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LEGAL ASPECTS OF DUE PROCESS HEARINGS IN THE STATE OF NORTH CAROLINA, 1978-1984

The University of North Carolina at Greensboro ED.D. 1985

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LEGAL ASPECTS OF DUE PROCESS HEARINGS IN THE STATE OF NORTH CAROLINA, 1978-1984

by

Kenneth A. Wilson

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
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1985

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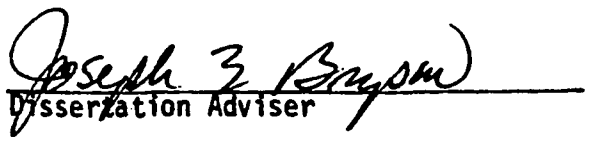

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WILSON, KENNETH A., Ed.D. Legal Aspects of Due Process Hearings in the State of North Carolina, 1978-1984. (1985)
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The purposes of this study were, first, to determine the impact of the procedural safeguards mandated by Public Law 94-142--Education for All Handicapped Children Act of 1975, and, second, to examine the opinion of the North Carolina Exceptional Children Program administrators on the effects of due process hearings in North Carolina schools.

The following six factors were selected for direct examination: incidence factors; precipitating factors; initiating factors; decision factors; factors that relate to the characteristics of the children, and factors that concerned time, cost, characteristics of the parents; and comments from program administrators for exceptional children.

Key court decisions in the history of exceptional children were presented along with the influencing rationale for each case. Scholarly opinion was sought and presented from legal periodicals and the general literature. Due process hearings in North Carolina were studied and an analysis was done based on the six factors used in the study.

A series of survey questions were developed and reviewed by a selected group of educators. One hundred forty-two school systems were surveyed and sixty-two North Carolina due process hearings were ana lyzed. One Hundred and six of the school systems in North Carolina participated in the study.

The consensus from the respondents was that prehearing mediation was helpful in averting formal due process hearings. However, the number of hearings initiated would be an invalid criterion for use in evaluating federal and state implementation of procedural safeguards.

Disagreements over the severity of the handicapping condition and the consequent needs were the reason for the majority of the due process hearings held. Requests for private placement by parents and school systems recommending placement in the existing system were also a frequent issue.

The decisions of the hearing officers most often favored the schools' recommendations. The trend of the appeals involved issues related to the quality and quantity of services available through the local school system.

Children classified as mentally handicapped, male children, and children in the age range of ten to sixteen were most involved in due process hearings in North Carolina. Parents who were involved were overwhelmingly middle- and upper-income whites.

School systems in North Carolina should initiate parental involvement in the early phase of the child's educational program with a step-by-step plan to avoid due process hearings which includes a mediation process. The North Carolina Department of Public Instruction, Division for Exceptional Children, needs to conduct a needs assessment of the types of programs and services being offered. Inservice on how to avoid and how to proceed with due process cases is needed.

ACKNOWLEDGMENTS

I wish to express my sincere appreciation to the persons who influenced the decision to continue my studies at the graduate level and provided stimulation that made this study possible.

Thanks are due to Dr. Joseph E. Bryson, who encouraged me to pursue graduate studies at The University of North Carolina at Greensboro, and under whose thoughtful and understanding supervision the dissertation was written. His professional and personal attitude, as well as his classes in school law, provided the stimulation for this specific study. I also wish to thank Drs. Dale Brubaker, E. Lee Bernick and Harold Snyder for their friendship and special interest, both in and out of the classroom. Particular thanks are given to the late Dr. Dwight Clark whose thoughtful and understanding ways gave encouragement and inspiration at a critical time in my program. I am indebted to all of these persons, whom I have learned to admire and respect.

Above all, I wish to thank my wife Brenda and sons Dennis and Joel for enduring with me and understanding.

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CHAPTER I

INTRODUCTION

Purpose of the Study

This will be an exploratory inquiry into the impact of the procedural safeguards mandated by Public Law 94-142--Education for All Handicapped Children Act of 1975--at two levels: the administrative unit of special education and the client pupils and their parents or guardians. The legislation, an extension of the earlier Education of the Handicapped Act (P.L 93-380), is the culmination of laws and litigation whose goal has been to guarantee educational opportunities for handicapped children. Specifically, the act is concerned with the conditions required for assurance of procedural fairness in the areas of identification, evaluation, placement, and the provisions for free appropriate public education for handicapped children.

The due process procedural safeguards stipulated by the law[1] include the following: (1) That parents or guardians have the right to examine all relevant records of the child as well as the right to obtain an independent educational evaluation of the child; (2) that parents or guardians must be given written prior notice in their native language whenever the school proposes to initiate or change or refuses to initiate or change the identification, evaluation, educational

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[1]Public Law 94-142, Education for All Handicapped Children Act of 1975, 83 Stat. 773 (codified at 20 U.S.C. 1232-1453) sec. 615.

placement of the child, or the provision of a free appropriate public education; (3) that parents or guardians be fully informed of the procedural safeguards; (4) that parents or guardians have the right to present complaints with respect to the identification, evaluation, educational placement, or the provision of a free appropriate public education for their child: (5) that upon presentation of a complaint, the parents or guardians shall have an opportunity for an impartial due process hearing. In the hearing they are to be given the right to be accompanied and advised by counsel. The parents or guardians are also to be granted the right to a written or electronic verbatim record of such hearings and the right to written findings of fact and decisions; (6) that any party aggrieved by the decision has the right to appeal to the state educational agency and ultimately the right to bring a civil action; and (7) that whenever the parents or guardians of the child are not known, the state must assign an individual who is not an employee of the local or state educational agency to act as a surrogate for the parents.

The key consideration in the study is that education involves a long-term continuing relationship among the parents (or guardians), child, and school, and one must be concerned with the long-term consequence of the conflicts engendered by any dispute. This study focused on identifying factors which are associated with the process of providing educational services to handicapped children, and particularly where there is a disagreement between the school system and the parents or guardians that is likely to lead to a district-level due process hearing. The factors proposed were obtained from a review of the

literature, legislation, litigation, and interviews with persons who have been involved in the due process system (school officials, hearing officers, lawyers, and advocates).

Eight research questions were generated by the study:

1. How many due process cases were initiated and heard in the state of North Carolina from August 1978 to August 1984?
2. Who were the children referred?
3. What were the critical issues that had generated hearings?
4. Who initiated the hearings?
5. What were the decisions of the hearing officers?
6. Were the decisions of the hearing officers implemented?
7. What were the time line and expense involved in each of the hearings?
8. Did the school systems mediate with parents to avert formal due process hearings?

Definitions of Terms

In order that the reader and the investigator of this study may benefit by the use of common meanings, the following terms are defined.

Child Count. An annual count of children receiving special education and related services.[2]

Public Law 94-142. It is the purpose of this act to assure that all handicapped children have available to them a free appropriate public education which emphasizes a special education and related services

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[2]Public Law 94-142, sec. 611, a,3.

designed to meet their unique needs. This law includes provisions requiring equal educational opportunities for all children. It also provides for specific safeguards regarding the assignment of children to classes for exceptional children.[3]

Right to Education. "Public Law 94-142 mandates a free appropriate public education for each exceptional child. Within the federal law, a legal framework has established the following mandates: 1) All exceptional children and their parents shall be guaranteed due process with regard to identification, evaluation, and placement procedures. 2) A written, individualized educational program shall be developed for each child determined to have special educational needs. 3) Educational placement decisions for each exceptional child shall always be in the least restrictive environment appropriate to the child's learning needs. 4) Responsibility for providing the appropriate educational program for each child rests with the local education agency. 5) A periodic review shall be conducted by the education agency at least annually to evaluate the exceptional child's progress and to rewrite the educational plan."[4]

Equal Protection. The claim is that the plaintiffs have the same rights to education as other children. The claim has two parts.

First, the complaint may be that there is differential treatment within the class of developmentally disabled children, that some are

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[3]The Education for All Handicapped Children Act of 1975, P.L. 94-142, sec. 615 (20 U.S.C. 1411 et seq.).

[4]Scottie Torres Higgins, Special Education Administrative Policies Manual (Reston, Virginia: Council for Exception Children, 1977), p. 1.

receiving education while others are not. In this case, the violation of equal protection consists of the irrationality in providing or denying education to persons classified as developmentally disabled.

Second, the complaint may be that some disabled children are not receiving the education that normal children are. In this case, the violation consists of the irrationality in providing or denying education to persons who are similarly classified as being school-aged children. The solution to these complaints is that all children, including the handicapped, be included in public education systems.[5]

Substantive Due Process. "Claimed violations of Fifth and Fourteenth Amendment substantive due process are more likely to arise when a pupil or a group of pupils has been misclassified because incorrect or invalid criteria were used to determine abilities and thus which track should be followed in school."[6]

Surrogate Parent. Public Law 93-380 provides for the appointment of a "parent surrogate," i.e., an individual appointed to safeguard a child's rights in the specific instance of educational decision making--identification, evaluation, and placement.[7]

Procedural Due Process. "Typically, courts set forth detailed procedural requirements. School authorities are first required to locate and notify all handicapped children and advise them of their

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[5]H. Rutherford Turnbull, III, Legal Aspects of Educating the Developmentally Disabled (Topeka, Kansas: National Organization on Legal Problems of Education, 1975), pp. 13-14.

[6]Ibid., p. 20.

[7]Higgins, p. 500.

rights to education. After locating the handicapped children, school authorities are required to evaluate them and place them in appropriate programs. Court decisions, consent decrees, or statutes lay out the procedural steps to be observed in placing a child, changing his placement, or excluding him from school"[8]

Governor's Advocacy Group. The Governor has created this group to serve as a permanent committee on exceptional children. The committee consists of representatives from state and local agencies charged which delivering services to exceptional children. This panel advises the state education agency on unmet needs, comments publically on rules and regulations, and assists the state in developing and reporting such data and evaluations as may be needed by the United States Commissioner of Education.

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."[9]

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[8]Turnbull, pp. 22-23.

[9]Higgins, pp. 16-18.

Appropriate Education. "An individualized program for a specified time period provided at no cost to the parents in order to meet the specific special education needs of an exceptional child."[10]

Free, Appropriate Public Education. "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 614 (a) (5) of Public Law 94-142, the Education for All Handicapped Children Act."[11]

Special Education. "The provision of a continuum of child-centered educational and supportive services in combination with those provided in the general school program to meet the needs of students who are handicapped."[12]

Public Expense. Public expense means that the local education agency either pays for the full cost of the evaluation or insures that the evaluation is otherwise provided at no cost to the parents.[13]

Individualized Education Program for the Handicapped. "A written statement for each handicapped child developed in any meeting by a

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[10]Ibid.

[11]Ibid.

[12]NSBA Council of School Attorneys, Preventing and Defending Suits by Handicapped Students (Washington, DC: National School Boards Association, 1982), p. A-8.

[13]Higgins, pp. 16-18.

representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and, whenever appropriate, the child."[14]

Handicapped Students. "Students between the ages of three and twenty-one, inclusive, with educational handicaps (physically handicapped, mentally retarded, emotionally disturbed, learning disabled, speech handicapped, autistic, or multiply handicapped) . . . and students between birth and age twenty-two, inclusive, who are audiorially handicapped or visually handicapped, whose disabilities are so limiting as to require the provision of special services in place of or in addition to instruction in the regular classroom."[15]

Residential Placement. "Handicapped children are eligible for School District Special Education Services by virtue of residence in the school district. Service to nonresident pupils temporarily confined to a hospital or agency within the district is contingent upon compliance with state and local policy and procedures."[16]

Due Process. The right of the individual faced with state action threatening life, liberty, or property to be informed of the imminence of such action, to have assistance in defending against such action, to present evidence and question those presenting evidence

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[14]Ibid.

[15]NSBA Council of School Attorneys, p. A-9.

[16]Ibid.

regarding such action and therein to confront and cross-examine adverse witnesses and have impartial review of such action.[17]

Handicapped Children. Children who are mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or children with specific learning disabilities, who by reason thereof require special education and related services.[18]

General Description of the Study

The study will be exploratory in nature, utilizing a case-study approach to examine local education agency due process hearings. The objectives of this study were to determine the incidence of due process hearings involving local education agencies in North Carolina, and the issues precipitating those hearings in order to determine the initiators of those hearings, and to assess the decisions of the hearing officers in relation to the recommendations of the school. In addition, the characteristics of the children and their parents or guardians, the school district expense and time involved in each hearning, and the school systems' use of internal due process procedures or mediation prior to formal due process proceedings were analyzed.

The study covered the administrative units in North Carolina that have had due process hearings. These are the 142 local education agencies with a total school population of 1,770,894 pupils.

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[17]Henry C. Black, Black's Law Dictionary (St. Paul: West Publishing Company, 1968), p. 590.

[18]Public Law 94-142, sec. 602, 1.

While the Education for All Handicapped Children Act of 1975 and Section 504 of the Rehabilitation Act of 1973 first established the basic framework for determining the rights of handicapped students, both the courts and the Congress are continually interpreting and changing the standards with which school boards must comply. There is a need to keep abreast of changes made since the passage of these laws and to seek new perspectives on various aspects of them and their regulations.

All of the regulations adopted under Section 504 and Public Law 94-142 were recodified and redesignated because of the establishment of the Department of Education. The regulations under Section 504 were transferred from 45 CFR Part 104 effective May 9, 1980. Public Law 94-142 regulations were transferred from 45 CFR Part 121a to 34 CFR Part 300 effective November 12, 1980.

In recent years numerous judicial decisions have overruled the practices of school districts that have excluded developmentally disabled children from educational programs. There is a need to examine these cases and their underlying legal principles, including the emerging "right to education" and the Fourteenth Amendment rights to equal protection and due process. Exceptional children administrators need to know the implications of these cases as they identify, evaluate, and place handicapped children in appropriate educational programs.

The practices of identification, least restrictive, and most appropriate service are perennial topics of debate among teachers,

parents, administrators, and university theoreticians. Educational decision-makers have to be concerned not only about the least restrictive and most appropriate setting, but also with constitutional requirements as well. Chester Nolte stated that students are entitled to due process of law when they are being assigned to certain tracks and that the educator who makes the assignment must be able to prove that the assignment is in the child's best interest.[19] As of this date, this specific principle has not been tested in a court of law.

Since 1973, the incidence of cases involving racial discrimination has diminished; however, there is a notable increase in litigation involving questions of due process and individual rights and equal educational opportunities related to grouping and classification practices.[20] Since American society, in general, seems to be placing more and more emphasis on individual freedoms, it is not surprising that questions regarding deprivation of an individual's constitutional rights without due process are now the norm rather than the exception. Neither is it unexpected that there is an increase in court cases involving such public school practices as sorting, classifying, and labeling children.[21]

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[19]Chester M. Nolte, Due Process and Its Historical Development in Education, U.S. Educational Resources Information Center, ERIC Document ED 088 186 (April 1974), p. 14.

[20]Ibid., p. 13.

[21]Merle McClung, "School Classification: Some Legal Approaches to Labels," Classification Materials (Cambridge, Massachusetts: Harvard University Center for Law and Education, 1973), p. 5.

Parents who raise official questions regarding service or classification policies generally question whether such service offends the due process and equal protection clauses of the United States Constitution. Due process questions generally are concerned with whether students are afforded procedural safeguards which insure that any label or service model has been fairly applied. In some cases, however, parents may even question the label itself, thus resulting in substantive due process questions.[22]

In 1975, the United States Congress passed the Education for All Handicapped Children Act (P.L. 94-142). This law includes provisions requiring equal educational opportunities for all children. It also provides for specific safeguards regarding the assignment of children to classes for exceptional children. As school officials attempt to implement this law, it is likely that litigation in this area will continue.

Thus, this study is significant in that it provides educational decision-makers with a comprehensive analysis of the legal aspects of due process in the public schools. The study provides educational leaders with a set of guidelines to use when making crucial decisions regarding due process hearings--guidelines which may prevent decision-makers from becoming involved in litigation.

The significance of this study can be accentuated by analyzing the due process hearings that have occurred in North Carolina. A

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[22]Ibid.

review of these cases indicates that the need for hearings occurs in all types of school districts--large, small, rural, and suburban.

It is largely because of higher educational costs that boards of education have failed to provide the educational needs of exceptional children. Special educators have failed to plead successfully for funds. Whatever the reason for failure to meet the needs of handicapped children, lack of money is an inadequate defense in litigation hearings brought to ensure the right of the handicapped to education.

The study was planned and conducted within the limits of the school districts that have had due process hearings in North Carolina, and those due process hearings completed during the period from August 14, 1978 through August 1984.

Methods of Analysis

From the review of the literature, litigation, and legislation, a series of interview questions was developed (Appendix B) regarding the internal due process machinery in each administrative unit as well as each due process hearing requested and conducted during the period from August 1978 through August 1984. The questions were mailed to the program administrators for exceptional children in North Carolina along with a letter of introduction (Appendix A) that also requested an appointment for an interview. The program administrators for exceptional children or their designees who agree to participate in the study will be visited or interviewed by phone.

The specific information thus collected regarding each due process hearing studied, in conjunction with information collected on the internal due process machinery of each local education agency was analyzed. The answers to the research questions were reported in terms of frequencies and percentages. The analysis of the results related considerable information regarding special education due process hearings for the state of North Carolina.

Significance of the Study

The importance of the study rests on the answers to two questions: "Why study procedural safeguards?" and "Why study special education due process hearings?" The most convincing response to the first question came from William R. Hazard:

> Slogans and catch-phrases abound in literature about schooling. "Equality of educational opportunity," "education for democratic living," "relevant education," and "meeting the needs of all youth" are but a few of the high-sounding but hollow slogans cluttering discussion about public schooling. The latent ambiguity of such slogans impedes the painful but necessary public examination of schools, pupils, teachers, and their educational attainments. The schools operate within the social, political, economic, and legal context of the larger society. Though they may reflect some of the social ideals, more likely they will mirror the social realities. The disparity between the real and imagined expectations and accomplishments of the public schools feeds the fire of public dialogue but does not necessarily produce appropriate action. The crises in urban schools across the nation illustrate the malfunctions plaguing our social institutions.[23]

School officials should be aware of the accomplishments of the schools in light of current litigation and legislation regarding equal

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[23]William R. Hazard, Education and the Law, 2nd ed. (New York: Free Press, 1978), p. 313.

education opportunities and due process safeguards. In part, it is this concept which answers the "Why study special education due process hearnings?"

The doctrine of due process emerged as a legal principle upon which much of the litigation in special education has been based. The litigation has resulted in the incorporation of due process in both state and federal legislation culminating in P.L. 94-142.

Shortly before the enactment of P.L. 94-142, federal legislation was enacted that focused on the responsibility of the federal government to provide financial assistance to the states to assist in the education of handicapped children. In this regard, Section 504 of the Rehabilitation Act of 1973 has fashioned this formula:

> No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.[24]

Public Law 94-142 provides such assistance in return for assurances that participating states have a policy mandating the right to education for all handicapped children within a specified time period. The state's educational policy must be consistent with the stated purpose of the Act:

> . . . to assure that all handicapped children have available to them, within the time periods specified in (the Act), a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents

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[24]U.S. Department of Health, Education and Welfare, "Nondiscrimination on the Basis of Handicap," Federal Register (Washington, DC: Office of the Secretary, May 4, 1977), sec. 84.4, p. 22678.

> or guardians are protected, to assist states and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children.[25]

The required state policy regarding the education of handicapped children has been developed for North Carolina in regulations[26] that follow the mandate of P.L. 94-142. Specifically, North Carolina

> . . . requires a system of educational opportunities for all children with special needs and requires the identification and evaluation of the needs of children and the adequacy of various education programs before placement of children, and shall provide for periodic evaluation of the benefits of programs to the individual child and the nature of the child's needs thereafter.[27]

The significance of procedural due process in the education of handicapped children was enunciated by the Bureau of Education for the Handicapped (BEH) preamble to the proposed regulations for Public Law 94-142.

> A basic tenet of the American system of government as provided by the United States Constitution, is that any individual who is threatened or becomes subject to serious or adverse action by public authorities must be provided with full rights of due process of law. Such procedures provide to the individual the opportunity to contest the proposed action within a series of proceedings which insure that fairness and good judgment govern the entire decision-making process.[28]

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[25]Public Law 94-142, sec. 601, 4, (c).

[26]State Board of Education, Rules and Regulations.

[27]North Carolina General Statue, 115C-106.

[28]U.S. Department of Health, Education and Welfare, "Proposed Rules for Education of Handicapped Children and Incentive Grants Program," Federal Register (December 30, 1976), p. 56972.

Further elaborating on the importance of procedural due process, BEH emphasized that the implementation of the regulation is:

> . . . to produce a setting in which interested parties . . . understand the nature of a child, his needs, the procedures and process used to obtain that information, the proposed plan to meet the needs of the child, the review procedures to determine program effectiveness and, finally, their rights under the law.[29]

Since P.L. 94-142 was fully implemented, little attention has been paid to the results of due process hearings.

The problems that states have encountered in implementing due process procedures has been documented by Callahan,[30] Kotin,[31] and D.H.E.W.[32] While the manner in which due process procedures are implemented at the local level is a secondary issue in this study, the measurable results of those due process hearings initiated and heard is the basis of the study.

Organization of the Study

The study consists of five chapters, a selected bibliography, and appendices.

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[29]Ibid.

[30]Dan W. Callahan, "Procedural Due Process Required for Exceptional Children," Georgia Association of Middle School Principals 2 (Fall 1977):37-42.

[31]Lawrence Kotin, Due Process in Special Education: Legal Perspectives; The State of the States, P.L. 94-142 and Systems Design (Boston: Massachusetts Center for Public Interest Law, 1977).

[32]U.S. Department of Health, Education and Welfare, Progress Toward a Free Appropriate Public Education (Washington, DC: Office of Education, 1979), p. 81.

Chapter I includes the purpose of the study and a general description of the study.

Chapter II is a review of the related literature, research, legislation, and litigation regarding due process safeguards for handicapped children.

Chapter III describes the methodology of the study.

Chapter IV provides an analysis of the data derived from the interviews.

Chapter V provides an overview of the study along with a summary, conclusions, and recommendations.

CHAPTER II

REVIEW OF RELATED LITERATURE

Legislation, litigation, and the pressures of special interest groups have been significant in shaping national educational policy affecting education of the handicapped. The purpose of this chapter is to provide a review of the organizational, legislative, and judicial evolutions that led to the development and implementation of the due process procedures of Public Law 94-142, the Education for All Handicapped Children Act, and the educational implications of these due process procedures.

History of Events

The organization of education in the United States has been highly decentralized from the earliest colonial days. The Constitution laid a firm groundwork for this continuing tradition in the Tenth Amendment, which leaves the power to provide for public education to the states. "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]

The Tenth Amendment was interpreted by the judiciary in 1899 in Cummings v. Richmond County Board of Education: the education of

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[1]U.S. Constitution, amend. X.

the people in schools maintained by state taxation is a matter belonging to the respective states.[2]

Since the United States Constitution does not specifically mention educational function, it has followed that those provisions not specified by the Constitution become the function of the states. However, litigation that cites the Constitution has referred to equal protection and due process guarantees of the Fifth and Fourteenth Amendments.

The Constitution of the United States provides for guarantees and protections in the wording of the Fifth Amendment. "No person shall . . . be deprived of life, liberty, or property without due process of law."[3] Similarly, the Fourteenth Amendment states that:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.[4]

Fundamentally, the Fifth and Fourteenth Amendments seek to insure fairness in the exercise of governmental power to the child, the family, and the schools. All of these parties will benefit from adherence to well-developed educational practices and the elements of

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[2]Cummings v. Richmond County Board of Education, 175 U.S. 528 (1899).

[3]U.S. Constitution, amend. V.

[4]U.S. Constitution, amend. XIV.

due process. Whether applying the Fifth or Fourteenth Amendments, the due process guarantees assure that handicapped students shall have their life, liberty, and property protected.

There are two aspects of due process--procedural and substantive. Procedural due process means that if an action is to be taken against a person that deprives that person of life, liberty, or property (e.g, suspending a pupil from school), three basic steps are required: first, that proper notice be given to the individual that he or she is about to be deprived of life, liberty, or property; second, that the individual be given an opportunity to be heard; and finally, that the individual be given a fairly conducted hearing.

Substantive due process means that if the government is going to deprive an individual of life, liberty, or property, there must be a valid objective, and the action to be taken must be reasonably calculated to achieve the valid objective.[5]

The significance of procedural due process in the education of handicapped children can be viewed in terms of the constitutional guarantees of the Fifth and Fourteenth Amendments. These guarantee further protection of the rights of citizens, to protect action involving the identification, evaluation, and placement of handicapped children, and the provision for free, appropriate public education. In terms of the rights of handicapped children, procedural due process has a long history which has resulted in litigation and legislation.

