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David E. Schoenfeld
Washington University School of Law

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RESOLVING PLACEMENT AND FINANCING DISPUTES UNDER THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT OF 1975

The Education for All Handicapped Children Act (EAHCA)\(^1\) provides state and local school boards with federal financial assistance in educating handicapped children.\(^2\) EAHCA's primary goal is to ensure that every handicapped child\(^3\) receives a "free appropriate public education."\(^4\) The statute contemplates that in most situations an "appropriate" educational setting is a daytime, classroom program where handicapped and nonhandicapped children learn together.\(^5\) When a classroom placement is inappropriate for a particular child,\(^6\) EAHCA obligates a participating state\(^7\) to provide the child with a free "appropriate-


The term "free appropriate public education" mean special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

Id. See infra notes 23-25 and accompanying text (discussing statutory definitions and judicial interpretations of "special education" and "related services").

5. 20 U.S.C. § 1412(5)(B). The statutory requirement that school officials ensure that, to the maximum extent possible, handicapped and nonhandicapped children attend classes together is commonly known as the "least restrictive environment" or "mainstreaming" provision. See infra notes 33-34 and accompanying text (discussing statutory preference for "mainstreaming").

6. See infra notes 61-62 and accompanying text (discussing the appropriateness of residential and nonresidential placement alternatives).

7. Only New Mexico has elected not to participate in the EAHCA program. See New Mexico Ass'n for Retarded Citizens v. New Mexico, 678 F.2d 847, 853 (10th Cir. 1982). The Tenth Circuit noted that New Mexico's failure to accommodate handicapped students may nevertheless constitute unlawful discrimination under § 504 of the Rehabilitation Act of 1973. Id. See infra notes 56 & 58 and accompanying text (discussing § 504).
“residential placement” education in a residential setting. Disputes frequently arise between parents and school officials over financing the high costs of residential education. EAHCA provides a series of procedural safeguards for resolving placement and financing disputes. This Note focuses on federal court review of state administrative decisions regarding placement of handicapped children in residential educational facilities. Part I summarizes the substantive and procedural rights of handicapped children under EAHCA. Part II discusses the availability of publicly funded residential placements and related services. Part III examines financing disputes that accompany interim and final placement decisions. This Note concludes that conventional methods of resolving placement and financing disputes are inconsistent with EAHCA’s substantive guarantees and that the equitable approach of Doe v. Brookline School Committee is better-suited to balance the substantial interests of school officials, parents, and children.

I. EAHCA

Two federal court decisions predating EAHCA’s enactment established that handicapped children have a substantive constitutional right to public education. These decisions, however, neither defined the obligation of school officials to provide handicapped children with public ed-

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8. The term “residential placement” means placement in a publicly or privately operated educational facility that provides handicapped children with 24 hour care. See 34 C.F.R. § 300.302 (1984).
10. In 1985 the cost of maintaining an emotionally disturbed child at the Edgewood Children’s Center in Webster Groves, Missouri, was $86.95 per day for a residential program that included special education.
12. See infra notes 18-60 and accompanying text.
13. See infra notes 61-68 and accompanying text.
14. See infra notes 69-111 and accompanying text.
15. See infra notes 112-18 and accompanying text.
16. 722 F.2d 910 (1st Cir. 1983).
17. See infra notes 119-30 and accompanying text.
ucation nor provided procedures to protect this right to a public education. Congress enacted EAHCA in 1975 to remedy these deficiencies.

A. Substantive Provisions

EAHCA provides local school boards with funding for the education of handicapped children. The statute's fundamental substantive requirement is that states provide each handicapped child with a "free ap-

The Supreme Court's decision in San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973), further limited the constitutional impact of PARC and Mills. In Rodriguez, the Court rejected the argument that the right to a public education is a fundamental interest. Id. at 36; see Comment, supra, at 575-76. Thus, a state seeking to exclude handicapped children from public schools may defeat an equal protection challenge simply by establishing a rational basis for the exclusion.

In Fialkowski v. Sharp, 405 F. Supp. 946 (E.D. Pa. 1975), the state of Pennsylvania argued that on the basis of Rodriguez it could permissibly exclude mentally retarded children from its public schools. The court rejected this narrow interpretation of Rodriguez, holding that there exists a constitutional right to a certain minimum level of education. Id. at 958.

The court in Fialkowski addressed the interaction of two distinct issues: the right of handicapped children to a public education, and the right of mentally retarded children to equal protection of the law. With respect to the latter problem, the court suggested in dictum that retarded children may be a suspect class and that courts must "strictly scrutinize" laws that treat them unequally. Id. at 958-95 (dictum). The court further suggested that there may not be a rational basis for providing education to most children while denying retarded children beneficial instruction. Id. at 959 (dictum).


19. Comment, supra note 18, at 577-78. The court in PARC ignored the issue of financing altogether. The Mills court found that a lack of sufficient funds did not relieve the school district of its constitutional obligation. The court ruled that "[t]he inadequacies of the District of Columbia 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 the normal child," Mills v. Board of Educ., 348 F. Supp. at 876.

20. See SENATE REPORT, supra note 2, at 1431-33 (observing that lack of financial resources had prevented states from complying with court decisions recognizing rights of handicapped children to an appropriate education and concluding that federal assistance is necessary).

