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LEGAL ASPECTS OF SPECIAL EDUCATION WITH RESPECT TO PROGRAM INCLUSION OR EXCLUSION BASED SOLELY ON DISABILITIES

by

Nicole Martin Pope

A Dissertation Submitted to
the Faculty of The Graduate School at
The University of North Carolina at Greensboro
in Partial Fulfillment
of the Requirements for the Degree
Doctor of Education

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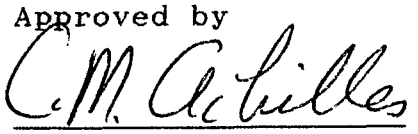

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APPROVAL PAGE

This dissertation has been approved by the following committee of the Faculty of the Graduate School at The University of North Carolina at Greensboro.

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With the advent of the civil rights movement in America in the 1960's, equality of education for all students has been in the forefront of judicial decisions. With the passage of numerous public laws, Congress has provided definitions of the rights of individuals with disabilities and guarantees of due process. However, by not clearly defining these rights, Congress left clarification to the courts and created problems for educators and administrators.

The procedure used in this study involved analysis of judicial decisions, case law and federal and selected state statutes. Primary sources were state and federal court decisions involving exceptional children and children with disabilities. Students attended either elementary or secondary public schools; no cases involving private schools were included. No cases involving public or private community college, college or university students were reviewed.

Based on this analysis, the following conclusions were drawn:

(1) Parents must be given a copy of the due process procedures and have these rights explained.

(2) The Individual Education Program (IEP) must be developed appropriately with full parental participation and a student must receive some education-

al benefits from the services.

(3) If an IEP is inappropriate or not implemented correctly, a free appropriate public education (FAPE) has not been provided.

(4) A student must be educated in the least restrictive environment (LRE) where appropriate.

(5) Parents must exhaust all administrative remedies before they take legal action.

(6) The Individuals with Disabilities Education Act (IDEA) is the exclusive avenue for legal action involving FAPE for a child with disabilities.

(7) If there is any pending due process procedure, a student's placement can <u>not</u> be changed.

(8) Courts have not ruled on different methods of education, leaving educational methods to the professionals.

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Preface

The topic of this dissertation is very important to me because I am a middle-aged adult with a learning disability. All three of my natural children are identified as exceptional. All four of my step-children are exceptional on one end of the scale or the other and three of my seven step-grandchildren are classified as exceptional. Yet, my disability wasn't diagnosed until I was 38 years old and it was an accident at that.

Few knew what a learning disability (LD) was when I entered kindergarten in 1951. In addition to being LD, I am severely red-green colorblind. Needless to say, the primary curriculum of the day was a horror for me. Reading was an exercise in futility and frustration. Frankly, I despised reading and that stupid "bluebird" reading group. Everyone knew that the "bluebirds" were "slow" or "just plain stupid." This was the beginning of a life-long hidden stigma. It was also the beginning of the art of deception at which I became very adept! "What's the matter? Can't you . . ." struck cold fear in my heart because I usually couldn't do whatever they were asking about. So I learned to hide how dumb I felt I was.

I would have done anything in the world to get out of that "bluebird" group. So, I memorized the pictures on each

page of the "Dick, Sally, Jane and Spot" books. I could "read" every word on the page if I could see the pictures! But the words didn't make any sense. I finally got out of the "bluebirds," but now I had another set of books to learn to "read." No one found out I couldn't read that year or the next. But I didn't like myself very much because I was lying to everyone, including my parents. I didn't want to be stupid or a "retard" as the slow children were called. I just wanted to fit in like any "normal" kid. My father used to say that I was like a chameleon and blended in anywhere.

Spelling wasn't much better. Phonics made absolutely no sense because I could not distinguish the different sounds. The sounds made no sense to me. I could memorize a word long enough to make 100 on the spelling test, but don't ask me to spell it the next week. The review lessons were an absolute horror because I would have to learn each word all over again; I just couldn't memorize all those words again. Much later, my mother would ask me if I couldn't hear the sounds the letters make; the words sing. No, I couldn't. My reaction to my mother was something like "I can't hear the sounds." I guess that I am "tone deaf" when it comes to phonics.

Math on the other hand was my forte, but girls weren't supposed to be very good at math. So I got no encouragement from my teachers to pursue it. Yet, my parents believed in

me and encouraged my interest in mathematics. By the fifth grade, my father had taught me to use a slide rule to do all my multiplication problems and was explaining interpolation to me. I was so proud that I could actually do something the other students couldn't that I took my slide rule to class. I could even do logarithms and understood them. So what was my teacher's reaction? She sent me to the principal for cheating on my homework. When my father arrived at school, he and the principal decided that it would be best if I kept my slide rule at home. I could use it in junior high school. My math grades began to suffer when "word problems" became more complicated. I could work any of them if I could read them, but I couldn't always read them.

My father tried to make me feel better once just after report cards came out. He sat me down and told me that "You aren't quite as smart as your brothers and sisters. Things take you a little longer, but you can do anything you want to do if you just put your mind to it." I know in my heart that my father was trying to help me, but I translated what he said to mean I was not very intelligent. I have seven siblings and I was convinced that I was the "dummy" in the family.

Teachers don't seem to realize the impact they have on their young students. I still remember comments made to me by my elementary school teachers. I have more than once

wanted to find three particular teachers and tell them what dispiriting repercussions their insensitive, careless remarks had on my life. Their impact was very negative and harmful in my case. I suffered from a subterranean self-image until I was almost 40 years old.

Forty years ago, my third-grade teacher, whose name I still can't spell, told me that I could be a good student if I just tried a little harder -- after I had spent hours and hours working on a math project researching mathematicians and what they had contributed to math. She said my spelling was atrocious and my handwriting worse. My mother had corrected my rough draft, but I couldn't get it from the rough draft to the finished paper. I just couldn't copy it correctly; I transposed letters, left out words and punctuation marks. I couldn't try any harder. I didn't know how to try any harder. I was already giving 150 percent. Did other kids work this hard? I didn't think so. My brothers and sisters didn't spend as much time on their homework as I did and their grades were much better. I had to be weird or maybe I really *was* retarded.

I finally did learn to read, but not the way other children learned. To read, I had to memorize each and every word, how each looked and what the shape of each word was. I would know a word one day and not the next. If I can get

a word into my long-term memory, I usually have it for life (not that I can spell it). I just have to figure out different ways to accomplish this. I am an extremely slow reader, but I only have to read something once. I average 95-98% retention over time.

One educator in my life jerked me up short and out of the "retarded" mind set. She was a guidance counselor in my high school. She called me in to discuss my first six week's grades in my sophomore year, my first year at the high school. I politely explained to her that I was frankly doing the best that I could, but what did she expect anyway because I wasn't very bright. Her reaction changed my life. She said "I wish half of the students in this school were that 'retarded'." She went on to explain that my I.Q. was in the top one percent of students my age and there was obviously something else causing me problems. She never told me what my I.Q. was and I probably wouldn't have understood the significance at that stage of my life. I actually didn't want to know what it was anyway. All I truly needed to know was that she believed in me and she was an educator who was supposed to know everything. I honestly didn't believe her or what she said about how bright I was. But I did want to believe that there was hope and maybe, just maybe, I wasn't stupid or retarded after all.

I began to look at who I was and how I did learn things. I began to analyze when I could study the best. I found that it was when it was quiet so I'd go to bed very early and get up at 1:30 in the morning and study until it was time to go to school. I would also walk to school so I could drink my coffee on the way, which helped to settle me down (caffeine always is good for the hyperactive), and go over my homework in my head.

Everyone with a disability learns to cope somehow - I used my mouth. Also, I was a lucky guesser on standardized tests. I became a very verbal person--I certainly couldn't write. If I had a choice to do a written report or an oral presentation in front of the class, I'd pick the presentation every time. I became a very adept story teller. I never read to my students in all the years I taught school. I would paraphrase or summarize or memorize, but I never read to them. And they loved it.

I am an excellent resource teacher. I can recognize my problems in others and teach them the way I have to learn. Guess what? It works! I have walked a mile in their shoes and understand all of the different problems and feelings they are facing. I still have former students write or call me for help and I haven't taught in the public schools for over 12 years.

The other motivating reason to select this topic for my dissertation is because I have a second and third generation of children with disabilities going through the public school system. The struggle has gotten somewhat better and a little easier. Now there are laws to protect and provide for these children. But the human nature hasn't changed that much. Most teachers react from lack of knowledge or inexperience.

My son, Craig, who is now 22 years old, was one of the reasons I went back to school to work on a Masters degree in special education. From the time he was very little it was apparent to me that he had some major difficulties that would cause him problems in school. Craig talked to himself all the time. His attention span was very short. He was busy and active all the time with a variety of things. He loved music.

When Craig entered kindergarten, his teacher said he was "very bright," but by the end of the first grade, this opinion was beginning to change. Craig was having trouble with writing and learning to read. His printing was illegible at best.

The second grade was a continuation of the downhill slide for Craig. He was caught "cheating" in reading circle. He was trying to see the teacher's manual that was on her lap to get the correct answer because he couldn't read

the question. I couldn't get the other "professionals" to see that he had a problem. (I still hadn't been diagnosed as having a learning disability.) Craig was tested by the school contract psychologist at the end of the second grade. I was told by that psychologist that I was looking for skeletons in the closet because I taught L.D. children and I should just accept the fact that he wouldn't do very well in school because not every child is an Einstein. Does this sound familiar? Remember, this second trip through the public school system began in 1978 when Craig was six-years-old. As far as I was concerned, not a lot of progress had been made in the field of education in 27 years and I was an educator. I frankly refused to accept this diagnosis of the child or of the situation. This sounded too familiar.

Craig had repeated the third grade and made some progress that year. He changed schools and school systems in the fourth grade. We paid tuition for him to attend another public school out of our district that had a much better program for students having difficulty and for exceptional children. By the time Craig was ten, he was dramatically losing ground at school and in the self-esteem department. He still hadn't been identified as having any problems other than some disruptive behavior in the classroom. We worked every night on the same material the teacher had covered that day to keep Craig at least even in school. He

could remember anything he heard so I re-read his assignments to him. He could answer the questions in class, but had trouble taking the tests. When I told him he was a very smart person, he would reply "You have to say that because you are my mother, but I'm really a dummy or I could do this work!" It was time to have an independent evaluation done. This time I had him evaluated by a private psychologist, one I had worked with professionally. Now I had some positive input into the evaluation of my son. I wasn't disregarded as an over-reacting parent with a "little" knowledge, but treated as a concerned parent and a professional.

The test results were as I had expected, but because of Craig's high I.Q. it was difficult to determine exactly what his problem was. Several tests that the school system didn't routinely give or give at all had to be administered. Finally a more complete picture began to emerge. Craig did have a learning disability and the discrepancy between his potential and his actual scholastic achievement levels was increasing at an alarming rate. He was literally drowning at school. Something had to be done quickly or he would be labeled incorrectly, if at all and lost in the educational maze!

In the meantime, we requested that Craig attend a different school within that school system because it was closer to our home. This request was granted. When I took

the private evaluation results to the new school-based committee, Craig was immediately placed in a resource program for LD students. He was now in the fifth grade. Craig had a long way to go to learn to deal with his disability.

At this same time, because of a series of accidents, I found out for sure what I had long suspected, that I also have a learning disability. I had recently earned a MA in special education majoring in the Gifted/Talented area specializing in math and science. I had quit teaching in the public schools for a multitude of reasons, including being verbally reprimanded by a soon-to-retire principal for my unorthodox teaching methods even though the results were extraordinary, positive, and lasting, and being unable to fight for my child and teach in a school system at the same time. A friend of mine was working on her MA in psychology and needed to give the Wechsler Adult Intelligence Scale (WAIS) to someone in *my* age group. She kept after me for several days until I finally acquiesced, but only with the conditions that no one else except her professor was to see the results and I was to get a copy of the "report" no matter what it said. I was frankly afraid that the test would prove that I was a chronic over-achiever and not as bright as the rest of the world finally perceived me or as I hoped I was.

When the testing was finished and scored and the report written, she showed me the profile on the front of the WAIS. I was shocked. I immediately got out a copy of Craig's current profile. They were almost carbon copies. Where I scored exceedingly high, so did he. My weaknesses were also his. The fact that these test results proved what I had suspected for a very long time lifted a big weight off my shoulders! I really was a smart person with worth and value. I wasn't retarded or lazy, I just learned differently and at a different rate. This was the first time, in my mind and soul, that it was O.K. to be me!

Even with all the support at home, Craig was still suffering from these same feelings. By the eleventh grade, Craig had had enough of school, of teachers who didn't understand or seem to care, and of the system in general. He was never considered for academically gifted classes because of his grades (and behavior by now) even though his I.Q. was far above that necessary to be placed. He wouldn't get resource help because of the stigma that was attached to "the dummy" hall and he was becoming a definite discipline problem at school. He had quit school once, but I convinced him to return with some modification being made in the regular classroom program.

It wasn't until Craig was 17 years old that his "real" disability was discovered! Craig is almost completely an

auditory processor. The written word is very difficult if not impossible for him to comprehend. He can read most things, but he must hear the information to retain it. For this reason, he qualifies for recordings for the blind. This helped him considerably. But a lot of the psychological damage had already been done.

Craig's dejection, misery, and anger with public education are apparent in a research paper he wrote in tenth grade. The following quote is from that paper, titled "A Lesson in Life: The Gifted/LD Student (May, 1989)."

> The word "*frustration*" has been in my vocabulary since my first reading circle! . . . I will never "*outgrow*" my disability, but I will try to overcome it. My self-image is so poor in certain areas I would rather take a zero than get up in front of a class to give a speech or read a passage from a book. Until recently I have failed so many times before, even when I put forth my maximum effort. . . .
>
> From doing this research, I have found a lot of people, including teachers, do not know or understand the gifted/LD student. I have gained a different insight into myself as a person. I feel much better about my abilities and potential to achieve. I also understand in greater detail how to contend with my disability. I do have talents and I am **not** an idiot. I am not the "brightest, laziest" student my teachers ever had because I can't (or as they say won't) learn to spell their vocabulary words. [This statement is a direct quote from one of Craig's high school teachers.]. . . gifted LD students are just as capable if not better equipped to cope with the stress of life after school. If a LD student can learn to cope and eventually overcome his problem, he has learned the necessary skills to survive in a "real life" situation. . . .Most people never scratch the surface of their potential ability and go through life without ever discovering their talents or themselves. While I have

> not fully discovered myself, I have a new purpose in life. Two sayings I have heard often are "*A wise person will make more opportunities than he finds.*" and "*Luck is when opportunity meets preparation.*" I think these sayings best describe the gifted/LD student. If he survives high school, he can survive anything.

Craig quit high school at the beginning of the second semester in eleventh grade. I didn't oppose him at all. We were both tired of the battle with public education. He was given permission by the superintendent of schools to enter an adult high school diploma program. He completed all of the tests to graduate from high school with excellent scores in only two days. All of the tests were given orally. He entered a community college immediately. I can't say it has all been smooth sailing at this level because it hasn't. Yet Craig found out that he could do the academic work with some modifications made for his disability. In fact, his last semester GPA was 3.5. He has taken a break from college, but not out of frustration this time. He just doesn't know what he really wants to major in or do with his life. Now he is working and learning exactly what he is capable of accomplishing. He will return to college in the near future when he finds the career that he wants to pursue. I have no doubts that Craig will make it.

My job is not over because I have two more children at home and both are classified as exceptional. Granted my

daughter, Danna, is in the academically gifted curriculum at the high school, but there are still problems to overcome for her. Her learning disability is so mild and doesn't appreciably affect her school work that I have not even told the school system that she has one!

Erica is another story. She apparently has all of Craig's problems and has attention deficit disorder too. But by the time Erica entered school, I had already figured out the school system and the correct approach for getting her through it. I had her evaluated in kindergarten by the same private psychologist who tested Craig. Erica was diagnosed and placed much earlier than Craig. The teachers and administrators now work with me and not against me. There is a much better relationship. I still have to be her advocate at school, but there aren't any more "battles". Having pertinent federal and state laws has helped significantly. The terms "free ***appropriate*** public education" and "parent participation" work wonders.

Now, my greatest frustration is with the college and university curriculum for future teachers. This curriculum is absolutely abysmal in preparing regular classroom teachers to deal with total inclusion of students who happen to have disabilities. As far as I can tell from reading the course requirements in catalogues from several colleges and

universities, there haven't been a lot of changes made since I went to college in 1965. This lack of teacher training in inclusion of children with disabilities is devastating for the students--handicapped and non-handicapped--and for the teachers. Not all children with disabilities should be totally included; it should still be a parent option.

Until this school year, I have been absolutely against total inclusion for Erica. She was capable, but not all of her teachers were. The teachers as a whole **want** to include and educate all children, but they don't know how! No one has *ever* shown them, or allowed them, to experience working with children who are physically or mentally challenged. Unless teachers have personal experiences with children with disabilities, that first child included in their classroom may be a first encounter.

Some disabilities can be very frightening to the average person. Teachers are not superpeople. They are just people. If they have never been around children with disabilities, how are they supposed to know how to relate to them or to interact with them, much less teach them? Every child is an unique individual. All children are children. No child is the sum of his or her disabilities!

The elementary and secondary teacher-preparation curricula need to include courses on educational law, teaching

children with disabilities, classroom modifications that can be made to accommodate these children and hands-on experience in relating to children with disabilities. All student teachers practice teach in regular classrooms. They must also spend time in classrooms with children with disabilities. This would help alleviate some of the "fear" and misunderstanding associated with children with disabilities.

The second area that desperately needs reform is the system of support for classroom teachers when it comes to children with disabilities. There are systems in place, but these aren't sufficient. Teachers already in the system need more opportunities to learn about children with disabilities. This should not cause additional stress to an already stressful occupation, but it should be hands-on experience, not just theoretical.

There needs to be more communication on a very regular basis to support that teacher and the other students in the classroom when a child with disabilities is included. This would help ease the transition. Not all disabilities are visible or easily understood. The "invisible" disabilities can be the most difficult to understand because the differences can't be seen. Children will adjust to individual differences if they understand the "what" and "why" of any situation. Children are naturally curious and will ask

questions. A lot of the time, adults don't give children enough credit for coping with these circumstances.

It has been my personal experience in teaching that the students handle inclusion situations much better than do their parents and some of their teachers. There also needs to be some support or system for educating the other parents. It has been the experience of parents of children with physical and/or mental disabilities that I have worked with that the earlier their children are included in regular classrooms, the quicker the other children accept them. Total inclusion is the trend of the future. Are we ready? Is public education ready? Are classroom teachers and administrators ready? I don't think so, yet!

CHAPTER I

INTRODUCTION

What legal rights do exceptional children and children with disabilities have in public education? Do they have the right to the same free appropriate public education as "normal" students? Should exceptional children be excluded from or included in a program solely because of their disabilities? Can educators include or exclude children not qualifying as exceptional solely because of their disabilities? What services must be provided? What position would a school administrator be able to defend regarding similar issues in a court of law? These questions are answered in this investigation of the legal aspects of special education with respect to program inclusion or exclusion based solely on disabilities.

Initially in Colonial America, the education of children was conducted at home by parents or guardians. The primary purpose of education was religious in nature and closely tied to the established religion of each regional area. Education was not provided equally to all children. There was considerable contrast in the education of different classes of children. Apprenticeship training was available in all the colonies for poor and orphaned children, but

the children of affluent colonists had many educational opportunities available to them, ranging from being tutored at home to being sent back to England to be educated. Children with any disabilities were taken care of by families with support from the community.

Education of children with disabilities is first specifically mentioned in conjunction with Thomas H. Gallaudet, a Connecticut minister. In 1817, this pioneer in education for the disabled founded the first elementary school for the deaf, dumb, and blind in America.

Edward M. Gallaudet continued the work his father, Thomas, had begun by becoming the first superintendent of the Columbia Institute for Deaf and Blind and Dumb in Washington, D.C. in 1858. This institution, now called Gallaudet University, established a higher level of educational opportunities for students with disabilities.

Another pioneer in the field of educating children with disabilities, Edward Seguin a French physician and a Saint-Simonian, is linked to the education of "mental defectives." As Frank Graves states in his book, *A Student's History of Education*, written in 1915,

> One of the most patent evidences of the growth of the humane spirit in modern times is found in the universal attention now given to the education of mental defectives. This movement was given its greatest impulse through Edward Seguin, who came to the United States in 1850 and developed his methods here.

> . . . Although there has grown up a tendency to introduce intellectual elements into the training of the feeble-minded, the advantages of such a procedure are doubtful.[1]

Until the early 1970's, people with handicapping conditions were either kept at home and schooled there, if at all, or put into institutions. In the landmark case of *Brown v. Board of Education of Topeka*[2], the U.S. Supreme Court established the principle of extending equal access to educational opportunities to all children of school age as a basic constitutional entitlement. Even though *Brown* is about school desegregation, it has been the basis for cases involving children with handicaps because of the many similarities between the two groups of children.

The first federal legislation specifically addressing the education of handicapped children was an amendment to the Elementary and Secondary Education Act of 1965 (P.L. 89-10)(ESEA). It encouraged state education leaders to provide programs for handicapped children. One section of this amendment (P.L. 89-750) was passed in 1966. The next step for Congress was passing the Education of the Handicapped Act of 1968 (P.L. 90-247). In 1970, Congress repealed the

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[1]Frank P. Graves, *A Student's History of Education* (New York: The MacMillan Company, 1915), 426.

[2]347 U.S. 483, 74 S.Ct. 689, 98 L.Ed. 873 (1954).

1966 amendments to ESEA and passed P.L. 91-230 (The Education of the Handicapped Act of 1970).

Parents of children with handicaps began organizing. Support groups of the 1950's became advocacy groups of the 1960's. In the early 1970's, parents of children with disabilities seriously questioned the exclusion of their children from public schools. They took their cases to state and federal courts. The issues under litigation included admission of their children to public schools and placement in appropriate educational programs.

In the landmark case, *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania* (better known as P.A.R.C.)[3], the federal court's decision, even though it was finally settled with a consent decree, was the beginning of a deluge of litigation dealing with exceptional children. The court decision in *Mills v. Board of Education of the District of Columbia*[4], broadened the principles set down in the *P.A.R.C.* case to include all exceptional children and to provide due process prior to any decisions made by educators regarding classification of students, exclusion of students from educational programs, or termination of student services.

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[3]334 F.Supp. 1257 (E.D. Pa. 1971), final consent agreement, 343 F.Supp. 279 (E.D. Pa. 1972).

[4]348 F.Supp. 866 (D.D.C. 1972).

Congress provided federal legislation to guarantee the rights of people with disabilities in one section of The Vocational Rehabilitation Act of 1973 (P.L. 93-112). This law defined and protected the rights of people with disabling conditions. Section 504 of this statute was applied to teachers with handicaps as well as to students, putting the burden of proof on the school system or college to prove that a qualified candidate with a disability was not excluded solely on the basis of that disability. In regard to § 504 cases, the courts created the three-pronged standard: "1) Is the plaintiff a handicapped person under the law? 2) Is the activity involved one that receives federal assistance? 3) Is the plaintiff a person who has been excluded from that activity solely because of his/her handicap?"[5]

> Passing of the Education Amendments of 1974 (P.L. 93-380) extended due process protection to parents of handicapped children (between ages thirteen and twenty-one) in such matters as testing, identification, placement, record examination, and program finance.[6]

The Education for All Handicapped Children Act (P.L. 94-142) was passed by Congress in November, 1975. This created by law the due process hearing that is binding on all the parties. This much-litigated provision is impressed

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[5]H. C. Hudgins, and Richard S. Vacca, *Law and Education: Contemporary Issues and Court Decisions* (Charlottesville, Va.: The Michie Co., 1985) 401.

[6]88 Stat. 484 (1976), Ibid.

on every teacher of exceptional children. This law also mandated that each child be given an I.E.P. (Individualized Educational Program), which must be reviewed annually. "That no child of school age shall be arbitrarily or capriciously denied admission to a public school became the law of the land."[7]

Statement of the Problem

With the advent of the civil rights movement in America in the 1960's, equality of education for all students has been in the forefront of judicial decisions. With the passage of P.L. 90-247 (The Education of the Handicapped Act of 1968), P.L. 91-230 (The Education of the Handicapped Act of 1970), P.L. 93-112 (The Vocational Rehabilitation Act of 1973), P.L. 93-380 (The Education Amendments of 1974), P.L. 94-142 (The Education for All Handicapped Children Act of 1975), P.L. 101-336 (The Americans with Disabilities Act of 1990), and P.L. 101-476 (The Individuals with Disabilities Education Act of 1990), Congress has provided federal legislation to define and protect the rights of individuals with disabilities and to guarantee due process for each individual. However, these laws have also created problems for educators and administrators because Congress did not clear-

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[7]H. C. Hudgins, and Richard S. Vacca, *Law and Education: Contemporary Issues and Court Decisions* (Charlottesville, Va.: The Michie Co., 1985) 256.

ly define every aspect and guarantee of these mandates. It is up to the courts to clarify.

