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ABSTRACT

A panel of four education experts selected the 15 most important court cases of 1990 in the field of special education, based on review of approximately 100 reported decisions. The cases deal with attorney's fees, the need to exhaust administrative remedies before taking discipline cases to court, least restrictive environment, reimbursement for placement of student in private school or residential program, and related services. A group of supplementary cases, also felt to deserve mention and review, is also presented. These focus on handling of dangerous students, funding, placement in school closest to home, monitoring reports as public records, parents' right to tape record Individualized Education Meetings, interpretation of policy concerning related services, and parents' rights to sign language interpreting during meetings. The issue of whether litigation will decline in the 1990s is briefly discussed. (JDD)

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A Review of Most Important Court Cases in 1990: No Precedent Shattering Decisions Rendered

Team of Experts Cite, Review Top 15 Court Decisions of '90

No single court decision of 1990 seems destined to have the influence of Rowley, Tatro, or Honig. One proceeding with that potential has been aborted: Rogers v. Bennett, 873 F.2d 1387 (11th Cir. 1989), a frontal assault on the scope of Sec. 504 of the Rehabilitation Act, was abandoned by the prosecuting Decatur, Georgia school district following a threatened Federal funds cut-off by the Office for Civil Rights.

A second, Timothy W. v. Rochester, N.H., School District, 875 F.2d 954 (1st Cir. 1989), widely heralded as affirming the incorporation of "zero reject" by IDEA (formerly the Education of the Handicapped Act), is so full of holes -- not the least being strongly contradictory opinions about Timothy's ability to benefit from education -- that support for this conclusion is shaky, if not nonexistent.

Given these circumstances, choosing 15 cases from the approximately 100 reported decisions handed down during the past year is more subjective than usual. One's position as school board attorney, parent/student attorney, advocate, or legal scholar might be more influential than in previous years. Therefore, two selections reflecting five perspectives follow:

The first selection, -- "The Experts' Choices" -- is the fruit of selection made by persons with four different perspectives: Jean B. Arnold, Esq., a school board attorney who represents the Virginia School Boards Association; Arthur W. Cernosia, Esq., an attorney employed by the New England Regional Resource Center; Reed Martin, Esq., an attorney who represents parents/students; and Professor Stephen B. Thomas of Kent State University, President of the National Organization on Legal Problems in Education.

The court decisions presented here represent those decisions selected by at least three of the four, with these caveats: first, the description of the decisions, comments about their importance, and identification by topic are Rosenfeld's, not theirs; second, categorization under a single topic is highly arbitrary, as many of these decisions could be categorized under one or more additional topics.

The second group, -- "Supplement to the Experts' Choices" -- are decisions selected as worth mentioning in a presentation at the first Public Policy Conference sponsored by the Council of Administrators of Special Education in January 1991. I would not substitute them for the Experts' Choices, but they deserve mention and review.

The Experts' Choices: Observations and Comments

Although there will be occasional exceptions, it seems likely that, finally, we may be seeing the last decisions involving questions about attorneys' fees. Still, it was shocking to learn from Independent School District No. 623 that any school district would manipulate the hearing procedures to effectively deny a parent's request for a hearing. In any event, it is now clear that parents can recover attorneys' fees

The Most Important Court Decisions of 1990

Few words bring such strong reactions as "litigation" and most special educators spend what they consider an inordinate amount of time monitoring legal developments.

NASDSE has asked S. James Rosenfeld to identify and summarize what he considered the more important court decisions over the past year. Two lists are presented: "The Experts' Choices" -- represent the consensus of four attorneys active in special education litigation. Fifteen cases are presented, involving these categories: Attorney's Fees, Discipline, Least Restrictive Environment, Placement/Reimbursement, and Related Services. Eleven other court decisions were chosen by Rosenfeld to supplement this list. They are presented in seven categories: Discipline, Funding, Least Restrictive Environment, Monitoring, Parent Rights, Related Services, Section 504.

Each group of selections are arranged by topic, and each decision contains references (citations) to two or more sources where the full text can be found. These citations are as follows (xxx = volume; yyy = page):

xxx F.2d yyy: West's Federal Reporter, 2d
xxx F.Supp. yyy: West's Federal Supplement
xxxEd.L.Rep. yyy: West's Education Law Reporter

EHLR yyy:yyy or xx EHLR yyy: Education for the Handicapped Law Report.

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whenever the attorney's intervention has produced any material benefit to the child, even if that result is reached before a due process hearing is held or requested. See Angela L. and Shelly C.

We also know that courts will exercise their discretion in determining the amount of fees, including downward adjustments, to reflect inappropriate conduct by parents, and that paralegals who are neither formally trained nor certified are ineligible to recover fees (Howey). Consequently, there should be little future litigation over the availability of attorneys' fees and, hopefully, the parties will routinely provide for fee awards in a settlement.

To those previously referenced cases involving discipline should be added the Tenth Circuit ruling, in Hayes v. Unified School District No. 377, that parents cannot use the Civil Rights Act, 42 U.S.C. Sec. 1983, to avoid the administrative requirements of EHA in challenging the placement of their handicapped child in a three-by-five time out room.

Four of the decisions concern school districts' scope of responsibility for related services, two of them involving psychiatric placement.