21. EAHCA's principal funding section is 20 U.S.C. § 1411(a)(1) (1982). This section provides annual payments to each participating state equal to 40% of the national average per pupil public school expenditures for each handicapped child receiving special education and related services in the state. Id. § 1411(a)(1)(B)(v). The statute also authorizes grants to states for such purposes as training teachers and research projects. See, e.g., id. §§ 1432-36, 1441-44.
propriate public education,” meaning “special education and related services.” “Special education” is instruction designed “to meet the unique needs of the handicapped child.” “Related services” are services “required to assist a handicapped child to benefit from special education.”

The Supreme Court narrowly interpreted the requirement of a “free appropriate public education” in *Board of Education v. Rowley.* The Court examined the legislative history of EAHCA and concluded that Congress merely intended states to provide handicapped children with meaningful access to public education and did not intend to assure any particular level of education. The Court therefore held that EAHCA requires only that a participating state provide personalized instruction and related support services. Lower federal courts have determined that these services include necessary medical services that may be performed by school nurses. Some courts have also held that school dis-

22. *Id.* § 1412(1); *see supra* note 4 (defining “free appropriate public education”).
23. 20 U.S.C. § 1401(18) (1982); *see supra* note 4 (quoting § 1401(18)).
24. 20 U.S.C. § 1401(16) (1982). “The term 'special education' means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.” *Id.*
25. *Id.* § 1401(17).

The term “related services” means 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.

27. *Id.* at 192 (citing *Senate Report,* *supra* note 2, at 11).
28. *Id.* at 203. In particular, the *Rowley* Court concluded that EAHCA did not obligate the state of New York to provide a sign language interpreter to assist a deaf child who had progressed easily from grade to grade, but was not learning as much as she would with the interpreter’s assistance. *Id.* at 185-86. The Court limited its holding to the facts of the case and found Amy Rowley's academic progress, considered in light of the special services and “professional consideration” afforded by the school administrators, to be dispositive. *Id.* at 203 n.25. For thorough discussions of *Rowley,* see, e.g., Zirkel, *Building an Appropriate Education from Board of Education v. Rowley: Razing the Door and Raising the Floor,* 42 Md. L. REV. 466 (1983); Comment, Board of Education v. Rowley: *Handicapped Children are Entitled to a Beneficial Education,* 69 IOWA L. REV. 279 (1983).
29. *See Tatro v. Texas,* 625 F.2d 557 (5th Cir. 1980), *aff'd sub nom.* Irving Indep. School Dist. v. Tatro, 104 S. Ct. 3371 (1984). In *Tatro,* the parents of a four-year-old girl suffering from myelomingocele, a birth defect commonly known as spina bifida, sought administration by school personnel of a procedure known as Clean Intermittent Catheterization (CIC). CIC is a simple pro-

tricts must extend the duration of instruction for handicapped children beyond 180 days if a normal school calendar would prevent the proper formulation of educational goals for handicapped children.

If a handicap is so severe that the child can benefit only from an educational program offered in a residential environment, EAHCA obligates the state and the local school district to provide the program at no cost to the child’s parents or guardians. EAHCA discourages residential placement by establishing a rebuttable presumption that handicapped children can benefit from classroom education. This presumption may

cedure for manually draining the bladder and requires only 30 minutes of training. Id. at 558-59 & n.3. The court held that CIC is a “related service” under EAHCA. Id. at 563-64.

The court established the following criteria for determining whether medical services qualify as “related services” that must be performed by public schools: (1) the child must be handicapped and require special education; (2) the service must be one that has to be performed during school hours in order for the child to benefit from special education; and (3) the service must be one that a school nurse or other similarly qualified person can perform. Id. at 562-63 (citing 45 C.F.R. § 121a.13(b)(4), (10) (1979)). The regulations cited by the Tatro court are now codified at 34 C.F.R. § 300.13(b)(4), (10) (1984); see also Tokarcik v. Forest Hills School Dist., 665 F.2d 443 (3d Cir. 1981) (following Tatro). Both Tokarcik and Tatro addressed the availability of free educational services in the context of classroom settings. For a discussion of related services in residential programs, see infra notes 64-68 and accompanying text.

30. The formulation of educational goals is a part of the Individualized Educational Program (IEP) process. See infra notes 36-39 and accompanying text (discussing the cooperative IEP process).


be rebutted by demonstrating that classroom education is not appropriate for the particular child. A court or state agency determination that a residential placement is the only appropriate program for a child, however, is conclusive evidence that the placement is the "least restrictive environment."  

Individualized education of handicapped children is one of EAHCA's principal goals. The child's individualized education program (IEP) implements this goal. As envisioned by Congress, the IEP is more than a document describing a final program; it is the culmination of a series of negotiations between the child's parents and the school district. The parties to IEP negotiations set annual goals for the handicapped child and establish a program for attaining those goals.

B. Procedural Provisions

EAHCA provides specific procedures for resolving disputes between


The statutory preference for mainstreaming has several bases: constitutional arguments, educational policy arguments, and economic arguments. The due process and equal protection clauses of the fourteenth amendment limit the power of a state or local government to act "in any way that curtails a citizen's liberty any more than necessary to accomplish its purposes." Who Really Wants It?, supra, at 164; see A Policy Analysis, supra, at 505-08. Mainstreaming arguably enhances a handicapped child's educational experience. See Who Really Wants It?, supra, at 169; A Policy Analysis, supra, at 522-25; Comment, The Least Restrictive Environment Section of the Education for All Handicapped Children Act of 1975: A Legislative History and Analysis, 13 GONZ. L. REV. 717, 758-59 (1978). In addition, mainstreaming is less expensive than residential placement. Id. at 759-60.

