Chapter 7

Education

A. Introduction and Overview

Before the 1970s, most children with disabilities had minimal access to education, particularly education in regular schools. While some special programming was available in separate settings, such as schools for children who were blind or deaf, children with intellectual disabilities or who had serious behavior disorders were more likely to be institutionalized and given minimal, if any, educational programming.

In the early 1970s, an advocacy movement applied the principles established by the Supreme Court in *Brown v. Board of Ed.*, 347 U.S. 483 (1954), relating to schools that were segregated on the basis of race. Advocacy groups throughout the United States in several states brought a number of cases challenging the exclusion and the different treatment of children with disabilities. The plaintiffs claimed that these practices by schools violated the Fifth and Fourteenth Amendment Due Process and Equal Protection Clauses. Two of these cases resulted in landmark settlement agreements, in which the parties agreed to provide education to children with disabilities. See *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971), 343 F. Supp. 279 (E.D. Pa. 1972); and *Mills v. Board of Ed.*, 348 F. Supp. 866 (D.D.C. 1972). In *Mills*, the court approved detailed procedural safeguards to ensure that these substantive rights were carried out.

In recognition of the additional burdens to the state and local educational agencies of educating children with disabilities and the value of consistent policy for all the states, Congress enacted major federal legislation, the Education for All Handicapped Children Act (EAHCA), in 1975 to provide additional funding to states. 42 U.S.C. §1400 et seq. An earlier version of the statute enacted in 1970 was known as the Education of the Handicapped Act (EHA), 84 Stat. 175, and amended in 1974, 88 Stat. 579. The EHA did not include the elaborate procedural safeguards that are viewed as essential to carrying out the purposes of the EHA. S. Rep. No. 94-168, at 11–12. The condition of funding granted through the Department of Education (formerly the Department of Health, Education and Welfare), was that the state educational agency was required to submit a state plan demonstrating that the state would provide free, appropriate, public education to all children with disabilities in the state. Education was to be individualized and was to be provided in the least restrictive appropriate environment. The state plan was required to include detailed procedural safeguards and a plan for personnel development. The EAHCA became effective in 1977. In 1990 the EAHCA was amended, and the title was changed to the Individuals with Disabilities Education Act (IDEA). The changed title reflected the new preferred language that had been adopted in the Americans with Disabilities Act. The statute was amended in 1997, adding some new requirements, but also renumbering many of the existing sections. Congress again amended and renumbered some sections of the statute in 2004. The statutory and regulatory citations in the case excerpts in this chapter refer to the provisions in effect on the date of the case. Major changes are noted in the text that accompanies relevant sections that follow.

While the EAHCA was being developed, Section 504 of the Rehabilitation Act, 29 U.S.C. §794, had already been enacted in 1973. Section 504 prohibits discrimination on the basis of handicap (now amended to use “disability”) by programs receiving federal financial assistance. Because virtually all

public schools receive federal financial assistance through a variety of programs, such as school lunch programs, these schools are subject to the nondiscrimination mandates of the Rehabilitation Act.

In 1990, Congress passed the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 et seq., which also prohibits discrimination on the basis of disability by both public schools (under Title II) and private schools (under Title III). While the ADA theoretically does not require substantively much more than was already required under Section 504, its application to private schools is a major addition. In addition, it might be interpreted as mandating more than was required under the Rehabilitation Act with respect to architectural barrier removal.

The differences in coverage under the IDEA and Section 504 and the ADA are important in the context of children with disabilities in the school setting. Section 504 and the ADA are nondiscrimination statutes. While they mandate reasonable accommodation as part of nondiscrimination, they do not require schools to carry out activities that would be unduly burdensome or that would fundamentally alter the program. The IDEA mandates more than basic nondiscrimination and reasonable accommodation. The IDEA contemplates special education and related services that may be much more expensive than a reasonable accommodation would require.

The other significant difference between IDEA and Section 504/ADA application relates to who is protected by the statutes. The IDEA categorically defines who is protected as children

> with [intellectual disabilities], hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities ... who, by reason thereof, need special education and related services.

20 U.S.C. §1401(3)(A)(i)(ii).[1]

In contrast, Section 504 and the ADA protect individuals who have substantial impairments to one or more major life activities (which includes learning), individuals who have a record of such an impairment, or those who are regarded as having such an impairment. 29 U.S.C. §706(8)(B); 42 U.S.C. §12102. The ADA also provides protection for individuals who are associated with someone who has a disability. 29 C.F.R. §1630.8(1). Both statutes have separate definitional clarification related to application for individuals with contagious or infectious diseases, 29 U.S.C. §706(8)(D), 42 U.S.C. §12113; and those who illegally use or who are addicted to drugs or alcohol, 29 U.S.C. §706(8)(C), 42 U.S.C. §§12111(6) & 12114.

In 2008, Congress enacted the ADA Amendments Act of 2008, P.L. 110-325 (2008), which took effect on January 1, 2009. The definition of coverage clarifies that the intent of the ADA was to provide for broad coverage. The definition's amendment applies to both the ADA and to the Rehabilitation Act.

The definition of disability basically remains the same and provides as follows:

> (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment ...

42 U.S.C. §12102(1). The definition does not apply to impairments that are transitory and minor. 42 U.S.C. §12102(4)(D).

Major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working. A major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine,

and reproductive functions. 42 U.S.C. §12102(2). This broader definition will result in greater eligibility for services and accommodations under Section 504 for students with impairments such as learning disabilities, ADD, ADHD, diabetes, asthma, peanut allergies, and other conditions that might not require special education.

[1] Chapter Goals

This chapter will provide the following:

- A review of the key principles of the applicable statutes.
- An application of these principles in the context of:
  - substantive educational rights and provision of related service
  - ensuring that principles of least restrictive environment are applied
  - disciplinary issues
  - procedural safeguards and remedies
- An understanding of the relationship of the major rights statute (Individuals with Disabilities Education Act) to the nondiscrimination statutes (Section 1983, Section 504, and the Americans with Disabilities Act)
- A general overview of some of the emerging issues and trends affecting students with disabilities

[2] Key Concepts and Definitions

The following are some key concepts for reference in learning about students with individuals with disabilities in the education context.

Americans with Disabilities Act

> Enacted in 1990, the ADA provides additional rights and remedies for students with disabilities who may not be eligible for special education and related services; applies to both private and public school settings.

Change in placement (stay put)

> Addresses the expectation that ordinarily the school may not change the placement of a student with a disability without triggering procedural safeguards; applies somewhat differently to parents who may be able to remove students and be reimbursed later.

Discrimination

> Treating students with disabilities in a discriminatory way (directly or indirectly) when the treatment is based on the disability.

Free appropriate public education (FAPE)

> A basic principle of EAHCA/IDEA that provides for more than a right not to be discriminated against; it also provides for substantive rights from the public education program for special education and related services at no cost to the parents.

Individuals with Disabilities Education Act (IDEA)

> The basic special education statute enacted in 1975 under the name Education for All Handicapped Children Act (EAHCA) and sometimes referred to as P.L. 94-142, providing significant substantive rights to special education and related services and procedural safeguards.

Individualized education program (IEP)

> A basic principle of EAHCA/IDEA that provides that the educational program for a student with a disability is to be individualized for that child; it means that all students with certain disabilities would not automatically be given identical programs of special education and related services.

Least restrictive environment (LRE)

A basic principle of EAHCA/IDEA and all disability discrimination laws that the programming is to be provided in the least restrictive appropriate setting. This is sometimes referred to as "mainstreaming" and is subject to some policy debate about whether all students with disabilities should be provided all of their education in the regular classroom (sometimes referred to as "full inclusion").

Procedural protections

A basic principle of EAHCA/IDEA that ensures that students not only have rights to special education, but also have procedural protections of notice and due process to ensure that they can obtain those rights.

Reasonable accommodations

A concept under the federal discrimination statutes (ADA and Rehabilitation Act) that ensures that individuals not only may not be discriminated against, but must also be provided reasonable accommodations; a recognition that some policies, practices and procedures are not intentionally discriminatory.

Section 504 of the Rehabilitation Act

A 1975 federal law that requires that any programming receiving federal financial assistance ("FFA") may not discriminate on the basis of disability. Virtually all public schools receive FFA through school lunch programs and a range of other federal programs.

Special education and related services

The basic substantive entitlement under EAHCA/IDEA giving students identified as eligible the right to special education and related services; the details of those provisions are spelled out within the statute.

Zero reject

The basic principle under EAHCA/IDEA that all students with disabilities (regardless of how severe) are eligible for education services.

Sequential Listing of Key Statutes and Supreme Court Decisions

Congress and the Supreme Court have both given substantial attention to issues involving students with disabilities in the education context. The following are the major provisions for historical reference.

1954	*Brown v. Board of Education*
	Separate but equal unconstitutional (in context of race)
1971/72	*PARC* and *Mills*
	Lower court cases setting stage for IDEA; applying due process and equal protection from *Brown* to disability discrimination
1973	Section 504 of the Rehabilitation Act
	Programs receiving federal financial assistance may not discriminate on basis of disability (all public schools receive federal funding)
1974	Education for Handicapped Act (EHA) provided funding, but not procedures
1975	Education for All Handicapped Children Act (EAHCA)
	Key statute establishing right to free appropriate public education and related services in the least restrictive environment for all age eligible students with disabilities and procedural safeguards

1984	*Board of Education v. Rowley* Defining "appropriate" in context of EAHCA
1984	*Irving Independent School District v. Tatro* Addressing issue of related services under EAHCA
1985	*Smith v. Robinson* Not allowing actions under Section 504 or Section 1983 where EAHCA provides a remedy
1985	*Burlington School Commission Department of Education* Allowing reimbursement where parents make unilateral placements when school's placement was not appropriate
1986	EAHCA amended (preschool and attorney fee amendments)
1988	*Honig v. Doe* Addressing disciplinary removal and procedural safeguards
1989	*Dellmuth v. Muth* Holds that states are immune from EAHCA actions
1990	Americans with Disabilities Act Broad coverage for disability discrimination in a much wider range of settings. Title II applies to public schools. Title III applies to private schools. Prohibits discrimination on the basis of disability and requires reasonable accommodations.
1990	EAHCA changed to Individuals with Disabilities Education Act (IDEA) Amendments also overturned *Dellmuth* immunity decision; provided for transition services
1993	*Zobrest v. Catalina Foothills School District* Addresses issue of providing services to private religious schools under the Establishment Clause
1993	*Florence County School District Four v. Carter* Establishes that public agency may be required to pay for private schools, even in unapproved programs, if the program is appropriate
1994	*Board of Education v. Grumet* Addresses provision of special education services under the Establishment Clause
1999	*Cedar Rapids Community School District v. Garret F.* Intensive nursing services are related services required under IDEA
2002	No Child Left Behind Sets standards for providing education to all students with implications for special education; in a state of flux in terms of its application
2004	IDEA amended Adds provisions regarding private school placements, discipline, and attorney's fees
2005	*Schaffer v. West* Burden of proof under IDEA is on the party seeking relief
2006	*Arlington Central School District Board of Education v. Murphy*

	IDEA does not provide for the award of expert witness fees to be awarded to prevailing party
2007	*Winkelman v. Parma City*
	Allows parents to seek remedies in court without using an attorney
2008	ADA Amendments Act
	Clarifies the broad definition of disability, which had been narrowed by the Supreme Court in 1999; may have implications for students seeking reasonable accommodations under Section 504 and ADA
2009	*Forest Grove School District v. T.A.*
	Student may obtain reimbursement for private school placement from public school even if he/she had not received special education services in public school before the parents made the placement

B. Relationship of Discrimination Statutes to Individuals with Disabilities Education Act

One of the earliest Supreme Court decisions related to children with disabilities in schools addressed the issue of overlapping application of the IDEA and Section 504. The Court's analysis, which follows in the next case excerpt, would almost certainly be applied to a similar challenge involving the ADA, which had not been enacted in 1984, when the Court decided this case.

The facts of the following case involved a boy who was 8 years old in 1976 when the proceedings began. The boy had physical and emotional disabilities, and there was a dispute over the appropriate placement and who had responsibility for payment for the placement. The case was brought under several legal theories and included requests for attorney's fees under the statutes that provided for attorney's fees. At the time of the original action, attorney's fees were not available under the federal special education statute, so it was necessary for the parents to use other theories to recover those expenses. The key language of the decision, which is important for other situations, is found in the following excerpt. Note that the Court used the now disfavored term “handicapped” instead of today's accepted term “disability.”

Smith v. Robinson

468 U.S. 992 (1984)

JUSTICE BLACKMUN delivered the opinion of the Court:

III.

As the legislative history illustrates and as this Court has recognized, §1988 is a broad grant of authority to courts to award attorney's fees to plaintiffs seeking to vindicate federal constitutional and statutory rights. Congress did not intend to have that authority extinguished by the fact that the case was settled or resolved on a nonconstitutional ground. As the Court also has recognized, however, the authority to award fees in a case where the plaintiff prevails on substantial constitutional claims is not without qualification. Due regard must be paid, not only to the fact that a plaintiff “prevailed,” but also to the relationship between the claims on which effort was expended and the ultimate relief obtained.

A similar analysis is appropriate in a case like this, where the prevailing plaintiffs rely on substantial, unaddressed constitutional claims as the basis for an award of attorney's fees. The fact that constitutional claims are made does not render automatic an award of fees for the entire proceeding. Congress' purpose in authorizing a fee award for an unaddressed constitutional claim was to avoid

penalizing a litigant for the fact that courts are properly reluctant to resolve constitutional questions if a nonconstitutional claim is dispositive. That purpose does not alter the requirement that a claim for which fees are awarded be reasonably related to the plaintiff's ultimate success. It simply authorizes a district court to assume that the plaintiff has prevailed on his fee-generating claim and to award fees appropriate to that success.

In light of the requirement that a claim for which fees are awarded be reasonably related to the plaintiff's ultimate success, it is clear that plaintiffs may not rely simply on the fact that substantial fee-generating claims were made during the course of the litigation. Closer examination of the nature of the claims and the relationship between those claims and petitioners' ultimate success is required.

Besides making a claim under the EHA, petitioners asserted at two different points in the proceedings that procedures employed by state officials denied them due process. They also claimed that Tommy was being discriminated against on the basis of his handicapping condition, in violation of the Equal Protection Clause of the Fourteenth Amendment.

A.

The first due process claim may be disposed of briefly. Petitioners challenged the refusal of the School Board to grant them a full hearing before terminating Tommy's funding. Petitioners were awarded fees against the School Board for their efforts in obtaining an injunction to prevent that due process deprivation. The award was not challenged on appeal and we therefore assume that it was proper.

The fact that petitioners prevailed on their initial due process claim, however, by itself does not entitle them to fees for the subsequent administrative and judicial proceedings. The due process claim that entitled petitioners to an order maintaining Tommy's placement throughout the course of the subsequent proceedings is entirely separate from the claims petitioners made in those proceedings. Nor were those proceedings necessitated by the School Board's failings. Even if the School Board had complied with state regulations and had guaranteed Tommy's continued placement pending administrative review of its decision, petitioners still would have had to avail themselves of the administrative process in order to obtain the permanent relief they wanted—an interpretation of state law that placed on the School Board the obligation to pay for Tommy's education. Petitioners' initial due process claim is not sufficiently related to their ultimate success to support an award of fees for the entire proceeding. We turn, therefore, to petitioners' other §1983 claims.

As petitioners emphasize, their §1983 claims were not based on alleged violations of the EHA, but on independent claims of constitutional deprivations. As the Court of Appeals recognized, however, petitioners' constitutional claims, a denial of due process and a denial of a free appropriate public education as guaranteed by the Equal Protection Clause, are virtually identical to their EHA claims. The question to be asked, therefore, is whether Congress intended that the EHA be the exclusive avenue through which a plaintiff may assert those claims.

B.

We have little difficulty concluding that Congress intended the EHA to be the exclusive avenue through which a plaintiff may assert an equal protection claim to a publicly financed special education. The EHA is a comprehensive scheme set up by Congress to aid the States in complying with their constitutional obligations to provide public education for handicapped children. Both the provisions of the statute and its legislative history indicate that Congress intended handicapped children with constitutional claims to a free appropriate public education to pursue those claims through the carefully tailored administrative and judicial mechanism set out in the statute.

In the statement of findings with which the EHA begins, Congress noted that there were more than 8,000,000 handicapped children in the country, the special education needs of most of whom were not being fully met. Congress also recognized that in a series of "landmark court cases," the right to an

equal education opportunity for handicapped children had been established. The EHA was an attempt to relieve the fiscal burden placed on States and localities by their responsibility to provide education for all handicapped children. At the same time, however, Congress made clear that the EHA is not simply a funding statute. The responsibility for providing the required education remains on the States. And the Act establishes an enforceable substantive right to a free appropriate public education.

In light of the comprehensive nature of the procedures and guarantees set out in the EHA and Congress' express efforts to place on local and state educational agencies the primary responsibility for developing a plan to accommodate the needs of each individual handicapped child, we find it difficult to believe that Congress also meant to leave undisturbed the ability of a handicapped child to go directly to court with an equal protection claim to a free appropriate public education. Not only would such a result render superfluous most of the detailed procedural protections outlined in the statute, but, more important, it would run counter to Congress' view that the needs of handicapped children are best accommodated by having the parents and the local education agency work together to formulate an individualized plan for each handicapped child's education. No federal district court presented with a constitutional claim to a public education can duplicate that process.

We do not lightly conclude that Congress intended to preclude reliance on §1983 as a remedy for a substantial equal protection claim. Since 1871, when it was passed by Congress, §1983 has stood as an independent safeguard against deprivations of federal constitutional and statutory rights. Nevertheless, §1983 is a statutory remedy and Congress retains the authority to repeal it or replace it with an alternative remedy. The crucial consideration is what Congress intended.

In this case, we think Congress' intent is clear. Allowing a plaintiff to circumvent the EHA administrative remedies would be inconsistent with Congress' carefully tailored scheme. The legislative history gives no indication that Congress intended such a result. Rather, it indicates that Congress perceived the EHA as the most effective vehicle for protecting the constitutional right of a handicapped child to a public education. We conclude, therefore, that where the EHA is available to a handicapped child asserting a right to a free appropriate public education, based either on the EHA or on the Equal Protection Clause of the Fourteenth Amendment, the EHA is the exclusive avenue through which the child and his parents or guardian can pursue their claim.

[Discussion of due process claim omitted.]

IV.

We turn, finally, to petitioners' claim that they were entitled to fees under §505 of the Rehabilitation Act, because they asserted a substantial claim for relief under §504 of that Act.

Much of our analysis of petitioners' equal protection claim is applicable here. The EHA is a comprehensive scheme designed by Congress as the most effective way to protect the right of a handicapped child to a free appropriate public education. We concluded above that in enacting the EHA, Congress was aware of, and intended to accommodate, the claims of handicapped children that the Equal Protection Clause required that they be ensured access to public education. We also concluded that Congress did not intend to have the EHA scheme circumvented by resort to the more general provisions of §1983. We reach the same conclusion regarding petitioners' §504 claim. The relationship between the EHA and §504, however, requires a slightly different analysis from that required by petitioners' equal protection claim.

Section 504 and the EHA are different substantive statutes. While the EHA guarantees a right to a free appropriate public education, §504 simply prevents discrimination on the basis of handicap. But while the EHA is limited to handicapped children seeking access to public education, §504 protects handicapped persons of all ages from discrimination in a variety of programs and activities receiving federal financial assistance.

Because both statutes are built around fundamental notions of equal access to state programs and

facilities, their substantive requirements, as applied to the right of a handicapped child to a public education, have been interpreted to be strikingly similar. In regulations promulgated pursuant to §504, the Secretary of Education has interpreted §504 as requiring a recipient of federal funds that operates a public elementary or secondary education program to provide a free appropriate public education to each qualified handicapped person in the recipient's jurisdiction. 34 CFR §104.33(a) (1983). The requirement extends to the provision of a public or private residential placement if necessary to provide a free appropriate public education. §104.33(c)(3). The regulations also require that the recipient implement procedural safeguards, including notice, an opportunity for the parents or guardian to examine relevant records, an impartial hearing with opportunity for participation by the parents or guardian and representation by counsel, and a review procedure. §104.36. The Secretary declined to require the exact EHA procedures, because those procedures might be inappropriate for some recipients not subject to the EHA, see 34 CFR, subtitle B, ch. 1, App. A, p. 371, but indicated that compliance with EHA procedures would satisfy §104.36.

On the other hand, although both statutes begin with an equal protection premise that handicapped children must be given access to public education, it does not follow that the affirmative requirements imposed by the two statutes are the same. The significant difference between the two, as applied to special education claims, is that the substantive and procedural rights assumed to be guaranteed by both statutes are specifically required only by the EHA.

Section 504, 29 U.S.C. §794, provides, in pertinent part, that:

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

In *Southeastern Community College v. Davis*, the Court emphasized that §504 does not require affirmative action on behalf of handicapped persons, but only the absence of discrimination against those persons. In light of *Davis*, courts construing §504 as applied to the educational needs of handicapped children have expressed confusion about the extent to which §504 requires special services necessary to make public education accessible to handicapped children.

In the EHA, on the other hand, Congress specified the affirmative obligations imposed on States to ensure that equal access to a public education is not an empty guarantee, but offers some benefit to a handicapped child. Thus, the statute specifically requires "such ... supportive services ... as may be required to assist a handicapped child to benefit from special education," ... including, if the public facilities are inadequate for the needs of the child, "instruction in hospitals and institutions." 20 U.S.C. §§1401(16) and (17).

We need not decide the extent of the guarantee of a free appropriate public education Congress intended to impose under §504. We note the uncertainty regarding the reach of §504 to emphasize that it is only in the EHA that Congress specified the rights and remedies available to a handicapped child seeking access to public education. Even assuming that the reach of §504 is coextensive with that of the EHA, there is no doubt that the remedies, rights, and procedures Congress set out in the EHA are the ones it intended to apply to a handicapped child's claim to a free appropriate public education. We are satisfied that Congress did not intend a handicapped child to be able to circumvent the requirements or supplement the remedies of the EHA by resort to the general antidiscrimination provision of §504.

The [EHA] appears to represent Congress' judgment that the best way to ensure a free appropriate public education for handicapped children is to clarify and make enforceable the rights of those children while at the same time endeavoring to relieve the financial burden imposed on the agencies responsible to guarantee those rights. Where §504 adds nothing to the substantive rights of a handicapped child, we cannot believe that Congress intended to have the careful balance struck in the EHA upset by reliance on §504 for otherwise unavailable damages or for an award of attorney's fees.

We emphasize the narrowness of our holding. We do not address a situation where the EHA is not available or where §504 guarantees substantive rights greater than those available under the EHA. We hold only that where, as here, whatever remedy might be provided under §504 is provided with more clarity and precision under the EHA, a plaintiff may not circumvent or enlarge on the remedies available under the EHA by resort to §504.

[Dissenting opinions of Justices Brennan, Marshall, and Stevens are omitted.]

Note

Attorneys' Fees Amendment: As the *Smith v. Robinson* opinion indicates, one of the major reasons that Section 504 and Section 1983 were being used as vehicles for relief was to obtain attorneys' fees and possibly damages, which were not specifically provided for in the EAHCA. After this decision was rendered, Congress amended the EAHCA in 1986 by passing the Handicapped Children's Protection Act (HCPA). The HCPA provides that courts may award reasonable attorneys' fees to parents or guardians of children with disabilities who prevail in EAHCA claims. 20 U.S.C. §4(e)(4). The statutory amendments did not address the issue of damages as a remedy.

The HCPA has given rise to a substantial amount of litigation addressing issues such as what it means to be a prevailing party, whether such fees are available for administrative proceedings (the majority of courts hold that they are), and what is meant by "reasonable" within a particular set of circumstances. See LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW §2.51 (2012 and cumulative supplement). The 1997 amendments clarified that attorneys' fees may not generally be recovered for IEP meetings. 20 U.S.C. §1415(i)(3)(D)(iii) (1997).

See also Laura Rothstein, *Roads and Schools: Parallel Paths in the Government Role to Education for Students with Disabilities,* 83 MISSISSIPPI LAW JOURNAL 777 (2014).

C. Substantive Protections under the Individuals with Disabilities Education Act

The Individuals with Disabilities Education Act (formerly the Education for All Handicapped Children Act) is more than a nondiscrimination statute. The key substantive principles of the IDEA are that special education and related services are to be provided to *all* children with disabilities; the education is to be *appropriate* and *individualized*; it is to be *free*; and it is to be provided in the *least restrictive appropriate setting*. In addition to the principle substantive provisions, the IDEA provides for an elaborate set of *procedural safeguards*.