Purpose of the Study

The purpose of this study is 1) to determine the crucial issues regarding the legal rights of exceptional children and children with disabilities in terms of educational program exclusion or inclusion; 2) to review and analyze federal statutes regarding program inclusion or exclusion based solely on a disability; 3) to review and analyze case law related to these statutes; and 4) to suggest guidelines for practicing school administrators who must make the decisions of inclusion or exclusion regarding educational programs.

Questions

This study will answer the following research questions related to educational program exclusion or inclusion:

1. What is revealed in selected current literature regarding the legal rights of exceptional children and children with disabilities in public education?

2. What is the status of educational program inclusion or exclusion based solely upon a disability as outlined in federal statutes?

3. What is the status of cases involving children with disabilities?

4. What discernible patterns and trends can be identified in judicial decisions?

5. What legal guidelines can be set forth as a result of this research to aid administrators and school board members?

Design of the Study

This study employs an analysis of pertinent legal and court documents that primarily follows qualitative design processes. As a legal dissertation, the procedures involve a descriptive and content analytic research approach to interpret the pertinent laws and legal decisions. In this method the writer attempts to provide an accurate picture of a particular situation or phenomenon, to identify variables that exist, and to describe and explain relationships between these variables. The design includes a review of selected legal sources, analysis of cases, and results obtained from using the methodology described in the next section.

Methodology

The methodology used in this study involves analysis of judicial decisions, the study of case law and analysis of federal and selected state statutes. Primary sources were state and federal court decisions involving exceptional children and children with disabilities. Students attended

or had attended either elementary or secondary public schools. All cases involved a public school system or district. No cases involving a private elementary or secondary school as plaintiff or defendant were analyzed. No cases involving public or private community college, college or university students were reviewed.

Each court decision was read and analyzed on the basis of the following: 1) reason suit was brought, 2) court findings of original suit, 3) any appeals made, 4) rulings of appellate court, 5) legal ramifications of each suit, and 6) the effects on public school administrators and/or school policy. Primary sources of information for case analysis were found in the *National Reporter System*, which includes *Federal Supplement*, *Federal Reporter* (Second Series), *Federal Reporter* (Third Series), *Atlantic Reporter*, *South Eastern Reporter* (Second Series), and *North Eastern Reporter*, and the *United States Reports*, *Supreme Court Reporter*, *U.S. Supreme Court Reports, Lawyers' Edition* (Second Series). Secondary sources used for case analysis were federal and states statutes and the *Educational Law Reporter*. Sources for review of the literature in the field were *School Law Bulletin*, National Organization on Legal Problems of Education (NOLPE) publications, Educational Resources Information Center (ERIC) documents, *Current Index to Journals in Education*, *Current Law Index*, *Index to Legal*

Periodicals, current periodicals, and recent books on law in the public schools. One additional source of information was a compilation of complaints received from parents by the Office of Civil Rights (OCR) of the Department of Education in Washington, D.C. from January, 1991 to March, 1993. Due to the large volume and similarity of complaints, one month was chosen as representative of the types of complaints that are received.

A Lexis computer search of court cases related to program inclusion or exclusion solely based on a disability was run. Legal cases were "shepardized" using *Shepard's Citations* to provide a history of related court decisions as well as a treatment of the decisions. This allowed the researcher to rely on the applicable court holding.

Limitations of the Study

This study was limited to analysis of federal statutes and some state statutes (since only five states have different wording) and federal and some state court decisions based on a student's program inclusion or exclusion based solely on a disability using the time frame of 1978 to 1993. These cases involve only public elementary or secondary schools. Office of Civil Rights (OCR) complaints from January, 1990 to June, 1993 were considered only as a basis for future trends. Complaints from a representative month were chosen to review in depth.

Definition of Terms

The following words and phrases are key terms utilized in this paper. The source of these definitions was *Black's Law Dictionary*[8], unless otherwise stated.

Affirmed -- A word that indicates in a citation to a case that a higher court has agreed with the result, and usually the reasoning, of a lower court and approved the judgement of the lower court.[9]

Amicus curiae--Means, literally, friend of the court. A person with strong interest in or views on the subject matter of an action, but not a party to the action, may petition to file a brief. Such amicus curiae briefs are commonly filed in appeals concerning matters of a broad public interest; *e.g.* civil rights cases.

Appeal -- The process whereby a court of appeals reviews the record of proceedings and judgment of a lower court to determine if errors of law or fact were made which might lead to a reversal or modification of the lower court's decision. If substantial errors are not found, the

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[8]*Black's Law Dictionary*, Sixth Edition, (St. Paul, Minn: West Publishing Co., 1990).

[9]H. Rutherford Turnbull, III, Free Appropriate Public Education: The Law and Children with Disabilities (Denver, Colorado: Love Publishing Co., 1990), 335.

lower court's decision will be affirmed. If they are, its decision will be reversed or modified.[10]

Appropriate-- especially suitable or compatible; fitting.[11]

Attention Deficit Disorder (ADD) -- a syndrome of learning and behavioral problems that is not caused by any serious underlying physical or mental disorder and is characterized especially by difficulty in sustaining attention, by impulsive behavior (as in speaking out of turn), and usually by excessive activity.[12]

Burden of proof--In the law of evidence, the necessity or duty of affirmatively proving a fact or facts in dispute on an issue raised between the parties in a case. The obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court.

Certiorari--A writ of common law origin issued by a superior to an inferior court requiring the latter to produce a certified record of a particular case tried therein. The writ is issued in order that the court issuing the writ may inspect the proceedings and determine where there have

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[10]Ibid.

[11]Frederick C. Mish, Ed. *Merriam-Webster's Collegiate Dictionary* (Springfield, Massachusetts: Merriam-Webster, Incorporated, 1993), 57.

[12]Ibid., 74.

been any irregularities. It is most commonly used to refer to the Supreme Court of the United States, which uses the writ of certiorari as a discretionary device to choose the cases it wishes to hear.

Children with disabilities--means children--(i) with mental retardation, 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; and (ii) who, by reason thereof, need special education and related services.[13]

Consent--Agreement; approval; permission; the act or result of coming into harmony or accord. Consent is an act of reason, accompanied with deliberation, the mind weighing as in a balance the good or evil on each side. It means voluntary agreement by a person in the possession and exercise of sufficient mental capacity to make an intelligent choice to do something proposed by another. Consent is implied in every agreement. It is an act unclouded by fraud, duress, or sometimes even by mistake.

Consent decree--A judgement entered by consent of the parties, whereby the defendant agrees to stop alleged illegal activity without admitting guilt or wrongdoing. [I]t is

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[13]20 U.S.C.A. § 1401(a)(1)(A)(i)-(ii) (1990).

not properly a judicial sentence, but is in the nature of a solemn contract or agreement of the parties, made under the sanction of the court, and in effect an admission by them that the decree is a just determination of their rights upon the real facts of the case, if such facts had been proved.

Declaratory relief-- *See* Declaratory judgment.

Declaratory judgment--Statutory remedy for the determination of a justiciable controversy where the plaintiff is in doubt as to his legal rights. A binding adjudication of the rights and status of litigants even though no consequential relief is awarded.

De novo--anew; afresh; a second time.

Disability--The want of legal capacity to perform an act. Term is generally used to indicate an incapacity for the full enjoyment of ordinary legal rights; thus, persons under age, insane persons, and convicts are said to be under legal disability. Absence of competent physical, intellectual, or moral powers; impairment of earning capacity; loss of physical function that reduces efficiency; inability to work. [Under General Classification are these definitions] A *physical* disability is a disability or incapacity caused by physical defect or infirmity, or bodily imperfection, or mental weakness or alienation; as distinguished from *civil* disability, which relates to the civil *status* or condition of the person, and which is imposed by the law.

Disable--Ordinarily, to take away the ability of, to render incapable of proper and effective action.

Disabled person--Person who lacks legal capacity to act *sui juris* or one who is physically or mentally disabled from acting in his own behalf or from pursuing occupation.

Due Process of Law--Law in its regular course of administration through courts of justice. "Law of the Land," "due course of law," and "due process of law" are synonymous.

Due process rights--All rights which are of such fundamental importance as to require compliance with due process standards of fairness and justice.

EAHCA--For the purposes of this paper, the acronym EAHCA (The Education for All Handicapped Children Act of 1975) is used when referring only to P.L. 94-142.

EHA--For the purposes of this paper, the acronym EHA is used when referring to the Education of the Handicapped Act and all amendments as listed in 20 U.S.C.A. §§1400 *et seq.*

Eleventh Amendment--The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.[14]

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[14]U.S.Const. amend. XI.

Exceptional --deviating from the norm: as having above or below average intelligence; physically handicapped [15]

Exclusion--Denial of entry or admittance.

Fifth Amendment --The amendment to the federal Constitution that guarantees that the rights of life, liberty, and property will not be taken from a citizen by the federal government without due process of law. Due process guarantees apply to state and local governments under the Fourteenth Amendment.[16]

First Amendment -- Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.[17]

Fourteenth Amendment -- The amendment to the federal Constitution that applies to the states (not the federal government, which is bound by the first 10 amendments) and

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[15]Frederick C. Mish, Ed. *Merriam-Webster's Collegiate Dictionary* (Springfield, Massachusetts: Merriam-Webster, Incorporated, 1993), 404.

[16]H. Rutherford Turnbull, III, *Free Appropriate Public Education: The Law and Children with Disabilities* (Denver, Colorado: Love Publishing Co., 1990), 338.

[17]U.S. Const. amend. I.

guarantees the rights of due process and equal protection to the citizens of each state.[18]

Free Appropriate Public Education (FAPE)--special education and related services that (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.[19]

Handicapped--(1915) Having a physical or mental disability that substantially limits activity esp. in relation to employment or education.[20]

IDEA--For the purposes of this paper, the acronym IDEA is used when referring to the Individual with Disabilities Education Act and all amendments as listed in 20 U.S.C.A. §§1400 *et seq*, 1990.

Inclusion--refers to the opportunity for all students to participate in the totality of the school experience. It

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[18]H. Rutherford Turnbull, III, *Free Appropriate Public Education: The Law and Children with Disabilities* (Denver, Colorado: Love Publishing Co., 1990), 338.

[19]20 U.S.C.A. § 1401(a)(18) (1990).

[20]Frederick C. Mish, Ed. *Merriam-Webster's Collegiate Dictionary* (Springfield, Massachusetts: Merriam-Webster, Incorporated, 1993), 526.

includes integration into regular classrooms in neighborhood schools for both educational and social opportunities.[21]

Injunction--A court order prohibiting someone from doing some specific act or commanding someone to undo some wrong or injury. A judicial process operating *in personam*, and requiring person to whom it is directed to do or refrain from doing a particular thing.

Learning Disabled --(1973); having difficulty in learning a basic scholastic skill because of a disorder (as dyslexia or attention deficit disorder) that interferes with the learning process.[22]

Least Restrictive Environment--Each public agency shall ensure--(1) That to the maximum extent appropriate, children with disabilities, including children in public and private institutions or other care facilities, are educated with children who are non-disabled; and (2) 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

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[21]Sharon H. Davis, *Report Card to the Nation on Inclusion in Education of Students with Mental Retardation* (Arlington, TX: The ARC, 1992), 2, ERIC ED 352 778.

[22]Frederick C. Mish, Ed. *Merriam-Webster's Collegiate Dictionary* (Springfield, Massachusetts: Merriam-Webster, Incorporated, 1993), 663.

that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.[23]

Moot - A subject for argument; unsettled; undecided. A moot point is one not settled by judicial decisions.

Moot case--A case is "moot" when a determination is sought on a matter which, when rendered, cannot have a practical effect on the existing controversy. Question is "moot" when it presents no actual controversy or where the issues have ceased to exist.

Nexus - Connection, link; a connected group or series[24]

Permanent injunction--One intended to remain in force until the final termination of the particular suit.

Perpetual injunction--An injunction which finally disposes of the suit, and is indefinite in point of time.

Preliminary injunction--An injunction granted at the institution of a suit, to restrain the defendant from doing or continuing some act, the right which is in dispute, and which may either be discharged or made perpetual, according to the result of the controversy, as soon as the rights of the parties are determined. Fed.R.Civil P. 65.

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[23]34 C.F.R § 300.550 (1993).

[24]Frederick C. Mish, Ed. *Merriam-Webster's Collegiate Dictionary* (Springfield, Massachusetts: Merriam-Webster, Incorporated, 1993), 783.

Reasonable - Fair, proper, just, moderate, suitable under the circumstances. Fit and appropriate to the end in view.

Related services--means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabilitation counseling, and mental services, except that such medical services shall be diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.[25]

Relief--Deliverance from oppressive, wrong, or injustice. In this sense it is used as a general designation of the assistance, redress, or benefit which a complainant seeks at the hands of a court, particularly in equity.

Remand - To send back. The act of an appellate court when it sends a case back to the trial court and orders the trial court to conduct limited new hearings or an entire new trial, or to take some further action.

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[25]20 U.S.C.A. § 1401(a)(17) (1990).

Retarded --slow or limited in intellectual or emotional development or academic progress[26]

Reverse--To overthrow, vacate, set aside, make void, annul, repeal, or revoke; as, to reverse a judgement, sentence or decree of a lower court by an appellate court.

Special education--means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a child with a disability, including --(A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and (B) instruction in physical education.[27]

Special law--One relating to particular persons or things; one made for individual cases or for particular places or districts; one operating upon a selected class, rather than upon the public generally.

"Stay-put provision"--During the pendency of any proceeding conducted pursuant to this section, 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, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public

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[26]Frederick C. Mish, Ed. *Merriam-Webster's Collegiate Dictionary* (Springfield, Massachusetts: Merriam-Webster, Incorporated, 1993), 999.

[27]20 U.S.C.A. § 1401 (a)(16) (1990).

school program until all such proceedings have been completed.[28]

Summary judgement--Procedural device available for prompt and expeditious disposition of controversy without trial when there is no dispute as to either material fact or inferences to be drawn from undisputed facts, or if only question of law is involved. Federal Rule of Civil Procedure 56 permits any party to a civil action to move for a summary judgement on a claim, counterclaim, or cross-claim.

Transition services--means a coordinated set of activities for a student, designed within an outcome-oriented process, which promotes movement from school to post-school activities, including post-secondary education, vocational training, integrated employment (including support employment), continuing and adult education, adult services, independent living, or community participation.[29]

Vacated - To annul; to set aside; to cancel or rescind; to render an act void; as to vacate an entry of record, or a judgement.

Organization of the Study

Chapter I contains an introduction, the statement of the problem, the purpose of the study, the questions to be

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[28]20 U.S.C.A. § 1415(e)(3) (1990).

[29]20 U.S.C.A. § 1401(a)(19) (1990).

answered, the design of the study, the methodology, the limitations of the study, the definition of terms and organization of the study.

Chapter II begins with a brief statement to provide a general context for the evolution of special education, and traces the evolution of special education programs and student rights. An examination of current literature from legal sources helped to determine trends. Landmark cases beginning with *Brown v. Board of Education of Topeka*[30] (1954) and running into 1978 were summarized. The Individuals with Disabilities Education Act of 1990 (IDEA) and The Americans with Disabilities Act of 1990 (ADA) were reviewed because they are the most recent legislation from Congress dealing with disabilities.

Chapter III includes a review of federal statutes and selected state statutes dealing with rights of exceptional children and children with disabilities to be included or excluded from educational programs because of their disabilities. The relationships between the Public Laws and the federal statutes are discussed. The relationship of recent amendments to the acts is reviewed.

Chapter IV includes analysis of relevant legal cases of educational program inclusion or exclusion solely because of

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[30]347 U.S. 483, 74 S.Ct. 689, 98 L.Ed. 873 (1954).

disabilities. A section on future trends, based on selected current OCR complaints filed by parents, is included.

Chapter V summarizes the findings of this research and offers answers to the research questions. It provides some guidelines for administrators and school board members confronted with decisions on student participation in programs regardless of a disability. Recommendations for further study also are included.

CHAPTER II

REVIEW OF SELECTED LITERATURE

Brief Context for Special Education[1]

Before reviewing the literature related to exceptional children and children with disabilities, it seems appropriate to review some context for the idea of free and appropriate public education for all students, especially the disabled. Educational philosophies are tied to the values of a nation and are in a constant state of transition. As a society changes and evolves so do the educational philosophy and system.

The colonists brought their philosophies of education and schools to the United States. Some strife and conflicts of the time in Europe were reflected in the colonies. In Massachusetts, the schooling of children at home didn't seem

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[1]This section draws from various sources such as Butts and Cremin, *A History of Education in American Culture* (1953); Cremin, *American Education: The National Experience 1783-1876* (1980); Cubberley, *A Brief History of Education* (1922); Edgar, *Social Foundations of Education* (1965); Graves, *A Student's History of Education (1920)*; Johnson, *Old-time Schools and School-books* (1925); Meyer, *The Development of Education in the Twentieth Century* (1939); Teeter, *The Opening Up of American Education* (1983); Turnbull, *Free Appropriate Public Education: The Law and Children with Disabilities* (1990); Turnbull, *The Law and The Mentally Handicapped in North Carolina* (1980); Tyack, James and Benavot, *Law and the Shaping of Public Education, 1785-1954* (1987); Van Cleve, ed. *Gallaudet Encyclopedia of Deaf People and Deafness*, (1987).

to accomplish the purposes of education to suit colonial officials.

> In 1642, twelve years after the settlement of Boston, the General Court of Massachusetts, "taking into consideration the great neglect of many parents and guardians in training up their children in learning and labor which may be profitable to the commonwealth," ordered that the selectmen in every town should have power to take account of all parents and masters as to their children's education and employment. . .He [the selectman] must see that all the children learned to read, and that they were taught to understand the principles of religion and the capital laws of the country, and finally, he must make sure that they were put to some useful work.[2]

The idea of different educational opportunities for different classes of people came with the colonists from England and Europe.

> [T]he idea of a classical higher and secondary training for the upper classes. . .and but little in the way of elementary education, except private "dame" schools and the catechetical training by the clergy. There were, in addition, the family "tutorial" education. . . for the children of the wealthy, and evident attempts at perpetuating the old English industrial training through apprenticeship for orphans and children of the poor.[3]

At least until 1954, (the *Brown* case), in American education, the treatment of the exceptional child includes a focus on obvious impairments or disabling categories or on

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[2]Clifton Johnson, *Old-time Schools and School-books*, (New York: The MacMillan Company, 1904), 1.

[3]Frank P. Graves, *A Student's History of Education* (New York: The MacMillian Company, 1915), 191.

treatment of the child as a second-class citizen. These categories included the deaf, dumb, blind, mentally retarded, crippled, and Negroes. Other disabilities were later "discovered" and acknowledged by society.

The 19th century was a time of dramatic social changes for the entire world. As the development of new machinery replaced hand tools, and as water, steam or electric power supplanted muscle power provided by men and beasts, society was changed forever.

America began the arduous change from an agrarian economy to an industrial economy and cottage industries were replaced by the factory system. The barbarous working conditions in some factories impelled workers to fight to improve conditions by forming unions, lobbying for labor legislation and child labor laws, and demanding civil rights. Education was also experiencing dramatic changes, including education of handicapped youth.

> The earliest federal role -- creating special schools for the mentally ill, blind, and deaf between the 1820s and the 1870s -- paralleled a movement at the state level, in which state schools for the handicapped were established as early as 1823.[4]

Some individuals were working to provide education for handicapped children. Thomas Hopkins Gallaudet, a Connecti-

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[4]H. Rutherford Turnbull, III, *Free Appropriate Public Education: The Law and Children with Disabilities* (Denver, Colorado: Love Publishing Co., 1990), 13.

cut minister, was striving to educate the deaf, blind and dumb children. He went to Europe to study the current methods of educating the deaf. When Gallaudet returned to America, he brought a brilliant deaf teacher named Laurent Clerc. The two men toured the eastern seaboard, raising donations for a school for the deaf. Equally as important as raising funds, they increased public awareness that the deaf could be educated and, in fact, could perform intelligently. In 1817, at Hartford, Connecticut, Gallaudet opened the first American elementary school for the deaf and dumb.

Amos Kendall and several other wealthy citizens of Washington, D.C., became interested in the education of deaf. In fact, Kendall was guardian for five deaf youngsters. With the support of an act of Congress, Kendall and several other individuals founded the Columbia Institute for the Deaf and Dumb and Blind in 1856. Kendall asked Edward M. Gallaudet, son of Thomas Gallaudet, to become the first superintendent of this institute, located in Washington, D.C. Edward began his duties in 1857. He remained with the Institute for 54 years. This institution was renamed Gallaudet University in honor of Edward Gallaudet.

During this same period, Samuel G. Howe, superintendent of the Perkins Institute of the Blind in Boston, Massachusetts, began teaching Laura Bridgeman, a deaf-blind child. His success was remarkable, and Laura went on to become a

teacher of the blind, deaf and dumb. Helen Keller's teacher, Annie Sullivan, was a student of the Perkins Institute.

The "challenge" of educating "mental defectives," Negroes and women was also being explored during this century. Edward Seguin, a French physician, was instrumental in the education of "feeble-minded" children. He opened a school for "idiots" in Paris. He studied idiocy and discovered that it was caused by arrested development and not by a malformation of the brain as was the popular belief. He came to the United States in 1850 to practice as a physician. From 1854 to 1857 he worked with Harvey Wilbur at his Institution in Syracuse, New York. Seguin later opened a school for the "feeble-minded" in New York.

Attitudes toward education of Negroes were also changing. Myrtilla Miner was born in New York and handicapped with a "spinal" disease. She became interested in the education of "colored" girls while she was an instructor in a private school for daughters of planters. In 1851, she opened a "normal" school for colored girls in Washington, D.C. It was illegal to educate Negroes in southern states. The Civil War advanced the education of black men, but not necessarily of women, either black or white.

Formal education of women past the basic elementary level was not illegal, but it was not encouraged ". . . girls' brains were 'too light, their foreheads too small,

their reasoning powers too underdeveloped, and their emotions too easily worked upon to make serious students.'"[5] Education wasn't "good" for women because it would make them discontented. An education would also make them coarse and unmarriageable.[6]

> While American public education opened a wee crack to admit an increasing number of blacks in the late 19th Century, no substantial accommodation was made for fully one half the white population: females of every age. The implication of a black's inferiority was greatly undermined once he was taken out of the institution that confined him to that debasement. . . .No act of Congress, no amendment of Constitution, no judgement of the Supreme Court could remove from women the weaknesses and uselessness ascribed to them for countless centuries.[7]

While women could get a basic elementary education, there were very few high schools for them and even fewer colleges. In 1828, John Kingsbury founded his "Young Ladies' High School" in Providence, Rhode Island. Mary Lyons established the Mount Holyoke Female Seminary in 1837 to provide women who wanted to teach, the course work approximately equivalent to college courses for men. Women were allowed to become teachers, but female teachers of this era were not allowed to marry.

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[5]Ruskin Teeter. *The Opening Up of American Education* (Lanham, MD: University Press of America, Inc., 1983), 109.

[6]Ibid.

[7]Ibid., 105.

A shift in treatment of exceptional children began after World War I and just before World War II. In 1939, Adolph Meyer presented the following quote in the section on "Educating Exceptional Children" under the subheading titled "Defective Children:"

> [T]wentieth-century education seeks for each child an education which will be in harmony with his native capacities. There are, unfortunately, many thousands of youngsters who by virtue of their inheritance or the influence of their environment, are so constituted that they can profit very little from what the average school has to offer. In this group there are children who vary from the normal in either direction. Among them are the undernourished, the physically handicapped, and the mentally defective, as well as those who excel in mind and body.[8]

Meyer discussed different forms of special education that had been developed to ensure that exceptional children would have confidence, self-respect and self-sufficiency. The key word in Meyer's quote is "average" school. The average school system was not able to educate these children "who vary from the normal in either direction," but their existence was acknowledged. There also weren't any specific laws to cover children with disabilities or the right of all children to attend public schools. They weren't encouraged or allowed to attend public school. This trend continued until the United States Supreme Court was asked to ruled on

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[8]Adolph E. Meyer. *The Development of Education in the Twentieth Century* (New York: Prentice-Hall, Inc., 1939), 154.

Brown v. Board of Education of Topeka in 1954. This case was actually a desegregation case and is cited as the catalyst needed to give "birth" to the civil rights movement of the 1960's in America. It also influenced parents of children with disabilities.

