 1168; see also an OSEP letter to Senator Kohl, 20 IDELR 1465

But in 1996, the Department of Education (25 IDELR 516) again addressed the 1992 “Policy Guidance” and provided a more equivocal answer:

OSEP does not interpret Part B’s LRE provision to require that a disabled student actually be placed in the regular classroom and fail before a more restrictive environment be considered.

[But] in implementing Part B’s LRE provision, therefore, IEP and placement teams...must give **first consideration** to placement of a disabled child in the regular classroom with appropriate aids and services before a more restrictive environment can be considered. [emphasis added] (25 IDELR 516)

How does the IEP team “consider” such a placement? Must there be evidence of failure, and if so, doesn’t that require actual regular classroom placement? The language of IDEA explicitly states that a child shall not be “removed” from a regular classroom and law is superior to policy. Not only is policy uncertain and non-mandatory, but there is no evidence that it has resulted in any change. The U.S. Department of Education has not monitored the Policy Guidance and, as of late 1999, no states have formally implemented it.

IDEA has

something for everyone except for the deaf child.... Dr. McCay Vernon, prominent educational psychologist, calls P.L. 94-142 [IDEA] 'Deafness's Three Mile Island'.... The regulations of P.L. 94-142 trap us in a meaningless no-man's land of isolation and social and intellectual starvation....

"Unrealized Promises: Reflections on P.L. 94-142 and the Education of Deaf Children," Joanne Greenberg, Gallaudet Today, Winter 1986, p.8.

Leaders in the Deaf community, parents, and professionals have, almost from the inception of IDEA, articulated serious concerns about its conflicting messages and misuse for deaf and hard of hearing children. Dr. Robert Davila, former Assistant Secretary for Special Education and Rehabilitative Services in the U.S. Department of Education and responsible for implementation of IDEA throughout the nation, has written that the threat of IDEA to the Deaf community has "not been fully addressed." Merv Garretson, former Gallaudet University teacher and a member of the University's Board of Trustees, has written that IDEA's emphasis on mainstreaming was and "is wrong" for many deaf and hard of hearing children. "Current Issues Facing Education of the Deaf," Dr. Robert Davila, and "When Tomorrow Comes: A Challenge to Educators of Deaf Children," Merv Garretson, Deafness: Life and Cultures II, A Deaf American Monograph, the National Association of the Deaf, 1995, pp. 20, 52.

In 1989, Dr. Larry Stewart testified before the U.S. House of Representatives, Sub-Committee on Select Education, that IDEA is "not being implemented properly—many deaf children have been neglected, sometimes to the point of mental and emotional abuse." A parent testified after Dr. Stewart that a regular classroom was a "nightmare" for her child; he was a "victim" of IDEA and the damage to him "irreparable." "Educational Isolation of Deaf Children," written testimony submitted to the U.S. House of Representatives, Sub-Committee on Select Education, March 7, 1989, printed by the Committee on Education and Labor, Serial No. 101-3.

Parental testimony before the COED was universally consistent regarding the destructive impact of IDEA. "Appropriate" under IDEA meant

placement in a classroom with children who could hear...a few hours a day with a teacher minimally qualified to teach deaf children...a poorly qualified sign language interpreter...being the only kid in class with your very own grown-up hanging on your heels all day...growing up not knowing that you were part of a community of deaf people...being embarrassed at your voice...and the strangeness of your signs...denying every aspect of your identity...not expecting too much....

Toward Equality, 1988, p. 19

Why would there be such a response to a law that was enacted to end the “segregation” of children with disabilities? Why would the individual responsible for the implementation of that law—Dr. Davila—call it a threat to deaf children?

IDEA (1997) did add new language which represented a welcome change for deaf and hard of hearing children; the IEP team must consider “the child’s language and communication needs, opportunities for direct communications with peers and professional personnel in the child’s language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child’s language and communication mode....” (20 U.S.C §1414(d)(3)(B)(iv))

But this change does not yet resolve the fundamental paradox of IDEA for deaf and hard of hearing children, or relieve the stress created as their communication needs push against the superior “mainstreaming” or “inclusive” force of the law. That the IEP team will “consider” communication needs creates neither a mandate similar to LRE, nor ultimately changes IDEA so that deaf and hard of hearing children can be assured that their unique needs will be met. The changes have not fundamentally altered the educational landscape, and thus deaf and hard of hearing children must still battle for the right to develop and access language on a case-by-case basis. A four- or seven- or twelve-year-old child should not have to prove his or her right to communication.

IDEA’s Preference for Mainstreaming Placement Directly Affects Broad Fiscal and Programmatic Determinations. IDEA’s LRE mandate, and in particular the viewpoint that placement options become more restrictive the farther they are from a regular classroom, has directly affected which programs are available for special education students. Local and state educational agencies have made fiscal and programmatic decisions based on a belief that non-regular classrooms are disfavored. But to encourage neighborhood school placement as a legally viable and educationally sound option, and to place a heavy burden on school systems to remove a child from such a placement, is entirely different from viewing that placement as representing the LRE for **all** children and justifying the elimination of fiscally and programmatically disfavored programs.