34. Who Really Wants It?, supra note 33, at 173; see also Hessler v. Maryland Bd. of Educ., 700 F.2d 134 (4th Cir. 1983) (holding that parents challenging the placement of their child in a public school must demonstrate that the challenged placement is inappropriate within the terms of EAHCA). An educational placement, however, is not inappropriate simply because another placement would be more appropriate. Id. at 139; see infra notes 61-62 and accompanying text (discussing the appropriateness of residential and nonresidential placement alternatives).


37. Note, supra note 36, at 96.


39. Note, supra note 36, at 97. The Department of Education described the cooperative IEP process as follows:

There are two main parts of the IEP requirement, as described in the Act and regulations: (1) the IEP meeting(s), at which parents and school personnel jointly make decisions about a handicapped child's educational program, and (2) the IEP document itself, which is a written record of the decisions reached at the meeting.

Id. at 96 n.112 (quoting 46 Fed. Reg. 5460, 5462 (1981)).
parents and school officials over the proper placement and program for
the child.\textsuperscript{40} The school district must notify parents in advance of any
decision affecting the child's education,\textsuperscript{41} and it must provide the parents
with an opportunity to object to that decision.\textsuperscript{42} EAHCA entitles ob-
jecting parents to a hearing conducted by the school district.\textsuperscript{43} Either
party may appeal an unsatisfactory decision to the state educational
agency,\textsuperscript{44} which must render a final decision within thirty days of the
date of appeal.\textsuperscript{45}

EAHCA explicitly provides for judicial review by a state or federal
court.\textsuperscript{46} Generally, an "aggrieved" party must exhaust all available state
administrative remedies before seeking review by a federal district
court.\textsuperscript{47} Courts do not strictly require exhaustion of remedies, however,
and frequently waive the requirement if an administrative challenge ap-
ppears futile.\textsuperscript{48}

Appeals from a state agency decision to a state court typically must
comply with a thirty-day statute of limitations.\textsuperscript{49} Most federal courts

\textsuperscript{40} See 20 U.S.C. \S 1415 (1982) (codifying the procedural due process rights of handicapped
children); \textit{infra} notes 41-55 and accompanying text.
\textsuperscript{41} 20 U.S.C. \S 1415(b)(1)(C) (1982).
\textsuperscript{42} Id. \S 1415(b)(1)(E); 34 C.F.R. \S 300.504-.505 (1984).
\textsuperscript{44} 34 C.F.R. \S 300.512(b) (1984).
\textsuperscript{45} 20 U.S.C. \S 1415(c) (1982); 34 C.F.R. \S 300.509-.510 (1984); see also John A. v. Gill, 565
F. Supp. 372, 380 (N.D. Ill. 1983) (30-day deadline protects the handicapped child's right to a "free
appropriate public education" by limiting the time the child must remain in an allegedly inappropri-
ate placement). The 30-day statute of limitations, however, does not affect the period for appealing
final agency decisions to federal courts. See \textit{infra} note 49-51 and accompanying text.
\textsuperscript{47} \textit{E.g.}, Smrcka v. Ambach, 555 F. Supp. 1227, 1234 (E.D.N.Y. 1983); see generally Hyatt,
\textit{Litigating the Rights of Handicapped Children to an Appropriate Education: Procedures and Remedy-
ies}. 29 UCLA L. REV. 1, 30-35 (1981) (discussing exhaustion of administrative remedies doctrine
under EAHCA).
\textsuperscript{48} 121 CONG. REC. 37,416 (1975) (statement of Sen. Williams) (courts should not require
exhaustion if futile either as a legal or practical matter); see Christopher T. v. San Francisco United
School Dist., 553 F. Supp. 1107, 1115-16 (N.D. Cal. 1982) (court did not require exhaustion when
facts revealed a consistent refusal by the local school district to comply with provisions of EAHCA);
see also Monahan v. Nebraska, 645 F.2d 592, 597 (8th Cir. 1981) (court did not require exhaustion
when administrative remedies available could not provide plaintiffs with an adequate means for re-
dressing their grievances); \textit{cf.} Riley v. Ambach, 668 F.2d 635, 641 (2d Cir. 1981) (court required
exhaustion when possibility existed that additional administrative proceedings would not prove fu-
tile). \textit{But see} Ezratty v. Commonwealth of Puerto Rico, 648 F.2d 770, 774-75 (1st Cir. 1981) (case
remanded to agency despite futility of additional administrative proceedings).
\textsuperscript{49} See, e.g., \textit{TEX. REV. CIV. STAT. ANN.} art. 6252-13a (Vernon Supp. 1982-83) (Administrative
Procedure and Texas Register Act). EAHCA does not address the timing of appeals of local
agency decisions to state or federal courts.
hold that such a restrictive statute of limitations is inconsistent with EAHCA’s policy of encouraging parental involvement in planning the child’s educational program and instead apply the state statute of limitations governing claims of negligent or wrongful acts.

Federal court review of state administrative decisions must examine both the extent of the state’s compliance with EAHCA’s procedural requirements and the substance of the IEP. EAHCA provides a reviewing court with broad remedial powers to fashion an appropriate educational program for the child if the IEP fails to satisfy EAHCA’s minimum procedural requirements. If the IEP meets these requirements, a reviewing court will not judge the desirability of the program.

Parents asserting the rights of their handicapped children to a beneficial, publicly funded education may also file suit under section 504 of the Rehabilitation Act of 1973 and section 1983 of the Civil Rights Act of 1871. Section 504 prohibits discrimination against any “otherwise...


