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ABSTRACT

Litigation of handicapped students' and employees' rights continued at a significant level in 1990. Much of the litigation concerned the provision of an appropriate special education placement, due process rights, and recovery of attorney fees by prevailing parents under the Handicapped Children's Protection Act of 1986. Cases are summarized under the following topics: (1) entitlement to services; (2) procedural safeguards; (3) placement; (4) related services; (5) discipline; (6) remedies, including attorney fees; (7) state laws; and (8) discrimination under the Rehabilitation Act, Section 504. (MLF)

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HANDICAPPED

Allan G. Osborne, Jr.

INTRODUCTION

Litigation over the rights of students and school employees with handicaps continued at a significant level. As in the past few years, much of the litigation in 1990 concerned the provision of an appropriate special education placement, due process rights, and recovery of attorney fees by prevailing parents under the Handicapped Children's Protection Act of 1986 (HCPA).

In past years one of the more controversial issues, in terms of frequency of litigation, was whether prevailing parents were entitled to recover attorney fees when a final resolution to their special education dispute came at the administrative hearing level. Although the majority of courts have held that they are entitled to a fee award, the controversy intensified in 1989 when a divided panel of the District of Columbia federal appeals court ruled that they were not.[1] However, in 1990 that same court, sitting *en banc*, reversed its previous decision.[2] It is now fairly well settled in the federal circuits that attorney fees are available for representation at the administrative level.

Litigation concerning the rights of students under section 504 increased significantly in 1990 over the previous year's level. While some of that litigation involved higher education students, the majority of cases were filed on behalf of students at the elementary and secondary level.

ENTITLEMENT to SERVICES

The Education for All Handicapped Children Act (EHCA) requires school districts to provide handicapped students with a free appropriate public education, consisting of any needed special education and related services.[3] However, the EHA does not establish any specific substantive standards by which those services can be judged to be adequate. The Act provides that the handicapped student is to be provided with specially designed instruction[4] in conformance with the student's individualized education program (IEP).[5] The Supreme Court has held that the handicapped student is entitled to personalized instruction with sufficient support services to permit the student to benefit educationally from the instruction provided.[6] The courts have been cautioned not to impose their

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1. Moore v. District of Columbia, 886 F.2d 335 (D.C. Cir. 1989). *See* Yearbook of Education Law 1990 at 113.
2. Moore v. District of Columbia, 907 F.2d 165 (D.C. Cir. 1990).
3. 20 U.S.C. § 1401(18).
4. 20 U.S.C. § 1401(16).
5. 20 U.S.C. § 1401(18)(d)
6. Board of Educ. of Hendrick Hudson Cent. School Dist. Bd. of Educ., Westchester County v. Rowley, 458 U.S. 176 (1982).

views of preferable educational methods on school districts;[7] however, they are frequently asked to determine what level of services is required to meet the EHA's minimum standards.

A federal district court held that an athletic association's rule that renders a transfer student ineligible to participate in interscholastic sports for one year interfered with a handicapped student's rights as guaranteed by the EHA.[8] The student had transferred from one high school to another in order to receive a free appropriate public education (FAPE). The athletic association had denied the student's request for an exemption from the rule and the student filed a court action. Although the district court held in favor of the student, the appeals court reversed because of the student's failure to exhaust administrative remedies under the EHA.[9] While litigation was pending the student participated in interscholastic sports pursuant to the district court's order and the athletic association later ruled that the high school was required to forfeit all games and championships in which the student participated. In the present action the district court issued a preliminary injunction prohibiting the association from interfering with the hearing officer's decision which effectively reversed the association's ineligibility ruling. The court also held that the school district could not be punished for following the court's previous order allowing the student to play.

A federal court in Arizona held that a hearing impaired student who was born in that state and lived there with family friends was entitled to attend the state's school for deaf and blind students even though her natural parents lived in Mexico. The court held that the student's United States citizenship, physical presence in Arizona, and wardship to family friends was evidence of domicile entitling her to a FAPE. Since the student was found to be in the state for legitimate reasons the court held that she was entitled to attend the state school.[10]

PROCEDURAL SAFEGUARDS

The EHA contains an elaborate system of due process safeguards to ensure that handicapped students are properly identified, evaluated, and placed according to the mandates of the Act.[11] The regulations promulgated under the EHA state that the parents or guardians of a handicapped child

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7. *Id.*
8. Crocker v. Tennessee Secondary School Athletic Ass'n, 735 F. Supp. 753 (M.D. Tenn. 1990), *aff'd without pub. opinion sub. nom.* Metropolitan Gov't of Nashville and Davidson County v. Crocker, 908 F.2d 973 (6th Cir. 1990).
9. *See* Yearbook of Education Law 1990 at 100.
10. Sonya C. v. Arizona School for the Deaf and Blind, 743 F. Supp. 700 (D. Ariz. 1990).
11. 20 U.S.C. § 1415.

must be provided with the opportunity to participate in the development of an IEP for their child.[12] These regulations also require school districts to obtain parental consent prior to evaluating the child or making an initial placement.[13] Once a handicapped child has been placed, the school district must provide the parents with proper notice before it may initiate a change in placement.[14]

If the parents disagree with any of the decisions made by the school district concerning a proposed IEP or any aspect of the provision of a FAPE, they may request an impartial due process hearing.[15] Any party that is not satisfied with the final outcome of these administrative proceedings may appeal to the state or federal courts.[16] While an administrative or judicial action is pending, the school district may not change the child's placement without parental consent[17] or a court order.[18]

The courts have been empowered to review the record of the administrative hearings, hear additional evidence, and "grant such relief as the court determines is appropriate" based on the preponderance of evidence.[19] However, judges have been cautioned not to substitute their views of proper educational methodology for that of competent school authorities.[20]

Rights of Parents or Guardians

The federal district court in Connecticut held in two separate cases that parents are entitled to tape record meetings with school district personnel concerning the development of an IEP. In the first case the mother of the handicapped child had limited English proficiency and requested permission to tape record the meetings so that she could better understand and follow what transpired.[21] In the second case the child's mother could not take notes because of a disabling hand injury and the child's father could not attend the meetings due to work commitments.[22] In each case the court held that allowing parents to tape record IEP meetings allowed them to effectively participate in the process. The court noted that the EHA requires school districts to make every effort to ensure the full and meaningful participation of parents in the development of IEPs. Tape

12. 34 C.F.R. § 300.345.
13. 34 C.F.R. § 300.504(b).
14. 20 U.S.C. § 1415(b)(1)(C).
15. 20 U.S.C. § 1415(b)(2).
16. 20 U.S.C. § 1414(e)(2).
17. 20 U.S.C. § 1415(e)(3).
18. Honig v. Doe, 484 U.S. 305 (1988).
19. 20 U.S.C. § 1415(e)(2)(C).
20. Board of Educ. of Hendrick Hudson Cent. School Dist. Bd. of Educ., Westchester County v. Rowley, 458 U.S. 176 (1982).
21. E.H. and H.H. v. Tirozzi, 735 F. Supp. 53 (D. Conn. 1990).
22. V.W. and R.W. v. Favolise, 131 F.R.D. 654 (D. Conn. 1990).

recording would help the parents understand the proceedings of the meeting and thus be equal collaborators in the formulation of the IEP.

The First Circuit Court of Appeals held that a school district may employ the services of a court reporter to supplement the official transcript of due process hearings.[23] The court found that the official tape recordings made by the state were often of such poor quality that a verbatim transcript could not be made. Allowing a school district to employ its own court reporter was held to be a reasonable means for the school district to secure its statutory right to a verbatim record of the proceedings and did not violate the student's privacy rights. The court also held that the presence of the reporter was not equivalent to opening the hearing to the public.

A federal district court in New York held that although the school district did at times violate the letter of the law concerning the procedures involved in developing IEPs, those violations did not prejudice the student or his parents in any way. The court found that in spite of the violations the parents were involved in planning and executing the student's educational program.[24] The Eleventh Circuit Court of Appeals also found that the EHA's requirements were not violated by deficiencies in the notice provided to the parents of a handicapped child since they had no impact on the parents' full and effective participation in the IEP process.[25] Since the purpose of the EHA's requirements had been fulfilled the court held that there had been no violation which required relief. The court also found that the parents' other procedural violation claims were without merit, particularly since some were actually caused by the parents or resulted from accommodations that were required because of the student's fragile condition. The Sixth Circuit Court of Appeals held that the school district's failure to provide written notice of an IEP conference was not prejudicial since oral notice had been provided and the student's mother participated in the conference.[26] Although the court noted that strict compliance with the EHA's procedural safeguards was the best way to assure enforcement of the Act's substantive provisions, it found that the error here did not result in a substantive deprivation.

The Second Circuit Court of Appeals held that the parent of a handicapped student between the ages of eighteen and twenty-one retained her procedural rights even though the student had not been determined to be incompetent.[27] The court held that the student's parent must be notified of any contemplated change in placement including the termination of services, and if the parent objected, the EHA's stay-put provision applied.