Brown v. Board of Education (1954)

In the landmark case of *Brown v. Board of Education of Topeka*[9], the U.S. Supreme Court established the principle of extending equal access to educational opportunities to all children of school age, as a basic constitutional entitlement.

> *Brown* was a landmark because it had an impact on so many aspects of educational law and procedure: . . .Just as *Brown* was the first case on the battlefield of racial desegregation of schools, it was the seed that gave birth to other civil rights battles and to grounds for successful challenges to governmental discrimination against certain persons because of their unalterable personal characteristics (such as race or sex). *Brown* gave rise to the *right-to-education* cases, and they in turn helped establish other rights for handicapped persons. The point--so obvious, but so important--is that judicial resolution of educational issues on constitutional grounds becomes precedent for judicial resolution of related civil rights issues on similar constitutional grounds.[10]

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[9] 347 U.S. 483, 74 S.Ct. 689, 98 L.Ed. 873 (1954).

[10] H. Rutherford Turnbull III. *Free Appropriate Public Education: The Law and Children with Disabilities* (Denver, CO: Love Publishing Co., 1990), 9.

This court case gave parents of children with disabilities some hope and possibly some "legal ground" to stand on. Parents of handicapped children began to organize locally and nationally. Advocacy groups such as The Arc (formerly The Association for Retarded Citizens of the United States and originally, The National Association for Retarded Children/Citizens) and The Council for Exceptional Children (CEC) were formed in the 1950's and 1960's. The parent movement gained increasing influence in the federal and state arenas in the 1960's. The Bureau of Education for the Handicapped, part of the Office of Education, was created by the ESEA Amendments of 1966.

Earl Warren was the Chief Justice of the United States Supreme Court from 1953 through 1969. Following his lead, the Court "took a liberal and expansive approach to the constitutional issues, including the application of the due process clause of the Fourteenth Amendment to the operation of public schools."[11]

The Supreme Court rulings during the 1950's and 1960's were the impetus the parent movement in the United States needed. Parents now had constitutional grounds to fight for inclusion of their children in public education programs. "[T]he Warren Court's attitude in *Brown* declared that the

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[11]Robert E. Phay. "Due Process and the Public Schools in the Seventies and Eighties." *School Law Bulletin*, 13 (Fall, 1982): 1.

importance of education in our society made it imperative to provide every child of school age with access to an education opportunity, absent discrimination."[12]

Encouraged by the ruling in *Brown*, parents of children with handicaps began to test, in court, this opportunity for education as "a right which must be made available to all on equal terms."[13]

> Although *Brown* established the right to an equal educational opportunity based upon the Fourteenth Amendment, it was not until *Pennsylvania Association for Retarded Children (PARC) v. Commonwealth of Pennsylvania* and *Mills v. D. C Board of Education* that *Brown* became meaningful for handicapped children.[14]

The *PARC* case was a class-action suit brought by parents of retarded children in the Commonwealth of Pennsylvania. These children were being excluded from public education and training solely because they were retarded. The case was finally settled with a consent decree that was binding solely on the parties of the case.

> [T]he actual legal value of the *PARC* decision is found in what the district court suggested; it simply set forth a plan to provide for retarded children in Penn-

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[12]H. C. Hudgins, and Richard S. Vacca, *Law and Education: Contemporary Issues and Court Decisions* (Charlottesville, Va.: The Michie Co., 1985) 397.

[13]347 U.S. 483, 493 (1954).

[14]H. Rutherford Turnbull III. *Free Appropriate Public Education: The Law and Children with Disabilities* (Denver, CO: Love Publishing Co., 1990), 30.

> sylvania who, up to that time, had been excluded from receiving educational opportunities in the schools of the Commonwealth.[15]

Not only was the Commonwealth of Pennsylvania to provide an education for retarded students, but it was to search actively for and identify retarded children who had been excluded from public education before that point.

Mills v. District of Columbia Board of Education[16] was brought by parents of Peter Mills and six other children who had a variety of handicaps, but who were not mentally retarded. The parents alleged that the labeling of their children was an "exclusionary practice" that violated their constitutional rights to due process under the Fifth and Fourteenth Amendments. The children were being denied equal access to a public education. While the *Mills* decision expanded the principles set down in *PARC* to include all handicapped children, it also included a "due process" section. This court order stated that educators provide due process prior to any decisions made regarding classification of students, exclusion of students from educational programs, or termination of student services.

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[15]H. C. Hudgins, and Richard S. Vacca, *Law and Education: Contemporary Issues and Court Decisions* (Charlottesville, Va.: The Michie Co., 1985) 395.

[16]348 F.Supp. 866 (D.D.C. 1972).

The *San Antonio Independent School District v. Rodriguez*[17] case has had a significant effect on special education case law. *Rodriguez* was a challenge to the way the State of Texas financed its public schools and not specifically a special education case. The Supreme Court reversed the lower court's decision and found in favor of the State of Texas.

> From 1954 to 1973 (with the United States Supreme Court's decision in *Rodriguez*) the emphasis was on making certain, by application of fourteenth amendment guarantees of equal protection and due process, that the 'doors to equal educational opportunity' were opened to every eligible child. . . .The primary focus of attention in the *Post-Rodriguez* era, however, was redirected away from efforts to 'open public school doors' to all children, and courts of law turned their attention to the issue of ensuring *quality* educational programs for children once they enter the school.[18]

One other case, *Cuyahoga County Association for Retarded Children & Adults v. Essex*,[19] needs to be mentioned even though it is not a landmark case. *Cuyahoga* began before the passage of P.L. 94-142 (the Education for All Handicapped Children Act of 1975). In this case the federal district court ruled that children could not be excluded from or included in public education solely based on an I.Q. score.

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[17]411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973).

[18]H. C. Hudgins, and Richard S. Vacca, *Law and Education: Contemporary Issues and Court Decisions* (Charlottesville, Va.: The Michie Co., 1985) 397-398.

[19]411 F.Supp. 46 (N.D. Ohio 1976).

In *Cuyahoga*, a class action was brought on the grounds of equal protection and due process, disputing the constitutionality of the Ohio program of educating and training mentally handicapped children. The one important finding of the federal district court was that I.Q. scores alone could not determine whether a child would benefit from an education. The Court stated:

> if children of particular I.Q. levels are being 'rubber-stamped' into special education and/or out of the public school system without regard for the detailed standards . . . [it] might constitute denial of equal protection under the relevant statutes and regulations.[20]

The Court saw "the handwriting on the wall" with the passage of P.L. 94-142 by Congress. With the appointment of the last five justices ". . .the Court since 1969 has moved with few exceptions to a more conservative interpretation and application of due process to the public schools."[21] With the retirement of Justice Harry Blackmun in June, 1994, every current member of the United States Supreme Court was appointed during or after 1972.

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[20]Ibid., 60.

[21]Robert E. Phay, (1982). "Due Process and the Public Schools in the Seventies and Eighties." *School Law Bulletin*, 13 (Fall, 1982): 2.

Free Appropriate Public Education and Least Restrictive Environment

After the 1990 amendments to the Education of the Handicapped Act, the EHA is known as the Individuals with Disabilities Education Act or IDEA. In passing this Act:

> The Congress finds that--(1) there are more than eight million children with disabilities in the United States; (2) the special educational needs of such children are not being fully met; (3) more than half of the children with disabilities in the United States do not receive appropriate educational services which would enable them to have full equality of opportunity; (4) one million of the children with disabilities in the United States are excluded entirely from the public school system and will not go through the educational process with their peers.[22]

One concept in IDEA is "to assure that all children with disabilities have available to them a free appropriate public education,"[23] Unfortunately "appropriate" remains difficult to define and can even be controversial.[24] IDEA also states "to assure that, to the maximum extent appropriate, children with disabilities are educated with children

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[22]20 U.S.C.A. § 1400(b)(1)-(5).

[23]20 U.S.C.A § 1400(c) (1990).

[24]*See, e.g.*, Board of Education v. Rowley, 458 U.S.176 (1982); Harrell v. Wilson County Schools, 58 N.C. App. 260, 293 S.E. 2d 687, *disc. review* denied, 306 N.C. 740, 295 S.E. 2d 759 (1982), Hall v. Vance County Bd. of Educ., 744 F.2d 629 (4th Cir. 1985), Burke County Bd. of Educ. v. Denton, 895 F.2d 973 (4th Cir. 1990).

who are not disabled."[25] This section pertains to mainstreaming or inclusion of children with disabilities in the classes of "regular" or non-disabled students to the maximum extent practicable. Placing a disabled child in the "least restrictive environment"[26] (LRE) appropriate for the child, while receiving a free appropriate public education (FAPE) are two areas of current debate, both educationally and legally. "Yet a close look at the statutes and regulations reveal that FAPE and LRE are not competing requirements. Rather, each is an element in a decision-making process aimed at meeting the needs of a disabled child."[27]

> 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.[28]

Controversy also arises in the discussion of LRE. "[This] mandate is a primary consideration when courts are asked to

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[25]20 U.S.C.A. § 1412(5)(B) (1990).

[26]34 C.F.R. §§300.550-.556 (1990).

[27]Ann McColl, "Placement in the Least Restrictive Environment for Children with Disabilities," *School Law Bulletin* 23 (Winter 1992): 13.

[28]20 U.S.C.A. § 1401(a)(18) (1990).

settle disputes between school districts and parents over a proposed special education program."[29] "The statutory goal was to prevent systematic exclusion of children with disabilities from mainstream schools and classrooms and to integrate these children with nondisabled children."[30]

> The regulations under Section 504 (Sec. 104.33(b)) provide a third way to define appropriate education. . . Like the EHA [now IDEA], Section 504 addresses the requirement of appropriate or individualized education by requiring that schools follow a process and requires equivalency between the handicapped and the nonhandicapped.[31]

Exclusion of disabled students from educational programs has taken on different forms in recent years. "The assumption appears to be that a child can be *either* intelligent *or* 'handicapped,' but is rarely--if ever--both.[32]

> As a general rule, the nation's public schools were highly ingenious and very successful in denying educational opportunities, equal or otherwise, to disabled children. . . . Exclusion occurs when children are denied education (denied access to all public educational programs or provided an inadequate education for

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[29]71 Ed.Law Rep. [369] (Feb 13, 1992).

[30]David M. Engel, "Law, Culture, and Children with Disabilities: Educational Rights and the Construction of Difference," *Duke Law Journal* 1991 (February, 1991): 175.

[31]H. Rutherford Turnbull, III, *Free Appropriate Public Education: The Law and Children with Disabilities* (Denver, Colorado: Love Publishing Co., 1990), 128.

[32]David M. Engel, "Law, Culture, and Children with Disabilities: Educational Rights and the Construction of Difference," *Duke Law Journal* 1991 (February, 1991): 185.

> their needs). *Total Exclusion* may involve the school's refusing to admit a child or placing him or her on a long waiting list. Exclusion also occurs when programs are inadequate or unresponsive to students' needs, . . . Another example of exclusion occurs when moderately retarded children are put in large regular classes and given little or no training or education. Practices such as these constitute *functional exclusion*. Although the child has access to a program, the program is of such a nature that the child cannot substantially benefit from it and therefore receives few or none of the intended benefits of education.[33]

Yet, while mainstreaming was including children with disabilities in a regular classroom for non-academic subjects, such as recess, music, or lunch, inclusion has come to mean more. Mainstreaming can be another name for "least restrictive environment," and for educational program inclusion.

> Inclusion refers to the opportunity for all students to participate in the totality of the school experience. It includes integration into regular classrooms in neighborhood schools for both educational and social opportunities.[34]

Inclusion also means that children with disabilities interact with nondisabled children. Mainstreaming of children with disabilities is one solution to the "LRE" language of IDEA. Another solution to interaction of disabled children

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[33]H. Rutherford Turnbull, III, *Free Appropriate Public Education: The Law and Children with Disabilities* (Denver, Colorado: Love Publishing Co., 1990), 14.

[34]Sharon H. Davis, *Report Card to the Nation on Inclusion in Education of Students with Mental Retardation* (Arlington, TX: The ARC, 1992), 2, ERIC ED 352 778.

with nondisabled children is to bring nondisabled children into special education classrooms.

Some advocacy groups are endorsing total program inclusion of children with disabilities and the elimination of the separate system restrictive placement.

> Only 6.7 percent of our nation's children with mental retardation were educated in regular classrooms in the 1989-90 school year. Clearly, few states consider the regular classroom as the appropriate placement for children with mental retardation. Only two states, Massachusetts and Vermont, have more than 50 percent of children in this setting. Most states placed fewer than 5 percent in regular class.[35]

Parents are being instructed in and encouraged to use their civil rights by numerous advocacy groups. These groups are primarily comprised of parents of children with disabilities. Some groups use the "each one teach one" principle to educate other parents about civil rights by using their own experiences and knowledge of federal law.

On the other hand, some parents do not want their children in the mainstream of education. They think that their child would be served better in the long run in a self-contained educational environment.[36] The parents' opinions about inclusion in or exclusion from regular classrooms should be given serious consideration. After all,

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[35]Ibid., 17.

[36]*See* Gaudiello v. Delaware County Intermediate Unit, 796 F.Supp. 849 (E.D. Pa. 1992).

parents have raised their children since birth, and they know their child better than anyone else.

> Many changes and much progress has [sic] occurred for students with disabilities since the 1970's. It is good to assess how far we have come but at the same time not to forget how far we have yet to go and more importantly, in what direction we are going. For example, this assessment must not overlook the fact that historically in seeking special educational services for students with disabilities, we have in fact created and fostered a dual system, a "separate system" for special and regular education.[37]

Parents must be extremely vigilant of the education their child with a disability receives and must assure that all procedures are followed correctly. In following these procedures, parents must not lose sight of what is in the best interest of their child concerning both placement and the LRE appropriate.

As with any issue there are always at least two sides to it. What are the opinions of educators? In order to move one second-grader "to a 'more restrictive environment', [it] took almost nine months, hundreds of hours of work, and thousands of dollars to achieve."[38] The child began exhibiting extremely disruptive behavior after his initial educa-

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[37]Robin Cunconan-Lahr. *The American With Disabilities Act: Educational Implications and Policy Considerations.* Paper presented at the Annual Convention of the Council for Exceptional Children, Atlanta, Georgia, 1-5 April 1991, 4, Speech, ERIC, ED 333 665.

[38]Pete Idstein. "Swimming Against the Mainstream," *Phi Delta Kappan* 75 (December 1993): 336.

tional placement. But what about the other 31 students in the classroom? They were average children "who form the bulk of our student population and who stand without advocate in the political arenas of education."[39] Some courts seem to agree with this opinion.[40]

Educators aren't arguing with the spirit of IDEA or even the letter of the law, but rather with "the cumbersome implementation of a law that has magnified the concept of due process to the point that it overshadows other school-based concerns, such as instruction and learning."[41]

The IEP, Parental Participation, and Due Process

The IEP is an essential component of the IDEA. The IEP document defines "appropriate education" based on the unique needs of each child with a disability.

> Prior to the passage of the IDEA, school districts made decisions with little or no input from the parents and the parents had no recourse if they did not like what the school district proposed.[42]

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[39]Ibid., 337.

[40]*See* Roncker on behalf of Roncker v. Walter, 700 F.2d 1058 (6th Cir. 1983), A.W. v. Northwest R-1 School District, 813 F.2d 158 (8th Cir 1987), *cert. denied*, 484 U.S. 847, 108 S.Ct. 144, 98 L.Ed.2d 100 (1987).

[41]Pete Idstein. "Swimming Against the Mainstream," *Phi Delta Kappan* 75 (December 1993): 337.

[42]80 Ed.Law Rep. [711] (April 22, 1993).

The IEP is to be developed by a multi-disciplinary team or committee which is to include one or both parents or guardians and the disabled child, when appropriate, a representative of the local education agency (LEA) who is qualified to provide or supervise specially designed instruction and the teacher. The IEP must include certain components and must be reviewed annually.[43]

Parents are to be involved completely in the development of their child's IEP. In fact, they are to be involved in the entire process of educating their child since they usually know their own child better than anyone else does.

> Often, but not always, parents feel that their own observations or requests are given little weight and that [IEP] decisions are based primarily on the recommendations of the professionals. Their own close relationship with the child is viewed as a liability rather than as an asset--a liability that renders their judgments inherently suspect.[44]

Provisions of IDEA help strengthen the parents' position and guarantees parental involvement in developing an "appropriate" individualized education program for their child with a disability. Parental involvement also is a way to ensure the delivery of these services to their child.

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[43]20 U.S.C.A. § 1401(a)(20) (1990).

[44]David M. Engel, "Law, Culture, and Children with Disabilities: Educational Rights and the Construction of Difference," *Duke Law Journal* 1991 (February, 1991): 188.

Due process procedures or procedural safeguards are important elements of IDEA. "The IDEA provides parents with an elaborate grievance procedure in the event they disagree with the school district's evaluation findings or recommended placement."[45] These procedural safeguards for the parents of a handicapped child are guaranteed by IDEA.[46] The parents have the right to attend the IEP meeting,[47] and are allowed to invite anyone, even an advocate, to attend the meeting with them.[48] Failure of the LEA in following these procedures has led to law suits. "Those rights were included within the legislation because Congress intended parents to be equal partners in the development of appropriate educational programs for their children."[49] Parents have brought legal action when they disagree with their child's IEP and have exhausted all due process procedures. "Failure to provide parents with the rights enumerated in the IDEA will compromise the school district's position if the case should end up in litigation."[50]

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[45]80 Ed.Law Rep. [771] (April 22, 1993).

[46]20 U.S.C.A. § 1414 (1990).

[47]20 U.S.C.A. § 1401(A)(20) (1990).

[48]34 C.F.R. § 300.345(a) (1990).

[49]80 Ed.Law Rep. [771] at 776 (April 22, 1993).

[50]Ibid.

Summary

Exclusion from or inclusion in educational programs is being tested in court on several different grounds: appropriate education, least restrictive environment, violation of due process procedure, dispute over appropriate IEP, mainstreaming (or appropriate placement) and exclusion based on Sec. 504 of the Vocational Rehabilitation Act.

Historically, at least until 1990, students with disabilities could be and often were excluded from regular educational programs. With the changes brought about by the civil rights movement and resulting federal legislation, rights of disabled students to a free appropriate public education have been validated in court.

In reviewing the recent history of these changing rights and entitlements, a free appropriate public education in the least restrictive environment for each disabled child is a recurrent theme. School officials have tried to accommodate children with disabilities by "appropriate" program inclusion. Problems arise with the interpretation of such terms and concepts as "least restrictive environment," mainstreaming, and "free appropriate public education." As viewpoints change, litigation becomes more frequent. Federal and state courts are trying to clarify equitably these constitutional issues with their recent decisions.

CHAPTER III

ANALYSIS OF STATUTES REGARDING SPECIAL EDUCATION AND PROGRAM INCLUSION OR EXCLUSION BASED SOLELY ON DISABILITIES

The United States Constitution states that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[1] Therefore, the direct responsibility for the organization and maintenance of public education systems falls to each state. Following the passage of a new federal education act, each state may enact statutes of its own to meet federal requirements or simply adopt the wording of the federal statute. For this reason, particular states' statutes will only be discussed if they are substantially different from the federal statutes or if they exceed standards established in the federal law.

Federal Statutes

The first federal legislation addressing the education of handicapped children was an amendment to the Elementary and Secondary Education Act of 1965 (P.L. 89-10) (ESEA), passed in 1966 (P.L. 89-750). This amendment was to encourage state education leaders to provide and improve programs

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[1]U.S.Const. amend. X.

for handicapped children. It established a series of federal grants to assist individual states in educational programs and projects for handicapped children. But it did not make these programs mandatory.

Next, Congress passed the Elementary and Secondary Education Amendments of 1967 (P.L. 90-247) on January 2, 1968. One amendment to the ESEA was

> Sec. 154. Title VI of the Elementary and Secondary Education Act of 1965 is further amended by adding at the end thereof the following new section:
>
> "Short Title
>
> "Sec. 615. This title may be cited as the 'Education of the Handicapped Act'."[2]

Thus Title VI of ESEA became the original Education of the Handicapped Act (EHA). Yet these amendments still did not mandate special education programs; they only strongly suggested that programs be created.

In 1970, Congress repealed the 1966 and 1967 amendments to ESEA and passed P.L. 91-230 (The Education of the Handicapped Act of 1970). This act also provided federal funding in the form of grants. Through the grants process Congress wanted to encourage state leaders to develop special education programs, resources, and personnel, but Congress didn't legislate these programs, yet.

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[2]81 Stat. 804 (1968).

"Generally regarded as the first national civil rights statute to protect the rights of people with disabling conditions, the Rehabilitation Act (P.L. 93-112) was passed by Congress in 1973."[3] Any state or local government or private organization that receives federal funding is prohibited from discriminating against an "otherwise qualified handicapped individual" solely based on the person's disability. "In both its language and intent it is like other federal civil rights laws that prohibit discrimination by federal recipients on the basis of race or gender."[4]

Section 504 of this statute has had a major impact on education. While it was not intended by Congress to be an educational statute, § 504 has been much litigated. Several of the first education cases used both *Brown* and Section 504 as justification for the suits.[5] The Rehabilitation Act

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[3]H. C. Hudgins, and Richard S. Vacca, *Law and Education: Contemporary Issues and Court Decisions* (Charlottesville, Va.: The Michie Co., 1985) 399. *See* 29 U.S.C. § 794 (1973), and the federal regulations for implementing the law at 34 C.F.R. § 104.

[4]H. Rutherford Turnbull III. *Free Appropriate Public Education: The Law and Children with Disabilities* (Denver, CO: Love Publishing Co., 1990), 18.

[5]*See*, for example, Pennsylvania Association for Retarded Children (PARC) v. Commonwealth of Pennsylvania, 334 F.Supp. 1257 (E.D. Pa. 1971). Final consent agreement at 343 F.Supp. 279 (E.D. Pa. 1972). Also, Mills v. District of Columbia Board of Education, 348 F.Supp. 866 (D.D.C. 1972), Fialkowski v. Shapp, 405 F.Supp 946 (1975) and Frederick L. v. Thomas, 419 F.Supp 960 (1976), 557 F.2d 373 (3rd Cir. 1977), 578 F.2d 513 (1978).

was and is intended to be federal anti-discrimination legislation.

> Section 504 applies to all persons with disabilities regardless of age. It covers preschool and adult programs as well as elementary and secondary education, requiring *equal and accessible* transportation, architecture, educational programs, and nonacademic services. Graduation and textbook standards may not be discriminatory, nor may evaluation systems. Different treatment is justified only if it is necessary to provide services to persons with disabilities that are as effective as those provided to others.[6]

With the challenge of two landmark special education cases, *Pennsylvania Association for Retarded Children (PARC) v. Commonwealth of Pennsylvania*[7] and *Mills v. District of Columbia Board of Education*[8] and the slow progress of states to develop special education programs, Congress became extremely disappointed by 1974. The Education Amendments of 1974 (P.L. 93-380) resulted from this disappointment. Due process protection in the areas of testing, identification, placement, record examination, and program finance, was extended to parents of handicapped children be-

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[6]ERIC/OSEP Special Project. *Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990, Legal Foundations, Number 1* (Reston, VA: ERIC Clearinghouse on Handicapped and Gifted Children, 1992), 2, ERIC ED 357 552.

[7]334 F.Supp. 1257 (E.D. Pa. 1971), final consent agreement, 343 F.Supp. 279 (E.D. Pa. 1972).

[8]348 F.Supp. 866 (D.D.C. 1972).

tween the ages of 13 and 21.[9] Federal funding was substantially increased to every state for special education and a mandate was given to each state to adopt a goal of providing "full educational opportunities to all handicapped children" (P.L. 93-380). Congress realized this 1974 law was a provisional measure only and would have to be augmented. It was for this very reason that Congress enacted the Education for All Handicapped Children Act of 1975 (P.L. 94-142)[EAHCA as well as EHA is used when referring to P.L.94-142.][10]

> To experts writing at that time, P.L. 94-142 represented an enforceable civil rights act for exceptional children. The new law was intended to make certain that handicapped children receive appropriate special education and related services.[11]

P.L. 94-142 created by law several new features. School systems were to find and identify handicapped children. Programs and related services for handicapped children were to be improved, expanded and designed to meet the unique needs of each individual child. Handicapped children

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[9]H. C. Hudgins, and Richard S. Vacca, *Law and Education: Contemporary Issues and Court Decisions* (Charlottesville, Va.: The Michie Co., 1985) 401-2.

[10]H. Rutherford Turnbull III. *Free Appropriate Public Education: The Law and Children with Disabilities* (Denver, CO: Love Publishing Co., 1990), 14. *See* 20 U.S.C.A. § 1401 *et seq.* (1976), and the federal implementing regulations at 34 C.F.R. § 300.