52. Board of Educ. v. Rowley, 458 U.S. 176, 206 (1982). The Supreme Court established a two-part test for courts to employ in resolving suits brought under EAHCA. First, the state must have complied with the procedures set forth in the Act. Second, the negotiated IEP must have been reasonably calculated to enable the child to receive educational benefits. Id. at 206-07.

53. 20 U.S.C. § 1415(o)(2) (1982); see Hyatt, supra note 47, at 9. Specifically, section 1415(o)(2) permits a reviewing court to “grant such relief as it determines is appropriate” after reviewing the record of the agency proceedings and hearing “additional evidence at the request of a party.” 20 U.S.C. § 1415(o)(2) (1982).


55. Id.; see Roncker v. Walter, 700 F.2d 1058, 1062 (6th Cir. 1983).


No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title 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 . . . .


Every person who, under color of any statute, ordinance, regulation, custom, or usage of
qualified handicapped individual" in the administration of "any program or activity receiving federal financial assistance."\textsuperscript{58} Section 1983 protects the due process and equal protection rights of the handicapped child and provides a remedy for any deprivation of rights, privileges, and immunities under federal law.\textsuperscript{59} EAHCA's specificity in guaranteeing both the substantive and procedural rights of handicapped children in educational matters, however, gives it primary importance in this area.\textsuperscript{60}

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\textsuperscript{58} any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States . . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.


A person seeking to recover monetary damages in a private action may, with varying success, use either § 504 or § 1983. See Hyatt, supra note 47, at 51-61.


For cases recognizing that private damages under § 504 are consistent with the purpose of EAHCA and are therefore not foreclosed by the existence of a remedy under EAHCA, see Meiner v. Missouri, 673 F.2d 969 (8th Cir.), cert. denied, 459 U.S. 909 (1982); Christopher N. v. McDaniel, 569 F. Supp. 291 (N.D. Ga. 1983); Patsel v. District of Columbia Bd. of Educ., 530 F. Supp. 660 (D.D.C. 1982); see also Recent Case, Damages are Available under Section 504 of the Rehabilitation Act as a Necessary Remedy for Discrimination Against an Otherwise Qualified Handicapped Individual; Damages are not "Appropriate Relief." However, Under the Education for All Handicapped Children Act: Meiner v. Missouri, 51 U. Cin. L. Rev. 697 (1982). But see Darlene L. v. Illinois State Bd. of Educ., 568 F. Supp. 1340 (N.D. Ill. 1983) (no § 504 remedy available where defendants have not violated EAHCA); Manecke v. School Bd. of Pinellas County, Florida, 553 F. Supp. 787 (M.D. Fla. 1982) (no § 504 remedy available because there is relief available under 45 C.F.R. § 80.3 (1982) in the form of termination of funding to institutions guilty of discrimination).


 Plaintiffs have traditionally fared very poorly under § 1983 in obtaining monetary damages in educational placement disputes. Courts have generally refused to recognize § 1983 actions seeking enforcement of EAHCA's provisions, holding that EAHCA's more comprehensive scheme indicates a congressional intent to preclude enforcement suits brought under § 1983. Rollison v. Biggs, 567 F. Supp. 964, 970 (D. Del. 1983); see Sockin v. Texas, 723 F.2d 432, 440-41 (5th Cir. 1984); Anderson v. Thompson, 658 F.2d 1205, 1217 (7th Cir. 1981). The court in Christopher N. v. McDaniel, 569 F. Supp. 291 (N.D. Ga. 1983), however, suggested that it would have awarded monetary relief if the plaintiff had established a § 1983 cause of action. Id. at 298; see also Hyatt, supra note 47, at 24-29 (§ 1983 contemplates a cause of action for deprivation of rights, privileges and immunities secured by federal "laws" such as EAHCA); cf. Maine v. Thiboutot, 448 U.S. 1 (1980) (permitting petitioner who challenged state AFDC benefits decision under § 1983 to recover attorney's fees under 42 U.S.C. § 1988). For a discussion of the availability of attorney's fees under § 1983 and § 504, see infra note 60.

\textsuperscript{60} Rollison v. Biggs, 567 F. Supp. 964, 970 (D. Del. 1983). The Rollison court denied the plaintiff's request for attorney's fees under § 505(b) of the Rehabilitation Act, 29 U.S.C. § 794(a)(2) (1982), noting that the relief sought by the plaintiffs under § 504 was available under EAHCA. 567 F. Supp. at 970; accord Smith v. Robinson, 104 S. Ct. 3457 (1984) (Rehabilitation Act attorney's fees provision inapplicable if remedy is available under EAHCA). With respect to the plaintiffs' § 1983 claim, the court agreed with the plaintiffs that EAHCA, as a law of the United States, comes within

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II. The Handicapped Child's Substantive Right to a Residential Educational Placement

A school district must finance a residential educational placement for a handicapped child upon a showing by the child's parents that such a placement is the only "appropriate" placement. The court will not consider residential alternatives if a nonresidential educational placement satisfies EAHCA's guarantee of a "free appropriate public education." A demonstration that a handicapped child cannot benefit from a nonresidential education does not obligate the school district to pay all the costs of a residential placement. EAHCA requires only that the school district pay for "special education" and "related services." Furthermore, the school district may refuse to pay for the residential placement