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23. Caroline T. v. Hudson School Dist., 915 F.2d 752 (1st Cir. 1990).
24. Hiller v. Board of Educ. of Brunswick Cent. School Dist., 743 F. Supp. 958 (N.D.N.Y. 1990).
25. Doe v. Alabama State Dep't of Educ., 915 F.2d 651 (11th Cir. 1990).
26. Thomas v. Cincinnati Bd. of Educ., 918 F.2d 618 (6th Cir. 1990).
27. Mrs. C. v. Wheaton, 916 F.2d 69 (2d Cir. 1990).

The Sixth Circuit Court of Appeals held that the parents of a handicapped student waived their right to a properly constituted IEP meeting when they refused the school district's offer to convene one.[28] The parents had met with school officials to discuss a summer program for the student but all of the required participants were not present at the meeting. The school district did not amend the student's IEP as a result of that meeting but offered to convene a properly constituted IEP meeting. The parents declined the offer and later challenged the meeting on procedural grounds.

Development of Individualized Education Programs

The EHA states that an IEP must contain statements of the student's current educational performance, annual goals and short-term objectives, the specific educational services to be provided, the extent to which the child can participate in regular education, the date of initiation and duration of services, and evaluation criteria to determine if objectives are being met.[29] The Sixth Circuit Court of Appeals upheld an IEP that did not specifically state current performance levels or the criteria that would be used to evaluate progress toward educational objectives.[30] The court held that this information was known to all concerned and stated that to hold that these technical deviations from the EHA rendered the IEP invalid would be to exalt form over substance. The court further stated that the Supreme Court's emphasis on procedural safeguards refers to the process by which an IEP is developed rather than the myriad of technical items that must be included in the written document.

Change in Placement

The Ninth Circuit Court of Appeals held that once a state educational agency decides that a placement chosen by the parents is appropriate it becomes the then current placement under the EHA.[31] The parents had prevailed in an administrative hearing and the school district appealed; however, the district court upheld the administrative decision. The appeals court held that the school district was required to maintain the parents' chosen placement pending court review.

The federal district court in the District of Columbia also ruled that the school district must comply with a hearing officer's order for the school district to maintain and fund a private placement chosen by the parents after the closing of the private school the student had been attending.[32]

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28. Cordrey v. Euckert, 917 F.2d 1460 (6th Cir. 1990).
29. 20 U.S.C. § 1401(19).
30. Doe v. Defendant I, 898 F.2d 1186 (6th Cir. 1990).
31. Clovis Unified School Dist. v. California Office of Admin. Hearings, 903 F.2d 635 (9th Cir. 1990).
32. Block v. District of Columbia, 748 F. Supp. 891 (D.D.C. 1990).

When the student's former school ceased operation, the school district offered a public school placement but failed to execute a complete IEP. A proper IEP was not developed until mid-year at which point the hearing officer felt that it was not in the student's best interest to be transferred and ordered that the private placement be maintained for the remainder of the school year.

The Sixth Circuit Court of Appeals held that a school district did not violate the EHA's stay-put provision when it refused to maintain a student in a summer school program that had never been included in the student's IEP.[33] That same court held that the then current placement refers to the operative placement actually functioning at the time the dispute first arises, not a proposed placement that has not been implemented.[34]

Administrative Remedies

Under the EHA's due process requirement the parties must exhaust all administrative remedies before filing court action unless it is futile to do so. The exhaustion of administrative remedies principle was an issue in several cases in 1990.

Several district courts refused to decide the merits of lawsuits because the plaintiffs had failed to exhaust administrative remedies and had not shown that resort to the administrative process would have been futile or that adequate relief was not available through that process.[35] One court stated that although administrative proceedings are lengthy, they are meaningful in that they provide the courts with expert fact finding and preserve the intent of the EHA that parents and school districts work together to develop an IEP.[36] Another court also held that administrative remedies under the EHA must be exhausted even though claims under another statute or the Constitution were also filed.[37]

However, several courts also found adequate grounds to support a futility argument and allowed cases to proceed without prior administrative proceedings. The Ninth Circuit Court of Appeals held that the plaintiffs had no recourse but to seek judicial intervention after they were denied a requested due process hearing.[38] The court also found that the major

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33. Cordrey v. Euckert, 917 F.2d 1460 (6th Cir. 1990).
34. Thomas v. Cincinnati Bd. of Educ., 918 F.2d 618 (6th Cir. 1990).
35. Harper v. School Admin. Dist. No. 37, 727 F. Supp. 688 (D. Me. 1989); Buffolino v. Board of Educ. of Sachem Cent. School Dist. at Holbrook, 729 F. Supp. 240 (E.D.N.Y. 1990); Howell v. Waterford Pub. Schools, 731 F. Supp. 1314 (E.D. Mich. 1990); Waterman v. Marquette-Alger Intermediate School Dist., 739 F. Supp. 361 (W.D. Mich. 1990).
36. Howell v. Waterford Pub. Schools, 731 F. Supp. 1314 (E.D. Mich. 1990).
37. Buffolino v. Board of Educ. of Sachem Cent. School Dist. at Holbrook, 729 F. Supp. 240 (E.D.N.Y. 1990).
38. Kerr Center Parents Ass'n v. Charles, 897 F.2d 1463 (9th Cir. 1990). *Note:* This decision supercedes the court's previous decision published at 842 F.2d 1052 (9th Cir. 1988). *See* Yearbook of Education Law 1989 at 102 and 109.

issue in the case, the legislature's failure to appropriate sufficient funds, was not a problem that could have effectively been dealt with through administrative appeals. The federal district court in Arizona also held that exhaustion was not required when the defendants had failed to provide the plaintiff with meaningful access to the EHA's due process procedures.[39] The Third Circuit Court of Appeals also held that the administrative process could not have provided the student with the relief sought and was thus futile since the issues involved were purely legal, not factual.[40]

A federal district court in California held that the state's higher standard of appropriateness was the correct standard of review in administrative actions brought pursuant to the EHA.[41] The California education code requires educational programs for handicapped children that will provide them an equal opportunity to achieve their full potential commensurate with the opportunity provided to nonhandicapped students.

Court Proceedings

Several courts were asked to determine which party bore the burden of proof in special education disputes. The Sixth Circuit Court of Appeals, finding that absent procedural violations due weight and greater deference should be accorded to a school district's placement decision, held that the party challenging the terms of the IEP should bear the burden of proving that the educational placement established by the IEP is not appropriate.[42] However, the Fourth Circuit Court of Appeals held that the party challenging an administrative decision must bear the burden of proof in court proceedings.[43] A New York district court agreed, holding that the party challenging an administrative decision must prove, by a preponderance of the evidence, that the administrative findings should be set aside.[44] The court cautioned, however, that administrative findings are entitled to some degree of deference. Another federal district court held that a court may reverse a hearing officer's decision only if the court is satisfied that the challenging party has shown, by a preponderance of the evidence, that the hearing officer was wrong.[45] The Sixth Circuit Court of Appeals held that where a state has established a two-tiered review process, the federal courts are required to defer to the final administrative decision.[46]

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39. Begay v. Hodel, 730 F. Supp. 1001 (D. Ariz. 1990).
40. Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990)
41. Pink v. Mt. Diablo Unified School Dist., 738 F. Supp. 345 (N.D. Cal. 1990).
42. Cordrey v. Euckert, 917 F.2d 1460 (6th Cir. 1990)
43. Tice v. Botetourt County School Bd., 908 F.2d 1200 (4th Cir. 1990)
44. Hiller v. Board of Educ. of Brunswick Cent. School Dist., 743 F. Supp. 958 (N.D.N.Y. 1990).
45. Block v. District of Columbia, 748 F. Supp. 891 (D.D.C. 1990).
46. Thomas v. Cincinnati Bd. of Educ., 918 F.2d 618 (6th Cir. 1990).

The First Circuit Court of Appeals noted that the question of whether an IEP is appropriate is a mixed issue of fact and law and held that a district court's decision is reviewable only for clear error.[47] The court indicated that in the absence of a mistake of law the appeals court should accept a district court's resolution of questions about the appropriateness of the IEP as long as the lower court's conclusions are not clearly erroneous. The Fourth Circuit Court of Appeals held that neither a district court nor an appeals court should disturb an IEP simply because it disagreed with its content.[48] Rather, courts should defer to educators as long as the IEP meets the EHA's basic requirements. However, the court held that no deference is due where procedural errors result in the failure of school officials to make decisions regarding an IEP.