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[5]Alexander Kern, Ray Corns, and Walter McCann, Public School Law, Cases, and Materials (St. Paul, Minnesota: West, 1979), pp. 539-540.

The Rights of Children

Influenced by the Civil Rights Movement of the last few decades, state and federal courts have been compelled to examine the legal status of children in accordance with fundamental constitutional guarantees and privileges. The Supreme Court clearly struck down the traditional "in loco parentis" concept in the case of In Re Gault.[6]

That 1967 decision related to the rights of juveniles under an Arizona law and extended the right of due process procedures to children. Gault enumerated six elements of due process guaranteed to children:

1. Notice of the charges
2. Right to counsel
3. Right to confrontation and cross-examination
4. Privileges against self-incrimination
5. Right to a transcript of the proceedings
6. Right to appellate review.[7]

The implication of Gault is that children cannot be deprived of rights simply because they have not achieved adult status. In another case, Tinker v. Des Moines School District,[8] 1969, the Supreme Court stipulated that children are persons under the Constitution.

Hillary Rodham has asserted that the rights of children cannot be secured until they are recognized.

> Children's rights cannot be secured until some particular institution has recognized them and assumed responsibility for enforcing them. In the past, adult institutions have not performed this function partly . . . because it was thought children have few

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[6]In Re Gault, 387 U.S. 1 (1967).

[7]Ibid.

[8]Tinker v. Des Moines School District, 393 U.S. 503 (1969).

> rights to secure. Unfortunately the institutions designed specifically for children also have failed to accomplish this aim, largely because they were established to safeguard interests, not enforce rights, on the assumption that the former could not be done without the latter.[9]

Throughout the past decade, this recognition and clarification has been intensified in public education.

Traditionally, school boards assumed the power to reject applicants for admission who did not conform to requirements established by the board. That power was consistent with the belief that attendance in public schools, while compulsory, was viewed as a privilege as opposed to a right.[10] In an analysis of the 1970 census data, the Children's Defense Fund noted that the nation's public schools had systematically excluded more than two million children.[11]

Some school exclusions had been based on law and were in many quarters considered legal and appropriate. Typical were state statutes containing provisions for excluding children with physical or mental conditions that prevented or rendered inadvisable their attendance at school. In the 1919 Beattie v. State Board of Education,[12] the Wisconsin Supreme Court insisted ". . . the rights of a child of school

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[9]Hillary Rodham, "Children Under the Law," Harvard Educational Review 43 (November 1973):506.

[10]Newton Edwards, The Courts and the Public Schools (Chicago: University of Chicago Press, 1971), p. 540.

[11]Alan Abeson, Nancy Bolich, and Jayne Haas, "Due Process of Law: Background and Intent." In Public Policy and the Education of Exceptional Children, ed. Fredrich J. Weintraub, Alan Abeson, Joseph Ballard, and Martin LaVor (Reston, Virginia: Council for Exceptional Children, 1977), p. 32.

[12]Beattie v. State Board of Education, City of Autigo, 172 N.W. 153 (1919).

age to attend the public schools of the state cannot be insisted upon when his presence therein is harmful to the best interests of the school."

The legality of denying an education to a child has had an impact on handicapped children. This demission has been challenged in both state and federal judicial systems. The rationale for such litigation has been primarily derived from the Fourteenth Amendment of the United States Constitution.

Judicial Background to Due Process Rights

Due process as guaranteed by the United States Constitution has often been ignored by the leaders of educational institutions. Because school systems have traditionally turned a deaf ear to parental inquiries and pleas for change, the parents have had to turn to the courts. Court rulings have caused legislative bodies and governmental officials to be more positive in outlining educational rights for the handicapped.

The courts have had a dramatic impact on the functions of local school boards. William R. Hazard noted that:

> . . . over the past two decades state and federal courts have exercised expressed influence on school policy taking away from local boards in many important issues. In particular, the application of law to school conflict has changed our perceptions of the role of the school board in policy-making. School board decisions are rarely accepted these days as the last word; more and more citizens regard them as the trigger for legal confrontations. Put another way, schooling is no longer regarded as a take-it-or-leave-it proposition, but is viewed, along with

> the policies supporting it, as an offer negotiable in court. As a result, educational policies are the product of constitutional, statutory, and case-law interpretations.[13]

In the landmark cases of Brown v. Board of Education of Topeka (1954), the court said:

> In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has taken to provide it, is a right which must be made available to all on equal terms.[14]

Intellectual functioning was introduced in the Brown case. John W. Davis, attorney from South Carolina, opened his argument to the Supreme Court by saying,

> May it please the Court, I think if the appellants' construction of the Fourteenth Amendment should prevail here, there is no doubt in my mind that it would catch the Indian within its grasp just as much as the Negro. If it should prevail, I am unable to see why a state would have any further right to segregate its pupils on ground of sex or on the ground of age or on the ground of mental capacity.[15]

In the 1964 Lee v. Macon County Board of Education,[16] the judge said, "as long as the State of Alabama maintains a public school system, it cannot make public education 'unavailable' for a class of citizens."

In recent years, the equal protection concept has been applied to handicapped children. A number of courts have attacked discriminatory practices as a violation of procedural due process when no hearing

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[13]William R. Hazard, "Courts in the Saddle: School Boards Out," Phi Delta Kappan (December 1974): 259.

[14]Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).

[15]Ibid.

[16]Lee v. Macon County Board of Education, 231 F. Supp. 743 (1964).

is held regarding inappropriate educational decision-making relating to the identification, evaluation, and placement of handicapped children.

The argument for due process rights for handicapped children has followed the reasoning in the 1971 Supreme Court decision in Wisconsin v. Constantineau in which the court held that:

> . . . a Wisconsin law requiring the posting of the names of alleged problem drinkers in taverns and package stores for the purpose of preventing the sale of liquor to them constituted stigmatification serious enough to require prior notice and hearing before posting.[17]

Justice William Douglas found the Wisconsin law to be a violation of due process clause of the Fourteenth Amendment. The educational connotation that classification of handicapped children also is a stigma and should, therefore, also require public notice and a prior hearing, is one of the most frequent points made in the right to education cases.

The applicability of procedural due process rights in the education of handicapped children was firmly established in the 1971 suit involving the Pennsylvania Association for Retarded Children (PARC) and the Commonwealth of Pennsylvania, in which thirteen mentally retarded children were represented in a class action suit.[18] The court order provided that the state could not apply any law which would postpone, terminate, or deny mentally retarded children access to a publicly supported education, including a public school program.

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[17]Wisconsin v. Constantineau, 39 U.S.L.W. 4128 (1971).

[18]The Pennsylvania Association for Retarded Children et al. v. Commonwealth of Pennsylvania et al., 334 F. Supp. 1257 (1971) and 343 F. Supp. 279 (1972).

As the Pennsylvania School Code was written, children between the ages of six and twenty were eligible for a free public school education. The plaintiffs represented children who had been excluded from school, "excused" from attendance at public school, had their admission to public school postponed, or otherwise had been refused free access to public school education because they were retarded.

The court approved a stipulation which provided that:

> . . . no child of school age who is mentally retarded . . . should be subjected to a change in educational status without first being accorded notice and the opportunity of a due process hearing . . .[19]

According to Fredrick J. Weintraub,

> One of the most significant aspects of the Pennsylvania Association for Retarded Children case . . . was the court's stipulation regarding due process rights of children and their parents in regard to education. In examining the question of whether children had the right to an education, the court was disturbed by the fact that the schools were totally autonomous in their decisions to place or not to place. The court ordered the state to adopt regulations regarding procedures for "change in educational status" of mentally retarded children.[20]

The year following the PARC decision, the same guarantees were applied to children with all types of handicaps in the District of Columbia. In the 1972 Mills v. Board of Education of District of Columbia, parents and guardians of seven handicapped children brought a class action suit against the District of Columbia Board of Education and petitioned that despite moral and legal obligation, the District had excluded handicapped children from educational opportunity. The

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[19]Ibid, 343 F. Supp. 303.

[20]Fredrick J. Weintraub, "Recent Influences of Law Regarding the Identification and Educational Placement of Children," Focus on Exceptional Children (May 1972):6-7.

court issued a stipulated agreement and order that declared the constitutional right of all children, regardless of any exceptional condition or handicap, to a publicly supported education. It was further declared that defendant's rules, policies, and practices, which excluded children without a provision for adequate and immediate alternative educational services and the absence of prior hearing and review of placement procedures, denied the plaintiffs and the class the right of due process and equal protection of the law.[21]

The Mills case demanded that procedural safeguards, required by the constitutional provisions of the Fourteenth Amendment, must be offered during the special education placement process. Where PARC dealt specifically with the mentally retarded, Mills expanded the concept to all children who are thought to be in need of special education.

As already indicated the first application of the constitutional guarantee of due process to children had occurred earlier in the case of In Re Gault.[22] In that 1967 case, due process safeguards were extended to juveniles in criminal hearings. In the Gault case, which is considered to be a landmark case involving children's rights, Hillary Rodham wrote:

> Gault held that children in juvenile court were constitutionally entitled to certain due process guarantees previously granted only to adults in criminal court: (a) notice (to both parent and child) adequate to afford reasonable opportunity to prepare a defense, including sufficient statement of the charge; (b) right to counsel, and if the child is indigent, provision for

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[21]Mills v. Board of Education of District of Columbia, 348 F. Supp. 866 (1972).

[22]In Re Gault, 387 U.S. 1 (1967).

> the appointment of counsel; (c) privilege against self-incrimination; and (d) right to confrontation and cross-examination of witnesses. The court restricted its holding to precisely these procedural guarantees and not others. It also limited the guarantees to those juveniles facing possible commitment to a state institution. But Gault declared, generally, that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." This and similar language in opinion suggested future grounds for arguing the constitutional rights of children.[23]

In trying to provide all children an education suited to their own unique abilities, many problems have developed. Abeson and Zettle have described the manifestations of these problems as occurring in

> . . . the exclusion of children who have handicaps, incorrect or inappropriate classification, labeling, or placement, and the provision of inappropriate education programs, as well as arbitrary and capricious educational decision-making.[24]

The requirement for a due process hearing was upheld in the 1970 case of Marlega v. Board of School Directors.[25] The United States District Court in Wisconsin ruled that no child could be excluded from a free public education on a full-time basis without a due process hearing.

In the 1970 Diana v. State Board of Education,[26] litigation focused on the issue of denial of due process rights and on the substantive issue of placement in the least restrictive environment. The class

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[23]Rodham, p. 499.

[24]Alan Abeson and Jeffery Zettle, "The End of the Quiet Revolution: The Education for All Handicapped Children Act of 1975," Exceptional Children 44 (October 1977):117.

[25]Marlega v. Board of School Directors of the City of Milwaukee, Civil No. 70-C-8, (U.S.D., Ct. Wisconsin, 1970).

[26]Diana v. State Board of Education, C-70 37 R.F.P. (ND. California, 1970).

action suit was filed on behalf of nine Mexican-American public school pupils. The plaintiffs alleged that they were being denied their constitutional right to due process by being placed in classes for the mentally retarded on the basis of inaccurate test scores. The court ordered the following four due process safeguards:

1. Parent permission must be given for psychological examining
2. An individual case study must be undertaken which includes all other pertinent information
3. A local admissions committee must be established, conferences must be held with parents
4. Written parental consent must be given before placement

In November 1971, Larry P. v. Riles was filed as a class action suit in California on behalf of all black elementary school children in the state.[27] The State of California was charged with inappropriately segregating black children into special education classes for the educable mentally retarded on the basis of culturally biased tests. The complaint argued that the children were not mentally retarded, but rather the victims of a testing procedure which penalized them for their unfamiliarity with middle-class culture. The complaint further argued that the tests ignored the learning experiences the children may have had in their homes. On June 2, 1971, the court enjoined the San Francisco Unified School District from placing black children in classes for the educable mentally retarded on the basis of IQ tests it had administered, if the consequences of using such tests resulted in a

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[27]Larry P. v. Riles, 343 F. Supp. 1306 (1972).

racial imbalance in the composition of classes for the educable mentally retarded.

The case concluded in 1979 when Chief Judge Robert Peckham handed down a decision on Larry P. v. Riles (N.D. Cal. 1979) that said the WISC, WISC-R, and Stanford-Benet tests, as administered to black children for placement, were unconstitutional.

Due process and equal protection were cited in Harrison et al. v. State of Michigan et al. (1972).[28] This litigation was brought on behalf of all children in Michigan being denied a publicly supported education because they were labeled retarded, emotionally disturbed, or otherwise handicapped. The plaintiffs asked the court to declare that the defendants' acts and practices denied them due process of law and equal protection under the Fourteenth Amendment of the United States Constitution and to enjoin the defendants from excluding plaintiffs and the class they represented from a regular public school placement without providing adequate and immediate alternatives, including but not limited to special education and a constitutionally adequate prior hearing and periodic review of their status, progress, and the adequacy of any educational alternative. The District Court granted motions to dismiss. They claimed that the action was rooted by a state statute which in unequivocal terms directed the state and other educational districts to face up to the problem of providing educational programs and services designed to develop the maximum potential of every handicapped child.

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[28]Harrison et al. v. State of Michigan et al., 350 F. Supp. 846 (1972).

Although the courts have been indicating that all children can benefit from educational services, pupils with specific needs have not always been identified. In the 1976 case of Pierce v. Board of Education[29] it was alleged that from 1971 to February 1974, the plaintiff attended the F. W. Riley School in the city of Chicago. During that time the minor plaintiff was discovered to be suffering from a specific learning disability. The defendant was advised of this fact by the minor plaintiff's parents and various of the plaintiff's privately retained physicians, who recommended that the boy be transferred from the regular classes of instruction to special education. Nevertheless, the defendant failed and refused to either transfer the minor to these classes or undertake their own testing and evaluation of the boy. As a result of the defendant's failure to comply with their statutory duties, the plaintiff remained in regular classes, where he was required to compete with students not suffering from a learning disability and as a result sustained severe and permanent emotional and psychic injury requiring hospitalization and medical treatment. The court insisted that schools are responsible for identifying pupils in need of special services.

The schools' responsibility for identifying children in need of services was affirmed in the 1976 Fredrick L. v. Thomas[30] case. The court indicated that:

> . . . professional educators often have difficulty recognizing learning disabilities. It thus remains to be shown that lay

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[29]Pierce v. Board of Education, 358 N.E. 2d 67 (1976).

[30]Fredrick L. v. Thomas, 408 F. Supp. 832 (1976).

> persons will be able to identify the admitted by large numbers of learning disabled children which have not been screened out already by teachers and school psychologists.

Once children are identified as potentially eligible for a special education service, an equally serious responsibility must be discharged by the agency. Children must be offered an appropriate program of services.

The defendant school board in the Mills case maintained that they could not afford to provide a public education to all handicapped children. In the words of District Judge John Waddy:

> If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system, then available funds must be expanded equitably in such a manner that no child is entirely excluded from a publicly supported education . . . . The inadequacies of the . . . public school system, whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the "exceptional" or handicapped child than on a normal child.[31]

One notable case, where the plaintiffs were offered an inappropriate program, is Fialkowski v. Shapp (1975). The court stated:

> . . . an educational program must be assessed in terms of its capacity to equip a child with the tools needed in life . . . . Placement of children with the intelligence of two year olds in a program which emphasizes skills such as reading and writing would seem inadequate for their needs. The harmful consequences of denying plaintiffs an adequate education is underscored by the fact that mentally retarded children have greater need for formal education since they are less likely than ordinary children to learn and develop informally.[32]

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[31] Mills v. Board of Education, 348 F. Supp. 876 (1972).

[32] Fialkowski v. Shapp, 405 F. Supp. 946 (1975).

The cases cited, although not exhaustive, illustrated that where fundamental rights of handicapped pupils are involved, they will be protected. Laws, school policies, and administrative procedures must meet the conditions inherent in the definitions of due process and equal protection imposed by the courts. If that involvement is not provided, a violation of the due process clause of the Fourteenth Amendment may be cited.

Litigation has been responsible for stimulating the public conscience into articulating its obligations to children. Those litigations have led to legislative actions that have become meaningful to handicapped children, their parents, and the schools.

Statutory Action

Prior to the 1970s, handicapped children were often the victims of discrimination in terms of identification, evaluation, and placement. Consequently, the doctrine of due process emerged as the legal principle upon which much of the litigation in special education has been based. This litigation in turn has resulted in the incorporation of due process provisions in both state and federal legislation.

In 1971, the United States Senate began an effort which has had great consequences for services to the handicapped. An attempt was made to amend the Civil Rights Act to recognize that handicapped citizens have civil rights, too, and thus to prohibit discrimination on the basis of handicaps. The spirit of that amendment was included in a final section, Section 504, of the Rehabilitation Amendments of

1973 (Public Law 93-112) providing:

> No otherwise qualified handicapped individual . . . shall, solely, by reason of his/her handicap be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.[33]

Final regulations for Section 504 were published May 4, 1977. One of the first cases which has relied on Section 504, Hairston v. Drosick, very simply stated what the law requires:

> The exclusion of a minimally handicapped child from a regular public classroom situation without a bona fide educational reason is in violation of Title V of Public Law 93-112, "The Rehabilitation Act of 1973," 29 U.S.C. 794. The federal statute prescribes discrimination against handicapped individuals in any program receiving federal financial assistance. To deny to a handicapped child access to a regular public school classroom in receipt of federal financial assistance without compelling educational justification constitutes discrimination and a denial of the benefits of such a program in violation of the statute. School officials must make every effort to include such children within the regular public classroom situation, even at great expense to the school system.[34]

In regard to procedural safeguards, the Section 504 requirements are the following:

> A recipient that operates a public elementary or secondary education program shall establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of handicap, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardians of the person to examine relevant records, an impartial hearing with opportunity for participation by the parents or guardian and representation by counsel, and review procedure.[35]

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[34]Hairston v. Drosick, 423 F Supp. 180 (1976).

[35]U.S. Department of Health, Education and Welfare, "Nondiscrimination on Basis of Handicap," sec. 84.36, p. 22683.

Following the 1971 decision in PARC and the 1972 decision in Mills, a bill was introduced in the United States Senate in 1972 to expand the federal role in regard to procedural safeguards in the education of handicapped children. Many of the provisions in the court decisions were reflected in Public Law 93-380 passed in 1974.

In the Education Amendments of 1974 (Public Law 93-380), the Congress ordered an immediate assurance from the states that procedures were in place to guarantee that all handicapped children within each state and their parents are assured of procedural safeguards in all decisions regarding identification, evaluation, and educational placement.[36]

As summarized by LeVor:

> These amendments also included vital guarantees of the educational rights of exceptional children and their parents, such as assurance of due process procedures and assurance of education in the least restrictive environment. Also of great significance in this legislation was the requirement that each state establish a goal of providing full educational opportunities for all handicapped children within each state, along with a comprehensive blueprint and detailed timetable toward the achievement of that objective.[37]

On November 29, 1975, President Gerald Ford signed into law Public Law 94-142, The Education for All Handicapped Children Act. The legislation committed the Federal Government to a most substantial financial contribution toward the education of handicapped children.

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[36]Public Law 93-380, Education Amendments of 1974, 88 Stat. 484 (codified at 20 U.S.C. 1402-1461), Sec. 612, d, 13, A.

[37]Martin L. LeVor, "Federal Legislation for Exceptional Persons: A History." In Public Policy and Education of Exceptional Children, ed. Fredrick J. Weinstraub, Alan Aheson, Joseph Ballard, and Martin L. LeVor (Reston, Virginia: Council for Exceptional Children, 1977), p. 101.

It also refined and strengthened those educational rights that had originally received attention in Public Law 93-380. Moreover, Public Law 94-142 is permanent legislation with no expiration date. This is in stark contrast to normal congressional procedure.

The intent of this legislation is perhaps best expressed in a passage from the law itself:

> It is the purpose of this Act to assure that all handicapped children have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist states and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children.[38]

The requirement necessary to meet the procedural safeguards was guaranteed through procedural safeguards:

> Compliance with the procedural safeguards of Section 615 of the Education of the Handicapped Act is one means of meeting this requirement.[39]

Abeson and Zettle likewise noted the relationship between Public Law 94-142 and Section 504:

> To be in violation of Public Law 94-142, in most situations, also will mean a violation of Section 504, which in its finality can mean the withholding of all federal funds. This is particularly true in relation to the basic educational rights of children who have handicaps. Section 504 in concert with Public Law 94-142 will be substance of implementation.[40]

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[38]Public Law 94-142, sec. 3 (c).

[39]USDHEW, "Nondiscrimination on Basis of Handicap, p. 22683.

[40]Abeson and Zettle, p. 127.

amending North Carolina law to provide those children with such opportunities, the 1977 General Assembly enacted Ch. 927 appropriately called the state's "second-step" legislation. These two laws together set forth the educational rights of children with special needs.

The General Assembly of 1973 also responded to the 1972 litigation by creating the Commission on Children with Special Needs (Ch. 1422, 1973 Sessions Laws, Second Session, 1974). Ch. 1422 required the Commission to evaluate existing state law governmental organization with respect to education and human services for children with special needs and to recommend changes to the 1975 General Assembly. The Commission issued its report on February 1, 1975, and sponsored legislation based on it.[42]

Many states have experienced difficulties in implementing the due process provisions of Public Law 94-142 even though many of the provisions were part of Public Law 93-380. In a study prepared by the Bureau of Education for the Handicapped in the United States Office of Education, it was noted that although most of the twenty-six states studied had developed acceptable policies regarding due process procedures, many of these states had not been able to implement the policies.[43] The Bureau noted that one of the difficulties in implementing the provisions was related to the states' difficulty in acquiring the resources needed for effective monitoring. Another problem area in

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[42]Rutherford Turnbull, III, The Law and the Mentally Handicapped in North Carolina, 2nd ed. (Chapel Hill: Institute of Government, The University of North Carolina, 1979), pp. 2-3.

[43]U.S. Department of Health, Education and Welfare, Progress Toward a Free Appropriate Public Education (Washington, DC: Office of Education, 1978), pp. 27-29.

implementing the due process provision was related to the difficulty that many of the states encountered in selecting hearing officers who were not affiliated with the agencies serving the children. However, according to the Bureau, ". . . several of these states have found ways to improve their due process procedures since the time of the program review."[44]

Due process legislation, according to Abeson, Bolick, and Haas, will not reduce the educators' professional responsibility or authority but rather ". . . provide them with the leverage to do that which must be their goal--to act openly and in the best interests of the children they serve."[45] Due process can assure that the school personnel will do or have the opportunity to do what is required in the education of handicapped children.

As the 1970s emerged it became clear the responsibility to adhere to due process requirements was to be upon American educators. In the past, decisions exempting a child from school, placing him in a special class, or otherwise changing his educational placement, were often made without regard to fair procedure. Traditionally, the children most affected by such arbitrary and capricious decision-making were the handicapped or exceptional--the mentally retarded, emotionally handicapped speech handicapped, learning disabled, and sometimes the gifted. Exceptional children, individually and collectively, were frequently denied the benefits of appropriate public education.

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[44]Ibid., p. 28.

[45]Abeson, Bolick, and Haas, p. 32.

Since the early 1970s, however, the situation has changed dramatically. Extensive litigation and legislation have resulted in the requirement that state and local education agencies guarantee due process protection to handicapped children in all matters pertaining to their identification, evaluation, and placement. With enactment by the United States Congress of the Education Amendment of 1974 (Public Law 93-380), all state education agencies, in order to remain eligible for federal funds for the education of handicapped children, were required to adopt a state plan that would include provisions of adequate due process in educational decision-making.

CHAPTER III

METHODOLOGY

This study is a history of handicapped education including Federal Court decisions concerning the constitutional imperatives which have had relevancy in due process assurance of Public Law 94-142. In an attempt to relate the organization and administration of the due processes which were imposed by Public Law 94-142 to a study of special education school district due process hearings in North Carolina, this study focuses on the incidence and precipitating factors, the initiators of the hearing process, and the decisions of the hearing officers.

This chapter elaborates on the pertinent factors of this study's design: the research questions; the nature of the sample; the population surveyed; the interview questions; the administration of the interview; the design itself; and the design's control of internal and external validity factors.

Research Questions

A number of specific questions can be identified under the major thrusts of the study:

1. How many due process cases were initiated and heard by a hearing officer at the local education agency level?
2. Was the enrollment related to the incidence of due process hearings at the local education agency level?

3. Did internal mediation avert local education agency hearings?
4. What were the critical issues that had generated hearings?
5. Who initiated the hearings?
6. What were the decisions of the hearing officer?
7. Were the decisions of the hearing officers implemented?

The focus was on factors associated with the process of providing educational services to handicapped children, and particularly where there is disagreement between the school system and parents or guardians that is likely to lead to a local education system level due process hearing. The following factors, selected for examination, were derived from literature, legislation, litigation, and interviews with persons who have been involved in the due process system such as school officials, hearing officers, lawyers, and advocates:

Incidence factors: administrative unit enrollment, and administrative unit due process procedure.