But the mis-application of LRE for deaf and hard of hearing children is real. In 1993, the Nebraska Department of Education established a “zero reject” philosophy, which called for all children in the state to be educated in a local school, as “increasingly demanded” by “statute, regulation, and case law.” Nebraska Special Education Advisory Council, Ad Hoc Committee on Neighborhood Schools and Inclusion in Nebraska, Final Report (August 6, 1993, p. 34). As noted, Nebraska State School for the Deaf closed several years later.

Congress, in re-authorizing IDEA in 1997, specifically formalized this process, requiring that states “revise the funding mechanism” to ensure that “such mechanism does not result in the removal of children with disabilities from the regular educational environment...” 20 U.S.C. §1412(a)(5)(A)(B). Not surprisingly, both before and after IDEA 1997, states and school districts have moved to eliminate or reduce non-regular education programs.

California revamped its special education funding in 1998 to discourage non-regular placement (Ed. Code §56836 *et. seq.*). Other states, such as New York and Illinois, subject to litigation, have moved to

eliminate non-regular placement options. Protection and Advocacy, Inc. (1999), a publicly funded parent and child advocacy organization, recently reported that “all classes in Utah, Nevada, and Vermont” are full inclusion classes. PAI Newsletter, Summer 1999, p. 18.

The fiscal and programmatic consequences of viewing LRE as one-dimensional are profound, particularly since broad state- or area-wide administrative decisions are all the more difficult to address through individual IEPs or due process. Once a state closes a center school for the deaf or a local school district eliminates a language-rich special day class or program, it is difficult, if not impossible, to resurrect it, particularly as the school or program is viewed as contrary to philosophy, policy, and law. And, of course, any new communication-driven and communication-rich programs face remarkable barriers well before discussion becomes reality.

The Systemizing of LRE/Mainstreaming: A Final Word. The LRE mandate of IDEA has been applied to many children with varying results. Clearly, the value of the mandate and the need to vigorously enforce it are beyond question. Those involved in the education of deaf and hard of hearing children have consistently and clearly stated their support for mainstreaming:

For some, full inclusion [mainstreaming] is an inalienable right.... The arguments for full inclusion in regular schools and classrooms of children with severe intellectual disabilities are impressive.

“Perspectives on the Full Inclusion Movement in the Education of Deaf Children,” Oscar P. Cohan, Conference Proceedings: Defining Quality Education for Deaf and Hard of Hearing Students, Gallaudet University, 1995, p. 9

...it is clear that a good many children who should be mainstreamed are not [and there] is no compromise on that...[we must] vigorously condemn the failure of the system to include those children who should be included.

“Full Inclusion: An Analysis,” Lawrence Siegel, Conference Proceedings, Gallaudet University, 1994, p. 19

Regardless of the LRE/FAPE push-pull, the burden to turn the LRE concept on its head is daunting. A parent or guardian must prove why an overwhelmingly preferred and legally mandated placement is not appropriate. System-wide, this is a most difficult proposition. Not surprisingly, the U.S. Department of Education in its 1992 Policy Guidance for Deaf Children, Fed. Reg., vol. 57, no. 211, October 30, 1992, p. 49275, reported that school districts have “misapplied the LRE provision by presuming that placements in or closer to the regular classroom are required for children who are deaf without taking into consideration the range of communication and related needs....” The COED reported that LRE was an “explosive” matter provoking confusion and generating “more input” than any other issue. Toward Equality, *supra* at p. 25

While some may argue that a truly effective system would allow all children, no matter how unique their needs, to be placed in regular classrooms, there are certain children for whom a regular classroom would not be appropriate. Deaf and hard of hearing children certainly, but what of the child whose psychological difficulties are so severe as to make placement in a regular classroom in a regular school wholly inappropriate and even cruel? Or the child whose medical complications require placement in a hospital? Or for that matter, a child who represents a danger to others?

This is not to argue for the elimination of the burden, but rather to shift the burden away from the child. The very reason for the enactment of IDEA in 1975 and its re-authorization in 1997 was to reverse a historic trend that children with disabilities had no right to partake in American mainstream education. The rules and procedures established to prevent the exclusion of children with disabilities must be clear, vigorous, and unqualified. At the same time, such protections are not mutually exclusive to equally valid rules and procedures that protect fundamental rights of deaf and hard of hearing children.¹⁴

Generic notions of least restrictive environment and legal mandates regarding mainstreaming and access to general curriculum must be consistent with, not in opposition to, communication needs. Rather than having a strong LRE mandate and a weak communication standard, the law can and must aggressively maintain the former and strengthen the latter.

We are surely capable of establishing rules and policies that protect different rights and are clear enough so that one set of protections does not diminish another. To reform IDEA so as to provide a fundamental right of communication for deaf and hard of hearing children need not and will not be at the expense of clear placement rights of other children.

Unfortunately, parent and advocacy communities have continued parochial battles over IDEA, which maintains an unnecessary tension among those groups and shifts focus away from the educational system, which should have the clear responsibility of serving all children. As long as the inclusion and other special education communities see LRE as something they must fight over, “all” children will not be served. The burden to make IDEA work for all children should be on the system, rather than on diverse parent and student communities.