[11]H. C. Hudgins, and Richard S. Vacca, *Law and Education: Contemporary Issues and Court Decisions* (Charlottesville, Va.: The Michie Co., 1985) 402.

and their parents had the right to procedural due process hearing during any phase of the process. These hearings are binding on both parties. The local education agency (LEA) educators must advise parents of their rights and the due process procedure, how the procedure works and when parents can ask for and get a hearing. Before this time, local educators appeared to adhere to the principle of "what parents don't know, we aren't going to tell them because it will help us in the long run." If parents didn't know their rights or what services were available, the LEA didn't have to provide these services. This attitude leads to exclusion of disabled children by omission.

The individualized education program (IEP) process was another provision of EAHCA. An appropriate IEP must be designed to meet each child's unique needs and must be reevaluated annually.

> The 1975 law [the Education for All Handicapped Children Act] was the most significant amendment of the Education of the Handicapped Act (EHA) to that time. But it has not been the only amendment. Congress has amended the EHA in 1978 by P.L. 95-561, in 1983 by P.L. 98-199, in 1986 by P.L. 99-372 [the Handicapped Children's Protection Act], and again in 1986 by P.L. 99-457.[the Handicapped Infants and Toddlers Act - Part H-EHA] [12]

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[12]H. Rutherford Turnbull III. *Free Appropriate Public Education: The Law and Children with Disabilities* (Denver, CO: Love Publishing Co., 1990), 14.

In 1990, Congress passed P.L. 101-336 (The Americans with Disabilities Act or ADA) and P.L. 101-476 (The Individuals with Disabilities Education Act or IDEA). The IDEA amended the EHA and changed its name. The ADA is modeled after the Rehabilitation Act of 1973.

> The protection from discrimination that was provided in federally funded activities by Title V of the Vocational Rehabilitation Act [of 1973] was extended to private-sector and state and local governments activities by the Americans with Disabilities Act (ADA).[13]

ADA is composed of five titles. Title I deals with employment and affects employers with 15 or more employees. Employers may not discriminate against otherwise qualified applicants with disabilities. Reasonable accommodations must be made for applicants or employees with disabilities unless undue hardship would be caused. The U.S. Equal Employment Opportunity Commission administers this title.[14]

Title II deals with public services such provided by as state and local governments. This title affects facility accessibility of both existing and new construction and transportation vehicles. Facilities must meet accessibility requirements consistent with section 504 of the Rehabilita-

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[13]ERIC/OSEP Special Project. *Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990, Legal Foundations, Number 1* (Reston, VA: ERIC Clearinghouse on Handicapped and Gifted Children, 1992), 3, ERIC ED 357 552.

[14]Ibid.

tion Act of 1973. New transportation vehicles must be accessible to disabled individuals. Administration of Title II falls on the U.S. Department of Justice and the U.S. Department of Transportation.[15]

Of the five titles, Title III has the greatest relevance to public elementary and secondary education and it extends concerns from public to private agencies. In its entirety, Title III states:

> Title III: Public Accommodations. Privately owned public accommodations such as restaurants, hotels, theaters, stores, doctors' offices. parks, private schools, and day-care centers may not discriminate on the basis of disability. Physical barriers must be removed if removal is readily achievable; otherwise, alternative methods of providing services must be offered. New constructions and alterations to existing constructions must be accessible. . . .New buses and other vehicles operated by private entities must be accessible or the system must provide service equivalent to that provided to the general public. Lead agencies for Title II are the U.S. Department of Justice and the U.S. Department of Transportation.[16]

Title IV deals with telecommunications. "Telephone companies must provide telecommunications relay services for hearing impaired and speech impaired persons 24 hours per day."[17] Implementation will be the responsibility of the Federal Communications Commission.

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[15]Ibid, 4.

[16]Ibid.

[17]Ibid.

Title V covers many miscellaneous issues from insurance regulations to the implementation of each title. It also contains amendments to the Rehabilitation Act of 1973.

The ADA is patterned after the Rehabilitation Act of 1973 and specifically section 504. "This Act served as the model for much of the language found in the ADA. However, the Rehabilitation Act only applies to recipients of federal funds; the ADA covers many more employers."[18] ADA has extensive ramification for students with disabilities.

> On behalf of students with disabilities, the ADA challenges educators and policymakers to renew the spirit that was prevalent during *Brown v. Board of Education of Topeka* and at the time of the development of EAHCA to ensure maximum opportunities for inclusive citizenship.[19]

The IDEA has eight parts and includes past legislation such as P.L. 94-142. Several highlights of the 1990 amendments are: the creation of the Office of Special Education Programs (OSEP) in the U.S. Department of Education, the inclusion of transition services in IEPs beginning at age 16, and the provision of grants in excess of $2 billion per

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[18]Stephen Allred. "The Americans with Disabilities Act: Some Questions and Answers." *School Law Bulletin* 22 (Winter 1991): 6.

[19]Robin Cunconan-Lahr. *The American With Disabilities Act: Educational Implications and Policy Considerations.* Paper presented at the Annual Convention of the Council for Exceptional Children, Atlanta, Georgia, 1-5 April 1991, 5, Speech, ERIC, ED 333 665.

year to state and local educational agencies to help underwrite the cost of educating children with disabilities.

> IDEA, formerly the Education of the Handicapped Act (EHA), is the comprehensive law articulating federal policy concerning the education of and early intervention for infants, toddlers, children and youth with disabilities.[20]

The IDEA also extended and clarified the elements necessary in every IEP. Each IEP must be a written statement and include at least the following elements:

> (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) a statement of the needed transition services for students beginning no later than age 16 and annually thereafter (and, when determined appropriate for the individual, beginning at age 14 or younger), including, when appropriate, a statement of the interagency responsibilities or linkage (or both) before the student leaves the school setting, (E) the projected date for initiation and anticipated duration of such services, and (F) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis whether instructional objectives are being achieved.[21]

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[20]ERIC/OSEP Special Project. *The Individuals with Disabilities Education Act (IDEA), Legal Foundations, Number 2* (Reston, VA: ERIC Clearinghouse on Handicapped and Gifted Children, 1992), 1, ERIC ED 357 553.

[21]20 U.S.C.A. § 1401(a)(20) (1990).

The parents of the handicapped child are to be included in the development of the IEP. The IDEA provided parents with the guarantee of procedural due process.

> The intent of the law [IDEA] was to guarantee these students an appropriate education in the least restrictive environment. The law was unique in that it provided students, and their parents, with substantial procedural due process rights to ensure that the intended appropriate education became a reality.[22]

State Statutes

The only state statutes that will be discussed are from states that have enacted statutes with higher standards than the IDEA. To qualify for and receive funding under IDEA, a state must have statutes in effect "that assure all children with disabilities the right to a free appropriate public education"[23] "which emphasizes special education and related services designed to meet their unique needs."[24] The federal Act provides the **minimum** requirements for providing a free appropriate public education.

There were substantial differences among some different state statutes. Most states enacted similar statutes in response to the original federal legislation, The Education for All Handicapped Children Act of 1975 (P.L. 94-142),

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[22]80 Ed.Law Rep. [771] (April 22, 1993).

[23]20 U.S.C.A. § 1412(1) (West 1994).

[24]20 U.S.C.A. § 1400(c) (West 1994).

passed in 1975. Then Congress passed the 1990 amendments (IDEA). Consequently, the wording of the state statutes did not mirror the new federal verbiage. States that didn't have equivalent statutes again wrote their statutes to parallel the 1990 federal verbiage and intent. Indeed, some states amended their statutes to match the exact wording of the federal legislation.[25] In fact, 45 states now have statutes with parallel or exact wording to IDEA or the court has ruled that the statutes do not exceed the federal statutes. However, five states still have statutes using language that exceeds the federal requirements for a "free appropriate public education" by the use of words such as "full" or "maximize" when referring to the potential or capabilities of a disabled child. This difference in wording and therefore intent is causing legal problems for several of these states.[26] The courts must decide if particular state statutes exceed the federal requirements and therefore must be considered in a ruling (see Table 1).

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[25] *California Education Codes* § 56000 (Deering Supp. 1994) states "It is also the intent of the Legislature that nothing in this part shall be construed to set a higher standard of educating individuals with exceptional needs than that established by Congress under the Individuals with Disabilities Education Act."

[26] *See* Harrell v. Wilson County Schools, 293 S.E.2d 687, *appeal dismissed*, 295 S.E.2d 759 (1982), Scituate School Committee v. Robert B., 620 F.Supp. 1224 (D.C.R.I. 1985), *aff'd* 795 F.2d 77 (1st Cir. 1986), Conklin v. Bd. of Education, 946 F.2d 306 (4th Cir. 1991), Doe v. Board of Education of Tullahoma, 9 F.3d 455 (6th Cir. 1993).

Table 1
Comparison of Phrasing of State Statutes and IDEA

State	Same as the IDEA	exceeds IDEA	State	Same as the IDEA	exceeds IDEA
Alabama	XXX		Montana	XXX	
Alaska	XXX		Nebraska	XXX	
Arizona	XXX		Nevada	XXX	
Arkansas	XXX(a)		New Hampshire	XXX	
California	XXX		New Jersey	XXX(b)	
Colorado	XXX		New Mexico	XXX	
Connecticut	XXX		New York	XXX	
Delaware	XXX		North Carolina	XXX(c)	
Florida	XXX		North Dakota	XXX	
Georgia	XXX		Ohio	XXX	
Hawaii	XXX		Oklahoma	XXX	
Idaho	XXX(d)		Oregon	XXX	
Illinois	XXX		Pennsylvania	XXX	
Indiana	XXX		Rhode Island	XXX(e)	
Iowa	XXX(f)		South Carolina	XXX	
Kansas		XXX(g)	South Dakota	XXX	
Kentucky	XXX		Tennessee	XXX(h)	
Louisiana	XXX		Texas	XXX	
Maine	XXX		Utah	XXX	
Maryland		XXX(i)	Vermont	XXX	
Massachusetts		XXX(j)	Virginia	XXX	
Michigan		XXX(k)	Washington	XXX	
Minnesota	XXX		West Virginia	XXX	
Mississippi	XXX		Wisconsin	XXX	
Missouri		XXX(l)	Wyoming	XXX	

(a)The original wording, "to meet the needs to maximize the capabilities of handicapped children," was amended in 1990 to parallel IDEA. (b)The wording of the 1978 Statutes exceeded IDEA. This wording was amended to parallel to IDEA by 1993. (c)While the wording exceeds IDEA, the court has ruled the intent does not exceed the intent of IDEA. (d)The statute as written in 1981 used the words "fullest potential". Statute was amended by 1993 to exactly match IDEA. (e)Court has ruled Statute did not exceed IDEA regardless of wording. (f)Statue was amended to match IDEA in 1985. (g)Statute uses the phrase "progress toward the *maximum* of their abilities or capacities." This definition has not been challenged in court as of June, 1994. (h)Court ruled that Statute does not exceed IDEA regard-less of wording. (i)Definition has been challenged in court, but no clear decision has been handed down. (j)Statute has been challenged in court twice. Both times, the court used the state statute in deciding the cases. (k)The statute states "to develop the *maximum* potential of every handicapped person. It hasn't really been tested in court regarding the term "maximum." (l)While the phrasing of the statute exceeds IDEA, it has not been challenged in court as of June, 1994.

In the *Arkansas Code of 1987 Annotated* the original wording "to meet the needs to *maximize* the capabilities of handicapped children"(emphasis added)[27] has been changed to "[i]t shall be the policy of this state to provide . . . a free appropriate public education for students with disabilities."[28] Now, the wording is identical to the federal statute.

The *Idaho Code* originally defined exceptional children using the phrase "as to require special education and special services in order to develop to their fullest capacity."[29] This wording has been dropped from the current definition of exceptional children. The definition of special education or special instructional services was added to include "specially designed instruction or related services at no cost to the parents, to meet the unique needs of an exceptional child."[30] This now exactly parallels the federal wording.

On the other hand, in 1985 Iowa amended its original statutes from ". . . To meet the needs and maximize the capabilities of children requiring special education" to "[i]t is the policy of this state. . . to provide . . . for

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[27]Ark. Code Ann. § 6-41-202 (Michie 1989).

[28]Ark. Code Ann. § 6-41-202(a) (Michie 1993).

[29]Idaho Code § 33-2002 (Bobbs-Merrill 1981).

[30]Idaho Code §33-2001(5) (Michie Supp. 1994).

a free and appropriate public education sufficient to meet the needs of all children requiring special education."[31]

The *Kansas Statutes Annotated* adds a new dimension to the definition of "exceptional children"

> (f) "Exceptional children" means persons who: (1) are school age, . . .; and (2) differ in physical, mental, social, emotional or educational characteristics to the extent that special education services are necessary to enable them to progress toward the *maximum* of their abilities or capacities.[32]

Their definition of special education services simply states "programs for which specialized training, instruction, programming techniques, facilities and equipment may be needed for the education of exceptional children."[33] The wording of this statute hasn't been challenged in court, yet. If the statute is challenged, it will be interesting to see if a court focuses on "progress toward" or "maximum" in the wording.

The Maryland statutes define special educational services as meaning:

> the educational services necessary to assure that all handicapped children are given the opportunity to reach

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[31]Iowa Code Ann. §281.2(3) (West 1988).

[32]Kan. Stat. Ann. § 72-962(f) (1992).

[33]Kan. Stat. Ann. § 72-962(h) (1992).

> appropriate levels of knowledge and learning skills consistent with their potential.[34]

This statute has been challenged in court.[35] The Fourth Circuit Court of Appeals remanded the case to the district court to decide if the Maryland statute exceeds the federal Act. No clear-cut decision had been made as of June, 1994.

The Massachusetts statute has an unique wording among the other states including "to minimize the possibility of stigmatization and to assure the *maximum* possible development in the least restrictive environment of a child with special needs."(emphasis added)[36] This Massachusetts statute has been challenged in court twice. In each case, the court considered the wording and intent of the state statute over the IDEA. The first case[37] was decided in favor of the parents. The school system was required to educate a child with Down's Syndrome in a private residential school. In the second challenge, the court ruled for the school district stating that both the IEP developed and the public school educational placement recommended by the school

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[34]Md. Code Ann. Educ. §8-401(a)(2) (Michie 1992).

[35]Conklin v. Board of Education of Anne Arundell County, 946 F.2d 306 (4th Cir. 1991).

[36]Mass. Ann. Laws ch. 71B, § 2 (Law. Co-op. 1994).

[37]David D. v. Dartmouth School Committee, 775 F.2d 411 (1st Cir. 1985).

district would maximize the child's development in the least restrictive environment.[38]

The Michigan statute defines a state plan "which shall provide for the delivery of special education programs and services designed to develop the maximum potential of every handicapped person."[39] This statute has been tested in court only to the extent of deciding between two equal but different programs for a handicapped child. Both programs would help the child develop to his/her maximum potential; therefore, the court ruled in favor of the less expensive program.[40]

Missouri statutes require special education services "sufficient to meet the needs and maximize the capabilities of handicapped and severely handicapped children."[41] This statute apparently hasn't been challenged in any state or federal court as of 1994.

North Carolina statutes are very explicit in the special education policy statement "to ensure every child a

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[38]Roland M. v. Concord School Committee, 910 F.2d 983 (1st Cir. 1990), *cert. denied*, 499 U.S. 912 (1991).

[39]Mich. Stat. Ann. § 15.41701(a) (Callaghan 1987).

[40]Mich. Stat. Ann. § 15.41701 note 12 (Callaghan 1987). *See* Chuhran v. Walled Lake Consolidated Schools, 839 F.Supp. 465 (E.D. Mich. 1993).

[41]Mo. Ann. Stat. § 162.670 (Vernon 1991).

fair and full opportunity to reach his full potential."[42] The case notes for this section make a revealing statement regarding the North Carolina Statute:

> **This section was not designed to require the development of a utopian educational program** for handicapped students any more than the public schools are required to provide a utopian educational program for nonhandicapped students. Harrell v. Wilson County Schools, 58 N.C. App. 260, 293 S.E.2d 687, cert. denied and appeal dismissed, 306 N.C. 740, 295 S.E.2d 759 (1982).[43]

New Jersey original statutes state that "a local public school district must provide each handicapped pupil a special education and services according to how the pupil can best achieve educational success."[44] The wording of the recent *New Jersey Statutes Annotated* [45] parallels the federal statutes. These changes may be the result of a court case.[46]

The Rhode Island statute exceeds the federal wording in one area stating that the school committee "shall provide the type of special education that will *best* satisfy the

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[42]N.C. Gen. Stat. § 115C-106(a) (Michie 1993).

[43]N.C. Gen. Stat. § 115C-106 case note (Michie 1993).

[44]N.J. Admin. Code Title 6 § 28-2.1 to 2.2 (1978).

[45]N.J. Stat. Ann. § 18A:46-19.1 (West 1989 & Supp. 1993).

[46]*See* Geis v. Board of Education of Parsippany-Troy Hills, Morris County, 589 F.Supp 269,272 (D.N.J. 1984), 774 F. 2d. 575 (3rd Cir. 1985).

needs of the handicapped child."[47] In the case of *Scituate School Committee v. Robert B.*,[48] the court found that the Rhode Island statute did not impose a substantive standard higher than the federal mandate for a free appropriate public education. The difference in wording of the statute was taken into consideration by the court.[49]

The Tennessee statute, in its legislative intent, maintains that the state will "provide special education services sufficient to meet the needs and maximize the capabilities of handicapped children."[50] Yet, the definition of "special education services" only states "to meet the needs of handicapped children."[51] In the only case to challenge the wording of the Tennessee statute, the appellate court ruled that Tennessee's special education statute did not impose a standard higher than established by the IDEA.[52]

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[47]R.I. Gen. Laws § 16-24-1 (Michie 1988).

[48]620 F.Supp. 1224 (D.R.I. 1985), *aff'd*, 795 F.2d 77 (1st Cir. 1986).

[49]Ibid., 1233.

[50]Tenn. Code Ann. §49-10-101(a)(1) (Michie 1990).

[51]Tenn. Code Ann. §49-10-102(4) (Michie 1993).

[52]Doe v. Board of Education of Tullahoma City Schools, 9 F.3d 455 (6th Cir. 1993).

Summary

Evidently, most state legislatures have decided to safeguard their school systems from legal proceedings by exactly matching or paralleling the language of the IDEA in their state statutes. This may be the better part of discretion. As of June, 1994, only five states still have wording that exceeds the federal substantive standards. The other states have either changed the wording of the statutes to parallel the federal mandate or the courts have decreed that the intent is the same, even if the wording is not. As Chapter IV will show, few cases involve the difference in wording between state and federal statutes. The majority of case law deals exclusively with violations of federal statutes.

CHAPTER IV

LEGAL ASPECTS OF SPECIAL EDUCATION WITH RESPECT TO PUBLIC ELEMENTARY AND SECONDARY SCHOOL PROGRAM INCLUSION OR EXCLUSION BASED SOLELY ON DISABILITIES

Educational program exclusion or inclusion solely based on a disability has become a much litigated area since the landmark decision in *Brown v. Board of Education of Topeka*[1] and the passage of Education of the Handicapped Act (EHA) and the Vocational Rehabilitation Act (P.L. 93-112). The courts have been asked to clarify both constitutional and statutory issues in many cases. Of all the education cases litigated only a few have been heard by the United States Supreme Court. For this reason, federal courts of appeal and state supreme courts have been forced to make landmark rulings. The legal cases considered in this analysis are from 1978 through December, 1993.

The facts in each case are examined. The final decision of the court is discussed. Legal ramifications of the case and the effects on public school administrators and/or school policy are included.

Exclusion from or inclusion in education programs is currently being tested in court on several different grounds: free appropriate public education, least restric-

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[1]347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954).

tive environment, violation of due process procedure, dispute over Individual Education Programs (IEP), mainstreaming, appropriate placement, exclusion based on Sec. 504 of the Vocational Rehabilitation Act, and the definition of related services under IDEA. Because each case usually has more than one factor or legal issue, each case is put into a category based on the major issue. The cases are divided into five categories: 1) landmark cases, 2) free appropriate public education, 3) due process, 4) exclusion and 5) IEP, mainstreaming, and parental participation. The cases are reviewed in chronological order within each section.

Landmark Cases

Landmark cases are presented first because the court findings and decisions in these cases are cited, in one form or another, in other cases discussed in this study.

In the now landmark case, *Board of Education of the Hendrick Hudson Central School District v. Rowley*[2], the United States Supreme Court had its first litigation dealing with statutory interpretation of the Education for All Handicapped Children Act of 1975 (EAHCA). In particular, the Act's directive that "appropriate education" be afforded every child eligible under the Act needed to be clarified.

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[2]458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982).

Amy Rowley, a hearing-impaired student with minimal residual hearing, was enrolled in regular classes since kindergarten. She received help from a tutor for one hour every day and a speech therapist three hours each week. Her parents requested the additional services of a sign-language interpreter. The parents felt that the additional service of an interpreter would enable Amy to develop to her maximum potential. School administrators challenged whether this service was necessary because Amy had passed each grade with above average grades.[3] An impartial hearing officer found that the sign-language interpreter was not necessary. The parents brought suit in the U.S. District Court. The District Court found for the parents stating:

> Entering judgement for the respondents, the District Court found that although the child performed better than the average child in her class and was advancing easily from grade to grade, she was not performing as well academically as she would without her handicap. Because of this disparity between the child's achievement and her potential, the court held that she was not receiving a "free appropriate public education," which the court defined as "an opportunity to achieve [her] full potential commensurate with the opportunity provided to other children." The Court of Appeals affirmed.[4]

The United States Supreme Court reversed the Court of Appeals ruling. The Court found that "in seeking to provide

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[3]Ibid., 3039-40.

[4]458 U.S. 176 (1982).

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."[5] The Court stated in part:

> 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. . . .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 (emphasis added).[6]

The Court determined that Congress did not mean for schools to try to educate handicapped students to their maximum potential. According to the EHA, schools only have to provide the disabled child with the same basic opportunities for an education as nonhandicapped children. Educators do not have to provide an education that enables a disabled child to reach his *maximum* potential.

This is a landmark case for another reason. In considering appropriate methodologies, the Court maintained:

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[5]458 U.S. 176, 192 (1982).

[6]458 U.S. 176, 200-201.

> 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. . . . [I]t 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." *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S., at 42. We think that Congress shared that view when it passed the Act. . . . Therefore, once a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the States.[7]

These two principles have been used as the basis for numerous rulings made by other courts.

Two additional landmark cases, *Smith v. Robinson*[8] and *Irving Independent School District v. Tatro*,[9] were decided by the United States Supreme Court the same day, July 5, 1984. Since *Smith* was argued first, it is presumed to precede *Tatro*. Also *Smith* is cited in the Court's ruling on *Tatro*.

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[7]458 U.S. 176, 207-08.

[8]703 F.2d 4, 468 U.S. 992, 104 S.Ct. 3457, 79 L.Ed.2d 304. (1984).

[9]468 U.S. 883, 104 S.Ct. 3371, 82 L.Ed.2d 664 (1984).

The case of *Smith v. Robinson*[10] is extremely complicated and includes several different legal issues.

> The [major] issue in *Smith* was whether a student may sue under the EHA, Section 504, and Section 1983 where the alleged discrimination is prohibited under EHA; that is, may the student use Section 504 and Section 1983 to enforce a right already granted by the EHA and, if successful, recover attorneys' fees?[11]

Thomas F. Smith III suffered from cerebral palsy and a variety of physical and emotional handicaps. Tommy was eight years old in November, 1976. In December 1975, he was initially placed by the Cumberland School Committee in a day program at a hospital in East Providence, R.I. In November 1976, the parents were informed by the Superintendent of Schools that the School Committee would no longer fund the child's placement in a special education program. The committee decided that according to Rhode Island law, the State's Division of Mental Health, Retardation, and Hospitals (MHRH) was responsible for educating an emotionally disturbed child. The parents began the due process procedure and brought suit in Federal District Court.

> They asserted, at various points in the proceedings, claims for declaratory and injunctive relief based on

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[10]703 F.2d 4, 468 U.S. 992, 104 S.Ct. 3457, 79 L.Ed.2d 304. (1984).

[11]H. Rutherford Turnbull III. *Free Appropriate Public Education: The Law and Children with Disabilities* (Denver, CO: Love Publishing Co., 1990), 228.