The cases in this section illustrate some of the major substantive provisions of the IDEA. The focus is on those provisions that have been the subject of major judicial attention. There have been hundreds of reported decisions addressing a variety of issues under the IDEA. Citations to many of these decisions can be found in LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW ch. 2 (2014 cumulative edition).

[1] Appropriate Education

The term "appropriate" as used in the IDEA is a difficult term to define. Part of the reason it is so difficult to define is that the type of educational programming needed for each child varies significantly depending on the type of disability, the degree of severity, and even when the child became disabled. For example, a child who is deaf from birth may have very different needs than a child whose hearing impairment occurred as a result of an illness when the child was a teenager.

Hypothetical Problem 7.1

Helen K. is five years old and became deaf at age three after having meningitis. Her parents placed Helen (at age three) in a private intensive program for children with hearing impairments and paid for the costs of the program themselves. Helen is very bright and has progressed well and, although she has learned American Sign Language, she has become an excellent lip reader, and her parents would prefer that she not rely on sign language but only use lip reading. Helen has a hearing aid that facilitates a small degree of residual hearing. In May, while Helen is still attending the private school, her parents contact the local school district asking for special education for Helen for the following year in first grade. Helen's sixth birthday is in July.

She lives in a large school district and there are four other children Helen's age with hearing impairments. The closest public school (McKinley School) to Helen's home is two blocks away and would be the school assigned to many of Helen's friends in the neighborhood. After the educational agency evaluates Helen's existing records, it proposes at the IEP meeting in June to place Helen in a mainstream first grade class in Lincoln Elementary School that is fifteen miles away. This would require a one hour bus ride each way. Helen's family lives on the 10th floor of a condominium building, and Helen would need to be at the school bus stop by 6:30 am and would not return home until approximately 4:30 pm each day, and would be dropped at a stop a block from the entrance to the building in which Helen's family lives. Lincoln Elementary has several students with hearing impairments enrolled in various grades and there is a full time deaf education specialist on staff at the school. The four other children Helen's age, who live varying distances from Lincoln Elementary, have all learned sign language and received services from a state agency, facilitated by the local school district for one to five years. A full time sign language interpreter would be placed in the classroom. Helen would also attend separate speech therapy sessions at the school three times a week for an hour. The school has installed microphone systems in all classrooms at Lincoln to benefit those students with residual hearing.

At the IEP meeting, Helen's parents strongly object to the school's proposed placement for several reasons. They are concerned about the time spent in travel and that she would lose the social interaction of after school activities with the other children in her building and neighborhood. They are concerned that Helen will have to wait at a bus stop in the early morning hours and someone would have to wait for her at a busy intersection to take her back to her apartment on the 10th floor. Both of Helen's parents are employed in positions that require them to be at their offices until 5 pm, arriving home between 5:30 and 6:00. McKinley Elementary School has an after school program for enrolled students allowing them to stay there until 5:00 pm at no cost, and a nominal cost after 5:00 until 6:30. The parents strongly object to having a sign language interpreter in the classroom because they think Helen will begin to rely on signing rather than lip reading. They refuse to agree to the proposed IEP, and the dispute remains unresolved by the first day of school. The parents decide to keep Helen enrolled at the private placement until the dispute can be resolved.

The cost of the private school placement is $40,000 a year. The cost to the school district of providing Helen's education at Lincoln Elementary would be $20,000 (including transportation costs and the related service costs divided by the five children in the classroom and the speech therapy). If the school district provided speech therapy at McKinley and installed a microphone, the costs would be $30,000 (because an itinerant speech therapist would have to travel to McKinley), the school would provide a sign language interpreter (although this is a dispute about whether this is needed), and the installation of a microphone system in the classroom would be required and this would be a recurring cost in each classroom to which Helen would move as she moves from grade to grade.

How would this dispute proceed in a best case scenario? What factors would determine whether Helen is receiving an “appropriate” education at Lincoln?

The first Supreme Court decision to address any issue under the IDEA (then EAHCA) is the

following case. In this decision, the Court attempts to clarify the meaning of the term “appropriate.”

Board of Education v. Rowley

458 U.S. 176 (1982)

JUSTICE REHNQUIST delivered the opinion of the Court:

I.

The Education of the Handicapped Act (Act) provides federal money to assist state and local agencies in educating handicapped children, and conditions such funding upon a State's compliance with extensive goals and procedures. The Act represents an ambitious federal effort to promote the education of handicapped children, and was passed in response to Congress' perception that a majority of handicapped children in the United States “were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to ‘drop out.’” The Act's evolution and major provisions shed light on the question of statutory interpretation which is at the heart of this case.

Congress first addressed the problem of educating the handicapped in 1966 when it amended the Elementary and Secondary Education Act of 1965 to establish a grant program “for the purpose of assisting the States in the initiation, expansion, and improvement of programs and projects ... for the education of handicapped children.” That program was repealed in 1970 by the Education of the Handicapped Act, Part B of which established a grant program similar in purpose to the repealed legislation. Neither the 1966 nor the 1970 legislation contained specific guidelines for state use of the grant money; both were aimed primarily at stimulating the States to develop educational resources and to train personnel for educating the handicapped.

Dissatisfied with the progress being made under these earlier enactments, and spurred by two District Court decisions holding that handicapped children should be given access to a public education, ... Congress in 1974 greatly increased federal funding for education of the handicapped and for the first time required recipient States to adopt “a goal of providing full educational opportunities to all handicapped children.” The 1974 statute was recognized as an interim measure only, adopted “in order to give the Congress an additional year in which to study what if any additional Federal assistance [was] required to enable the States to meet the needs of handicapped children.” The ensuing year of study produced the Education for All Handicapped Children Act of 1975.

In order to qualify for federal financial assistance under the Act, a State must demonstrate that it “has in effect a policy that assures all handicapped children the right to a free appropriate public education.” 20 U.S.C. §1412(1). That policy must be reflected in a state plan submitted to and approved by the Secretary of Education which describes in detail the goals, programs, and timetables under which the State intends to educate handicapped children within its borders. §§1412, 1413. States receiving money under the Act must provide education to the handicapped by priority, first “to handicapped children who are not receiving an education” and second “to handicapped children ... with the most severe handicaps who are receiving an inadequate education,” §1412(3), and “to the maximum extent appropriate” must educate handicapped children “with children who are not handicapped.” §1412(5). The Act broadly defines “handicapped children” to include “mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, [and] other health impaired children, [and] children with specific learning disabilities.” §1401(1).

The “free appropriate public education” required by the Act is tailored to the unique needs of the handicapped child by means of an “individualized educational program” (IEP). §1401(18). The IEP, which is prepared at a meeting between a qualified representative of the local educational agency, the child's teacher, the child's parents or guardian, and, where appropriate, the child, consists of a written

document containing "(A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved." §1401(19). Local or regional educational agencies must review, and where appropriate revise, each child's IEP at least annually. §1414(a)(5). See also §1413(a)(11).

In addition to the state plan and the IEP already described, the Act imposes extensive procedural requirements upon States receiving federal funds under its provisions. Parents or guardians of handicapped children must be notified of any proposed change in "the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to such child," and must be permitted to bring a complaint about "any matter relating to" such evaluation and education. §§1415(b)(1)(D) and (E).... Complaints brought by parents or guardians must be resolved at "an impartial due process hearing," and appeal to the state educational agency must be provided if the initial hearing is held at the local or regional level. §§1415(b)(2) and (c). Thereafter, "[a]ny party aggrieved by the findings and decision" of the state administrative hearing has "the right to bring a civil action with respect to the complaint ... in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy." §1415(e)(2).

Thus, although the Act leaves to the States the primary responsibility for developing and executing educational programs for handicapped children, it imposes significant requirements to be followed in the discharge of that responsibility. Compliance is assured by provisions permitting the withholding of federal funds upon determination that a participating state or local agency has failed to satisfy the requirements of the Act, §§1414(b)(2)(A), 1416, and by the provision for judicial review. [Authors' note: All states have now adopted the IDEA requirements.]

II.

This case arose in connection with the education of Amy Rowley, a deaf student at the Furnace Woods School in the Hendrick Hudson Central School District, Peekskill, N.Y. Amy has minimal residual hearing and is an excellent lipreader. During the year before she began attending Furnace Woods, a meeting between her parents and school administrators resulted in a decision to place her in a regular kindergarten class in order to determine what supplemental services would be necessary to her education. Several members of the school administration prepared for Amy's arrival by attending a course in sign-language interpretation, and a teletype machine was installed in the principal's office to facilitate communication with her parents who are also deaf. At the end of the trial period it was determined that Amy should remain in the kindergarten class, but that she should be provided with an FM hearing aid which would amplify words spoken into a wireless receiver by the teacher or fellow students during certain classroom activities. Amy successfully completed her kindergarten year.

As required by the Act, an IEP [individualized educational program] was prepared for Amy during the fall of her first-grade year. The IEP provided that Amy should be educated in a regular classroom at Furnace Woods, should continue to use the FM hearing aid, and should receive instruction from a tutor for the deaf for one hour each day and from a speech therapist for three hours each week. The Rowleys agreed with parts of the IEP, but insisted that Amy also be provided a qualified sign-language interpreter in all her academic classes in lieu of the assistance proposed in other parts of the IEP. Such an interpreter had been placed in Amy's kindergarten class for a 2-week experimental period, but the interpreter had reported that Amy did not need his services at that time. The school administrators likewise concluded that Amy did not need such an interpreter in her first-grade classroom. They reached this conclusion after consulting the school district's Committee on the Handicapped, which had received expert evidence from Amy's parents on the importance of a sign-

language interpreter, received testimony from Amy's teacher and other persons familiar with her academic and social progress, and visited a class for the deaf.

[Administrative hearing and lower court proceedings omitted.]

We granted certiorari to review the lower courts' interpretation of the Act. Such review requires us to consider two questions: What is meant by the Act's requirement of a "free appropriate public education"? And what is the role of state and federal courts in exercising the review granted by 20 U.S.C. §1415? We consider these questions separately. [Authors' Note: The second issue is omitted.]

III.

A.

This is the first case in which this Court has been called upon to interpret any provision of the Act.

We are loath to conclude that Congress failed to offer any assistance in defining the meaning of the principal substantive phrase used in the Act. It is beyond dispute that, contrary to the conclusions of the courts below, the Act does expressly define "free appropriate public education": "The term 'free appropriate public education' means *special education* and *related services* which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title." §1401(18) (emphasis added). "Special education," as referred to in this definition, means "specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions." §1401(16). "Related services" are defined as "transportation, and such developmental, corrective, and other supportive services ... as may be required to assist a handicapped child to benefit from special education." §1401(17).

Like many statutory definitions, this one tends toward the cryptic rather than the comprehensive, but that is scarcely a reason for abandoning the quest for legislative intent. Whether or not the definition is a "functional" one, as respondents contend it is not, it is the principal tool which Congress has given us for parsing the critical phrase of the Act. We think more must be made of it than either respondents or the United States seems willing to admit.

According to the definitions contained in the Act, a "free appropriate public education" consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child "to benefit" from the instruction. Almost as a checklist for adequacy under the Act, the definition also requires that such instruction and services be provided at public expense and under public supervision, meet the State's educational standards, approximate the grade levels used in the State's regular education, and comport with the child's IEP. Thus, if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items on the definitional checklist are satisfied, the child is receiving a "free appropriate public education" as defined by the Act.

Other portions of the statute also shed light upon congressional intent. Congress found that of the roughly eight million handicapped children in the United States at the time of enactment, one million were "excluded entirely from the public school system" and more than half were receiving an inappropriate education....

Noticeably absent from the language of the statute is any substantive standard prescribing the level of education to be accorded handicapped children. Certainly the language of the statute contains no requirement like the one imposed by the lower courts—that States maximize the potential of handicapped children "commensurate with the opportunity provided to other children." That standard was expounded by the District Court without reference to the statutory definitions or even to the

legislative history of the Act....

B.

(i)

As suggested in Part I, federal support for education of the handicapped is a fairly recent development. Before passage of the Act some States had passed laws to improve the educational services afforded handicapped children, but many of these children were excluded completely from any form of public education or were left to fend for themselves in classrooms designed for education of their nonhandicapped peers. As previously noted, the House Report begins by emphasizing this exclusion and misplacement, noting that millions of handicapped children "were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to 'drop out.'"

This concern, stressed repeatedly throughout the legislative history, ... confirms the impression conveyed by the language of the statute. By passing the Act, Congress sought primarily to make public education available to handicapped children. But in seeking to provide such access to public education, Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such access meaningful. Indeed, Congress expressly "recognize[d] that in many instances the process of providing special education and related services to handicapped children is not guaranteed to produce any particular outcome." Thus, the intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside.

Both the House and the Senate Reports attribute the impetus for the Act and its predecessors to two federal-court judgments rendered in 1971 and 1972. As the Senate Report states, passage of the Act "followed a series of landmark court cases establishing in law the right to education for all handicapped children."

Mills and *PARC* [citations omitted] both held that handicapped children must be given access to an adequate, publicly supported education. Neither case purports to require any particular substantive level of education. Rather, like the language of the Act, the cases set forth extensive procedures to be followed in formulating personalized educational programs for handicapped children. The fact that both *PARC* and *Mills* are discussed at length in the legislative Reports suggests that the principles which they established are the principles which, to a significant extent, guided the drafters of the Act. Indeed, immediately after discussing these cases the Senate Report describes the 1974 statute as having "incorporated the major principles of the right to education cases." Those principles in turn became the basis of the Act, which itself was designed to effectuate the purposes of the 1974 statute.

That the Act imposes no clear obligation upon recipient States beyond the requirement that handicapped children receive some form of specialized education is perhaps best demonstrated by the fact that Congress, in explaining the need for the Act, equated an "appropriate education" to the receipt of some specialized educational services....

(ii)

Respondents contend that "the goal of the Act is to provide each handicapped child with an equal educational opportunity." We think, however, that the requirement that a State provide specialized educational services to handicapped children generates no additional requirement that the services so provided be sufficient to maximize each child's potential "commensurate with the opportunity provided other children." Respondents and the United States correctly note that Congress sought "to provide assistance to the States in carrying out their responsibilities under ... the Constitution of the United States to provide equal protection of the laws." But we do not think that such statements imply a congressional intent to achieve strict equality of opportunity or services.

The educational opportunities provided by our public school systems undoubtedly differ from student to student, depending upon a myriad of factors that might affect a particular student's ability to assimilate information presented in the classroom. The requirement that States provide "equal" educational opportunities would thus seem to present an entirely unworkable standard requiring impossible measurements and comparisons. Similarly, furnishing handicapped children with only such services as are available to nonhandicapped children would in all probability fall short of the statutory requirement of "free appropriate public education"; to require, on the other hand, the furnishing of every special service necessary to maximize each handicapped child's potential is, we think, further than Congress intended to go. Thus to speak in terms of "equal" services in one instance gives less than what is required by the Act and in another instance more. The theme of the Act is "free appropriate public education," a phrase which is too complex to be captured by the word "equal" whether one is speaking of opportunities or services.

The legislative conception of the requirements of equal protection was undoubtedly informed by the two District Court decisions referred to above. But cases such as *Mills* and *PARC* held simply that handicapped children may not be excluded entirely from public education. In *Mills*, the District Court said:

> If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom.

The *PARC* court used similar language, saying "[i]t is the commonwealth's obligation to place each mentally retarded child in a free, public program of education and training appropriate to the child's capacity...." The right of access to free public education enunciated by these cases is significantly different from any notion of absolute equality of opportunity regardless of capacity. To the extent that Congress might have looked further than these cases which are mentioned in the legislative history, at the time of enactment of the Act this Court had held at least twice that the Equal Protection Clause of the Fourteenth Amendment does not require States to expend equal financial resources on the education of each child.

In explaining the need for federal legislation, the House Report noted that "no congressional legislation has required a precise guarantee for handicapped children, i.e. a basic floor of opportunity that would bring into compliance all school districts with the constitutional right of equal protection with respect to handicapped children." Assuming that the Act was designed to fill the need identified in the House Report—that is, to provide a "basic floor of opportunity" consistent with equal protection—neither the Act nor its history persuasively demonstrates that Congress thought that equal protection required anything more than equal access. Therefore, Congress' desire to provide specialized educational services, even in furtherance of "equality," cannot be read as imposing any particular substantive educational standard upon the States.

The District Court and the Court of Appeals thus erred when they held that the Act requires New York to maximize the potential of each handicapped child commensurate with the opportunity provided nonhandicapped children. Desirable though that goal might be, it is not the standard that Congress imposed upon States which receive funding under the Act. Rather, Congress sought primarily to identify and evaluate handicapped children, and to provide them with access to a free public education.

(iii)

Implicit in the congressional purpose of providing access to a "free appropriate public education" is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child. It would do little good for Congress to spend millions of dollars in providing access to a public education only to have the handicapped child receive no

benefit from that education. The statutory definition of "free appropriate public education," in addition to requiring that States provide each child with "specially designed instruction," expressly requires the provision of "such ... supportive services ... as may be required to assist a handicapped child *to benefit* from special education." §1401(17) (emphasis added). We therefore conclude that the "basic floor of opportunity" provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.

The determination of when handicapped children are receiving sufficient educational benefits to satisfy the requirements of the Act presents a more difficult problem. The Act requires participating States to educate a wide spectrum of handicapped children, from the marginally hearing-impaired to the profoundly retarded and palsied. It is clear that the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between. One child may have little difficulty competing successfully in an academic setting with nonhandicapped children while another child may encounter great difficulty in acquiring even the most basic of self-maintenance skills. We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act. Because in this case we are presented with a handicapped child who is receiving substantial specialized instruction and related services, and who is performing above average in the regular classrooms of a public school system, we confine our analysis to that situation.

The Act requires participating States to educate handicapped children with nonhandicapped children whenever possible. When that "mainstreaming" preference of the Act has been met and a child is being educated in the regular classrooms of a public school system, the system itself monitors the educational progress of the child. Regular examinations are administered, grades are awarded, and yearly advancement to higher grade levels is permitted for those children who attain an adequate knowledge of the course material. The grading and advancement system thus constitutes an important factor in determining educational benefit. Children who graduate from our public school systems are considered by our society to have been "educated" at least to the grade level they have completed, and access to an "education" for handicapped children is precisely what Congress sought to provide in the Act.

C.

When the language of the Act and its legislative history are considered together, the requirements imposed by Congress become tolerably clear. Insofar as a State is required to provide a handicapped child with a "free appropriate public education," we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP. In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.

IV.

A.

[Omitted portions introduce the discussion of the importance of procedural safeguards to the implementation of the special education statute.]

Therefore, a court's inquiry in suits brought under §1415(e)(2) is twofold. First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive

educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.

B.

In assuring that the requirements of the Act have been met, courts must be careful to avoid imposing their view of preferable educational methods upon the States. The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child. The Act expressly charges States with the responsibility of "acquiring and disseminating to teachers and administrators of programs for handicapped children significant information derived from educational research, demonstration, and similar projects, and [of] adopting, where appropriate, promising educational practices and materials." §1413(a)(3). In the face of such a clear statutory directive, it seems highly unlikely that Congress intended courts to overturn a State's choice of appropriate educational theories in a proceeding conducted pursuant to §1415(e)(2).

We previously have cautioned that courts lack the "specialized knowledge and experience" necessary to resolve "persistent and difficult questions of educational policy." We think that Congress shared that view when it passed the Act. As already demonstrated, Congress' intention was not that the Act displace the primacy of States in the field of education, but that States receive funds to assist them in extending their educational systems to the handicapped. Therefore, once a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the States.

V.

[Omits the discussion of parental involvement as a means of ensuring special education.]

VI.

Applying these principles to the facts of this case, we conclude that the Court of Appeals erred in affirming the decision of the District Court. Neither the District Court nor the Court of Appeals found that petitioners had failed to comply with the procedures of the Act, and the findings of neither court would support a conclusion that Amy's educational program failed to comply with the substantive requirements of the Act. On the contrary, the District Court found that the "evidence firmly establishes that Amy is receiving an 'adequate' education, since she performs better than the average child in her class and is advancing easily from grade to grade." In light of this finding, and of the fact that Amy was receiving personalized instruction and related services calculated by the Furnace Woods school administrators to meet her educational needs, the lower courts should not have concluded that the Act requires the provision of a sign-language interpreter. Accordingly, the decision of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

[Concurring and dissenting opinions omitted.]

Notes

1. *Education for Students with Hearing Impairments:* There is substantial controversy about the best or most appropriate method of education for children who are deaf. In light of the compelling arguments that are made on behalf of various methodologies, the Supreme Court and other courts have wisely deferred to the educational agencies to make these decisions. Schools are not required to provide the *best* education, but they are required to provide education that is *individualized* to the needs of the particular child. For that reason, it would seem that an educational agency should evaluate each child's needs and abilities and not assume that a particular methodology is necessarily

appropriate for all children who are deaf. See Andrew Solomon, *Deaf Is Beautiful*, N.Y. TIMES MAG. 40 (August 28, 1994); Edward Dolnick, *Deafness as Culture*, ATLANTIC MONTHLY 37 (September 1993). See also Andy Liu, *Full Inclusion and Deaf Education—Redefining Equality,* 24 J.L. & EDUC. 241 (1995); Michael Stinson & Shirin Antia, *Considerations in Educating Deaf and Hard-of-Hearing Students in Inclusive Settings,* JOURNAL OF DEAF STUDIES AND EDUCATION 163–175 (1999).

2. *Higher State Standards Than "Appropriate":* Although federal special education law has been interpreted in *Rowley* to mean that schools are not required to provide the best special education or to provide education that will maximize the potential of the child, some states have set higher standards. Courts have consistently held that federal procedural safeguards under the IDEA may be applied to substantive protections that are greater than the IDEA. For example, in *Amann v. Stow Sch. Sys.*, 982 F.2d 644 (1st Cir. 1992), the court upheld the potential maximization standard. In *D.R. v. East Brunswick Bd. of Ed.*, 838 F. Supp. 184 (D.N.J. 1993), the court recognized a standard requiring that students receive services that allow them to best achieve success in learning. Recognizing the limits of even state laws assuring maximum possible development, the court in *Frank S. v. School Committee of Dennis-Yarmouth Regional School Dist*., 26 F. Supp. 2d 219 (D. Mass. 1998), held that a school is not required to mold a child in to a "responsible and independent individual capable of interacting with the material world around him."

3. *State Minimum Standards Not Dispositive of "Appropriateness":* In the early years after passage of EAHCA, there are some educational policies set by state agencies that were used by the educational agencies as the basis for denying certain programming to children with disabilities. In *Battle v. Commonwealth*, 629 F.2d 269 (3d Cir. 1980), the court addressed a state policy of providing 180 school days per year to all children. The state's position in the class action by special education students claiming a need for year-round programming to avoid significant regression was that the state was required to provide only the same number of school days for special education children as were provided for everyone else. The court found that this policy violated the EAHCA because it did not meet the mandate that education be individualized and appropriate to each child's needs. All other decisions on this and similar issues have reached consistent results. LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW §2.20, note 17 (2012 and cumulative supplement).

4. *Deference to Educational Agencies:* The *Rowley* decision has been closely adhered to by courts in terms of not second guessing educational agencies and recognizing that schools are in a much better position to evaluate and decide about educational methodology. That does not mean that the courts have never required the schools to provide something different than was initially recommended by the schools. This is particularly true in a number of cases relating to least restrictive environment, which is discussed later in this chapter.

The burden of proof issue was addressed by the Supreme Court in 2005 in its decision in *Schaffer v. Weast*, 546 U.S. 49 (2005). The Court recognized that the IDEA is silent on the issue, but decided that the burden of proof falls on the party seeking relief. This recognizes Congressional deference to the expertise of educational agencies, which is balanced through extensive procedural safeguards.

5. In footnote 23 of the *Rowley* decision, which is omitted from the excerpt in this chapter, the Court quotes from the legislative history and notes that:

> The long range implications of these statistics are that public agencies and taxpayers will spend billions of dollars over the lifetimes of these individuals to maintain such persons as dependents and in a minimally acceptable lifestyle. With proper education services, many would increase their independence, thus reducing their dependence on society.

Although the IDEA is important and necessary primarily to society from an equal protection and due process perspective, the economic benefits should not be forgotten.

[2] Related Services

One issue that has given educational agencies and, as a result, the courts difficulty is the issue of related services. Such services are to be provided when they are necessary for the child to benefit from special education. When services relate to health care, questions arise about whether such services are required under the special education mandates. The *Tatro* case illustrates the Supreme Court's response to this question.