The inexorable impact of the generic application of LRE (sometimes characterized as the need for a system in which “one size fits all”) on deaf and hard of hearing children has been profound. As a result, there have not only been numerous individual disputes in which the LRE mandate has ill-served those children, but perhaps more importantly, that requirement has become so institutionalized that reversing the trend becomes individually daunting and structurally improbable for those who seek communication and quality education for deaf and hard of hearing children.

VI. A PROPOSAL FOR A NEW EDUCATIONAL DELIVERY SYSTEM FOR DEAF AND HARD OF HEARING CHILDREN

A new and effective educational delivery system for deaf and hard of hearing children must fundamentally ensure:

¹⁴ See Part 6 regarding proposed language to protect both the inclusion and communication rights of children.

- a communication-driven program that requires communication **access** (critical mass of peers, language-proficient staff) and communication **development** (to insure that deaf and hard of hearing children have age-level receptive and expressive skills).
- that communication needs define a quality educational process from beginning to end, including how programs and fiscal allocations are established.

In short, deaf and hard of hearing children require a quality, communication-rich and communication-driven system. To propose a paradigm for the entire nation is to recognize that such a model must articulate clear, strong, but broad concepts. While such a paradigm cannot require that a specific program in a specific location necessarily look a certain way, all programs and systems must have an underlying and fundamental concept or “starting point,” be communication-driven, and have state and local structures to accommodate all deaf and hard of hearing children.

Such a paradigm must include:

A Recognition in Law: *The Importance of Communication*

For at least 30 years, various national and state blue ribbon committees, task forces, commissions, and study groups have analyzed the status of deaf education in America. Reference has been made to those findings precisely because of a historic inability to convert the best thinking of parents, professionals, and deaf and hard of hearing adults into concrete and legally enforceable programs. From the Babbage Report through the 1999 California “Communication Access and Quality Education for Deaf and Hard of Hearing Children” report, excellent suggestions have been developed. While those reports have had some impact, much of their wisdom gathers dust on the bookshelves of the educational world. **The simple fact is that without a legal mandate, the best of recommendations remain unenforceable and ineffectual.**

Therefore, any and all components of an effective educational delivery system for deaf and hard of hearing children must be formalized in law. We can no longer rely on interpretation of IDEA and either statutory language or policy statements that ask that the school system “consider” communication needs. **The right to communication must have the force of law, which is no less important than the right to be educated in the LRE.**

Deaf and hard of hearing children cannot wait for the system to change on a case-by-case basis, if in fact change could be accomplished that way. Therefore federal (and state) law must unequivocally provide that:

The determination of what constitutes an appropriate program for deaf and hard of hearing children **and** the development of educational programs must be based on individual communication needs and those needs must fundamentally determine the components, budgets, staffing, and location of specific programs.

The law must formally recognize that communication assessment, development, and access are central to such programs and are the foundation for the actual delivery system.

In addition, existing federal law must shift the burden off of parents and guardians. Current law requires:

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of the child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. [current IDEA law on LRE, 20 U.S.C. §1412(a)(5)]

To that language, the following should be **added**:

To the maximum extent appropriate, children with disabilities who need alternative educational settings have an equal right to such settings. The burden to either remove children from a regular educational environment or from an alternative environment rests on the Local Educational Agency (LEA), which must demonstrate clear and convincing reasons why the child should be so removed.

Recognition in Law: *Proposed Language*

In addition to the proposed LRE language above, and whether changes are made to IDEA or new federal law is established, new legal language should contain the following:

Congress finds the following:

- A. There are in this nation as many as 1,053,000 individuals under the age of 18 with a reported hearing loss and anywhere from 60,000 to 80,000 children with a hearing loss in special education programs.
- B. A hearing loss involves the most basic of human needs, the ability to communicate with other human beings. Many deaf and hard of hearing children use, as their primary communication mode, American Sign Language while others express and receive language through English-based sign systems, or orally and aurally, with or without visual signs or cues.
- C. The importance of developing early and effective language and communication skills is fundamental to the educational growth of all children; deaf and hard of hearing children

are often denied early opportunity for, and enter school with, minimal communication skills.