Parties to § 504 and § 1983 actions have on occasion persuaded courts to award attorney's fees, which are not generally available under EAHCA. Rollison v. Biggs, 567 F. Supp. 964, 967-68 (D. Del. 1983); see Hyatt, supra note 47, at 61-64. For cases awarding attorney's fees in § 504 actions, see Rollison v. Biggs, 567 F. Supp. at 968-69 (party may recover attorney's fees only when the § 504 claim is more than a mere restatement of the EAHCA claim); Patsel v. District of Columbia Bd. of Educ., 530 F. Supp. 660, 666 (D.D.C. 1982). But see Department of Educ. v. Katherine D., 727 F.2d 809, 820-21 (9th Cir. 1983); Hines v. Pitt County Bd. of Educ., 497 F. Supp. 403, 409 (E.D.N.C. 1980). Parties to § 1983 actions have been less successful in recovering attorney's fees. For cases denying attorney's fees for § 1983 actions, see Department of Educ. v. Katherine D., 727 F.2d at 819-20; Rollison v. Biggs, 567 F. Supp. at 970-72. But see Monahan v. Nebraska, 687 F.2d 1164 (8th Cir. 1982), cert. denied, 460 U.S. 1012 (1983).

61. Hessler v. Maryland Bd. of Educ., 700 F.2d 134, 139 (4th Cir. 1983); see supra note 33 and accompanying text (discussing EAHCA's rebuttable presumption that mainstreaming is "appropriate"). The Supreme Court emphasized this point in Board of Educ. v. Rowley, 458 U.S. 179 (1982), holding that EAHCA only guarantees a handicapped child a beneficial education, not an optimal educational program. Id. at 201; see supra notes 26-28 and accompanying text. Accordingly, a court will order a residential placement only when the child cannot benefit from any other educational program.

Department of Education regulations contemplate the availability of alternative educational placements ranging from regular classes to instruction in hospitals and institutions. 34 C.F.R. § 300.551 (1984); see also 34 C.F.R. § 300.14 (1984) (describing alternative placements).


64. 20 U.S.C. § 1401(18) (1982); see supra notes 23 & 25 and accompanying text (quoting statutory definition).
altogether if services that do not qualify for funding constitute the principal reason for the child's placement. 65

Disputes over whether a particular residential program satisfies EAHCA's requirement of an "appropriate public education" generally focus upon the program's related services. Many related services necessitating a residential program are noneducational. 66 Some courts recognize that therapeutic services addressing the child's medical, social, and emotional needs are critical components of the learning process and thus are not severable from educational services. 67 The severability of noneducational and educational services depends upon whether the particular placement is the product of educational necessity or medical, social, or emotional problems that are not related to the learning process. 68

65. See McKenzie v. Jefferson, 566 F. Supp. 404 (D.D.C. 1983). The court in McKenzie addressed the question whether a school district had to fund a residential facility placement for a child who had suffered a mental breakdown. Because the reasons for the child's placement were primarily medical, not educational, the court held that the school district did not have to finance the placement. Id. at 412-13.

66. For example, medical services only qualify as related services when provided for "diagnostic and evaluative purpose." 20 U.S.C. § 1401(17) (1982). Furthermore, only a licensed physician may render "medical services." 34 C.F.R. § 300.13(4) (1983).

These definitional limitations often lead courts to seize upon subtle or unrealistic distinctions in resolving placement disputes. Thus, while a psychologist's therapeutic efforts constitute "related services," a psychiatrist's services do not. See Darlene L. v. Illinois State Bd. of Educ., 568 F. Supp. 1340, 1344 (N.D. Ill. 1983); McKenzie v. Jefferson, 566 F. Supp. 404, 409-11 (D.D.C. 1983). While the practices of the two professions differ substantially—for example only a psychiatrist may prescribe medication—both can treat many conditions with equal success. Given the clarity of the statutory language, it remains for Congress to devise a more realistic approach, one that predicates state funding of a child's treatment on the nature of his or her condition, rather than on the professional background of the therapist.


68. Kruelle v. New Castle County School Dist., 642 F.2d at 693. The distinction between educational and noneducational services obviously is vague, given the close relationship of the handicapped child's medical, social, and emotional problems to his or her educational problems. See id. at 694; North v. District of Columbia Bd. of Educ., 471 F. Supp. 136, 141 (D.D.C. 1979). Therapy addressing emotional and social problems is frequently a prerequisite to learning. See Christopher T. v. San Francisco Unified School Dist., 553 F. Supp. 1107, 1119-20 (N.D. Cal. 1982); North v. District of Columbia Bd. of Educ., 471 F. Supp. at 140-41. The court in North observed that Ty North's combination of needs deserved the attention of two separate agencies: the Board of Education and the Department of Human Resources. Because the antiquated laws of the District of Columbia prevented the court from apportioning the financial obligation according to the child's needs, the court resolved this bureaucratic dispute by invoking EAHCA's requirements and placing the entire financial burden on the local school board. Id. at 141. Still, effective interagency cooperation to remedy and prevent problems such as the one in North remains possible. Stoppleworth, Mooney &
III. Assigning Financial Responsibility for a Residential Placement in a Disputed Case

A. Initial Financial Responsibility: During the Pendency of Judicial Review

Section 1415(e)(3) requires that a handicapped child remain in his or her "then current educational placement" during the pendency of administrative or judicial review. This provision prevents a legal dispute over placement from disrupting the child's educational program.