Precipitating factors: change in educational placement status, identification and designation of handicap, and the provision for a free appropriate public education.

Initiating factors: educational agency, parent or guardian, child.

Decision factors: decision rendered, the implementation of the decision to the initiator.

In order to determine answers to the research questions, it was also necessary to treat factors related to each child as though they were equivalent to the central focus of the study. Those factors are

the characteristics of the child: age, sex, educational classification, and pre-hearing placement.

In addition, direction was focused on the time, cost, and number of school personnel involved in each due process hearing studied; general characteristics of the parents or guardians; and general comments or suggestions from the directors of special education regarding local education agency-level due process hearings.

Nature of the Sample

A familiarity with the organization of special education in North Carolina's 142 public school districts is essential to an understanding of the procedures utilized in this study and the analysis of the findings. Therefore, prior to a discussion of these portions of the study, background information involving the organizational structure employed throughout the state in delivering special education services is presented.

To fulfill the state and federal mandates requiring districts to provide services for handicapped children, several delivery systems have been developed in North Carolina. In some instances individual local education systems are of insufficient size to independently provide for the handicapped children and must provide programs and services through a cooperative effort between various local education systems.

Joint Agreement Plan

Special education joint agreements represent the organizational plan most widely employed to deliver special education services in North Carolina. This plan involves a contract between the two or more local education systems to establish and provide special education services for pupils in each system.[1] The purpose of the joint agreement is to enable small local education systems to combine students and resources providing a broad base of student population and thus permit the operation of comprehensive services for the handicapped. It is common for serving systems to count the student being served on their headcount thus drawing state aid for out-of-district students receiving services.

The joint agreements are merely North Carolina's response to the need for a delivery system capable of serving all handicapped children in the state. The final responsibility for providing an educational opportunity for resident handicapped children remains with the local education system.

The Population

The population of this study consisted of the 142 local education systems in North Carolina. These 142 local educational systems are divided into eight regions within the state as shown in Table 1.

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[1]NCAC 16 2E.1526.

Table 1

Regional Education Centers and

Local Education Agencies[2]

Regional Center	Local Education System
Northeast Regional Education Center (Region 1) Williamston, NC	Beaufort Washington Bertie Camden Chowan Currituck Dare Gates Hertford Hyde Martin Pasquotank Perquimans Pitt Greenville Tyrrell Washington
Southeast Regional Education Center (Region 2) Jacksonville, NC	Brunswick Carteret New Bern/Craven Duplin Greene Jones Lenoir Kinston New Hanover Onslow Pamlico Pender Sampson Clinton Wayne Goldsboro Camp Lejeune Dependent Schools Conrad Sloan

Table 1 (continued)

Regional Center	Local Education System
Central Regional Education Center (Region 3) Knightdale, NC	Durham Durham Edgecombe Tarboro Franklin Franklinton Granville Halifax Roanoke Rapids Weldon Johnston Nash Rocky Mount Northampton Vance Wake Warren Wilson
South Central Regional Education Center (Region 4) Carthage, NC	Bladen Columbus Whiteville Cumberland Fayetteville Fort Bragg Dependent Schools Harnett Hoke Lee Montgomery Moore Richmond Robeson Fairmont Lumberton Red Springs Saint Pauls Scotland

Table 1 (continued)

Regional Center	Local Education System
North Central Regional Education Center (Region 5) Greensboro, NC	Alamance Burlington Caswell Chatham Davidson Lexington Thomasville Forsyth Guilford Greensboro High Point Orange Chapel Hill Person Randolph Asheboro Rockingham Eden Western Rockingham Reidsville Stokes
Southwest Regional Education Center (Region 6) Charlotte, NC	Anson Cabarrus Kannapolis Cleveland Kings Mountain Shelby Gaston Lincoln Mecklenburg Rowan Salisbury Stanly Albemarle Union Monroe

Table 1 (continued)

Regional Center	Local Education System
Northwest Regional Education Center (Region 7) North Wilkesboro, NC	Alexander Alleghany Ashe Avery Burke Caldwell Catawba Hickory Newton-Conover Davie Iredell Mooresville Statesville Surry Elkin Mt. Airy Watauga Wilkes Yadkin
Western Regional Education Center *Region *) Canton, NC	Buncombe Asheville Cherokee Clay Graham Haywood Henderson Hendersonville Jackson Macon Madison McDowell Mitchell Polk Tryon Rutherford Swain Transylvania Yancey

[2]North Carolina Department of Public Instruction, North Carolina Education Directory 1984-85 (Raleigh: North Carolina Department of Public Instruction, 1985), pp. 22-23.

The relatively large number of local education agencies chosen for this study was of importance as indicated by Cronbach in Essentials of Psychological Testing.[3]

Interview Questions

The questions for the interview were developed in the following manner. A rough draft was constructed which contained items keyed to the research questions and which was related to the procedure safeguards specified in Section 504 of the Rehabilitation Act, Public Law 94-142, and the Rules Governing Procedures and Services for Children with Special Needs in North Carolina.

Content validity, according to Fred Kerlinger[4], is "the representativeness of sampling adequacy of the content . . . the substance, the matter, the topics . . . of a measuring instrument." For example, a psychology professor might ask several colleagues to evaluate the content of a text measuring understanding of principles of human development. The content validity of the interview questions was established in the same manner.

The effort to establish validity received strong support from Dr. Joseph E. Bryson, Professor in the School of Education, University of North Carolina at Greensboro. Through his recommendations a panel of experienced exceptional children educators was selected to review

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[3]Lee J. Cronbach, Essentials of Psychological Testing (New York: Harper and Row, 1970), p. 167.

[4]Fred Kerlinger, Foundations of Behavioral Research, 2nd ed. (New York: Holt, Rinehart and Winston, 1973), p. 458.

the interview questions. The ten-member panel included one state consultant, one local educational system superintendent, one school attorney, one school psychologist, and five local program administrators for exceptional children. These people all gave of their time freely.

Each member of the review panel was asked by telephone to serve as a member of the review panel for the study. Upon agreement, each received an abstract of the research effort and a copy of the interview questions. This writer then arranged for an appointment with each member of the panel to discuss the draft.

One problem regarding the questions related to the amount and depth of information needed to describe each local education agency hearing. On the issue of questionnaire length, Cronbach suggested that "a long test is generally better than a short test because, with every question added, the sample performance becomes more adequate. Long tests are less influenced by chance."[5] There also exists a danger of creating an instrument which is so long that it elicits boredom and causes the respondent to fail to complete the instrument. These matters were given considerable attention as the instrument was being developed.

The review panel suggested that the interview questions be sent with the letter of introduction so that the directors of special education could obtain some of the facts in advance of the interview. The review panel also felt that the program administrators of exceptional

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[5]Cronbach, p. 171.

children might feel more comfortable in participating in the study if they were aware of the areas of inquiry. This technique of sending the questions in advance of the interview was also recommended by Paul Leedy in Practical Research: Planning and Design.[6]

After unanimity was achieved in regard to a final draft of interview questions, the next phase in the process of evaluating the instrument was to give the instrument to one assistant superintendent of schools for curriculum, one special education consultant, and one school psychologist. Each of these people was well versed in the field of special education. The readers were asked to review the questions and provide comments. The results were compared to the final recommendations of the review panel. The correlation of results of the two groups was quite high. Thus validity and readability of the actual questions were established by comparing the responses of the two groups--the review panel and the practitioners.

The final phase in the process of evaluating the interview questions was to receive the approval of this writer's doctoral committee. Their suggestions were utilized to refine the interview questions and the letter of introduction.

Administration of the Interview Survey

Each of the 142 program administrators of exceptional children of North Carolina received an introductory letter explaining the nature and the auspices of the study (Appendix A) and a copy of the interview

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[6](New York: Macmillan Publishing Company, 1974), p. 87.

survey questions (Appendix B). The letter stated that the interview survey would require twenty-five to thirty minutes of the director's time. To enlist a high level of participation, the director was assured that complete anonymity would prevail throughout the study. Neither their name, the name of the local educational system of exceptional children, nor the names of the individual school would be included with direct information regarding local educational system due process hearings. Finally, mutual benefits were stressed from their participation. The program administrators were promised a local educational system due process procedure that would reflect North Carolina law, Section 504 of the Rehabilitation Act and Public Law 94-142.

Fifteen days after the introductory letter and survey were mailed, each program administrator that had not responded received a phone call and was asked to participate in the survey. Eight program administrators or their designees immediately responded by returning the survey. This response corresponded to 53 percent of the sample. Four of the program administrators were on vacation and required subsequent phone calls before a contact could be arranged. Three of the directors, although interested in the study, declined to participate because they felt their local education system was too small or because they had not had a due process hearing.

Table 2 summarizes the number of local education agencies and schools represented and the number of interview surveys used.

For one local education agency, two interviews were necessary to obtain the information. The coordination of local education agency due process hearings was assigned to a coordinator of the elementary school

Table 2

Local Administrative Units Who Have

Had Due Process Hearings

Local Education Agency and Hearing Date	Number of Due Process Hearings	Participation in the Study
Person County 9/4/79 8/28/80	2	X
Pitt County 2/25/80	1	X
Reidsville 10/27/81	1	X
Robeson County 12/14/78 1/03/80	2	X
Salisbury 10/1/80	1	X
Vance County 1/22/82	1	X
Wilson County 10/11/78	1	X
Wake County 10/23/78 12/06/78 2/1/82	3	X
Moore County 1/12/79 1/12/79 1/12/79	3	X
Mount Airy 7/30/80 7/30/81 7/30/81	3	X

Table 2 (continued)

Local Education Agency and Hearing Date	Number of Due Process Hearings	Participation in the Study
Newton-Conover 7/15/82	1	X
New Hanover 11/02/78	1	X
Orange County 2/23/81	1	X
Perquimans County 10/31/79	1	X
Harnett County 9/11/79	1	X
Hertford County 3/23/82	1	X
High Point City 7/31/78	1	X
Kinston 1/10/83	1	X
Madison-Mayodan City 10/30/79 12/08/82	2	X
Durham County 7/30/79 2/09/82	2	X
Elizabeth City/Pasquotank 2/5/79 4/14/80	2	X
Haywood County 2/15/79	1	X
Forsyth County 11/21/79	2	X
Gaston County 4/17/81	1	X

Table 2 (continued)

Local Education Agency and Hearing Date	Number of Due Process Hearings	Participation in the Study
Greensboro 11/18/80 1/06/81	2	X
Guilford County 6/04/79	1	X
Charlotte-Mecklenburg 1/04/79 1/05/79 4/20/79 4/27/79 2/21/80 6/17/80 10/16/80 11/11/80 9/21/81 3/05/82	10	X
Chapel Hill-Carrboro 5/17/79	1	X
Concord City 8/22/79 6/02/80	2	X
Cumberland County 4/12/79	1	X
Albemarle City 1/30/80	1	X
Alexander County 3/05/82	1	X
Brunswick 8/14/81	1	X
Burlington 8/12/83	1	X
Burke County 12/19/79 7/15/82	2	X

Table 2 (continued)

Local Education Agency and Hearing Date	Number of Due Process Hearings	Participation in the Study
Cabarrus County 5/15/80	1	X
Caldwell County 11/06/78	1	X

districts and a coordinator of the high school district. In this local education agency, the interviewer met with the director's designees.

Most of the program administrators or their designees were cooperative and encouraged discussion. Quite often their questions were curtailed in the interest of time. Occasionally the less interested respondents were asked to expand on an initial statement.

An alternative survey method based on written responses to a questionnaire was used in addition to the interview. This approach was acceptable because of the distance assumed and difficulty in interviewing all local education agency program administrators of exceptional children. Since factual information was needed, there was no problem in using both the survey and interview approach.

CHAPTER IV

REVIEW OF JUDICIAL DECISIONS

Included in this chapter are major federal court decisions relating to handicapped education, especially due process considerations. The later part of this chapter includes cases concerning the least restrictive and most appropriate setting issues that cause school systems and parents of handicapped children difficulties.

Section 504 and Public Law 94-142 were recodified and redesignated when the Department of Education was established in 1976. The regulations under Section 504 were transferred from 45 Code of Federal Regulations Part 84 to 34 Code of Federal Regulations Part 104 effective May 9, 1980. Public Law 94-142 regulations were transferred from 45 Code of Federal Regulations Part 121a to 34 Code of Federal Regulations Part 300 effective November 21, 1980.

Cases Selected for Review

Cases chosen for review in this chapter were selected because they met one or more of the following criteria:

1. The case is considered a landmark case in the broad constitutional areas of special education and due process procedures.
2. The case helped to establish legal precedent or case law in a particular area.

3. The issues in the case relate to one of the following subtopics: (a) changing interpretations, (b) services a school must provide, and (c) denial of due process in placement, services or classification of students.
4. The case brought additional services sought by parents.

Appropriate Education

The Supreme Court's decision on Board of Education of the Hendrick Hudson Central School District v. Rowley[1] means more than business as usual to educators of exceptional children. Justice William Rehnquist's opinion will be eagerly grasped by the many judges already predisposed to avoid involvement in educational decision-making; in the hands of skillful attorneys for education agencies, it provides a powerful tool for convincing the remaining courts that the determination of what constitutes an "appropriate" education for handicapped children is a responsibility of schools, not judges. So long as schools follow the criteria of the Rowley decision and meticulously apply the procedural safeguards mandated by Public Law 94-142, their educational decisions stand little chance of being overturned.

The impact of the Rowley decision is clear from even a cursory reading of the Court's opinion. Justice Rehnquist explicitly warned lower courts against "second guessing" educational decisions and advised his brethren to give state administrative decisions "due

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[1]Board of Education of the Hendrick Hudson Central School District v. Rowley, 1981-82 EHLR DEC. 553.656 (1982).

weight," limiting their review to the procedural aspects of the dispute. But where this posture is insufficient to resolve the matter at hand, and it becomes necessary for a court to determine whether an appropriate education is being provided, he stated that Public Law 94-142's substantive requirements are satisfied as a matter of law when the child is being given personalized instruction with sufficient support services to enable the child to benefit educationally from that instruction. Rarely should a school not be able to demonstrate that a child is receiving educational benefit.[2]

The Rowley decision will be persuasive in most situations because it gives direction for educators. Even if motivated by a desire to impose a conservative interpretation upon a liberal statute, the opinion falls well within the mainstream of judicial efforts to avoid becoming enmeshed in educational matters.[3] Bluntly put, most courts simply do not feel competent to decide educational disputes, a discomfiture that increases substantially in matters of special education.[4]

A particularly piquant statement of this attitude occurred in Grkman v. Scanlon,[5] in which Senior District Judge Edward Dumbauld stated protestingly:

> In the case at bar, the Court is again called upon unwillingly to function as a super-superintendent of schools. In that

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[2]Ibid.

[3]Ibid.

[4]Ibid.

[5]Grkman v. Scanlon, 1981082 EHLR DEC. 553.508 (WD PA 1981).

> capacity, as (the late Supreme Court) Justice Robert H. Jackson noted, "we act in these matters not by authority of competence but by force of our commissions." (Citation omitted.) The question for decision is where an eight-year-old girl shall receive an "appropriate" education as mandated by Federal law.[6]

Judge Dumbauld went on to observe:

> "To determine what constitutes appropriate relief, the Court must in effect determine what constitutes an appropriate education."*
>
> *If this is thought an unsuitable task for a court, . . ., one may take comfort in the fact that sometimes the Pennsylvania legislature confers upon the Courts of Common Pleas, rather than the Public Utilities Commission, the power to regulate public utility service.[7]

Thus, courts have held that education is a matter traditionally entrusted to the states[8] and that there is no Constitutional right to an education.[9] More specifically, they have been unable to discern generally accepted professional standards of education, an indispensable prerequisite for the imposition and finding of liability.

This last barrier has prevented, for the most part, suits for educational malpractice, even where the alleged malpractice has involved a ministerial act, as opposed to the exercise of professional judgment.[10] So, when a school district failed to retest a student originally placed in a class for children with retarded mental development, the parents' suit was characterized as an attack upon the

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[6] Ibid.

[7] Ibid., p. 509.

[8] Epperson v. Arkansas, 393 U.S. 97 (1968).

[9] San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973).

[10] Ibid.

professional judgment of the board of education, i.e., educational malpractice, and dismissed, even though the professional judgment was simply a failure to retest pursuant to the recommendation of the evaluating psychologist.[11]

More recently, a Maryland State Court also dismissed an action for educational malpractice, citing a long string of supporting case law, as precluded by considerations of public policy,

> among them being the absence of a workable rule of care against which the defendants' conduct may be measured, an inherent uncertainty in determining the cause and nature of any damages, and the extreme burden which would be imposed on the already strained resources of the public school system, to say nothing of those of the judiciary.[12]

Disclaiming any desire to make the judiciary "overseers of both day-to-day operation of our educational process as well as the formulation of its governing policies," the court noted that such matters have been properly entrusted to the State Department of Education and local school boards.[13]

These impediments failing, the courts have resorted to more traditional, less direct means. One, certainly not limited to educational matters, is to refuse to decide, or defer a decision, until the dispute is sharpened to the point that judicial resolution is unavoidable or judicial remedies are appropriate. The doctrine of exhaustion of administrative remedies is a favored example of this practice and

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[11]Hoffman v. The Board of Education of the City of New York, 1979-80 EHLR DEC. 551:382 (Ct. Appls. NY 1979).

[12]Hunter v. Board of Education of Montgomery County, 1981-82 EHLR DEC. 553:559 (Ct. Appls. MC 1982).

[13]Ibid.

has been invoked even where the failure has resulted not from parental inaction, but because of the educational agency's misconduct.[14] Thus, the First Circuit has affirmed a lower court's dismissal of an action by parents, for their failure to exhaust administrative remedies, despite the appellate court's finding that the education agency's actions were improper and unjustifiable:

> The Secretary (of the Department of Education) refused plaintiffs' request for further agency action and hearing on the ground that plaintiffs' suit was currently pending. The Secretary's ground in fact provides no justification for refusing plaintiffs the procedures to which the statute and regulations entitled them. Even had it done so, the Secretary's letters make plain that he was unwilling to provide any further department proceedings to exhaust.[15]

The failure to exhaust administrative remedies has also been invoked in the face of contentions that the administrative agency has predetermined the issue, thus rendering the administrative process futile.[16] In a New York State case, parents challenged a State regulation that established a quantitative test for demonstrating the existence of a "severe discrepancy" between achievement and ability in order to support the finding of learning disability. The parents alleged that, under Federal regulations, a more flexible, qualitative test was required and the underlying objective of the state regulation was to limit the numbers of children who would be identified as learning

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[14] Ibid.

[15] Exratty v. The Commonwealth of Puerto Rico, 1980-81 EHLR DEC. 552:444 (CA-1 1981) at 552:447.

[16] Ibid.

disabled.[17] To substantiate this allegation, they pointed to a state policy memorandum informing local education systems that identification of more than two percent of their school populations as learning disabled would subject the system to an on-site review. The "chilling effect" of such a memorandum, they contended, was obvious.

In reversing a district court decision for the parents, the Second Circuit rejected the parents' contention that exhaustion would be futile because the state, in effect, had predetermined the issue.[18] Noting the state's explanation that its rule was not strictly a quantitative one, the court concluded that plaintiffs had not "made the requisite showing that they cannot secure the relief they seek from the state."[19] The court continued:

> The Commissioner contends that the rule will be administered flexibly and qualitatively, that it is an interpretive rule and not a restrictive one. If the rule is not flexibly administered, first resort should be to State processes and the Commissioner. There is no reason to think the Commissioner will fail to enforce the law.[20]

The court also used the exhaustion doctrine to defer consideration of the state regulation itself, pointing to conflicting opinions concerning the significance of the rule and its alleged deficiencies.

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[17] Ibid.

[18] Riley v. Ambach, 1979-80 EHLR DEC. 551:668 (ED NY 1980).

[19] Riley v. Ambach, 1980-81 EHLR DEC. 552:410 (CA-2 1980) at 552:414.

[20] Ibid.

The effect of the rule, the court said,

> will be much more clearly focused when a particular child can show that application of the rule caused his or her ineligibility in circumstances where he or she would have qualified under the prior standard.
>
> Rather than balance such (conflicting) views (on the significance of the rule) in the abstract, we think the merits of the challenge to the standard will be more appropriate for adjudication in a case in which the standard has been applied . . . . When the merits of dispute are better resolved on a detailed factual record, a court properly may elect to await the events that will permit the development of such a record.[21]

None of the foregoing means, of course, that all courts consistently have refused in the past, or will refuse in the future, either to inject themselves into educational disputes or substantively determine matters fairly brought before them.[22] Court involvement in educational matters, as it has been in the past, will continue to be a product of factors such as the personal and political outlook of the particular judge, the skill of the attorney in presenting the matter as one amenable to judicial resolution, and controlling case law. However, ample evidence supports the conclusion that, for a variety of reasons and by well-tested and established mechanisms, most courts have abstained from educational disputes, leaving them for decision by others.[23]

The Rowley decision recognizes, reaffirms, and builds upon this abstinence. In addition, it provides a methodology by which it can be continued in cases arising under Public Law 94-142.

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[21] Ibid.

[22] Ibid.

[23] Ibid.

The Supreme Court answered two questions in Rowley: What is meant by Public Law 94-142's requirement of a "free appropriate public education," and what is the role of state and federal courts in exercising the review granted by the Act?[24] Judging by the number and size of the briefs filed in the case, it is clear that Rowley was seized upon by many as being of widespread importance. Indeed, the glacier of paper that slowly engulfed the court--not to mention the packed courtroom during oral argument--exceeded the normal activity that attends the court's first interpretation of a statute.[25] And, in fact, the atmosphere surrounding the court's review was characterized chiefly by anxiety.

One cause for this anxiety is the general belief, noted briefly before, that the court has become increasingly "conservative" in interpreting and applying the law.[26] The Rowleys and, perhaps even more, the advocacy groups supporting them were greatly concerned about what might be left of Public Law 94-142 following the court's decision. For their part, the school district and its supporters saw an opportunity, finally, to place some limits upon the programs and services required to be provided by schools. That is why the briefs filed in

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[24]Board of Education of the Hendrick Hudson Central School District v. Rowley, 1981-82 EHLR DEC. 553.656 (1982).

[25]Ibid.

[26]Ibid.

Rowley were so expansive in the issues addressed, many of which were neither raised nor analyzed in the lower court proceedings.[27]

That the court, in accepting review of the lower court decision, had some broader objective in mind was not a groundless fear. For one thing, the United States Solicitor General, at the court's invitation, had advised the court to decline review and, in doing so, had offered many reasons usually considered persuasive.[28] The lower court decision, the Solicitor General had noted, turned on the peculiar factual circumstances of the case, a point underscored by the Court of Appeals' admonition that its decision not be cited as precedent. In addition, the Solicitor General pointed out, there was no conflict among the circuits on the meaning of "appropriate education." Finally, it was suggested that the lower court opinion was consistent with the statute--in other words, that it was correct. Nevertheless, the court granted the petition for certiorari.

Another factor contributing to the charged atmosphere was the court's earlier decision in Pennhurst State School and Hospital v. Halderman.[29] In that case, the court found that the "bill of rights" provision of the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. SS 6010, does not create any substantive rights to

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[27]In addition to the parties directly involved and the brief on the merits of the U. S. Department of Justice, at least seven supporting briefs were filed, most on the side of Rowley.

[28]Brief of the U. S. Solicitor General Opposing Petition for Certiorari, 1981-82 EHLR DEC. 553:145.

[29]1980-81 EHLR DEC. 552:321 (1981).

"appropriate treatment" in the "least restrictive environment," in favor of the mentally retarded.[30] Although Pennhurst involved a statute fundamentally different from Public Law 94-142, the court's language was so sweeping that its psychological impact was devastating.[31] The best that could be said, in the words of one advocacy group, was that the decision showed "little sympathy with the efforts of developmentally disabled people to compel the states to provide them with adequate treatment."[32] It was not unreasonable to fear that the "mindset" lurking in Pennhurst could be carried over to Rowley and Public Law 94-142, with similarly disastrous results.[33]

Finally, the poor facts presented by the case were perhaps the most intangible factor contributing to the surrounding anxiety. It is generally conceded that, in order to provide a firm foundation for subsequent lower court decisions, the Supreme Court's first interpretation of a statute should result in a resounding victory—that is, a broad and expansive interpretation of the scope of the law and the

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[30]Ibid.

[31]Ibid.

[32]For its part, the Court paid deference to its Pennhurst argument in Rowley. In rejecting arguments accepted by the lower courts, that P.L. 94-142 required maximazation of potential, Justice Rehnquist (who also wrote the Pennhurst decision) found insufficient isolated supporting statements in the legislative history. "Moreover," he continued, "even were we to agree that these statements evince a congressional intent to maximize each child's potential, we could not hold that Congress had successfully imposed that burden upon the states," citing Pennhurst.