- D. Deaf and hard of hearing children, on average, graduate, if at all, from high school with substandard reading and other academic skills, have high rates of illiteracy, and low rates of college attendance. Deaf and hard of hearing adults have significantly high rates of unemployment and under-employment and higher reliance on various forms of governmental assistance.
- E. In 1988, the Commission on the Education of the Deaf (COED) reported to Congress and to the President of the United States that the status of education for deaf children was unacceptable and recommended fundamental changes in how educational services are delivered to deaf and hard of hearing children, including changes in the way IDEA was applied to these children; the National Association of State Directors of Special Education, in its 1994 “Educational Guidelines for Deaf and Hard of Hearing Children,” reported that because of the unique communication and cultural needs of deaf and hard of hearing children, significant changes in the educational delivery system should be made.
- F. Existing law, particularly IDEA, provides significant assistance to deaf and hard of hearing children and as re-authorized in 1997 requires that the IEP team consider a deaf or hard of hearing child’s unique communication needs; IDEA, however, because of its focus on the “least restrictive environment,” is particularly limiting, as written, for many deaf and hard of hearing children.
- G. Congress therefore recognizes that IDEA should and can be made compatible with the unique needs of deaf and hard of hearing children and by this Act assures that all deaf and hard of hearing children are provided a quality education in which:
 - 1. the educational delivery system for deaf and hard of hearing children is communication-driven to ensure that programs and services provided for those children address their unique communication needs.
 - 2. a communication-driven educational delivery system will ensure that communication assessment, development, and access and the various programmatic and other components described herein are fundamental to any educational delivery system for deaf and hard of hearing children.
 - 3. in a communication-driven system, all programmatic and fiscal determinations will be based on the unique communication needs of deaf and hard of hearing children.
 - 4. this Act is designed to be fully compatible with IDEA and in addition establishes standards and rules and procedures for educating children who are deaf and hard of hearing, such standards and rules to be specifically incorporated into IDEA with all determinations made by an IEP team or any other educational unit to be fully consistent with the requirements described herein.

5. a child's individual communication and educational needs dictate all components of his or her educational program; this Act establishes the requirement that the child's individual communication needs will determine individual placement and service determinations. Deaf and hard of hearing children communicate in very different ways; what constitutes communication assessment, development, and access for an oral child will be very different for a child who uses sign language. Each communication mode and language or system will be recognized, respected, and provided for.
6. a deaf or hard of hearing child is fully entitled to a free appropriate public education which meets his or her specific communication needs in the least restrictive environment as required by IDEA and consistent with the requirements herein.
7. the least restrictive environment for a deaf or hard of hearing child is specifically defined as that classroom and program which provides for the child's communication development and access as described herein at §9 and therefore may be a regular classroom, a special classroom, or school or residential placement. By this Act, the right to be educated in a regular classroom is not altered.

To the maximum extent appropriate, children with disabilities who need alternative educational settings have an equal right to such settings. The burden to remove children from a regular educational environment or from an alternative environment rests on the LEA, which must demonstrate clear and convincing reasons why the child should be so removed.

8. given the importance of deaf and hard of hearing children's communication needs, the IEP team shall be formally designated as the "IEP/Communication Development Team" for those children.
9. a deaf or hard of hearing child is entitled to an education which provides
 - a. appropriate early and on-going communication **assessment**;
 - b. early and on-going communication **development**, which includes specific educational programs and services to ensure that the child has age-appropriate communication (expressive and receptive) and other academic skills; and
 - c. appropriate early and on-going communication **access**, including a critical mass of age and language peers, staff proficient in the child's communication mode, and direct and appropriate communication access to all school activities.
10. there is recognition of the individual child's particular hearing loss and unique cultural and linguistic needs.
11. there is a provision of appropriate programs, including all options on the "continuum of placement options" under IDEA, as well as regional centers as required by 20

U.S.C. §1413(h), center schools and other placement options which can provide for the critical mass, language access, and development necessary for many deaf and hard of hearing children.

12. there is a provision of programs and program components that are communication-accessible with professional staff appropriately trained, fully proficient in the child's individual communication mode and language, and who understand the unique needs of deaf and hard of hearing students.
13. there is development of age-appropriate English writing and reading language skills.
14. there is development of appropriate curricula, materials, and assessment instruments and the implementation of "best practices."
15. there is recognition of American Sign Language as a distinct language of deaf people, and the development of standards for teaching it as a language and adoption of American Sign Language as a foreign language for high school graduation requirements.
16. there is clear recognition of and provision for the unique needs of deaf and hard of hearing children who are oral/aural and require an educational environment and program that meet those needs, including, but not limited to a critical mass of oral/aural peers, appropriately trained staff, and such support services as required to provide for the development of the child's receptive and expressive speech skills, and the right to be in regular education under IDEA 1997.
17. there is the development of standards for teachers, sign language and oral interpreters, and other aides and professionals who work with deaf and hard of hearing students.
18. there is the development of the highest academic standards for deaf and hard of hearing children and the provision of services and programs to insure they are provided a quality and rigorous educational experience.
19. state and local educational agencies will be responsible for developing communication-driven programs for deaf and hard of hearing children.
20. there is the development of programs and procedures to ensure that the responsible educational units, including state and local agencies, develop inter-agency agreements with appropriate health and other institutions and agencies in the various states regarding universal, early identification of hearing loss and effective interface between medical and educational services.
21. there is the provision of parent and guardian training, reference to appropriate medical, educational, and community resources, and assistance in developing family language skills.

The importance of language development requires particular emphasis here. While many programs in this nation provide some communication access (teachers who sign or programs with interpreters), too few actually help deaf and hard of hearing children develop age-appropriate communication skills. There is no formalized and systemic approach to communication development. **If the American educational system is to help students learn, the ability to communicate at an age-appropriate level is an absolute prerequisite.**

The Importance of State Oversight and the Development of a State-Wide Structure for Program Delivery. An effective, communication-driven educational delivery system will require a corresponding shift in state oversight and the nature of program delivery.