Most courts interpret section 1415(e)(3) as providing an "automatic stay," which terminates public funding to parents who change the placement of their handicapped child without the approval of school officials. Courts adopting this interpretation will not order the school district to finance an unapproved placement during the pendency of litigation between school officials and parents over the proper placement of the child. These courts will, however, order the school district to continue paying for the education of a handicapped child of parents who resist the efforts of school officials to revise the child's IEP to provide for a different placement.

Parents who unilaterally place their child in an unapproved setting must therefore bear the total cost of educating the child until the school district acquiesces in the unapproved setting or a state educational agency or a reviewing court resolves the placement dispute.

The "automatic stay" theory frequently presents parents with a diffi-


The need for cooperation among different agencies will increase in the future. Advances in medical science save the lives of many children with multiple disabilities that would have been fatal a few years ago. "The result is a lesser proportion of children with a single, uncomplicated disability and a greater proportion of children whose development is complicated by a number of handicaps." S. Kirk & J. Gallagher, Educating Exceptional Children 417-18 (4th ed. 1983).

70. See, e.g., Doe v. Anrig, 692 F.2d 800, 810 (1st Cir. 1982).
72. See Vander Malle v. Ambach, 673 F.2d 49, 52 (2d Cir. 1982). Courts do not consider the child's initial placement unapproved if the school district unilaterally attempts to revise the child's IEP to provide for a new placement. The child's parents may demand that the school district continue to fund the initial placement pending final arrangements. Id.
cult choice. Parents dissatisfied with a state-funded placement must either leave their child in an educational setting they consider inappropriate or unilaterally enroll their child elsewhere and risk assuming the costs of his or her education during ensuing litigation. Parents contesting the school district's efforts to move the child from a residential facility to a nonresidential facility may simply file an appeal and thus obtain a temporary continuation of a perhaps inappropriate publicly financed placement. In either event, the automatic stay subverts the cooperative IEP process and undermines Congress' goal of a "free appropriate public education" for all handicapped children.

The First Circuit recently rejected the "automatic stay" theory in favor of a more sensible approach to allocating interim placement costs during judicial review of the child's IEP. The court in Doe v. Brookline School Committee suggested that the party wishing to move the child from an approved placement should ask for a preliminary injunction. Relying on its equitable powers to fashion "appropriate relief," a court

74. Once litigation over the child's educational placement has concluded, the parents may, under strictly limited circumstances, win reimbursement of interim educational expenses. See infra notes 86-87, 94-102, & 105-11 and accompanying text.

75. See Vander Malle v. Ambach, 673 F.2d 49, 52 (2d Cir. 1982); supra note 72 (discussing Vander Malle).

76. See supra notes 36-39 and accompanying text (Congress envisioned the IEP process as a series of negotiations between parents and school officials and did not intend for any one party to dominate the proceedings). The court in Doe v. Brookline School Comm., 722 F.2d 910 (1st Cir. 1983), characterized the unilateral efforts of parents to defeat the cooperative IEP process as a "private appropriation of public monies." Id. at 916.

77. During the pendency of litigation, parents must therefore choose between either a "free" or an "appropriate" education for their handicapped child, despite EAHCA's substantive guarantees.

78. 722 F.2d 910 (1st Cir. 1983).

79. Id. at 919. This "preliminary injunction" theory represents the logical continuation of earlier decisions exhibiting similar equitable approaches, see Stacey G. v. Pasadena Indep. School Dist., 695 F.2d 949, 955 n.5 (5th Cir. 1983); Town of Burlington v. Department of Educ. of Mass., 655 F.2d 428, 432-34 (1st Cir. 1981) (Burlington I), and a repudiation of Doe v. Anrig, 692 F.2d 800 (1st Cir. 1982) (Anrig I), which employed the "automatic stay" theory.

In Anrig I, the parents of a handicapped child successfully challenged the school district's efforts to move their child from a residential program to a public school program. The First Circuit held that EAHCA did not authorize reimbursement of the parents' expenses in maintaining their child in the residential program during the litigation and accordingly remanded the case to the district court. 722 F.2d at 921. On remand, the district court in Anrig thus awarded reimbursement to the child's parents. Doe v. Anrig, 561 F. Supp. 121 (D. Mass. 1983) (Anrig II). The First Circuit affirmed. Doe v. Anrig, 728 F.2d 30, 32 (1st Cir. 1984) (following Brookline).

then may employ traditional standards in ruling on the motion. The court's ruling will establish the child's appropriate interim educational placement and obligate the school district to finance this placement while litigation on the merits of the dispute is pending.

This "preliminary injunction" theory protects the cooperative IEP process by denying either party the improper advantage that might result from an automatic stay of all placement and financing obligations. Furthermore, the Brookline approach prevents "private appropriation of public monies" and avoids misuse of EAHCA's procedural guarantees by enabling courts to resolve placement disputes on the basis of the child's interests, rather than a narrow reading of statutory language.

B. Ultimate Financial Responsibility: Reimbursement and Compensation

Interim placement and financing decisions have no bearing on the ultimate disposition of placement costs. Some courts hold that EAHCA neither provides for nor bars reimbursement of interim costs after litigation over the child's placement has concluded. In the absence of explicit statutory language, these courts have looked to alternative sources of relief, such as section 504 and section 1983, and have concluded that EAHCA does not bar reimbursement of most interim costs to parents who successfully challenge the placement of their child. The only circumstance precluding reimbursement arises when parents unilaterally move their child from a public to a private placement.