The Sixth Circuit Court of Appeals interpreted the EHA's provision that a reviewing court "shall hear additional evidence at the request of a party"[49] quite literally.[50] The court stated that in its ordinary sense "additional" means something that exists by way of addition that is joined or united with the original. The court affirmed the lower court's decision to admit additional evidence concerning less restrictive placements stating that to do so did not undercut the role of administrative expertise in the EHA process and that it was appropriate for a court to hear that evidence when a hearing officer had failed to do so. The First Circuit Court of Appeals, however, stated that a party seeking to introduce additional evidence at the district court level must provide some justification for doing so.[51] In this instance the parents had been given full opportunity to present the testimony of expert witnesses at the administrative level but had flatly refused. The appeals court ruled that the district court had not abused its discretion in precluding the testimony of the parents' expert witnesses where that testimony was deliberately withheld at the administrative level.

In a rather unusual case the Eighth Circuit Court of Appeals held that court proceedings under the EHA could be closed to the public.[52] A school district had sought a court order to enjoin a handicapped student from attending school after he brought a handgun to school. After the district court granted the student's request that the proceedings be closed to the public, a newspaper filed motions to open the courtroom and the case file. On appeal of the district court's denial, the appeals court noted that strong public policy favored the protection of the privacy of minors regarding sensitive matters and that the EHA restricted the release of information concerning handicapped students without parental consent. In order to

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47. Roland M. v. Concord School Comm., 910 F.2d 983 (1st Cir. 1990).
48. Tice v. Botetourt County School Bd., 908 F.2d 1200 (4th Cir. 1990).
49. 20 U.S.C. § 1415(e)(2).
50. Metropolitan Gov't of Nashville and Davidson County, Tenn. v. Cook, 915 F.2d 232 (6th Cir. 1990).
51. Roland M. v. Concord School Comm., 910 F.2d 983 (1st Cir. 1990).
52. Webster Groves School Dist. v. Pulitzer Publishing Co., 898 F.2d 1371 (8th Cir. 1990).

safeguard that information the court found that it was appropriate to restrict access to the courtroom and file.

Standing to Sue

A New York district court held that one school district lacked standing to sue another school district to prevent it from removing a student from one of its programs.[53] The student, who resided in the plaintiff school district, had been attending a specialized program in the defendant school district under a contractual agreement between the two districts. However, when the defendants notified the student's home district that it would no longer provide those services, the plaintiff filed suit seeking to prevent the student's exclusion by claiming that the exclusion would violate the EHA's stay-put provision. The court, however, held that the EHA's safeguards are designed for the benefit of handicapped children and their parents and that the plaintiff's claim that the student's exclusion would subject it to suit from his parents was far too speculative to give it standing to sue.

Actions Under Other Statutes

The parents of a handicapped student who had received corporal punishment filed suit under 42 U.S.C. section 1983 and state law, claiming that excessive force was used in violation of the due process clause of the fourteenth amendment. The district court dismissed for failure to state a claim and the appeals court affirmed holding that adequate remedies were afforded by state law so the fourteenth amendment was not implicated.[54] The court also held that the student's special education teacher did not have any duty under state law to intervene.

The federal district court in Arizona held that a sufficient basis existed to support a constitutional damages claim within the context of an EHA claim for a physically handicapped student who was denied admission to her neighborhood school because it could not accommodate her wheelchair.[55] The student eventually enrolled in the school pursuant to a court order but graduated two years later than she otherwise should have. Her suit claimed violations of the EHA section 504 of the Rehabilitation Act, and the fifth amendment.

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53. Board of Educ. of Seneca Falls Cent. School Dist. v. Board of Educ. of Liverpool Cent. School Dist., 728 F. Supp. 910 (W.D.N.Y. 1990).
54. Fee v. Herndon, 900 F.2d 804 (5th Cir. 1990).
55. Begay v. Hodel, 730 F. Supp. 1001 (D. Ariz. 1990).

PLACEMENT

The EHA's regulations require school districts to "insure that a continuum of alternative placements is available to meet the needs of handicapped children for special education and related services."[56] That continuum must range from placement within the regular classroom to a private residential facility and must also include homebound instruction. However, the placement chosen for any given handicapped student must be in the least restrictive environment (LRE) appropriate for that child.[57] The placement must be made at public expense and must meet state educational standards.[58] Every placement must be reviewed at least annually and revised if necessary.[59] The Supreme Court has held that an appropriate placement is one that is developed in compliance with the EHA's procedures and is reasonably calculated to enable the child to receive educational benefits.[60] Although states must adopt policies that are consistent with federal law, they are free to provide greater benefits to handicapped children. If a state does establish standards that are higher than those in the EHA, the courts incorporate those higher standards into the Act when determining the appropriateness of the IEP.[61]

Appropriate Educational Program

One court found that a school district's noncompliance with the EHA's procedures caused the IEP to fail the first prong of the Supreme Court's appropriateness test. The Fourth Circuit Court of Appeals held that a school district's proposed IEP was not appropriate since it was not developed according to the time-lines established by state law.[62] The school district's procedural lapse and delay in evaluating the student resulted in an IEP not being in place when it should have been.

Most courts, however, do not find minor procedural flaws to be fatal as long as they do not result in harm to the student. The First Circuit Court of Appeals held that procedural flaws do not automatically render an IEP defective.[63] In order to set aside an IEP that is otherwise appropriate there must be some rational basis to believe that the procedural errors compromised the student's right to an appropriate education, seriously interfered

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56. 34 C.F.R. § 300.553(a).
57. 34 C.F.R. § 300.550.
58. 20 U.S.C. § 1401(18).
59. 34 C.F.R. § 300.552(a)(1).
60. Board of Educ. of Hendrick Hudson Cent. School Dist. Bd. of Educ., Westchester County v. Rowley, 458 U.S. 176 (1982).
61. *See* David D. v. Dartmouth School Comm., 775 F.2d 411 (1st Cir. 1985); Geis v. Board of Educ. of Parsippany-Troy Hills, Morris County, 774 F.2d 575 (3d Cir. 1985); Yearbook of School Law 1986 at 131.
62. Tice v. Botetourt County School Bd., 908 F.2d 1200 (4th Cir. 1990).
63. Roland M. v. Concord School Comm., 910 F.2d 983 (1st Cir. 1990).

with the parents' right to participate in the process, or caused a deprivation of educational benefits according to the court. The Eleventh Circuit Court of Appeals and a district court in New York also held that deficiencies that had no impact on the parents' full and effective participation in the IEP process did not render the IEP inappropriate.[64]

An IEP cannot be held to be inappropriate due to procedural flaws that are either caused by the parents or are due to accommodations that are made specifically for the parents. The Sixth Circuit Court of Appeals held that a handicapped student's father could not claim that the school district violated the EHA by not having an IEP in place at the beginning of the school year when the district was complying with his request to suspend services for the first marking period.[65] The Eleventh Circuit Court of Appeals held that the parents' procedural violation claims were without merit since delays in formulating an IEP were caused by the parents and the school district's reliance on a hospital evaluation to develop the IEP was due to the fact that the student was too emotionally fragile to be tested by the school district's personnel.[66]

Determining whether a proposed IEP will confer educational benefit on a given handicapped student is a difficult task. If the student has a significant educational history, however, courts are often able to use past performance as a guide to help determine whether a proposed IEP is likely to confer educational benefit. The Fourth Circuit Court of Appeals refused to revers a district court's determination that an IEP was reasonably calculated to confer educational benefit after it had been shown that the student made great improvement under it.[67] A district court in New York held that an examination of the student's progress in the fifth and sixth grades demonstrated that the IEPs were reasonably calculated to enable him to receive educational benefit.[68] The court noted that the student's less than outstanding performance was not due to an inadequate educational program, but rather, was attributable to the fact that the student did not always give his best effort, failed to complete homework and class assignments, and often talked with classmates during lessons. A federal district court in Texas also held that the failure or success of an educational program is not something that can be judged on the theory that if the child did not succeed the school must have failed to do its job.[69]

Two district courts have found proposed IEPs to be inappropriate when the evidence indicated that the students had not progressed under similar

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64. Doe v. Alabama State Dep't of Educ., 915 F.2d 651 (11th Cir. 1990); Hiller v. Board of Educ. of Brunswick Cent. School Dist., 743 F. Supp. 958 (N.D.N.Y. 1990).
65. Doe v. Defendant I, 898 F.2d 1186 (6th Cir. 1990).
66. Doe v. Alabama State Dep't of Educ., 915 F.2d 651 (11th Cir. 1990).
67. Tice v. Botetourt County School Bd., 908 F.2d 1200 (4th Cir. 1990).
68. Hiller v. Board of Educ. of Brunswick Cent. School Dist., 743 F. Supp. 958 (N.D.N.Y. 1990).
69. McDowell v. Fort Bend Indep. School Dist., 737 F. Supp. 386 (S.D. Tex. 1990).

programs. A Tennessee court found that a student had deteriorated under a homebound program and that there was no evidence to indicate that it would be different under another proposed homebound program.[70] A Pennsylvania court held that a special class placement in a public school building was not appropriate since the student was not deriving any educational benefit and was so disruptive as to interfere with the education of other students.[71]

The Fourth Circuit Court of Appeals held that in-home habilitation services requested by an autistic student's parents were not required since the record showed that the student had made educational progress without the requested services and the EHA required no more.[72] The court further held that the school district's proposed IEP also met the more stringent North Carolina standard that schools must provide a handicapped student with an equal opportunity to learn if that is reasonably possible, by ensuring that the student had an opportunity to reach his full potential commensurate with the opportunity provided to other students.