> state law, on the Education of the Handicapped Act (EHA), on § 504 of the Rehabilitation Act of 1973, and, with respect to certain federal constitutional claims, on 42 U.S.C. § 1983.[12]

During this process, the Associate Commissioner of Education acknowledged the parents' contention that a state statute was in conflict with the EHA. The state statute concerning MHRH required the parents to pay a portion of the cost for providing services to their son. The district court stated ". . . the child was entitled, as a matter of state law, to a free appropriate special education paid for by the School Committee."[13] In addition, the Court found ". . . it was therefore unnecessary and improper to reach petitioners' federal statutory and constitutional claims."[14]

The parents also were requesting attorney fees be paid by the school committee and the state defendants. The school committee agreed to pay certain attorney fees. The district court also granted certain fees associated with the administrative process because parents are obligated "to exhaust their EHA remedies before asserting their § 1983 and § 504 claims."[15] The First Circuit Court of Appeals reversed this decision, concluding ". . . the action and

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[12]468 U.S. 992 [Syllabus] (1984).

[13]Ibid.

[14]Ibid.

[15]Ibid.

relief granted fell within the reach of the EHA,"[16] but the EHA does not grant attorney's fees. The appellate court concluded that "Congress could not have intended its omission of attorney's fees relief in that statute [EHA] to be rectified by recourse to § 1988."[17] The United States Supreme Court stated:

> We have little difficulty concluding that Congress intended the EHA to be the *exclusive avenue* through which a plaintiff may assert an equal claim to a publicly financed special education.[Emphasis added][18]

This case is cited often when a case has both EHA issues and § 504 issues to be decided. "Its [the Supreme Court] 1984 decision in *Smith v. Robinson* specifically side-stepped the damages question, but contained language suggesting that the Court will rule consistent with the majority trend."[19] The important implication to educators is that EHA issues take precedence over Section 504 or Section 1983 claims.

A third landmark case, *Irving Independent School District v. Tatro*,[20] addresses "related services" required

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[16]Ibid.

[17]Ibid.

[18]468 U.S. 992, 1069.

[19]H. Rutherford Turnbull III. *Free Appropriate Public Education: The Law and Children with Disabilities* (Denver, CO: Love Publishing Co., 1990), 229.

[20]468 U.S. 883, 104 S.Ct. 3371, 82 L.Ed.2d 664 (1984).

under EHA. The U.S. Supreme Court in 1983 considered two separate issues in this case: 1) is clean intermittent catheterization (CIC) a "related service" under the EHA? and 2) is a § 504 of the Rehabilitation Act claim applicable, including attorney's fees?[21]

Amber Tatro was an 8-year-old girl born with spina bifida. She suffered from orthopedic and speech impairments and has a neurogenic bladder, which prevents voluntary voiding of the bladder. To prevent damage to her kidneys, Amber had to be catheterized every three or four hours.[22] The procedure called clean intermittent catheterization (CIC) was prescribed by her physician.

CIC involves the insertion of a catheter into the urethra to drain the bladder. The procedure isn't difficult and can be performed by a layperson with less than one hour of training. In fact Amber's parents, older brother and babysitter were all trained in the procedure that only takes a few minutes. Amber could have performed this procedure herself if she were older.[23]

The parents maintained that CIC was a "related service" and should be provided by the school district. Without this service, Amber could not attend school. This, in effect,

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[21]Ibid., 884.

[22]Ibid., 885.

[23]Ibid.

excluded Amber from school solely based on her disability. The school district contended that CIC was a "medical service," not a "related service" as defined in EHA. Therefore, the school district should be excluded from having to provide this services for her.

Amber was to attend a public pre-school program beginning in 1979 when she was three and a half-years old. The initial IEP developed provided Amber with special services including physical and occupational therapy, but made no provision for CIC by school personnel. The parents disagreed and asked for procedural due process hearing. A hearing officer ruled for the parents and was upheld by the Texas Commissioner of Education. The ruling was reversed by the State Board of Education. The parents brought suit in United States District Court. The district court initially ruled in favor of the school district. The parents appealed. The United States Fifth Circuit Court of Appeals reversed this ruling and remanded the case. On remand, the district court found for the parents. In addition, the court awarded compensatory damages under § 504 of the Rehabilitation Act.

The U.S. Supreme Court held that states receiving funding through EHA must provide a "free appropriate public education" which is defined as "special education and relat-

ed services"[24] The Court referred to the EHA definition of related services:

> 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).[25]

The Court's opinion was that CIC is a "related service" under EHA because it enabled Amber to remain at school. It was not a "medical service," but a "school health service," 34 C.F.R. §300.13(a) (1983)[26] which was defined as "services provided by a qualified school nurse or other qualified person," §300.13(b)(10) (1983).[27] The Court clarified the issue further stating:

> 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. . . .[T]he regulations state that school nursing services must be provided only if

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[24]20 U.S.C.A. § 1401(18) (1990).

[25]468 U.S. 883, 889-890.

[26]Ibid., 892.

[27]Ibid.

> they can be performed by a nurse or other qualified person, not if they must be performed by a physician.[28]

If the service required a physician, it would be excluded as a "medical service." Since CIC doesn't require a nurse or a physician to preform the procedure, it must be provided by the school district.

On the issue of relief under § 504 of the Rehabilitation Act, the Court citing *Smith v. Robinson*[29] stated "§ 504 is inapplicable when relief is available under the Education of the Handicapped Act to remedy a denial of educational services."[30] The Court held that the parents were not entitled to relief under § 504 and reversed this part of the appellate court decision.

In the landmark case of *Burlington School Committee v. Massachusetts Department of Education*,[31] the Town of Burlington (Town) brought suit against the Massachusetts Department of Education's Bureau of Special Education Appeals (BSEA) and the parents of a learning disabled child over a decision about educational placement and reimbursement of private school expenses. By the time this case

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[28]Ibid., 894.

[29]468 U.S. 992, 104 S.Ct. 3457, 79 L.Ed.2d 304. (1984).

[30]468 U.S. 883, 895.

[31]471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985).

reached the United States Supreme Court, Mr. and Mrs. Panico and Town had been negotiating this case for over eight years. Therefore, only the issues that the Supreme Court granted certiorari will be discussed.

Michael Panico, originally referred to as John Doe, Jr. in the earlier cases, was a learning disabled child. He began having serious academic trouble in the first grade. He was later identified as "handicapped" under the EHA. "This entitled him to receive at public expense specially designed instruction to meet his unique needs, as well as related transportation. §§1401(16), 1401(17)."[32]

The IEP developed for Michael for the 1978-79 academic year called for one hour of reading tutoring per day and counseling. The school Michael attended was not staffed to serve his needs. He continued to perform poorly. These factors led to extensive discussion between the school and the parents. These discussions were not always amicable. Both the Town and parents agreed that Michael had an above average to superior intelligence, but needed to be in a different school for the 1879-80 academic year. There was much disagreement over the type and origin of Michael's disability. The Town said that the source was emotional and the parents believed it to be neurological. Based on the results of an independent evaluation, the parents withdrew

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[32]Ibid., 361.

Michael from public school and enrolled him in a state-approved private school. The evaluation found that Michael had a severe learning disorder and should be placed in a private school-type setting that specialized in learning handicaps. Mr. Panico rejected the proposed IEP for the 1979-1980 academic year and requested a hearing.[33]

The hearing officer found Michael's placement in the private school was appropriate and ordered the Town to reimburse the parents for tuition, transportation and expenses. The Town brought suit in district court. The district court granted summary judgment against the Town. The Town appealed. The appellate court vacated the judgment and remanded the case. On remand, the district court found for the Town, stating that the Town was not responsible for tuition for academic years 1979-80 through 1981-82. The parents appealed again. The First Circuit Court of Appeals remanded the case again.[34]

The United States Supreme Court affirmed the findings of the appellate court:

> 1. The grant of authority to reviewing court under §1415(e)(2) 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. The ordinary

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[33]Ibid., 362.

[34]Ibid., 362-64.

> meaning of the language in §1415(e)(2) directing the court to 'grant such relief as [it] determines is appropriate' confers broad discretion on the court. To deny such reimbursement would mean that 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 of the Act would be less than complete. Pp. 369-371.
>
> 2. A parental violation of §1415(e)(3) by changing the 'then current educational placement' of their child during the pendency of proceedings to review a challenged proposed IEP does not constitute a waiver of parents' right to reimbursement for expenses of the private placement. Otherwise, the parents would be forced to leave the child in what may turn out to be an inappropriate educational placement or to obtain the appropriate placement only by sacrificing any claim for reimbursement. But if the courts ultimately determine that the proposed IEP was appropriate, the parents would be barred from obtaining reimbursement for any interim period in which their child's placement violated §1415(e)(3). Pp. 371-374.[35]

The two prerequisites to reimbursement as interpreted by the Court are: 1) Did the educational program proposed by the school district fail to provide a free appropriate public education for the child? and 2) Did the private school chosen by the parents provide an appropriate education, allowing the child to receive reasonable educational benefits from it?

The landmark case, *Honig v. Doe*,[36] addresses the "stay-put" provision of the EHA as it applies to expulsion

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[35]Ibid., 360.

[36]484 U.S. 305, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988). The original case was Doe by Gonzales v. Maher, 793 F.2d 1470 (9th Cir. 1986).

of disabled children, especially emotionally handicapped. This provision requires that a disabled child shall remain in the current educational placement until the procedural review proceedings are completed.

By the time the United States Supreme Court granted the writ of certiorari, the case in regard to John Doe was moot because he was then 24 years old and no longer eligible under the EHA. The Act limits eligibility to disabled children between the ages of 3 and 21. The case was justiciable in respect to Jack Smith because he was only 20 years old and had not finished high school yet.[37]

John Doe and Jack Smith were emotionally disturbed students. They attended schools in the San Francisco Unified School District (SFUSD). SFUSD officials tried to expel both students for violent and disruptive behavior related to their disabilities.

Both students had exhibited violent or disruptive behavior in the respective schools. They were suspended for five days and recommendations to expel them permanently were made to School Placement Committees. Both suspensions were extended indefinitely. Doe brought legal proceedings first and Smith later intervened.

The United States District Court for the Northern District of California granted summary judgment for the

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[37]484 U.S. 305 (1988).

students. The judge held in a series of decisions that the proposed expulsions and indefinite suspensions for disability-related conduct violated their EHA rights to a FAPE and due process, and 1) permanently enjoined the school district from taking disciplinary action other than a two or five day suspension for any disability-related misconduct by any disabled child, 2) enjoined the school district from executing any change in educational placement without parental consent until completion of EHA proceedings, and 3) ordered, if it was determined in an individual case that a local education agency was unable or unwilling to provide direct services to disabled children, the State must provide services directly to disabled children.[38]

The U.S. Ninth Circuit Court of Appeals affirmed the orders with slight modifications. The appellate court ruled that the 1983 amendments to the California Education Code that authorized initial suspensions of 20 days and up to 30 days in special cases "did not fall within the reach of §1415(e)(3)[of EHA], and therefore upheld such suspensions."[39] A writ of certiorari was filed.

As previously stated, the United States Supreme Court found the case concerning John Doe to be moot because of his age. The Court did consider the case with respect to Jack

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[38]Ibid., 315-16.

[39]Ibid.

Smith since he was still eligible under the EHA. The Court considered the "stay-put" provision of EHA which states:

> During the pendency of any proceedings conducted pursuant to this section, 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, or, if applying for initial admission to a public school, shall, with the consent of parents or guardian, be placed in the public school program until such proceedings have been completed.[40]

This provision forbids state or local school authorities "from unilaterally excluding disabled students from the classroom for dangerous or disruptive conduct growing out of their disabilities"[41] during the continuance of review proceedings. The Court held that "Congress did not leave school administrators powerless to deal with dangerous students,"[42] but instead allowed "the use of normal, nonplacement-changing procedures, including temporary suspension of up to 10 school days for students posing an immediate threat to others' safety."[43]

The Supreme Court did modify the appellate court's ruling that an initial suspension of 20 days did not fall under §1415(e)(3) stating:

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[40]20 U.S.C.A. §1415(e)(3) (1990).

[41]484 U.S.305, 306.

[42]Ibid., 323.

[43]Ibid., 306.

> Because we believe the agency [The United States Department of Education, Office of Civil Rights] correctly determined that a suspension in excess of 10 days does constitute a prohibited "change of placement," we conclude that the Court of Appeals erred to the extent it approved suspensions of 20 and 30 days' duration.[44]

The final issue the Supreme Court addressed was the order by the district court, affirmed by the appellate court, that the State must provide services directly to a disabled child, if it is determined in individual cases that a local education agency was unable or unwilling to provide direct services to the disabled child.[45] The Supreme Court was equally divided so the judgment was affirmed.

A recent landmark case, *Florence County School District Four v. Shannon Carter*,[46] is very similar to *Burlington*, but deals with the IDEA. The parents of a learning disabled student brought suit for reimbursement of tuition to a private school because the public school system failed to provide a free appropriate public education for their daughter.

Shannon attended public school in the first grade. She attended a private school through the sixth grade. She re-enrolled in public school for the seventh grade. Because of

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[44]Ibid., 326, n. 8.

[45]Ibid., 315-16.

[46]510 U.S. ___, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993).

her poor academic performance during that year, the school tested her twice for a learning disability. The school ruled that Shannon was not learning disabled. Her parents requested additional testing after Shannon continued to perform miserably during the first semester of the ninth grade. Results of these tests showed that Shannon was indeed learning disabled. "Although the disability went unnoticed by the school district for almost three years, the district court found that it was comparatively severe."[47]

The school system developed an IEP for Shannon, but her parents disagreed with it and requested a hearing. Hearing officers at both local and state levels upheld the school system. The parents placed Shannon in a private school and she subsequently graduated in the spring of 1988. This suit was filed in July 1986, claiming failure to provide a FAPE.

The district court ruled in favor of the parents, citing the fact that the goals of the proposed IEP and the proposed educational placement failed to satisfy the requirements of the IDEA. The district court held that the private school provided Shannon with an excellent education; therefore, the school district was ordered to reimburse the parents expenses totaling $35,716.11 plus prejudgment interest. The school district appealed.

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[47]950 F.2d. 156, 158.

The Fourth Circuit Court of Appeals affirmed the ruling of the district court. The United States Supreme Court *unanimously* affirmed the ruling of the appellate court:

> **Decision:** Parents held not barred under Individuals with Disabilities Education Act from reimbursement for child's private school placement on grounds that school did not meet all statutory requirements.[48]

Free Appropriate Public Education

The phrase "free appropriate public education" is one of the mainstays of the EHA and is defined as:

> 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.[49]

Since *Rowley*, the courts have had to decide if a school system provided a handicapped child with a free appropriate public education in compliance with EHA or IDEA. If the courts concluded that the education provided was appropriate and there were no other pertinent legal issues, the rulings

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[48]126 L.Ed.2d 284.

[49]20 U.S.C.A. 1401(a)(18) (1990).

were in favor of the school district.[50] On the other hand, if the court concluded that the school district did not provide a free appropriate public education, the decisions were in favor of the parents.[51]

Geis v. Board of Education of Parsippany-Troy Hills,[52] involves "free appropriate public education" where the state statutes exceed the EHA "floor of opportunity." The second issue involves residential placement for the student to best achieve educational success. S. Geis (S.G.) was a disabled child who has been in a residential placement since he has been in school. S.G. suffered from neurological dysfunction, mental retardation, communication disorder, and chron-

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[50]*See* McDowell v. Fort Bend Independent School District, 737 F.Supp. 386 (S.D. Tex. 1990), Burke County Board of Education v. Denton, 895 F.2d 973 (4th Cir. 1990), P.C. v. McLaughlin, 913 F.2d 1033 (2nd Cir. 1990), Chuhran v. Walled Lake Consolidated Schools, 839 F.Supp. 465 (E.D.Mich. 1993), student met IEP goals of passing mainstream classes and received transition services had received a FAPE.

[51]*See* Block v. District of Columbia, 748 F.Supp. 891 (D.D.C. 1990), Lester H. By Octavia P. v. Gilhool, 916 F. 2d 865 (3rd Cir. 1990), plaintiff was awarded two and one-half years of compensatory education beyond age 21 because he was denied a FAPE, Chris D. v. Montgomery County Board of Education, 753 F.Supp 922 (M.D.Ala. 1990), school system did not satisfy requirements of EHA in IEP development and implementation, therefore failed to provide FAPE, Valerie J. v. Derry Cooperative School District, 771 F.Supp. 483 (D.N.H. 1991), plaintiff awarded compensatory education because of failure to provide FAPE, Johnson v. Lancaster-Lebanon Intermediate Unit 13, Lancaster City School District, 757 F.Supp 606 (E.D.Pa. 1991), failure to provide FAPE resulted in reimbursement for private therapy.

[52]589 F.Supp. 269 (D.N.J. 1984), 774 F.2d 575 (3rd Cir. 1985).

ic illness with emotional overtones. When his parents moved to Parsippany, New Jersey, S.G.'s educational placement became the responsibility of Parsippany-Troy Hills Regional School District. The school district continued S.G.'s residential placement for four years.

In 1981, the school district recommended a change of placement for S.G. District personnel wanted to place him in the public school in Parsippany. A hearing was held and the hearing officer ruled that S.G. would enter public school for the next school year. The parents appealed.

> [T]he district court held that the New Jersey regulations which implemented the Act created a higher standard for the education of handicapped than the basic opportunity required in order to receive federal funding. Specifically, the court held that under N.J. Admin.Code §§ 6:28-2.1 and 2.2 (1978) "a local public school district must provide each handicapped pupil a special education and services according to how the pupil can *best* achieve educational success." *Geis v. Board of Education*, 589 F.Supp 269,272 (D.N.J. 1984) (emphasis added).[53]

The district court found that S.G.'s placement in the residential school would be the least restrictive environment for him and he would make the best educational progress there.

On the issue of New Jersey's higher standards, the district court ruled that since these state standards were involved in the implementation the EHA, the court had the

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[53]744 F.2d 575, 579 (1985).

authority to enforce the higher standards. The court also ruled that the Eleventh Amendment did not apply to this case. The educational implications of this case apply to states that have higher standards than the EHA. Those state standards will take precedence over federal ones in court.

Hall by Hall v. Vance County Board of Education[54] was heard by the United States Fourth Circuit Court of Appeals in 1985. There are three fundamental issues involved: 1) reimbursement from public funds for a private school, 2) the school's failure to provide information of procedural due process, and 3) failure of the public school to provide a free appropriate public education.

The case involved a severely dyslexic student, James Hall. He had been educated in Vance County, North Carolina public schools from 1974 to Spring, 1980, or six academic years. He received resource services, but spent 95% of his time in the regular classroom. The parents took him out of public school. Two private evaluations were done in 1980. They showed that even "with James' impressive ability, James was functionally illiterate and that his reading comprehension was untestable."[55] The Halls attempted to place James in Oakland School in Boyd Tavern, Virginia, the private residential school nearest their home, but the placement

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[54]774 F.2d 629 (1985).

[55]774 F.2d 629, 632 (4th Cir. 1985).

took several months. He was tutored at home from October 1980 through June 1981.

> In April 1981, when the Halls first learned from someone at Oakland that they might be able to obtain public funding for James' education at a private school, they contacted a lawyer who suggested that they obtain Vance County Board of Education approval for his placement at Oakland.[56]

The County Board finally evaluated James in 1981 and found that his reading and spelling scores had increased at least one grade level since the last testing. The school proposed public school placement with a new IEP. The parents disagreed and after exhaustive due process filed suit in district court. The United States District Court found in favor of the parents on all three issues. It found that Vance County Board of Education would be responsible for reimbursement to the parents for the costs of providing James' education through the 1983-84 school year because the Board of Education failed to provide the parents with information of procedural due process. The United States Fourth Circuit Court of Appeals states: "failure to meet the Act's procedural requirements are adequate grounds by themselves for holding that the school board failed to provide a FAPE."[57] Finally, Vance County Board of Education failed

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[56]Ibid.

[57]Ibid., 635.

to provide James with a FAPE prior to January, 1982. The United States Fourth Circuit Court of Appeals affirmed the ruling of the district court. This case has been cited frequently in cases addressing FAPE.[58]

In *Spielberg v. Henrico County Public Schools*[59], heard by the U.S. Fourth Circuit Court of Appeal in 1988, the county schools violated both the spirit and the intent of the EHA. By deciding to change the placement of a severely handicapped child from a residential facility to a public school before developing the IEP, procedural regulations were violated. The IEP was then written to support this change in placement. According to the district court, this violation of procedural due process was sufficient to prevent the school system from providing the child with a free appropriate public education. The Fourth Circuit Court of Appeals upheld the district court's decision to continue the child's placement in the residential facility.

Jonathan Spielberg was a severely retarded nineteen-year-old student. He functioned at the level of an eighteen month old child. Henrico County Public Schools, in 1985, began a reevaluation of Jonathan's residential placement. This process began only nine months after his regular trien-

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[58]*See* Board of Education of Cabell County v. Dienelt, 843 F.2d 813 (4th Cir. 1988).

[59]853 F.2d 256 (4th Cir. 1988), *cert. denied*, 489 U.S. 1016, 109 S.Ct. 1131, 103 L.Ed. 192 (1989). (1989).

nial evaluation. From the beginning of the evaluation, county personnel focused on a change of placement. The court held by definition: "An IEP is developed for each handicapped child by school officials and the child's parents. Educational placement is based on the IEP, which is revised annually."[60] The United States Supreme Court denied the writ of certiorari.[61]

Beasley v. School Board of Campbell County,[62] is not a federal litigation. The case was heard by the Virginia Court of Appeals in 1988. This case involves the issue of providing a handicapped student with a free appropriate education and appropriate placement. There are no procedural violations involved.

Darren Beasley attended public school through the seventh grade. At the end of the second grade, Darren was tested and found eligible for special education. He participated in numerous special education programs over the next five years. In 1983, the spring of his seventh grade year, Darren was given a comprehensive re-evaluation by the school system. He was found to be a non-reader and primarily

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[60]853 F.2d 256, 258 (4th Cir. 1988).

[61]*cert. denied* 489 U.S. 1016, 109 S.Ct. 1131, 103 L.Ed. 192 (1989).

[62]367 S.E.2d. 738 (Va.App 1988), 380 S.E.2d 884 (Va. 1989).

an auditory learner. Recommendation by the public schools to continue his placement was made.

Darren's parents elected to place him in a private school starting that summer. When he was tested in the spring of 1984, the results indicated Darren had made at least two years progress in reading. When a disagreement over the appropriate placement for Darren for the 1984-85 school year ensued, a procedural review was held. The hearing officer held that the IEP proposed did not provide Darren a free and appropriate public education. The reviewing officer upheld the decision. The school board brought suit. When the circuit court reversed the decision of the hearing officer, the parents appealed.

The appellate court citing *Rowley* for the determination of a state providing a free appropriate public education, noted that the state must provide ". . . personalized instruction with sufficient support services *to permit the child to benefit educationally from that instruction.* 458 U.S. at 203, 102 S.Ct. at 3049 (emphasis added)."[63] Since Darren did not benefit from his special education placement in the public schools after five years, but did benefit from the private school setting, his public school placement had been inappropriate. The court found that the appropriate program wasn't available in Campbell County Schools or the

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[63]367 S.E.2d 738, 741.

State of Virginia. The appellate court reversed the decision and remanded the case to the circuit court.

The school board appealed this decision to the Virginia Supreme Court. The court held that there was evidence "that the child's alleged lack of sufficient progress in reading was due to factors not related to a deficiency in the county educational program."[64] The court reversed the appellate court decision and made a final judgement in favor of the school board, finding that a free appropriate public education had been provided for the child.

Exclusion

The first exceptional children cases filed on the grounds of exclusion or discrimination cited § 504 of the Rehabilitation Act of 1973.[65] These cases may have caused some of the changes in EHA made by the 1990 amendments.

With the advent of Acquired Immune Deficiency Syndrome (AIDS) and AIDS Related Complex (ARC), a new type of exclusion solely based on a disability is occurring in educa-

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[64] 380 S.E.2d 884, 889 (Va. 1989).

[65] *See* New Mexico Association for Retarded Citizens v. State of New Mexico, 495 F.Supp 392 (D.N.M. 1980), 678 F.2d 847 (10th Cir. 1982), Kerr Center Parents Association v. Charles, 572 F.Supp. 448 (1983), 581 F.Supp. 166 (1983), 842 F.2d 1052.

tion.[66] The case of *Martinez v. School Board of Hillsborough County, Florida*[67] deals with this type of exclusion. Eliana was a trainable mentally handicapped (TMH) child diagnosed with AIDS Related Complex (ARC). Eliana's adoptive mother brought suit claiming violation of the child's right to a FAPE in the least restrictive environment. Mrs. Martinez wanted Eliana placed in a self-contained TMH classroom, not a "mainstream" classroom. Eliana was not toilet trained and frequently put her thumb and forefinger in her mouth, resulting in saliva on the digits. She also suffered from thrush, a disease caused by a parasitic fungus that produced white patches and ulcers in the mouth. These ulcers could bleed, but Eliana didn't have any open ulcers. When the IEP committee met, it recommended a homebound placement for Eliana. A hearing officer found the homebound placement appropriate because of Eliana's incontinence.