81. 722 F.2d at 917. A court ruling on a motion for a preliminary injunction usually considers both the likelihood that the moving party will win on the merits and the likelihood that the moving party will sustain irreparable harm absent injunctive relief. Id. See Town of Burlington v. Department of Educ. of Mass., 655 F.2d 428, 432-34 (1st Cir. 1981).
82. 722 F.2d at 921; see supra notes 74-77 and accompanying text (discussing the problems arising under the "automatic stay" theory).
83. 722 F.2d at 916; see supra note 76 and accompanying text.
84. See supra notes 75-77 and accompanying text.
Courts generally hold that EAHCA does not authorize an award of damages. First, EAHCA does not contain a general damages provision. Second, courts construe the language of section 1415(e)(2), providing for “such relief as the court determines is appropriate,” as justifying only prospective injunctive relief. Third, the legislative history contains no indication that Congress intended a damages remedy under EAHCA. Finally, damage awards would force school districts to expend a large share of their limited resources for noneducational purposes. Many courts similarly interpret EAHCA to preclude damage awards under sections 504 and 1983.

Some courts recognize narrow exceptions to the general rule precluding damages under EAHCA. The Seventh Circuit held in Anderson v. Thompson that at least two exceptional situations warrant a damage award: (1) when the placement offered by the school district would have endangered the child’s physical health, and (2) when the school district acted in bad faith by failing to comply with EAHCA’s procedural provisions. Parents successfully invoking one of these exceptions are entitled to reimbursement for the cost of services that the school district should have paid. The Ninth Circuit has added a third exception in situations where reimbursement by unilateral action that seriously violates EAHCA’s procedural provisions. 722 F.2d at 921. Nevertheless, in Town of Burlington v. Department of Educ., 736 F.2d 773 (1st Cir. 1984), cert. granted, 105 S. Ct. 562 (1984) (Burlington II), the court explained that Brookline “implicitly recognized . . . the validity of parents making a unilateral move to fund educational services pending review and of the parents’ right to receive reimbursement at final judgment if they are held to have acted appropriately.” Id. at 797.

88. See, e.g., Marvin H. v. Austin Indep. School Dist., 714 F.2d 1348, 1356 (5th Cir. 1983) (“appropriate relief” under § 1415(e)(2) does not include damages). But see Ezratty v. Puerto Rico, 648 F.2d 770, 775-76 (1st Cir. 1981) (administrative agencies may grant monetary relief in some circumstances); infra notes 94-99 and accompanying text (exceptions to the no damages rule).

89. See 20 U.S.C. § 1415(e)(2) (1982); see supra note 53 and accompanying text.

90. See, e.g., Marvin H. v. Austin Indep. School Dist., 714 F.2d at 1356. But see Doe v. Brookline School Comm., 722 F.2d 910, 912 (1st Cir. 1983); infra notes 103-107 and accompanying text (holding that § 1415(e)(2) authorizes retroactive reimbursement of interim placement costs to prevailing party).


92. Id. at 1212-13 (citing 121 CONG. REC. 25,531 (1975) (statement of Rep. Quie)).

93. See cases cited supra note 60.

94. 658 F.2d 1205 (7th Cir. 1981).

95. Id. at 1213-14; see Tatro v. Texas, 625 F.2d 557 (5th Cir. 1980), aff’d sub nom. Irving Indep. School Dist. v. Tatro, 104 S. Ct. 3371 (1984); see also supra note 29 (discussing Tatro).


97. The Anderson court explicitly rejected the possibility that EAHCA authorizes tort damages. 658 F.2d at 1213 n.12.
when the school district inexplicably fails to offer a classroom placement to a child who has clearly demonstrated his or her ability to function in a classroom environment. Under this exception, parents may recover the costs of private education that accrued before the parties devised an appropriate educational program.

The court in *Thornock v. Evans* rejected these narrow exceptions and created an "equitable catch-all" exception to the rule that EAHCA does not authorize an award of damages. In *Thornock*, the court ordered a school district to pay for a teaching assistant. The court relied upon an "equitable catch-all" exception to extend retroactively the school district's financing obligation to the date the proceedings commenced. This broad exception to the no-damages rule is a sensible approach to the question of reimbursement to parents for the costs of providing an "appropriate education" for their child during review of a school district's decision not to provide a necessary service.

In *Doe v. Brookline School Committee*, the First Circuit went a step beyond *Thornock* and rejected *Anderson*. The *Brookline* court held that a party who loses on the merits in a dispute over a child's educational placement must reimburse the prevailing party for its interim placement costs. The court observed that section 1415(e)(2) not only creates a private right of action for "aggrieved" parties, but also explicitly authorizes "such relief as the court determines is appropriate." According to the First Circuit, "appropriate" relief includes reimburse-

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98. Department of Educ. v. Katherine D., 727 F.2d 809, 815-17 (9th Cir. 1983).
99. Id.
101. Id.
102. Id.
103. 722 F.2d 910 (1st Cir. 1983).
104. Id. at 919; see supra notes 94-102 and accompanying text (discussing exception to the no damages rule).
105. 722 F.2d at 921. The First Circuit rejected its earlier decision in Doe v. Anrig, 692 F.2d 800 (1st Cir. 1982) (*Anrig I*), which denied reimbursement to parents who later prevailed on the merits of their case. Id. at 812; see supra note 79.
106. 722 F.2d at 919; see supra note 53 and accompanying text.

ment of interim costs.107

Permitting reimbursement to the prevailing party promotes EAHCA’s purpose and policy.108 The prospect of reimbursement will encourage parents to protect their child’s rights assiduously.109 At the same time, the parties to the dispute will know in advance that they will bear the costs of impulsive, unfounded actions or excessive recalcitrance.110 Thus, the Brookline approach strikes an effective and appropriate balance.