The First Circuit Court of Appeals also considered Massachusetts' higher standard that special education programs should assure the maximum possible development of the child in determining that a school district's IEP was appropriate.[73] The court found that the school district could provide a well rounded program with related services keyed to the student's specific handicaps and that the school district's faculty was more experienced and better credentialed than that of a private school chosen by the parents.

A California district court held that the state's standard, which required an educational program for a handicapped student that provided him with an equal opportunity to achieve his potential commensurate with the opportunity provided to nonhandicapped pupils, was the correct standard of review in EHA actions.[74]

A federal district court in Kentucky held that the state failed to provide a continuum of placement alternatives for visually impaired students as required by the EHA.[75] In the class action suit filed on behalf of a blind, multihandicapped child, and other similarly situated students who had been denied admission to the state school for the blind, the court held that the state had to either educate severely multihandicapped students at the school or develop some other program for them.[76]

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70. Brown v. Wilson County School Bd., 747 F. Supp. 436 (M.D. Tenn. 1990).
71. Liscio v. Woodland Hills School Dist., 734 F. Supp. 689 (W.D. Pa. 1989), *aff'd without pub. opinion*, 902 F.2d 1561 (3d Cir. 1990).
72. Burke County Bd. of Educ. v. Denton, 895 F.2d 973 (4th Cir. 1990).
73. Roland M. v. Concord School Comm., 910 F.2d 983 (1st Cir. 1990).
74. Pink v. Mt. Diablo Unified School Dist., 738 F. Supp. 345 (N.D. Cal. 1990).
75. Eva N. v. Brock, 741 F. Supp. 626 (E.D. Ky. 1990).
76. *Id.*

Least Restrictive Environment

Congress expressed a preference in the EHA that handicapped students are to be educated with nonhandicapped students to the maximum extent appropriate and that removal from the regular classroom is to occur only to the extent necessary to provide special educational services. However, mainstreaming is not appropriate for all handicapped students and the courts are required to balance the need for services in a specialized environment with the benefits to be gained from mainstreaming. Several courts in 1990 wrestled with this issue.

A Pennsylvania district court approved the placement of a multihandicapped student in a class for students with dual handicaps that was located in a segregated special education center with mainstreaming in nonacademic subjects in a public school.[77] The court found that a less restrictive placement in a special education class located within a public school building was not appropriate since the student had not derived any educational benefit from it and had disrupted that class to the extent that he interfered with the education of other students during an interim placement there. However, the court found that the student benefitted from his interaction with nonhandicapped peers in extracurricular activities and approved a plan that called for some mainstreaming. That decision was affirmed by the Third Circuit Court of Appeals without a published opinion.

The First Circuit Court of Appeals held that the student's general capabilities and whether the IEP addresses the student's basic needs must be considered along with the LRE mandate when courts determine the appropriateness of a proposed placement.[78] The court found that the desirability of mainstreaming must be weighed with the mandate for educational improvement and that the courts must balance the benefits to be gained or lost on both sides of the fulcrum. The court approved a public school placement over a private school program for the student who suffered from several disabilities.

The Sixth Circuit Court of Appeals held that although the EHA established a mainstreaming policy under which handicapped children are to be educated with nonhandicapped children to the maximum extent appropriate, it did not preclude a homebound placement for a severely multihandicapped child.[79] However, an Alabama district court held that a residential placement requested by an emotionally handicapped student's mother was less restrictive than the school district's proposals for homebound instruction or individual instruction in an isolated room in an administration building.[80] The court found that the school district's

77. Liscio v. Woodland Hills School Dist., 734 F. Supp. 689 (W.D. Pa. 1989), *aff'd without pub. opinion*, 902 F.2d 1561 (3d Cir. 1990).
78. Roland M. v. Concord School Comm., 910 F.2d 983 (1st Cir. 1990).
79. Thomas v. Cincinnati Bd. of Educ., 918 F.2d 618 (6th Cir. 1990).
80. Chris D. v. Montgomery County Bd. of Educ., 743 F. Supp. 1524 (M.D. Ala. 1990).

proposals would not offer the student any contact with other children during the school day and would not facilitate his eventual return to a regular classroom setting; but rather, would allow his social interaction skills to regress.

Private Facilities

The Ninth Circuit Court of Appeals upheld a placement in a residential school and psychiatric hospital for an emotionally disturbed student who had a history of assaultive behavior and psychiatric hospitalization.[81] The school district had argued that the facility in question was a psychiatric hospital that provided exempted medical services. The court, however, ruled that it was a boarding school that had the capacity to provide medical services that may be necessary. The court was persuaded by the fact that the facility was a state accredited educational institution.

A federal district court in Tennessee approved a residential rehabilitation facility placement requested by a handicapped student's parents over the school district's proposal for a homebound instruction program.[82] The court noted that the student's condition worsened and her behavior was intolerable in the family home during a previous homebound program. Since there was no evidence to indicate that anything would be different under the proposed homebound program, the court held that it did not meet the EHA's standards. Since the record indicated that the student had made progress in the residential program, the court found that it offered the only available appropriate placement. The court also found that the rehabilitation program qualified as special education and related services under the EHA as it provided many of the services contemplated by the Act. An Alabama district court approved a residential placement after determining that an emotionally handicapped student's behavior problems were left untreated by the school district to the point where they had deteriorated to a level of intensity requiring consistent and systematic round-the-clock behavioral training.[83] The court also found the residential program to be less restrictive than homebound instruction. The First Circuit Court of Appeals held that a public school placement was preferable to a private school placement after determining that the school district could implement a more appropriate and well rounded IEP, could provide more related services, and had more experienced and better credentialed faculty than the private school.[84] The Eleventh Circuit Court of Appeals also approved a school district's proposed IEP after finding that it provided for

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81. Taylor v. Honig, 910 F.2d 627 (9th Cir. 1990).
82. Brown v. Wilson County School Bd., 747 F. Supp. 436 (M.D. Tenn. 1990)
83. Chris D. v. Montgomery County Bd. of Educ., 743 F. Supp. 1524 (M.D. Ala. 1990). *See* n. 80 and accompanying text.
84. Roland M. v. Concord School Comm., 910 F.2d 983 (1st Cir. 1990).

more than the student's minimal educational needs and that a residential program requested by the parents could be counterproductive to the student's development.[85]

Extended School Year

The Sixth Circuit Court of Appeals held that a developmentally delayed student with autistic behaviors did not require an extended school year program.[86] The court held that the regression standard enunciated in earlier cases[87] was best interpreted not to require absolutely that it be demonstrated that the student regressed in the past to the detriment of educational progress in order to prove the need for an extended school year program. Instead, where such data are not available, a need could be shown by expert opinion based on a professional individual evaluation. The court stated that those requesting the extended school year program were required to show that it was necessary to permit the child to benefit from the instructional program. The court further held that if the child benefitted meaningfully from a regular school year program, the extended school year program would not be required unless those benefits would be significantly jeopardized without the extended school year program. In the case at bar, the court found that the student would benefit from the extended school year program but that it was not necessary to preserve the benefits he received from his school year program.

RELATED SERVICES

The EHA mandates that handicapped students are to be provided with related or supportive services if such services are required to assist the students in benefitting from their special education.[88] The Act specifically indicates that related services include such developmental, corrective, or supportive services as transportation, speech pathology, audiology, psychological services, physical therapy, occupational therapy, recreation, counseling services, medical services, and early identification and assessment.[89] The only limitation placed on what could be considered a related service is that medical services are exempted unless they are specifically for diagnostic or evaluative purposes. The Supreme Court has held that related services need to be provided only to students receiving special

85. Doe v. Alabama State Dep't of Educ., 915 F.2d 651 (11th Cir. 1990).
86. Cordrey v. Euckert, 917 F.2d 1460 (6th Cir. 1990).
87. *See e.g.*, Armstrong v. Kline, 476 F. Supp. 583 (E.D. Pa. 1979), *aff'd sub nom.* Battle v. Commonwealth of Pa., 629 F.2d 269 (3d Cir. 1980).
88. 20 U.S.C. § 1401(17).
89. *Id.*

education and only those services that are necessary for the child to benefit from special education must be incorporated into the IEP.[90]

The Fourth Circuit Court of Appeals held that since the record showed that an autistic student had made educational progress without in-home habilitation services requested by his parents, those services were not required.[91] The court also held that the requested services, which were aimed at controlling the student's behavior, did not fall under either the federal or state definitions of special education and related services.