Hypothetical Problem 7.2

Matt is a mature 11-year-old student in 7th grade at a public school. He was recently diagnosed with diabetes and needs to check his insulin levels on a regular basis and inject insulin or have juice or other food, depending on his blood sugar levels. Matt's parents contact the school principal to inquire about the following: whether Matt can carry and self administer the glucose checking apparatus and/or his insulin, whether a school nurse or other school personnel would be available to assist with this if necessary, and what arrangements would be made if that person were absent or out of the building. The school has a policy that prohibits students from carrying medication and self administering. Matt's sugar levels are generally stable, but if he has a problem, it is critical that his sugar levels be corrected fairly quickly. Matt also wants to participate on the middle school football team, and the school is concerned about liability and medication issues.

What is legally required under any of the applicable federal statutes? What is the best way to resolve this? What if Matt had asthma instead and needed to be able to use his inhaler and carry it with him? What if Matt had a peanut allergy and wanted to carry an Epi-pen to deal with possible anaphylaxis, a severe allergic reaction from exposure to peanuts or peanut products? What if Matt's parents requested that peanuts and peanut products not be allowed at his school? What if Matt were 8 instead of 11, or if he were 17? Consider these questions in reading the following materials.

Irving Independent School District v. Tatro

468 U.S. 883 (1984)

CHIEF JUSTICE BURGER delivered the opinion of the Court:

We granted certiorari to determine whether the Education of the Handicapped Act or the Rehabilitation Act of 1973 requires a school district to provide a handicapped child with clean intermittent catheterization during school hours.

I.

Amber Tatro is an 8-year-old girl born with a defect known as spina bifida. As a result, she suffers from orthopedic and speech impairments and a neurogenic bladder, which prevents her from emptying her bladder voluntarily. Consequently, she must be catheterized every three or four hours to avoid injury to her kidneys. In accordance with accepted medical practice, clean intermittent catheterization (CIC), a procedure involving the insertion of a catheter into the urethra to drain the bladder, has been prescribed. The procedure is a simple one that may be performed in a few minutes by a layperson with less than an hour's training. Amber's parents, babysitter, and teenage brother are all qualified to administer CIC, and Amber soon will be able to perform this procedure herself.

In 1979 petitioner Irving Independent School District agreed to provide special education for Amber, who was then three and one-half years old. In consultation with her parents, who are respondents here, petitioner developed an individualized education program for Amber under the requirements of the Education of the Handicapped Act as amended significantly by the Education for All Handicapped Children Act of 1975, 20 U.S.C. §§1401(19), 1414(a)(5). The individualized education program provided that Amber would attend early childhood development classes and receive special services such as physical and occupational therapy. That program, however, made no provision for school personnel to administer CIC.

Respondents unsuccessfully pursued administrative remedies to secure CIC services for Amber during school hours. In October 1979 respondents brought the present action in District Court against petitioner, the State Board of Education, and others. They sought an injunction ordering petitioner to provide Amber with CIC and sought damages and attorney's fees. First, respondents invoked the Education of the Handicapped Act. Because Texas received funding under that statute, petitioner was required to provide Amber with a "free appropriate public education," which is defined to include "related services." Respondents argued that CIC is one such "related service." Second, respondents invoked §504 of the Rehabilitation Act of 1973, which forbids an individual, by reason of a handicap, to be "excluded from the participation in, be denied the benefits of, or be subjected to discrimination under" any program receiving federal aid.

[Lower court proceedings omitted.]

II.

This case poses two separate issues. The first is whether the Education of the Handicapped Act requires petitioner to provide CIC services to Amber. The second is whether §504 of the Rehabilitation Act creates such an obligation. We first turn to the claim presented under the Education of the Handicapped Act.

States receiving funds under the Act are obliged to satisfy certain conditions. A primary condition is that the state implement a policy "that assures all handicapped children the right to a free appropriate public education." Each educational agency applying to a state for funding must provide assurances in turn that its program aims to provide "a free appropriate public education to all handicapped children."

A "free appropriate public education" is explicitly defined as "special education and related services." The term "special education" means

> specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.

§1401(16).

"Related services" are defined as

> transportation, and such developmental, corrective, and other *supportive services* (*including* speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and *medical* and counseling *services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education*, and includes the early identification and assessment of handicapping conditions in children.

§1401(17) (emphasis added).

The issue in this case is whether CIC is a "related service" that petitioner is obliged to provide to Amber. We must answer two questions: first, whether CIC is a "supportive servic[e] required to assist a handicapped child to benefit from special education"; and second, whether CIC is excluded from this definition as a "medical servic[e]" serving purposes other than diagnosis or evaluation.

A.

The Court of Appeals was clearly correct in holding that CIC is a "supportive servic[e] required to assist a handicapped child to benefit from special education." It is clear on this record that, without having CIC services available during the school day, Amber cannot attend school and thereby "benefit from special education." CIC services therefore fall squarely within the definition of a "supportive service."

As we have stated before, "Congress sought primarily to make public education available to

handicapped children" and "to make such access meaningful." [Citing to *Rowley*.] A service that enables a handicapped child to remain at school during the day is an important means of providing the child with the meaningful access to education that Congress envisioned. The Act makes specific provision for services, like transportation, for example, that do no more than enable a child to be physically present in class; and the Act specifically authorizes grants for schools to alter buildings and equipment to make them accessible to the handicapped. Services like CIC that permit a child to remain at school during the day are no less related to the effort to educate than are services that enable the child to reach, enter, or exit the school.

We hold that CIC services in this case qualify as a "supportive servic[e] required to assist a handicapped child to benefit from special education."

B.

We also agree with the Court of Appeals that provision of CIC is not a "medical servic[e]," which a school is required to provide only for purposes of diagnosis or evaluation. See 20 U.S.C. §1401(17). We begin with the regulations of the Department of Education, which are entitled to deference. The regulations define "related services" for handicapped children to include "school health services," which are defined in turn as "services provided by a qualified school nurse or other qualified person." "Medical services" are defined as "services provided by a licensed physician." Thus, the Secretary has determined that the services of a school nurse otherwise qualifying as a "related service" are not subject to exclusion as a "medical service," but that the services of a physician are excludable as such.

This definition of "medical services" is a reasonable interpretation of congressional intent. Although Congress devoted little discussion to the "medical services" exclusion, the Secretary could reasonably have concluded that it was designed to spare schools from an obligation to provide a service that might well prove unduly expensive and beyond the range of their competence.... From this understanding of congressional purpose, the Secretary could reasonably have concluded that Congress intended to impose the obligation to provide school nursing services.

Congress plainly required schools to hire various specially trained personnel to help handicapped children, such as "trained occupational therapists, speech therapists, psychologists, social workers and other appropriately trained personnel." School nurses have long been a part of the educational system, and the Secretary could therefore reasonably conclude that school nursing services are not the sort of burden that Congress intended to exclude as a "medical service." By limiting the "medical services" exclusion to the services of a physician or hospital, both far more expensive, the Secretary has given a permissible construction to the provision.

Petitioner's contrary interpretation of the "medical services" exclusion is unconvincing. In petitioner's view, CIC is a "medical service," even though it may be provided by a nurse or trained layperson; that conclusion rests on its reading of Texas law that confines CIC to uses in accordance with a physician's prescription and under a physician's ultimate supervision. Aside from conflicting with the Secretary's reasonable interpretation of congressional intent, however, such a rule would be anomalous. Nurses in petitioner's school district are authorized to dispense oral medications and administer emergency injections in accordance with a physician's prescription. This kind of service for nonhandicapped children is difficult to distinguish from the provision of CIC to the handicapped. It would be strange indeed if Congress, in attempting to extend special services to handicapped children, were unwilling to guarantee them services of a kind that are routinely provided to the nonhandicapped.

To keep in perspective the obligation to provide services that relate to both the health and educational needs of handicapped students, we note several limitations that should minimize the burden petitioner fears. First, to be entitled to related services, a child must be handicapped so as to require special education. In the absence of a handicap that requires special education, the need for what otherwise might qualify as a related service does not create an obligation under the Act.

Second, only those services necessary to aid a handicapped child to benefit from special education must be provided, regardless how easily a school nurse or layperson could furnish them. For example, if a particular medication or treatment may appropriately be administered to a handicapped child other than during the school day, a school is not required to provide nursing services to administer it.

Third, the regulations state that school nursing services must be provided only if they can be performed by a nurse or other qualified person, not if they must be performed by a physician. It bears mentioning that here not even the services of a nurse are required; as is conceded, a layperson with minimal training is qualified to provide CIC.

Finally, we note that respondents are not asking petitioner to provide equipment that Amber needs for CIC. They seek only the services of a qualified person at the school.

We conclude that provision of CIC to Amber is not subject to exclusion as a "medical service," and we affirm the Court of Appeals' holding that CIC is a "related service" under the Education of the Handicapped Act.

III.

Respondents sought relief not only under the Education of the Handicapped Act but under §504 of the Rehabilitation Act as well. After finding petitioner liable to provide CIC under the former, the District Court proceeded to hold that petitioner was similarly liable under §504 and that respondents were therefore entitled to attorney's fees under §505 of the Rehabilitation Act, 29 U.S.C. §794a. We hold today, in *Smith v. Robinson* ... that §504 is inapplicable when relief is available under the Education of the Handicapped Act to remedy a denial of educational services. Respondents are therefore not entitled to relief under §504, and we reverse the Court of Appeals' holding that respondents are entitled to recover attorney's fees. In all other respects, the judgment of the Court of Appeals is affirmed.

It is so ordered.

[Concurring and dissenting opinions omitted.]

The following opinion addresses some of the issues left unresolved by the *Tatro* decision. Note that the Court used the term "handicapped," which is now disfavored.

Cedar Rapids Community Schooldistrict v. Garret F.

526 U.S. 66 (1999)

JUSTICE STEVENS delivered the opinion of the Court.

... The question presented in this case is whether the definition of "related services" in §1401(a)(17) requires a public school district in a participating State to provide a ventilator-dependent student with certain nursing services during school hours.

I

Respondent Garret F. is a friendly, creative, and intelligent young man. When Garret was four years old, his spinal column was severed in a motorcycle accident. Though paralyzed from the neck down, his mental capacities were unaffected. He is able to speak, to control his motorized wheelchair through use of a puff and suck straw, and to operate a computer with a device that responds to head movements. Garret is currently a student in the Cedar Rapids Community School District (District), he attends regular classes in a typical school program, and his academic performance has been a success. Garret is, however, ventilator dependent, and therefore requires a responsible individual nearby to attend to certain physical needs while he is in school.[1]

During Garret's early years at school his family provided for his physical care during the school

day. When he was in kindergarten, his 18-year-old aunt attended him; in the next four years, his family used settlement proceeds they received after the accident, their insurance, and other resources to employ a licensed practical nurse. In 1993, Garret's mother requested the District to accept financial responsibility for the health care services that Garret requires during the school day. The District denied the request, believing that it was not legally obligated to provide continuous one-on-one nursing services.

The administrative judge concluded that the IDEA required the District to bear financial responsibility for all of the services in dispute, including continuous nursing services. The district and appellate court agreed with the administrative decision. [These proceedings are omitted.]

II

The District contends that §1401(a)(17) does not require it to provide Garret with "continuous one-on-one nursing services" during the school day, even though Garret cannot remain in school without such care. However, the IDEA's definition of "related services," our decision in *Irving Independent School District v. Tatro*, 468 U.S. 883 (1984), and the overall statutory scheme all support the decision of the Court of Appeals.

The text of the "related services" definition, broadly encompasses those supportive services that "may be required to assist a child with a disability to benefit from special education." As we have already noted, the District does not challenge the Court of Appeals' conclusion that the in-school services at issue are within the covered category of "supportive services." As a general matter, services that enable a disabled child to remain in school during the day provide the student with "the meaningful access to education that Congress envisioned." This general definition of "related services" is illuminated by a parenthetical phrase listing examples of particular services that are included within the statute's coverage. §1401(a)(17). "Medical services" are enumerated in this list, but such services are limited to those that are "for diagnostic and evaluation purposes." The statute does not contain a more specific definition of the "medical services" that are excepted from the coverage of §1401(a)(17).

The scope of the "medical services" exclusion is not a matter of first impression in this Court. In *Tatro*, we concluded that the Secretary of Education had reasonably determined that the term "medical services" referred only to services that must be performed by a physician, and not to school health services. Accordingly, we held that a specific form of health care (clean intermittent catherization) that is often, though not always, performed by a nurse is not an excluded medical service. We referenced the likely cost of the services and the competence of school staff as justifications for drawing a line between physician and other services, but our endorsement of that line was unmistakable. It is thus settled that the phrase "medical services" in §1401(a)(17) does not embrace all forms of care that might loosely be described as "medical" in other contexts, such as a claim for an income tax deduction.

Based on certain policy letters issued by the Department of Education, it seems that the Secretary's post-*Tatro* view of the statute has not been entirely clear. We may assume that the Secretary has authority under the IDEA to adopt regulations that define the "medical services" exclusion by more explicitly taking into account the nature and extent of the requested services; and the Secretary surely has the authority to enumerate the services that are, and are not, fairly included within the scope of §1407(a)(17). But the Secretary has done neither; and, in this Court, she advocates affirming the judgment of the Court of Appeals. We obviously have no authority to rewrite the regulations, and we see no sufficient reason to revise *Tatro* either.

The District does not ask us to define the term so broadly. Indeed, the District does not argue that any of the items of care that Garret needs, considered individually, could be excluded from the scope of §1401(a)(17). It could not make such an argument, considering that one of the services Garret needs (catheterization) was at issue in *Tatro*, and the others may be provided competently by a school

nurse or other trained personnel. As the [Administrative Law Judge] concluded, most of the requested services are already provided by the District to other students, and the in-school care necessitated by Garret's ventilator dependency does not demand the training, knowledge, and judgment of a licensed physician. While more extensive, the in-school services Garret needs are no more "medical" than was the care sought in *Tatro*.

Instead, the District points to the combined and continuous character of the required care, and proposes a test under which the outcome in any particular case would "depend upon a series of factors, such as [1] whether the care is continuous or intermittent, [2] whether existing school health personnel can provide the service, [3] the cost of the service, and [4] the potential consequences if the service is not properly performed."

The District's multi-factor test is not supported by any recognized source of legal authority. The proposed factors can be found in neither the text of the statute nor the regulations that we upheld in *Tatro*. Moreover, the District offers no explanation why these characteristics make one service any more "medical" than another. The continuous character of certain services associated with Garret's ventilator dependency has no apparent relationship to "medical" services, much less a relationship of equivalence. Continuous services may be more costly and may require additional school personnel, but they are not thereby more "medical." Whatever its imperfections, a rule that limits the medical services exemption to physician services is unquestionably a reasonable and generally workable interpretation of the statute. Absent an elaboration of the statutory terms plainly more convincing than that which we reviewed in *Tatro*, there is no good reason to depart from settled law.

Finally, the District raises broader concerns about the financial burden that it must bear to provide the services that Garret needs to stay in school. The problem for the District in providing these services is not that its staff cannot be trained to deliver them; the problem, the District contends, is that the existing school health staff cannot meet all of their responsibilities and provide for Garret at the same time. Through its multi-factor test, the District seeks to establish a kind of undue-burden exemption primarily based on the cost of the requested services. The first two factors can be seen as examples of cost-based distinctions: intermittent care is often less expensive than continuous care, and the use of existing personnel is cheaper than hiring additional employees. The third factor—the cost of the service—would then encompass the first two. The relevance of the fourth factor is likewise related to cost because extra care may be necessary if potential consequences are especially serious.

The District may have legitimate financial concerns, but our role in this dispute is to interpret existing law. Defining "related services" in a manner that accommodates the cost concerns Congress may have had, is altogether different from using cost itself as the definition. Given that §1401(a)(17) does not employ cost in its definition of "related services" or excluded "medical services," accepting the District's cost-based standard as the sole test for determining the scope of the provision would require us to engage in judicial lawmaking without any guidance from Congress. It would also create some tension with the purposes of the IDEA. The statute may not require public schools to maximize the potential of disabled students commensurate with the opportunities provided to other children; and the potential financial burdens imposed on participating States may be relevant to arriving at a sensible construction of the IDEA. But Congress intended "to open the door of public education" to all qualified children and "require[d] participating States to educate handicapped children with nonhandicapped children whenever possible."

This case is about whether meaningful access to the public schools will be assured, not the level of education that a school must finance once access is attained. It is undisputed that the services at issue must be provided if Garret is to remain in school. Under the statute, our precedent, and the purposes of the IDEA, the District must fund such "related services" in order to help guarantee that students like Garret are integrated into the public schools.

The judgment of the Court of Appeals is accordingly Affirmed.

Notes

1. *Psychological Services:* Psychological counseling is intended to be a related service that the school is to provide if it is essential to the child's ability to benefit from special education. 34 C.F.R. §300.13(a). The major difficulty occurs in sorting out the interrelationship between educational and noneducational needs. This same difficulty occurs in deciding when a student is eligible for residential programming to be provided through the educational agency. For example, an adolescent who becomes depressed or troubled as part of the growing up process may benefit from psychological counseling, but unless the need for services becomes so great as to interfere with the educational experience, the student is ineligible for the service to be provided through federal special education mandates. This approach has been criticized as a policy because it fails to provide for intervention until the problem is severe. Earlier intervention might prevent severe problems later. This issue is discussed in depth in Theresa Glennon, *Disabled Ambiguities: Confronting Barriers to the Education of Students with Emotional Disabilities*, 60 TENN. L. REV. 295 (1993).

2. *Transportation:* Transportation is perhaps the most expensive service provided for special education because of the capital expenditures involved in purchasing and maintaining school buses and special vehicles with hydraulic lift devices. The Americans with Disabilities Act portions related to mass transit specify that public school transportation is not covered within the ADA. 42 U.S.C. §12141(2). The IDEA contemplates that transportation is a part of special education programming. 34 C.F.R. §300.13(b)(13). Requirements relating to time in transit, type of equipment required, bus routes, and transportation personnel, however, are usually found in state and local policies. Cases related to transportation and students with disabilities have addressed what is meant by door-to-door service, whether students can be disciplined by denying them the right to ride the school bus, and whether a school must purchase a special vehicle to reach a child living in a remote area with poor roads. In *Donald v. Board of Sch. Comm'rs*, 117 F.3d 1371 (11th Cir. 1997), the court held that the educational agency is not responsible for transporting a student from a private school to a public school to receive therapy. See LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW §2.26 (2012 and cumulative supplement).

3. *Providing Related Services to Parochial Schools:* Two Supreme Court decisions have addressed the issue of providing related services to parochial schools. The issue arises because governmental agencies are prohibited from providing direct aid to religious schools because of First Amendment separation of church and state doctrinal interpretations. See *Aguilar v. Felton*, 473 U.S. 402 (1985). In 1993, the Supreme Court permitted public schools to pay for interpreter services for a deaf student in a parochial school. The Court basically held that such services are neutral and benefit the child rather than the parochial school. *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993).

A year later the Court addressed the constitutionality of a state statute creating a new school district within the Hasidic sect community in New York City. The purpose of creating the special public school district was to allow the public school system to provide special education and related services to children in this community. Part of the Hasidic sect's religious practice is to avoid interaction between boys and girls in certain activities and between nonmembers of the community and those who are members of the community. The Court struck down the statute as being unconstitutional. *Board of Ed. v. Grumet*, 512 U.S. 687 (1994).

In *Russman v. Sobol*, 85 F.3d 1050 (2d Cir. 1996), the court held that it did not violate the establishment clause of the Constitution for the public school system to provide a consultant teacher and teacher's aide to a student with an intellectual disability in a parochial school. The court further held that the IDEA required the provision of such services at the parochial school site.

In 1997, the Supreme Court again looked at the issue of public aid to parochial schools. In *Agostini v. Felton*, 521 U.S. 203 (1997), the Court allowed public school teachers to provide special education and related services to children in parochial schools in the same way that the services are provided in

other private school settings. The 2004 IDEA amendments clarified to some degree whether public schools can provide special education services at a parochial school site. The amendments allow, but do not require, services at the parochial site, to the extent it is consistent with law. 20 U.S.C. §1412(a)(10)(A)(1)(iii). This leaves it to be resolved what is "consistent with law."

For a more detailed discussion of this issue, see LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW §2.29 (2012 and cumulative supplement).

4. *Providing Services in Private School Settings*: There has been much controversy about the degree of obligation that a public school has to provide special education and related services when parents have voluntarily placed their children in private school settings.

The 1997 amendments to IDEA provided some clarification on this issue. The amendments provide that the educational agency is not obligated to provide certain related services and programming at the private school site, where the student has been offered a free appropriate individualized education program at the public school site, when the parents voluntarily transfer the student to a private school. 20 U.S.C. §1412(10)(C) (1997). See also LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW §2.28 (2012 and cumulative supplement).

5. *Services in Camp Settings.* Related service issues include monitoring children with diabetes. See, e.g., *Medina v. City of Cape Coral, Fla.*, 72 F. Supp. 3d 1274 (M.D. Fla. 2014), in which the court held that a child with diabetes had been provided meaningful access. The day camp had provided monitoring and other accommodations other than having a trained staff member required to administer insulin injections that would only rarely be needed and by having a plan to address those occasions when they were. The court noted that these accommodations need only be reasonable. This case was in a day camp setting, not a public school setting. Would the result be different if it were in a school setting?

[3] Least Restrictive Environment—Mainstreaming

The Individuals with Disabilities Education Act does not use the term "mainstreaming" in the statutory language or in the regulations. The term is commonly used, however, to indicate the philosophy of providing education in the least restrictive environment. The goal is to provide education in the mainstream of the regular class if possible.

In the early 1990s, a strong advocacy movement calling for "full inclusion" as its primary goal pressed for mainstreaming in the regular classroom to be used much more than it is today. This is a controversial topic. Many teachers feel that they are not adequately prepared or staffed for children with needs that will put significant demands on their time. They also are concerned about children with behavior problems in the regular classroom. Some parents of children without disabilities are concerned about the needs of their children being neglected if children with disabilities are included in the regular classroom. Some parents of children with disabilities also are concerned about the specialized services their children need and may not receive if they are in the regular classroom.

The advocates who press for full inclusion, however, note that mainstreaming is one of the major principles in not only the IDEA, but in other laws enacted to protect individuals with disabilities. The benefits of mainstreaming include stigma avoidance and peer modeling. The other key principle to keep in mind, however, is individualization. Each child's needs are to be met by an individualized placement plan. The needs and development of the child are to be reevaluated periodically. While it may be appropriate to place a child in a separate special education resource room during first and second grades, the goal should be to consider less restrictive placements on an ongoing basis.

Hypothetical Problem 7.3

Lisa is seven years old and has a moderate intellectual disability. She has been successfully

mainstreamed in first and second grades. She is making very good progress, and her classroom teacher believes that she would be able to continue in third grade so long as a summer program were provided to prevent or reduce regression. The school district in which Lisa attends public school has such a summer program, but it is only for students with special education needs. Do the mainstreaming requirements mandate that they enroll other students in the summer program? What if a private school had a summer program for students with disabilities, which also included students who did not have disabilities? If the evaluation determines that Lisa would benefit from having summer programming to retain not only academic skills, but also social skills, would that make a difference?

The following case demonstrates one standard that is applied in determining whether a student should be placed in the regular classroom. It should be noted that the courts have applied a variety of tests in making these determinations. In reading this case, note the weight the court gives to different evidence and the reason for doing so. Note also that the court used the now-disfavored term "mentally retarded" instead of "person with an intellectual disability." Review the previous hypothetical problems and consider the evidence that either party might provide and the weight that could be given to that evidence.

Sacramento City Unified School District v. Rachel H.

14 F.3d 1398 (9th Cir. 1994)

SNEED, CIRCUIT JUDGE:

Facts and Prior Proceedings

Rachel Holland is now 11 years old and is mentally retarded. She was tested with an I.Q. of 44. She attended a variety of special education programs in the District from 1985–89. Her parents sought to increase the time Rachel spent in a regular classroom, and in the fall of 1989, they requested that Rachel be placed full-time in a regular classroom for the 1989–90 school year. The District rejected their request and proposed a placement that would have divided Rachel's time between a special education class for academic subjects and a regular class for non-academic activities such as art, music, lunch, and recess. The district court found that this plan would have required moving Rachel at least six times each day between the two classrooms. The Hollands instead enrolled Rachel in a regular kindergarten class at the Shalom School, a private school. Rachel remained at the Shalom School in regular classes and at the time the district court rendered its opinion was in the second grade.