[33]Board of Education of the Hendrick Hudson Central School District v. Rowley, 1981-82 EHLR DEC. 443:656.

intent of Congress in enacting it. These results usually flow from cases presenting factual situations showing egregious violations of the law and massive harm or damages to the plaintiff. In this vein, cases involving the handicapped traditionally have presented "worst case" situations; not only have the offending institutions clearly violated the law, but the individual plaintiffs have evoked great personal sympathy and compassion.

Rowley simply was not this kind of case. The school district and its personnel had taken extensive measures to facilitate Amy Rowley's successful placement and performance--a point that was hammered home by its counsel during oral argument to the Supreme Court.[34] In addition, Amy's performance in class had been far from unsuccessful. In fact, she had been and was performing better than most of her classmates, even without the signing-interpreter service claimed to be essential to her education. Thus, although Amy might not have understood a substantial part of the communication taking place in her classrooms, the Rowleys were unable to demonstrate how she was being harmed.[35]

With these apparent "deficiencies" in mind and faced with a broad range of issues raised for the first time in the Supreme Court by the school district, advocacy groups concluded that the court had to be provided with counter-arguments defending virtually every aspect of the statute. In such a manner the stakes were gradually increased.

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[34] Ibid.

[35] Ibid.

In writing the Court's majority opinion, Justice Rehnquist quickly disposed of lower court findings that Public Law 94-142 does not itself define what is meant by an "appropriate" education. He agreed that "like many statutory definitions, this one tends toward the cryptic rather than the comprehensive, but that is scarcely a reason for abandoning the quest for legislative intent"; functional or not, "it is the principal tool which Congress has given us for parsing the critical phrase of the Act."[36]

Looking to the definition, as well as other statutory language defining "special education"[37] and "related services,"[38] Justice Rehnquist concluded that free appropriate public education consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child "to benefit" from the instruction.[39] Other portions of the statute evidence a congressional intent, he opined, not to prescribe a substantive standard of education--and certainly not the standard applied by the lower courts--but rather an intention to bring previously excluded handicapped children into the public education systems of the states.[40] In doing so, he continued, the states are also required to adopt and follow procedures that will result in

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[36]Board of Education of the Hendrick Hudson Central School District v. Rowley, 1981-82 EHLR DEC. 553:656.

[37]20 U.S.C. SS 1401(16).

[38]20 U.S.C. SS 1401(17).

[39]Ibid.

[40]Ibid.

individualized consideration of and instruction for each child. Nevertheless, he said, "there remains the question of whether the legislative history indicates a Congressional intent that such education (to be provided a handicapped child) meet some additional substantive standard. For an answer we turn to that history."[41]

At this point, it is useful to note a number of observations. First, Justice Rehnquist is undoubtedly correct in focusing on the definition of free appropriate public education contained in Public Law 94-142; the trial court's reliance on the language of parallel regulations under SS 504 was an obvious defect in its decision.[42] Further, it also appears beyond refute that the statutory definition is inconclusive on its face, and that there is no readily apparent Congressional prescription of the substantive level of education to be provided under the statute. Justice Rehnquist appears to be on similarly firm ground in his emphasis on the importance of procedures in realizing the underlying purposes of the Act, since it is difficult to find, in other federal legislation concerning matters of such traditional local concern

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[41]Note 1, supra, at 553:656.

[42]The trial court noted, correctly, that P.L. 94-142 does not define the term "appropriate education," but then continued by stating that "(t)he regulations promulgated thereunder supply a functional explanation . . ." Rowley v. The Board of Education of the Hendrick Hudson Central School District (SD NY 2980), 1979-80 EHLR DEC. 551:506 at 551:509 (emphasis supplied). Although the court's contextual reference is to P.L. 94-142, the regulations it cites are those promulgated under SS 504, 29 U.S.C. SS 794. Why the trial court overlooked the definition of FAPE in P.L. 94-142, 20 U.S.C. SS 1401(18) remains a mystery.

as education, a statute that is so prescriptive in its procedural obligations.[43]

Less certain, however, is Justice Rehnquist's emphasis of the words "to benefit" contained in the definition of "related services." Taking the words from that definition and incorporating them in the definition of free appropriate public education appears to be neither clearly correct nor incorrect, but it is a critical step in translating the meaning of free appropriate public education into a standard that can be more easily understood, applied and defended.

Turning to Public Law 94-142's legislative history, Justice Rehnquist easily built a convincing argument that the chief concern of Congress was assuring handicapped children access to an adequate, publicly supported education.[44] As he noted, the relevant committee reports, landmark cases, and research submitted by the (then) Bureau of Education for the Handicapped spoke almost exclusively in terms of access. Moreover, since indiscriminate exclusion and programming were the chief problems at that time, it is not difficult to conclude that the primary Congressional objective was assuring access to public schools.[45]

Having established to his satisfaction that Public Law 94-142 was enacted to provide handicapped children with access to public education, Justice Rehnquist could have stopped. His reasoning is logically

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[43]Ibid.

[44]Ibid.

[45]Ibid.

complete at the point where he identifies the congressional objective. No less than anyone else, he was aware of the difficulties in identifying and explicating a substantive standard. That he did not stop, but rather continued his search for a substantive standard, provides an opportunity for speculation.

A clue may be revealed in the first two sentences of the next portion of the opinion.[46] There Justice Rehnquist states that the intent to confer educational benefit is "implicit" in the concept of requiring access because, in effect, Congress would have been foolish "to spend millions of dollars in providing access . . . only to have the handicapped child receive no benefit from that education."[47] These words recast in the form of a question rather than a conclusion, sound very much like the kind of informal discussion that surrounds the formulation of a majority opinion of the court.[48]

For example, consider the following line of inquiry; if strict equality of access were all the Congress intended, it could easily have said that in language far simpler than Public Law 94-142 and, moreover, without providing federal financial assistance to the states. Isn't access precisely the objective Congress intended in enacting SS 504? Surely, then, something more than mere access was intended by Public Law 94-142. And doesn't the increasing scale of federal financial assistance (even though unmet) indicate not merely access but rather

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[46]Board of Education of the Hendrick Hudson Central School District v. Rowley, 1981-82 EHLR DEC. 553:667.

[47]Ibid.

[48]Ibid.

meaningful access by increasing the level of services for handicapped children?[49]

It is impossible to know, of course, whether a give-and-take such as this surrounded preparation of the court's opinion. But it can be effectively argued that there is simply too much evidence in the legislative record of Public Law 94-142 to dismiss out-of-hand the conclusion that the statute requires more than equal access.[50] It is possible, then, that Justice Rehnquist was compelled to address this issue in order to attract sufficient support for majority opinion.[51]

Whatever the reason, Justice Rehnquist was now faced with the "more difficult problem" of determining when handicapped children are "receiving sufficient educational benefits" to satisfy the requirements of Public Law 94-142. He recalled his earlier conclusion that there was no evidence of Congressional intent to prescribe a substantive standard under the Act. He referred also to the inherent difficulty of formulating one standard for such a broad range of problems. Accordingly, he set aside any "attempt today to establish any one test for determining the adequacy of educational benefit conferred upon all children covered by the Act." Nevertheless, he concluded, in the case before him involving Amy Rowley, who is in the public school classroom, who is receiving substantial specialized instruction and related services, and who is, moreover, performing above average, there could

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[49]Ibid.

[50]Ibid.

[51]Ibid.

be no doubt that educational benefit is being conferred and that free appropriate public education is being provided.[52]

However, though he was unwilling to articulate a single comprehensive test, Justice Rehnquist enunciated criteria that can be used to assess whether free appropriate public education is being provided. These are the following:

1. personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction
2. instruction and services provided at public expense, meeting the state's other educational standards, approximating grade levels used in "regular" education and comporting with the child's individualized education plan
3. individualized education plan formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public schools, reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.

It is worthwhile observing that, in gauging the scope of these criteria, approximately 70 percent of school-aged handicapped children are now being educated in regular public schools.[53]

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[52]Board of Education of the Hendrick Hudson Central School District v. Rowley, 1981-82 EHLR DEC. 553:656, fn. 25.

[53]OSE, 2nd Annual Report to Congress, 1 EHLR 104:260.

Justice Rehnquist turned next to the second issue presented in the case: what is the scope of judicial review under Public Law 94-142?[54] The school board had urged a very limited scope of review authority--that the courts have only limited power to review for state procedural compliance and no power to review the substance of a state program. The Rowleys contended that the courts exercise de novo review over both procedures and policies. Here, though he expressly rejected the school board's argument, Justice Rehnquist ultimately stated a position that is far closer to the school board's conclusion than it is to that of the Rowleys.

He did this first by pointing to the importance Congress attached to the procedural safeguards, noting their detail and emphasis upon school/parent joint decision-making, and concluding that Congress believed the proper substantive result would be reached, in most cases, when the procedural safeguards were adhered to.[55]

In addition, he suggested that adherence to those safeguards, and the hearing process that flows from them, would be an exercise in futility if the result of those processes were not entitled to some deference upon judicial review.[56] No doubt that observation has occurred to many special education administrators and their counsel.

For these reasons, Justice Rehnquist concluded that courts are limited to two questions in reviewing suits brought under Public Law

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[54]20 U.S.C. SS 1415 (e) (2).

[55]Ibid.

[56]Ibid.

94-142:

1. Has the state complied with the procedures set forth in the act?
2. Is the individualized education plan developed through the mandated procedures reasonably calculated to enable the child to receive educational benefits?

"If these requirements are met, the state has complied with the obligations imposed by Congress and the courts can require no more."[57]

In weighing the impact of the Rowley decision, it is important, preliminarily, to note some factors that may appear obvious, but carry some special weight in this case. One of these is that Rowley is the first Supreme Court decision on Public Law 94-142 and the first interpretation of a statute by the court is always of substantial importance and weight. The fact that the court addressed what can be characterized fairly as the "substantive heart" of the statute, of course, magnifies the importance of the decision.

Similarly, the court's decision is controlling law for all lower courts, state and federal, asked to construe the federal statute. Accordingly, any plaintiff contending that a child is not receiving a free appropriate public education under Public Law 94-142 must show now either that the school district has not met the Rowley test or that the test does not apply. A school district can effectively minimize its liability by adhering to the procedural requirements of Public Law 94-142. Whether there are any circumstances under which the Rowley test

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[57]Note 1, supra, at 553:656.

does not apply in construing the federal definition of FAPE remains to be seen; as of this time, they are not obvious.

More intangibly, courts will be referred to, if they do not recall Justice Rehnquist's language concerning the respective roles of educators, parents, and the judiciary in making educational decisions. It has been noted, earlier in this analysis, that many judges would prefer not to become involved in education decision-making; Justice Rehnquist's language provides all the additional justification they require, if any. Those who are not so included will have to become far more creative in distinguishing Rowley and, even then, stand a far greater chance of being reversed on appeal.

This writer feels that courts will be far less likely to delve into the substance of special education cases.[58] They will look at administrative hearing decisions more charitably, giving more weight to the hearing record.[59] They will look, first and foremost, to the procedures followed by the school in arriving at a specific programming decision and, assuming that those procedures are adequate, will concur in the school's decision in most, if not all cases.[60] In other words, they will follow Justice Rehnquist's direction to weigh the substantive outcome within procedural standards.

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[58] Ibid.

[59] Ibid.

[60] Ibid.

There is some evidence that this is already occurring. In Frank v. Grover,[61] the court reviewed the evidence contained in the record of the due process and review hearings and, after noting that "(t)he Act as interpreted in Rowley does not require a discussion of the comparable benefits of an oral-only education versus those of a total communication education," stated its conclusions in almost exactly the language used by Justice Rehnquist in defining the scope of judicial review.[62]

However, even when a court, for one reason or another, more closely examines the substance of an education decision, the adequacy of the program being offered will be measured against the standard of "educational benefit" rather than "appropriateness." As has been previously suggested, that is no small difference. Most school board attorneys, to say nothing of special education administrators, will find it far easier to explain how a program will "benefit" a child, as distinguished from how the program is "appropriate" for the child. In the same manner, it should be far simpler to document a "reasonable calculation" of educational benefit; guaranteed success is not required.[63]

Nevertheless, Rowley will increase the pressures on state education systems to get their houses in order, at least in the short run. The first thing that is likely to occur is a shift of special education

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[61]Current EHLR DEC. 554:148 (Cir. Ct. WI 1982).

[62]Ibid at 554:152.

[63]Ibid.

litigation from the federal to state courts. These suits will concentrate on rights provided by state, not federal, law because many state statutes conferring the right to special education are far more expansive than Public Law 94-142. A recent state court decision noted, for example, the declaration of its state legislature that "the policy of the state is to ensure every child a fair and full opportunity to reach his full potential."[64] It therefore distinguished Rowley and concluded that state law required that "a handicapped child should be given an opportunity to achieve his full potential commensurate with that given other children."[65] The statute of Arkansas similarly proclaims: "It shall be the responsibility of the school district and the state to provide the most appropriate services based on a careful evaluation of the child's needs."[66] It seems reasonable to assume that similar "bombshell" language is contained in statutes of other states, waiting to be invoked.

Finally, having raised the procedural safeguards to the status of "holy writ," it will be far more difficult in the future for courts, state and federal, to excuse procedural violations.[67] Thus far, no court has established a test for assessing the materiality of a procedural violation, e.g., how serious must a procedural violation be

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[64]Harrell v. Wilson County Schools, Current EHLR DEC. 554:125 (CT. Appls, NC 1982) at 554:127.

[65]Ibid.

[66]Arkansas Statute SS 81-2133; see also, In re Traverse Bay Area Intermediate School District (MI SEA 1982), Current EHLR DEC. 504:140 at 504:142.

[67]Ibid.

before it fatally contaminates a substantive education decision?[68] The importance which the Rowley decision attributes to procedural matters will make this a far more pressing question. Adherence to mandated procedures will be examined from the top down and the search may include matters that have, thus far, been tolerated by SEP--such as impartiality of hearing officers.

On the balance, however, the Rowley decision points the way for education systems. It remains to be seen whether the opportunity will be grasped.

Related Services

Under the Education for All Handicapped Children Act of 1975,[69] a handicapped child is entitled to a free, appropriate public education consisting of special education and related services designed to meet the special needs of the handicapped child. The regulations define related services as including:

> transportation and such developmental, corrective, and other supportive services as are required to assist a handicapped child

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[68] But cf., Anderson v. Thompson, 1981-82 EHLR DEC. 553:105 (CA-7 1981), in which the court held that an award of money damages is authorized by EHA in two exceptional circumstances, one of which is where the school district has "acted in bad faith by failing to comply with the procedural provisions of (20 U.S.C., SS 1415) in an egregious fashion." 1981-82 EHLR DEC. 553:110. The Anderson test, however, by its terms applies only to cases involving requests for money damages and, in addition, was formulated prior to the Rowley decision. It seems likely that a somewhat lesser standard will be developed, to be used in cases attacking the substance of the education decision, as a result of the Rowley decision.

[69] 20 U.S.C., SS 1401, et seq.

> to benefit from special education and includes speech pathology and audiology, psychological services, physical and occupational therapy, recreation, early identification and assessment of disabilities in children, counseling services, and medical services for diagnostic and evaluation purposes. The term also includes school health services, social work services in the school, and parent counseling and training.[70]

Recently, school districts have had to confront changing interpretations on how far the courts will go in including certain services to which a handicapped child may be entitled. The case of Tatro v. Texas[71] provides a useful model to examine the nature of this problem.

Amber Tatro is a four-year-old child with spina befida, causing her to suffer from both orthopedica and speech handicaps, along with a neurogenic bladder. Because of the neurogenic bladder, Amber cannot empty her bladder voluntarily and has to be catheterized every three or four hours to avoid developing chronic and possibly fatal kidney infection. The school district developed an Individualized Education Program (IEP) that was satisfactory to the parents in all respects but one. It failed to provide for the Clean Intermittent Catheterization (CIC) to be administered to Amber during the school day.

Amber's challenge to the school system's denial of the Clean Intermittent Catheterization in the federal district court was unsuccessful.[72] The court, although sympathizing with her plight, concluded that the Clean Intermittent Catheterization was not a related service

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[70] 34 C.F.R. SS 300.13 (1980).

[71] 481 F. Supp. 1224 (N.D. Tex. 1979), rev'd, 625 F.2d 447 (Fifth Cir. 1980).

[72] 481 F. Supp. 1224. Suit was brought under 20 U.S.C. SS 1415 (e) (2).

in the statutory sense because it did not arise from the effort to educate. The court pointed out that:

> . . . (t)here is a difference between maintenance of the life systems and enhancing a handicapped person's ability to learn. The Clean Intermittent Catheterization is essential to Amber's life, but once that life maintenance service is provided, it is unrelated to her learning skills.[73]
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> Plaintiffs cannot convert a statute prohibiting discrimination in certain governmental programs to a statute requiring, in essence, the setting up of governmental health care for people seeking to participate in such programs.[74]

However, in an opinion issued on September 2, 1980, the Fifth Circuit Court of Appeals reversed the district court and ruled that the school system was obligated to provide Clean Intermittent Catheterization as one of the related services to which the child was entitled.[75] The court reasoned that Amber was entitled to a free, appropriate public education which should be provided in the regular classroom to the maximum extent possible.[76] To accomplish this in Amber's case, it is necessary to provide catheterization while she is at school. Ergo, the catheterization is a "supportive service" that is required to assist a handicapped child to benefit from special education.[77]

Following the Tatro decision, the United States Department of Education, on January 19, 1981, published a policy interpretation defining catheterization as a related service when it is required in

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[73] Id. at 1227.

[74] Id. at 1229.

[75] 625 F.2d 447.

[76] Id. at 563.

[77] Id. at 563-64.

order to provide a free, appropriate public education in the least restrictive environment.[78] However, the effective date of the interpretation was twice postponed by the Reagan Administration, first to March 30, then to May 10.[79] On May 8, the operative date of the interpretation was indefinitely postponed by the Department of Education.[80]

To forestall worries about the decision in Camenisch v. University of Texas[81] is worth noting. That case involved the question of whether or not an educational agency was required to provide a sign language interpreter for a deaf student at the post-secondary education level. The Fifth Circuit there affirmed the district court's ruling requiring the University of Texas to procure and pay for a qualified interpreter for a deaf student under the provisions of Section 504 of the Rehabilitation Act of 1973. In doing so, the court distinguished the Supreme Court decision in Southeastern Community College v. Davis[82] by pointing out that unlike Davis, a deaf person seeking admission to a nursing program, Camenisch was a fully qualified individual in that he could perform well in his profession in spite of his handicap. All he needed was the education and training that would allow him to continue.

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[78] 46 Fed. Reg. 4912 (1981).

[79] 46 Fed. Reg. 12495; 46 Reg. 18975.

[80] 46 Fed. Reg. 25614.

[81] Id. at 535-6.

[82] 632 F2d at 948.

Residential Placement

Closely associated with the concept of related services is the question of residential placement. The Handicapped Act regulations require that "if placement in a public or private residential program is necessary to provide special education and related services to the handicapped child, the program including nonmedical care and room and board, must be at no cost to the parents of the child.[83]

It might appear from this that before a school system would be obligated to pay for all of the costs of a residential placement, three determinations should have to be made: (1) that the child is handicapped and therefore entitled to special education and related services; (2) that the child is in need of some type of residential placement; and (3) that the special education and related services cannot be provided without the residential placement.

Instead, courts appear to be ordering school districts to provide residential placement if the need for such placement merely arises out of the handicap, as opposed to being necessary for educational purposes.[84]

In North v. District of Columbia Board of Education,[85] a severely handicapped sixteen-year-old boy was determined by the school system's placement committee to be in need of a residential placement in order to

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[83]Dec. 15, 1980 (Docket #80-1002).

[84]616 F.2d 127 (Fifth Cir. 1980), vacated and remanded on other grounds, ___U.S.___, 101 S. Ct. 1830 (1981).

[85]442 U.S. 397, 99 S. Ct. 2361 (1979). Cited at 616 F.2d at 132.

receive a free appropriate public education. The school system found such a placement after being ordered to do so by a hearing officer.

However, problems developed and the placement became unavailable. The parents requested that the school system provide emergency residential placement until some other appropriate placement was found. The school system refused, contending that plaintiff's problems were emotional, social, and otherwise noneducation, and that the school system should not be required to provide living arrangements that were not strictly of an educational nature.[86]

Possibly because the school system's own placement committee originally recommended the residential placement as being required or possibly because the school system had suggested that neglect proceedings be initiated against the parents if they did not provide for their child, the district court refused to attempt to separate the social, emotional, medical, and educational problems to determine which one required the residential placement. Instead, the court assigned sole responsibility for the residential placement to the school board.[87]

The North decision was cited with approval by the district of Delaware in the case of Kruelle v. Biggs.[88] The Kruelle case, however, differed from North in that the school system had never recommended the residential placement, as was originally done in North. The school

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[86]C.F.R. SS 300.302.

[87]See North v. District of Columbia Board of Education, 471 F. Supp. 136 (D.D.C. 1979): Kruelle v. Biggs, 489 F. Supp. 169 (D. Del. 1980).

[88]471 F. Supp. 136.

system had developed appropriate services and treatments in the Individualized Education Program (IEP), a fact that parents did not dispute. The parents simply were claiming that their son required a residential placement as part of the individualized education program. The court stated the issue as "not whether (the current placement) is adequate for what it offers, but whether Paul (Kruelle) requires more continuous care than that available in a six-hour school day in order to learn."[89]

Although the court appropriately framed the issue in terms of whether or not the residential placement was required in order for the child to learn, the decision apparently was based upon the testimony of a doctor of osteopathy, who had not testified at the original hearing. This doctor, who was also the child psychiatrist consulted by the parents, had testified that what Paul needed was "an around-the-clock placement with programming by people who know how to do it in order to maximize Paul's chances of learning."[90] Maximizing chances" to learn was a standard ostensibly rejected although actually followed in the Rowley case.[91] But the court here ruled that it was "evident that Paul will realize his learning potential only if he receives more professional help than the Meadowwood School's day program can offer him."[92]

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[89]Id. at 140.

[90]Id. at 142.

[91]489 F. Supp. at 173.

[92]Id. at 172.

It is important to note that sympathy may have played a part in these decisions. For example, in the Kruelle case, not only did the child have extremely severe emotional and physical problems, but he was also being represented by his parents.[93] This sympathy factor is real and can be difficult to overcome.[94]

What happens when the residential placement is ordered and the school system does not have the money to fund the placement? In Hines v. Pitt County Board of Education,[95] the court pointed out that state and local school officials had suggested that they could not afford the up to $1,850.00 per month tuition that might be required to implement a residential placement. But because the state had volunteered to participate in the Handicapped Act program, the court found that it had to comply with the requirements.[96] If there was a money shortage, the burden could not be allowed to fall on one single child or group of children, but should be spread equally to all children in the system.[97]

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[93]Id. at 173.

[94]See notes 15-19, supra.

[95]489 F. Supp. at 173-74, (N.D. Ind. 1979).

[96]Ibid.

[97]Paul had been described as a profoundly retarded child whose physical development was further complicated by cerebral palsy. At age 12, he could not walk, dress himself, or eat unaided . . . was not toilet trained . . . did not speak, and his receptive communication level was extremely low. In addition to his physical problems, he had a history of emotional problems which resulted in choking and self-induced vomiting when experiencing stress.

Discipline

One area that generates much interest and concern is the discipline of handicapped students. What should be done with a handicapped student who commits an act of misconduct, which, if committed by a nonhandicapped student, would result in expulsion?

In Doe v. Koger,[98] an Indiana district court ruled that the Handicapped Act did not prohibit expulsions of handicapped children in general, but rather, "only prohibits the expulsion of handicapped children who are disruptive because of their handicap."[99] The court ruled that the change in placement procedures of the Handicapped Act should be utilized to determine whether or not the handicap is the cause of the child's propensity to disrupt.[100] Unfortunately, though, the court did not stop there. Seemingly unknowingly, the court shifted from determining whether or not the handicap is a cause of the misconduct to requiring that a determination be made as to whether the student's misconduct was a result of an inappropriate placement, saying that "when a handicapped child is involved, expulsion must not be pursued until after it has been determined that the handicapped child has been appropriately placed."[101]

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[98]471 F. Supp. at 138, 140 (N.D. Cal. 1979). For example, in North the court felt it would not serve the child's best interests to institute neglect proceedings against his parents who refused to accept him after he was discharged from his original placement.

[99]497 F. Supp. 403 (E.D.N.C. 1980).

[100]Id. at 408. See also Mills v. Board of Education of the District of Columbia, 348 F. Supp. 866, 876 (D.D.C. 1972).