In two separate cases the Ninth Circuit Court of Appeals was called on to determine if psychiatric facilities were educational or medical in nature. Taken together these two decisions illustrate how the reasons for the placement and the primary services provided at the facility influence the final determination. In the first case the court held that the psychiatric hospital was a medical facility and that the care and treatment that a child received in such a hospital could be compared to the care and treatment received when one is hospitalized for a physical illness.[92] The court found that the student had been hospitalized for psychiatric or medical reasons and that the services she received there were for treating an underlying medical condition. The court also found that room and board costs were medically related, not educationally related, since the hospital itself did not provide educational services. In the second case the court upheld a placement in a residential school and psychiatric hospital chosen by an emotionally disturbed student's parents.[93] In this second case the court found that the facility had the capacity to provide medical services, and that the placement was made primarily for educational, rather than medical, reasons and was not made in response to a medical crisis.

A federal district court in Tennessee also held that the limited medical services a student received in a residential rehabilitation program could not be used to characterize the entire program as a medical program.[94] The court found that the medical services that were provided were related services since their primary purpose, which was to monitor and adjust medication, was diagnostic and evaluative. The Fourth Circuit Court of Appeals would not allow reimbursement to the parents of a handicapped student for medically related aspects of a placement in a psychiatric facility but did allow reimbursement for educational and counseling services provided to the student while he was in the hospital.[95]

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90. Irving Indep. School Dist. v. Tatro, 468 U.S. 883 (1984).
91. Burke County Bd. of Educ. v. Denton, 895 F.2d 973 (4th Cir. 1990).
92. Clovis Unified School Dist. v. California Office of Admin. Hearings, 903 F.2d 635 (9th Cir. 1990).
93. Taylor v. Honig, 910 F.2d 627 (9th Cir. 1990).
94. Brown v. Wilson County School Bd., 747 F. Supp. 436 (M.D. Tenn. 1990).
95. Tice v. Botetourt County School Bd., 908 F.2d 1200 (4th Cir. 1990).

DISCIPLINE

The EHA does not contain any provisions that specifically refer to discipline; however, disciplinary sanctions applied to handicapped students have been the issue in numerous cases in past years. These cases indicated that the EHA's change in placement and status quo provisions were applicable to the disciplinary process. The Supreme Court has emphatically stated that handicapped students cannot be expelled for disciplinary reasons, where the offending behavior is a manifestation of the handicap.[96] However, they may be temporarily suspended and are subject to other normal disciplinary sanctions. This decision seems to have significantly lessened the litigation over disciplinary issues as very few cases have been reported since the Court's opinion was issued.

In a 1989 case that was reported too late for inclusion in the *Yearbook of Education Law 1990*, a New York Family Court held that the Supreme Court's *Honig* decision did not affect truancy proceedings and did not deprive the court of subject matter jurisdiction.[97] The respondent had claimed that the *Honig* decision divested the Family Court of jurisdiction over truancy proceedings against handicapped children.

REMEDIES

When a school district fails to provide a handicapped student with an appropriate placement the courts are empowered to grant such relief as the court determines is appropriate.[98] Often the relief granted involves reimbursement of costs borne by the parents in unilaterally obtaining appropriate services for their child. According to the Supreme Court, school districts may be required to reimburse parents for any unilaterally obtained private educational services if they prevail in having their chosen placement determined to be appropriate.[99] Awards of compensatory educational services have been made in situations where the parents did not have the means to obtain the necessary services while litigation was pending.

Congress amended the EHA in 1986 with the Handicapped Children's Protection Act (HCPA)[100] which allows parents who prevail in an EHA suit against the school district to recover their legal expenses. Since the passage of that amendment, reimbursement of attorney fees has been a frequently litigated issue.

The eleventh amendment to the Constitution protects the states from

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96. Honig v. Doe, 484 U.S. 305 (1988).
97. *In re* Thomas W., 560 N.Y.S.2d 227 (Fam. Ct. 1989).
98. 20 U.S.C. § 1415(e)(2)(C).
99. Burlington School Comm. v. Department of Educ., Commonwealth of Mass., 471 U.S. 359 (1985).
100. 20 U.S.C § 1415(e)(4)(B) *et seq.*

lawsuits in the federal courts; however, Congress may abrogate the states' immunity when it enacts legislation if it makes its intention to do so known in clear and unmistakable language within the statute itself.[101] The Supreme Court has held that Congress did not abrogate the states' sovereign immunity when it enacted the EHA.[102]

Damages

The Second Circuit Court of Appeals held that employees of a state department of mental health could not be held personally liable for damages in a lawsuit claiming that they had violated a handicapped child's constitutional and statutory rights.[103] The court determined that several issues were not clearly established including the contentions that the employees reasonably could have understood that their alleged actions violated the child's rights under the EHA or that procedural violations occurred. In a separate case that same court also held that officials of a state department of children and youth services were entitled to qualified immunity because at the time they discharged a student from a mental health center it had not been clearly established that such a decision was covered by the EHA's procedural protections.[104]

An Arizona district court held that a sufficient basis existed to support a constitutional damages claim within the context of an EHA claim in a case where a handicapped student had been denied meaningful access to the EHA's due process procedures.[105] The court ruled, however, that the plaintiff must prove at trial that the defendants' conduct amounted to a constitutional violation beyond an EHA violation. A district court in Michigan, however, held that monetary damages are not available under the EHA.[106]

Tuition Reimbursement

A federal district court in Tennessee awarded tuition reimbursement to the parents of a severely handicapped student for a unilaterally made placement in a residential rehabilitation facility for brain-injured victims.[107] Reimbursement was ordered from the date the parents' private insurance benefits ceased paying for the program until the day the student's entitlement to services under the EHA ended. The court found that a

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101. Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985).
102. Dellmuth v. Muth, 109 S. Ct. 2397 (1989).
103. P.C. v. McLaughlin, 913 F.2d 1033 (2d Cir. 1990).
104. Christopher P. v. Marcus, 915 F.2d 794 (2d Cir. 1990).
105. Begay v. Hodel, 730 F. Supp. 1001 (D. Ariz. 1990).
106. Waterman v. Marquette-Alger Intermediate School Dist., 739 F. Supp. 361 (W.D. Mich. 1990).
107. Brown v. Wilson County School Bd., 747 F. Supp. 436 (M.D. Tenn. 1990).

homebound instruction program offered by the school district was not an appropriate placement. The District Court for the District of Columbia held that the parents' decision to enroll their handicapped child in a private school was proper since the school district had failed to offer a proper IEP by the start of the school year. A hearing officer had held that a mid-year transfer to the program proposed by the district was not in the student's best interests. The court, therefore, ordered tuition reimbursement for the entire school year.[108]

The South Dakota federal district court awarded reimbursement for privately obtained occupational therapy services after finding that the school district was dilatory in not promptly resolving objections the parents raised concerning the district's occupational therapy program.[109] The fact that the school district eventually agreed to fund the private therapy was an indication that those were the appropriate services according to the court's ruling.

The Fourth Circuit Court of Appeals held that reimbursement was appropriate if the parents could show that a psychiatric hospital placement where the student also received educational, counseling, and therapy services was proper under the EHA.[110] The court emphasized, however, that medically related expenses were not reimbursable.

Several courts denied reimbursement after finding that the school district had offered and had the capacity to implement an appropriate IEP.[111]

Compensatory Services

The Second Circuit Court of Appeals held that procedural violations which caused a student to be excluded from an educational placement until he was twenty-one entitled the student to compensatory services.[112] The Third Circuit Court of Appeals held that a profoundly retarded student was entitled to compensatory services for the inappropriate education he received while the school district failed to find a proper placement for him.[113] Evidence existed that the school district did not aggressively seek an appropriate placement for a thirty month period while the student remained on homebound instruction. In awarding the compensatory services, the court indicated that such awards are an appropriate remedy for

108. Block v. District of Columbia, 748 F. Supp. 891 (D.D.C. 1990).
109. Rapid City School Dist. v. Vahle, 733 F. Supp. 1364 (D.S.D. 1990).
110. Tice v. Botetourt County School Bd., 908 F.2d 1200 (4th Cir. 1990).
111. Doe v. Defendant I, 898 F.2d 1186 (6th Cir. 1990); Matta v. Board of Educ.—Indian Hills Exempted Village Schools, 731 F. Supp. 253 (S.D. Ohio 1990); Hiller v. Board of Educ. of Brunswick Cent. School Dist., 743 F. Supp. 958 (N.D.N.Y. 1990); Roland M. v. Concord School Comm., 910 F.2d 983 (1st Cir. 1990).
112. Mrs. C. v. Wheaton, 916 F.2d 69 (2d Cir. 1990).
113. Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990).

students whose parents cannot afford to provide them with an alternative education while a dispute is pending.

However, a federal district court in Tennessee held that compensatory services were not warranted for a student who had remained on homebound instruction because the school district's actions had not denied the student access to a residential facility that was eventually determined to be appropriate.[114] During the two years the student remained on homebound instruction, neither the parents nor the school district were aware of the residential program.