In considering whether the District proposed an appropriate placement for Rachel, the district court examined the following factors: (1) the educational benefits available to Rachel in a regular classroom, supplemented with appropriate aids and services, as compared with the educational benefits of a special education classroom; (2) the non-academic benefits of interaction with children who were not disabled; (3) the effect of Rachel's presence on the teacher and other children in the classroom; and (4) the cost of mainstreaming Rachel in a regular classroom.

1. *Educational Benefits*

The district court found the first factor, educational benefits to Rachel, weighed in favor of placing her in a regular classroom. Each side presented expert testimony. The court noted that the District's evidence focused on Rachel's limitations but did not establish that the educational opportunities available through special education were better or equal to those available in a regular classroom. Moreover, the court found that the testimony of the Hollands' experts was more credible because they had more background in evaluating children with disabilities placed in regular classrooms and that they had a greater opportunity to observe Rachel over an extended period of time in normal

circumstances. The district court also gave great weight to the testimony of Rachel's current teacher, Nina Crone, whom the court found to be an experienced, skillful teacher. Ms. Crone stated that Rachel was a full member of the class and participated in all activities. Ms. Crone testified that Rachel was making progress on her IEP goals: She was learning one-to-one correspondence in counting, was able to recite the English and Hebrew alphabets, and was improving her communication abilities and sentence lengths.

The district court found that Rachel received substantial benefits in regular education and that all of her IEP goals could be implemented in a regular classroom with some modification to the curriculum and with the assistance of a part-time aide.

2. *Non-academic Benefits*

The district court next found that the second factor, non-academic benefits to Rachel, also weighed in favor of placing her in a regular classroom. The court noted that the Hollands' evidence indicated that Rachel had developed her social and communications skills as well as her self-confidence from placement in a regular class, while the District's evidence tended to show that Rachel was not learning from exposure to other children and that she was isolated from her classmates. The court concluded that the differing evaluations in large part reflected the predisposition of the evaluators. The court found the testimony of Rachel's mother and her current teacher to be the most credible. These witnesses testified regarding Rachel's excitement about school, learning, and her new friendships and Rachel's improved self-confidence.

3. *Effect on the Teacher and Children in the Regular Class*

The district court next addressed the issue of whether Rachel had a detrimental effect on others in her regular classroom. The court looked at two aspects: (1) whether there was detriment because the child was disruptive, distracting or unruly, and (2) whether the child would take up so much of the teacher's time that the other students would suffer from lack of attention. The witnesses of both parties agreed that Rachel followed directions and was well-behaved and not a distraction in class. The court found the most germane evidence on the second aspect came from Rachel's second grade teacher, Nina Crone, who testified that Rachel did not interfere with her ability to teach the other children and in the future would require only a part-time aide. Accordingly, the district court determined that the third factor, the effect of Rachel's presence on the teacher and other children in the classroom weighed in favor of placing her in a regular classroom.

4. *Cost*

Finally, the district court found that the District had not offered any persuasive or credible evidence to support its claim that educating Rachel in a regular classroom with appropriate services would be significantly more expensive than educating her in the District's proposed setting.

The District contended that it would cost $109,000 to educate Rachel full-time in a regular classroom. This figure was based on the cost of providing a full-time aide for Rachel plus an estimated $80,000 for school-wide sensitivity training. The court found that the District did not establish that such training was necessary. Further, the court noted that even if such training were necessary, there was evidence from the California Department of Education that the training could be had at no cost. Moreover, the court found it would be inappropriate to assign the total cost of the training to Rachel when other children with disabilities would benefit. In addition, the court concluded that the evidence did not suggest that Rachel required a full-time aide. In addition, the court found that the District should have compared the cost of placing Rachel in a special class of approximately 12 students with a full-time special education teacher and two full-time aides and the cost of placing her in a regular class with a part-time aide. The District provided no evidence of this cost comparison.

The court also was not persuaded by the District's argument that it would lose significant funding if

Rachel did not spend at least 51% of her time in a special education class. The court noted that a witness from the California Department of Education testified that waivers were available if a school district sought to adopt a program that did not fit neatly within the funding guidelines. The District had not applied for a waiver.

By inflating the cost estimates and failing to address the true comparison, the District did not meet its burden of proving that regular placement would burden the District's funds or adversely affect services available to other children. Therefore, the court found that the cost factor did not weigh against mainstreaming Rachel.

The district court concluded that the appropriate placement for Rachel was full-time in a regular second grade classroom with some supplemental services and affirmed the decision of the hearing officer.

Discussion

B. *Mainstreaming Requirements of the IDEA*

1. *The Statute*

The IDEA provides that each state must establish:

> [P]rocedures to assure that, to the maximum extent appropriate, children with disabilities are educated with children who are not disabled, and that 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 is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. §1412(5)(B).

This provision sets forth Congress's preference for educating children with disabilities in regular classrooms with their peers.

3. *Test for Determining Compliance with the IDEA's Mainstreaming Requirement*

We have not adopted or devised a standard for determining the presence of compliance with 20 U.S.C. §1412(5)(B). The Third, Fifth and Eleventh Circuits use what is known as the *Daniel R.R.* test. The Fourth, Sixth and Eighth Circuits apply the *Roncker* test.

Although the district court relied principally on *Daniel R.R.* and *Greer*, it did not specifically adopt the *Daniel R.R.* test over the *Roncker* test. Rather, it employed factors found in both lines of cases in its analysis. The result was a four-factor balancing test in which the court considered (1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect Rachel had on the teacher and children in the regular class; and (4) the costs of mainstreaming Rachel. This analysis directly addresses the issue of the appropriate placement for a child with disabilities under the requirements of 20 U.S.C. §1412(5)(B). Accordingly, we approve and adopt the test employed by the district court.

4. *The District's Contentions on Appeal*

The District strenuously disagrees with the district court's findings that Rachel was receiving academic and non-academic benefits in a regular class and did not have a detrimental effect on the teacher or other students. It argues that the court's findings were contrary to the evidence of the state Diagnostic Center and that the court should not have been persuaded by the testimony of Rachel's teacher, particularly her testimony that Rachel would need only a part-time aide in the future. The district court, however, conducted a full evidentiary hearing and made a thorough analysis. The court found the Hollands' evidence to be more persuasive. Moreover, the court asked Rachel's teacher extensive questions regarding Rachel's need for a part-time aide. We will not disturb the findings of the district court.

The District is also not persuasive on the issue of cost. The District now claims that it will lose up to $190,764 in state special education funding if Rachel is not enrolled in a special education class at least 51% of the day. However, the District has not sought a waiver pursuant to California Education Code §56101. This section provides that (1) any school district may request a waiver of any provision of the Education Code if the waiver is necessary or beneficial to the student's IEP, and (2) the Board may grant the waiver when failure to do so would hinder compliance with federal mandates for a free appropriate education for children with disabilities.

Finally, the District argues that Rachel must receive her academic and functional curriculum in special education from a specially credentialed teacher. We hold only, under our standard of review, that the school district's decision was a reasonable one under the circumstances of this case. More importantly, the District's proposition that Rachel must be taught by a special education teacher runs directly counter to the congressional preference that children with disabilities be educated in regular classes with children who are not disabled.

We affirm the judgment of the district court. While we cannot determine what the appropriate placement is for Rachel at the present time, we hold that the determination of the present and future appropriate placement for Rachel should be based on the principles set forth in this opinion and the opinion of the district court.

Affirmed.

Notes

1. The factors cited in *Rachel H.* as being applied in the *Daniel R.R. v. State Bd. of Ed.*, 874 F.2d 1036 (5th Cir. 1989), decision are as follows:

> First, the court must determine "whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily...." *Daniel R.R.*, 874 F.2d at 1048. If the court finds that education cannot be achieved satisfactorily in the regular classroom, then it must decide "whether the school has mainstreamed the child to the maximum extent appropriate." *Id.* Factors the courts consider in applying the first prong of this test are (1) the steps the school district has taken to accommodate the child in a regular classroom; (2) whether the child will receive an educational benefit from regular education; (3) the child's overall educational experience in regular education; and (4) the effect the disabled child's presence has on the regular classroom. *Daniel R.R.*, 874 F.2d at 1048–49; see also *Oberti v. Board of Educ.*, 995 F.2d at 1215–1217; *Greer v. Rome City School Dist.*, 950 F.2d at 696–97. In *Greer* the court added the factor of cost, stating that "if the cost of educating a handicapped child in a regular classroom is so great that it would significantly impact upon the education of other children in the district, then education in a regular classroom is not appropriate." 950 F.2d at 697. Regarding the second factor, the *Oberti* and *Greer* courts compared the educational benefits received in a regular classroom with the benefits received in a special education class. *Oberti*, 995 F.2d at 1216; *Greer*, 950 F.2d at 697.

14 F.3d at 1404, note 5, referring to *Daniel R.R. v. State Bd. of Ed.*, 874 F.2d 1036 (5th Cir. 1989).

2. The *Rachel H.* case stated:

> According to the court in *Roncker v. Walter*: "[W]here the segregated facility is considered superior, the court should determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting. If they can, the placement in the segregated school would be inappropriate under the Act." 700 F.2d at 1063. Courts are to (1) compare the benefits the child would receive in special education with those she would receive in regular education; (2) consider whether the child would be disruptive in the non-segregated setting; and (3) consider the cost of mainstreaming. *Id*.

14 F.3d at 1404, note 6, referring to *Roncker v. Walter*, 700 F.2d 1058 (6th Cir. 1983).

3. In *French v. Omaha Public Schools*, 766 F. Supp. 765 (D. Neb. 1991), the court evaluated the

costs and benefits of mainstreaming for a student who was deaf and held that placement in school for those who are deaf was the least restrictive placement for a student with multiple physical disabilities. The court found that marginal benefit from brief encounters with hearing students were outweighed by the educational benefits offered by an all-signing environment.

Problems

1. Most of the cases addressing education in the regular classroom involve children in elementary grades. How would these tests work in a high school setting? Can a tenth grade history course be appropriately provided to a student with a severe intellectual disability? If not, in what classes would that student be appropriately mainstreamed? How could the high school ensure at least the social interaction aspect of the high school experience?

2. For special education students receiving specialized programming during the summer to avoid undue regression, how is mainstreaming accomplished?

The following case raises an issue that is not clearly resolved in the statutory language itself. The case addresses the right to receive education in the neighborhood school. The holding represents how the majority of courts have responded to this issue.

Murray v. Montrose County School District

51 F.3d 921 (10th Cir. 1995)

STEPHEN H. ANDERSON, CIRCUIT JUDGE.

Background

Tyler Murray ("Tyler") is a twelve-year-old boy with multiple disabilities due to cerebral palsy. His disabilities include significant mental and physical impairments, as well as speech difficulties. Tyler lives in Olathe, Colorado, approximately five blocks from Olathe Elementary School.

In late 1987 and in early 1988, Tyler was tested in anticipation of his commencing kindergarten in the fall of 1988. Olathe Elementary offers basic services to disabled children with "mild to moderate" ("M/M") needs. It offers these services through its two resource teachers, as well as through paraprofessionals and itinerant specialists.[3] When Tyler began kindergarten at Olathe, and until early 1991, the school was not fully accessible to children with disabilities like Tyler's. It is now fully accessible. Another school, Northside Elementary School, located in Montrose, some ten miles from Olathe, has a specific program, implementing the Colorado Effective Education Model ("CEEM"), for children with "severe/profound" needs ("S/P"). It is fully accessible to disabled children. It is one of six elementary schools in Colorado implementing CEEM. Northside also contains regular education classrooms which serve nondisabled children.

In April and October of 1988, a multi-disciplinary staffing team at Olathe met to develop an individualized education program ("IEP") for Tyler, as the IDEA requires for each child with disabilities. The staffing team determined that Tyler's IEP could be implemented at Olathe. Tyler was in the regular kindergarten class at Olathe for the full two and one-half hour school day, with two to four hours per week of speech and occupational/physical therapy. As of February 1989 he began spending one and one-quarter to three and three-quarters hours per week in the resource room instead of the regular classroom.

The required annual review of Tyler's IEP occurred in May 1989, at which needs and goals were established for first grade. Tyler remained at Olathe in the regular first grade classroom with five hours served in the resource room, one to two hours of speech and language therapy, and one and one-half hours of occupational therapy per week.

In January 1990 Tyler's IEP was reviewed because the staff at Olathe were concerned that he was not progressing as well as expected, and that his current educational placement might be inappropriate. His time in special education services was increased, and his curriculum was modified.

Tyler had surgery in July 1990, and spent six weeks in a cast, which caused him to regress in certain areas and made it difficult for him to meet his IEP goals during that time period.

At a meeting in August 1990, between the Murrays, Donald Binder, the Director of Student Services for the District, and others, District personnel suggested that the CEEM program at Northside might be a more appropriate placement for Tyler. The Murrays expressed their strong preference that Tyler remain at Olathe, where his sibling and neighborhood friends attended school.

At a triennial review held on November 27, 1990, Tyler's IEP was carefully reviewed and modified, and the staffing team discussed alternative placements, comparing the benefits of Olathe and Northside. At that time, Tyler was in second grade, but his academic level was determined to be kindergarten in some areas, and beginning first grade in others. His greatest area of strength was in social skills and interaction.

[The review meeting resulted in a disagreement between school personnel who voted to send Tyler to Northside, and the parents, the occupational therapist, the physical therapist, and speech therapist who voted to keep him at Olathe. Because agreement could not be reached, a due process hearing was held, resulting in a decision to send Tyler to Northside. On appeal, the district court affirmed the administrative decision.]

Discussion

A. *Is There a Presumption of Neighborhood Schooling in LRE?*

The Murrays argue that the LRE mandate includes a presumption that the LRE is in the neighborhood school, with supplementary aids and services. They rely upon the "plain meaning" of the statute; the 1973–1975 legislative history of the IDEA; the wording of two regulations implementing the IDEA; and the 1982–1983 legislative history of the IDEA. We reject these arguments.

The statute requires that to the maximum extent appropriate, children with disabilities ... are educated with children who are not disabled, and that 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 is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.... 20 U.S.C. §1412(5)(B). The Murrays argue that "regular educational environment" implicitly includes neighborhood schools, that "special classes" means non-regular classes; and that "separate schooling" means non-neighborhood schools. They further argue that because Congress has declared that "the neighborhood is the appropriate basis for determining public school assignments," 20 U.S.C. §1701(a)(2), then the reference to "removal" in section 1412(5)(B) must mean removal from the neighborhood school. Thus, they argue that "supplementary aids and services" must be fully explored before a child is removed from both the neighborhood school and the regular classroom with nondisabled children.

This interpretation strains the plain meaning of the statute. The statute clearly addresses the removal of disabled children from classes or schools with nondisabled children. It simply says nothing, expressly or by implication, about removal of disabled children from neighborhood schools. In other words, while it clearly commands schools to include or mainstream disabled children as much as possible, it says nothing about where, within a school district, that inclusion shall take place.

The Murrays next argue that two implementing regulations make express what the statute merely implies. 34 C.F.R. §300.552(a)(3) provides that "[t]he educational placement of each child with a disability [shall be] as close as possible to the child's home." 34 C.F.R. §300.552(c) provides that state agencies must ensure that "[u]nless the IEP of a child with a disability requires some other

arrangement, the child is educated in the school that he or she would attend if nondisabled." The Murrays assert that these two regulations create a presumption that the LRE is in the neighborhood school.

We disagree. A natural and logical reading of these two regulations is that a disabled child should be educated in the school he or she would attend if not disabled (i.e., the neighborhood school), unless the child's IEP requires placement elsewhere. If the IEP requires placement elsewhere, then, in deciding where the appropriate placement is, geographical proximity to home is relevant, and the child should be placed as close to home as possible. There is at most a preference for education in the neighborhood school. To the extent the Third Circuit has expressly held in *Oberti* that the IDEA encompasses a presumption of neighborhood schooling, we disagree.

The Murrays next argue that the voluminous legislative history surrounding the enactment of the statute, as well as the legislative history surrounding a subsequent proposal to amend certain implementing regulations and a resulting amendment to the IDEA, support their interpretation of the statute. We disagree.

With respect to legislative statements surrounding the enactment of the IDEA, they all present the same problem for the Murrays as the statute: they simply do not clearly indicate that Congress, in discussing mainstreaming or inclusion and the concept of the LRE for each disabled child, meant anything more than avoiding as much as possible the segregation of disabled children from nondisabled children. They in no way express a presumption that the LRE is always or even usually in the neighborhood school.

The Murrays fare little better with the legislative history surrounding the proposed amendment to certain implementing regulations in 1982 and 1983. In 1982 the Secretary of Education proposed amending some regulations, including 34 C.F.R. §300.552(a)(3) requiring education as close as possible to a child's home. The regulations were ultimately not amended, but the IDEA was itself amended to include a prohibition against "any regulation ... which would procedurally or substantively lessen the protections provided to children ... as embodied in regulations in effect on July 20, 1983 (particularly as such protections relate to ... least restrictive environment)." 20 U.S.C. §1407(b). The Murrays cite various statements made in connection with the proposed amendments, as well as the fact of section 1407(b)'s enactment, to support their argument that the LRE concept includes a strong presumption in favor of neighborhood schools. We again reject this argument as simply insufficiently persuasive to overcome the plain meaning of the statute, and the absence therein of any reference to neighborhood schools. Accordingly, we hold that there is no presumption of neighborhood schooling, either in the IDEA or its implementing regulations.

The Murrays ask us to select an LRE standard from those proposed thus far by other circuit courts. We need not adopt an LRE compliance standard in order to decide this case, and we therefore choose not to do so. This is so because we have held that the LRE mandate does not include a presumption of neighborhood schooling, and a school district accordingly is not obligated to fully explore supplementary aids and services before removing a child from a neighborhood school. It is only so obligated before removing a child from a regular classroom with nondisabled children. The Murrays have never objected to the degree to which Tyler was educated outside the regular classroom; they only challenge his removal from his neighborhood school. We therefore need not decide which standard this circuit would apply to determinations of whether the LRE requirement of section 1412(5)(B) has been met.

Problems

1. *Time in Transit Concerns:* Hypothetical Problem 7.1 noted concerns by the parents about the amount of time Helen would spend on the bus. *Murray* and the majority of other courts seem to have found that there is not a right to be in the neighborhood school under the IDEA mainstreaming

mandate. Might there still be issues, however, about the "appropriateness" of a placement at a distant site aside from mainstreaming concerns?

2. *School Choice Issues:* What is the effect of the movement towards school choice on this issue? As an increasing number of school districts adopt a variety of choice programs (including vouchers, magnet school programs, and open enrollment), are students with disabilities entitled to the same choices as those who do not require special education and related services? For a discussion of this issue, see STEPHEN D. SUGARMAN & FRANK KEMERER, SCHOOL CHOICE AND SOCIAL CONTROVERSY: POLITICS, POLICY AND LAW (Brookings Institute 2000) chapter 11, by Laura Rothstein. The 2004 amendments to IDEA clarified the obligation to provide services to students placed in private schools by parents rather than the educational agency. In particular, the amendments specify that the school district where the school is located is responsible for the costs, and the funding formula allows for that. 20 U.S.C. §1412(a)(10).

[4] Disciplinary Removal—Denial of Services

Schools are faced with the task of providing discipline that meets constitutional due process and equal protection requirements as well as state and local educational agency policy requirements. Discipline of special education students creates additional complexities, as the following materials illustrates.

Hypothetical Problem 7.4

Bryan is 16 and a junior at a public high school in Springfield. He is very outgoing and popular and has a C+ grade point average. He has never received special education services. His father is a computer company executive, and the family has moved a lot, although Bryan has lived in Springfield throughout high school. Although some of his teachers in elementary and middle school have raised questions to Bryan's parents in conversation about whether Bryan might have ADD or ADHD, he was never referred for testing. Bryan learned in February that his father is going to be transferred to another state and that Bryan will have to attend his senior year of high school in a new place. This is very troubling to Bryan, and he has begun to act out, yelling at teachers and other students. He was on the high school gymnastics team, and after winning the school competition in the still rings and the pommel horse, which would make him eligible for the state competition, he tells the coach for the first time about the upcoming move. The coach has told the school vice principal that he is worried about Bryan and thinks he should be referred to the school counselor. A week later, the school learns that while at school Bryan purchased "uppers" (stimulants) from a classmate to cope with his depression about the move. Both the classmate and Bryan have been suspended for ten days. Bryan has been removed from the gymnastics team and will not be able to compete in the state competition. Law enforcement authorities have not yet become involved, but the school principal plans to notify them. What are the implications under applicable federal laws and what are the options for Bryan? What if just before the school competition, Bryan's parents requested the school to evaluate him for special education services? Bryan's coach wants him to compete at the state meet. If Bryan wins all of his events, the school will probably win the overall state championship.

Honig v. Doe

484 U.S. 305 (1988)

JUSTICE BRENNAN delivered the opinion of the Court:

As a condition of federal financial assistance, the Education of the Handicapped Act requires States to ensure a "free appropriate public education" for all disabled children within their jurisdictions. In aid of this goal, the Act establishes a comprehensive system of procedural safeguards designed to ensure parental participation in decisions concerning the education of their disabled children and to

provide administrative and judicial review of any decisions with which those parents disagree. Among these safeguards is the so-called "stay-put" provision, which directs that a disabled child "shall remain in [his or her] then current educational placement" pending completion of any review proceedings, unless the parents and state or local educational agencies otherwise agree. 20 U.S.C. §1415(e)(3). Today we must decide whether, in the face of this statutory proscription, state or local school authorities may nevertheless unilaterally exclude disabled children from the classroom for dangerous or disruptive conduct growing out of their disabilities. In addition, we are called upon to decide whether a district court may, in the exercise of its equitable powers, order a State to provide educational services directly to a disabled child when the local agency fails to do so.

I.

[Legislative history of the EHA omitted.]

In responding to [funding constraints and exclusionary practices], Congress did not content itself with passage of a simple funding statute. Rather, the EHA confers upon disabled students an enforceable substantive right to public education in participating States and conditions federal financial assistance upon a State's compliance with the substantive and procedural goals of the Act. Accordingly, States seeking to qualify for federal funds must develop policies assuring all disabled children the "right to a free appropriate public education," and must file with the Secretary of Education formal plans mapping out in detail the programs, procedures, and timetables under which they will effectuate these policies. 20 U.S.C. §§1412(1), 1413(a). Such plans must assure that, "to the maximum extent appropriate," States will "mainstream" disabled children, i.e., that they will educate them with children who are not disabled, and that they will segregate or otherwise remove such children from the regular classroom setting "only when the nature or severity of the handicap is such that education in regular classes cannot be achieved satisfactorily." §1412(5).

The primary vehicle for implementing these congressional goals is the "individualized educational program" (IEP), which the EHA mandates for each disabled child. Prepared at meetings between a representative of the local school district, the child's teacher, the parents or guardians, and, whenever appropriate, the disabled child, the IEP sets out the child's present educational performance, establishes annual and short-term objectives for improvements in that performance, and describes the specially designed instruction and services that will enable the child to meet those objectives. §1401(19). The IEP must be reviewed and, where necessary, revised at least once a year in order to ensure that local agencies tailor the statutorily required "free appropriate public education" to each child's unique needs. §1414(a)(5).

Envisioning the IEP as the centerpiece of the statute's education delivery system for disabled children, and aware that schools had all too often denied such children appropriate educations without in any way consulting their parents, Congress repeatedly emphasized throughout the Act the importance and indeed the necessity of parental participation in both the development of the IEP and any subsequent assessments of its effectiveness. See §§1400(c), 1401(19), 1412(7), 1415(b)(1)(A), (C), (D), (E), and 1415(b)(2). Accordingly, the Act establishes various procedural safeguards that guarantee parents both an opportunity for meaningful input into all decisions affecting their child's education and the right to seek review of any decisions they think inappropriate. These safeguards include the right to examine all relevant records pertaining to the identification, evaluation, and educational placement of their child; prior written notice whenever the responsible educational agency proposes (or refuses) to change the child's placement or program; an opportunity to present complaints concerning any aspect of the local agency's provision of a free appropriate public education; and an opportunity for "an impartial due process hearing" with respect to any such complaints. §§1415(b)(1), (2).

At the conclusion of any such hearing, both the parents and the local educational agency may seek further administrative review and, where that proves unsatisfactory, may file a civil action in any state

or federal court. §§1415(c), (e)(2). In addition to reviewing the administrative record, courts are empowered to take additional evidence at the request of either party and to "grant such relief as [they] determine is appropriate." §1415(e)(2). The "stay-put" provision at issue in this case governs the placement of a child while these often lengthy review procedures run their course. It directs that:

> During the pendency of any proceedings conducted pursuant to [§1415], unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child....