The federal district court held that Eliana be placed in the TMH classroom with certain restrictions. These restrictions included: construction of a separate room with a large picture window within the TMH classroom; this room

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[66] *See* Board of Ed., Plainfield v. Cooperman, 523 A.2d 655 (N.J. 1987), Thomas v. Atascadero Unified School District, 622 F.Supp. 376 (C.D.Cal. 1987).

[67] 675 F.Supp. 1574 (M.D. Fla. 1987), 692 F. Supp. 1293 (M.D. Fla 1988), 861 F.2d 1502 (11th Cir. 1988), *on rem'd* 711 F. Supp 1066 (M.D.Fla. 1989)

must have an adequate sound system and a door giving access to an outside corridor. The school board must employ a full-time aide to stay with Eliana in the room. Eliana must stay in the separate room as long as she was incontinent and continued to suck her fingers. When Eliana was toilet trained and didn't suck her fingers, she may be integrated into the TMH classroom. If she developed open sores or lesions, she would be returned to the separate room.

The mother appealed this decision. The appellate court vacated the lower court's order. It remanded the case to district court for further consideration of the possible effects on Eliana both psychologically and educationally from this isolation in a separate room. Also the court was to examine the balance of least restrictive environment against the possible risk of transmission of AIDS.

On remand, the district court found: 1) the possibility of transmission with respect to tears, saliva, and urine was remote and theoretical, 2) the risk level wasn't "significant" to require exclusion of Eliana from the TMH classroom, and 3) the school nurse would be consulted to evaluate the advisability of Eliana being in the classroom on a particular day; she would also evaluate another child if there was a danger of exposing Eliana to an infection.[68]

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[68]711 F.Supp 1066, 1072.

Another case involving a child who tested HIV positive is *Parents of Child, Code No. 870901W v. Coker.*[69] The child was a hemophiliac with an emotional disorder and resided in Wagoner County, Oklahoma. The child was placed by IEP meeting in the class for emotionally children in the public schools, but a temporary restraining order prevented the child from attending class. Parents of other children in the special education program brought the suit which resulted in the restraining order. The grounds for this suit were the state statutes regarding contagious diseases. The parents of the child, code number 870901W, brought suit against the school system, parents group, and the state district court judge. The U.S. District Court held that EHA statutes take precedence over the state statutes because the state accepted federal funding under EHA. Therefore, the child was entitled to placement and could not be barred from school based on the state statutes.

In the case of *Thomas v. Atascadero Unified School District,*[70] The major issues are: 1) Is the child considered "handicapped" for the purposes of the Rehabilitation Act? 2) Is the child "otherwise qualified" to attend regular kindergarten classes for the purpose of the Rehabilitation

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[69]676 F.Supp. 1072 (E.D.Okl. 1987).

[70]662 F.Supp. 376 (C.D.Cal 1987).

Act? and 3) Does the child pose a significant risk of harm to the other students or teachers?[71]

Ryan Thomas was a kindergarten student infected with the AIDS virus. He had no other disabilities. He was a premature baby who became infected from contaminated blood transfusions received shortly after his birth. He was diagnosed as being infected early in 1985.[72] Because of Ryan's illness, a placement committee met to make recommendation concerning his placement in public school. Placement in a regular kindergarten was recommended. He attended school for three days in September, 1986. Ryan was involved in an incident with another child and bit the child's pant leg. The school advised the plaintiffs to keep Ryan at home until the placement committee could review its pervious placement in light of his current behavior. An evaluator "did not predict that Ryan would 'bite again.'"[73] The school still recommended "home tutoring"[74] for the remainder of the year. The parents filed for a preliminary injunction in November citing discrimination under § 504 of the Rehabilitation Act.

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[71]Ibid.

[72]Ibid., 379.

[73]Ibid., 381.

[74]Ibid.

The United States District Court for the Central District of California issued a preliminary injunction in December. The court held in the judgment granting permanent injunction that:

> Ryan is a 'handicapped person' within the meaning of § 504 . . . is 'otherwise qualified' to attend a regular kindergarten class . . . and [t]here is no evidence that Ryan Thomas poses a significant risk of harm to his kindergarten classmates or teachers.[75]

The plaintiff's were also awarded costs and attorneys' fees in excess of $40,000. This case came to court before the 1990 amendments to EHA, so Ryan was not classified as an exceptional child, only as a handicapped person.

In *Begay v. Hodel*,[76] a handicapped student brought a discrimination suit against federal school officials citing violation of EHA, § 504 of the Rehabilitation Act and the fifth amendment. Lorraine Begay, a 23-year-old handicapped Navajo woman, suffered from arthritis so severe that she had been confined to a wheelchair since age 13. After finishing junior high, she applied for admission to her neighborhood high school, Many Farms High School (MFHS). MFHS is a boarding school administered by the Bureau of Indian Affairs. She was denied admission to MFHS for four consecu-

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[75]Ibid., 381-2.

[76]730 F.Supp. 1001 (D.Ariz. 1990).

tive school years (1981-1985) because the school's facilities lacked adequate handicapped bathrooms or ramps.[77]

Ms. Begay was forced to attend another high school. Since she lived approximately 10 miles from the nearest paved highway, her daily commute to school over numerous poorly surfaced roads was physically painful because of her condition. During bad weather the van could not get to Ms. Begay's house. She tolerated this situation for two years, but her school academic work suffered. Excessive absences contributed to her academic problems and finally she quit school in October 1983.[78]

Ms. Begay continued her struggle to gain admission to MFHS. When her numerous attempts failed, she brought legal action in July 1985. "Pursuant to the Court Order of August 13, 1985, Ms. Begay was finally admitted to MFHS as a full-time residential student."[79] She still managed to graduate in May, 1987, which was two years late.

The United States District Court denied the defendant's motion to dismiss. The court held that "there is sufficient basis to support a constitutional damages claim within the context of an EHA claim"[80] and the plaintiff had

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[77]Ibid., 1003.

[78]Ibid.

[79]Ibid.

[80]Ibid., 1010.

been denied meaningful access to EHA due process procedures. The court further ruled that the plaintiff must "prove at trial that defendants' conduct amounted to a constitutional violation within the context of an EHA claim."[81]

In a similar § 504 case, *Sullivan v. Vallejo City Unified School*,[82] a disabled student sought injunctive and declaratory relief because the school district refused to allow her service dog to come to school. The plaintiff, Christine Sullivan, was not questioning her IEP or the educational necessity of her service dog. Therefore she did not bring legal action citing violation of the EHA. Instead, she brought suit citing violation of § 504 of the Rehabilitation Act because she was refused access to the school if she was accompanied by her service dog. The school district contended that the complaint should be dropped because the plaintiff did not exhaust the administrative remedies stated in the EHA.

Christine, a 16-year-old handicapped student, attended Hogan Senior High School in Vallejo, California. Her disabilities included cerebral palsy, a learning disability, and rightside deafness. She used a wheelchair for mobility. To increase her independence, she acquired a service dog specially trained for handicapped people.

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[81]Ibid.

[82]731 F.Supp. 947 (E.D.Cal 1990).

The school district in arguments before the court maintained that it had "excluded only the plaintiff's service dog from the school premises and not plaintiff herself."[83] In responding, the court asserted that the

> [d]efendants' attempt to distinguish between plaintiff and her service dog for the purposes of admission to the school premises cannot be reconciled with either the letter or the spirit of the Rehabilitation Act. . . .Because a central purpose of the Act is to prevent discrimination based on public perception of a person's handicap, deference must be shown to the manner in which a handicapped person chooses to overcome the limitations created by her disabling condition. . . .[T]he statute requires accommodation to the plaintiff's handicap; it does not require that she accommodate to the views of the public about her condition.[84]

The court restrained the school district from interfering with the plaintiff's right to be accompanied by her service dog. A new IEP meeting was to be held within seven days to modify the IEP which ensured "that plaintiff's right to be accompanied by her service dog in all aspects of her educational program is not impaired,"[85] and the new IEP had to be in place within 20 days.

The principle issue in *Gaudiello v. Delaware County Intermediate Unit*[86] is a challenge by the parents of the

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[83]Ibid., 958.

[84]Ibid.

[85]Ibid., 962.

[86]796 F.Supp. 849 (E.D.Pa. 1992).

mainstream placement of their handicapped child. The plaintiffs filed their action citing § 504 of the Rehabilitation Act instead of pursuing the administrative procedures and remedies provided by the IDEA.[87] The school district was granted summary judgment because the District Court held that the IDEA was the exclusive avenue through which the a child with disabilities has equal protection to a FAPE. The court asserted that § 504 can't be used to bypass the procedural due process in IDEA. The plaintiffs placed great confidence in *Sullivan v. Vallejo City Unified School District*[88] but the Court determined that the *Sullivan* ruling was not applicable to the facts in this case.

Due Process

Procedural due process is definitely spelled out in EHA.[89] Parents' and students' rights are specifically defined as are administrative procedures. Parents must exhaust all administrative remedies before legal action can be taken. As stated previously, failures of the school board to meet due process requirements are adequate grounds by themselves for finding that a free appropriate public educa-

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[87]Ibid., 853.

[88]731 F.Supp. 947 (E.D. Cal. 1990).

[89]20 U.S.C.A. §1400 *et seq.*

tion has not been provided.[90] On the other hand, legal actions brought by parents have been dismissed or found in favor of the school district because the parents have failed to exhaust administrative remedies.[91] Courts also have ruled that legal actions must be brought within the time allowed by EHA.[92] The last major due process issue is, have any of the student's or parents' right been violated?

The one significant legal aspect of *David D. v. Dartmouth School Committee*[93] is the ruling by the court regarding state statutes that exceed federal guidelines. When state statutes exceed the federal Act in the definition

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[90]Hall by Hall v. Vance County, 744 F.2d 629, 635. *See* Knight v. District of Columbia, 691 F.Supp. 1567 (D.D.C 1988), failure to comply with "stay-put" provision of EHA, Board of Education of Cabell County v. Dienelt, 843 F.2d 813 (4th Cir. 1988), school failed to conduct multi-disciplinary review, failed to involve parents in IEP development, failed to provide FAPE.

[91]*See* Timms v. Metropolitan School District of Wabash County, Indiana, 722 F.2d 1310 (1983), Abney by Kantor v. District of Columbia, 849 F.2d 1491 (D.C.Cir. 1988), Digre v. Roseville Schools Independent District No. 623, 841 F.2d 245 (8th Cir. 1988), Laura V. v. Providence School Board, 680 F.Supp. 66 (D.R.I. 1988), Evans v. District No. 17 of Douglas County, Neb., 841 F.2d 824 (8th Cir. 1988), Secor v. Richmond School Joint District No. 2 Lisbon-Pewaukee, 689 F.Supp 869 (E.D. Wis. 1988), Crocker v. Tennessee Secondary School Athletic Ass'n, 873 F.2d 933 (6th Cir. 1989), Pink by Crider v. Mt. Diablo Unified School District, 738 F.Supp. 345 (N.D. Cal. 1990).

[92]*See* I.D. v. Westmoreland School District, 788 F.Supp. 632 (D.N.H. 1991), 788 F.Supp. 634 (D.N.H. 1992).

[93]775 F.2d 411 (1st Cir. 1985), *cert. denied*, 475 U.S. 1140, 106 S.Ct. 1790, 90 L.Ed. 2d 336 (1986).

of free appropriate public education and substantive standards, the court will incorporate these statutes into its decision. The other legal issues in this case are the appropriateness of the IEP and residential placement versus public school placement.

David was born with Down's Syndrome. David resided in Massachusetts. At the time of this suit, he was 17-years-old with a functional learning and skills level of a kindergartner. He had made some academic progress during the years he was at the Dartmouth School. Yet, David's behavior had become increasingly inappropriate in recent years. He demonstrated little if any self-control in unfamiliar or unstructured situations. "David has repeatedly and unrelentingly engaged in sexual and aggressive behavior directed at persons and animals."[94] The major concern of his parents was that this behavior would prevent David from becoming "a productive adult with a job in a sheltered workshop and [result in] denial of his access to and living within the mainstream community."[95] The plaintiffs felt that "the Dartmouth School has not taught and will not be able to teach David self-control, rendering the IEP the Town [Dartmouth School Committee] proposed for him fatally defi-

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[94]Ibid., 415.

[95]Ibid.

cient."[96] The district court agreed with the parents and the appellate court affirmed this ruling.

The appropriate educational placement for David, according to the four independent evaluators, was "a comprehensive, 24-hour, highly structured special education program that would address his social and behavioral needs."[97] The considered opinion of the experts was that learning the self-control needed would take David one to two years. He could then be returned to the mainstream community. Again, the district court concurred with the plaintiffs and the First Circuit United States Court of Appeals affirmed the ruling.

When a state accepts funds under EHA regulations, it agrees to educate disabled children according to the "education standards of the State educational agency."[98] The appellate court held that the state statutes must be incorporated into any decision made by a federal court otherwise there would be "double legal standards dependent solely upon the aggrieved party's choice [federal or state] of forum."[99] In applying the higher state standards, the court held the IEP was inappropriate "to assure the maximum possi-

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[96]Ibid.

[97]Ibid., 416.

[98]20 U.S.C.A. § 1412(6) (1990).

[99]775 F.2d 411, 419.

ble development in the least restrictive environment of a child with special needs."[100]

The case of *Roland M. v. Concord School Committee*[101] is a parallel to *David D.* The original suit was brought by parents of a handicapped child challenging the adequacy and appropriateness of the IEP. The underlying legal issue is the state statute which exceeds federal standards under EHA.

Matthew M. was a 15-year-old handicapped child who resided in Concord, Massachusetts. His disabilities included difficulties with visual perception, visual tracking and visual motor skills as well as fine and gross motor coordination. He was easily distracted. "The parents assail the district court's unwillingness to find Matthew also 'suffered from Attention Deficit Disorder.'"[102] He had difficulty relating to peers. Still, David had average intelligence and "enjoys significant potential for academic progress."[103]

Matthew attended Concord public schools through the fifth grade. He was in a self-contained classroom for LD students. Then his parents rejected the IEP for the 1986-87

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[100]Mass. Ann. Laws ch. 71B, § 2 (Law. Co-op. 1994).

[101]910 F.2d 983 (1st Cir. 1990), *cert. denied*, 499 U.S. 912 (1991).

[102]Ibid., 988 no. 2.

[103]Ibid.

school year and his continued placement in public school. Instead, they enrolled Matthew in a private, residential school. Concord did not agree. The parents brought suit in district court after the hearing officer only found partially for the parents.

The district court found that the IEP developed by the Concord School Committee was adequate and appropriate to assure Matthew's maximum possible development and in fact provided related services the private school could not provide. Therefore, the public school placement was the appropriate placement for Matthew. The appellate court affirmed the district court ruling.

The case of *Tice v. Botetourt County School Board*[104] deals with procedural due process violations in the development of an appropriate IEP, educational placement and reimbursement of educational expenses prior to appropriate IEP and educational placement.

Matthew Tice was an eleven-year-old boy with above average intelligence suffering from learning and emotional disabilities. He was a resident of Virginia and attended a Botetourt County public school. Matthew's problems became apparent when he had difficulty performing at school.

After a conference with his teacher, the parents formally requested a special education evaluation. It took the

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[104]908 F.2d 1200 (4th Cir. 1990).

school 22 working days to act on the parental request. This is the first procedural violation, since this meeting should have occurred within 10 working days after the referral. This minor procedural violation was compounded by the excessive delay of school officials in convening the placement committee. It took the school officials over 200 days to convene the placement committee. This entire evaluation should have been completed within 65 working days.

The committee found Matthew ineligible for special education services, but recommended he receive counseling at the expense of his parents. The parents requested postponement of the committee decision until they could have Matthew evaluated by a private professional. The school officials agreed and even acquiesced to pay for the evaluation.

The psychiatrist examined Matthew and recommended immediate placement in the special education program because of deteriorating mental and emotional problems. Three days after the school system received a copy of the doctor's report, Matthew became hysterical at school and was sent home. His condition became progressively worse and he was admitted to a psychiatric center later that day. Matthew had suffered a nervous breakdown. Throughout his hospitalization, Matthew received daily educational services provided by the hospital. Matthew was hospitalized for 20 days.

During this time the school committee reconvened and found Matthew eligible for special education services, but postponed IEP development until later. Later, the IEP was developed by school professional and Mrs. Tice. The IEP did not provide for individual psychological counseling. Mrs. Tice agreed with and signed the IEP.

Several months later, the Tices demanded full reimbursement from the School Board for Matthew's hospitalization and counseling. The School Board refused and a due process hearing was held. The hearing officer ruled in favor of the school system. The state review officer affirmed the decision. The parents filed suit in district court. After trial, the district court upheld the ruling of the review officers. The parents again appealed.

The United States Fourth Circuit Court of Appeals held that 1) the school district did not comply with EHA requirements because it delayed providing an IEP, 2) the IEP that was eventually developed was adequate and appropriate, and 3) the parents were entitled to reimbursement for education expenses incurred prior to adoption of IEP.

In *Hiller v. Board of Education of Brunswick Central School District*,[105] the parents of an educationally handicapped child originally brought suit seeking reimbursement

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[105]687 F.Supp. 735 (N.D.N.Y. 1988), 743 F.Supp 958 (N.D.N.Y. 1990).

for certain educational related expenses. The second suit filed in district court alleged their child was a handicapped child and had been denied a FAPE because of procedural due process violations.

David Hiller entered the Brunswick School District in the fall of 1985 as a fifth grade student. There was no documentation of a learning disability or handicapping condition from his previous school in Albany, New York. When David began to experience some difficulties in the classroom, the teacher discussed the problems with the mother, who requested an evaluation of her son for a learning disability (LD).

David was evaluated by the school psychologist. He was not diagnosed as a learning disabled child, but he did have some learning problems that could be improved with modifications to his educational program. A remedial program was undertaken.

The parents had two private evaluations done on David. Only one of these evaluations labeled David as LD. Even though the school officials violated due process procedures, they tried to accommodate placement of David in a resource program. They continued his placement in the resource program until the parents removed him from public school.

The United States District Court for the Northern District of New York ruled that 1) David demonstrated a weak

attention span and had difficulties in handwriting, but was not handicapped within the interpretation of EAHCA, 2) the educational program implemented by the school was designed to facilitate educational benefits for David as required by EAHCA, and 3) the procedural violation committed by the school officials did not violate the spirit of the EAHCA therefore David had not been denied a free appropriate public education.[106]

IEP, Mainstreaming and Placement

The appropriateness of an IEP, mainstreaming of a student and appropriate educational placement are three closely related areas. The IDEA provides for development of the IEP before placement decisions are made.[107] The courts have ruled in favor of parents when the conclusion of fact is that a school district failed to provide an appropriate IEP,[108] failed to mainstream or inappropriately main-

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[106]743 F.Supp 958 (N.D.N.Y. 1990).

[107]20 U.S.C.A. § 1401(20) (1990).

[108]*See* Russell by Russell v. Jefferson School District, 609 F.Supp. 605 (D.C.Cal. 1985), inadequate IEP and inappropriate placement, Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171 (3rd Cir. 1988), *cert. denied*, 488 U.S 1030, 109 S.Ct. 838, 102 L.Ed.2D 970 (1989), violated procedural requirements in developing IEP.

streamed a disabled child[109] or failed to place a disabled child in an appropriate program.[110] On the other hand, courts have ruled in favor of school districts when the IEP developed is found to be appropriate for the disabled child,[111] or appropriate mainstreaming has been implemented in accordance with least restrictive environment provision, or educational placement was correct and appropriate.[112]

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[109]*See* Liscio v. Woodland Hills School District, 734 F.Supp 689 (W.D.Pa 1989), failure of the school system to mainstream handicapped student for nonacademic subjects, Oberti v. Board of Education of Borough of Clementon School District, 995 F.2d 1204 (3rd 1993), failure of school system to mainstream student, Mavis v. Sobol, 839 F.Supp. 968 (N.D.N.Y. 1993), failure of school system to mainstream handicapped student appropriately.

[110]*See* Block v. District of Columbia, 748 F.Supp. 891 (D.D.C. 1990), failure of school system to provide a timely IEP, Brown v. Wilson County School Board, 747 F.Supp 436 (M.D. Tenn. 1990), residential rehabilitation facility only appropriate placement for brain damaged student, Clovis Unified School District v. California Office of Administrative Hearings, 903 F.2d 635 (9th Cir. 1990), school district responsible for maintaining placement in hospital until due process decided.

[111]*See* Gillette v. Fairland Board of Education, 932 F.2d 551 (6th Cir 1991), IEP and therefore placement were appropriate.

[112]*See* Eva N. v. Brock, 741 F.Supp. 626, educational placement was correct, Roland M. v. Concord School Committee, 910 F.2d 983 (1st Cir. 1990) *cert. denied*, 499 U.S. 912 (1991), court held that parents' placement of child in a private school did not meet state standards to assure maximum development, A.E. by and through Evans v. Independent School District No. 25, 936 F.2d 472, student wasn't handicapped and therefore didn't qualify under IDEA.

Harrell v. Wilson County Schools,[113] is a North Carolina case not a federal case. Three major issues were argued: 1) were due process procedures violated; 2) did the IEP meet students unique needs and 3) was the placement appropriate for this hearing-impaired child. One additional legal issue involves North Carolina's higher standards for substantive outcomes than the EHA.

Marguerite Harrell was a hearing-impaired child living in Wilson County, North Carolina. She never attended Wilson County Public Schools, but had been enrolled in Central Institute for the Deaf (CID) in St Louis, Missouri since 1973.[114] In 1978, her parents applied for a grant to cover the costs of sending her to CID. The grant was denied, but they sent Marguerite back to CID anyway.

The school system then evaluated Marguerite's needs to ascertain if the school system could meet them. Subsequently, a committee developed an IEP and proposed placement in a regular sixth grade class with support services. The parents did not agree with the recommendations and appealed. The hearing officers at the local and state level affirmed the committee's decision. The parents again appealed, this

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[113]58 N.C. App. 260, 293 S.E.2d 687 (1982), *appeal dismissed*, 306 N.C. 740, 295 S.E. 2d 759 (1982), *cert. denied*, 460 U.S.1012 (1983).

[114]58 N.C. App. 260.

time to the Superior Court of Wilson County. This court also affirmed the decision.

The state appellate court also affirmed the hearing officers' decisions that the IEP developed was appropriate and placement in a regular sixth grade with support services met both federal and state requirements under the EHA. In regard to North Carolina's higher standards, the court stated:

> Our statute, as progressive as it may be, was not designed to require the development of a utopian educational program for handicapped students any more than the public schools are required to provide utopian educational programs for non-handicapped students.[115]

Lastly, the state appellate court held that there were no violations of due process procedures.

In *Roncker v. Walter*,[116] the parent of a handicapped child challenged the educational placement of her son. Neill Roncker was a severely retarded child. His trainable mentally retarded (TMR) classification denoted an IQ below 50. He suffered from seizures, but was on medication. He requires constant supervision because he was unable to recognize dangerous situations.[117]

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[115]58 N.C. App. 260, 293 S.E. 2d 687, 691.

[116]700 F.2d 1058 6th Cir. 1983), *cert. denied*, 464 U.S. 864, 104 S.Ct. 196, 78 L.Ed.2d 171 (1983).

[117]Ibid., 1060.

The school system recommended placement in a county school program instead of a city program. The county school recommendation was specifically for TMR students, but Neill would receive no interaction with nonhandicapped students. The parents refused this placement and requested a due process hearing. The hearing officer ruled in favor of the parents. The school appealed to the Ohio State Board of Education. The State Board ruled that Neill should be placed in a county program but, because he needed contact with nonhandicapped students, they suggested a split program. The parent brought suit in district court. The court ruled in favor of the school district and the parents appealed.

The Sixth Circuit Court of Appeals vacated and remanded the decision of the district court. The court stated that this case involved a mainstreaming issue and the failure of the district court to give "due weight" to the administrative proceedings. Also, the court asked if "the district court erred in refusing to allow this case to proceed as a class action?"[118] The appellate court held that de novo review was required giving "due weight" to the administrative proceedings. The court held that because the EHA requires individual placement decisions, does not bar all class actions under the law.

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[118]Ibid., 1062-63.