Attorney Fees

In past years much of the attorney fees litigation involved the question of whether the HCPA authorized reimbursement of legal expenses when the dispute was settled at the administrative hearing level. Although the majority of the federal appeals courts had held that attorney fees awards were authorized for administrative proceedings, a split among the circuits developed in 1989 when the District of Columbia Circuit Court of Appeals held that awards were not authorized for representation at that level.[115] However, in 1990 the appeals court, sitting *en banc*, reversed its previous decision.[116] In the second decision the court held that construing the HCPA to authorize an award to a parent who prevailed at the administrative level best comported with the language of the statute. Furthermore, the court found that an examination of the legislative history removed "any doubt that Congress intended parents who prevailed in EHA administrative proceedings to be able to recover their attorney fees."[117] Other courts also held that attorney fees were available at the administrative level.[118]

Several cases in 1990 dealt with the issue of what constitutes a prevailing party. The Fifth Circuit Court of Appeals held that a plaintiff is not a prevailing party unless the resolution of the dispute altered the legal relationship of the parties in a manner Congress sought to promote in the HCPA.[119] The federal district court in New Jersey held that the parents were the prevailing party since they obtained most of the relief they sought.[120] The court also held that the parents were not deprived of their prevailing party status just because they reached a settlement prior to an administrative hearing. They also were not collaterally estopped from

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114. Brown v. Wilson County School Bd., 747 F. Supp. 436 (M.D. Tenn. 1990).
115. Moore v. District of Columbia, 886 F.2d 335 (D.C. Cir. 1989). *See* Yearbook of Education Law 1990 at 112-13.
116. Moore v. District of Columbia, 907 F.2d 165 (D.C. Cir. 1990).
117. *Id.* at 172.
118. McSombodies (No. 2) v. San Mateo City School Dist., 897 F.2d 975 (9th Cir. 1990); E.P. v. Union County Regional High School Dist., 741 F. Supp. 1144 (D.N.J. 1989).
119. Angela L. v. Pasadena Indep. School Dist., 918 F.2d 1188 (5th Cir. 1990).
120. E.P. v. Union County Regional High School Dist., 741 F. Supp. 1144 (D.N.J. 1989).

seeking a fees award even though fees were not included in the settlement agreement since all parties understood that fees would be discussed at the appropriate time. The district court in South Dakota awarded attorney fees after determining that the parents were without question the prevailing party.[121] In *dicta* the court questioned the wisdom of the school district in incurring over $25,000 in legal expenses to contest a tuition reimbursement award of $861.

An Indiana district court reduced a requested award after determining that although the parents were the prevailing party, their counsel protracted the hearing in an extensive and expansive fashion after the parents had achieved most, if not all, of their objectives.[122] The court also denied a request to award fees to the plaintiff for acting as a paralegal. A New York district court held that fees could not be recovered for unsuccessful claims which were distinct in all respects from successful claims.[123] Since the court found that the plaintiff was seeking fees only for issues related to a successful attempt to gain compensatory services, fees were awarded. The Second Circuit Court of Appeals held that granting a temporary restraining order without addressing the merits of the case was not sufficient to give a plaintiff prevailing party status.[124]

The Eighth Circuit Court of Appeals held that if special circumstances were found to exist in a case, the parent would not be entitled to compensation for the legal fees she incurred even though her rights under the EHA were violated.[125] The school district had claimed that it should not be required to pay attorney fees resulting from a hearing officer's erroneous refusal to consider the parent's initial claim. The First Circuit Court of Appeals held that the school district was entitled to reimbursement of attorney fees under Appellate Rule 38[126] after it determined that the parents had engaged in tactics throughout the proceedings that led to undue delays and had failed to cooperate in negotiations to settle the dispute.[127] However, a New York district court denied a school district's request for attorney fees after finding that both parties had proceeded in good faith.[128] The school district claimed that the parents brought the action in bad faith.

State Immunity

The Ninth Circuit Court of Appeals held that the eleventh amendment

121. Rapid City School Dist. v. Vahle, 733 F. Supp. 1364 (D.S.D. 1990).
122. Howey v. Tippecanoe School Corp., 734 F. Supp. 1485 (N.D. Ind. 1990).
123. Burr v. Sobel, 748 F. Supp. 97 (S.D.N.Y. 1990).
124. Christopher P. v. Marcus, 915 F.2d 794 (2d Cir. 1990).
125. Independent School Dist. No. 623, Roseville, Minn. v. Digre, 893 F.2d 987 (8th Cir. 1990).
126. FED R. APP. p. 38.
127. Caroline T. v. Hudson School Dist., 915 F.2d 752 (1st Cir. 1990).
128. Hiller v. Board of Educ. of Brunswick Cent. School Dist., 743 F. Supp. 958 (N.D.N.Y. 1990).

prohibits an award against the state for restitution of benefits that were wrongfully withheld in the past but did not prevent a prospective order for the state to comply with the EHA.[129] The Third Circuit Court of Appeals held that a school district did not acquire the state's eleventh amendment immunity in special education suits simply because it received a significant amount of state funding for those programs.[130] The federal district court in Arizona held that sovereign immunity does not apply when officials act in an unconstitutional manner.[131]

OTHER EHA ISSUES

The Second Circuit Court of Appeals held that Medicaid was responsible for nursing services provided in a school setting to a handicapped child who required twenty-four hour per day nursing care.[132] The court stated that it was generally understood that private duty nursing is "setting independent" and refers to a level of care rather than a location where it can be performed. Furthermore, the court noted that if the nurse were not allowed to accompany the student to school, the child would be confined to home and the state would be required to provide a home tutor. This would result in a greater total expenditure of public funds.

The EHA includes provisions that ensure that federal funds received under the Act are used to defray the excess costs of educating handicapped children and to supplement or increase the amount funded by the state for this purpose.[133] A school district in Washington adopted a program that changed the way it delivered special education services, resulting in a reduction in special education expenditures. A United States Department of Education audit concluded that federal funds had been used to supplant state funds in violation of the EHA after the program change. The Ninth Circuit Court of Appeals held that the EHA required a maintenance of fiscal effort even if this required a reallocation of funds.[134] If costs decline, the court stated that federal funds can be used to fund new programs that the district could not otherwise afford. According to the court only two exceptions to the maintenance of expenditure requirement exist: when there is a decrease in enrollment or if there had been unusual expenditures in the previous year. The court also held that the Department of Education was not incorrect in counting the actual number of students rather than full time equivalents for purposes of a decrease in expenditure calculation.

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129. Kerr Center Parents Ass'n v. Charles, 897 F.2d 1463 (9th Cir. 1990). *Note:* This decision supercedes the court's previous decision published at 842 F.2d 1052 (9th Cir. 1988).
130. Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990).
131. Begay v. Hodel, 730 F. Supp. 1001 (D. Ariz. 1990).
132. Detsel v. Sullivan, 895 F.2d 58 (2d Cir. 1990).
133. 20 U.S.C. § 1414(a)(2)(B).
134. State of Washington v. United States Dep't of Educ., 905 F.2d 274 (9th Cir. 1990).

STATE LAWS

The Sixth Circuit Court of Appeals held that an Ohio law which indicates that a school district is to provide home instruction to handicapped children who cannot be transported to school did not imply that home education may not be provided if the child is capable of being transported to school.[135] The court held that the student's IEP, which called for home instruction, was appropriate.

A federal district court in California held that a school building is a place of public accommodation subject to the provisions of a statute allowing access to service dogs.[136] The court found that public schools serve a significant segment of the population for whom attendance is mandatory and are thus places of public accommodation.

A state appellate court in New York held that a student with Down's Syndrome who had lived all his life in a "family home at board" was a resident of the school district in which the home was located.[137] The court found that the student was entitled to a tuition free education in that district even though the child's natural parents had moved out of state. A New York state trial court dismissed a suit brought by one school district seeking to collect the expenses of educating a handicapped child from another school district on the grounds that the one year statute of limitations applicable in such actions had passed.[138]

The Supreme Court of Illinois reversed the lower courts' award of interest on a tuition reimbursement award to the parents of a handicapped child.[139] The lower courts had awarded tuition reimbursement, but the school district failed to pay the award promptly and the student's mother sought interest on the late payment. However, the high court stated that the language in the state statute authorizing interest payments did not contain a sufficiently clear expression by the state legislature to waive the state's sovereign immunity.

The Commonwealth Court of Pennsylvania held that a student with spina bifida who was paralyzed from the waist down was exceptional under state law.[140] The court awarded compensatory physical and occupational therapy services after having found that the school district had failed to provide the student with an appropriate education.