[101]480 F. Supp. 225 (N.D. Ind. 1979).

In Stuart v. Nappi[102] and S-1 v. Turlington,[103] federal district courts for Connecticut and Florida, respectively, have ruled that expulsions of handicapped students must be treated as a change in placement and must be accomplished by following the change in placement procedures outlined under the Act and its regulations and keeping in mind the requirement of the least restrictive environment.[104] The Fifth Circuit Court of Appeals has affirmed the district court's ruling in S-1 v. Turlington.[105]

The S-1 case involved seven educable mentally retarded children who were expelled from school for separate unrelated acts of misconduct. The acts included threats to teachers and other students, vandalism, and sexual misconduct in class. All of these expelled students were afforded the procedural protections required by Goss v. Lopez.[106]

In only one case did a student raise his handicap as a defense in the expulsion proceedings.[107] Based upon the testimony presented to them, the school board made a determination in the discipline hearing that S-1 knew and understood the rules, understood the consequences of violating the rules and had handicaps which were not behavioral in

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[102] Ibid.

[103] Ibid.

[104] Id. at 229.

[105] Ibid.

[106] Ibid.

[107] See Stuart v. Nappi, 443 F. Supp. 1235 (D. Conn. 1978) and S-1 v. Turlington, 3 EHLR 551:211 (S.D. Fla. 1979), aff'd, 635 F.2d 342 (5th Cir. 1981), petition for certiorari filed April 22, 1981, Docket #80-1770.

nature. They concluded that S-1's handicap of being mentally retarded was not the cause of his misconduct.

In its opinion, the Fifth Circuit pointed out that the district court had refused to determine whether a handicapped student can ever be expelled.[108] The appellate court refused to dodge the question because of the "gray areas" that might result if the question were left unanswered and held that "expulsion is still a proper disciplinary tool under the Education for All Handicapped Act (EHA) and Section 504 when proper procedures are utilized and under proper circumstances."[109]

What then are the proper circumstances under which a handicapped child may be expelled? The school district in S-1 argued that expulsion of a handicapped child would be appropriate where the handicap was not a behavioral handicap or where the child possessed sufficient intelligence to understand rules and comply with them. For example, if a child is seriously emotionally disturbed, then the child's misconduct might very well be a manifestation of the handicap itself. To expel the child under those circumstances would be punishing the child for the child's handicap. Also, it would not be appropriate to expel a child who was profoundly retarded and did not have the ability to understand rules and whose compliance or noncompliance with such rules would be a random occurrence as opposed to an intentional act.[110]

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[108] 635 F2d 352 (Fifth Cir. 1981).

[109] 419 U.S. 565, 95 S. Ct. 729 (1975), cited at 635 F2d at 344.

[110] Id. at 344. Except for S-1, the students were not given, nor did they request, hearings to determine whether their misconduct was a manifestation of their handicap.

On the other hand, if the handicapped child was simply orthopedically impaired, mildly mentally retarded, visually impaired, hearing impaired, speech impaired, or simply had a specific learning disability, then there would be no reason why such a child could not comply with the rules just like any other child. If such a handicapped child committed an act which, if done by a nonhandicapped child, would result in the expulsion of that child, then expulsion would also be appropriate for the handicapped child. The school district argued that the fact of being handicapped does not exempt or immunize the handicapped child from the normal discipline procedures of the school except in the two circumstances already mentioned.[111]

The Fifth Circuit, in rejecting the school district's position, relied in part on the testimony of a clinical psychologist testifying on behalf of plaintiffs. The psychologist had testified at the hearing that:

> a connection between the misconduct upon which the expulsions were based and the plaintiff's handicap may have existed . . . a child with a low intellectual function and perhaps the lessening of control would respond to stress or respond to a threat in the only way they feel adequate, which may be verbal aggressive behavior.[112]

The court also noted the psychologist's example of an orthopedically impaired child who would provoke fights notwithstanding the fact that he is likely to lose. She indicated that would be his way of

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[111] Id.

[112] Id. at 347.

dealing with stress and feelings of physical vulnerability, and in that sense the misconduct was connected to the handicap.[113]

Apparently, the proper circumstances where expulsion would be available with respect to a handicapped child would be when it is determined that the student's misconduct does not bear a relationship to his handicapping condition. This determination cannot be made by the school board but must be made by a trained and knowledgeable group of persons.[114] But it would seem that to rule out expulsion, all the child really needs is a psychologist that will testify that the child may have been frustrated because of the handicapping condition, and that this might have caused him to act inappropriately in a stressful situation.[115]

If a connection is established, then expulsion of a handicapped student would not be appropriate. On the other hand, if there is no connection between the handicapping condition and a given misconduct, then expulsion would be appropriate following the proper procedures. Because the court specifically ruled that expulsion is a change in educational placement, proper procedures would be the change in placement procedures found under the act and its regulations, not the Goss v. Lopez due process procedures for discipline in ordinary situations. In other words, there is a dual discipline system for expulsion depending

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[113] Id.

[114] Id. at 350.

[115] Ibid.

upon whether the child is handicapped or not. The court said that:

> unlike any other disruptive child, before a disruptive handicapped child can be expelled, it must be determined whether the handicap is the cause of the child's propensity to disrupt. This issue must be determined through the change of placement procedures required by the handicapped act.[116]

The fact of this dual discipline system is even more readily apparent in light of the Fifth Circuit's final clarifying statement with respect to expulsion of handicapped students. Although the court ruled that expulsion was still a proper disciplinary tool for a handicapped student under proper circumstances and following proper procedures, the court also stated that it could not "authorize the complete cessation of educational services during an expulsion period.[117] A student, through his or her own misconduct, can lose the right to receive educational services, just as a student might lose any other valuable right, including liberty, as a result of misconduct. But the Handicapped Act seems to have created a right that can never be lost. Apparently, the court is saying that a handicapped student can be expelled so long as you do not really expel him.

The effect of this ruling is still unclear. For example, what is a school's responsibility when, for appropriate cause, it decides to expel a student that it has no reason to believe is handicapped, but the student subsequently asserts that the misconduct in question is the result of an undiagnosed handicap? Need the school comply with S-1 or can it follow its normal expulsion process? In Florida, within one

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[116]Id. at 348, citing Doe v. Krueger, 480 F. Supp. at 229.

[117]Id. at 348.

week of the Fifth Circuit's decision, a sixteen-year-old eleventh grade student stabbed another student during a fight over a boy friend on a school bus. The school board had started expulsion procedures when the attorney who had represented S-1 appeared with a copy of the Fifth Circuit opinion. Although the student had never been classified as handicapped, the attorney contended that the student might have an undiagnosed learning disability and if so, it would not be appropriate to expel the student. The school board had no choice but to agree to postpone the expulsion decision pending the outcome of the testing evaluation.

The position taken in S-1 is in agreement with the position suggested by the Department of Education in December of 1980 on what process is due under Section 504 when it becomes necessary to expel a student who is handicapped.[118] The department's position is that in expelling a handicapped child, a determination must first be made on whether there is a relationship between a student's misconduct and the student's handicap. The department is presently deciding whether or not to issue a regulation dealing with this subject.

Testing Bias

Another area of concern is charges of testing bias. In Larry P. v. Riles[119] plaintiffs were black students who claimed that the IQ tests used by defendant were biased and that the defendant discriminated

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[118] 45 Fed. Reg. 85082, 85083.

[119] 495 F. Supp. 926 (N.D. Cal. 1979).

against blacks by using them. They alleged that the tests resulted in the misplacement of black children in special classes for the educable mentally retarded.[120] In reaching its decision, the court accepted expert testimony concerning the discriminatory nature of certain IQ tests.

However, in Parents in Action on Special Education (PASE) v. Hannon,[121] the court was not impressed with testing experts concerning the impact of the testing, but rather, wanted to review each and every question on the challenged test to determine which ones were in fact discriminatory and how.[122] During this process, the court found that many of the attorneys and experts involved had not even read the questions.[123] After reviewing all of the questions, they found that only nine of them should not be used because of bias.[124]

The court also rejected plaintiffs' claim that the school district must prove that the tests are not biased, ruling instead that the school system only needs to show that the total process used was free of bias.[125]

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[120] Id. at 931.

[121] 506 F Supp. 831 (N.D. Ill. 1980).

[122] Id. at 837.

[123] Id.

[124] Id. at 875.

[125] Id. at 880.

In 1979, the District Court for the Eastern District of Pennsylvania ruled in Armstrong v. Kline,[126] that a Pennsylvania blanket prohibition against educational programs for the handicapped extending beyond the normal 180-day school year violated the Handicapped Act. The Court of Appeals for the Third Circuit has upheld the district court's determination,[127] although it should be emphasized that this case does not require that all mentally retarded children be provided with year-round school, but simply that there not be a prohibition against it in case an individual child is determined to be in need of such year-round school. On June 22, 1981, the Supreme Court denied a motion for certiorari in the case.[128]

Fees

When, if ever, is a prevailing plaintiff in a special education case entitled to attorney's fees? It has generally been assumed that fees are unavailable in cases brought solely under the Education for All Handicapped Act (EHA), which contains no express fee provision. However, plaintiffs who assert Education for All Handicapped Act claims often raise related or parallel claims under the Due Process and Equal Protection Clauses of the Fourteenth Amendment and Section 504 of the

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[126] 476 F. Supp. 583 (E.D. Pa. 1979) aff'd, 629 F2d 269 (3d Cir. 1980).

[127] 629 F2d 269.

[128] 49 U.S.L.W. 3949.

Rehabilitation Act (Section 504).[129] In such cases, fees are often sought pursuant to two related statutes: The Civil Rights Attorney's Fee Awards Act, 42 U.S.C. Sec. 1988, which authorizes fees to private paties who prevail in cases brought under 42 U.S.C. Sec. 1983[130] and Section 505 of the Rehabilitation Act[131] which provides for fees for successful private claimants under Section 504.

The question of whether to allow fee awards in such cases has bedeviled the courts, which have sometimes approved the practice and sometimes found it contrary to Congressional intent.[132] Now, in Smith v. Robinson, the Supreme Court has concluded that fees are generally unavailable under Section 1988 or Section 505 for claims that fall within the scope of the Education for All Handicapped Act. However, the court has also suggested that this general rule may not apply to certain special education claims, particularly those concerning procedural irregularities in the special education system.

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[129] 29 U.S.C. Sec. 794. The statute prohibits, inter alia, discrimination against handicapped persons in federally assisted programs and the exclusion of handicapped persons from such programs.

[130] Section 1983 provides a cause of action to any person deprived under color of state law of rights secured by the Constitution or laws of the United States.

[131] 29 U.S.C. Sec. 794a.

[132] Compare e.g., Monahan v. Nebrasks, 1983-83 EHLR DEC. 554:140 (8th Cir. 1982) and Espino v. Besteiro, 1983-84 EHLR DEC. 555:145 (5th Cir. 1983) with Timms v. Metropolitan School Dist., 1983-84 EHLR DEC. 555:178 (7th Cir. 1983) and Department of Education v. Katherine D., 1983-84 EHLR DEC 555:276 (9th Cir. 1983).

Interagency Responsibilities

Tommy Smith, a physically and emotionally handicapped child, was placed by his school district in a special education program. Subsequently, the district decided that the state mental health agency was responsible for the education of children with such multiple handicaps. The district accordingly announced that it would no longer educate Tommy and that his parents, the Smiths, should seek services from mental health authorities--who had no program available for Tommy at the time and could not have provided him with free services in any event.

Tommy's parents filed an administrative appeal with the school district concerning its decision to terminate Tommy's program. In addition, they filed suit in federal court under Section 1983, arguing that the Due Process Clause prohibited the district from terminating the program before a decision had been reached on the administrative appeal.[133] The court agreed and issued a preliminary injunction against such termination.

The district decided the administrative appeal adversely to Tommy, and state education officials upheld the decision. The Smiths then amended their federal court complaint, joining the state officials as defendants and alleging additional claims. These claims were that Tommy's exclusion from public education on the basis of his multiple handicaps would violate his rights under the Education for All

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[133]These events predated the effective date of the 1975 amendments to the Education for All Handicapped Act, which included a provision preventing districts from terminating a child's program during the pendency of an administrative appeal. 20 U.S.C. Section 1415 (e)(3).

Handicapped Act, The Equal Protection Clause, Section 504, and state law. The parents also alleged that the handling of their administrative appeal had violated the Due Process Clause and the Education for All Handicapped Act because the decision-makers had been employees of the district and of the state education agency. Section 1983 was invoked as the basis for the new equal protection and due process claims.

The court ruled for Tommy on the central issue of the case, holding that he could not be excluded from public education services.[134] On the issue of the impartiality of the administrative proceedings, the court decided in favor of the defendants.

The court then approved an agreed award of attorney's fees against the school district for the work done in securing the preliminary injunction. The court also awarded fees against the state defendants for most of the work done in the administrative hearings and in court following the entry of the preliminary injunction. This fee award was based on Section 1988, the court reasoning that the plaintiffs had asserted a substantial equal protection claim via Section 1983 and obtained--albeit on other grounds--the relief that they sought.

The award of fees against the state defendants was reversed by the Court of Appeals.[135] That court noted that the plaintiffs'

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[134]Before reaching this conclusion, the court certified to the Rhode Island Supreme Court the question of whether the district was required under state law to educate Tommy. That court answered in the affirmative, Smith v. Cumberland School Committee, 1979-80 EHLR DEC. 551:639 (Sup. Ct. RI 1980).

[135]Smith v. Cumberland School Committee, 1982-83 EHLR DEC. 554: 431 (1st Cir. 1983).

constitutional claims were factually identical to claims raised under the Education for All Handicapped Act. To allow attorneys' fees under Section 1988 in such circumstances, the court held, would defeat the Congressional intent evidenced by the omission of an express fee provision from the Education for All Handicapped Act. The Court of Appeals also held, for similar reasons, that the award could not be justified under Section 505 of the Rehabilitation Act.

Supreme Court Proceedings

In the Supreme Court, the Smiths argued that they were entitled to fees under the court's unanimous decision in Maher v. Gagne.[136] Maher authorized fees under Section 1988 where a plaintiff raises a substantial Constitutional claim and obtains relief, even if that relief is awarded on a nonconstitutional theory. In addition, they argued that they entitled to fees under Section 505 of the Rehabilitation Act because they had asserted a substantial claim under Section 504. Respondent officials countered--in a literacy tone rarely found in Supreme Court briefs--that fees should be denied because "the so-called Constitutional claim is nothing but a simulacrum of the Education for All Handicapped Act, and the claim under Section 504 of the Rehabilitation Act is nothing but a spectral avatar of the very same Education for All Handicapped Act claim. Petitioners are simply attempting to do indirectly what they can't do directly."

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[136] 448 U.S. 122 (1980).

In a 6-3 opinion by Justice Blackmun, the Supreme Court sided with the defendants. First, the court held that the Smiths had not advanced a viable equal protection claim under Section 1983 in the court below. This was because that claim was factually identical to the Education for All Handicapped Act cause of action. The court reasoned that if special education plaintiffs could pursue equal protection claims under Section 1983, which does not require exhaustion of administrative remedies, they could thereby evade the Education for All Handicapped Act's elaborate procedures for Individualized Education Plan development and for administrative review. This, the court held, would defeat Congress' intent that the rights, remedies and procedures available with respect to such claims be those specified in the Education for All Handicapped Act be "the exclusive avenue through which a plaintiff may assert an equal protection claim to a publicly financed special education." Accordingly, Section 1983 was not available for enforcement of the Smiths' equal protection claim, and fees under Section 1988 could not be awarded.

The court took a different view of the Smiths' due process claims. The court did not question that Section 1983 had been available to assert the first of these claims, i.e., that Tommy's program could not be terminated during the pendency of his administrative appeal. However, the Smiths had already recovered attorney's fees for the work done on this claim, which had resulted in the preliminary injunction. And, according to the court, this due process claim was "entirely separate" from the subsequent proceedings to establish Tommy's entitlement to educational services; therefore, the Smiths'

success in obtaining the preliminary injunction did not justify an additional award for the remainder of the litigation.

The court reached a similar conclusion regarding the second due process claim, which related to the impartiality of the administrative proceedings. In dicta that future plaintiffs should find useful, the court suggested that section 1983 could indeed be used as a vehicle for such challenges to the adequacy of the administrative procedures established pursuant to the Education for All Handicapped Act. In this case, however, the procedural claim was distinct from the access-to-education claim on which most of the litigation had focused. Therefore, even if the Smiths had prevailed on the issue of the impartiality of the administrative proceedings (which they had not), that success would not have supported a fee award for the entire litigation.

Finally, the court addressed the Smiths' argument that, having stated a substantial claim under Section 504, they were entitled to fees under Section 505. The court acknowledged that the regulations under Section 504 require the provision of an appropriate education to a handicapped child. But, the court asserted, "it is only in the Education for All Handicapped Act that Congress specified the rights and remedies available to a handicapped child seeking access to public education." It followed, according to the court, that Congress intended only those remedies and procedures specified in the Education for All Handicapped Act to be available to plaintiffs seeking special education services. But Section 504 does not contain an exhaustion requirement, and (in conjunction with Section 505) it offers relief unavailable under the Education for All Handicapped Act--i.e., attorney's fees and in some

cases damages that the Education for All Handicapped Act would not authorize.[137] Therefore, the court concluded, Section 504 was not available to a plaintiff whose claim could be asserted under the Education for All Handicapped Act, and Section 505 fees were therefore also barred.[138]

Comments and Implications

Smith has important implications for special education and may prove significant in other areas of law as well. First, attorney's fees are now unavailable under the Education for All Handicapped Act, Section 1988, or Section 505 in the majority of special education cases, i.e., those seeking access to special education services or challenging a particular program or placement. On the other hand, it appears that Section 1983 can be invoked and Section 1988 fees awarded for claims that an education agency followed defective procedures with respect to a handicapped child.

The court's holding with respect to Section 1988 was not based on any new interpretation of that statute.[139] It rested instead on the

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[137]The court noted that damages have generally been held to be available under the EHA in "exceptional circumstances," citing such cases as Anderson v. Thompson, 1981-82 EHLR DEC. 553:105 (7th Cir. 1981).

[138]The court did indicate that a Section 504 claim would be permitted in a case "where Section 504 guarantees substantive rights greater than those available under the EHA." Presumably, such cases might include, e.g., instances in which a child qualifies as "handicapped" under Section 504 but not under the EHA, and cases in which the state in question does not receive EHA funds.

[139]Thus, the court avoided expressly modifying or overruling the holding of Maher v. Gagne, supra.

court's conclusion that equal protection claims to educational services cannot be raised under Section 1983. This represents a dramatic extension of the doctrine set forth three years ago in Middlesex County Sewage Authority v. National Sea Clammers Association,[140] where the court held that by enacting a federal statute that contained its own comprehensive enforcement scheme, Congress intended to preclude the use of Section 1983 to enforce that same statute. The holding in Smith, by contrast, is that by enacting a comprehensive statute on special education, Congress intended to preclude the use of Section 1983 to enforce certain Constitutional rights in that area--a proposition that might surprise those who voted on the Education for All Handicapped Act, not a single one of whom stated at the time that such was his or her intent.

To be sure, the Section 1983 holding may not make much difference to special education plaintiffs except on the issue of attorney's fees. Much of the other relief that might have been secured under the Equal Protection Clause is available under the Education for All Handicapped Act.[141] But the holding carries ominous implications for other areas of the law, since it shows that the court is willing to find, on relatively meager evidence, that Congress intended to circumscribe the enforcement of Constitutional rights.

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[140] 453 U.S. 1 (1981).

[141] While Smith forecloses the possibility of obtaining damages on an equal protection theory, that possibility probably only existed where an intentional deprivation of rights could be shown, in such cases, a court might find "exceptinal circumstances" sufficient to justify a damage award under the EHA. See n. 10, supra.

The Section 1983 holding is also remarkable for the argument on which it is based. Because exhaustion is not required under Section 1983, the court reasons, and because Congress intended that exhaustion be required in special education cases, Section 1983 must be inapplicable to such claims. It would be equally logical to fix a leaky roof by blowing up the house. If the Education for All Handicapped Act and Section 1983 conflict on the issue of exhaustion, the proper approach--as Justices Brennan, Marshall and Stevens argue in dissent--is to construe the later statute not as repealing the earlier act entirely but as amending it to the extent necessary to resolve the conflict. If this well-settled rule were followed, the substantive guarantees of Section 1983 would be preserved, subject only to an exhaustion requirement in cases where Education for All Handicapped Act procedures are available.

Moreover, the Education for All Handicapped Act is a Spending Clause enactment that applies only in states which have accepted federal special education funds. While all fifty states currently accept those funds, such has not always been true and will not necessarily be true in the future. If a state opts out of the program, will plaintiffs in the state regain the right to assert equal protection claims under Section 1983 and to receive fee awards if they prevail? Congress surely did not intend to make Section 1983 remedies available on a state-by-state basis, but such results (or others equally anomalous) appear to follow from the court's holding in Smith.

The court's conclusion with respect to Section 505 is also problematic. In concluding that the relief sought for Tommy was

"specifically required only by the Education for All Handicapped Act," the court overlooked the language of Section 504 itself, which prohibits "exclusion" on the basis of handicap. It is difficult to imagine how Congress could have spoken more "specifically" to a case such as Tommy's. Furthermore, like its holding that Section 1983 may not be used to assert equal protection claims to special education, the court's partial abrogation of Section 504 in the special education area is an act of overkill. The conflict between Section 504 and the Education for All Handicapped Act on the issue of exhaustion should be resolved by construing the former to require exhaustion in special education cases rather than by curbing its substantive guarantees. And the conflict, if any exists, between the Education for All Handicapped Act and Section 505 on the issue of fees should be resolved by giving effect to Section 505, which was enacted three years later than the Education for All Handicapped Act.

Ultimately, Smith seems to rest more on a practical concern than on legal logic. That concern, which figures prominently in the opinion, is the "financial burden" that the education system might incur if it had to pay the lawyer's fees of those who win cases against it. One problem with the decision, of course, is that the court has merely transferred the burden to parents, who are even less able to absorb it. Even routine special education litigation involves legal costs in the thousands of dollars; while such costs may be substantial for a school system, they are overwhelming for parents already burdened with extraordinary expenses for medical care, psychological treatment, therapies, and the like.

The further problem, however, is that Congress has already weighed these competing interests and made its choice. That choice, clearly expressed in two statutes enacted well after the Education for All Handicapped Act, was to authorize fee awards to prevailing plaintiffs in cases raising claims under Sections 1983 and 504. Congress set forth in these statutes no exception for cases raising claims to special education services, nor was any exception discussed.

The tortured reasoning of Smith was thus necessary only because a more straightforward analysis would have produced a result that the court did not desire. Apart from its immediate significance for special education plaintiffs, therefore, the court's outcome-oriented approach is a troublesome precedent in its own right. It also stands as yet another example of the "voracious appetite for judicial activism"[142] of a court that swears allegiance to a philosophy of judicial restraint.

Summary

The following cases were selected because they speak specifically to problem areas in special education that often arise from parents seeking additional services and school districts objecting.

The question of residential placement was addressed in Appeal v. Ambach.[143] Because of deteriorating home situation between herself and her severely emotionally disturbed child, mother transferred her child from a local school system program to a 24-hour residential facility,

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[142]Stevens, J., dissenting from order in New Jersey v. T.L.O., No. 83-712, 52 U.S.L.W. 3935 (July 5, 1984).

[143]Current EHLR DEC. 554:236 (SD NY 1982).

without knowledge or consent of local school system or its Committee on the Handicapped. The Committee on the Handicapped subsequently denied the mother's request to fund this placement because it was unilaterally and not primarily for educational reasons. The due process hearing officer concluded that placement was "the more approrpiate one" for the child; he ordered local school system to pay for placement for the current year but not for the prior year because of unilateral action. On appeal, the state level hearing reversed the hearing officer's decision, finding that the local school system had offered an appropriate nonresidential placement. However, because the residential school was in the public school district that the child was entitled to attend under state law, State Education Agency found that residential school was required to admit the child and that local school system was obligated to pay the child's tuition, though not her maintenance. The mother sought review of State Education Agency decision in court, moving for summary judgment; defendants cross-moved to dismiss for lack of subject-matter jurisdiction or, in the alternative, for summary judgment. On referral, the magistrate recommended that all motions be denied and that the court had subject matter jurisdiction.

It was held that motions of parties to dismiss or for summary judgment are denied; the case was dismissed without prejudice to the plaintiff and remanded to the State Education Agency.