In deciding between a mainstream placement or a "more restrictive environment" the court held that:

> some handicapped children simply must be educated in segregated facilities either because the handicapped child would not benefit from mainstreaming, because any marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting, or because the handicapped child is a disruptive force in the non-segregated setting.[119]

One additional court assertion was made in this decision regarding the cost of a placement. "Cost is a proper factor to consider since excessive spending on one handicapped child deprives other handicapped children."[120] The court further explained this position. "Cost is no defense, however, if the school district has failed to use its funds to provide proper continuum of alternative placements for handicapped children."[121]

Scituate School Committee v. Robert B.[122] is very similar to *Hall*, but the major issue deals with the IEP for the disabled student. There are three germane legal issues: 1) Did the Scituate School Committee follow incorrect due process procedures in notification to parents of the IEP

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[119]Ibid., 1063.

[120]Ibid.

[121]Ibid.

[122]620 F.Supp 1224 (D.C.R.I. 1985), *affirmed* 795 F.2d 77 (1986).

committee meeting. If so, did these errors invalidate the IEP? 2) Was the IEP adequate? and 3) Are the parents entitled to reimbursement of tuition to the private school?

Todd B. attended Scituate Rhode Island Public Schools for a total of three and one-half years. He was diagnosed as learning disabled. An IEP was developed by a committee, including Mrs. B., placing Todd in the public school. Mrs. B. requested a hearing. The hearing officer found in favor of the school system. The parents appealed. The state reversed the decision of the hearing officer. The school committee appealed. The district court found: 1) the committee's failure to give the parents proper notification of the IEP committee meeting was not significant enough to invalidate the IEP, 2) the IEP was adequate to meet Todd's needs and provide a FAPE, and 3) because the IEP was appropriate, the parents were denied any reimbursement for private school expenses. This decision was affirmed by the federal appellate court[123]

The case of *A.W. By & Through N.W. v. Northwest R-1 School District*[124] is very similar to *Roncker*. The parents of a handicapped child requested placement of their child in

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[123]795 F.2d 77 (1986).

[124]813 F.2d 158 (8th Cir. 1987), *cert. denied*, 484 U.S. 847, 108 S.Ct. 144, 98 L.Ed.2d 100 (1988)

a regular school instead of in a state school exclusively for handicapped children.

A.W. has Down's syndrome. He resided in Missouri. When his mother attempted to enroll him in the neighborhood school, he was referred for testing and services. The testing showed that A.W. was severely mentally retarded and was classified as "severely handicapped" under state guidelines. This classification meant A.W. was eligible for placement in a state school exclusively for handicapped children. His parents disputed this classification and challenged his placement as a violation of the "least restrictive environment" provision of the EHA. In order for A.W. to be mainstreamed in the regular school, a specially trained teacher would have to be hired. There wasn't a teacher already employed by that school to teach severely handicapped children. After following due process procedures, the parents brought suit in district court.

The district court ruled that 1) A.W. was severely handicapped, 2) the state school placement provided A.W. with an appropriate public education, 3) the mainstreaming provision did not require A.W. placement in the regular school. The court held that because of the minimal benefits A.W. would receive from mainstreaming, the placement was not feasible. The court also took into consideration to cost of adding one teacher who would, in all probability, be teach-

ing only A.W. The court stated that since the funds available are finite, it could not justify taking benefits away from handicapped children for this purpose. The Eighth Circuit Court of Appeals affirmed the decision of the district court.

In the case of *Kattan by Thomas v. District of Columbia*[125] the major issues are 1) Can the public school provide the services required by the child's IEP? and 2) Is the public school setting the appropriate placement for the child? When the hearing officer held that public school placement was appropriate for Sarah, her parents sought a judicial review. The district court held public school placement was not appropriate for Sarah. The school system appealed.

Sarah Kattan was a five-year-old multiply-handicapped child. Her specific deficiencies made full-time special education placement with numerous related services necessary. Her parents enrolled her in a private pre-school program for the 1987-88 school year. In October, The District of Columbia Public Schools [DCPS] developed an IEP for Sarah.

> Sarah's IEP requires (1) an individual OT [occupational therapy] program of four half-hour sessions, two times a week, (2) fine and gross motor skill instruction, (3) speech and language therapy in half-hour sessions three

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[125]691 F.Supp 1539 (D.D.C. 1988).

> times a week, (4) a program facilitating socialization, and (5) adaptive physical education once a week. AR Exh. G at 3a-3s. Sarah's IEP also encourages OT collaboration with requirements (2), (3), and (5).[126]

The court found that Sarah needed an integrated occupational therapy (OT) program to receive any benefit from her special education program. The court determined that the

> DCPS's failure to provide OT services to Sarah, as well as other handicapped children in the District of Columbia who have required such services, is systemic and the result of apparently irreconcilable bureaucratic disarray, continuing contractual disputes, inability to attract occupational therapists, and total failure of funding.[127]

The court also noted that 28 other handicapped DCPS students attended a private school, Ivymount, in Rockville, Maryland, at the District's expense. Because of these problems, the court ordered that 1) the appropriate placement for Sarah was in the private school setting at Ivymount and 2) the public school would place and fund Sarah at the Ivymount. The court denied the parents' request that Sarah's placement not be changed without express consent of her parents for a period of two years.

There are two important implications for educators. First, if an IEP states that a related service is warranted for a disabled child to benefit from educational placement,

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[126]691 F.Supp. 1539, 1541.

[127]691 F.Supp 1539, 1545.

it must be provided. Second, if a school says that it can provide a particular service but doesn't, that school may be paying for a private placement.

The case of *Lachman v. Illinois State Board of Education*[128] is the opposite of *Kattan*. The parents wanted the school officials to place their deaf child in a neighborhood school. The parents also wanted a specific program, cued speech, taught. The school system advocated the total communication approach which relies heavily on sign language to communicate.

Benjamin Lachman was a profoundly deaf seven-year-old child. The school district in which he resides provides services for hearing impaired students through a Regional Hearing Impaired Program (RHIP). These RHIP programs were located in schools outside Benjamin's neighborhood. School officials maintained that the appropriate placement for Benjamin was in a self-contained classroom, where he would spend at least 50% of his school day. The other 50% would be spent in mainstream activities.

The appellate court determined that the real issue between the parents and the school district was the appropriate method or technique used to educate Benjamin. The district court had decided that the district officials had complied with EAHCA. The appellate court agreed:

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[128]852 F.2d 290 (7th Cir. 1988).

> [P]arents, no matter how well-motivated, do not have a right under the EAHCA to compel a school district to provide a specific program or employ a specific methodology in providing for education of their handicapped child.[129]

This ruling is encouraging for school administrators. In essence, it means that school personnel can develop IEP's using proven methodologies and the courts will reasonably uphold them.

In *Cronin v. Board of Education of East Rampo Central School District*[130] the parents of a disabled child sought a preliminary injunction to continue the current educational placement of their child until administrative due process procedures were completed. The three issues that the court ruled on were: 1) Is graduation of a handicapped student a "change in placement" under EHA? 2) Does graduation during the procedural due process violate the "stay-put" provision of the EHA? and 3) Is the student entitled to a preliminary injunction to require the school district to reinstate him in the education program?

Bruce Cronin, a 20-years-old emotionally disabled student, lived in Monsey, New York. In 1986, he was enrolled in both a "mainstream" vocational training program at BOCES (Board of Cooperative Educational Services), a region-

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[129]852 F.2d 290, 297.

[130]689 F.Supp 197 (S.D.N.Y. 1988).

al center, and special classes at Karafin School. Bruce received passing grades in the vocational program for two years. The Committee on the Handicapped (COH) informed the parents that Bruce would be graduated from high school at the end of the 1986-87 school year. After receiving a letter from BOCES stating that Bruce should continue in that program another year, the parents requested an impartial hearing to resolve the conflict.

The hearing was held before graduation. The parents contended that Bruce had not met the objectives established for him at BOCES and should not be graduated. Before the Impartial Hearing Officer's (IHO) decision, Bruce "was graduated and received a regular diploma."[131] The IHO eventually upheld the school district, but also stated that Bruce might be able to attend the BOCES program through Vocational Rehabilitation. An appeal was made to the Commissioner of Education who upheld the IHO. The parents "filed the instant action pursuant to The Education of All Handicapped Children Act"[132] for a preliminary injunction.

The United States District Court for the Southern District of New York heard this case April 1988. Using the logic in *Honig v. Doe*,[133] the court held:

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[131]Ibid., 199.

[132]Ibid., 200.

[133]484 U.S. 304, 108 S. Ct. 592, 98 L.Ed.2d 686 (1988).

> Courts have found that an expulsion of a handicapped student constitutes a 'change in placement' within the meaning of the EHA. . . .Because graduation is similar to long-term suspension and expulsion in that it results in total exclusion of a child from his or her educational placement, graduation would appear to be a 'change in educational placement' implicating the mandatory procedural safeguard of the EHA.[134]

Because the court finds that graduation is a change in educational placement, then the school district did violate the "stay-put" provision of the EHA and must "immediately reinstate Bruce to the BOCES program during the pendency of these proceedings."[135] The court also held that "the stay-put provision [would be rendered] meaningless because the school district could unilaterally graduate handicapped children."[136]

Visco by Visco v. School District of Pittsburgh,[137] involves issues of appropriate IEP, placement in a private school setting and application of EHA principles. Jennifer and Rene Visco were hearing-impaired children. Their mother, Rita, was also hearing-impaired. Jennifer and Rene attended a private school only for hearing-impaired children. The school district evaluated the children in 1981 and recommended placement in public school programs for

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[134]689 F.Supp 197 (S.D.N.Y. 1988), 202-3.

[135]Ibid.

[136]Ibid., 202 n. 4.

[137]684 F.Supp. 1310 (W.D.Pa. 1988).

hearing-impaired students. The parent refused and began due process proceedings. When these hearings ruled in favor of the school system, the parent brought suit in United States District Court for the Western District of Pennsylvania.

The parent contended that since the children lived in a deaf household where lip reading and speech had little significance, they needed emphasis on these skills at school. The court held that the children would receive more benefit in the long run from remaining in the private school. They would be mainstreamed anyway into the public school in the tenth grade after graduation from the private school. The court further held that the School District of Pittsburgh would continue to pay for this schooling. The court, in one final note, severely admonished the lawyers for taking so long to bring the case to a resolution.

Thomas v. Cincinnati Board of Education[138] is another case involving an IEP and appropriate placement of a multiple disabled child. Emily Thomas, an eleven-year-old, was severely retarded, multi-handicapped and confined to a wheelchair. She had a gastrostomy tube and breathed through a tracheostomy which required continual monitoring and suctioning. Emily had been receiving one hour of home training per week provided by an agency other than by the public schools. Her physician recommended placement in a

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[138]918 F.2d 618 (6th Cir 1990).

small, self-contained special education program for severely and profoundly retarded.[139] The initial IEP required placement in the public schools in a small self-contained special education class. Before the IEP could be implemented, several committee members, upon further consideration and investigation, changed their recommendations. They decided one hour per day of home instruction would be more appropriate for Emily considering her disabilities. The mother asked for a hearing. The hearing officer found for the parent. Cincinnati Board of Education (CBE) appealed to the State Level Reviewing Officer (SLRO) who found for CBE. The district court reversed the SLRO's decision. The appellate court reversed the district court decision and remanded the case stating "the mainstreaming concept is simply inapplicable."[140] The court concluded that Emily would benefit from the home instruction.

In the case of *Christopher M. v. Corpus Christi Independent School District*[141], the major issue was the length of the school day provided for the child as stated in the IEP. Christopher M. was a profoundly mentally and physically handicapped child. He suffered from extreme physical distress to prolonged stimulation and required frequent rest

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[139]Ibid., 621.

[140]Ibid., 627.

[141]933 F.2d 1285 (5th Cir. 1991).

periods. In developing his IEP, it was determined that a four-hour school day including two hours of instruction interspersed with two hours of rest periods was appropriate. It was also determined that this amount of time was all that Christopher could tolerate physically or benefit from educationally. The Fifth Circuit Court of Appeals concluded "to presume that every child's school day should be of uniform length is at odds with the conception of individually tailored education embodied in the EHA."[142]

For educators the significance of this case is that the length of the school day doesn't have to be seven hours for every child. The appropriate length of the school day must be determined on a case-by-case basis taking into consideration the educational benefit received by the child balanced against any harm to the child that could be caused by a full seven-hour day.[143]

In the case *In re Conklin*,[144] parents of a learning disabled child brought suit challenging the IEP and therefore educational placement of their son. Thomas Conklin, a

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[142]Ibid., 1291.

[143]*See* Cordrey v. Euckert, 917 F.2d 1460, *cert. denied*, 499 U.S. 938 (1991), student was not entitled to extended school year program under EHA, Johnson v. Independent School District No. 4 of Bixby, Tulsa County, Oklahoma, 921 F.2d 1022 (10th Cir. 1990), summary judgement was reversed and case was remanded to district court to decide if summer educational program is warranted.

[144]946 F.2d. 306 (4th Cir. 1991).

13-year-old dyslexic, lived in Anne Arundel County, Maryland. He was diagnosed as learning disabled early in his school career. Consequently, an IEP was developed and he was mainstreamed with supplemental services. This program didn't work for Thomas, so his IEP was reevaluated. His parents had him tested by a private consultant. On the recommendations of this person, the parents placed Thomas in a private summer school program at their own expense.

The school district continued his placement the next school-year, but increased the number of supplementary hours. The parents requested placement in a self-contained class. The school did not do this. The parents asked for a hearing. They also removed Thomas from public school and placed him in a private school program designed especially for learning disabled students.

The local and state hearing officers ruled in favor of the school system. The parents brought suit in U.S. District Court while the school system filed suit in the Circuit Court of Anne Arundel County. The state suit was removed to the federal court, where the two suits were combined. The district court ruled: 1) the IEP did not provide a FAPE for Thomas, but an additional two hours of private tutoring per week would bring the IEP into compliance with EHA and 2) the parents would be allowed to recover

some of their expenses for private tutoring and attorney's fees. The parents appealed.

The Fourth Circuit Court of Appeals affirmed the district court's ruling regarding additional tutoring and attorney's fees, but remanded to the district court to decide if Maryland's statutes exceeded the EHA statutes. The District Court, in turn, remanded this to the state court.

The question of appropriate placement continues to be litigated[145]. The courts still hold that "appropriate" does not mean "best" or "maximum." In *Angevine v. Smith*[146] the parents of a multiple handicapped child brought action challenging the decision that public school placement of their child, Ann Marie, was appropriate rather than a private school. The hearing officer found that Ann Marie's placement by District of Columbia Public Schools (DCPS) in Sharpe School was appropriate. The U.S. District Court for D.C. overturned the findings of the hearing officer and found in favor of the parents. The court ordered reimbursement of educational expenses paid to the parents by DCPS.

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[145]*See* Russell by Russell v. Jefferson School District, 609 F.Supp. 605 (D.C.Cal. 1985), Liscio v. Woodland Hills School District, 734 F.Supp 689 (W.D.Pa 1989), Oberti v. Board of Education of Borough of Clementon School District, 995 F.2d 1204 (3rd 1993), Mavis v. Sobol, 839 F.Supp. 968 (N.D.N.Y. 1993).

[146]959 F.2d 292 (D.C. Cir. 1992).

When DCPS appealed this decision, the U.S. District of Columbia Court of Appeals reversed and remanded the decision. The court indicated that the district court's decision may have been influenced by the comparison of a public school and a private school program, but the question of comparison was not before the court. The appellate court stated "EHA, however, requires the District to provide Ann Marie with an appropriate education, not the best education possible."[147]

Another case in a similar vein is *Granite School District v. Shannon M. by Myrna M.*[148] The parents of Shannon M., a six-year-old medically fragile child, wanted the school district to provide the constant tracheostomy care required for their daughter to be mainstreamed in a regular first grade class. Granite School District maintained that nursing/tracheostomy care is a "medical service" under IDEA and therefore should be excluded.

Shannon was classified as "orthopedically impaired." She was confined to a motorized wheelchair. The IEP developed for the 1990-91 school year for Shannon required homebound instruction instead of mainstreaming. Parents asked for a due process hearing. Both the Administrative Hearing

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[147]Ibid., 296.

[148]787 F.Supp. 1020 (D. Utah 1992).

Officer and the State Review Panel found in favor of the parents.

The school district appealed and asked for summary judgment. The facts in this case were not in dispute. The federal district court only had to rule on points of law. The school district contended that Shannon's IEP and home-bound instruction provided her with a basic floor of opportunity as required by the IDEA.

The U.S. District Court held that the full-time nursing/tracheostomy care Shannon was requesting was not a related service under the Act and the school district did not have to provide it. The court granted summary judgment for the school district maintaining that the student would probably receive a greater educational benefit from classroom participation. Yet, the school district had complied with the IDEA by providing the "basic floor of opportunity" the Act requires. Finally, the court concluded that Shannon could not be mainstreamed satisfactorily

Trends from OCR Complaints

The Office of Civil Rights (OCR) is part of the United States Department of Education (1994). OCR is responsible for ensuring that no individual is discriminated against in any educational program or activity that receives federal funds.

> OCR enforces five Federal statutes that prohibit discrimination on the following bases: (1) Title VI of the Civil Rights Act of 1964 (race, color, national origin); (2) Title IX of the Education Amendments of 1972 (sex); (3) Section 504 of the Rehabilitation Act of 1973 (disability); (4) the Age Discrimination Act of 1975 (age); and (5) Title II of the Americans with Disabilities Act of 1990 (disability).
>
> Additionally, OCR assists the Department of Education (ED) in implementing civil rights provisions in certain education statutes, including Title III of the Elementary and Secondary Act of 1965, as amended (Magnet Schools Assistance Program), the Carl D. Perkins Vocational Education Act, and the Individuals with Disabilities Education Act.
>
> OCR investigates complaints and conducts compliance reviews involving 56 state education agencies and 83 state rehabilitation agencies, including the District of Columbia, the U.S. territories , and possessions, approximately 16,000 local education agencies, 3,600 colleges and universities, 5,600 proprietary schools, and other recipients of ED funds such as libraries and museums.[149]

If a parent of a disabled student or an employee feels that his/her civil rights have been violated by school officials, a complaint is filed with OCR. The complaints must be in writing. The OCR has 15 days to acknowledge receipt of the complaint. For OCR to act on an allegation, the complaint must be based on discrimination because of race, color, national origin, sex, disability, or age. An OCR investigation begins by determining: 1) Is the named school

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[149]U. S. Department of Education, Office of Civil Rights, *Fiscal Year 1993--Year-End Management Report--March 1994* prepared by Planning, Analysis and Systems Service, Planning and Analysis Division, Reports and Analysis Branch, ([Washington, D.C.]: U.S. Department of Education, Office of Civil Rights, 1994), i.

receives federal assistance? 2) Is the complaint timely? and 3) Are other federal agencies or the courts involved?.

OCR uses Early Complaint Resolution (ECR) if both parties are open to mediation. If this settles the problem, the case is considered resolved. If ECR doesn't work, an investigation begins. The OCR has 120 days to complete an investigation. If OCR finds violations, negotiations for voluntary compliance are attempted. These negotiations can take up to 60 days. After the investigation is completed, a letter of finding (LOF) is issued. It states the findings and any remedies necessary. The OCR then has 30 days to initiate enforcement, if necessary. The maximum time permitted to process a complaint is 225 days.

When all attempts at voluntary compliance fail, OCR takes legal action to terminate federal funding or turns the case over to the Justice Department to determine if court actions are warranted.

The type of complaints received by the Office of Civil Rights today may be the court cases of tomorrow. This information can be extremely helpful in predicting trends in educational case law before they happen. Each LOF reads like a mini-law case. Each alleged violation is listed. Then the appropriate federal statute is specified. Facts of the investigation are recorded. Finally, the decision as to whether or not a violation has occurred is given. All after

this is done after the investigation is completed. The LOF also includes any corrective actions needed for compliance with the appropriate statutes. OCR is responsible for monitoring all of the corrective action plans that are negotiated with the individual school districts.

The OCR fiscal year runs from October 1 through September 30. All of the statistics in this section are reported by fiscal year (FY). The total number of complaints the OCR has received over the five year period from October 1, 1989 through September 30, 1993, has increased 83% from 2,780 complaints received in FY 1989 to 5,090 complaints received in FY 1993.[150] For FY 1993, as can be seen in Table 2, below, discrimination because of a disability is the largest category listed with 2,088 complaints, which was 59% of the total number of complaints, followed by race/national origin (1,291 - 27%), sex (715 - 15%), age (245 - 5%), and other (313 - 7%). The percents add up to more than 100% because a complaint can cite more than one basis. Table 3 shows the major areas of complaints with service and employment accounting for 96% of the total complaints.

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[150]Ibid., 11.

Table 2
Number and Percent of FY 1993 Complaint Receipts Citing Each Basis

Basis	Number	Percent
Disability	2,088	59%
Race/N.O.	1,291	27%
Sex	715	15%
Age	245	5%
Other	313	7%

NOTE: Percents total more than 100 because complaints can cite more than one basis.

Source: U. S. Department of Education, Office of Civil Rights, *Fiscal Year 1993--Year-End Management Report--March 1994* prepared by Planning, Analysis and Systems Service, Planning and Analysis Division, Reports and Analysis Branch, ([Washington, D.C.]: U.S. Department of Education, Office of Civil Rights, 1994), Table 3.

Table 3
Receipts by Service and Employment Issues FY 1993

Issue Type	Number of Receipts	Percent of Receipts
Service	3,884	82%
Employment	643	14%
Both	79	2%
Other	151	3%
Total	5,090	100%

Source: U. S. Department of Education, Office of Civil Rights, *Fiscal Year 1993--Year-End Management Report--March 1994* prepared by Planning, Analysis and Systems Service, Planning and Analysis Division, Reports and Analysis Branch, ([Washington, D.C.]: U.S. Department of Education, Office of Civil Rights, 1994), Table 4.

The OCR receives thousands of complaints every year. Not all of these complaints deal with students; some are lodged by employees. Also, any institution that receives federal funding can be the target of a complaint. The statistics in Table 4 only deal with elementary and secondary institutions.

It is informative to look at the top five reasons for complaints made to the OCR over the past five fiscal years. The five most commonly cited types of discrimination are shown in Table 4 with a graphic depiction in Figure 1. The top three categories in each of the five years centered on disabled students and were service related. In two of the five years grievance procedures and due process ranked in the top five reasons cited.

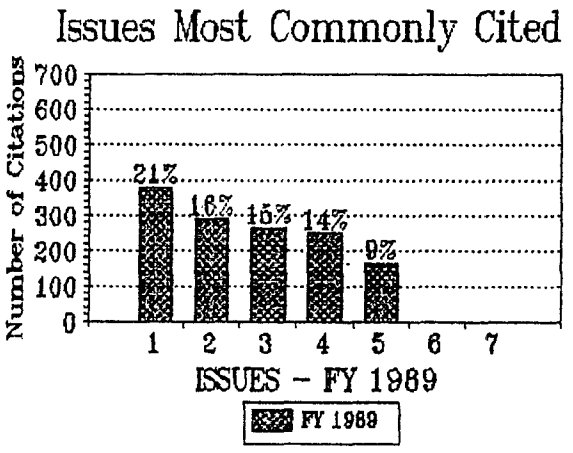
All five of the most commonly cited reasons for FY 1993 deal with disabled students and are 58% of the total 3,310 complaints received. Program accessibility for disabled students ranked first with 471 citations for 14% of the total. Evaluation/classification of disabled students ranked second with 419 citations for 13% of the total 3,310 complaints. In third place was placement/referral of disabled students totaling 389 complaints or 12%. Aids/services for disabled students ranked a close fourth with 338 citations for 10% with IEP services in fifth place with 302 complaints at 9%.