The Ninth Circuit Court of Appeals found that under Oregon Law the financial responsibility for funding the education of mentally retarded

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135. Thomas v. Cincinnati Bd. of Educ., 918 F.2d 618 (6th Cir. 1990).
136. Sullivan v. Vallejo City Unified School Dist., 731 F. Supp. 947 (E.D. Cal. 1990).
137. Catlin by Catlin v. Sobol, 553 N.Y.S.2d 501 (App. Div. 1990).
138. Board of Educ. of Katonah-Lewisboro School Dist. v. Board of Educ. of Carmel Cent. School Dist., 549 N.Y.S.2d 322 (Sup. Ct. 1989).
139. *In re* Walker, 546 N.E.2d 520 (Ill. 1989).
140. Pittsburgh Bd. of Educ. v. Commonwealth, Dep't of Educ., 581 A.2d 681 (Pa. Commw. Ct. 1990)).

students who attended a private facility rested with the state.[141] The court held that the state could provide the funding in any manner it saw fit, but could not fail to provide the funds necessary to meet its responsibility.

DISCRIMINATION UNDER the REHABILITATION ACT, SECTION 504

Section 504 of the Rehabilitation Act of 1973 provides that "[n]o otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from participation in, or be denied the benefits of, or be subjected to discrimination under any program or activity receiving [f]ederal financial assistance."[142] Section 504 effectively prohibits any recipient of federal funds from discriminating against handicapped persons in the provision of services or employment. Section 504 applies to any agency that receives federal funds, not just schools. For that reason this section includes several cases that did not arise in an educational context, but which contain legal principles that are applicable to educational programs that receive federal funds.

Students

Elementary and Secondary. Handicapped students at the elementary and secondary level have rights under both the EHA and section 504. For that reason many lawsuits state claims under both statutes. Often the claims stated under one statute are identical or similar to claims stated under the other however, sometimes distinct claims are raised under section 504. The Eleventh Circuit Court of Appeals held that since a student's section 504 claims were identical to EHA claims that had been found to be without merit, the court did not need to address the section 504 claims.[143] Similarly, the Sixth Circuit Court of Appeals held that since the denial of an extended school year program had been determined to be proper under the EHA, there was nothing in the record to suggest that its denial was discriminatory under the Rehabilitation Act.[144]

A Texas district court held that there was no evidence to support a discrimination claim in the case of a handicapped student who alleged that

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141. Kerr Center Parents Ass'n v. Charles, 897 F.2d 1463 (9th Cir. 1990). *Note:* This decision supercedes the court's previous decision published at 842 F.2d 1052 (9th Cir. 1988).
142. 29 U.S.C. § 794.
143. Doe v. Alabama State Dep't of Educ., 915 F.2d 651 (11th Cir. 1990). *See* nn. 25, 66, & 85 and accompanying text.
144. Cordrey v. Euckert, 917 F.2d 1460 (6th Cir. 1990). *See* n. 86 and accompanying text.

the school district failed to provide him an appropriate education.[145] The court found that the facts failed to support a claim that the student was treated differently from other handicapped children. However, the Second Circuit Court of Appeals held that the Rehabilitation Act does not require that all handicapped individuals be provided with identical benefits.[146] In denying a discrimination claim under section 504 the court stated, "[t]he requirement that professional judgment be exercised is not an invitation to a court reviewing it to ascertain whether in fact the best course of action was taken."[147] The Fourth Circuit Court of Appeals held that section 504 was designed to prevent discrimination against the handicapped, not to impose an affirmative obligation on recipients of federal funds.[148] In denying the parents' request for in-home habilitation services for an autistic student the court found that the parents' claims under section 504 had no merit.

The federal district court in Arizona held that proof of discriminatory intent is not necessary to state a claim under section 504.[149] The court found that school officials' failure to act to correct architectural barriers that prevented a physically handicapped student from attending her neighborhood school suggested a disparate impact which was sufficient for a section 504 claim. The Second Circuit Court of Appeals held that compensatory educational services were an appropriate remedy when section 504 rights were used to enforce EHA rights.[150] Procedural violations under the EHA had caused the student to be excluded from an educational placement. A Michigan district court held that claims that a handicapped student was not being provided the proper amount of services nor provided services in the proper manner stated an actionable claim under section 504.[151]

In an interesting twist a district court in Kentucky held that a student who had been denied admission to the state's school for the blind was not otherwise qualified under section 504 because he did not meet the requirement that he must be classified as at least trainable mentally retarded in order to attend the school.[152] The court found that in order to serve the student properly the school would have to hire additional staff and modify the mission of the institution, requirements which went beyond a reasonable accommodation. However, referring to the EHA's requirement that states must provide a continuum of placements for handicapped children, the court

145. McDowell v. Fort Bend Indep. School Dist., 737 F. Supp. 386 (S.D. Tex. 1990). *See* n. 69 and accompanying text.
146. P.C. v. McLaughlin, 913 F.2d 1033 (2d Cir. 1990).
147. *Id.* at 1043.
148. Burke County Bd. of Educ. v. Denton, 895 F.2d 973 (4th Cir. 1990).
149. Begay v. Hodel, 730 F. Supp. 1001 (D. Ariz. 1990).
150. Mrs. C. v. Wheaton, 916 F.2d 69 (2d Cir. 1990). *See* nn. 27 & 112 and accompanying text.
151. Howell v. Waterford Pub. Schools, 731 F. Supp. 1314 (E.D. Mich. 1990).
152. Eva N. v. Brock, 741 F. Supp. 626 (E.D. Ky. 1990). *See* n. 76 and accompanying text.

indicated that some children who may not meet the school's criteria may need to be placed there if that was the only way they could be provided with an appropriate education.

A California district court held that a school district's refusal to admit a handicapped student's service dog violated section 504.[153] The court stated that as long as the means by which a handicapped person addressed her circumstances were reasonable, section 504 protected those means from scrutiny and prohibited discrimination against the person on the basis of those means. The court found that by excluding the service dog, school officials effectively prevented the student from addressing her handicap in school in the same manner as she did elsewhere.

The Second Circuit Court of Appeals affirmed in part a district court ruling that the hearing impaired parents of nonhearing impaired students were entitled to the services of a sign language interpreter at certain school functions.[154] The court found that the parents were otherwise qualified for parent oriented activities offered by the school district, but were unable to participate in them due to their inability to effectively communicate. The court stated that the parents were not excluded from the protections of section 504 simply because they were parents and not students.

The Eleventh Circuit Court of Appeals vacated an order of the district court which had adopted a magistrate's findings that a student with hepatitis B was an otherwise qualified handicapped individual who had been excluded from school solely because of his handicap.[155] The district court's preliminary injunction readmitting the student to school was vacated because the district court failed to conduct a *de novo* review of the magistrate's findings.

A district court in Tennessee issued a preliminary injunction under the EHA and section 504 prohibiting a high school athletic association from interfering with a hearing officer's order which allowed a handicapped transfer student to participate in interscholastic sports.[156] The court found that the association was a state actor and acted under color of state law when it declared that the student, who had transferred from one high school to another in order to receive special education services, was not exempt from a rule that prohibited transfer students from participating in extracurricular activities for one year. The decision was affirmed by the Sixth Circuit Court of Appeals without a published opinion.

Higher Education. The Eleventh Circuit Court of Appeals held that

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153. Sullivan v. Vallejo City Unified School Dist., 731 F. Supp. 947 (E.D. Cal. 1990).
154. Rothschild v. Grottenthaler, 907 F.2d 286 (2d Cir. 1990). *See* Yearbook of Education Law 1990 at 118.
155. Jeffrey S. v. State Bd. of Educ. of Ga., 896 F.2d 507 (11th Cir. 1990).
156. Crocker v. Tennessee Secondary School Athletic Ass'n, 735 F. Supp. 753 (M.D. Tenn. 1990); *aff'd without pub. opinion sub nom.*, Metropolitan Gov't of Nashville and Davidson County v. Crocker, 908 F.2d 973 (6th Cir. 1990). *See* n. 8 and accompanying text and Yearbook of Education Law 1990 at 100.

the failure of a university to provide sign language interpreters or auxiliary aids to hearing impaired students violated section 504 since access to the benefit of some courses was eliminated without these services.[157] The court further held that the Civil Rights Restoration Act of 1987[158] allowed the application of section 504 to noncredit and nondegree courses. The court also held that the university's policy of providing handicapped accessible transportation for only four hours a day violated section 504 because it was not equivalent to or as effective as the transportation provided to nonhandicapped students who had access to transportation twelve hours per day.

The district court in the District of Columbia dismissed a damages claim by a student who alleged that he had been subjected to harassment and embarrassment when information about a positive test for AIDS was leaked to unauthorized faculty and staff.[159] The court held that section 504 damages were limited to equitable relief only.

A New York district court dismissed a discrimination claim by a graduate student with cerebral palsy who had been terminated from a degree program.[160] The student had been terminated from the program after twice failing the qualifying examinations in accordance with university policy allowing two attempts to pass. The court held that the student had not offered any evidence of discriminatory intent on the university's part and that she had been terminated as the result of her unsatisfactory academic performance.