§1415(e)(3).

The present dispute grows out of the efforts of certain officials of the San Francisco Unified School District (SFUSD) to expel two emotionally disturbed children from school indefinitely for violent and disruptive conduct related to their disabilities. In November 1980, respondent John Doe assaulted another student at the Louise Lombard School, a developmental center for disabled children. Doe's April 1980 IEP identified him as a socially and physically awkward 17-year-old who experienced considerable difficulty controlling his impulses and anger. Among the goals set out in his IEP was "[i]mprovement in [his] ability to relate to [his] peers [and to] cope with frustrating situations without resorting to aggressive acts." Frustrating situations, however, were an unfortunately prominent feature of Doe's school career: physical abnormalities, speech difficulties, and poor grooming habits had made him the target of teasing and ridicule as early as the first grade; his 1980 IEP reflected his continuing difficulties with peers, noting that his social skills had deteriorated and that he could tolerate only minor frustration before exploding.

On November 6, 1980, Doe responded to the taunts of a fellow student in precisely the explosive manner anticipated by his IEP: he choked the student with sufficient force to leave abrasions on the child's neck, and kicked out a school window while being escorted to the principal's office afterwards. Doe admitted his misconduct and the school subsequently suspended him for five days. Thereafter, his principal referred the matter to the SFUSD Student Placement Committee (SPC or Committee) with the recommendation that Doe be expelled. On the day the suspension was to end, the SPC notified Doe's mother that it was proposing to exclude her child permanently from SFUSD and was therefore extending his suspension until such time as the expulsion proceedings were completed. The Committee further advised her that she was entitled to attend the November 25 hearing at which it planned to discuss the proposed expulsion.

After unsuccessfully protesting these actions by letter, Doe brought this suit against a host of local school officials and the State Superintendent of Public Instructions. Alleging that the suspension and proposed expulsion violated the EHA, he sought a temporary restraining order canceling the SPC hearing and requiring school officials to convene an IEP meeting. The District Judge granted the requested injunctive relief and further ordered defendants to provide home tutoring for Doe on an interim basis; shortly thereafter, she issued a preliminary injunction directing defendants to return Doe to his then current educational placement at Louise Lombard School pending completion of the IEP review process. Doe reentered school on December 15, 5 1/2 weeks, and 24 school-days, after his initial suspension.

Respondent Jack Smith was identified as an emotionally disturbed child by the time he entered the second grade in 1976. School records prepared that year indicated that he was unable "to control verbal or physical outburst[s]" and exhibited a "[s]evere disturbance in relationships with peers and adults." Further evaluations subsequently revealed that he had been physically and emotionally abused as an infant and young child and that, despite above average intelligence, he experienced academic and social difficulties as a result of extreme hyperactivity and low self-esteem. Of particular concern was Smith's propensity for verbal hostility; one evaluator noted that the child reacted to stress by "attempt[ing] to cover his feelings of low self worth through aggressive behavior[,] primarily verbal provocations."

Based on these evaluations, SFUSD placed Smith in a learning center for emotionally disturbed children. His grandparents, however, believed that his needs would be better served in the public school setting and, in September 1979, the school district acceded to their requests and enrolled him at A.P. Giannini Middle School. His February 1980 IEP recommended placement in a Learning Disability Group, stressing the need for close supervision and a highly structured environment. Like earlier evaluations, the February 1980 IEP noted that Smith was easily distracted, impulsive, and anxious; it therefore proposed a half-day schedule and suggested that the placement be undertaken on a trial basis.

At the beginning of the next school year, Smith was assigned to a full-day program; almost immediately thereafter he began misbehaving. School officials met twice with his grandparents in October 1980 to discuss returning him to a half-day program; although the grandparents agreed to the reduction, they apparently were never apprised of their right to challenge the decision through EHA procedures. The school officials also warned them that if the child continued his disruptive behavior —which included stealing, extorting money from fellow students, and making sexual comments to female classmates—they would seek to expel him. On November 14, they made good on this threat, suspending Smith for five days after he made further lewd comments. His principal referred the matter to the SPC, which recommended exclusion from SFUSD. As it did in John Doe's case, the Committee scheduled a hearing and extended the suspension indefinitely pending a final disposition in the matter. On November 28, Smith's counsel protested these actions on grounds essentially identical to those raised by Doe, and the SPC agreed to cancel the hearing and to return Smith to a half-day program at A.P. Giannini or to provide home tutoring. Smith's grandparents chose the latter option and the school began home instruction on December 10; on January 6, 1981, an IEP team convened to discuss alternative placements.

[District and appellate court proceedings omitted.]

II.

At the outset, we address the suggestion, raised for the first time during oral argument, that this case is moot. Under Article III of the Constitution this Court may only adjudicate actual, ongoing controversies. That the dispute between the parties was very much alive when suit was filed, or at the time the Court of Appeals rendered its judgment, cannot substitute for the actual case or controversy that an exercise of this Court's jurisdiction requires. In the present case, we have jurisdiction if there is a reasonable likelihood that respondents will again suffer the deprivation of EHA-mandated rights that gave rise to this suit. We believe that, at least with respect to respondent Smith, such a possibility does in fact exist and that the case therefore remains justiciable.

Respondent John Doe is now 24 years old and, accordingly, is no longer entitled to the protections and benefits of the EHA, which limits eligibility to disabled children between the ages of 3 and 21. It is clear, therefore, that whatever rights to state educational services he may yet have as a ward of the State, ... the Act would not govern the State's provision of those services, and thus the case is moot as to him. Respondent Jack Smith, however, is currently 20 and has not yet completed high school. Although at present he is not faced with any proposed expulsion or suspension proceedings, and indeed no longer even resides within the SFUSD, he remains a resident of California and is entitled to a "free appropriate public education" within that State. His claims under the EHA, therefore, are not moot if the conduct he originally complained of is "'capable of repetition, yet evading review.'" Given Smith's continued eligibility for educational services under the EHA, the nature of his disability, and petitioner's insistence that all local school districts retain residual authority to exclude disabled children for dangerous conduct, we have little difficulty concluding that there is a "reasonable expectation," that Smith would once again be subjected to a unilateral "change in placement" for conduct growing out of his disabilities were it not for the statewide injunctive relief issued.

We have previously noted that administrative and judicial review under the EHA is often "ponderous," and this case, which has taken seven years to reach us, amply confirms that observation. For obvious reasons, the misconduct of an emotionally disturbed or otherwise disabled child who has not yet reached adolescence typically will not pose such a serious threat to the well-being of other students that school officials can only ensure classroom safety by excluding the child. Yet, the adolescent student improperly disciplined for misconduct that does pose such a threat will often be finished with school or otherwise ineligible for EHA protections by the time review can be had in this Court. Because we believe that respondent Smith has demonstrated both "a sufficient likelihood that he will again be wronged in a similar way," and that any resulting claim he may have for relief will surely evade our review, we turn to the merits of his case.

III.

The language of §1415(e)(3) is unequivocal. It states plainly that during the pendency of any proceedings initiated under the Act, unless the state or local educational agency and the parents or guardian of a disabled child otherwise agree, "the child *shall* remain in the then current educational placement." §1415(e)(3) (emphasis added). Faced with this clear directive, petitioner asks us to read a "dangerousness" exception into the stay-put provision on the basis of either of two essentially inconsistent assumptions: first, that Congress thought the residual authority of school officials to exclude dangerous students from the classroom too obvious for comment; or second, that Congress inadvertently failed to provide such authority and this Court must therefore remedy the oversight. Because we cannot accept either premise, we decline petitioner's invitation to rewrite the statute.

Petitioner's arguments proceed, he suggests, from a simple, commonsense proposition: Congress could not have intended the stay-put provision to be read literally, for such a construction leads to the clearly unintended, and untenable, result that school districts must return violent or dangerous students to school while the often lengthy EHA proceedings run their course. We think it clear, however, that Congress very much meant to strip schools of the unilateral authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school. In so doing, Congress did not leave school administrators powerless to deal with dangerous students; it did, however, deny school officials their former right to "self-help," and directed that in the future the removal of disabled students could be accomplished only with the permission of the parents or, as a last resort, the courts.

As noted above, Congress passed the EHA after finding that school systems across the country had excluded one out of every eight disabled children from classes. In drafting the law, Congress was largely guided by the recent decisions in *Mills v. Board of Education of District of Columbia*, 348 F. Supp. 866 (1972), and *PARC*, 343 F. Supp. 279 (1972), both of which involved the exclusion of hard-to-handle disabled students. *Mills* in particular demonstrated the extent to which schools used disciplinary measures to bar children from the classroom. There, school officials had labeled four of the seven minor plaintiffs "behavioral problems," and had excluded them from classes without providing any alternative education to them or any notice to their parents. After finding that this practice was not limited to the named plaintiffs but affected in one way or another an estimated class of 12,000 to 18,000 disabled students, the District Court enjoined future exclusions, suspensions, or expulsions "on grounds of discipline."

Congress attacked such exclusionary practices in a variety of ways. It required participating States to educate all disabled children, regardless of the severity of their disabilities, and included within the definition of "handicapped" those children with serious emotional disturbances. It further provided for meaningful parental participation in all aspects of a child's educational placement, and barred schools, through the stay-put provision, from changing that placement over the parent's objection until all review proceedings were completed. Recognizing that those proceedings might prove long and tedious, the Act's drafters did not intend §1415(e)(3) to operate inflexibly, and they therefore allowed

for interim placements where parents and school officials are able to agree on one. Conspicuously absent from §1415(e)(3), however, is any emergency exception for dangerous students. This absence is all the more telling in light of the injunctive decree issued in *PARC*, which permitted school officials unilaterally to remove students in "'extraordinary circumstances.'" Given the lack of any similar exception in *Mills*, and the close attention Congress devoted to these "landmark" decisions, we can only conclude that the omission was intentional; we are therefore not at liberty to engraft onto the statute an exception Congress chose not to create.

Our conclusion that §1415(e)(3) means what it says does not leave educators hamstrung. The Department of Education has observed that, "[w]hile the [child's] placement may not be changed [during any complaint proceeding], this does not preclude the agency from using its normal procedures for dealing with children who are endangering themselves or others." Comment following 34 CFR §300.513 (1987). Such procedures may include the use of study carrels, timeouts, detention, or the restriction of privileges. More drastically, where a student poses an immediate threat to the safety of others, officials may temporarily suspend him or her for up to 10 schooldays. This authority, which respondent in no way disputes, not only ensures that school administrators can protect the safety of others by promptly removing the most dangerous of students, it also provides a "cooling down" period during which officials can initiate IEP review and seek to persuade the child's parents to agree to an interim placement. And in those cases in which the parents of a truly dangerous child adamantly refuse to permit any change in placement, the 10-day respite gives school officials an opportunity to invoke the aid of the courts under §1415(e)(2), which empowers courts to grant any appropriate relief.

Petitioner contends, however, that the availability of judicial relief is more illusory than real, because a party seeking review under §1415(e)(2) must exhaust time-consuming administrative remedies, and because under the Court of Appeals' construction of §1415(e)(3), courts are as bound by the stay-put provision's "automatic injunction," as are schools. It is true that judicial review is normally not available under §1415(e)(2) until all administrative proceedings are completed, but as we have previously noted, parents may bypass the administrative process where exhaustion would be futile or inadequate. While many of the EHA's procedural safeguards protect the rights of parents and children, schools can and do seek redress through the administrative review process, and we have no reason to believe that Congress meant to require schools alone to exhaust in all cases, no matter how exigent the circumstances. The burden in such cases, of course, rests with the school to demonstrate the futility or inadequacy of administrative review, but nothing in §1415(e)(2) suggests that schools are completely barred from attempting to make such a showing. Nor do we think that §1415(e)(3) operates to limit the equitable powers of district courts such that they cannot, in appropriate cases, temporarily enjoin a dangerous disabled child from attending school. As the EHA's legislative history makes clear, one of the evils Congress sought to remedy was the unilateral exclusion of disabled children by schools, not courts, and one of the purposes of §1415(e)(3), therefore, was "to prevent school officials from removing a child from the regular public school classroom over the parents' objection pending completion of the review proceedings." The stay-put provision in no way purports to limit or pre-empt the authority conferred on courts by §1415(e)(2); indeed, it says nothing whatever about judicial power.

In short, then, we believe that school officials are entitled to seek injunctive relief under §1415(e)(2) in appropriate cases. In any such action, §1415(e)(3) effectively creates a presumption in favor of the child's current educational placement which school officials can overcome only by showing that maintaining the child in his or her current placement is substantially likely to result in injury either to himself or herself, or to others. In the present case, we are satisfied that the District Court, in enjoining the state and local defendants from indefinitely suspending respondent or otherwise unilaterally altering his then current placement, properly balanced respondent's interest in receiving a free appropriate public education in accordance with the procedures and requirements of the EHA

against the interests of the state and local school officials in maintaining a safe learning environment for all their students.

IV.

We believe the courts below properly construed and applied §1415(e)(3), except insofar as the Court of Appeals held that a suspension in excess of 10 schooldays does not constitute a "change in placement." ...

Affirmed.

[Concurring and dissenting opinions omitted.]

Problem

The Court noted that the case was moot as to John Doe because he was twenty-four years old at the time of the decision. Should John Doe be able to receive compensatory education or damages to compensate for the denial of education? The IDEA is silent on the availability of these remedies. The courts have reached inconsistent results, and commentators have addressed this issue at some length. See LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW §§2.46, 2.48, 2.50, 2.57 (2012 and cumulative supplement).

Notes

The case of *Clyde K. v. Puyallup*, 35 F.3d 1396 (9th Cir. 1994), raises the troubling issue of how to handle extremely disruptive students whose behavior results from the disability. The court noted the importance of having parents and school officials resolve their differences through cooperation and compromise. After an escalating set of behavioral problems by a fifteen year old student with ADHD and Tourette's Syndrome, which resulted in an emergency expulsion after an assault on a staff member of the school, the school recommended a placement in a more structured environment on an interim basis. The parents rejected the placement, claiming it to be too restrictive. Ultimately the court found the school's placement to be appropriate because of his behavior difficulties and the danger and disruption that resulted from them.

The issue of discipline was also the subject of the decision in *Commonwealth v. Riley*, 106 F.3d 559 (4th Cir. 1997), in which the appellate court held that IDEA does not require providing special education to students with disabilities who have been expelled or suspended for criminal or other serious misconduct that is wholly unrelated to their disabilities.

The controversy over this issue was resolved to some degree in 1997, when Congress reauthorized IDEA and amended it to provide for disciplinary removal of students beyond the 10 day limit imposed by *Honig v. Doe*. The amendment allows schools to suspend students with disabilities for up to 45 days if they bring weapons or drugs to school or where they pose a serious threat to other students. 42 U.S.C. §1415(k)(1)(B).

The 2004 amendments update the 1997 amendments that had addressed issues of disciplinary removal. A child identified as disabled may not be denied educational services, but removal from the current placement to an alternative educational setting is permissible in circumstances involving weapons, drug sale and use, or infliction of bodily harm on another. There are procedures for expedited hearings in these instances. 20 U.S.C. §1415(k). See also LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW §2.44 (2012 and cumulative supplement).

The 2004 amendments also incorporate a procedure called a "manifestation determination review." 20 U.S.C. §1415(k)(1)(E). This process provides for a determination about whether behavior that is subject to disciplinary treatment is related to a disability. If the student currently has an IEP, the procedure is to assess whether any intervention strategies in the IEP are appropriate. This becomes more difficult where a student has not yet been identified as eligible for special education, but where

the educational agency knew of the disability before the misconduct. If parents have expressed concern in writing to appropriate personnel or if school personnel have expressed concern, this may trigger the manifestation process.

When the conduct relates to the disability or when it was caused by the educational agency's failure to implement the IEP, a functional assessment is to be conducted and a behavioral plan developed and implemented. If one exists, it should be reviewed. There has been some, but not a great deal of case law applying these requirements.

[5] Education during Dispute Resolution

It is not unusual for parents to disagree with the educational agency about whether the education of a child is appropriate. The difficult question is where the child should be placed pending resolution of this disagreement. This is an important issue because, as the *Burlington* case illustrates, these matters can sometimes take years to resolve. Unlike employment disputes, where back wages, reinstatement, and similar remedies can go a long way towards putting the employee back in the position he or she would have been in had there been no discrimination, lost educational experience cannot easily be compensated for.

Hypothetical Problem 7.5

Review the facts from Hypothetical Problem 7.1 involving Helen and her parents' decision to place her in the private school pending resolution of where she should be placed for first grade, Lincoln or McKinley. How would the following cases resolve their rights to reimbursement?

Burlington School Committee v. Department of Education

471 U.S. 359 (1985)

JUSTICE REHNQUIST delivered the opinion of the Court:

The Education of the Handicapped Act (Act), 20 U.S.C. §1401 et seq., requires participating state and local educational agencies "to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education" to such handicapped children. These procedures include the right of the parents to participate in the development of an "individualized education program" (IEP) for the child and to challenge in administrative and court proceedings a proposed IEP with which they disagree. Where as in the present case review of a contested IEP takes years to run its course—years critical to the child's development—important practical questions arise concerning interim placement of the child and financial responsibility for that placement. This case requires us to address some of those questions.

Michael Panico, the son of respondent Robert Panico, was a first grader in the public school system of petitioner Town of Burlington, Mass., when he began experiencing serious difficulties in school. It later became evident that he had "specific learning disabilities" and thus was "handicapped" within the meaning of the Act. This entitled him to receive at public expense specially designed instruction to meet his unique needs, as well as related transportation. The negotiations and other proceedings between the Town and the Panicos, thus far spanning more than eight years, are too involved to relate in full detail; the following are the parts relevant to the issues on which we granted certiorari.

In the spring of 1979, Michael attended the third grade of the Memorial School, a public school in Burlington, Mass., under an IEP calling for individual tutoring by a reading specialist for one hour a day and individual and group counselling. Michael's continued poor performance and the fact that Memorial School was not equipped to handle his needs led to much discussion between his parents and Town school officials about his difficulties and his future schooling. Apparently the course of these discussions did not run smoothly; the upshot was that the Panicos and the Town agreed that

Michael was generally of above average to superior intelligence, but had special educational needs calling for a placement in a school other than Memorial. They disagreed over the source and exact nature of Michael's learning difficulties, the Town believing the source to be emotional and the parents believing it to be neurological.

In late June, the Town presented the Panicos with a proposed IEP for Michael for the 1979–1980 academic year. It called for placing Michael in a highly structured class of six children with special academic and social needs, located at another Town public school, the Pine Glen School. On July 3, Michael's father rejected the proposed IEP and sought review under §1415(b)(2) by respondent Massachusetts Department of Education's Bureau of Special Education Appeals (BSEA). A hearing was initially scheduled for August 8, but was apparently postponed in favor of a mediation session on August 17. The mediation efforts proved unsuccessful.

Meanwhile the Panicos received the results of the latest expert evaluation of Michael by specialists at Massachusetts General Hospital, who opined that Michael's "emotional difficulties are secondary to a rather severe learning disorder characterized by perceptual difficulties" and recommended "a highly specialized setting for children with learning handicaps ... such as the Carroll School," a state-approved private school for special education located in Lincoln, Mass. Believing that the Town's proposed placement of Michael at the Pine Glen School was inappropriate in light of Michael's needs, Mr. Panico enrolled Michael in the Carroll School in mid-August at his own expense, and Michael started there in September.

The BSEA held several hearings during the fall of 1979, and in January 1980 the hearing officer decided that the Town's proposed placement at the Pine Glen School was inappropriate and that the Carroll School was "the least restrictive adequate program within the record" for Michael's educational needs. The hearing officer ordered the Town to pay for Michael's tuition and transportation to the Carroll School for the 1979–1980 school year, including reimbursing the Panicos for their expenditures on these items for the school year to date.

[Lower court proceedings omitted.]

The Town filed a petition for a writ of certiorari in this Court challenging the decision of the Court of Appeals on numerous issues.... We granted certiorari only to consider the following two issues: whether the potential relief available under §1415(e)(2) includes reimbursement to parents for private school tuition and related expenses, and whether §1415(e)(3) bars such reimbursement to parents who reject a proposed IEP and place a child in a private school without the consent of local school authorities. We express no opinion on any of the many other views stated by the Court of Appeals.

The modus operandi of the [Education of the Handicapped Act] is the already mentioned "individualized educational program." The IEP is in brief a comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs. §1401(19) [now §1402(11)]. The IEP is to be developed jointly by a school official qualified in special education, the child's teacher, the parents or guardian, and, where appropriate, the child. In several places, the Act emphasizes the participation of the parents in developing the child's educational program and assessing its effectiveness. See §§1400(c), 1401(19), 1412(7), 1415(b)(1)(A), (C), (D), (E), and 1415(b)(2); 34 CFR §300.345 (1984).

Apparently recognizing that this cooperative approach would not always produce a consensus between the school officials and the parents, and that in any disputes the school officials would have a natural advantage, Congress incorporated an elaborate set of what it labeled "procedural safeguards" to insure the full participation of the parents and proper resolution of substantive disagreements. Section 1415(b) entitles the parents "to examine all relevant records with respect to the identification, evaluation, and educational placement of the child," to obtain an independent educational evaluation of the child, to notice of any decision to initiate or change the identification, evaluation, or educational placement of the child, and to present complaints with respect to any of the above. The

parents are further entitled to "an impartial due process hearing," which in the instant case was the BSEA hearing, to resolve their complaints.

The Act also provides for judicial review in state or federal court to "[a]ny party aggrieved by the findings and decision" made after the due process hearing. The Act confers on the reviewing court the following authority:

> [T]he court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate. §1415(e)(2).

The first question on which we granted certiorari requires us to decide whether this grant of authority includes the power to order school authorities to reimburse parents for their expenditures on private special education for a child if the court ultimately determines that such placement, rather than a proposed IEP, is proper under the Act.

We conclude that the Act authorizes such reimbursement. The statute directs the court to "grant such relief as [it] determines is appropriate." The ordinary meaning of these words confers broad discretion on the court. The type of relief is not further specified, except that it must be "appropriate." Absent other reference, the only possible interpretation is that the relief is to be "appropriate" in light of the purpose of the Act. As already noted, this is principally to provide handicapped children with "a free appropriate public education which emphasizes special education and related services designed to meet their unique needs." The Act contemplates that such education will be provided where possible in regular public schools, with the child participating as much as possible in the same activities as nonhandicapped children, but the Act also provides for placement in private schools at public expense where this is not possible. See §1412(5); 34 CFR §§300.132, 300.227, 300.307(b), 300.347 (1984). In a case where a court determines that a private placement desired by the parents was proper under the Act and that an IEP calling for placement in a public school was inappropriate, it seems clear beyond cavil that "appropriate" relief would include a prospective injunction directing the school officials to develop and implement at public expense an IEP placing the child in a private school.

If the administrative and judicial review under the Act could be completed in a matter of weeks, rather than years, it would be difficult to imagine a case in which such prospective injunctive relief would not be sufficient. As this case so vividly demonstrates, however, the review process is ponderous. A final judicial decision on the merits of an IEP will in most instances come a year or more after the school term covered by that IEP has passed. In the meantime, the parents who disagree with the proposed IEP are faced with a choice: go along with the IEP to the detriment of their child if it turns out to be inappropriate or pay for what they consider to be the appropriate placement. If they choose the latter course, which conscientious parents who have adequate means and who are reasonably confident of their assessment normally would, it would be an empty victory to have a court tell them several years later that they were right but that these expenditures could not in a proper case be reimbursed by the school officials. If that were the case, the child's right to a free appropriate public education, the parents' right to participate fully in developing a proper IEP, and all of the procedural safeguards would be less than complete. Because Congress undoubtedly did not intend this result, we are confident that by empowering the court to grant "appropriate" relief Congress meant to include retroactive reimbursement to parents as an available remedy in a proper case.

In this Court, the Town repeatedly characterizes reimbursement as "damages," but that simply is not the case. Reimbursement merely requires the Town to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP. Such a post hoc determination of financial responsibility was contemplated in the legislative history:

> If a parent contends that he or she has been forced, at that parent's own expense, to seek private schooling for the child because an appropriate program does not exist within the local educational

> agency responsible for the child's education and the local educational agency disagrees, that disagreement and *the question of who remains financially responsible* is a matter to which the due process procedures established under [the predecessor to §1415] appl[y]. (emphasis added)

Regardless of the availability of reimbursement as a form of relief in a proper case, the Town maintains that the Panicos have waived any right they otherwise might have to reimbursement because they violated §1415(e)(3), which provides:

> During the pendency of any proceedings conducted pursuant to [§1415], unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child....