Courts have prudently limited reimbursement to costs actually incurred by the prevailing party.111 Judicial recognition of a general damages remedy would be inconsistent with EAHCA’s role as a compromise between the needs of disabled children, the inherent difficulties in educating children with special needs, and the budgetary constraints facing school districts.

IV. CONCLUSION

The conventional approach to financing residential education for handicapped children during judicial review of their IEPs requires major reform. Courts employing the “automatic stay” theory112 in determining the child’s educational placement during the pendency of review simply lock the child into a placement at an arbitrary moment, regardless of that placement’s appropriateness.113 When the placement is inappropriate, the “automatic stay” interpretation may obstruct enforcement of

107. 722 F.2d at 919. The court observed that such an interpretation provides courts with “maximum flexibility” to effectuate EAHCA’s remedial objective. Id. See Senate Report, supra note 2, at 1430 (purpose of EAHCA is to provide maximum benefits to handicapped children and their families).

108. 722 F.2d at 921. If parents are incorrect in their claim that the IEP provides an inappropriate education for their child, they, like parents of nonhandicapped children, should bear the financial burden of giving their child a private education. If, however, the school board’s decision to place the child in a classroom setting was inappropriate, then reimbursement restores parents to the position Congress intended. Id.

109. Id.

110. Id.

111. Id. at 920; see Anderson v. Thompson, 658 F.2d 1205, 1213 n.12 (7th Cir. 1981) (rejecting tort damages under EAHCA); supra note 97. Possible eleventh amendment problems exist with requiring the state to reimburse parents. Ezratty v. Puerto Rico, 648 F.2d 770, 775-76 (1st Cir. 1976). But see Department of Educ. v. Katherine D., 727 F.2d 809, 819 (9th Cir. 1983) (a state waives its eleventh amendment immunity when it chooses to participate in a federally funded program such as EAHCA).

112. See supra notes 71-73 and accompanying text.

113. See supra notes 69-70 and accompanying text.
EAHCA’s substantive requirements for several years. Such a delay could inflict irreparable harm upon children who must maximize the use of their limited period of eligibility to obtain some measure of personal independence. Furthermore, courts that order reimbursement for the child’s interim educational expenses only in exceptional circumstances narrowly interpret EAHCA as guaranteeing a “free appropriate public education” only when parents and school officials agree from the commencement of negotiations on the appropriate educational placement for the child. When the parties disagree, courts following Anderson and its progeny hold that the ultimate financial responsibility for the child’s education during review of his or her IEP rests upon the party who happened to be paying for the child’s placement when the dispute arose.

The Brokline approach is much more sensible. A court employing this approach will invoke its statutory grant of equitable powers in an attempt to ensure that the child’s educational placement during review will be sustained upon a full review of the merits. This approach respects EAHCA’s preference for maintaining the child’s placement by requiring the party seeking to change the child’s placement to bear the substantial burden of demonstrating the need for a preliminary injunction. The availability of injunctive relief to remedy a patently inappropriate educational placement will also reduce the problems raised by parents who abandon the cooperative IEP process and unilaterally place

114. See supra notes 74-77 and accompanying text.
117. See supra notes 94-99 and accompanying text.
118. That courts created two new Anderson-type exceptions to the no-damages rule in 1983, see supra notes 96-99 and accompanying text, further indicates that the conventional approach to awarding reimbursement for the cost of a child’s interim placement requires revision.
119. See supra notes 78-84 & 103-07 and accompanying text.
120. See supra note 53 and accompanying text.
121. See supra note 81 and accompanying text.
122. See supra notes 33-34 and accompanying text.
123. See supra note 79 and accompanying text.
their child in an unapproved setting. The Brookline "prevailing party" rule permits a court to assign financial responsibility for the child's interim placement costs on the basis of EAHCA's substantive provisions, in accordance with Congress' intent. This rule also encourages thoughtful action by parents and school officials both prior to and during a placement dispute by ensuring that each party will bear the costs of its own poor judgment.

Judicial resolution of a dispute over the proper educational placement of a handicapped child has a major impact on the interests of the parents, the school district, and the child. The enormous costs of providing a beneficial education to a child who requires a residential placement could quickly bankrupt a typical family. These costs could also disrupt the efforts of a school district to educate all of its students properly. Most importantly, because handicapped children must overcome exceptional obstacles in the few years during which they are eligible for state-funded educational services, theirs is truly a case in which justice delayed is justice denied. The Brookline framework is far more effective than other conventional approaches in providing courts with the flexibility to resolve the tensions between these competing interests and thus make meaningful Congress' promise to the nation's handicapped children.

David E. Schoenfeld

124. See supra note 71 and accompanying text.
125. See supra notes 105-07 and accompanying text.
126. See supra note 110 and accompanying text.
127. See supra note 10.
128. See supra note 115.
129. "[D]elay in resolving matters regarding the education of a handicapped child is extremely detrimental to his development. The interruption or lack of the required services can result in a substantial setback to the child's development." 121 CONG. REC. 37,416 (1975) (statement of Sen. Williams).
130. "[EAHCA] promises handicapped children the educational opportunity that has long been considered the right of every other American child." 121 CONG. REC. 37,410 (1975) (statement of Sen. Randolph).