1. State Oversight and Responsibility

Although states certainly can vary in both their demographics and geography, the role they can and must play in changing the educational system for deaf and hard of hearing children is paramount. In addition to general oversight responsibilities (20 U.S.C. §1412), the states must ensure that alternative delivery systems are in place and

- (A) **shall** use the payments that would otherwise have been available to a local educational agency...to provide special education and related services directly to children with disabilities residing in the area served by that local agency...if the State educational agency determines that the local educational agency or State, as the case may be;
- (B) is unable or unwilling to be consolidated with one or more local educational agencies in order to establish and maintain such programs; or
- (C) has one or more children with disabilities who can best be served by a regional or State program or service-delivery system designed to meet the needs of such children.

20 U.S.C. §1413(h)(1)

2. An Area-Wide Approach to Delivering Communication-Based Educational Programs

Each state will need to develop a communication-based delivery system based on the broad requirements as described above. Analyzing how services and programs are delivered locally and regionally is fundamental to effective change. Each state should, therefore, develop an effective method for determining the best way to divide the state to insure proper delivery of programs and services in a communication-driven system.

The COED and NASDSE reports, as well as recent state legislation (California, South Dakota, Colorado, etc.), have recognized the importance of critical mass, language-proficient staff, and the need for a regionalized or area-wide approach to accomplish those goals: “Given their unique

communication needs, hard of hearing and deaf children would benefit from the development and implementation of regional programs...” Cal. Ed. Code, §56000.5(10).

It must be emphasized that a regional or area-wide delivery system is not the same as a regional program. Some may focus on the latter rather than the former and assume that such a paradigm really means the elimination of existing program options such as local or mainstreamed programs and/or center schools for deaf and hard of hearing children. Any new system cannot and must not reduce or debilitate existing options.

As noted, a truly effective and communication-based system recognizes that communication varies significantly among deaf and hard of hearing children, and thus the need for a variety of very different placement options and communication environments is fundamental to success. More specifically, each system must provide access to the following program options:

- mainstreamed placements with appropriate support services
- special day classes
- regional or area-wide program(s) specifically developed to ensure critical mass, trained and knowledgeable staff, and the delivery of necessary support services
- state center schools for deaf and hard of hearing children
- other placements including residential, hospital, and home instruction

Parents or guardians should be the primary decision-makers regarding which specific placement is appropriate for their child. Certainly educators have a significant role in that process, but it is the recommendation of this Statement that any disagreement between the parent and the school system over placement should generally be resolved in favor of the parent, absent clear evidence that the parent’s placement choice is inappropriate.

3. Other State Oversight Responsibilities

The state, in overseeing local delivery systems, must also:

- develop program and accountability standards and monitoring systems.
- provide expertise to regional and local educational agencies.
- develop appropriate professional standards and assist in improved training and recruitment of teachers and other staff.
- develop a system of early identification of hearing loss so that parents are provided information about a newborn’s hearing loss and available resources to ensure early language development and which also includes coordination between educational, health, and other state agencies.
- collaborate with other state agencies to develop appropriate vocational and technical training for deaf and hard of hearing students.

- establish procedures whereby the state or center school for the deaf can be a more effective resource for the state and regions or areas.

4. Area-Wide Programmatic Components

In addition to those components discussed immediately above, a local or area-wide educational delivery system must include:

- regional or area-wide advisory councils composed of parents, deaf and hard of hearing consumers, students, staff credentialed in deaf and hard of hearing education, other teachers and professional staff, and appropriate administrators with the responsibility of advising the regional or area-wide structure.
- a specific plan and appropriate staff to ensure that communication development is central to each program.
- fundamental to appropriate staffing will be language/communication specialists to provide staff consultation support and direct services to deaf and hard of hearing children.
- provision and coordination of delivery of appropriate support services to all deaf and hard of hearing children within the region or area.
- core and specialized curriculum; acoustically and visually appropriate facilities.
- assessment procedures by appropriately trained and knowledgeable individuals.
- vocational, college preparatory, and transitional services.
- parent training.
- transportation.
- staff training.
- coordination with center schools for the deaf, institutions of higher learning, and other appropriate state agencies.
- provision of services, in coordination with the state educational agency, for deaf and hard of hearing students with learning disabilities, emotional difficulties, developmental delays, physical restrictions, and other conditions.
- opportunities for deaf and hard of hearing children to have exposure to deaf and hard of hearing role models, adults, and deaf and hard of hearing mentors.
- a full continuum of placement options.

The communication/language specialist is a key component to any local/regional system, ensuring that communication assessment and development are central to the child's educational experience.

5. State Advisory Board

Given the unique needs of deaf and hard of hearing children, a statewide advisory commission or board (separate from any federally mandated State Special Education Advisory Commission or other state advisory boards that represent deaf and hard of hearing adults) should be established to meet on a regular basis to monitor and assess educational programs for deaf and hard of hearing students and to advise the state department of education regarding that system.