Although the claim under Education for All Handicapped Act arose prior to the effective date of the Act, the motion to dismiss for lack of subject matter jurisdiction must be denied where, under law of the circuit, retroactive application of the Act is warranted. The decision

by the Committee on the Handicapped and State Education Agency on educational program for handicapped child without complying with mandated procedural safeguards of Education for All Handicapped Act--e.g., conduct evaluation of the child, notify the mother of her right to present information concerning placement, and prepare the Individualized Education Plan--precludes the court from making a de novo finding on an appropriate program; accordingly, action to review the State Education Agency decision is dismissed without prejudice and remanded to the State Education Agency with directions that procedural safeguards can be complied with.

The question of summer programming was addressed in Birmingham and Lampshere School Districts v. Superintendent of Public Instruction for the State of Michigan.[144] The school district discontinued the summer program when a request for funding was denied. The parent of a handicapped child, who had been in summer program for five years, requested due process hearing. The hearing officer found that the program was required to meet a child's needs. The school district appealed to the State Board of Education, asking who the state-level hearing officer would be and when briefs must be filed, but was never notified. A state-level decision affirmed the hearing officer's decision. The school district then filed civil action in state court, alleging that procedures violated due process requirements, that the hearing officer's decision was not supported by the evidence, and that implementation of the summer program would violate the state constitutional provision.

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[144]Current EHLR DEC. 554:318 (CA-6 1982).

The trial court granted defendants' motions for summary judgment. The lower court decision was affirmed.

The trial court did not commit a reversible error in refusing to remand cause to the state hearing officer for written and oral arguments since, under applicable state and federal law, 34 CFR 300.510, the deci- to allow an opportunity for oral or written argument is left entirely to the state hearing officer's discretion.

The local hearing officer properly concluded that the proposed summer enrichment activities, essentially noninstructional in nature--camping, field trips, swimming, other sports, playground and recreational activities, gardening and work skills training--fall within the broad definitions of "special education" and "related services" as defined in the Education for All Handicapped Act, 20 U.S.C. 1401 (16) and (17).

State regulations providing for a minimum of 180 days of instruction per year do not preclude educational programs in excess of 180 days; moreover, since state regulations expressly confer upon local districts the authority to provide additional programs and services, state law provides some basis for a hearing officer's decision to require an educational program in excess of 180 days.

A state constitutional amendment precluding a state's mandating of a "new activity or service" by local governmental units without concommitant state appropriation to pay the costs thereof does not excuse local school district from providing summer enrichment program required by federal law.

The question of minimum competency testing was addressed in Brookhart v. Illinois State Board of Education.[145] Appeal from federal district court decision, 1981-82 EHLR DEC. 553:595, holding that handicapped students who failed minimum competency test because they had not been educated in the subject matter of the test are not denied due process of law where the lack of exposure results from a determination, in preparing the students' Individualized Education Plan, that subject matter is inappropriate in view of students' handicapping conditions. The lower court decision was reversed.

Denial of diplomas to handicapped children who have been receiving the special education and related services required by Education for All Handicapped Act, but are unable to achieve the educational level necessary to pass a minimum competency test, is not a denial of a free appropriate public education.

Use of minimum competency tests does not violate requirement of Education for All Handicapped Act that no single procedure shall be the sole criterion for determining an appropriate educational program for a child, 20 U.S.C. 1412(5) (c), 34 CFR 300.532, where the test is but one of three requirements a child must fulfill in order to graduate.

Denial of a diploma to a student because of a student's inability to pass a minimum competency test does not violate 504 because such a student is not an individual who is qualified in spite of his handicap; moreover, altering the content of minimum competency tests to accommodate a student's inability to learn the tested material because of his

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[145]Current EHLR DEC. 553:595 (CA-7 1983).

handicap would be a "substantial modification," as well as a "perversion," of the diploma requirement.

Students have liberty interest in a diploma insufficient to invoke the procedural protections of the due process clause of the Fourteenth Amendment to the U.S. Constitution; thus denying students adequate notice of any new diploma requirement, e.g., sufficient time to prepare for new diploma requirements, is fundamentally unfair and violates due process clause.

The question of filing suits simultaneously in federal and state courts was addressed in Coe v. Michigan Department of Education.[146] Objecting to a proposed change of placement, parents pursued, but lost, administrative proceedings, in the course of which the program which they preferred was discontinued. They appealed to the state court which failed to issue a decision for two years. Because of this failure, the parents filed suit in federal court, which agreed to take jurisdiction if the state court decision was not issued within two weeks of the parents' pursuit of other state court remedies. When the state court finally issued its decision, the federal court dismissed the parents' complaint on grounds that plaintiffs had chosen to litigate in state court and could not simultaneously litigate in federal court. Parents appealed this dismissal. The district court's dismissal is affirmed.

Language of Education for All Handicapped Act, 20 U.S.C. 1415(e)(2), clearly indicates Congressional intention that plaintiffs should not be permitted to litigate simultaneously in federal and state courts.

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[146]EHLR DEC. 554:252 (CA-6 1982).

Where claims asserted in federal action arise basically out of the same factual situation that is the subject of state proceedings, and are against essentially the same parties, the plaintiffs' failure to assert additional claims in a state court does not give a federal court jurisdiction to decide issues, and a suit is barred by res judicata.

The question of being able to recover damages was addressed in Davis v. Maine Endwell Central School District.[147] The action challenged the classification and placement of a child as emotionally handicapped. A previous motion for a preliminary injunction, the effect of which would be to change the child's placement, was denied for failure to exhaust administrative remedies, and that denial was upheld on appeal. Plaintiffs withdrew their claim for injunctive relief prior to trial because of their failure to exhaust administrative remedies. On the remaining claims for monetary damages for alleged violations of the Education for All Handicapped Act, Rehabilitation Act, and the First and Fourteenth Amendments to the U.S. Constitution, the court granted defendants' motion to dismiss all claims except for claim under First Amendment. Trial resulted in a jury verdict of $50,000.00 for plaintiffs. The opinion which follows sets forth the court's justification for granting motions to dismiss other claims for monetary damages. It was held that monetary damages may not be recovered for violations of Education for All Handicapped Act, Rehabilitation Act, or Fourteenth Amendment to the U.S. Constitution.

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[147] EHLR DEC. 554:101 (ND Ny 1982).

Monetary damages are not recoverable under Education for All Handicapped Act, 20 U.S.C. 1415, since the emphasis of the statute strongly suggests that Congress did not intend the punitive remedy of damages to be included within the phrase "appropriate relief." Monetary damages are not recoverable by plaintiffs who seek to enforce their Education for All Handicapped Act rights under U.S.C. 1983 since Congress intended the procedural safeguards set forth in Education for All Handicapped Act to be an exclusive remedy. Monetary damages are not recoverable under the Rehabilitation Act by plaintiffs who fail to exhaust their administrative remedies under Education for All Handicapped Act because Congress intended that the right to a free and appropriate education be determined, in the first instance, by local and state education officials through determinations made in administrative proceedings at the local and state level. Monetary damages are not recoverable under the Fourteenth Amendment to the U.S. Constitution for an alleged denial of a free and appropriate education because there is no Constitutional right to a free and appropriate education.

The question of improper placement or educational malpractice was addressed in Doe v. Board of Education of Montgomery County. Upon a child's entry into a school system in 1967, he was evaluated by a psychologist employed by the state health department working in conjunction with the board of education. The psychologist concluded that the child had suffered brain damage which resulted in mental retardation and recommended placement in a class for the brain injured, and that reevaluation be conducted in ten months, which was not done. The following year the board was notified by private physicians that the

child was, in fact, dyslectic and that he was improperly placed; however, no reevaluation was conducted until 1975, when the psychologist employed by the board recommended retention in the program for children with mild learning handicaps. Subsequently, the parents sued the Board of Education, superintendents, health department, and two psychologists, all of whom demurred and moved for summary judgment. The trial court's granting of motion was affirmed by the intermediate appellate court, which held that although action was cast in the form of actionable negligence, in reality, the suit was for educational malpractice. This appeal followed. The judgment was affirmed.

Action seeking, among other things, damages for allegedly negligent evaluation of a handicapped student is not suit for professional malpractice, but is, rather, action for educational malpractice which must be dismissed.

The question of determining when administrative remedies have been exhausted was addressed in Dore T. v. Board of Education of the Northeastern Clinton Central School District. Following the school district's refusal to hold a due process hearing, on the grounds that the child was not a resident of the school district and could not attend school in the district and that neither the child nor her representative had standing to request a hearing, the child filed suit in federal district court for declaratory, injunctive, and monetary relief, alleging violations of Federal and State Constitutions and statutes. It was also alleged that the state education agency failed to properly supervise the local education system and that the state education agency's regulations concerning persons who could act as "parents" violated

federal law. The court issued a temporary restraining order requiring the school to enroll the child until action was resolved. The defendants moved for dismissal of complaint, for appointment of guardian ad litem, and for costs and attorney's fees associated with these motions.

In the end, motions for dismissal and attorney's fees were denied; motion for appointment of guardian ad litem was denied without prejudice pending in camera evidentiary hearing.

Failure to exhaust administrative remedies is excused where administrative process cannot fully remedy plaintiff's grievances, e.g., challenges to validity of state education agency regulations, commissioner's performance of his duties under federal law, and alleged violation of Constitutional rights under due process clause for excluding the child from school without an opportunity to be heard. Damages are recoverable under Education for All Handicapped Act, 504 and the Civil Rights Act, 42 U.S.C. 1983, for violations of the provisions of those statutes.

The question of defining Free Appropriate Public Education (FAPE) under state statutes was addressed in Harrell v. Wilson County Schools.[148] Appeal from trial court affirmance of due process and state review hearings upholding a local education system's refusal to fund out-of-state residential placement for a hearing-impaired child. Parents contended that the school committee violated due process, that the individual education plan was not responsive to a child's special needs, and that the local education system failed to provide "the most

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[148]EHLR DEC. 554:125 (Ct. App NC 1982).

appropriate education" for the child. The lower court judgment was affirmed.

While the U.S. Supreme Court's definition of Free Appropriate Public Education in Rowley, 1981-82 DEC. EHLR 553:656 does not control interpretation of a state statute intended to provide each handicapped child an opportunity to achieve his full potential commensurate with that given other children, facts of this case show that the local education system met its obligation to provide a hearing-impaired child with free appropriate public education.

The expressed professional preference of an evaluation team member for mainstreaming over residential placement does not, considering the record as a whole, constitute sufficient degree of involvement, prejudgment, or predisposition to constitute violation of due process.

The question of bad faith or failing to cooperate was addressed in Intrator v. District of Columbia Board of Education.[149] The plaintiff moved for costs and attorney's fees in action seeking declaratory and injunctive relief, e.g., placement and funding of a handicapped child in private residential school. At a prior hearing on a motion for a temporary restraining order, the local education system counsel first contended that plaintiffs had failed to cooperate in consideration of alternative placements but, two hours after hearing had begun, he advised the court that the local education system residential placement committee had met on the day the plaintiffs' suit was filed and decided to provide and fund the requested placement. Local education has

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[149]EHLR DEC. 554:193 (D DC 1982).

failed to provide explanation of why plaintiffs were not advised of the decision at the time of filing or why the court was not advised. The motion for costs and attorney's fees was granted. The local education system, guilty of bad faith--e.g., failing to inform the plaintiff or the court of actions that substantially mooted the lawsuit thus causing the plaintiff to incur unnecessary fees and costs--is required to pay attorney's fees, costs, and a ten percent incentive fee under the "bad faith" exception to the "American Rule."

The question of how much a school district can be expected to fund was addressed in Pinkerton v. Moye.[150] A child identified as having a learning disability "with an emotional overlay" was proposed to be placed in "self-contained" learning disabilities class. However, the only such class was located in a school six miles further from the child's home and in another school district. The parent, contending that such a class should be created in the child's "neighborhood" school, instituted due process hearing, which she lost at local and state levels. Partial summary judgment was granted to defendants.

In enacting Education for All Handicapped Act, Congress intended for states to balance the competing interest of economic necessity on the one hand and the special needs of a handicapped child on the other; so a school board that provided placement in a school six miles further from home than the child's "neighborhood" school reached reasonable accommodation in view of the school's central location and small number of children requiring similar placement.

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[150]EHLR DEC. 554:291 (WD VA 1981).

The Education for All Handicapped Act Reg. 300.551(c), directing that placement of a handicapped child be as close as possible to the child's home and in the school the child would attend if not handicapped would attend if not handicapped, does not require placement in neighborhood school where, as here, the child's Individual Education Plan requires some other arrangement, and that arrangement is reasonable.

The school district's decision not to establish "self-contained" program at neighborhood school was reasonably based, and therefore, substantially justified under 504, because compelling creation of a program at the neighborhood school would necessitate substantial modifications to school district programs that are not required by 504.

The child appropriately placed in a program located in an out-of-district school is entitled to costs of alternative transportation as a related service under Education for All Handicapped Act, 20 U.S.C. 1401(17).

The mainstreaming question was addressed in Roncker v. Waiter.[151] This was an appeal of a district court decision, 1981-82 EHLR DEC. 553:221, which found that the school district did not abuse its discretion in proposing that a severely mentally retarded student be placed in the county school program for mentally retarded in which he would have received no contact with nonhandicapped children. The local hearing officer had held that the student should be placed within an appropriate special education class in a regular elementary school setting, but the

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[151] EHLR DEC. 554:381 (CA-6 1983).

state board of education concluded that the student required a split program--placement the county school with provision for contact with nonhandicapped--though without indicating how such a program should be administered. During administrative and court proceedings, the student had been attending special education class in a regular school and contact with nonhandicapped had been limited to lunch, gym, and recess. The district court judgment was vacated and the matter was remanded for further proceedings.

The district court which found that the school district's proposed placement did not satisfy the Education for All Handicapped Act's mainstreaming requirement erroneously reviewed the placement decision under the deferential abuse of discretion standard; accordingly, the district court's judgment must be vacated and the matter remanded for reexamination under the proper standard of review.

The standard for judicial review of administrative proceedings under Education for All Handicapped Act requires de novo review with due weight to be given to the administrative proceedings.

In determining whether placement in a segregated institution meets the mainstreaming requirement of the Education for All Handicapped Act, courts should determine whether the services which make that placement superior could be feasibly provided in a nonsegregated setting. Cost is a proper factor to consider since excessive spending on one handicapped child deprives other handicapped children, but is not a defense where the school district has failed to use its funds to provide a proper continuum of alternative placements for handicapped children.

Since the Education for All Handicapped Act does not bar class actions, the fact that the act requires individual placement decisions does not of itself bar all class actions; so where the plaintiff alleged that the school district automatically sends students classified as trainable mentally retarded to segregated county schools and that children are labelled as trainable mentally retarded solely on the basis of IQ scores, the court erred in refusing to allow the case to proceed as class action, at least as to these issues.

Dr. Joseph E. Bryson, in a speech to the Orton Dyslexia Society, concluded by stating:

> So Amy Rowley's public education academic experience for all intent and purpose provided the Supreme Court with a logical model for determining Congressional intent of the 1975 Handicapped Act. A provocative question arises - what if there had been a less able scholar than Amy Rowley? Would the Supreme Court's standard of "benefits" have been lower? Have been less? Would "access" and "basic floor" develop a synonymous relationship?[152]

Based on an analysis of Rowley the following conclusions are drawn:

> The 1975 Education for All Handicapped Act requires a state to provide handicapped children with a "free appropriate public education.
>
> Personalized instruction with sufficient support service to permit the handicapped child to benefit educationally from the instructional program.
>
> All services - instructional and related services - must be at public expense.
>
> The instructional program must meet state educational standards and approximate grade to grade level and meet the child's Individualized Education Plan.

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[152]Joseph E. Bryson,

All provisional imperatives of the 1975 Handicapped Act must be met.

Decisions to educate handicapped children in a regular classroom should be predicated on "reasonable" calculation that will enable the child to achieve passing marks and advance from grade to grade.[153]

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[153]Bryson,

CHAPTER V

AN ANALYSIS OF DUE PROCESS HEARINGS

A major purpose of Public Law 94-142--Education for All Handicapped Children Act of 1975-- is to assure that the rights of handicapped children and their parents or guardians are protected.

Section 615 of the legislation details the procedures which must be followed by educational agencies to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education. That is, when a decision or potential decision affecting a child's educational environment is faced, the child's parents or guardians must have the opportunity to be heard, as well as the right to impartial resolution of conflicting positions.

Although the Public Law 94-142 regulations provide a framework for implementing the due process provisions, many details are left to the state or local education systems. Under Part 121a of the federal regulations, educational agencies seeking to qualify for Public Law 94-142 funding must establish procedures for parents and guardians to examine their child's records, to obtain an independent evaluation of their child, to receive prior written notice throughout the educational decision-making process, to have an opportunity to present complaints, and rights to an impartial hearing and appeal. Procedures must also be established by which a surrogate parent, under certain conditions, can be appointed.

The due process provisions for North Carolina are defined and enumerated in Section 1517 of the Rules Governing Programs and Services for Children with Special Needs called "Due Process Procedures for Parents and Children."[1] Those provisions list the steps the state's public school systems must take when differences between the local school district and the parents (or other persons having primary care and custody of the child) or the child arise regarding the identification, evaluation, and educational placement of the child, or the provision for a free appropriate public education. They also define the following hearing rights for participants in a hearing:

1. Right to a full notice of procedures and rights
2. Right to have a hearing chaired by an impartial due process hearing officer (someone not an employee of the state or local agency providing services to the child)
3. Right to a timely proceeding, with a decision in writing 45 days of the request for a hearing, and within 30 days of an appeal
4. Right to appear and be accompanied by counsel and by persons with special knowledge
5. Right to present evidence and to prohibit introduction of evidence not disclosed to them five days before the hearing
6. Right to compel attendance of witnesses and to cross-examine them

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[1]State Board of Education, Rules Governing Programs and Services for Children with Special Needs (Raleigh, NC: State Department of Public Instruction, 1985), Sec. 1517, p. 48.

7. Right to receive a verbatim copy of the proceedings
8. Right to a written decision with findings of fact relied upon
9. Right to appeal to the state education agency and from the state education agency to state or federal court
10. Right to have the child remain in the present educational placement until the proceedings are completed

Study of Due Process Hearings

The primary concern of this study was on procedures that seek to determine whether, and under what circumstances, due process rights were utilized by the local education system, parents or other persons having primary care and custody of the child, or the child.

A search of the literature revealed that federal and state of North Carolina procedures, specified in legislation and regulation, require that all children needing special education services be identified, appropriate evaluations be made, placement options be generated, and an appropriate education be provided at no cost to parents. They involve necessary outreach procedures such as providing notice to parents and obtaining their consent prior to evaluation procedures; rules for school conduct of the evaluation; development of an individual educational plan by expert child evaluators, teachers, and related personnel; resources for individual educational programs in the least restrictive environment; parental notice, participation, and informed consent following development of the individual education plan; and provisions for monitoring handicapped children's progress.

The purpose of this study was to present an analysis of local education systems due process hearings concerning exceptional children conducted from September 1, 1978 through June 30, 1984. Surveys and interviews with the program administrators or their designees were conducted to elicit information regarding the hearings. The questions asked in the interviews and surveys were specifically designed to obtain information relating to the incidence, precipitating factors, the initiators of the hearings, characteristics of the children, the time and cost involved in each hearing, decisions of the hearing officers, and the availability of internal mediation procedures.

Not all exceptional children program administrators or their designees surveyed and interviewed for the study gave complete information. Details such as the participants in each hearing and the exact time and cost involved in each hearing were often incomplete. When estimates and ranges were reported, the mean or mode was utilized to report this information. The findings, therefore, are reported in various ways. Taken in total, they relate considerable information about exceptional children due process hearings and procedures for the sample population.

Sample Responses

Fred Kerlinger, writing in Foundations of Behavioral Research, reported the difficulty of securing complete results from mailed questionnaires, indicating that the researcher can expect less than a 40

percent return.[2] Therefore, an interview technique in combination with a questionnaire was employed to elicit the needed information. As Asher pointed out, "The interview format allows greater rapport to be established and more sensitive questions to be asked."[3]

The 142 local education agencies of North Carolina were chosen as the sample population. After the program administrators of each local education agency were contacted, 106 (74.6 percent) were able to participate in the study. This is a considerably higher participation rate than Kerlinger's estimate of mailed questionnaires. The program administrators of the local education agencies that did not participate in the study declined because they felt they had nothing to offer since they had not been involved in a due process procedure or were too small in size.

The surveys and interviews conducted provided usable data. In the eight regions that participated, 106 local education agencies were represented

Responses to Research Questions

The research questions were analyzed according to the respective factors. The purpose of this procedure was to determine whether or not significant differences existed between or among values of each factor.

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[2]Fred Kerlinger, Foundations of Behavioral Research, 2nd ed. (New York: Holt, Rinehart and Winston, 1973), p. 397.

[3]William Asher, Educational Research and Evaluation Methods (Boston: Little, Brown and Company, 1976), p. 173.

This determination permitted the framing of answers concerning the relationship between a factor and due process hearings.

Incidence Factors

1. How many due process cases were initiated and heard by a hearing officer at the local education agency?
2. Was the enrollment related to the incidence of local education agency due process hearings?
3. Did internal mediation avert local education agency due process hearings?

Due Process Cases Initiated

In the period involved in this study, a total of 72 hearing requests were initiated involving the sample population. Of that total, six requests (8.8 percent) were cancelled for reasons such as the issues being resolved through prehearing mediation, change in school district residence, and a change in the decision or need to proceed with a due process hearing. The remaining requests were either heard at the local education agency or were still in process. Information relative to the local education agency hearing requests and basic resultant actions as of July 1, 1984 are summarized in Table 3.

In the six-year period covered by this study, 62 hearings were held that involved the sample population. They represented nearly 72 percent of the total hearing requests filed, and slightly more than 80 percent of the 71 uncancelled requests.

Table 3

Disposition of Due Process Hearing Requests

	Number	Percentage
A. Hearing requests and their disposition		
Cancelled	6	8.8
Held or in process	62	91.2
Total Requests	68	100.0
B. Status of uncancelled hearings		
Hearings held	62	86.1
Cases pending	10	13.9
Total Uncancelled Hearings	72	100.0

Local Education System Enrollment

The relationship between enrollment and various information regarding local education agency hearings are summarized in Table 4. The enrollment data were obtained in the interviews and verified through the Division for Exceptional Children.[4]

Over twenty-five percent of the local education system hearings analyzed for the study were initiated and conducted in the Southwest Region. The State Board of Education of North Carolina has divided the local education agencies into eight regions designated as Northeast,

[4]Division for Exceptional Children, 1984 Directory (Raleigh: North Carolina State Department of Public Instruction, 1985).

Table 4

Enrollment and Hearing Data: Exceptional Children Headcount

Local Education System	Total Enrollment	Exceptional Child Count	Number of Hearings Initiated	Number of Hearings Held	Number of Hearings Cancelled
1	5582	670	2	2	0
2	11579	1389	2	1	0
3	4115	494	1	1	0
4	14880	1786	3	2	0
5	2524	303	2	1	0
6	7856	943	1	1	0
7	13138	1577	1	1	0
8	56730	6808	3	3	1
9	9015	1083	3	3	0
10	2100	252	4	3	1
11	3025	363	1	1	0
12	20172	2421	1	1	0
13	5112	613	1	1	0
14	1752	210	1	1	0
15	11970	1436	2	1	0
16	4519	542	1	1	0
17	9102	1092	1	1	0
18	5106	613	1	1	0
19	2959	355	2	2	1
20	17106	2053	3	2	0
21	5369	644	2	2	0
22	8568	1028	1	1	1
23	40451	4854	2	2	0
24	33665	4040	1	1	0
25	22990	2759	3	2	0
26	24596	2952	1	1	0
27	74559	8947	12	10	1
28	5230	628	1	1	0
29	12892	1547	2	2	0
30	37236	4468	2	1	0
31	2046	246	1	1	0
32	5037	604	1	1	0
33	8633	1036	1	1	0
34	7356	883	1	1	1
35	13139	1577	2	2	0
36	12892	1547	1	1	0
37	13502	1620	1	1	0

North Carolina Education Directory 1984-85.
NC State Department of Public Instruction Exceptional Children Headcount.

Southeast, Central, South Central, North Central, Southwest, Northeast, and Western.[5] The Southwest Region had sixteen or 25.8 percent of the total hearings, the North Central Region twelve or 19.3 percent, the South Central and Norwest Regions had nine each or 14.5 percent for each. Of the local education agencies that did not participate in this study, twenty-six were located in the Western Region and nine were located in the Northeast Region and one was located in the Southeast Region.

Internal Due Process Procedures

The relationship between the number of hearings initiated in each local education system and their use of an internal due process procedure or mediation attempt prior to formal due process proceedings is reported in Table 5. The local education agencies use of an internal mode to notify parents of their procedural safeguards is also reported. Fifty-eight percent of the participating local education agencies who had hearings utilized an internal due process procedure in an attempt to mediate differences prior to formal due process procedures. All of the local education agencies studied informed parents and guardians of their procedural safeguards.

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[5]Ibid., pp. 13-15.