This is not to say that §1415(e)(3) has no effect on parents. While we doubt that this provision would authorize a court to order parents to leave their child in a particular placement, we think it operates in such a way that parents who unilaterally change their child's placement during the pendency of review proceedings, without the consent of state or local school officials, do so at their own financial risk. If the courts ultimately determine that the IEP proposed by the school officials was appropriate, the parents would be barred from obtaining reimbursement for any interim period in which their child's placement violated §1415(e)(3). This conclusion is supported by the agency's interpretation of the Act's application to private placements by the parents....

The judgment of the Court of Appeals is Affirmed.

Problems

1. If the Court had ultimately determined that the placement chosen by the parents was not appropriate, would the parents be obligated to reimburse the school? See LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW §2.49 (2012 and cumulative supplement).

2. What remedy is available to parents who do not have the means to place their child in a private school pending dispute resolution? If the placement is ultimately determined to be substantially inappropriate, and the child has been found to have been substantially harmed educationally by such a placement, should the parents be able to recover damages for lost potential earnings or the costs of remedial or compensatory education?

The *Burlington* decision did not address what happens when the unilateral placement by the parents is in a program that has not been approved by the state or that does not comply with all the IDEA requirements. The following decision addresses those issues. The case involves a ninth grade student with a learning disability. The parents were not satisfied with the school's proposed IEP, and while the administrative review proceeded, the parents placed Shannon in a private school that specialized in educating students with disabilities. This case addresses whether the parents could be reimbursed for the expenses incurred during the dispute resolution process.

Florence County School District Four v. Carter

510 U.S. 7 (1993)

JUSTICE O'CONNOR delivered the opinion of the Court:

[Lower court proceedings omitted.]

II.

Reimbursement is [not] necessarily barred by a private school's failure to meet state education standards. Trident's deficiencies, according to the school district, were that it employed at least two faculty members who were not state-certified and that it did not develop IEPs. As we have noted, however, the §1401(a)(18) requirements—including the requirement that the school meet the

standards of the state educational agency, §1401(a)(18)(B)—do not apply to private parental placements. Indeed, the school district's emphasis on state standards is somewhat ironic. As the Court of Appeals noted, "it hardly seems consistent with the Act's goals to forbid parents from educating their child at a school that provides an appropriate education simply because that school lacks the stamp of approval of the same public school system that failed to meet the child's needs in the first place."

Furthermore, although the absence of an approved list of private schools is not essential to our holding, we note that parents in the position of Shannon's have no way of knowing at the time they select a private school whether the school meets state standards. South Carolina keeps no publicly available list of approved private schools, but instead approves private school placements on a case-by-case basis. In fact, although public school officials had previously placed three children with disabilities at Trident, Trident had not received blanket approval from the State. South Carolina's case-by-case approval system meant that Shannon's parents needed the cooperation of state officials before they could know whether Trident was state-approved. As we recognized in *Burlington*, such cooperation is unlikely in cases where the school officials disagree with the need for the private placement.

III.

The school district also claims that allowing reimbursement for parents such as Shannon's puts an unreasonable burden on financially strapped local educational authorities. The school district argues that requiring parents to choose a state-approved private school if they want reimbursement is the only meaningful way to allow States to control costs; otherwise States will have to reimburse dissatisfied parents for any private school that provides an education that is proper under the Act, no matter how expensive it may be.

There is no doubt that Congress has imposed a significant financial burden on States and school districts that participate in IDEA. Yet public educational authorities who want to avoid reimbursing parents for the private education of a disabled child can do one of two things: give the child a free appropriate public education in a public setting, or place the child in an appropriate private setting of the State's choice. This is IDEA's mandate, and school officials who conform to it need not worry about reimbursement claims.

Moreover, parents who, like Shannon's, "unilaterally change their child's placement during the pendency of review proceedings, without the consent of the state or local school officials, do so at their own financial risk." They are entitled to reimbursement only if a federal court concludes both that the public placement violated IDEA, and that the private school placement was proper under the Act.

Finally, we note that once a court holds that the public placement violated IDEA, it is authorized to "grant such relief as the court determines is appropriate." 20 U.S.C. §1415(e)(2). Under this provision, "equitable considerations are relevant in fashioning relief," and the court enjoys "broad discretion" in so doing. Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable.

Accordingly, we affirm the judgment of the Court of Appeals.

So ordered.

Problems

1. Do parents have an obligation to "mitigate damages" by trying to find the least expensive appropriate placement in cases where the school's proposed placement does not seem appropriate?

See *Tucker v. Bay Shore Union Free Sch. Dist.*, 873 F.2d 563 (2d Cir. 1989).

2. Under the IDEA can a school district limit rates it will pay for private facilities? See *Fisher v. District of Columbia*, 828 F. Supp. 87 (D.D.C. 1993); *McClain v. Smith*, 793 F. Supp. 756 (E.D. Tenn. 1989).

3. Does a school violate IDEA if it requires parents to use private insurance policies as a source of payment for some services in private school placements? For example, a placement for intense psychiatric treatment may be necessary for the child to benefit from education, and the parents may have private insurance available to cover at least some of the expenses of such a placement. See *Seals v. Loftis*, 614 F. Supp. 302 (E.D. Tenn. 1985). The IDEA has clarified that the school may request, but not require, that private insurance benefits be used to pay for services or programming. 34 C.F.R. §300.154(e).

The following Supreme Court decision excerpt addresses a reimbursement issue not raised in either *Burlington* or *Florence County* because in both previous cases, the student was already receiving special education services from the public educational agency.

Forest Grove School District v. T.A.

557 U.S. 230 (2009)

JUSTICE STEVENS delivered the opinion of the Court.

I

T.A. attended public schools in the Forest Grove School District (School District or District) from the time he was in kindergarten through the winter of his junior year of high school. From kindergarten through eighth grade, [his] teachers observed that he had trouble paying attention in class and completing his assignments. When [he] entered high school, his difficulties increased.

In December 2000, during [T.A.]'s freshman year, his mother contacted the school counselor to discuss respondent's problems with his schoolwork. At the end of the school year, [he] was evaluated by a school psychologist. After interviewing him, examining his school records, and administering cognitive ability tests, the psychologist concluded that [T.A.] did not need further testing for any learning disabilities or other health impairments, including attention deficit hyperactivity disorder (ADHD). The psychologist and two other school officials discussed the evaluation results with [T.A.]'s mother in June 2001, and all agreed that respondent did not qualify for special-education services. [T.A.]'s parents did not seek review of that decision, although the hearing examiner later found that the School District's evaluation was legally inadequate because it failed to address all areas of suspected disability, including ADHD.

With extensive help from his family, [T.A.] completed his sophomore year at Forest Grove High School, but his problems worsened during his junior year. In February 2003, [his] parents discussed with the School District the possibility of [T.A.] completing high school through a partnership program with the local community college. They also sought private professional advice, and in March 2003 [T.A.] was diagnosed with ADHD and a number of disabilities related to learning and memory. Advised by the private specialist that [he] would do best in a structured, residential learning environment, [his] parents enrolled him at a private academy that focuses on educating children with special needs.

Four days after enrolling him in private school, [T.A.]'s parents hired a lawyer to ascertain their rights and to give the School District written notice of [his] private placement. A few weeks later, in April 2003, [his] parents requested an administrative due process hearing regarding [his] eligibility for special-education services. In June 2003, the District engaged a school psychologist to assist in determining whether [T.A.] had a disability that significantly interfered with his educational

performance. [His] parents cooperated with the District during the evaluation process. In July 2003, a multidisciplinary team met to discuss whether [T.A.] satisfied IDEA's disability criteria and concluded that he did not because his ADHD did not have a sufficiently significant adverse impact on his educational performance. Because the School District maintained that [T.A.] was not eligible for special-education services and therefore declined to provide an individualized education program (IEP), [T.A.]'s parents left him enrolled at the private academy for his senior year.

The administrative review process resumed in September 2003. After considering the parties' evidence, including the testimony of numerous experts, the hearing officer issued a decision in January 2004 finding that [T.A.]'s ADHD adversely affected his educational performance and that the School District failed to meet its obligations under IDEA in not identifying respondent as a student eligible for special-education services. Because the District did not offer respondent a FAPE and his private-school placement was appropriate under IDEA, the hearing officer ordered the District to reimburse [T.A.]'s parents for the cost of the private-school tuition.

[The School District sought judicial review of the reimbursement order. The District Court upheld the hearing decision. The Court of Appeals for the Ninth Circuit reversed and remanded. The Supreme Court granted certiorari in the case because of inconsistent results among the federal circuits.]

II

Justice Rehnquist's opinion for a unanimous Court in *Burlington* provides the pertinent background for our analysis of the question presented. [Discussion of the *Burlington* decision omitted.]

Our decision [in *Burlington*] rested in part on the fact that administrative and judicial review of a parent's complaint often takes years. We concluded that, having mandated that participating States provide a FAPE for every student, Congress could not have intended to require parents to either accept an inadequate public-school education pending adjudication of their claim or bear the cost of a private education if the court ultimately determined that the private placement was proper under the Act. Eight years later, we unanimously reaffirmed the availability of reimbursement in *Florence County School Dist. Four v. Carter*, 114 S. Ct. 361 (1993) (holding that reimbursement may be appropriate even when a child is placed in a private school that has not been approved by the State).

The dispute giving rise to the present litigation differs from those in *Burlington* and *Carter* in that it concerns not the adequacy of a proposed IEP but the School District's failure to provide an IEP at all. And, unlike respondent, the children in those cases had previously received public special-education services. These differences are insignificant, however, because our analysis in the earlier cases depended on the language and purpose of the Act and not the particular facts involved. Moreover, when a child requires special-education services, a school district's failure to propose an IEP of any kind is at least as serious a violation of its responsibilities under IDEA as a failure to provide an adequate IEP. It is thus clear that the reasoning of *Burlington* and *Carter* applies equally to this case. The only question is whether the 1997 Amendments require a different result.

III

Congress enacted IDEA in 1970 to ensure that all children with disabilities are provided "'a free appropriate public education which emphasizes special education and related services designed to meet their unique needs [and] to assure that the rights of [such] children and their parents or guardians are protected.'" *Burlington*, now codified as amended at §§1400(d)(1)(A), (B). After examining the States' progress under IDEA, Congress found in 1997 that substantial gains had been made in the area of special education but that more needed to be done to guarantee children with disabilities adequate access to appropriate services. The 1997 Amendments were intended "to place greater emphasis on improving student performance and ensuring that children with disabilities receive a quality public education."

Consistent with that goal, the Amendments preserved the Act's purpose of providing a FAPE to all children with disabilities. And they did not change the text of the provision we considered in *Burlington*, §1415(i)(2)(C)(iii), which gives courts broad authority to grant "appropriate" relief, including reimbursement for the cost of private special education when a school district fails to provide a FAPE. "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." Accordingly, absent a clear expression elsewhere in the Amendments of Congress' intent to repeal some portion of that provision or to abrogate our decisions in *Burlington* and *Carter*, we will continue to read §1415(i)(2)(C)(iii) to authorize the relief respondent seeks.

[Discussion of School District and dissent arguments and Court's response to those arguments omitted.]

V

The IDEA Amendments of 1997 did not modify the text of §1415(i)(2)(C)(iii), and we do not read §1412(a)(10)(C) to alter that provision's meaning. Consistent with our decisions in *Burlington* and *Carter*, we conclude that IDEA authorizes reimbursement for the cost of private special-education services when a school district fails to provide a FAPE and the private-school placement is appropriate, regardless of whether the child previously received special education or related services through the public school.

When a court or hearing officer concludes that a school district failed to provide a FAPE and the private placement was suitable, it must consider all relevant factors, including the notice provided by the parents and the school district's opportunities for evaluating the child, in determining whether reimbursement for some or all of the cost of the child's private education is warranted. As the Court of Appeals noted, the District Court did not properly consider the equities in this case and will need to undertake that analysis on remand. Accordingly, the judgment of the Court of Appeals is affirmed.

It is so ordered.

Notes

1. *Compensatory Education:* Like reimbursement, compensatory education is a remedy that should be allowed in appropriate circumstances because it is intended to compensate for the denial of appropriate educational services that should have been provided all along. Although the Supreme Court has not directly addressed the availability of compensatory education as a remedy, most lower courts have recognized it as available in appropriate circumstances. A few courts indicate that it may only be provided as long as the child remains age eligible. See LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW §2.50 (2012 and cumulative supplement).

2. *Damages:* Courts are less likely to award monetary damages for a variety of reasons. There seems to be greater judicial reluctance to read this into the IDEA as a remedy that was intended by Congress. In addition, policy concerns about the financial burden such awards might place on educational agencies seems to be an underlying concern in some of the decisions. The question of immunity has been addressed by a number of courts, with inconsistent outcomes, and the issue remains unresolved by the Supreme Court. See LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW §2.48 (2012 and cumulative supplement).

3. *Attorneys' Fees:* Arguably, one disincentive to educational agencies dragging their feet in resolving controversies about appropriate placements is the fact that as of 1986, with the enactment of the Handicapped Children's Protection Act, an amendment to the IDEA, attorneys' fees are now available to parents who prevail in special education disputes. 20 U.S.C. §4(e)(4). The 1997 IDEA amendments clarified that attorneys' fees may not generally be recovered for work done as part of the IEP meeting. 20 U.S.C. §1415 (i)(3)(D)(ii) (2004). See LAURA ROTHSTEIN & JULIA IRZYK,

DISABILITIES AND THE LAW §2.51 (2012 and cumulative supplement).

The 2004 IDEA amendments clarified some additional issues related to attorney's fees. It codified what some courts had allowed, which is awarding attorney's fees for prevailing not only in court, but also during the due process hearing. 20 U.S.C. 1415(i)(3)(B)(i)(II) to (III). In recognition of concerns about inappropriate litigation, the 2004 amendments to IDEA provide for the award of fees against the parents' attorney where the complaint is frivolous, unreasonable, or without foundation, or where litigation is continued that becomes frivolous, unreasonable, or without foundation. Where the complaint was presented for an improper purpose, attorneys' fees may be awarded to the state or local agency, if the agency is the prevailing party.

Several cases have addressed this issue. In *K.S. v. Capistrano Unified Sch. Dist.,* 51 Nat'l Disability L. Rep. ¶14 (9th Cir. 2015), the court held that when a parent brings frivolous lawsuits, the parent, not just the lawyer, could be obligated for the whole amount. Although it is rare for courts to make such awards against plaintiffs, some have done so. Compare *R.P. ex rel. C.P. v. Prescott Unified School Dist.*, 631 F.3d 1117 (9th Cir. 2011) (fact that parents' arguments not successful did not make them frivolous), with *Capital City Public Charter School v. Gambale*, 27 F. Supp. 3d 121 (D.D.C. 2014) (student's parent and attorney never had basis to claim that public charter school delayed student's relocation to residential treatment facility thus rendering parent's claim against school frivolous, unreasonable or without foundation and warranting award of attorney fees), with *District of Columbia v. West*, 699 F. Supp. 2d 273 (D.D.C. 2010) (award of attorney's fees where attorneys did not continue to litigate after litigation clearly became frivolous, unreasonable, or without foundation).

4. *Special Education Malpractice:* The use of constitutional tort type theories for remediating misconduct by educational agencies in the provision of special education has been a much discussed topic. *Smith v. Robinson* seems to clarify that if the IDEA provides a resolution to the dispute, it is the sole avenue through which to proceed. What if the injury is physical (as a result of failure to adequately supervise a mainstreamed special education student) or if it is lost potential earnings (as a result of inappropriately identifying a child as retarded when the child is actually deaf)? Should the school be obligated to pay for medical expenses or lost potential earnings? It remains unsettled whether such theories can be used. Some of the obstacles to using constitutional tort or other malpractice theories are policy objections to having schools pay for such injuries, difficulty in proving the tort elements of negligence (duty, breach of duty, causation, and injury), and state immunity statutes. See LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW §2.57 (2014 cumulative edition).

5. *Reimbursement for Private Schools:* The 1997 IDEA amendments resolved some of the unanswered questions about reimbursement. Where the parents do not inform the educational agency at an IEP meeting of their intent to place the child in a private school or do not given 10 days notice, reimbursement may be reduced or even denied. 20 U.S.C. §1412(a)(10)(C)(iii) (2004).

D. Nondiscrimination and Reasonable Accommodation under Section 504 of the Rehabilitation Act and the Americans with Disabilities Act

Hypothetical Problem 7.6

Refer back to Hypotheticals 7.2 and 7.4 involving peanut allergies, diabetes, and learning disabilities and consider in reading the following materials whether there might be rights and remedies under the ADA and/or the Rehabilitation Act in addition to the IDEA. How would that affect those situations? What if in hypothetical 7.4, Bryan's grades fell below the average required for eligibility for sports and extracurricular activities?

Consider also the following two situations in reviewing the next section:

Lisa, from hypothetical problem 7.3, has reached the high school level and is receiving a special education program that will lead to a certificate, instead of a diploma. Although she has academic delays, she is quite athletic and tries out for the cross country team. She is allowed to participate in the meets, but her time and place is not counted for the team because she is not in a diploma program.

Bryan, from hypothetical problem 7.4, is identified in first grade as having a learning disability and is provided special education services, including accommodations on exams including additional time. He works very hard and has the grades that would qualify other students for the honor roll. Can the school deny equal recognition by claiming that special education supported classes should not count for eligibility?

[1] Students Not Covered by the IDEA

In *Smith v. Robinson*, 468 U.S. 992 (1984), reproduced in Section [A] of this Chapter, *supra*, the Court left open the possibility that there might still be some situations in which students with disabilities would not be protected by the IDEA but could resort to Section 504 or the ADA. The following case illustrates one such example.

Doe v. Belleville Public School District

672 F. Supp. 342 (S.D. Ill. 1987)

FOREMAN, CHIEF JUDGE:

Background

Plaintiff Johnny Doe is a six-year-old male child who was diagnosed as having Hemophilia B as an infant. Subsequent to that diagnosis, made in August of 1986, he was diagnosed as having Acquired Immune Deficiency Syndrome (AIDS). During the 1986–87 school year, Johnny attended kindergarten at a public school in Harmony School District No. 175. Sometime before the end of that school year, Johnny and his mother moved to a new school district where, by virtue of the timing of the move, he was required to enroll in the first grade in Belleville District No. 118.

School officials were notified that Johnny was a hemophiliac and that he had been diagnosed as having AIDS. Subsequent to that notification it appears the Board of Education decided that it needed to formulate a "policy" to serve as their basis in placing him. The final version of this policy, titled "Policy Regarding Children With Chronic Communicable Diseases," was adopted by the Board on July 21, 1987. Following the guidelines set forth in the policy, the Board appointed an interdisciplinary Placement Evaluation Committee which supplied a factual analysis of plaintiff's case to the Board for its use in determining appropriate placement for him. On August 25, 1987, the Board met in executive session with plaintiff's mother and her attorney and thereafter unanimously decided to exclude Johnny from the normal classroom and, instead, to provide him with a tutor in his home. It is this exclusion that plaintiff alleges gives rise to his claim of discrimination in violation of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794.

Discussion

The defendants urge this Court that it lacks subject matter jurisdiction over the case by virtue of plaintiff's alleged failure to exhaust his state law administrative remedies as required by 20 U.S.C. §1415(e)(2) and the law of this Circuit. The plaintiff, on the other hand, contends that he is not "handicapped," as that term is statutorily defined in EAHCA, and thus is not afforded a remedy by that Act. Consequently, plaintiff argues that he is not required to exhaust his administrative remedies because his claim does not arise under EAHCA, but rather under the Rehabilitation Act. Exhaustion of remedies is not required under the Rehabilitation Act.

Because defendants' argument relies on the applicability of EAHCA to the plaintiff, the Court must

determine if plaintiff's diagnosis of AIDS brings him within the statutory definition of a handicapped individual and is, therefore, subject to the exhaustion requirement. EAHCA defines "handicapped children" as children who are:

> mentally retarded, hard of hearing, deaf, speech or language impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, *or other health impaired children*, or children with specific learning disabilities, *who by reason thereof require special education and related services.*

20 U.S.C. §1401(a)(1). [Emphasis added.]

In this case the parties agree that the only category into which Johnny fits is that of "other health impaired children." That phrase is defined as children who have:

> [l]imited strength, vitality or alertness due to chronic or acute health problems such as a heart condition, tuberculosis, rheumatic fever, nephritis, asthma, sickle-cell anemia, *hemophilia*, epilepsy, lead poisoning, leukemia, or diabetes, *which adversely affects a child's educational performance.*

34 C.F.R. §300.5(b)(7). [Emphasis added.]

In applying these definitions to the plaintiff, the Court concludes that three tests must be met before the provisions of EAHCA can be made to apply in this case: 1) there must be limited strength, vitality, or alertness due to chronic or acute health problems, 2) which adversely affects a child's educational performance, and 3) which requires special education and related services. Here, the record reveals virtually no evidence that plaintiff suffers from limited strength, vitality, or alertness. Furthermore, given such evidence as is in the record of Johnny's limited strength, there is virtually no evidence that this limitation has adversely affected his educational performance.

The Court also finds it noteworthy that, while the defendants assert that Johnny's hemophilia brings him within the statutory definition of "other health impaired children," the health impairment they are apparently concerned with is Johnny's AIDS virus. AIDS is not listed as an example of an acute or chronic health problem in the statute. Furthermore, the United States Department of Education, directly addressing the applicability of EAHCA to AIDS victims, has opined that a child with AIDS might be considered "handicapped" under EAHCA, depending upon his or her condition. More significantly, the Department's opinion concludes that a child with AIDS is not considered to be "handicapped," as the term is defined in the EAHCA, unless he or she needs special education. With respect to the availability of special education programs for children with AIDS, the opinion states:

> Children with AIDS could be eligible for special education programs under the category of "other health impaired," if they have chronic or acute health problems which adversely affect their educational performance.

Based on the Department of Education's opinions and the tenor of the statutory language, the Court concludes that EAHCA would apply to AIDS victims only if their physical condition is such that it adversely affects their educational performance; i.e., their ability to learn and to do the required classroom work. There is no such showing at the present time, and it seems clear that the only reason for the Board's determination that Johnny needs "special education" is the fact that he has a contagious disease—AIDS. In the Court's opinion, given the facts of this case as they now exist, the provisions of EAHCA would not apply to the plaintiff at this time.

This conclusion is further buttressed by the Board's own actions. For example, at no time did the Board or its counsel advise the plaintiff that Johnny's placement was being treated as an individual education program (IEP) under EAHCA. More significantly the "policy" promulgated by the Board did not provide the rather detailed procedural safeguards mandated by EAHCA. In fact, the policy itself states that any appeal procedures otherwise available to an individual (such as those provided in EAHCA), which are contrary to those expressly set forth in the policy, are not applicable. Also, there

appears to have been no policy at all regarding placement of children with contagious diseases until the plaintiff attempted to enroll in the district. Thus, the policy appears to be more an ad hoc reaction to plaintiff's case than a well-established plan promulgated by the district under the auspices of EAHCA.

For these reasons, the Court is of the opinion that the Board itself did not consider Johnny's situation one to which EAHCA would apply. That being the case, the Court finds that the plaintiff is not required to exhaust his administrative remedies, and that it has subject matter jurisdiction over this case by virtue of 28 U.S.C. §1331.

Finally, even assuming arguendo that EAHCA does apply and exhaustion is required, it is well established that a plaintiff need not exhaust administrative remedies where the exercise of those remedies would be futile. Furthermore, exhaustion is not required if the only available administrative remedy is plainly inadequate.

Here, it is abundantly clear from the record that exhaustion would be futile. This conclusion is reached for a variety of reasons, not the least of which is the Board's failure to follow the Illinois Department of Public Health's guidelines for placing children with contagious diseases. The Board's failure to follow the guidelines apparently resulted in the director of that agency writing a letter to the editor of a local newspaper critical of the Board's decision. Additionally, and more importantly, there is the fact that the Board and its counsel apparently advised the plaintiff that his only mechanism for appeal of their decision was the monthly review provision set forth in the policy.

An even cursory review of the language of that provision reveals it to be plainly inadequate. It provides no mechanism for an independent review of an individual's case by any entity other than the Board, which of course made the original decision. Furthermore, it vests the medical decision-making in the school district nurse as opposed to a doctor and, in any event, does not seem to require expertise in infectious or contagious diseases on the nurse's part. These defects, when coupled with the language exempting the policy from other appellate mechanisms inconsistent with its terms, convince the Court that as a practical matter no meaningful administrative remedies exist for this plaintiff. Thus, the Court finds that even if EAHCA does apply, exhaustion in this case would not be required because it would indeed be futile.