6. Early Identification, Early Communication and an Appropriate Delivery System

The relationship among at-birth identification of a hearing loss, the provision of early communication, family support, and educational growth is crucial and the educational system in this nation must play a central role in developing that relationship. The studies of Drs. Yoshinaga-Itano and Apuzzo, as referred to earlier, underscore this point: “early identification of hearing loss and early intervention are highly related to normal language development of deaf and hard of hearing children.” *Annals of the Deaf*, vol. 143, p. 423

Fewer than 3% of newborns in this country are screened for a hearing loss; the average age of identification is three years, well beyond the time when a child should be first exposed to language. Seventy percent of deaf and hard of hearing children are initially identified by their parents rather than at birth or by a medical professional. (Statistics from the National Institutes of Health and the California Deaf Education Coalition, submitted to the California Senate regarding SB 555, 1998.)

As universal screening becomes a reality (see the Newborn and Infant Hearing Screening and Intervention Act of 1999, S956), the educational systems in this nation can and will play an important role in ensuring early communication development.

It is, therefore, imperative that any effective educational delivery model include a strong, statewide program to help parents of deaf and hard of hearing children in early identification of a hearing loss and in accessing services and programs that provide families with assistance in developing appropriate communication for their children. The model should also assist parents in accessing other agencies that provide support for families with children with a hearing loss, as well as infant and early childhood educational programs that provide communication assessment, development, and access.

The need for parents to have full information about hearing loss and oral and visual communication options, including the difference between “receiving” language and understanding and effectively “using” language, is of singular importance. With the increased use of cochlear implants, such information is absolutely necessary.

Coordination between educational and non-educational institutions is crucial, including other state agencies (e.g., mental health, rehabilitative services) and medical institutions, hospitals, and related health agencies.

7. The Value and Role of the Center Schools for Deaf and Hard of Hearing Children

The role of the center schools for the deaf is particularly important in this model. All too often, statewide or regional programs have been viewed as either too restrictive (under IDEA) or too

exclusive. Consequently, they have been under-utilized as a resource for both state administrators and local educators.

The center schools, particularly those statewide schools, in addition to being an equal placement option should be designated by the state educational agency as a state “**treasured resource**” and be provided funds to ensure that each school district and/or area-wide program has direct access to them. Among other things, the state or center schools would be available to provide expertise regarding communication/language development, the importance of communication-proficient staff and critical mass, as well as serve as a model for a comprehensive and rich communication environment. Through this type of relationship, the center school would be viewed by both the state and local schools as an invaluable resource and placement, enhancing access for children to the center schools. In addition, there should be no legal or fiscal disincentive for placing children in center schools.

A Specific Description of the New Paradigm. What will a truly communication-based and communication-driven educational delivery system look like? Consider Mary Smith, a 6-year-old, profoundly deaf child who uses ASL and communicates at a 4-year-old level (or David Jones, a 15-year-old hard of hearing child, or any number of deaf and hard of hearing students). She lives within the “Local Unified School District” (LUSD).

As she is assessed and her program is developed, she has before her not only a communication-driven administrative structure, but communication-driven options in which communication development and access are the programmatic centerpieces (not mere afterthoughts). What is that structure like?

1. Communication-Driven, Not LRE Driven

With changes in law and policy, and the formal recognition that communication needs are equal to other IDEA mandates, the IEP process will be communication-driven. This is the foundation of a true communication-based system. All administrative, programmatic, fiscal, and educational decisions will be based on communication and educational needs.

2. State Oversight

An effective, statewide, communication-based educational delivery system will require direct state educational agency (SEA) oversight and responsibility. A specifically designated office or unit in the SEA, staffed by deaf, hard of hearing, and hearing individuals, knowledgeable and trained in the needs of deaf and hard of hearing children, will ensure uniform provision of a communication-driven system throughout the state.

3. A Local/Area Prototype

Mary’s LUSD will provide the following:

A. Local Administrative Structure

The LUSD administrator and case managers would have specific training in, and be knowledgeable about, hearing loss and communication development and would be directly responsible for the child's IEP. They would also monitor the IEP for communication and educational effectiveness.

Communication/language specialists would be responsible for ensuring the appropriate assessment and development of each child's communication needs.

The area office would also provide for and administer parent training, professional in-service, communication-based assessments, and all related services. These services would include specific communication/language support services, vocational and transitional services, coordination as necessary with other state agencies, colleges, and universities, and other communication-related services and programs (e.g., deaf awareness, ASL training, parent classes, access to deaf and hard of hearing role models, and communication-accessible social, athletic, and group activities).

B. Communication-Based Educational Delivery System

A prototypical communication-based educational delivery system for an area or region would provide Mary (and all other deaf and hard of hearing students) the following:

1. The child would be assessed in all areas of need, including communication and language development, by a professional qualified to assess deaf and hard of hearing children. The area-wide communication/language specialist would have oversight responsibility.
2. The assessment would specifically determine the child's current level of communication and language development **and** make specific recommendations regarding those services and programs required to assist the child in developing age and cognitive appropriate communication and language skills (expressive and receptive).
3. An IEP/Communication Development team [note the importance of recognizing, even in name, the role of communication in the development of the IEP] would meet and have the specific legal duty to provide a "communication-based educational program" which constitutes for that child both her FAPE (free appropriate public education) and her LRE (least restrictive environment).
4. The IEP/Communication Development team would establish goals and objectives, including communication and language goals and objectives consistent with the communication/language and other assessments. The IEP/Communication Development team would specifically detail the child's current communication skill level and how age-appropriate communication skills would be developed, including specific, daily activities (whether individual or group) and services provided for that purpose.
5. The IEP/Communication Development team would determine related services focusing on all areas of need, including communication and language needs.