Table 5

Internal Due Process Machinery

Local Education System of Exceptional Children	Due Process Procedure		Notification of Rights		Number of Hearings Initiated	Number of Hearings Cancelled
	Yes	No	Yes	No		
1	x		x		2	0
2	x		x		1	0
3	x		x		1	0
4		x	x		2	0
5	x		x		1	0
6		x	x		1	0
7		x	x		1	0
8	x		x		3	1
9	x		x		3	0
10	x		x		3	1
11	x		x		1	0
12	x		x		1	0
13	x		x		1	0
14		x	x		1	0
15	x		x		1	0
16	x		x		1	0
17	x		x		1	0
18	x		x		1	0
19		x	x		2	1
20	x		x		2	0
21	x		x		2	0
22	x		x		1	0
23	x		x		2	1
24	x		x		1	0
25	x		x		2	0
26	x		x		1	0
27	x		x		10	1
28		x	x		1	0
29	x		x		2	0
30	x		x		1	0
31	x		x		1	0
32	x		x		1	0
33	x		x		1	0
34	x		x		1	1
35	x		x		2	0
36	x		x		1	0
37	x		x		1	0

Characteristics of the Children

All of the cases studied included information relative to characteristics of the children including age, sex, and the prehearing educational classification as determined by school personnel. Table 6 analyzes the ages and sex of the children involved in the district-level due process hearings conducted for the sample population.

Table 6

Age and Sex of Children at Time of Due Process Hearing

Age	Frequency	Sex		Total Percentage	Cumulative Percentage
		Male	Female		
5	1		1	1.6	1.6
6	5	4	1	8.1	9.7
7	5	3	2	8.1	17.8
8	3	2	1	4.8	22.6
9	6	3	3	9.7	32.3
10	4	3	1	6.5	38.8
11	9	3	6	14.5	53.3
12	4	2	2	6.5	59.8
13	10	7	3	16.0	75.8
14	3	3		4.8	80.6
15	4	3	1	6.5	87.1
16	6	4	2	9.7	96.8
17	2	2		3.2	100.0
Totals	62	39	23	100.0	100.0

There were more children involved in the sample in the 9-, 11-, 13- and 16-year-old age groups. Of the sixty-two hearings held, thirty-nine cases (62.9 percent) involved boys and twenty-three cases (37.1 percent) involved girls. The prevalence of males over females substantiates other studies depicting sex.[6]

Seventeen mentally handicapped children (27.5 percent) made up the largest group. The second largest group involved children classified as learning disabled. Table 7 shows the educational classifications of the children for whom requests for local education agency due process hearings were initiated and conducted. Eleven (17.7 percent) of the local education agency hearings for the sample population were requested for children classified by school personnel as behaviorally/emotionally handicapped.

Discussion

The information reported and summarized in Table 4 indicates that no significant relationship existed in the number of exceptional children due process hearings initiated and the enrollment of the local education agency. The range was from zero to ten cases initiated during the 1978-84 school years and involving a local education agency. The largest number of hearings initiated was naturally in the local education agency with the largest child count and member enrollment. In total, seventy-two requests for due process hearings have been initiated.

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[6]M. Stephen Lilly, Children with Exceptional Needs: A Survey of Special Education (New York: Holt, Rinehart and Winston, 1979), pp. 61-67.

Table 7

Educational Classifications of Children

in Due Process Hearings

School Classification at the Time of the Request for a Hearing	Frequency	Percentage
Autistic	1	1.6
Academically gifted	9	14.5
Hearing impaired	2	3.2
Mentally handicapped	17	27.5
Multihandicapped	3	4.8
Orthopedically impaired	1	1.6
Pregnant school girls	0	0
Behaviorally/emotionally handicapped	11	17.7
Specific learning disabilities	15	24.2
Speech and language impaired	2	3.3
Visually impaired	1	1.6
Totals	62	100.0

The number of hearings initiated and the number held in local education agencies that had developed an internal procedure to mediate conflicts was impossible to analyze since the exact number of possible hearings averted through prehearing mediation was not available. The respondents did indicate that when informal prehearing mediation was attempted, fewer formal hearings resulted. All of the respondents agreed that informal procedures, where most cases can be resolved, are more beneficial than a due process hearing that becomes formal, adversarial, and expensive. They also indicated that mediation is time consuming and involves a number of school personnel.

In those local education agencies that utilized an informal pre-hearing mediation procedure, the respondents were asked to elaborate in regard to the procedure. Many of the respondents provided this writer with a copy of their procedure. All of the procedures discussed and studied required a conference (mini-hearing) before formal procedures could be initiated. In the comments following Section 121a.506 of P.L. 94-142,[7] the Office of Education discusses mediation as an intervening step prior to a formal hearing that may serve as a useful function in the resolution of differences.

All of the respondents reported that all parents and guardians of handicapped children were informed of their procedural safeguards. Procedures to inform parents and guardians of the rights of handicapped children are mandated by both North Carolina[8] and federal[9] regulations. The modes of communication most frequently used were reported as mailings, newsletters, and a parents' guide published by the North Carolina State Board of Education.[10]

In the analysis of the sixty-two local education agency due process cases heard, 62.9 percent of the children were male and 37.1

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[7]U.S. Department of Health, Education and Welfare, "Education of Handicapped Children," Federal Register (Washington, DC: U.S. Office of Education, 1977), Subpart E, Sec. 121a.506, "Comment."

[8]North Carolina State Board of Education, Rules Governing Programs and Services for Children with Special Needs, Sec. 1507 (b) 3 (Raleigh: North Carolina Department of Public Instruction, 1984), p. 17.

[9]U.S. Department of Health, Education and Welfare, "Education of Handicapped Children," Subpart E.

[10]North Carolina State Board of Education, The Educational Rights of Handicapped Children (Raleigh: Division for Exceptional Children).

percent were female. The greatest frequency occurred for children whose prehearing educational classification, as determined by school personnel, was mentally handicapped (27.5 percent) and for children in the 9-, 11-, 13-, and 16-year-old age groups.

Precipitating Factors

What were the critical issues that generated hearings? Conflict is the critical focus of the major factors leading to a local education agency due process hearing. It is a function of the needs of the child, the extent to which resources are available to deal with those needs, parental objectives, and school system goals. Those conflicts can arise whenever the local educational agency plans to initiate or change or refuses to initiate or change the identification, evaluation, or educational placement of children, or the provision for free appropriate public education.

Table 8 summarizes the precipitators of the various hearings and the frequency.

Table 8

Precipitating Factors Leading to District-Level Due Process Hearings

Precipitating Factor	Frequency	Percentage
Identification	0	0
Evaluation	8	14
Placement	35	56
Free appropriate public education	19	30
Totals	62	100

Characteristics of the Children

There was only one case where there was any disagreement as to the handicapping condition. The majority of the cases dealt with the severity of the handicapping condition and the consequent needs.

Eleven of the hearings held were for children who attended private schools with full-time special education programs. Table 9 shows the prehearing educational placement for those hearings held during the 1978-84 school years involving the sample population.

Table 9

Educational Placement of Children in Due Process Hearings

Prehearing Full-Time Placement	Frequency	Percentage
Public special education (day)	10	16.2
Private special education (day)	11	17.7
Private special education (residential)	8	12.9
Public regular education (related services)	23	37.1
Public regular education	4	6.5
Private regular education (related services)	2	3.2
Private regular education	0	0
Private regular education (residential)	0	0
Homebound	2	3.2
Hospital	2	3.2
Totals	62	100.0

Twenty-three of the twenty-seven children enrolled in regular education at the time of the request for a hearing were receiving a service related to special education. In North Carolina, related services are defined as follows:

> . . . transportation and such developmental, corrective, and other supportive services as are required to assist a child with special needs to benefit from special education, and includes speech pathology and audiology, psychological services, physical and occupational therapy, recreation, early identification and assessment of disabilities in children, counseling services, and medical services for diagnostic or evaluation purposes. The term also includes school health services, social work services in schools, and parent counseling and training.[11]

This continuum of program options may include regular education placement where the child receives his or her basic educational experiences through the standard program which is augmented by one or more related services.

The age and sex of the children involved in the hearings were analyzed. Table 10 is a summary of these factors as they related to the precipitating factors for each hearing.

Although there were more male pupils involved in the local education agency hearings heard for the sample population, it can also be noted that more males were involved in precipitating factors involving evaluation and a free appropriate public education. More males were also involved in issues dealing with placement which had the greatest frequency as a precipitating factor. Females outnumbered males only in the eleven-year-old age group involving placement issues.

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[11]North Carolina, G.S. 115C-108 through 110; 115C-113; eff. October 1, 1978.

Table 10

Precipitating Factors, Age, and Sex of Children at Time of Due Process Hearing

Child's Age	Precipitating Factors: Evaluation Male	Evaluation Female	Placement Male	Placement Female	Free Appropriate Public Education Male	Free Appropriate Public Education Female	Totals
5				1			1
6			1	1	3		5
7			3	1		1	5
8	1		1	1			3
9		2	2	1	1		6
10		1	3				4
11	1	2	2	3		1	9
12	1		1	1		1	4
13			3	2	4	1	10
14	1		1		1		3
15			3	1			4
16	1		3			2	6
17			1		1		2
Totals	5	5	24	12	10	6	62

Table 11 summarizes the prehearing classification of exceptional children for whom hearings were requested and conducted. The exceptional children classification was assigned by school personnel. In only one case was there a disagreement as to the classification. The disagreements overwhelmingly arose over the consequent needs and placement.

Table 11

Precipitating Factors and the Prehearing Educational

Classification of Children in Due Process Hearings

Classification	Precipitating Factors: Identification Male	Identification Female	Evaluation Male	Evaluation Female	Placement Male	Placement Female	Free Appropriate Public Education Male	Free Appropriate Public Education Female	Totals
Autistic	1				1				1
Academically Gifted	4	5					4	5	9
Hearing Impaired	1	1							2
Mentally Handicapped	13	4			5	9	1	2	17
Multihandicapped	2	1			2	1			3
Orthopedically Impaired					1				1
Pregnant School Girls									0
Behaviorally/Emotionally Handicapped	7	4			4	3	2	2	11
Specific Learning Disabilities	12	3	1		6	2	3	3	15
Speech and Language Impaired	1	1				1	1		2
Visually Impaired	1				1				1
Totals	43	19	1		20	16	12	13	62

Special Issues

The frequency of local education due process hearings in relationship to the specific issues for each hearing heard are listed in Table 12.

Table 12

Specific Issues and Precipitating Factors

School Issue	Parent Issue	Participating Factor	Frequency
Self-contained	Private Residential	Placement	2
Physically Handicapped	Homebound	Placement	1
Adequate program	Additional Services	Free Appripriate Public Education	9
Adequate program	More Cued Speech	Free Appropriate Public Education	1
School Placement	Speech Private Placement	Placement	1
Interagency Should Pay	School Should pay	Placement	1
Classify as BEH	Opposed Classification	Evaluation	1
Assigned Special School	Parent Resisted	Placement	1
Group Speech	Individual Speech	Free Appropriate Public Education	2
Self-contained	Regular Class	Placement	5
Adequate Program	Wanted Reimbursement	Free Appropriate Public Education	1
Public Residential	Private Residential	Free Appropriate Public Education	1
Did Not Qualify Exc. Children	Wanted to Classify Exc. Children	Placement	1
Resisted Mucus Suctioning	Wanted Mucus Suctioning	Free Appropriate Public Education	1

Table 12 (continued)

School Issue	Parent Issue	Participating Factor	Frequency
Adjoining Program	Local Special Program	Placement	1
Self-contained at Jr. High	S-Car Special School	Free Appropriate Public Education	1
LEA Program	Self-contained	Placement	1
Self-contained	Reimbursed Private	Placement	1
Special School	LEA	Evaluation	1
Resource Room	Self-contained	Placement	1
LEA	Private School	Free Appropriate Public Education	5
Regular Class	Related Services	Evaluation	3
Approved Program	Special Program	Free Appropriate Public Education	1
Regular	AG	Evaluation	3
LEA	Wanted More	Free Appropriate Public Education	6
Category Label	Non-category Label	Evaluation	2
State School	LEA	Placement	1

Discussion

The information analyzed is highly significant to exceptional children educators. A breakdown analysis of the precipitating factors yielded results which indicated a significant difference among those factors. Consequently, it was concluded that significant differences existed in the precipitating factors leading to due process hearings as they related to the disposition of placements, identification and evaluation of handicaps, and the provisions for free appropriate public education.

The results of the analyses revealed that there was no disagreement as to the existence of a handicapping condition of any child in question. Even in those cases where the parents were requesting regular education services rather than special education services, the school's evaluation and educational classification was questioned only once. The contention arose over the placement where the child could be served.

Seventy-eight percent of the local education agency due process cases heard by a hearing officer involved a dispute over placement and 56.25 percent of those cases involved the parents' requesting a private school placement. Thirty-two placement cases (51.6 percent) related to the appropriateness of programs within the public schools. One placement case involved parents' disagreeing with the school's recommendation for a private school placement. Another case involved parents disagreeing with the school's recommendation for a residential placement. The majority of the remaining cases involved major disagreements over the severity of the handicapping conditions and the consequent needs. The trend of the hearings for the sample population was from parents requesting more specialized and expensive treatment than the public schools considered appropriate.

The results of the analyses also revealed a greater number of male pupils in the 10-, 11-, 13-, 15-, and 16-year-old age groups, classified as behavior disordered, and involving issues related to placement. The results also revealed that at the time of the initial request for a hearing, more children were in full-time special education programs rather than any other placement.

Initiating Factors

Who initiated the hearings? The requirement of an impartial hearing is the central feature of the "Procedural Safeguards" regulation of Public Law 94-142. It is during the hearing that both sides have the opportunity to present evidence and offer witnesses to an impartial adjudicator who will subsequently render a decision. The parents, guardians, child, or the school system may request a hearing on matters pertaining to the school's proposal or refusal to initiate or change the identification, evaluation or placement of the child, or the provision for a free appropriate public education.

Requests for local education agency due process hearings were overwhelmingly initiated by parents. Of the sixty-two hearings conducted, fifty were requested by parents. Table 13 shows the initiators of those hearings that were held.

Although direct information was not often available, the consensus was that parents who were involved in the hearings were overwhelmingly middle- and upper-income whites. It was estimated that less than five percent of the hearings for the sample population involved minority or low-income parents.

Characteristics of the Children

Eight of the children involved in hearings had been in full-time regular education programs at the time the hearing was requested. Twenty-seven had been in full-time special education programs. One child had been receiving temporary homebound services and one had been

Table 13

Initiators of District-Level Due Process Hearings

Initiator	Frequency	Percentage
Parent	50	80.7
School	10	16.1
Other	2	3.2
Totals	62	100.0

temporarily hospitalized because of their handicapping condition. Table 14 presents an analysis of the prehearing full-time educational placement status of the children and the initiators of those hearings that were held during the 1978-84 school years.

All the hearings initiated and held had been requested by the parents or a local education agency. In the fifty-nine hearings initiated by parents, twenty-six of the requests (44.1 percent) were filed and held for children who had full-time special-education assignments prior to any proposal for an educational change regarding a special education program or related service. Seven (12.1 percent) involved cases where the prehearing full-time educational placement was in a regular education program. One case (5.8 percent) involved homebound services and one case (5.8 percent) involved a child who was hospitalized because of his handicapping condition.

Of the three cases initiated by local education agencies, only one was filed and held for a child who had a full-time special

Table 14

Due Process Initiator and Prehearing

Educational Placement

Prehearing Full-Time Placement	Initiators and Frequency		
	Parent	Local Education Agency	Total
Public special education	26	1	27
Public regular education	7	1	8
Public special education (residential)	2		2
Private special education	21	1	22
Private special education (residential)	1		1
Homebound	1		1
Hospital	1		1
Totals	59	3	62

education assignment prior to any proposal for an educational change regarding an exceptional children education program and related services. One case involved a child in regular education programs and one case involved a child who was in regular education.

Discussion

The results of the analysis, as shown in Table 13 revealed that parents had filed 80.7 percent of the hearings held in the educational systems studied during the 1978-84 school years. A breakdown analysis of the factors yielded results regarding the prehearing educational

placement, educational classification, and sex of the children in relation to the initiator of the hearing. Twenty-six of the cases heard involved children who were programmed in a full-time self-contained education placement. Twenty-four of these cases were initiated by parents. Although the remaining thirty-six cases involved children who were programmed in full-time regular education programs, an exceptional children classification had been assigned by school personnel of the local educational agency. The classification was disputed in only one case. Of those thirty-six cases, thirty-five were initiated by parents.

The largest exceptional children category involved children classified by school personnel as mentally handicapped. All of the due process cases initiated by school personnel and heard by a hearing officer involved children classified as mentally handicapped.

Of the sixty-two cases heard, the fifty cases initiated by parents involved thirty-three male pupils and sixteen females. Four male pupils and nine females were involved in the cases initiated by schools.

Decision Factors

1. What were the decisions of the hearing officers?

2. Were the decisions of the hearing officers implemented?

The major concern in a due process hearing is fairness. The hearing officer must clearly be neutral, impartial, and actively involved in the search for the most effective programs appropriate to the child's needs. Procedurally, this requires reconsideration of the evidence

prior to the hearing so that the issues in the case can be understood and the occasion of the district-level hearing can be used to collect additional evidence to clarify particular points being contested.

Information about whether a decision favored the school or the parent was available for all of the hearings studied. The decisions rendered for thirty-six of the hearings (58 percent) favored the school's recommended plan and thirteen of the decisions (21 percent) favored the parents. Ten decisions (16 percent) seemed to favor both the parents and the school. Three decisions (5 percent) seemed to favor neither the parent or the school. Table 15 presents an analysis of the relationship of decisions to the initiator of the hearing.

Table 15

Relationship of Decision to Initiator

	Decisions Favoring				
Initiator	Parent	School	Both Parties	Neither Party	Total
Parent	13	0	5	3	21
School	0	36	5	0	41
Totals	13	36	10	3	62

Of the fifty cases initiated by parents, the decision of the hearing officer sustained the initial recommendation of the school in forty cases. In those cases initiated by school personnel, the hearing officer sustained the school's recommendation in every case but one.

The information summarized in Table 16 is an analysis of the decisions relative to the educational classification of the children involved in the hearings. In that comparison, forty-one of the decisions favoring schools involved seventeen children classified as behavior disordered.

Table 16

Decisions Relative to Classification

School Classification at the Time of the Hearing	Decision Favoring				
	Parent	School	Both Parties	Neither Party	Total
Autistic	1				1
Academically gifted	1	6	1	1	9
Hearing impaired		2			2
Mentally handicapped	2	12	3		17
Multihandicapped	1	2			3
Orthopedically impaired		1			1
Pregnant school girls					0
Behaviorally/emotionally handicapped	1	8	2		11
Specific learning disabilities	5	9	1		15
Speech and language impaired		1	1		2
Visually impaired	1				1
Totals	12	41	8	1	62

Table 17 compares the decisions relative to the full-time educational placement status at the time of the hearing.

Table 17

Decisions Relative to Prehearing Status

Prehearing Full-Time Placement	Decision Favoring				
	Parent	School	Both Parties	Neither Party	Total
Public special education	3	19	4		26
Private special education	6	13	3		22
Private special education (residential)		2			2
Public regular education	2	4	1		7
Public special education (residential)	1	1			2
Public regular school		1			1
Homebound		1			1
Hospital			1		1
Totals	12	41	9		62

Performance of Hearing Officers

The respondents were asked to rate the performance of the hearing officers for those local education agency cases heard and decided during the 1978-84 school years. Table 18 summarizes the analysis of that information which indicates that in most cases school personnel were satisfied with the performance of the hearing officer.

Implementation of Decisions

Valid observations on decision implementation could be made for all of the hearings conducted. The decisions were implemented as specified by the hearing officer in thirty-eight (61.2 percent) of the

Table 18

Performance Rating of the Hearing Officer

Rating	Frequency	Percentage
Exceeded expectations	20	33.0
Met expectations	35	56.0
Did not meet expectations	7	11.0
Totals	62	100.0

cases. A decision could not be implemented in one case because the family involved moved from the local education agency in which the due process action was taken. In six cases, the parents kept their child in a private educational facility at their own expense. In the case of one preschooler, the parents withdrew their child from school rather than follow the recommendation of the hearing officer. In the case of a hospitalized child, the parents enrolled the child in a private educational facility rather than the local education agency program as recommended by the school and sustained by the hearing officer. In two cases, the schools followed the parents' recommendation even though the hearing officers had ruled in favor of the public education agency's recommendation. The remaining cases were appealed.

Table 19

Appeals for a State-Level Review

Appeal Number	Age	Sex	Educational Classification	Prehearing Placement	Hearing Initiated by	Decision in Favor of	Appeal by	Specific Issue
1	13	F	H I	Private Special Education	Parent	L E A	Parent	Placement H I - Private School
2	9	M	S L D	Public Special Education	Parent	L E A	Parent	Tuition Reimbursement/ Change 1-1
3	5	F	M H	Private Special Education	Parent	L E A	Parent	Interagency - Who Should Pay
4	10	F	B E H	Public Special Education	Parent	L E A	Parent	Evaluation - L D v. B E H
5	13	M	S L D	Private Special Education	Parent	Parent	L E A	Tuition - Reimbursement
6	6	M	Multi-handicapped	Public Special Education	Parent	Parent	L E A	Related Service: - Mucus Suctioning
7	16	F	M H	Public	Parent	L E A	Parent	Appropriate Prog.; Parent objected to segregated school

Table 19 (continued)

Appeal Number	Age	Sex	Educational Classification	Prehearing Placement	Hearing Initiated by	Decision in Favor of	Appeal by	Specific Issue
8	10	M	B E H	Public Special Education	Parent	L E A	Parent	LEA wanted hospital; parent wanted private school
9	8	F	M H	Public Special Education	Parent	L E A	Parent	Parent wanted self-contained; LEA wanted private school
10	7	F	S L	Public Special Education	Parent	Both	Parent	Parent wanted more: Speech therapy
11	11	F	S L D	Public Special Education	Parent	Both	Parent	Placement - half day block v. spec. school
12	10	M	Ort. Im	Private Special Education	Parent	L E A	Parent	Tuition for prior year
13	16	M	S L D	Public Special Education	Parent	L E A	Parent	SLD placement with more service
14	11	F	S L D	Private Special Education	Parent	Parent	L E A	Parent wants LEA to pay for private school
15	16	M	S L D	Private Special Education	Parent	Parent	L E A	Parent wants LEA to pay for private school

Table 19 (continued)

Appeal Number	Age	Sex	Educational Classification	Prehearing Placement	Hearing Initiated by	Decision in Favor of	Appeal by	Specific Issue
16	13	M	S L D	Private Special Education	Parent	L E A	Parent	Parent wants LEA to pay private school tuition
17	11	M	S L D	Private Special Education	Parent	L E A	Parent	Parent wants LEA to pay private school tuition
18	9	M	S L	Public Special Education	Parent	L E A	Parent	Parent wants more speech therapy
19	9	F	A G	Public Special Education	Parent	L E A	Parent	Qualified as AG?
20	16	M	M H	Private Special Education	Parent	L E A	Parent	Parent wants LEA to pay for private school tuition
21	16	F	Multi-handicapped	Public Special Education	Parent	L E A	Parent	Parent wants LEA to pay private school tuition
22	13	M	S L D	Public Special Education	Parent	L E A	Parent	Is program appropriate?
23	17	M	M H	Public Special Education	Parent	L E A	Parent	Must TMH program be offered at high school?

Table 19 (continued)

Appeal Number	Age	Sex	Educational Classification	Prehearing Placement	Hearing Initiated by	Decision in Favor of	Appeal by	Specific Issue
24	12	F	B E H	Public Special Education	Parent	L E A	Parent	Is program appropriate?
25	13	M	S L D	Public Special Education	Parent	L E A	Parent	Is program appropriate?
26	7	M	M H	Public Special Education	Parent	L E A	Parent	Parent objects to TMH center placement
27	17	M	M H	Private Special Education	Parent	L E A	Parent	Parent objects to public school placement
28	7	M	V I	Public Special Education	L E A	Parent	L E A	Parent objects to sending child to state residential school
29	14	M	S L D	Private Special Education	Parent	L E A	Parent	Is program appropriate?
30	13	M	H I	Public Special Education	Parent	L E A	Parent	Program placement - parents want cued speech with aid
31	11	F	A B	Public Special Education	Parent	L E A	Parent	Parent objects to intra-district transfer
32	6	M	M H	Public Special Education	Parent	Both	Parent	Related service: speech therapy

Appeals

A decision made in a local education system due process hearing is final unless either party appeals to the State Education Agency.[12] If such an appeal is made, the State Education Agency will conduct an impartial state-level review in the following manner:

1. Examine the district-level hearing record
2. Insure that due process requirements were met
3. See additional evidence, if necessary
4. Afford the opportunity for oral or written arguments, or both, at the State Education Agency's discretion
5. Make an independent decision
6. Provide a written copy of the findings to the parties

Thirty-two decisions (51.6 percent) of hearing officers, out of the sixty-two local education agency due process hearings for the sample population, were appealed during the period studied. Table 19 provides a summary of the basic information on the appeals made to the state superintendent during the period of this study.