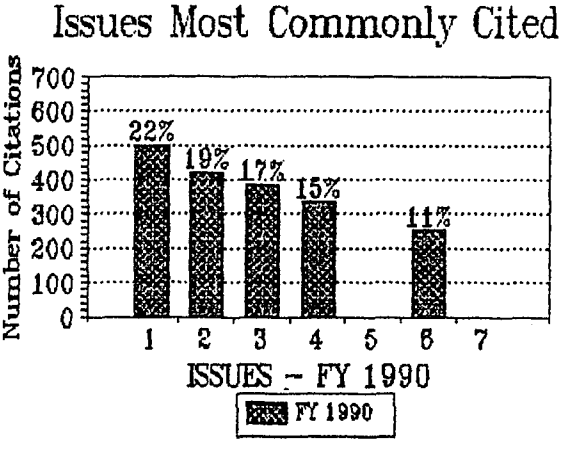
Table 4
Issues Most Commonly Cited in
Elementary & Secondary Complaint Receipts
FY 1989 through FY 1993

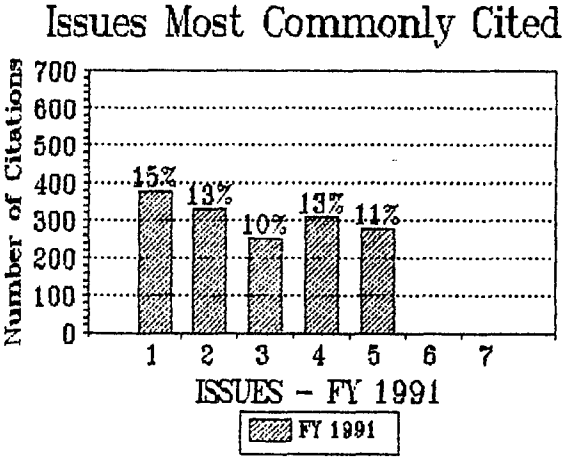
Rank	Issue/ Year	Citation n	Complaints N	%
	FY 1989			
1	Placement/Referral of Disabled Students	377	1,801	21%
2	Evaluation/Classification of Disabled Students	290	1,801	16%
3	Disabled Students in Education Settings	264	1,801	15%
4	Aids/Services for Disabled Students	250	1,801	14%
5	Grievance Procedures/Due Process	164	1,801	9%
	FY 1990			
1	Placement/Referral of Disabled Students	500	2,247	22%
2	Evaluation/Classification of Disabled Students	420	2,247	19%
3	Disabled Students in Education Settings	385	2,247	17%
4	Aids/Services for Disabled Students	335	2,247	15%
6	Individualized Education Plan Services	253	2,247	11%
	FY 1991			
1	Placement/Referral of Disabled Students	377	2,454	15%
2	Evaluation/Classification of Disabled Students	330	2,454	13%
3	Disabled Students in Education Settings	253	2,454	10%
4	Aids/Services for Disabled Students	308	2,454	13%
5	Grievance Procedures/Due Process	279	2,454	11%
	FY 1992			
1	Placement/Referral of Disabled Students	435	2,934	15%
2	Evaluation/Classification of Disabled Students	378	2,934	13%
3	Disabled Students in Education Settings	270	2,934	9%
4	Aids/Services for Disabled Students	308	2,934	10%
7	Program Accessibility for Disabled Students	340	2,934	12%
	FY 1993			
1	Placement/Referral of Disabled Students	389	3,310	12%
2	Evaluation/Classification of Disabled Students	419	3,310	13%
4	Aids/Services for Disabled Students	338	3,310	10%
6	Individualized Education Plan Services	302	3,310	9%
7	Program Accessibility for Disabled Students	471	3,310	14%

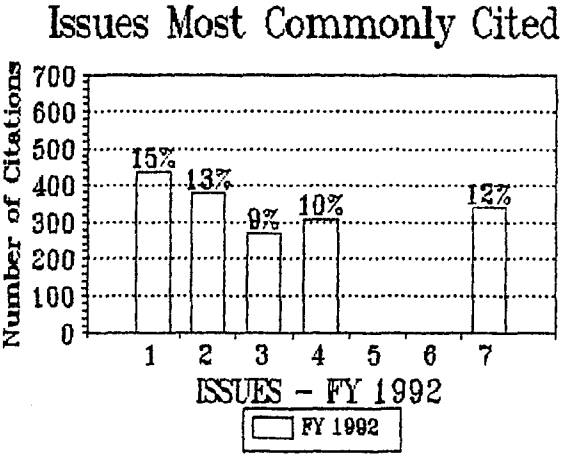
Source: U. S. Department of Education, Office of Civil Rights, *Fiscal Year 1993--Year-End Management Report--March 1994* prepared by Planning, Analysis and Systems Service, Planning and Analysis Division, Reports and Analysis Branch, ([Washington, D.C.]: U.S. Department of Education, Office of Civil Rights, 1994), Table 5, pg. 13.

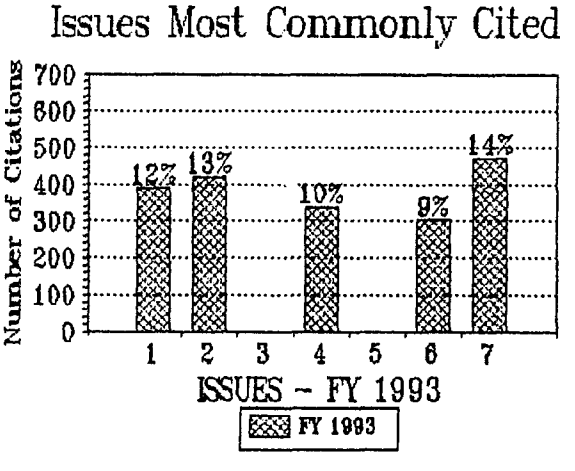
Figure 1- Graphs of Table 4











Legend

1. Placement/Referral of Disabled Students
2. Evaluation/Classification of Disabled Students
3. Disabled Students in Education Settings
4. Aids/Services for Disabled Students
5. Grievance Procedures/Due Process
6. Individual Education Plan Services
7. Program Accessibility for Disabled Students

Source: U. S. Department of Education, Office of Civil Rights, *Fiscal Year 1993--Year-End Management Report--March 1994* prepared by Planning, Analysis and Systems Service, Planning and Analysis Division, Reports and Analysis Branch, ([Washington, D.C.]: U.S. Department of Education, Office of Civil Rights, 1994), Table 5, pg. 13.

Of all the complaints received by the OCR in FY 1993, 4,480 were resolved with only 610 pending. The results on complaint closure with the actions taken are shown in Table 5 with a graphic representation in Figure 2. This table covers the last five fiscal years.

> Some of the complaints received by OCR do not meet basic requirements such as completeness, jurisdiction, and timeliness and are closed as no jurisdiction or other administrative closure. Others are successfully mediated and/or are withdrawn by the complainant; the rest proceed to investigation.[151]

Four types of closure are listed on the table as well as the percentage of corrective actions taken. Correction rate is the sum of the numbers in the "administrative" column and the "corrective action" column. This rate has exceeded 50% for all five fiscal years with a high of 60% during FY 1990. Administrative closures have passed corrective action closure in FY 1992 and FY 1993.

"No jurisdiction" has remained relatively constant around the 18% figure over the five year period. While "No corrective action required" has fluctuated from 28% in FY 1989 to 21% in FY 1993. The total number of complaints closed has increased in proportion to the total number of complaints received.

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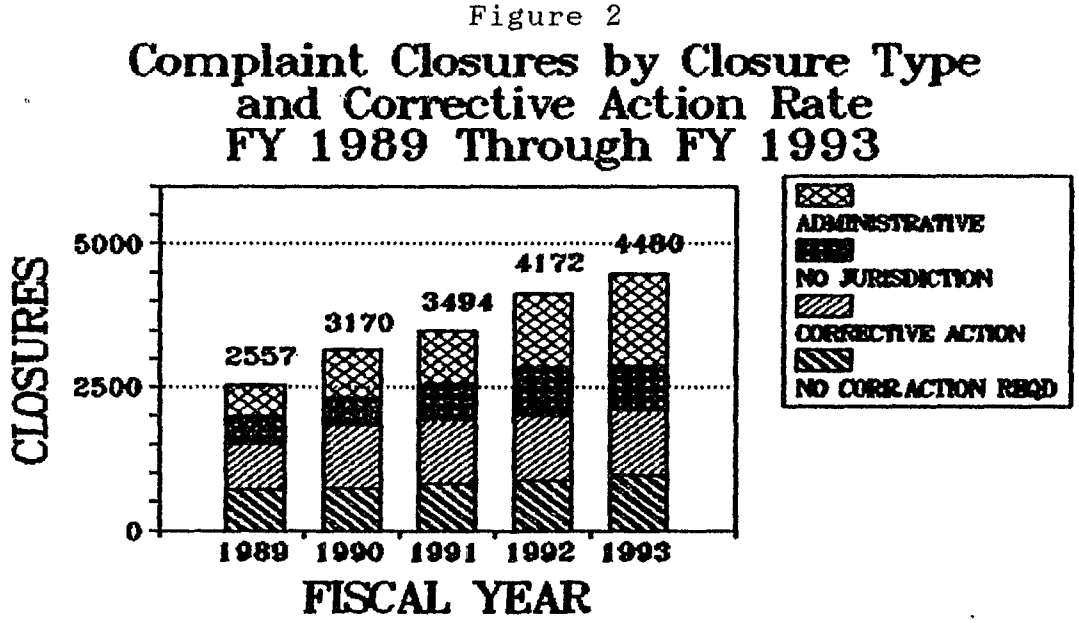
[151]U. S. Department of Education, Office of Civil Rights, *Fiscal Year 1993--Year-End Management Report--March 1994* prepared by Planning, Analysis and Systems Service, Planning and Analysis Division, Reports and Analysis Branch, ([Washington, D.C.]: U.S. Department of Education, Office of Civil Rights, 1994), 28.

Table 5
Complaint Closures by Closure Type
and Corrective Action (CA) Rate
FY 1989 through FY 1993

Fiscal Year		Substantive Closures: No CA Req'd	CA Req'd	No Jurisdiction	Admin.	Total	CA Rate
FY 1989	N	714	811	474	558	2,557	53%
	%	28%	32%	19%	22%	100%	
FY 1990	N	744	1,103	501	822	3,170	60%
	%	23%	35%	16%	26%	100%	
FY 1991	N	814	1,124	620	936	3,494	58%
	%	23%	32%	18%	27%	100%	
FY 1992	N	875	1,154	842	1,301	4,172	57%
	%	21%	28%	20%	31%	100%	
FY 1993	N	948	1,149	770	1,613	4,480	55%
	%	21%	26%	17%	36%	100%	

Source: U. S. Department of Education, Office of Civil Rights, *Fiscal Year 1993--Year-End Management Report--March 1994* prepared by Planning, Analysis and Systems Service, Planning and Analysis Division, Reports and Analysis Branch, ([Washington, D.C.]: U.S. Department of Education, Office of Civil Rights, 1994), Table 14, pg 29.

Figure 2



Source: U. S. Department of Education, Office of Civil Rights, *Fiscal Year 1993--Year-End Management Report--March 1994* prepared by Planning, Analysis and Systems Service, Planning and Analysis Division, Reports and Analysis Branch, ([Washington, D.C.]: U.S. Department of Education, Office of Civil Rights, 1994), Figure 10, pg 28.

A sample of the types of complaints that were being received by the OCR was reviewed to help predict future trends in educational case law. During FY 1993, the average number of complaints received each month was in excess of 400, suggesting the need to use a sample.

A review of this matter with a long-time employee of the OCR revealed that the type of complaints usually clustered into specific categories with very little variance. For this reason, one month (February, 1993) was chosen to review as a representative group of the whole. The OCR sent the researcher all letters of findings (LOF) issued during that month related to handicapped issues.

During February, 1993, 16 LOF's were issued. All of the investigations involved public systems. Fifteen complaints had been filed by parents of disabled students. The other complaint was filed by a disabled employee. Of the 16 total LOF's, 14 cited numerous violations against the school systems. These violations varied from failure to implement a self-evaluation of the school system in regard to the ADA to failure to provide a free appropriate public education for a disabled student. Two of the LOF's found absolutely no evidence of the alleged violations by the school districts; both complaints were unfounded.

Of the 14 school districts that were out of compliance with federal statutes, 12 had already initiated corrective

actions. The other two school systems were in the process of planning extensive renovations to remove architectural barriers and make the building accessible to the handicapped.

Of the 16 LOF's, the most common reason cited (n = 10) was violation of due process rights in one form or the other. The other 6 LOF's were evenly divided among three categories - § 504 architectural barriers, disciplinary policy, and racial discrimination. Since each LOF had several different violations, there is another pattern forming. Seven of the cases dealt with suspension of disabled students without proper due process or change of placement. Apparently, *Honig* has made it to the local level. Seven cases dealt with improper implementation of IEP's. Six cases dealt with inappropriate placement and failure to provide a free appropriate public education.

Summary

Decisions in the area of special education program inclusion or exclusion based solely on disabilities are fairly consistent at the appellate court level. The federal district courts are another matter altogether. Their decisions may vary on similar issues. Discrepancies seem to depend on which cases are cited as antecedents.

The United States Supreme Court has yet (1994) to hear a case involving a child with AIDS or ARC. As a result,

these cases have been litigated numerous times because there are no precedents to use as guidelines.

One significant element in all cases is the court's determination to protect the due process rights of the parents of disabled children and of the children themselves. The quickest way for a school district to lose a case is to violate due process regulations significantly. The fact that due process rights of parents or disabled students were violated has been sufficient cause for courts to rule that the school system had failed to provide a free appropriate public education. Minimally, parents must be advised of their rights and be given, in writing, "due process" procedures and regulations. All parent requests for hearings should be taken seriously and acted on promptly.

School officials must be aware of several factors playing important roles in recent case law. It is not enough for a child to be identified and served in a special education program. The student must receive benefits from the services provided for the placement to be appropriate. If an IEP is ruled inappropriate, the educational placement will also be considered inappropriate. If parents aren't completely involved in IEP development, their rights have been violated. The courts will rule in favor of the school systems the majority of the time if due process procedures are followed correctly and the IDEA regulations are applied

appropriately. The courts steadfastly refused to rule on the appropriateness of one educational technique or method over another. They leave the methods strictly up to the educational professionals.

Educational professionals should be encouraged by the apparent trend among federal judges to consider each case individually and employ common sense as well as case law in their findings.

CHAPTER V

SUMMARY, CONCLUSIONS, AND RECOMMENDATIONS FOR FURTHER STUDY

Summary

Historically speaking, children with disabilities have been considered second-class citizens and generally excluded from American public schools prior to the 1960s. With the advent of the national civil rights movement and resulting federal legislation, this practice has changed significantly. The rights of disabled students to a free appropriate public education (FAPE) have been supported by the court. These children must now be given the same opportunities and access to public education as non-handicapped children.

In reviewing the history of these changing rights and entitlements, a FAPE in the least restrictive environment (LRE) for each disabled child is now mandated federally. School officials have tried to accommodate disabled children by appropriate educational program inclusion. This resulted in a "dual system" of education between regular education and special education. Further problems arose with the federal mandate to educate disabled children in the LRE.

As viewpoints and attitudes change, litigation becomes more frequent. Federal and state courts are diligently trying to clarify these constitutional issues with recent

decisions. Until there is sufficient case law to define and illustrate congressional gray areas, confusion and litigation will continue in these areas.

Answers to the Research Questions

In Chapter I, five research questions were posed for this study to answer. The following answers emerge from a review of selected current literature on the educational program exclusion or inclusion solely based on a disability, the analysis of federal statutes, and the analysis of relevant federal and state case law.

Question One: What is revealed in current literature regarding the legal rights of exceptional children and children with disabilities in public education?

It is generally held that parents of disabled children have spearheaded the movement for educational changes by organizing and lobbying for inclusive legislation. They have accomplished much in the years since *Brown* (1954).

There seem to be two divergent views in most of the literature: one advocates the right of handicapped children, and the other advocates the rights of school systems and nonhandicapped children. These should not be conflicting views. Most authors agreed with the principle that *every* child is entitled to a FAPE in the LRE. There was resentment about these changes being such unyielding regulations. After a review of the historical aspects of inclusion of

children with disabilities in public education, it was clear that specific legislation was necessary. Schools did not include children with disabilities until inclusion was mandated by law. Even after federal mandates, schools continued to exclude these students from the mainstream by putting them in self-contained special education classes.

Some advocates of disabled children's rights are adamant about total inclusion or mainstreaming of all disabled children. The general viewpoint in current literature, however, defends mainstreaming, but only to the extent appropriate for an individual child. This view leads to another assertion that is surfacing in the literature. Because every child is an unique individual, the IDEA regulations should be applied on an individual basis. School systems should refrain from making blanket determinations based on a particular label or classification. This premise is strongly supported by the courts.

Another issue in the literature concerns the rights of the "normal" students who comprise the bulk of the student population. Who is their advocate? Who is ensuring that their rights are protected?

The final issue that is most prevalent in literature reviewed for this study are the effects of both the Individuals with Disabilities Act of 1990 (IDEA) and the Americans with Disabilities Act of 1990 (ADA) on educational case law.

Some educators believe that these federal Acts will geometrically increase the already myriad paperwork and personnel necessary to administer federal regulations, to say nothing of the time or the cost involved.

Question Two: What is the status of educational program inclusion or exclusion based solely upon a disability as outlined in federal statutes?

Federal statutes are specific in regard to program inclusion or exclusion based solely on a disability. First, according to federal statutes, *all* children with disabilities are entitled to a "free appropriate public education." Recent statutes involving educational program inclusion or exclusion include the IDEA. The IDEA is the "exclusive avenue" available to children with disabilities if there is a legal question regarding a free appropriate public education (FAPE), IEP or placement. The ADA or the Rehabilitation Act of 1973 are statutes that apply if there is exclusion from a federal funded program caused by an architectural barrier, *i.e.*, no ramp or handicapped restrooms, inaccessible playgrounds.

Problems arise from what Congress did not say in the statutes more than from what it did say. The courts are having to clarify numerous definitions as well as probable intent. The U.S. Supreme Court defined "free appropriate public education" in *Rowley*. In *Smith*, the Court held that

Congress intended the EHA to be the "exclusive avenue" through which legal actions are taken to insure a FAPE and all that implies. In *Tatro*, the Court clarified the definition of "related services," found in the EHA. *Burlington* and *Carter* deal with reimbursement under EHA of educational expenses incurred by parents. *Honig*, the Court clarified the "stay-put" provision of EHA.

To receive funding under IDEA, a state must have enacted similar or parallel statutes. As of 1993, 45 states have statutes with parallel or exact wording to IDEA or the court has ruled that the statutes do not exceed the federal statutes. However, five states (Kansas, Maryland, Massachusetts, Michigan, Missouri) still have statutes using language that exceeds the federal requirements for a "free appropriate public education."

Questions three and four can be answered together because both involve the analysis of cases dealing with program exclusion or inclusion because of a disability. *What is the status of cases involving children with disabilities? What discernible patterns and trends can be identified in judicial decisions?*

Sixty-seven cases, ruled on by state or federal courts since 1978, were read and analyzed for this study (See Table 6). The courts ultimately ruled in favor of the handicapped student in 35 of these cases and in favor of the schools in

30 of the cases. Two of the cases were split decisions. It was rare that there was only one issue for the court to rule on because of the complexity of these cases. The exception to this practice was when parents of disabled students failed to exhaust administrative remedies set forth in IDEA. The courts summarily ruled in favor of the schools in nine cases because the parents failed to follow due process. Three cases were decided in favor of the disabled students because the schools failed to follow due process procedures.

Failure of school districts to provide FAPE was the reason cited by courts ruling in favor of the students in 12 cases. In nine cases, the schools won because they had provided FAPE for the students with disabilities.

Mainstreaming of students was the principal issue in nine cases. Students won six cases and school districts won three cases. Development and implementation of an appropriate IEP was the primary issue in ten cases with the schools prevailing in five cases, students in one case and one split decision. The main concern of appropriate placement was evenly split between students and school systems in six cases. In four cases involving § 504 exclusion, three were won by handicapped students. The last area of dispute was the "stay-put" provision with the courts ruling for the students in all four cases.

Table 6 - Analysis of Judicial Decisions

Primary Reason for Judicial Decision	In Favor of Student	In Favor of School	Split Decision	Total Cases
Parents Failed to Follow Due Process	0	9	0	9
School Failed to follow Due Process	3	0	0	3
Was a FAPE Provided for the Student	12 Not Provided	9 Provided	1	22
Failure to Mainstream Student Appropriately	6	3	0	9
Development & Implementation of the IEP	4	5	1	10
Appropriate Placement	3	3	0	6
§ 504 Exclusion	3	1	0	4
"Stay-Put" Provision	4	0	0	4
Total Number of Cases	35	30	2	67

There are discernible patterns and trends apparent in the judicial decision of the courts. The courts have ruled that following due process procedures is of paramount importance for both the parents of handicapped students and the school district. The next important principle based on court decision is the development of an appropriate IEP with full parental participation. If the court concludes that

the IEP is inappropriate, the educational placement is usually inappropriate also. The courts have ruled that just providing services to handicapped students isn't enough. The student must benefit educationally from the services provided or the educational placement is inappropriate.

Question Five: What legal guidelines can be set forth as a result of this research to aid administrators and school board members? The legal guidelines which have developed from this study are presented later on in this chapter.

Conclusions

Making definite conclusions is difficult at best when dealing with legal research. No two cases are identical because each case has a different set of circumstances and deals with different disabilities. However, based on the cases analyzed in this study, there are some areas in common. Therefore, the following general conclusions concerning educational program inclusion or exclusion solely based on a disability can be made:

(1) Parents must be given a copy of the due process procedures and policies at least once. Their rights should then be explained in detail. If a dispute occurs between the parents and school officials, explain the due process again. Failure of the school officials to meet due process re-

quirements are adequate grounds by themselves for finding that a free appropriate public education has not been provided.

(2) The Individual Education Program (IEP) must be developed with all of the appropriate professional involved in addition to full parental participation.

(3) Inappropriate IEP development or implementation can cause an educational placement to be ruled inappropriate also. Therefore, a FAPE has not been provided.

(4) Even though a student is receiving services according to an IEP, the student must receive some educational benefit from the services provided by the IEP. Otherwise, The IEP is inappropriate and a school system can be charged with failure to provide a FAPE.

(5) Courts rule in favor of parents if a school district fails to mainstream or appropriately mainstream a disabled child (the LRE provision.)

(6) Failure of the schools to place a child with disabilities in an appropriate program will cause the court to rule in favor of parents.

(7) Parents must exhaust all administrative remedies before legal action can be taken. Legal actions

brought by parents have been dismissed or found in favor of the school district because the parents have failed to exhaust administrative remedies

(8) Courts also have ruled that legal actions must be brought within the time allowed by IDEA.

(9) The IDEA is the exclusive avenue through which a legal action regarding the FAPE of a handicapped child can be brought.

(10) If the §504 complaint is legitimate, the school district usually loses the case.

(11) If there is any pending due process procedure, a student's placement can <u>not</u> be changed.

(12) Courts have not ruled on different methods of education. They leave educational methods to the experts.

Guidelines for School Officials to Use Regarding Program Inclusion or Exclusion Based Solely on Disabilities

The following guidelines should help school officials in dealing with special education program inclusion or exclusion decisions. These guidelines will not guarantee trouble-free, legally defensible special educational decision and placements in all cases, but they will help public school administrators strive for this goal.

(1) Violation of due process procedures will put a school system in jeopardy legally and financially.

(2) Parents can't be given the due process rights too many times.

(3) If parents bring suit and haven't exhausted the administrative remedies, they will probably lose.

(4) If a dispute arises with a parent, explain the due process procedures again, orally and in writing.

(5) The IEP must be appropriate for an educational placement to be appropriate.

(6) The IEP must be implemented properly and in a timely fashion.

(7) Appropriate mainstreaming should be implemented in accordance with least restrictive environment provision when it is appropriate.

(8) Correctly place students in educational programs.

(9) Do not make any changes in educational placement without following due process procedures.

(10) Do not suspend an exceptional student for an indefinite period of time. Specify the exact amount of time for the suspension up to ten days. For a suspension of more than 10 days, a school-base committee meeting is required for a change in placement.

Recommendations for Further Study

Federal statutes regarding educational program exclusion or inclusion solely based on a disability have been in place since 1990. The courts have slowly clarified gray areas in these statutes with pertinent rulings. The Supreme Court has not heard any cases involving students with AIDS or ARC. This issue warrants further study in the near future.

With the recent change in the United States Congress after the elections in November, 1994, and the fact that IDEA must be re-authorized during the 104th Congress (probably in 1995), advocates of children with disabilities are extremely concerned with what types of changes will be made in IDEA. Assumptions about what the Republican Congress will do include making IDEA an unfunded mandate thus making enforcement very difficult or repealing the majority of the law and giving legal control back to the individual states. If any of these suppositions become law, the impact on educational case law will be substantial.

The evolution of the rights of children with disabilities is constantly in flux as a result of up-to-date U.S. Supreme Court decisions. For this reason and the scheduled re-authorization of IDEA, this study should be updated in the next two to four years. Total inclusion of children with disabilities in regular education as opposed to segre-

gated classes with mainstreaming only for non-academic subjects is occurring more frequently. The current trend in court decisions revolves around least restrictive environment and the interpretation of "where appropriate" in IDEA. The Supreme Court should address this issue soon. Total inclusion deserves closer scrutiny in the near future.

Another area currently being litigated in the courts is that of awarding reimbursement of educational expenses for students in private school settings. If these decision continue to favor the parents, they will have major repercussions on the educational community. The Supreme Court will need to clarify this issue.

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