6. The IEP/Communication Development team would specify the child's communication access needs, including the level of staff language proficiency and peers with similar cognitive and language abilities.
7. The IEP/Communication Development team would make a communication-based placement decision, with education and communication needs determining where the child is placed, including the appropriate option for providing **communication access** (critical mass of age, language, and cognitive peers) and **communication development**. The child's parent(s) or guardian(s) would determine program placement, provided that the parent or guardian choice was appropriate and could meet the child's needs. There would be no burden on the parent or IEP team to justify why a communication-driven class was more appropriate than any other placement option.
8. Keeping in mind all the services and programs as described above, LUSD would have available the following placements for Mary (and all other deaf and hard of hearing children):
 - a. Regular classrooms with necessary support services (interpreters, communication/language development). This option would be developed particularly for hard of hearing students and those deaf students who are either oral or prefer a regular classroom.
 - b. Area-wide programs that are developed to specifically provide the necessary critical mass of age, cognitive, and language peers. This would **not** be the current special day class or a heterogenous class in which children of all ages, abilities, language modalities, and even "disabilities" could be placed, but rather a specific special day class for deaf children that meets their communication and language needs. For example, a 5th grade class for deaf children who use ASL or a 7th grade class for deaf children who use an English-based signing system.
 - c. Center or state schools for the deaf.
 - d. Area-wide programs for deaf and hard of hearing children who are multi-handicapped, these classes to include both the appropriate language environment and other professionals and services necessary to assist deaf and hard of hearing children with disabilities (e.g., learning disability, emotional problems).
 - e. Other program options as necessary and required by law (hospital, in-home).
9. The IEP/Communication Development team would also designate other specific services required for the child and family, including parent training and parent language development. These services would be available through the area-wide office.
10. Each program option would be staffed by professionals knowledgeable about, and trained in the needs of, deaf and hard of hearing children, with full language proficiency, including psychologists, speech therapists, communication/language specialists,

vocational counselors, and others who understand the unique needs of deaf and hard of hearing children.

11. Each specific program would have sufficient support staff and programmatic components to ensure both academic and linguistic growth.

Communication and language services are distinct from general related services and would be a fundamental part of the IEP, and therefore not merely a limited related service. Communication and language development would be as important, and therefore mandated, as goals and objectives for reading, math, and other subjects.

In short, the area-wide system would represent a “communication/language” milieu approach to the education of deaf and hard of hearing children.

Mary Smith has been assessed in all areas of educational and communication needs. Her assessor and communication/language specialist is proficient in sign language. Given the importance of Mary developing age-appropriate receptive and expressive skills in ASL and English, she will be monitored by the assessor and communication/language specialist throughout the year. The assessor and specialist have recommended a specific communication/language component for her program, e.g., daily work in a small group with an ASL-proficient staff member to improve her ASL skills.

Mary’s IEP/Communication Development team will review the assessor’s report, develop specific goals and objectives, including communication-language goals and objectives, and recommend specific services and personnel to work with Mary on developing her ASL and English skills. The team is comprised of Mary’s parents, the area-wide deaf and hard of hearing case manager, the assessor, the area-wide communication/language specialist, the classroom teacher, and others as appropriate.

The team determines that Mary will meet with a small group for one hour per day to develop ASL vocabulary and fluency, in addition to her other academic activities. An area-wide communication/language specialist will be assigned to Mary for one hour per day.

The IEP/Communication Development team will be able to choose among three possible placement options for Mary. One would be a regular second grade in her home school with necessary support services. The second would be an area-wide communication class, which has 9 other children, all between the ages of 6 and 7, all with language skills in the 5-7 year range, and none with any significant disabilities. There is a full-time teacher with training and preparation in working with deaf and hard of hearing children who is proficient in ASL. There is one full-time aide who is also proficient in ASL. The class is located at a centrally designated school. The third choice would be the state school for the deaf.

The IEP/Communication Development team in making its placement choice is required **by law** to determine placement based on Mary’s unique educational and communication needs. Mary’s parents have indicated they believe at this time Mary should be in the special communication class, but think she may

want to go to the state school or be mainstreamed in the next year or two. The team confirms that this decision meets Mary's unique educational and communication needs. The placement is therefore LRE and Mary is placed in the special day/communication class.

VII. THE ADVANTAGES OF A NEW DELIVERY SYSTEM

A new delivery system means a full and effective range of options, not the weakening of one option to strengthen another.