The appeals involved thirty-two children in nine categories. The majority of the cases appealed involved an issue concerning placement. Of the thirty-two cases, only five were appealed by a public educational agency. Three of those cases involved the same education agency of exceptional children.

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[12]U.S. Department of Health, Education and Welfare, "Education of Handicapped Children," sec. 121a 510.

Discussion

The results of the information analyzed indicated that there were not significant differences in the decisions of the hearing officers in regard to the local educational system's recommendations to initiate or change or refusal to initiate or change the identification, evaluation, educational placement of children, or the provision for free appropriate public education.

Of the sixty-two cases initiated and heard, the hearing officers sustained the schools' recommendations in forty-eight cases. All but seven of those hearings had been initiated by parents. In the seven hearings initiated by school personnel, the hearing officers supported the school's recommendations in five cases. Eight decisions were rendered in favor of the parents' recommendation, one decision supported neither the school nor the parents, and eight decisions favored both the parents and the school. In these cases, the issue involved related services for children placed in a residential facility by the parents. Both parties agreed to the need for related services, but the school claimed service was available in the local school agency and that they were not responsible for tuition payments to the private residential facility. The hearing officer sustained the school's position in regard to tuition, but recommended that the local education agency pay for the related special education services to be provided at the private facility.

The initial decisions of the hearing officers were implemented in seventeen of the sixty-two cases heard. One case could not be

implemented because the family moved out of state. Six parents chose to continue private special-education placement at their own expense and in contradiction to the recommendations of the hearing officers. When the decision favored the school's recommendation that a preschooler attend a categorical special-education program rather than a noncategorical special-education program, the parents withdrew the child from school. In another case, the parents enrolled their hospitalized child in a private special-education program rather than the local education agency's program. Even though two cases involved decisions by the hearing officers in favor of the local education agency's recommendations, the school personnel eventually sustained the parents' recommended plan.

Thirty-two of the cases were appealed to the State Superintendent of Public Instruction for a state-level review. The appeals represented six of the eight regions. One local education agency had five appeals, another two, and the remaining fifteen local education agencies had one appeal. The trend of the appeals involved issues related to placement and involved a greater number of children classified by school personnel as mentally handicapped. Eighty-five percent of the appealed cases involved children receiving special education or related services. The majority of the issues were related to the quality or quantity of services available through the public educational agencies represented in the study.

All of the respondents were asked to rate the performance of the hearing officer. In sixty-seven percent of the cases, the hearing

officers were evaluated as meeting or exceeding expectations. The decisions of the hearing officers sustained the schools' recommendations in more than seventy-three percent of the cases.

Analysis of Additional Factors

The purpose for conducting the surveys and interviews for this study was to obtain general information regarding internal due process mechanisms and specific information regarding the district-level due process hearings that involved the sample population. In addition, the interview allowed an in-depth discussion related to the time, cost, number of school personnel involved in hearings, and general comments or suggestions regarding district-level due process hearings.

Exact information regarding the time involved in preparing for a hearing, the time involved from the initiation of a hearing and the decision, the cost involved in each hearing, and the number of school personnel involved in a hearing was often not available. Missing information in many cases prevented a complete comparison of when decisions were rendered relative to the exact date of initiation of the hearing, the exact cost, and number of staff and staff time utilized for each hearing.

Hearing Timetables

Of the sixty-two hearings held, no undue delays were reported from the time of the request for the hearing through the decision of the hearing officer. Both federal and state regulations are very clear in specifying how quickly school officials and hearing officers

must move on requests for hearings. A decision must be rendered by the hearing officer ". . . not later than forty-five days after receipt of request for a hearing . . . and a copy of the decision . . . mailed to each of the parties."[13] During that period of time, no change in the pupils' educational assignment can be made.

Personnel Involved

In an analysis of those cases in which the information was available, the public schools were generally represented by six to eight professional staff members. In many of the cases, both parents were present at the hearing. In hearings involving issues related to private school placements, the parents usually brought representatives from the private school. Some of the parents and schools used attorneys. There did not appear to be a trend in the use of an attorney and the appearance of an attorney seemed to have little impact on the results of the hearing.

Time and Cost

Exact information regarding the time involved in hearing preparation and attendance at the hearings as well as the cost was not available for most hearings. Therefore, the information presented is based on the estimates provided by the respondents.

Hearings averaged six to eight hours. Preparation for the hearing involved a greater number of hours. The range reported was from ten hours to one hundred hours. The mode was forty hours.

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[13]Ibid., sec. 121a, 512.

In regard to expenses, exact costs were difficult to compute because of the indirect costs that involved the cost of substitutes, secretarial time, cost of paper incurred in the preparation of written material, and staff time. In addition, some schools incurred attorney's fees. However, the respondents estimated costs that ranged from six hundred dollars to five thousand dollars per hearing. The mode was two thousand dollars.

Respondents' Comments

The comments of the program administrators' units or their designees in regard to implementing due process hearings at the local education agency level were analyzed. Although varied responses were evoked, the following similar problems were noted.

Hearing Officers

The issue of the qualifications and training of hearing officers was reiterated. Many respondents focused on the lack of training and experience regarding educational practices, labels, state and federal regulations, and failure to control the hearing as a natural and orderly education hearing process. Following are some of the specific comments and suggestions: "The State Board of Education should develop some parameters for the hearing officers. At the present time, they are 'God' and do whatever meets their fancy."; "Some hearing officers do not understand the educational system and labels."; and "The state should develop a three-member panel to hear cases at the local education agency rather than one person who often attempts to be infallible."

Adversarial Nature of Hearings

The most basic comments appeared to be that the hearing intensified the antagonism between school personnel and parents. One respondent suggested that a parent advisory council be formed to refer cases for mediation so that school recommendations may not be considered biased and antagonism be intensified. Another program administrator of exceptional children termed the due process hearing mechanism as "the Trojan Horse of Special Education."

Expense and Time

Expenses to the school system including the cost of substitutes, the preparation of written material, staff time, and attorney's fees were emphasized by many respondents. In addition to the expense, the amount of staff time utilized in preparation for the hearing and attendance at the hearing was listed as a problem. Specific problems were noted in the more frequent use of attorneys at the local education agency hearings. This was considered by many respondents as an additional unnecessary cost. One respondent termed local education agency hearings as "often frivolous." He further added that the "State Board of Education is not monitoring the requests for hearings."

Critical Issues

Problems were often encountered in attempts to develop appropriate treatment plans for the children based on parent proposals, public school system proposals, and the task of the hearing officer to determine what evidence was relevant to the issues presented. One respondent summed up this problem as "the hearing ultimately becomes an invitation for dispute."

Summary

With the mandates of Section 504 of the Rehabilitation Act of 1973, Public Law 94-142, and the North Carolina Rules Governing Programs and Services for Children with Special Needs, school personnel, the parents or guardians of handicapped children, or the child have received the opportunity to take formal steps when differences arise regarding the identification, evaluation, educational placement of children, or the provisions for a free appropriate public education for handicapped children.

During the six-year period covered for this study, seventy-eight requests for local education agency due process hearings were filed for the sample population. Six requests were cancelled. Of the remaining seventy-two requests, sixty-two were heard. The other ten requests were the caseload that remained in process at the terminal point of the study. The number of hearings initiated seemed to have no direct relationship to the exceptional children enrollment (head count) or total enrollment of the local education agency. Although mediation seemed to avert formal hearings, no direct information was available to support this factor.

In all of the cases analyzed, there was only one disagreement as to the existence of a handicapping condition of a child in question. Seventy-eight percent of the due process cases heard involved a dispute over placement. Fifteen percent of the cases dealt with provisions for a free appropriate public education, and seven percent involved issues concerning evaluation. No cases dealt with issues regarding

identification. It was concluded that a substantial difference does exist in the precipitating factors leading to a due process hearing.

There was a significant difference in the initiator of the hearings. Parents filed 80.6 percent of the hearings heard at the local education agency level. More than half of the hearings heard (53.7 percent) were for children classified by school personnel as mentally handicapped. Sixty-one percent of the cases heard involved children who had been in full-time special education programs at the time the hearing was initiated and conducted.

Of the sixty-two hearings heard, 54 percent involved males. Ages of the children ranged from three to seventeen, with 76 percent being nine through sixteen years old.

No delays were experienced between the times that requests were filed and the decisions that were rendered by the hearing officers. The hearings held were all reported within the time span established by the federal and state regulations.

There was no significant difference found in the decisions of the hearing officers and the school's initial recommendations. The decisions of the hearing officers favored the school's recommendations in 73.2 percent of the cases heard. The hearing officers' decisions were implemented in 41.5 percent of the cases. Appeals for state-level reviews were filed for 31.7 percent of the decisions rendered by the hearing o-ficers at the local education agency level. The majority of the remaining cases involved parents supporting special education placements in private facilities, at their own expense and in contradiction to the decision of the hearing officer.

The results of the analyses indicated that the mode for the cost incurred by local education agencies involving due process hearings was two thousand dollars per case. The time involved for school personnel to attend hearings averaged six to eight hours per case. The mode reported for the time involved for school preparation for the hearings was forty hours per case.

CHAPTER VI

SUMMARY, CONCLUSIONS, AND RECOMMENDATIONS

The purpose of this study was to determine the impact of the procedural safeguards mandated by Public Law 94-142--Education for All Handicapped Children Act of 1975--at two levels: the local education system, and client pupils and their parents or guardians. Concerns were the conditions required for the assurance of procedural fairness in the areas of identification, evaluation, placement, and the provisions for free appropriate public education, and in the processes associated with dispute resolution. Little attention has been paid to this problem in the past because advocacy groups for the handicapped have been concerned with the extension of procedural safeguards rather than intended benefits as well.

The related literature regarding procedural safeguards was examined to review the history of events, including litigation and legislative actions, that led to mandated federal and state legislation. Finally, the literature revealed that the events influenced by legislation led to the administration of a due process hearing mechanism for public educational systems.

The sample population included the local education systems in the state of North Carolina. The eight regional centers represented 142 local education systems. Local education systems from all eight regions participated in the current study and represented 142 local education systems with a total school population of 1,397,557 pupils.

The North Carolina local education systems studied provided a manageable number which allowed this writer the opportunity to survey and interview the administrator or person most responsible for administering the due process machinery for the local education system. In addition, the local education agencies in the sample provided reasonably comprehensive exceptional-children programs and services.

The major objectives of the study were analyzed to provide answers to the eight research questions established in Chapter I:

Question 1. How many due process cases were initiated and heard in the state of North Carolina from August 1978 to August 1984?

During the period of September 1, 1978 through June 30, 1984, sixty-two exceptional-children local education system due process cases were heard by hearing officers out of the seventy-two initiated in the sample population. The number of hearings initiated suggested a direct relationship to the exceptional children enrollment and total enrollment of the local education system; however, the number of hearings initiated would be an invalid criterion for use in evaluating federal and state implementation of procedural safeguards.

Question 2. Who were the children being referred for due process hearings?

The children most likely to be involved in a due process hearing are those classified as mentally handicapped. Twenty-four percent involved children classified as specific learned-disabled; the remaining cases involved a small sample of children with hearing, speech/language, and multiple impairments.

Fifty-nine percent of the cases heard involved children who had been in full-time regular special-education programs at the time the hearing was initiated and conducted. Fifty-three percent involved males. Sixty-one percent were between ten and sixteen years old.

Parents who were involved in the hearings heard were overwhelmingly middle and upper-income whites. Less than five percent of the hearings involved minority or low-income parents.

Question 3. What were the critical issues that had generated hearings?

The leading cause of due process hearings was the conflicts that arise whenever the local school system plans to initiate or change or refuses to initiate or change the identification, evaluation, educational placement of children, or the provision for free appropriate public education.

In a majority of the cases, there were major disagreements over the severity of the handicapping condition and the consequent needs. Fifty-six percent of the cases heard involved a dispute over placement and more than half of those cases involved the parents' requesting a private school placement.

Appropriateness of programs within the public schools was the issue in thirty percent of the placement cases heard. Issues regarding provisions for free appropriate public education generated fifteen percent of the cases, while fourteen percent involved issues regarding evaluation. However, no cases were initiated that involved issues regarding the identification of handicapped children.

Question 4. Who would most likely initiate a due process hearing?

Parents filed over sixty-four percent of the hearings heard at the local school system level. Of the sixty-two cases heard, school personnel had only initiated four cases. The trend of the requests was from parents requesting more specialized and expensive treatment than the public schools considered appropriate.

Question 5. What were the decisions of the hearing officers?

Although parents had filed the majority of requests for hearings, the decisions of the hearing officers overwhelmingly favored the schools' recommendations. Thirty-seven cases (51.6 percent) were appealed to the North Carolina State Superintendent for a state-level review. Twenty-seven (43.5 percent) were appealed by parents and five cases (6.4 percent) were appealed by school personnel. The trend of the appeals involved issues related to the quality or quantity of services available through the local education agency. Whenever possible, the decision seemed to favor both the school system and the parent. In most cases, school personnel were satisfied with the performance of the hearing officer.

Question 6. Were the decisions made by the hearing officers implemented?

Sixty-one percent of all decisions made by hearing officers were implemented. Of those not implemented, most were the result of parents' opting to continue private education for their child at their own expense. Forty-nine percent of the decisions of hearing officers were appealed to the state department level.

Question 7. What were the time line and expense involved in the hearings?

Information regarding the time involved in hearing preparation and attendance at the hearings as well as the costs is based on the estimates provided by the respondents. Hearings averaged six to eight hours. Preparation for the hearing ranged from ten hours to one hundred hours. The mode was forty hours. Exact costs were difficult to compute because of the indirect costs of substitutes, secretarial time, paper, and staff time. In addition, some schools incurred attorney's fees. However, estimated costs ranged from six hundred dollars to five thousand dollars per hearing. The mode was two thousand dollars.

Question 8. Did the school systems mediate with parents to avert formal due process hearings?

All of the school systems studied informed parents and guardians of their procedural safeguards. However, the exact number of possible hearings averted through prehearing mediation was not available. When informal prehearing mediation was attempted, fewer formal hearings resulted. Even though mediation is time consuming and involves a number of school personnel, informal procedures, where most cases can be resolved, are more beneficial than due process hearings which tend to be formal, adversarial, and expensive.

Conclusions

The major objectives of the study were analyzed to provide answers to the research questions listed in Chapter I. Of the remaining ten cases, six were cancelled and four were pending as of July 1, 1984.

Of the 106 local education agencies participating in the study, the local education agency with the largest number of hearings ranked first in enrollment. Although direct information was not always available, the consensus from the respondents was that prehearing mediation was helpful in averting formal local education agency due process hearings.

A high number of hearings would not necessarily indicate a "problem local education system" nor would a low number of hearings or no hearings in a local education system necessarily indicate a "good local education system." The due process mechanism would be abused if it were not used since it does provide an impartial point of view toward all parties and weighs the evidence to reach a decision or recommendation.

Recommendations

The following recommendations are based on the foregoing conclusions and findings:

1. Schools should promote and encourage parental involvement which may help to open the communication process and resolve problems that could otherwise lead to adversarial and expensive due process hearings.
2. Local education agencies of exceptional children should give greater emphasis to an informal mediation process which could serve to screen out complaints and resolve them at less costly and perhaps less adversarial level. All of the respondents in this study who utilized a prehearing mediation procedure emphasized its value in seemingly averting formal

hearings. Based on their remarks, the North Carolina State Board of Education should consider the potential value of prehearing mediation and its possible inclusion in the North Carolina regulations as a required procedure prior to any request for a local education agency due process hearing.

A possible approach to prehearing mediation is the formulation of a review panel, which could be responsible for screening requests, reviewing the case material, suggesting alternative strategies and possible solutions for alleviating the conflict, and facilitating appropriate educational programming.

3. Each local education agency of exceptional children should conduct a needs assessment of the programs and services offered in each of their regions to determine whether they meet the specifications of appropriateness of education for individual handicapped children. This assessment is relevant to the issue of "appropriate services" versus "optimal services" and the need to meet federal and state mandates of providing free appropriate public education, at no cost to parents, for all handicapped children.
4. Local education agencies of exceptional children should attempt to anticipate the number of possible requests for hearings from parents based on the tone and agenda of parent groups, appropriateness and quantity of local programs and services, and the number of children programmed in private

facilities that could appropriately return to public school programs. The assessment is relevant to early and ongoing communication with parents and staff in regard to the individual needs of handicapped children and the spirit and intent of federal and state legislation and their regulations.

5. Qualifications for hearing officers--including training, education, and experience--should be defined and developed. Hearing officers must be able to develop impartial and fair decisions or agreements that will result in appropriate and effective educational plans for handicapped children. The responsibility rests with building the most complete set of facts possible to meet the hearing officers' obligation to the children. Procedurally, this requires reconsideration of the evidence prior to the hearing or mediation so that the issues can be understood, and the occasion of the hearing can be used to collect additional information to clarify particular points being contested. The hearing officer must be impartial but favorable to the child's needs so that appropriate programs and services can be recommended.
6. The current North Carolina practice of selecting names from a list of prospective trained hearing officers to choose one that is acceptable to the local education agency involved in a hearing appears to be working well and should be continued.
7. Due to the high cost of due process hearings, local education agencies should develop their annual budgets so that they reflect the cost of potential hearings.

Recommendations for Further Research

The following areas of concern were beyond the scope of this study but could be explored by other researchers.

1. Replicate the study with other states to determine whether the results are consistent. Such studies would provide a basis for comparison as well as identify probable sources of differences, thus leading to the identification of other potentially powerful variables which may influence the procedures that seek to determine whether, and under what circumstances, the use of a local education agency due process hearing may be exercised with their intended effects.
2. There is a need for a continued after-the-fact survey of parents to determine whether local education agency due process hearings were conducted to their satisfaction and if they have a better understanding of and appreciation for their child's educational program. In addition, parents could be surveyed as to the time and expense they incurred in the hearing and their perception of the issue that precipitated the due process hearing.
3. An analysis of who is served in the local education agency under P.L. 94-142 should be made to address questions such as (a) Are the clients protected by the mandates of the Act? (b) What is the percentage of children who come through at least some part of the exceptional children education system? (c) What proportion are minority group children? (d) How many

come from non-English-speaking families? (e) How many come from low-income families? (f) How many severely or multiple handicapped children are potentially underserved? and (g) Within each of the subgroups, what is the rate of due process hearings initiated?

Finally, the results of the present study sould be shared with professionals, parents, and advocates of educational opportunities for handicapped children as the findings may enable each constituency to understand the complexities involved in realizing the intended benefits which transcend the mere mandating of due process procedural safeguards for handicapped children. With this information, all who are interested in the education of handicapped children are encouraged to work together to achieve their common goals.

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APPENDIX A

LETTER OF INTRODUCTION

Route 1, Box 70-A
Olin, NC 28660
May 11, 1985

Dear

The economic costs involved for school districts to conduct exceptional children local education agency due process hearings are considerable, while the time required for school personnel to present evidence and provide documentation can be disruptive to educational programs. As a Ed.D. candidate in educational administration at the University of North Carolina at Greensboro, I am currently developing a study which will examine the cost, length of time, and issues so that implementation strategies and effective procedures to expedite hearings may be established.

Your participation, or the participation of the appropriate person designated to represent your administrative unit in due process local education agency hearings, will be sought in the form of a twenty-five to thirty minute interview. The interview questions are constructed to provide you with the opportunity to elaborate as described. A copy of the questions is enclosed.

When the study is completed, I will be happy to send you a local education agency due process hearing procedure that will be designed to reflect the North Carolina regulations, Sections 504, and Public Law 94-142. Finally, let me assure you that neither your name, the name of the school districts that you represent, nor any direct identification will appear in the study.

I shall call your secretary in a few days to arrange a convenient time for the interview with you or your designee. Your cooperation in this regard will be greatly appreciated.

Sincerely,

Kenneth A. Wilson

APPENDIX B

INTERVIEW QUESTIONS

NORTH CAROLINA
DUE PROCESS HEARINGS
1978-84 SCHOOL YEARS

Local Education Agency of Exceptional Children:

_____

Person Interviewed: _____ _____
Name Title

Exceptional Children Child Count: _____

Total Local Education Agency Enrollment: _____

PART I

1. During the period 1978-84 school years, was your Local Education Agency of Exceptional Children involved in a due process special education hearing?

   Yes _____
   Number of hearings initiated: _____
   Number of hearings still in process: _____
   Number of hearings cancelled: _____
   Number of hearings decided: _____

   No _____
   What do you think is the reason that your Local Education Agency of Exceptional Children has not been involved in a due process hearing?

   _____

   _____

   _____

2. Do you have an internal procedure to follow in regard to a Local Education Agency hearing?

   Yes _____, Describe: _____

   No _____, Describe: _____

   If yes, what is the length of time the Local Education Agency has been implementing a due process procedure?

   _____

3. Do you have an internal mode of information to inform the parent of their due process rights?

   Yes _____
   Newsletter _____
   Mailing _____
   Handbook _____
   Other _____ Describe _____
   _____

   No _____

PART II

Complete the following for each individual Local Education Agency due process hearings:

1. If your Local Education Agency has been involved in due process Exceptional Children hearings at the local level during the 1978-84 period, briefly describe the issue.

   Identification: _____
   _____
   _____

   Evaluation: _____
   _____
   _____

   Placement: _____
   _____
   _____

   Free Appropriate Public Education: _____
   _____
   _____

2. Who initiated the hearing?

   School District _____

   Parent _____

   Other, describe: _____

3. What was the age, sex, and Exceptional Child Classification of the child?

   Age _____

   Sex _____

   Exceptional Child Classification: _____

Exceptional Children (Private): _____

_____

_____

Regular Education: _____

_____

_____

Other: _____

_____

_____

9. Did you personally know the hearing officer prior to selection?

_____

10. How did you make your selection? _____

_____

_____

11. Did you seek assistance from the State Exceptional Childrens' Office? _____

12. Was the decision of the hearing officer implemented?

Yes _____

No _____, Describe: _____

Appeal _____

13. What socioeconomic class would you place the family (guardian) of the child involved in the hearing?

Low Income _____

Middle Income _____

High Income _____

14. What was the time from the initial request for a district-level due process hearing through the decision of the impartial hearing officer at the local education agency?

Hours: _____

Days: _____

Weeks: _____

Months: _____

15. What was the local education agency direct cost for the hearing?

_____

_____

16. Estimate the indirect local education agency cost for the hearing (cost of staff time already employed, supplies, etc.).

_____

_____

17. Estimate the staff time utilized in preparation for the hearing.

_____

_____

18. Rate the performance of the hearing officer.

Above expectations _____

Met expectations _____

Did not meet expectations _____

19. Did you feel that the local education agency personnel had the competencies to prepare for a due process hearing?

_____

20. General comments or suggestions regarding local education agency due process hearings:

_____

_____

_____

APPENDIX C

DUE PROCESS TIMELINE

DUE PROCESS TIMELINE

NORTH CAROLINA DISTRICT-LEVEL DUE PROCESS HEARINGS

Local District	N.C. State Board of Education	Local District	Hearing Officer	Hearing Officer	School District Parent/Guardian
5 School Days	5 Calendar Days	5 Calendar Days	15 Calendar Days	10 Calendar Days	15 Calendar Days
Hearing Requested	Request for Hearing Officer	List of Hearing Officers	Selection of Hearing Officer	Hearing Scheduled	Decision / Request for Appeal
(a) The district shall send a certified letter to the N.C. State Board of Education, with a copy to the person requesting the hearing requesting the appointment of an impartial hearing officer. (b) If the district decides not to honor the request for a hearing, the parents or guardian of the student shall be notified in writing within five (5) calendar days.	After the N.C. State Board of Education receives the request from the local district, it shall provide a list of five (5) prospective trained impartial hearing officers.	The local district shall notify the N.C. State Board of Education, in writing, of the name of the person jointly selected by the district and the parent/guardian to be appointed as the hearing officer.	Within Five (5) calendar days of appointment, the hearing officer shall schedule the time and place of the hearing which shall be scheduled not later than fifteen (15) calendar days after the appointment of the hearing officer.	After the conclusion of the hearing, the hearing officer shall render the decision, by certified mail, to the district, the parent/guardian, the N.C. State Board of Education and upon request, to the attorney, if any, for both parties.	Either party aggrieved by the decision of the hearing officer may appeal that decision, in writing, to the N.C. State Board of Education with a copy of the written request to the other party in the hearing.