Employees

Discrimination Claims. The Tenth Circuit Court of Appeals has held that a private corporation did not fall within the ambit of section 504 simply because it contracted with a government agency.[161] The court ruled that a governmental contract does not convey financial assistance when services are provided at fair market value. The court also held that the Civil Rights Restoration Act of 1987,[162] which amended section 504 to ban discrimination in all operations of a college, university, or other postsecondary institution, could not be applied retroactively. The case arose when an applicant was denied a security inspector's position because he had vision in only one eye.

The Ninth Circuit Court of Appeals held that two totally blind employees of the state commission for the blind, who had lost their jobs

157. United States v. Board of Trustees for Univ. of Ala., 908 F.2d 740 (11th Cir. 1990).
158. 29 U.S.C. § 794(b)(2).
159. Doe v. Southeastern Univ., 732 F. Supp. 7 (D.D.C. 1990).
160. Villanueva v. Columbia Univ., 746 F. Supp. 297 (S.D.N.Y. 1990).
161. DeVargas v. Mason and Hanger–Silas Mason Co., Inc., 911 F.2d 1377 (10th Cir. 1990).
162. 29 U.S.C. § 794(b)(2).

due to a reorganization, were entitled to a jury trial under the seventh amendment.[163] The employees claimed that the reorganization violated their rights under section 504. The court held that since they were seeking relief in the form of compensatory damages that were not merely incidental to available injunctive relief, they were entitled to the jury trial. The court also ruled that the employees were not required to show that they were excluded from a newly created position solely by reason of their handicap since they claimed they were rejected due to discrimination on the basis of an impermissible factor. The burden of proof thus shifted to the commission to show that the employees were rejected for legitimate, nondiscriminatory reasons.

The federal district court in Kansas held that a former high school principal, who had lost his position when the school board voted to consolidate the positions of elementary and high school principals into one, failed to state a genuine issue of material fact regarding whether his status as a recovering alcoholic was the sole reason for his contract nonrenewal.[164] The school board awarded the contract for the consolidated position to the former elementary principal who was certified for grades K-12. The former high school principal was not certified for all grades covered by the consolidated position.

A New York district court upheld a jury award of $100,000 to a former bus driver/custodian after finding that the school district discriminated against him in violation of section 504 because of his physical handicap.[165] The court concluded that there was adequate evidence to support the jury's award, but noted that the evidence was barely sufficient. The district court for the District of Columbia held that an employee of the Department of Health and Human Services with multiple sclerosis who had filed three discrimination claims alleging that she was denied a promotion, not allowed to work at home, and finally terminated because of her handicap, failed to substantiate those claims.[166] The court found that she had failed to provide medical evidence that would substantiate her claims that she was unable to commute to work, that her illness was worsening, or that the only reasonable accommodation would be permission to work at home. The court further found that she did not meet the minimum qualifications for promotion and that her performance had deteriorated to an unacceptable level.

Handicapped Persons. In order to be considered a handicapped person under section 504, a claimant must have an impairment which substantially limits one or more major life activities, have a record of such

163. Smith v. Barton, 914 F.2d 1330 (9th Cir. 1990).
164. Pierce v. Engle, 726 F. Supp. 1231 (D. Kan. 1990).
165. Casino v. Mahopac Cent. School Dist., 741 F. Supp. 1028 (S.D.N.Y. 1989).
166. Langon v. United States Dep't of Health and Human Servs., 749 F. Supp. 1 (D.D.C. 1990).

an impairment, or be regarded as having such an impairment.[167] The Second Circuit Court of Appeals held that an applicant for a position with a police department was not a handicapped person under section 504 due to personality traits that rendered him unsuitable to be a police officer. A routine psychological examination indicated that the applicant showed poor judgment, poor impulse control, and irresponsible behavior. The court held that these personality traits were commonplace, did not rise to the level of an impairment, and did not amount to a mental condition which substantially limited a major life activity. The court further held that being declared unsuitable for a police officer's position was not a substantial limitation of a major life activity.[168]

Otherwise Qualified Individuals. The Supreme Court has held that an otherwise qualified person is one who can meet all of the employment requirements in spite of the handicap.[169] The Ninth Circuit Court of Appeals held that an emotionally handicapped clerk typist who was dismissed after it was discovered that she did not meet the minimum speed qualifications for the position was not otherwise qualified.[170] The court also found that the county that had employed her made several efforts to accommodate her but those efforts failed.

A Pennsylvania district court held that a former undercover narcotics officer who had undergone drug rehabilitation was not otherwise qualified to return to his former position since his drug use violated the laws he was sworn to uphold.[171] District courts also held that an employee who was chronically absent[172] and an employee who refused to obey a supervisor's orders[173] were not otherwise qualified.

Reasonable Accommodation. Under section 504 employers are required to make reasonable accommodations for handicapped employees unless doing so would impose an undue hardship on the operation of the program.[174] A federal district court in Wisconsin denied a school district's motion for summary judgment, holding that the record indicated that accommodations for a totally disabled teacher were possible but no evidence existed that those accommodations would create an undue financial or administrative burden on the district.[175]

A Pennsylvania district court held that any accommodations that would allow a former undercover narcotics officer who had undergone drug

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167. 34 C.F.R. § 140.1(j).
168. Daley v. Koch, 892 F.2d 212 (2d Cir. 1989).
169. Southeastern Community College v. Davis, 442 U.S. 397 (1979).
170. Lucero v. Hart, 915 F.2d 1367 (9th Cir. 1990).
171. Desper v. Montgomery County, 727 F. Supp. 959 (E.D. Pa. 1990).
172. Santiago v. Temple Univ., 739 F. Supp. 974 (E.D. Pa. 1990).
173. Dowden v. Tisch, 729 F. Supp. 1137 (E.D. Tex. 1989).
174. 34 C.F.R. § 104.12
175. Byrne v. Board of Ed'c., School Dist. of West Allis—West Milwaukee, 741 F. Supp. 167 (E.D. Wis. 1990).

rehabilitation to resume his duties would be substantial modifications of essential functions of that position.[176] An Alabama district court held that the Rehabilitation Act does not require reassignment and that an employee who suffered from bilateral carpal tunnel syndrome was properly dismissed since he was unable to perform the essential functions of his position.[177] The court held that plaintiff's claim that the failure to give him light duty was a failure to reasonably accommodate his handicap was not supported.

The Ninth Circuit Court of Appeals held that a postal employee who was discharged after leaving his mail vehicle unattended while intoxicated had been reasonably accommodated through the provision of counseling and treatment and the execution of a last chance agreement which the employee had violated.[178] In its opinion the court adopted the reasoning of the Fourth Circuit's decision regarding the accommodations that must be provided to alcoholic employees.[179]

Other Section 504 Issues

Complaints were filed alleging that the Suncoast Dome, a sports stadium, failed to meet state and federal requirements concerning handicapped access. The City of St. Petersburg asserted that since no federal funds were used in the construction of the stadium, it had no federal obligation regarding handicapped accessibility. However, the district court found that the city had used federal block grants for the acquisition of land, relocation of occupants, and demolition at the site on which the stadium was built. The court held that the stadium was thus subject to the Rehabilitation Act.[180]

A New York district court awarded attorney fees to a successful plaintiff but held that the attorney was not entitled to a contingency enhancement as part of the award.[181] An attorney fees award was upheld by the district court of the District of Columbia after it found that the plaintiff had achieved her objective and was therefore a prevailing party.[182]

Since the Rehabilitation Act does not contain a statute of limitations, one must be borrowed from analogous state law. A Virginia district court found that a one year statute of limitations from a state law patterned to be consistent with the Rehabilitation Act was applicable.[183] The District

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176. Desper v. Montgomery County, 727 F. Supp. 959 (E.D. Pa. 1990).
177. Black v. Frank, 730 F. Supp. 1087 (S.D. Ala. 1990).
178. Fuller v. Frank, 916 F.2d 558 (9th Cir. 1990).
179. Rodgers v. Lehman, 869 F.2d 253 (4th Cir. 1989). *See* Yearbook of Education Law 1990 at 121.
180. Locascio v. City of St. Petersburg, 731 F. Supp. 1522 (M.D. Fla. 1990).
181. Casino v. Mahopac Cent. School Dist., 741 F. Supp. 1028 (S.D.N.Y. 1990).
182. Callicotte v. Cheney, 744 F. Supp. 3 (D.D.C. 1990).
183. Eastman v. Virginia Polytechnic Inst. and State Univ., 732 F. Supp. 665 (W.D. Va. 1990).

of Columbia District Court held that a plaintiff did not file an appeal of a decision of the Equal Employee Opportunity Commission regarding claims of discrimination under the Rehabilitation Act within the proscribed thirty day time limit and that he failed to show that his psychological handicap prevented him from comprehending his legal rights or any other circumstance that would warrant equitable tolling of the thirty day limit.[184]

184. Kien v. United States, 749 F. Supp. 286 (D D.C. 1990)