A regional or area-wide delivery system as a general concept for program reform is necessary to ensure:

1. The appropriate critical mass for cognitive and language-appropriate class.
2. A more cost-effective use of staff and other educational resources.
3. The establishment of regions to counter the low incidence of deaf and hard of hearing children and to bring together a sufficient number of deaf and hard of hearing students of similar age **and** language ability. This will create an academic and social environment in which the deaf or hard of hearing student can thrive inside and outside of the classroom.
4. Regionalized or area-wide programming represents the kind of comprehensive program recommended by the Conference of Educational Administrators Serving the Deaf (CEASD), 1973, and described by the National Association of State Directors of Special Education (NASDSE), 1994; the Commission on Education of the Deaf (COED), 1988; and the 1999 California Department of Education's "Communication Access and Quality Education for Deaf and Hard of Hearing Children: Communication Access and Quality Education."
5. The development of regionalized programs will also:
 - a. encourage parental involvement and provide training for parents.
 - b. ensure that individuals who are trained in deaf and hard of hearing education and knowledgeable about deaf and hard of hearing students are responsible for the design, implementation, and management of regionalized programs.
 - c. ensure the provision and coordination of appropriate/quality services.
 - d. ensure appropriate assessment and early intervention procedures.
 - e. create a critical mass-based delivery system which will allow for the creation of age- and communication-appropriate classes, thus reducing the need for additional support and other high-cost individual services.

The Cost Benefit of Creating a More Effective System. The cost of poorly educated deaf and hard of hearing children has been noted. The low reading scores, high rates of illiteracy, and low college enrollment figures move inexorably forward, and become unacceptable unemployment and under-employment numbers. Make no mistake that even as there will be a cost to developing an effective paradigm, there is a greater cost to society if we continue to accept low academic achievement and high reliance on governmental assistance for deaf and hard of hearing children and adults. The COED reported to Congress and to the President:

Do we have at hand the knowledge it would take to improve the situation significantly, even dramatically? The answer is a resounding Yes.

But can we afford to do what's necessary? Indeed, we can't afford not to.

Maintenance of the status quo represents an unwarranted extravagance—especially when we consider that a clearer understanding of the needs of persons who are deaf, coupled with the redirection of some existing funding and priorities, and a modest amount of new funding could result in impressive long-term savings. Toward Equality, at viii

The provision of a communication-rich educational delivery system will not only be cost-effective, but more importantly will provide priceless educational opportunities for deaf and hard of hearing children. There is already evidence that a communication-based approach to the education of deaf and hard of hearing children is not only educationally sound, but fiscally effective. In Orange County, California, for example, a regionalized program for deaf and hard of hearing students in grades 6-12 draws students from throughout the county to one elementary, middle school, and high school program.

Approximately 170 students are served in this program with 17 teachers, 17 interpreters, 17 instructional aides, 3 speech therapists, 1 psychologist, 1 counselor, 1 career education teacher, and 1 audiologist. There are 27 separate school districts in Orange County. In 1995-96, for example, students came from 15 separate districts with 10 of those districts having fewer than 10 deaf and hard of hearing students. If those 170 students were served in individual school districts, approximately 165 employees would be needed, including 35 teachers, 35 interpreters, and 35 instructional assistants.

The pooling of these scant resources not only makes better use of public resources, but provides a richer educational experience for deaf and hard of hearing children. The existence of a critical mass encourages a variety of extra-curricular activities and involvement in important deaf-related activities, such as Junior National Association of the Deaf, the Deaf Academic Bowl, and deaf athletic events.

In 1996, 28 deaf and hard of hearing students graduated from the Orange County program; 24 attended college, with the other four enrolled in vocational training programs.

Is the program for Mary or the Orange County example merely quixotic? Perhaps, but is communication an extravagance? Do we measure into the accounting the value of basic human needs and rights? If a cost were placed on the varied ways in which children in this nation learn to read, would the price be too high? Do we factor in the cost of badly educating our children in terms of unemployment, welfare, mental health, and other “service” costs? Is communication so under-valued for our deaf and hard of hearing children that we neither fully assess the cost of its exclusion or the riches it creates for our children?

The deaf and hard of hearing children of Orange County, California, and throughout the nation, have fundamental human rights which cannot be quantified, but even as we must look to the cost of change, to serve these children will enrich our society and ultimately save our nation precious resources.

VIII. CONCLUSION

For too many years, deaf and hard of hearing children and their parents and guardians have had to fight, informally and formally, successfully and unsuccessfully, for a right and necessity that should not require any struggle at all. To develop language and to be able to communicate is so fundamental as to be beyond argument. Yet the current educational structure, including the governing law, does not effectively and systemically provide for, and in fact discourages, communication growth.

Our nation has, for all its difficulties and conflicts, shown a remarkable and unique ability to do the right thing—to address and protect the fundamental needs of its citizens. Even if institutional change has come later rather than sooner, it has come.

The epic decision in Brown v. Board of Education was rendered in 1954 and we still struggle with de facto segregation in this nation. Efforts to create fair and equitable gender opportunities bump up against individual and systemic opposition. The inclusion of individuals with disabilities into the American mainstream is an on-going battle. But the nation has shown both the heart and soul for change.

It is time we summon the spirit to make the educational system work for deaf and hard of hearing children, to make that which is fundamental and necessary a clear right and central to the delivery of educational services. It is time, as President Lincoln said, to think and act anew.