For the above-stated reasons, the Court is of the opinion that defendants' Motion to Dismiss should be, and hereby is, *Denied*.

Notes

Students with Contagious and Infectious Diseases: This decision only reaches the issue of whether Section 504 of the Rehabilitation Act can be used as a theory to challenge the exclusionary practices of the school. While it is legitimate for a school to consider health risks to others in deciding about the appropriateness of a placement, schools will not be permitted to use unsubstantiated fears as a basis for exclusion. The Center for Disease Control has developed policies on this issue. http://www.cdc.gov/healthyyouth/infectious/. See also LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW §2.09 (2012 and cumulative supplement).

Food Allergies: There has been recent attention to the issue of food allergies in higher education campus settings. Following a settlement agreement with a university about food on campus, the Justice Department released a new technical assistance document, “Questions and Answers About the Lesley University Agreement and Potential Implications for Individuals with Food Allergies.” Because there is not yet a case that has finally decided this issue, it is not clear what is actually required of universities with respect to modification of food service programs on campus and how this might apply to K-12 school settings. It is not even resolved whether and when a food allergy would be a disability. See www.ada.gov. This approach could have potential implications for the K-12 setting.

Impact of the ADA 2008 Amendments: The definitional changes of “disability” resulting from the

ADA Amendments Act of 2008, as discussed in Chapter 2, make it more likely that more students will be covered than might have been the case previously. This has not been a major issue in the education context, but it could be a factor in situations where the student has asthma, chronic illness, food allergies, some mental health conditions such as exam anxiety, and/or some learning and related disabilities.

[2] Substantive Application

The previous section demonstrated the kinds of situations in which Section 504, the ADA, or Section 1983 might apply in spite of the *Smith v. Robinson* limitations. The following material demonstrates some examples of the substantive application of the nondiscrimination statutes in cases where the IDEA does not provide a remedy. The cases in this section include issues of participation in sports and athletics and architectural barriers that affect individuals with mobility impairments. In both cases, it is quite possible that IDEA will not provide a remedy, so recourse to nondiscrimination statutory protection is required.

The following case excerpt involves athletics and sports participation. In reading this opinion, consider the high value placed on participation in athletics in American culture and the high stakes that can be involved in at least some of these cases where students are seeking eligibility for college sports and eventually professional sports.

Pottgen v. Missouri State High School Activities Ass'n

40 F.3d 926 (8th Cir. 1994)

BEAM, CIRCUIT JUDGE.

I. *Background*

After Pottgen repeated two grades in elementary school, the school tested him to see whether he needed special classroom assistance. When the school discovered that Pottgen had several learning disabilities, it placed him on an individualized program and provided him with access to special services. With these additional resources, Pottgen progressed through school at a normal rate. It is not clear from the evidence whether he attempted to make up the lost time through summer school or other remedial activities.

Pottgen was active in sports throughout junior high and high school. He played interscholastic baseball for three years in high school and planned to play baseball his senior year as well. However, because he had repeated two grades, Pottgen turned nineteen shortly before July 1 of his senior year. Consequently, MSHSAA By-Laws rendered Pottgen ineligible to play. The MSHSAA By-Law states, in relevant part, "A student shall not have reached the age of nineteen prior to July 1 preceding the opening of school. If a student reaches the age of nineteen on or following July 1, the student may be considered eligible for [interscholastic sports during] the ensuing school year."

Pottgen petitioned MSHSAA for a hardship exception to the age limit since he was held back due to his learning disabilities. Pottgen struck out. MSHSAA determined that waiving the requirement violated the intent of the age eligibility rule.

Pottgen then brought this suit, alleging MSHSAA's age limit violated the Rehabilitation Act of 1973 (the "Rehabilitation Act"), the Americans With Disabilities Act (the "ADA"), and section 1983.

II. *Discussion*

B. *Injunctive Relief*

1. *Section 504 of the Rehabilitation Act*

The district court found Pottgen to be an "otherwise qualified" individual because, except for the

age limit, Pottgen meets all MSHSAA's eligibility requirements. The court framed the issue as not whether Pottgen meets all of the eligibility requirements, but rather whether reasonable accommodations existed. We disagree. A Rehabilitation Act analysis requires the court to determine both whether an individual meets all of the essential eligibility requirements and whether reasonable modifications exist.

Here, Pottgen cannot meet all the baseball program's requirements in spite of his disability. He is too old to meet the MSHSAA age limit. This failure to meet the age limit does not keep Pottgen from being "otherwise qualified" unless the age limit is an essential or necessary eligibility requirement.

We find that MSHSAA has demonstrated that the age limit is an essential eligibility requirement in a high school interscholastic program. An age limit helps reduce the competitive advantage flowing to teams using older athletes; protects younger athletes from harm; discourages student athletes from delaying their education to gain athletic maturity; and prevents over-zealous coaches from engaging in repeated red-shirting to gain a competitive advantage. These purposes are of immense importance in any interscholastic sports program.

Even though Pottgen cannot meet this essential eligibility requirement, he is "otherwise qualified" if reasonable accommodations would enable him to meet the age limit. Reasonable accommodations do not require an institution "to lower or to effect substantial modifications of standards to accommodate a handicapped person." Accommodations are not reasonable if they impose "undue financial and administrative burdens" or if they require a "fundamental alteration in the nature of [the] program."

Since Pottgen is already older than the MSHSAA age limit, the only possible accommodation is to waive the essential requirement itself.[4] Although Pottgen contends an age limit waiver is a reasonable accommodation based on his disability, we disagree. Waiving an essential eligibility standard would constitute a fundamental alteration in the nature of the baseball program. Other than waiving the age limit, no manner, method, or means is available which would permit Pottgen to satisfy the age limit. Consequently, no reasonable accommodations exist.

Since Pottgen can never meet the essential eligibility requirement, he is not an "otherwise qualified" individual. Section 504 was designed only to extend protection to those potentially able to meet the essential eligibility requirements of a program or activity.

2. *Title II of the ADA*

MSHSAA also appeals the district court's ruling that Pottgen would likely prevail on his ADA claim. MSHSAA contends Pottgen is not a "qualified individual with a disability" under Title II of the ADA.

Consistent with our Rehabilitation Act analysis, we find MSHSAA has demonstrated that the age limit is an essential eligibility requirement of the interscholastic baseball program....

Problem

Texas has adopted a "no pass-no play" policy requiring that students maintain certain grades to participate in extracurricular activities including interscholastic athletics. Must such a policy incorporate exceptions for special education students? How would such a policy work?

Notes

1. *Age eligibility cases.* There have been a number of age eligibility challenges since the *Pottgen* decision. *McPherson v. Michigan High School Athletic Ass'n, Inc.*, 119 F.3d 453 (6th Cir. 1997) (time limitation on high school eligibility upheld); *Sandison v. Michigan High School Athletic Ass'n, Inc.*, 64 F.3d 1026 (6th Cir. 1995) (age restriction for playing sports did not provide claim to student with learning disability as the disqualification was based on age, not disability).

2. *Other eligibility challenges.* In *Crocker v. Tennessee Secondary School Athletic Ass'n*, 980 F.2d 392 (6th Cir. 1992), the court addressed a high school student's transfer from a private school to a public school. The student was found ineligible to participate in interscholastic sports, including football, for a year pursuant to the governing sports association rules, that would allow participation only if there was a change of residence. After a denial of a waiver, the student was evaluated for special education eligibility. What followed was a lengthy and complex application of eligibility requirements, injunctions, and temporary orders. This decision addresses the applicability of the various statutes and potential remedies. The appellate court's analysis addresses the applicability of statutes and remedies.

> We agree with Chief Judge John Nixon below that the facts alleged in this case do not state a valid claim for damages under the EHA. Section 615(e)(2) of the Act, 20 U.S.C. §1415(e)(2), confers upon courts reviewing handicapped claims the authority to "grant such relief as the court determines is appropriate." In this case, general damages for emotional anguish, including the pain of missing two high school games, do not constitute "appropriate" judicial relief. Other cases under the Act have limited monetary damages to restitutionary types of relief. They have allowed restitution to parents for the expense of providing educational services for the handicapped child, but we do not find case authority interpreting the Act to allow an award of general damages for emotional injury or injury to a dignitary interest.
>
> ...
>
> Although under the circumstances the organization may appear stubborn and inflexible in its conduct, it is ordinarily entitled to enforce its athletic rules in order to deter students, parents and school officials from trying to turn high school athletics into an activity that overshadows or unduly interferes with academic life. The main purpose of high school is to learn science, the liberal arts and vocational studies, not to play football and basketball. Young Crocker and his family seem to have taken sports more seriously than academic studies, and the TSSAA seems to have overreacted to this situation. The EHA does not contemplate such actions for damages in these circumstances. There is no case authority for it, and we believe such damage relief would be inequitable and inappropriate.
>
> Because Crocker cannot recover general damages under the EHA, he cannot recover damages under §1983 for any violation of his rights secured by the EHA. Section 1983 merely secures the federally protected rights a plaintiff already holds. It does not expand those rights. Through §1983 Crocker was able to bring an action that might otherwise have been foreclosed. Section 1983 did not provide a right to damages where none existed before.

What continues to be an issue is whether the refusal to waive certain eligibility rules as an accommodation is discriminatory and actionable under Section 504, Section 1983 (and now under the ADA). See, e.g., *Steines v. Ohio High Sch. Athletic Ass'n*, 68 F. Supp. 3d 768 (S.D. Ohio 2014), in which a high school student who lived in Kentucky but attended school in Ohio due to learning disabilities was entitled to have the residency requirement waived with respect to athletics. The court held that residency was not essential to functioning of athletic program. See also *Dennin v. Connecticut Interscholastic Athletic Conference, Inc.*, 94 F.3d 96 (2d Cir. 1996) (denying ADA challenges to sports ineligibility).

Hypothetical Problem 7.7

Julia is 13 years old and has fibromyalgia that has worsened over the years. Julia now has extreme difficulty walking up and down stairs, especially during winter months when it is cold or damp. She moves slowly and cannot carry heavy objects for any length of time. Before high school, Julia's classes were generally in the same room, and her condition was not as severe. She is about to begin her freshman year of high school. Her parents have asked that she be provided a school locker on each floor of the three-story high school or that all of her classes be scheduled for the first floor. They have

also asked what the evacuation plan is for Julia if there is a fire or other need for evacuation. They have also asked that a second set of books be provided to Julia so that she does not need to carry her books to and from school to do homework. The high school is an urban school with 1500 students, and a shortage of lockers. Students who are freshmen and sophomores generally are assigned to share lockers. There is an elevator in the building which requires a key and is used only by faculty and staff.

Consider what federal law might require in this situation.

School facilities constructed before the major disability laws were enacted often have substantial barriers. The following two cases demonstrate how the new laws can be applied to these situations. The *Wolff* case highlights not only the barriers within the school building, but also the challenges for off site programming. While the case involves activities in a foreign country, field trips to museums, parks, and other facilities in the United States can present some of the same barriers. The *Bechtel* case focuses more on what *Wolff* did not address, the access in the school facilities themselves.

Wolff v. South Colonie Central School District

534 F. Supp. 758 (N.D.N.Y. 1982)

MINER, DISTRICT JUDGE:

Findings of Fact

1. Plaintiff, Jean Wolff, a 15 1/2 year old student attending the 10th grade at South Colonie High School, has a congenital limb deficiency. Her legs are approximately 1 foot in length; her right arm has been amputated above the elbow and fitted with a prosthetic device. At the end of her left arm, which is shorter than normal, are two partially functional digits. Jean is approximately 3 1/2 feet in height.

2. Defendant South Colonie Central School District (hereinafter "School District"), a municipal corporation organized pursuant to the laws of the State of New York, operates the high school Jean attends and is an entity receiving Federal financial assistance.

3. In September, 1979, plaintiff Phyllis Wolff contacted School District officials concerning Jean's attendance in the South Colonie school system and requested that a van or automobile be supplied to transport Jean to and from school. She also requested that an "aide" be supplied to help Jean in school to perform her daily school activities.

4. At a meeting of the South Colonie Board of Education on September 18, 1979, a resolution was passed approving the creation of a 6 1/2 hour school monitor position (hereinafter "aide") at the Sand Creek Jr. High School to provide for Jean's individual safety and welfare. In addition, arrangements were made for a special van to transport Jean to and from school. The School District has continued to supply the special van and aide during Jean's attendance at the High School and plaintiff Phyllis Wolff has not applied to discontinue these services.

5. The special van, which has no riders other than Jean, transports Jean daily from the door of her house to the school entrance. The van is specially equipped with lower than usual access steps.

6. The aide, Mrs. Dorothy Kulzer, meets Jean at the entrance of the school. During the school day she takes Jean's books out of a locker and carries them from class to class. She also protects Jean from inadvertent harm from her fellow classmates by walking behind Jean and to her left, thereby blocking any onrushing students. In addition, the aide guards against slipping or falling when Jean ascends or descends stairways.

7. However, there are occasions when students have bumped into Jean in the hallways during the passing of classes as well as occasions when she has stumbled and fallen. Jean is allowed to use a "short cut" to class through normally restricted hallways. She usually is late for the class to which she

has the longest walk with a stairway en route.

8. In order to climb stairs, Jean must place one foot on the next level step and then, using the bannister for leverage, haul the rest of her body up to that level. This procedure is repeated until she reaches the top. Jean descends stairs in the same manner, hopping from stair to stair if no bannister is available.

9. Jean is capable of walking at a speed of approximately one half that of a normal adult for at least three miles, and is capable of "running" for between 5 and 10 minutes. On a short field trip through the Pine Bush, Jean was unable to keep up with the class.

10. This Court has had the opportunity to observe Jean during the course of these proceedings and notes the difficulties she encountered with such tasks as seating herself on the witness chair. Otherwise, Jean appears to be above average in intelligence, friendly and highly motivated for a child of her years.

11. In October, 1981, an announcement was made in Jean's Spanish class concerning a forthcoming trip to Spain. Wishing to participate, Jean fulfilled all the preliminary requirements, including demonstration of a serious interest in languages, completion of Level I Spanish studies, stipulating to certain school and trip policies, obtaining a medical release, attendance at certain planning meetings, paying a deposit of $100, and obtaining her mother's consent and signature. At some point, the balance of the cost of the trip was paid in full.

12. A meeting attended by Jean, her mother, and various school officials and teachers was held thereafter to discuss the itinerary, city by city, in light of problems which might develop for Jean. In January 1982, plaintiffs were informed that Jean would not be allowed to participate in the program without being accompanied by an aide. When plaintiffs made no attempt to obtain such an aide, all payments were returned to plaintiffs and Jean was dropped from the program.

[Description of the city by city itinerary (Madrid, Toledo, Seville, and Granada) and the challenges faced in each location is omitted.]

17. Given her present physical limitations, Jean would be unable to maintain the brisk and physically demanding pace of the group's walking tours and would be unable to ascend and descend the myriad stairways, many of which, as part of historically preserved sites, do not contain bannisters or guardrails necessary for her locomotion and safety.

18. In addition, the throngs of people encountered in many cities, the heavy urban traffic and the crowds gathered at events such as the bullfight, constitute significant hazards to the well-being and safety of the infant plaintiff.

Conclusions of Law

1. This action arises under section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, which provides that no otherwise qualified handicapped individual, shall, solely by reason of his handicap, be excluded from participation in any program or activity receiving Federal financial assistance.

4. Plaintiff Jean Wolff is a handicapped individual within the meaning of this Act.

5. The trip to Spain can be considered an activity or program receiving Federal financial assistance within the meaning of the Act since, although the students pay for a substantial portion of the expenses of the trip, regular salaried teachers will be attending as chaperones while school is in session, the School District has sponsored and planned the program, and students will be under the supervision of teacher and School District personnel during this trip.

6. For a determination of whether plaintiff Jean Wolff is "otherwise qualified" within the meaning of the Act, the Court may consider whether the program requires applicants to possess certain physical qualifications necessary for participation, and the Court may also consider a state's parens patriae interest in protecting the disabled against physical harm when the state has shown a risk to

safety in a particular activity.

7. Since Jean is unable to fulfill the physical requirements of the trip, and since a substantial degree of physical risk to her safety has been demonstrated were she to participate in the program, plaintiff Jean Wolff is not otherwise qualified within the meaning of §504 of the Act.

8. Accordingly, the relief sought by plaintiffs is denied in all respects and the complaint is dismissed.

The following case raises another architectural barrier issue likely to arise more frequently.

Bechtel v. East Pennsylvania School District

1994 U.S. Dist. LEXIS 1327, 3 A.D. Cases (BNA) 200 (E.D. Pa. 1994)

EDWARD N. CAHN, CHIEF JUDGE:

Bechtel is a minor who suffers from spina bifida. As a result of his medical condition, Bechtel is confined to a wheelchair. Although not currently a student at Emmaus High School ("Emmaus High"), Bechtel is a resident of the defendant school district and expects to attend Emmaus High next fall. Emmaus High is a public school located within the East Penn School District, and the defendant[s] are responsible for ensuring the school's compliance with all applicable laws and regulations.

Bechtel has long desired to use certain facilities at Emmaus High, specifically the stadium, which are not equipped for usage by those in wheelchairs. As a result, Bechtel has been unable to attend events at the school stadium, such as his sister's band performance. Bechtel's sister is currently enrolled at Emmaus High. On several occasions, the plaintiffs expressed to members of the defendant school board their dissatisfaction with the lack of accommodations for disabled students at Emmaus High.

Sometime in 1991, the defendant school board decided to renovate Emmaus High. In the spring of 1993, the defendants met with an architect to discuss the renovations. At that time, the architect advised the defendants that existing law required access for disabled individuals and that providing such access would not be financially burdensome. Nevertheless, the renovations which defendants undertook did not include providing access for the disabled.

A. *Americans with Disabilities Act Claim*

Plaintiffs have stated a claim of discrimination under Title II of the ADA. Title II of the ADA prohibits discrimination in public services and provides in relevant part that:

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by such entity.

42 U.S.C. at §12132. A "public entity" includes "any department, agency, special purpose district, or other instrumentality of a State or States or local government." *Id.* at §12131(1)(B). Defendants do not suggest that they fall outside the definition of "public entity."

Defendants' sole basis for dismissal is the plaintiffs' failure to exhaust their administrative remedies. However, defendants cite no caselaw to support the proposition that such exhaustion is required prior to filing a suit in federal court under Title II of the ADA. Rather, defendants rely exclusively on the enforcement mechanism in place for actions brought pursuant to Title III of the ADA. Defendants are correct that §12188 makes the enforcement procedures of the Civil Rights Act of 1964, which provide for exhaustion of administrative remedies, applicable to actions brought under Title III of the ADA. However, the plaintiffs in the instant case do not allege a cause of action under Title III of the ADA and therefore §12188 is inapplicable. The relevant enforcement provision of Title

II, pursuant to which plaintiffs brought their claim, is §12133 and is distinguishable from §12188. See 42 U.S.C. at §12133. In fact, the cases that have addressed this issue uniformly have held that Title II of the ADA, unlike the other titles, does not require the exhaustion of administrative remedies.

In reaching this result, the courts that have addressed the issue have looked to the regulations promulgated by the Department of Justice ("DOJ") interpreting Title II of the ADA, 28 C.F.R. §35.101 et seq., to help clarify whether exhaustion of remedies is required under Title II in light of the statutory ambiguity. The DOJ regulations specifically provide that although federal agencies are available to hear claims under Title II of the ADA, plaintiffs are not required to file with the agencies prior to filing in federal court. The relevant language reads:

> The Act requires the Department of Justice to establish administrative procedures for resolution of complaints, but does not require complainants to exhaust these administrative remedies.... Because the Act does not require exhaustion of administrative remedies, the complainant may elect to proceed with a private suit at any time.

28 C.F.R. at §35.172. Additionally, a technical assistance manual designed by the DOJ to educate individuals about their rights under Title II of the ADA clearly states that there is no exhaustion of remedies requirement.

Accordingly, defendants' motion to dismiss the plaintiffs claim under the ADA is denied.

B. *Act 166 of the Commonwealth of Pennsylvania*

The plaintiffs have also asserted a claim pursuant to a Pennsylvania statute, 71 P.S. §1455.1 et seq. The statute at issue requires that certain buildings and facilities meet set standards to make them accessible by persons with physical handicaps.

Where a statute is unambiguous, there is no need for the court to engage in speculative interpretations. The statute at issue makes clear that an individual may not bring a civil action until an initial determination is made by the government agency responsible for processing complaints under the statute. The plaintiffs have not yet filed a complaint with the Department of Labor and Industry as required by the statute. Therefore, the defendants' motion to dismiss this claim is granted.

Problems

1. Had the *Bechtel* case not involved renovations, what would the school probably have been required to do with respect to making the stadium (and existing structure) accessible?

2. Is this decision consistent with the *Smith v. Robinson*, *supra* Section [B], analysis?

3. Should the school be required to eliminate programs in which students with mobility impairments cannot participate?

4. If the student in *Wolff* were deaf, rather than mobility-impaired, would the school be required to find a sign language interpreter who understood Spanish to assist in any translation by guides who speak Spanish, assuming that there is an English translator for the other students?

5. Under the ADA, would the school have an obligation to do more than it is currently doing to ensure a student's movement around the school building without such difficulty as occurred in *Wolff*? For example, if it is too expensive to install an elevator, should the classes be rescheduled so as to avoid having to climb stairs? Could the student be required to attend a school that had been built to be barrier free?

Notes

1. *Doe v. Belleville*, in the previous section, focuses on whether a child with HIV might be protected under statutes other than the IDEA. The excerpt does not really focus on what accommodations might be reasonable as applied to the facts in the case. In addition to students with

diseases such as HIV, students with health impairments such as asthma or diabetes also present questions as to the accommodations that might be required. These might include allowing students to carry medication as an exception to school-wide policies prohibiting this. There is not substantial guidance from the courts on this, and each case will be individualized. The *Pottgen* decision includes factors to be addressed in determining whether something is a reasonable accommodation. These factors will be applied by the courts in cases involving accommodations for health impairments.

2. *Use of IQ Tests for Placement Decisions:* Two major judicial decisions have addressed the use of IQ tests for placing children in special education classes. In *Parents in Action on Special Ed. (PASE) v. Hannon*, 506 F. Supp. 831 (N.D. Ill. 1980), the court allowed IQ tests to be used in Illinois, while a court in California struck them down in *Larry P. v. Riles*, 495 F. Supp. 926 (N.D. Cal. 1979), *aff'd*, 793 F.2d 969 (9th Cir. 1984), as being discriminatory. What is significant about these two cases is that in the *PASE* case, the use of IQ tests was only one of many factors used in placement decisions, while in *Larry P.*, it was the primary (and in some cases the only) basis for the placement decision. See LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW §2.32 (2012 and cumulative supplement).

In *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403 (11th Cir. 1985), the court addresses the procedures for placing children into special education in a number of school districts in Georgia. The plaintiffs had alleged that the use of achievement grouping in Georgia public schools was intended to achieve or resulted in racial segregation. The claim also alleged that black children in Georgia were being assigned to classes for children with intellectual disabilities in a discriminatory manner in violation of §504. The lower court found that the local school districts did not act intentionally or in bad faith in their classification, and this finding was upheld. The appellate court held, however, there was evidence of misclassification, although there was insufficient evidence to demonstrate a violation of §504. The court found a number of procedural violations of §504 and that some of the school districts had misinterpreted the state I.Q. score regulation. This case illustrates the importance of taking care in relying on standardized tests and the need to use many factors in classifying and placing children into special education.

See also Robert Garda, *The New IDEA: Shifting Educational Paradigms to Achieve Racial Equality in Special Education,* 56 ALA. L. REV. 1071 (Summer 2005).

3. The 2000 amendments to IDEA provided that students with learning disabilities could be tested for such disabilities using tests other than IQ type discrepancy tests. 20 U.S.C. §1414(b)(6)(A).

E. Section 1983 Actions and Students with Disabilities in Schools

Hypothetical Problem 7.8

Consider the facts about Helen, the deaf student from Hypothetical Problem 7.1. Helen has lost her dispute about placement at McKinley School. The parents have not been reimbursed for her private placement, and because of the cost, they have decided to send her for second grade to Lincoln School. She now must take the bus or have her parents drive her to school, which is challenging because of their work schedules. On the bus, other students tease her about her hearing impairment. The bus driver is aware of this, but does nothing. The parents learn about this from Helen and ask the school district special education director to stop it. The harassment continues, and after several days, Helen jumps off of the bus and into oncoming traffic and is hit by a car, and suffers broken bones and an extensive hospitalization, although she ultimately recovers. What are the remedies available to the parents in this situation?

What if they are concerned that Helen is dropped at the bus stop a block from her apartment entrance and no one knows whether she gets to the apartment building or to her own apartment? What

obligations does the school have in this case?

Manecke v. School Board

762 F.2d 912 (11th Cir. 1985)

FAY, CIRCUIT JUDGE:

I. *Factual Background*

Lauren Manecke had suffered brain damage at birth. As a result, she was epileptic and also exhibited other mental and emotional handicaps. Despite these problems, Lauren had been enrolled in "regular" school programs supplemented with special education classes until February, 1979, when her then current high school placement came to a halt.

Lauren left the high school with a thirty-two year old man with whom she was having a sexual relationship. She stayed with him away from her home for six days. Both before and after this episode, Lauren acted in a sexually provocative manner. It seems she employed sex as a means of asserting her independence and maturity.

When Lauren returned from her stay with the older man, her parents withdrew her from the high school she was attending and enrolled her in a small private school. Mrs. Manecke thereafter requested that the Board enroll Lauren in a county special education school. The Board agreed, and Lauren commenced attending classes at the Nina Harris School for exceptional children ("Nina Harris") in September, 1979. Lauren was evaluated and classified as emotionally handicapped and physically impaired. Before she began at Nina Harris, an individual education program ("IEP") for Lauren was developed by the Board in conjunction with her parents. Lauren seemed to be adjusting well to Nina Harris: she was making adequate academic progress, appeared well-behaved, and participated in some extracurricular social activities. The quality of Lauren's homelife, however, was rapidly deteriorating. She fought incessantly with family members, especially her mother and younger brother.

On December 19, 1979, Mrs. Manecke wrote Dr. Howard J. Hinesley, the Board's Assistant Superintendent for Exceptional Student Education. In a two page typewritten letter, Mrs. Manecke expressed her concern over Lauren's emotionally charged behavior, and the Maneckes' desire to place Lauren in an out-of-state residential facility. Mrs. Manecke attached to the typewritten letter a handwritten note requesting a due process hearing on the issue of Lauren's appropriate educational placement.

Dr. Hinesley forwarded copies of the letter and request for due process hearing to the school district's attorney. Dr. Hinesley assumed that the attorney's office would take any necessary action relative to the due process hearing.

Mrs. Manecke sent a copy of her December 19, 1979, correspondence to the Florida Commission of Education. In response, Diane Wells, an administrator with that agency, instructed Dr. Hinesley to mediate the dispute between the Board and the Maneckes; he was specifically advised to avoid resort to more formal procedures. The Maneckes, Dr. Hinesley and Mr. Delp met on February 13, 1980. The Maneckes stated that because of Lauren's intractability, they believed residential placement was necessary. Dr. Hinesley and Mr. Delp, however, expressed their belief that the Board was providing Lauren with an appropriate education at Nina Harris. Consequently, it was their position that the expense of residential placement need not be borne by the school board.

The Maneckes suggested that Dr. Hinesley and Mr. Delp meet with Dr. Andriola, Lauren's treating neurologist, and Dr. John Mann, an adolescent psychologist. Dr. Hinesley acceded to this request, and, on March 12, 1980, the meeting was held. The Maneckes asked if this meeting was their due process hearing and if their attorney should be present. Dr. Hinesley responded that the meeting was merely an informal effort to resolve the dispute over Lauren's placement. Although Dr. Hinesley did not

waiver in his belief that the Board was not required to pay for Lauren's placement in a residential facility, he did end the meeting by promising to furnish the Maneckes with information concerning sundry residential facilities.

Immediately after this meeting, the Maneckes were contacted by the Devereux School for exceptional children. They were told that Devereux, which is located in Texas, had a rare residential placement vacancy which Lauren could fill if she were promptly enrolled. The Maneckes agreed to Devereux's terms and withdrew Lauren from Nina Harris on March 21, 1980. The Board was not informed why Lauren was removed from school. The Maneckes then enrolled Lauren in Devereux.

Mrs. Manecke later complained to the United States Office of Civil Rights (OCR) that the Board unlawfully refused to place Lauren in a residential facility because of her age. As a result of that agency's mediation efforts, the Board, in July of 1980, sent Lauren's parents a standard request for due process hearing form. Although the Maneckes received it, it was never returned to the Board. The OCR dropped the age discrimination charge in December, 1980. The OCR did, however, order the Board to hold a due process hearing. The hearing, scheduled for January 26, 1981, was cancelled by the Maneckes.

II. *Procedural History*

The gravamen of plaintiffs' two-count amended complaint, brought under §504 of the Rehabilitation Act, 29 U.S.C. §794, and the Civil Rights Act of 1871, 42 U.S.C. §1983, was that the board's failure to provide them with a due process hearing on the issue of Lauren's educational placement within 45 days of Mrs. Manecke's December 19, 1979 request, see 34 C.F.R. §300.512, necessitated their unilateral transfer of Lauren to a residential facility. The relief they sought was an order requiring the Board to reimburse them for Lauren's tuition at Devereux and other expenses.

[Lower court proceedings omitted.]

III. *The EHA*

The EHA provides public school districts with federal funding for the education of handicapped children so long as the "[s]tate has in effect a policy that assures all handicapped children the right to a free appropriate public education." ... The EHA also contains a detailed procedural component. Any state or local agency receiving federal assistance under the Act must, in accordance with the requirements of 20 U.S.C. §1415, establish and maintain procedural safeguards. Among these is the requirement that parents be given the opportunity to contest virtually any matter concerning the educational placement of the handicapped child, or the provision of a "free appropriate public education" to such child. Additionally, if the parents of a handicapped child decide to bring a complaint, they must be given an "impartial due process hearing." Federal regulations mandate that a hearing must be held and a final decision must be reached not later than 45 days after the public agency receives a request for a hearing. Upon completion of the administrative process, any party dissatisfied with the administrative final decision may "bring a civil action with respect to the complaint" in either state or federal court.

The Maneckes, relying on *Smith v. Robinson*, 104 S. Ct. 3457 (1984), argue that the district court erroneously dismissed both counts of their amended complaint. They essentially contend that in the unique circumstances of this case, the EHA is not the exclusive avenue through which to seek relief. The Board, of course, disagrees. First, the Board insists that *Smith* requires us to affirm the district court's dismissal of the §1983 count, albeit for reasons not articulated by the trial court. Second, the Board contends that the §504 count failed to state a claim because (1) the amended complaint alleges no discrimination; (2) money damages are not available under that statute; and (3) *Smith* holds that the EHA is the sole remedy for handicapped children seeking a free appropriate public education. After carefully considering the arguments of both sides, we conclude that the district court erred in dismissing the §1983 claim but correctly dismissed the §504 claim.

IV.

(a) *§1983 and the EHA*

The plaintiffs and the Board read *Smith* as supporting their respective positions on §1983. A review of that case is therefore appropriate.

In *Smith* the plaintiffs brought suit under the EHA, §504 of the Rehabilitation Act, and §1983. [Discussion of lower court proceedings omitted.]

The Supreme Court affirmed the court of appeals, holding that the plaintiffs were not entitled to attorney's fees under either §1988 or §505 of the Rehabilitation Act. The Court arrived at this conclusion after examining the law on awarding attorney's fees on the basis of substantial, though unaddressed, constitutional claims, and the substantive aspects and detailed procedural requirements of the EHA, a statutory scheme which does not mention attorney's fees.

The Court, after noting that the plaintiffs' unaddressed due process and equal protection claims, [brought] under §1983, were virtually identical to the EHA claims, undertook a separate analysis of these independent constitutional claims. The Court recognized "the comprehensive nature of the procedures and guarantees set out in the EHA" as well as the intent of Congress "to place on local and state educational agencies the primary responsibility for developing a plan to accommodate the needs of each individual handicapped child." The court also noted that in enacting the EHA, Congress attempted to accommodate the equal protection claims of handicapped children. With these factors in mind, the Court concluded that where a handicapped child asserts a right to a free appropriate public education, and the EHA is available, a claim based either on the EHA or on the Equal Protection Clause may be brought only under the EHA. Hence, the plaintiffs were not entitled to fees on the basis of their §1983 equal protection claims.

The Court was more circumspect in the way it handled the unaddressed due process claim. The Court raised but did not decide the issue of "whether the procedural safeguards set out in the EHA manifest Congress' intent to preclude resort to §1983 on a due process challenge." It was not necessary to resolve this threshold issue because the due process claim simply had no bearing on the substantive issue of the lawsuit—which agency was required to pay for the education of the minor handicapped plaintiff—and therefore could not support the award of fees.

The Board urges that *Smith* supports the district court's dismissal of the §1983 claim. The Board, however, reads that decision more broadly than we do, and totally ignores the fact that the Court in *Smith*, admittedly in dicta, took pains to distinguish a due process claim from an equal protection claim.

Smith suggests that not all §1983 claims are to be treated alike. Indeed, the Court expressly noted that the issue raised by an independent due process challenge "is not the same as that presented by a substantive equal protection claim to a free appropriate public education." Further, "unlike an independent equal protection claim, maintenance of an independent due process challenge to state procedures would not be inconsistent with the EHA's comprehensive scheme." Finally, speaking specifically to the issue of attorney's fees, the Court noted that Congress has not indicated "that agencies should be exempt from a fee award where plaintiffs have had to resort to judicial relief to force the agencies to provide them the process they were constitutionally due."

In our view, the approach the Supreme Court employed in *Smith* counsels holding that where, as here, a party is denied due process by effectively being denied access to "the carefully tailored administrative and judicial mechanism" found in the EHA, that party may seek relief under §1983. The thrust of the Court's equal protection claim holding is unmistakable: Congress enacted the EHA, with its panoply of procedures, to clarify and make enforceable the handicapped child's right to a free appropriate public education. This right is grounded on the Equal Protection Clause. Accordingly, a plaintiff asserting that equal protection right as a basis for relief understandably should do so via the

EHA, with all that that implies. This rationale, however, breaks down in the facts of this case.

The EHA "establishes an enforceable substantive right to a free appropriate public education." Moreover, Congress intended "the carefully tailored administrative and judicial mechanism" set forth in the EHA to be the vehicle to enforce that right. The plain language of the statute itself, however, suggests that Congress must not have intended the EHA to be the exclusive method to redress denial of access to that very mechanism.

The EHA provides that "[a]ny party aggrieved by the findings and decision" resulting from the administrative proceeding may bring an action with respect to the complaint presented initially to educational authorities. Additionally, the court, when reviewing the administrative proceedings, "shall receive the records of the administrative proceedings, shall hear additional evidence [upon request], and, basing its decision on the preponderance of the evidence, shall grant ... relief." We believe that this language presupposes the existence of an administrative hearing or record. Moreover, the Supreme Court has instructed that this statutory language "is by no means an invitation to the [reviewing] courts to substitute their own notions of sound educational policy for those of school authorities." Rather, the state administrative proceedings are to be given "due weight," mainly because "[t]he primary responsibility for formulating the education to be accorded a handicapped child ... was left by the Act to state and local educational agencies in cooperation with the parents ... of the child." The Court therefore also has made it clear that the principal office of a court proceeding under the EHA is to review the administrative determinations contemplated by the Act. With these principles in mind, we conclude that where, as here, the local educational agency deprives a handicapped child of due process by effectively denying that child access to the heart of the EHA administrative machinery, the impartial due process hearing, an action may be brought under §1983.

Post-*Smith* case law supports our conclusion. [Discussion of caselaw omitted.]

We initially noted that in *Smith* the Supreme Court did not resolve the §1983—EHA/exclusivity issue when a due process claim is involved. Rather than simply holding that a due process challenge could not be maintained apart from the EHA, we assumed that the conclusory allegations in the complaint that the defendants violated the Fourteenth Amendment by failing to comply with the procedural provisions of the EHA were sufficient to state a constitutional claim. We held that summary judgment for the defendants was proper, however, because a review of the record revealed that the defendants in no way contravened the procedural requirements of the EHA. That review would have been unnecessary had we not recognized that a due process challenge, at least in certain circumstances, could be maintained outside of the EHA.

In short, based on the language of the EHA itself, the *Smith* decision, and post-*Smith* case-law, we hold that the district court erroneously dismissed plaintiffs' §1983 due process claim. We accordingly remand on that issue.

[The court's holding that the §504 claim should be dismissed is omitted. The reason for the holding is that unlike EHA, §504 does not require affirmative action.]

V. *Remaining Issues*

[The court's discussion of whether the court is bound by the administrative record in reaching its decision or whether it can consider new information is omitted. The court held that usually decisions should be confined to reviewing administrative proceedings.]

VI. *Damages*

Given its rulings, the district court never reached the issue of reimbursement. Since a remand of the §1983 claim is indicated, we make the following observations which the district court should find useful in determining the amount of reimbursement to be ordered, if any is to be ordered at all. We hasten to add that in making these comments, we do not intend to limit the trial court's inquiry on the

damages issue.

We are not remanding this case for an entry of judgment for a sum certain. Rather, on remand the district court's task is to determine the damages that flow from the due process violation. Although the record before us has not been developed to any great extent on the damages issue, there are suggestions in it that cause us some concern.

Perhaps more important is the Maneckes' refusal to agree to a due process hearing after Lauren was removed from Nina Harris and enrolled in Devereux. The Maneckes received a form in July, 1980, which if completed, would serve as a formal request for a due process hearing. The form was not returned to the Board, and a hearing accordingly was not scheduled. Additionally, the Board, in consultation with counsel for the Maneckes, scheduled a due process hearing for January 26, 1981. The hearing was cancelled at the Maneckes' request. As we view the case, there is a serious question that damages, if there were any, ceased accruing when the Board ceased violating the Maneckes' due process rights. If the facts conform to the Board's version, the Board may not be liable for any reimbursement.

VII. *Conclusion*

We hold that the district court erred when it dismissed plaintiffs' §1983 claim alleging a deprivation of due process by virtue of the Board's failure to provide them with a timely impartial due process hearing. Lest our holding be broadly construed, we now emphasize its narrowness. We do not hold that §1983 may be employed whenever a procedural deprivation occurs in the EHA context. We simply conclude that, under the facts of the instant case, the plaintiffs properly invoked §1983. We affirm the district court's dismissal of the §504 claim, though for reasons not cited by the district court. We further hold that because of the district court's §1983 ruling, it improvidently addressed the EHA claim. On remand, the district court shall determine what damages, if any, the plaintiffs sustained as a result of the Board's deprivation of their right to due process.

Affirmed in part, *Reversed* in part, and *Remanded* for proceedings consistent with this opinion.

Problems

1. What §1983 liability would be likely if a substitute teacher were not advised about the need to supervise a special education student, and the student was injured as a result? *Collins v. School Bd.*, 471 So. 2d 560 (Fla. Dist. Ct. App. 1985). See also *Greider v. Shawnee Mission Unified Sch. Dist.*, 710 F. Supp. 296 (D. Kan. 1989).

2. What should the obligation be where the school refuses to administer prescription medicine in excess of PDR recommendations? In *DeBord v. Board of Ed.*, 126 F.3d 1102 (8th Cir. 1997), the school refused to administer the medication, but offered to alter the student's schedule to permit home administration or to allow administration by the parent. The court held that this was a reasonable accommodation. What is the likely concern of the school in a case where such a medication regime is requested?

Notes

1. *Failure to Supervise:* There have been a number of cases involving failures to supervise students with disabilities. The facts in these cases have included special education students who were sexually assaulted or physically injured by other students, special education students who were injured by equipment because they did not appreciate the dangers, and other circumstances. The injuries include not only physical injuries but also emotional damage in some cases. See LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW §2.57 (2014 cumulative edition).

2. *Special Education Malpractice:* In addition to denial of access to due process procedures and failure to supervise, §1983 has been used in a number of other situations as a theory of liability. The

results have varied, and as *Lopez v. Houston Indep. Sch. Dist.*, 817 F.2d 351 (5th Cir. 1987), illustrates, this is a difficult area of law because of the conflicting standards relating to immunity, the degree of negligence necessary to give rise to a constitutional tort action under §1983, and other reasons. See LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW §§2.56, 2.57 (2012 and cumulative supplement). It is quite unusual for courts to award damages in any case involving special education.

See also Mark Weber, *Disability Harassment in Public Schools,* 43WM. & MARY L. REV. 1079 (2002) (reform is necessary in the area of disability harassment to protect students and effect meaningful change); Comment, *Educational Malpractice—Does the Cause of Action Exist?*, 49 MONT. L. REV. 140 (1988); Donald Henderson, *Negligent Liability Suits Emanating from the Failure to Provide Adequate Supervision: A Critical Issue for Teachers and School Boards*, 16 J.L. & EDUC. 435 (1987); Laura Rothstein, *Accountability for Professional Misconduct in Providing Education to Handicapped Children*, 14 J.L. & EDUC. 349 (1985).

F. Enforcement

One of the critical aspects of the IDEA is the procedural safeguards that are required in order for states to receive funding under the Act. The safeguards apply whenever a child is identified, evaluated, or placed initially; when a change is proposed; or where the educational agency refuses to identify, evaluate, or place the child.

The key elements of the procedures include notice and right to a hearing if there is a disagreement about the child's identification, evaluation, or placement. The hearing is to be an impartial hearing, and the parents have a right to have representation at the hearing. The educational agency is not required to pay for the representation unless the parents are ultimately successful in the proceeding. This right to attorneys' fees and costs is a result of a 1986 amendment to the IDEA following the *Smith v. Robinson* decision excerpted at the beginning of the chapter, *supra* Section [A].

The 2004 IDEA amendments provided that attorneys' fees could be obtained against parents in cases involving litigation that is frivolous, unreasonable or without foundation or for an improper purpose. 20 U.S.C. §1415(8)(3)(B).

The rights related to the hearing include a right to a record of the hearing and written findings of fact and decisions. The parents have a right to have the child present at the hearing, and it is the decision of the parents whether the hearing should be open or closed. The formality of the hearing, such as whether rules of evidence apply, depends on the state.

If either party disagrees with the decision of the hearing officer, a review may be requested of a state administrative agency. If there is still disagreement with the agency's decision, either party may bring an action in a state court with competent jurisdiction or in federal court.

The courts have been consistent and clear that parties must exhaust administrative remedies unless it would be futile to do so. Only on rare occasions have factual circumstances justified a finding of futility.

The procedural safeguards also include specifications about deadlines for bringing actions at various levels, rights related to access to a student's records, and the status of the child during the resolution. A number of procedural issues have been subject to judicial attention. These include whether a hearing officer is impartial in certain cases, whether attorneys' fees are available for prevailing at the administrative level, and whether exhaustion is required in a particular case.

The remedies available are generally equitable in nature. The parents would be likely to obtain injunctive relief ordering a placement or a provision of services, for example. Reimbursement is clearly an available remedy in appropriate cases, but the courts are not clear about compensatory

education as a remedy in all jurisdictions. In a few cases, courts have recognized the availability of damages, but the Supreme Court has yet to rule on whether damages are available under the IDEA.

Where the claim is a pure discrimination claim, rather than a claim relating to special education, enforcement occurs through other avenues. Claims involving matters such as a child with HIV who is excluded from school may be brought directly to court alleging violation of Section 504 of the Rehabilitation Act and/or a violation of Title II or Title III of the ADA (depending on whether the school is public or private). In these cases, courts have been much clearer about the availability of damages for Section 504 and Title II cases, although punitive damages are not recoverable against state and local governmental agencies.

Complaints about discrimination under Section 504 or the ADA may also be made to the Department of Education. There is an administrative investigation procedure which follows in appropriate cases, but the complainant is not a party to any action taken, although the party may benefit from the Department of Education's investigation. In addition to injunctive relief, an administrative investigation might result in the termination of funds.

States and local educational agencies are not immune from actions under the IDEA, Section 504, or the ADA.

As noted in the previous material, courts are quite deferential to educational agencies regarding educational programming. In 2005, the Supreme Court gave guidance as to which party bears the burden of proof in administrative proceedings regarding the appropriate placement under IDEA. The Court held that "Absent some reason to believe that Congress intended otherwise ... we will conclude that the burden of persuasion lies where it usually falls, upon the party seeking relief.... The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief." *Schaffer v. Weast*, 126 S. Ct. 528 (2005). This rule is to apply with equal effect to school districts and to parents. Whichever party seeks relief bears the burden of persuasion.

Note

For a detailed discussion and case citation on issues related to enforcement, see LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW §§2.31–2.52, 2.55–2.57 (2012 and cumulative supplement). See also 34 C.F.R. §300.530–.543.

G. Summary

The origins of ensuring that students with disabilities were protected against discrimination and later ensuring that they received appropriate education are grounded in an extension of the principles of *Brown v. Board of Education*. In that 1954 Supreme Court decision, the Court held that separate but equal is not constitutional as applied to schools segregated by race. Similar principles were then used in a comprehensive advocacy effort throughout the country in cases brought within each state challenging the exclusion and segregation of students with disabilities, often those with severe physical or behavioral challenges. In 1971–1972, two lower court cases culminated in resolutions that were a catalyst for a Congressional decision to support a comprehensive set of supports to ensure that states had the funding to provide such services (through significant funding support from the Department of Education) and to support consistency from state to state. It was deemed critical to the federal protection that individuals not only had substantive rights, but also that these rights could be enforced by detailed procedural safeguards.

The result was the 1975 enactment of the Education for All Handicapped Children Act (later changed to the Individuals with Disabilities Education Act). Some of the key principles in the statute and judicial interpretations of the statute are found in this chapter. The EAHCA/IDEA was essential to the benefits of other federal legislation affecting higher education and employment, because it ensured

much greater ability for these individuals to be qualified to meet the requirements of college and work.

Section 504 of the Rehabilitation Act of 1973 was enacted before the 1975 special education statute, but it had little initial impact on public education. In fact, because it was less well known and regulations took some time to promulgate, it was not until 1984 that the interrelationship of Section 504 and the IDEA became a major issue. As noted in the Supreme Court decision in *Smith v. Robinson,* the benefits of Section 504 were more limited in certain respects, and students with disabilities would generally only find protection under IDEA. Section 504, however, has come to have some importance in areas such as exclusion of students with HIV, some architectural barrier issues, and participation in sports, athletics and extracurricular activities. It is probable that additional attention may occur in fact settings such as bringing support animals into the classroom.

It is notable that the Supreme Court has focused specifically on special education as an issue in thirteen decisions. Hundreds of lower court decisions have addressed these issues as well. Congress has responded to some of the Supreme Court decisions by amending the statute to add the remedy of attorney's fees and to address the issue of immunity. IDEA amendments have also responded to some of the issues raised in lower courts. Throughout over four decades since its enactment, the key principles of the IDEA have remained the same.

Issues that would benefit from some policy attention include discipline, remedies for serious misconduct by educational agencies and their employees, and the imbalance in access to protection for families whose knowledge and resources impair their ability to gain access to the protections of special education protections. The relationship of No Child Left Behind, a statute passed with the best of intentions, to special education remains problematic. The impact of school choice is not addressed in this textbook and is an issue that should be carefully considered by policymakers at all levels.

Scarce resources and Congressional gridlock make it unlikely that there will be substantial changes in this area in the foreseeable future. While the general consensus is that overall special education policy strikes a reasonable balance in terms of rights and remedies, ensuring that all eligible students have access to these rights is critical.

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1. In October 2010, “Rosa's Law” changed the term *mentally retarded* to *intellectually disabled* in all federal statutes and regulations. P.L. No. 111-256 (2010). This term should be replaced throughout this casebook as appropriate.

1. He needs assistance with urinary bladder catheterization once a day, the suctioning of his tracheotomy tube as needed, but at least once every six hours, with food and drink at lunchtime, in getting into a reclining position for five minutes of each hour, and ambu bagging occasionally as needed when the ventilator is checked for proper functioning. He also needs assistance from someone familiar with his ventilator in the event there is a malfunction or electrical problem, and someone who can perform emergency procedures in the event he experiences autonomic hyperreflexia. [Explanation of this condition omitted.]

3. Itinerant specialists travel to different schools, offering specialized services to students at those schools for a part of each day.

4. Other accommodations may exist when a younger student realizes that he will not be able to meet the age requirement when he is a senior. For example, MSHSAA allows eighth grade students to participate on a high school team if they will be ineligible as a high school senior. This accommodation permits students to play for four years at the high school level.