In Clovis Unified School District, the Ninth Circuit eschewed choices based simply on labeling; its reasoning process is well worth review when faced with the need to distinguish medical from related services.

In Taylor, another Ninth Circuit decision, the same court required a school district to pay its portion of the costs of a residential placement in a facility that operated both a school and a psychiatric hospital, noting that the district court intended to apportion costs among various related service agencies and, therefore, the school district's financial liability was not open-ended. And in Tice, the Fourth Circuit, though taking a much more procedurally-oriented approach in sorting recoverable from non-recoverable service costs, still left open the possibility that parents could recover the costs of psychiatric care. The Rapid City decision provides an unusual example of what can happen if a school district forgets the forest for the trees; in this case disagreement over a $861 bill for occupational therapy was gradually built into a $25,000 award against the school district for not prudently cutting its losses.

The process outlined by the Fifth Circuit in Daniel R.R. provides the best guidelines for determing compliance with EHA's mainstreaming requirement. And in Devries, the Fourth Circuit rejected the contention that the LRE mandate requires placement in the school closest to the child's home.

The last group of cases fall into a category called "placement/reimbursement." Ironically, two of the decisions -- Drew P. and Matta -- involved reimbursement of placement costs at the Higashi School in Tokyo, a highly specialized institution. In the first case, the court countenanced the placement but warned it would be approved only on a year-to-year, as-needed basis; in the second case, the court found the placement inappropriate. Gillette v. Fairland Bd. of Education, involving parental requests for tuition reimbursement, among other things, illustrates how the detailed procedural safeguards can complicate and delay resolution of an appropriate placement for a student.

15 Most Important Court Decisions of 1990

Attorney's Fees -- Is the Issue Settled?

√ *Angela L. v. Pasadena Independent School District* 16 EHLR 74B (S.D. Tex. 1989).

Mild mentally retarded child was twice denied eligibility for special education and filed for hearing; before hearing was held, negotiations produced settlement under which child would be served; parents now seek approximately $700 in attorney's fees and costs pursuant to the EHA, 20 U.S.C. Sec. 1415(e)(b). HELD: for plaintiff.

As "prevailing party," plaintiff was entitled to attorneys' fees of $18,200 based on time spent, difficulty of issues, whether fee was fixed or contingent, results obtained, and counsel's experience, reputation and ability.

√ *Howey ex rel. Howey v. Tippecanoe School Corp.* 734 F. Supp. 1485 (N.D. Ind. 1990), 60 Ed.L. Rep. 457, 16 EHLR 869.

Parents of child with Ehler's Danlos Type IV insisted on specific service providers at expense of Indiana school district and area special services agency, rescinding permission for district to complete its evaluation and release medical information; during due process hearing, parents substantially accepted services and programs urged by district, though they continued to maintain that district could not provide appropriate program; parents now seek attorneys' fees incurred during due process hearing.HELD: reduced attorneys' fees awarded.

Court substantially agreed with conclusion of hearing officer that district had prevailed and that parents had maintained adversary posture after achieving most of their objectives; on balance, however, parents had succeeded and were therefore entitled to attorneys' fees; moreover, because of lack of statutory authority, court refused to award costs of paralegal who was neither formally trained nor certified.

√ *Independent School Dist. No. 623, Roseville, Minn v. Digre* 893 F.2d 987 (8th Cir. 1990), 58 Ed. L. Rep. 92, 16 EHLR 420.

Minnesota school district appeals lower court's award of attorneys' fees, arguing that court abused its discretion in failing to consider special circumstances that made the award of attorneys' fees unjust -- that it had no control over the hearing officer's insistence that he could consider only "proposed" actions by the school district or commissioner's affirmance of this posture -- and awarding attorneys' fees for the pursuit of unnecessary administrative proceedings. HELD: lower court decision is affirmed.

School district refused to provide full hearing for several months before state officer became involved, and thereafter,

without any support from state law, opposed hearing on identification and placement of student and sought to limit issues before hearing officer; moreover, parent had no way of knowing that requested relief might have been available without exhaustion of administrative remedies.

√ *Shelly C. ex rel. Shelbie v. Venus Indep. School Dist.* 878 F.2d 862 (5th Cir. 1989), 54 Ed. L. Rep. 1126, EHLR 441:553.

Texas school district appeals summary judgment awarding attorneys' fees to parents, following settlement of dispute prior to resolution of due process hearing, contending that fee award was unreasonable in light of prevailing rates in community, that its offer of settlement ten days before hearing constituted genuine factual issue precluding summary judgment, and that, as a matter of law, attorneys' fees are not recoverable for settlements reached prior to hearing. HELD: reversed and remanded.

Contradictory evidence in record concerning reasonableness of fee award and of settlement offer created material issues of fact that must be resolved at trial, not by summary judgment; HCPA envisions fee award even though administrative proceedings do not reach due process hearing stage.

Discipline -- Must Exhaust Remedies Before Going to Court

√ *Hayes ex rel. Hayes v. Unified School Dist. No. 377* 877 F.2d 809 (10th Cir. 1989), 54 Ed.L. Rep. 450, EHLR 441:526.

Appeal from lower court decision granting defendants' motion for summary judgment in an action alleging that placement of handicapped children in three-by-five time-out room violates their rights under 42 U.S.C. Sec. 1983 and Kansas state law; defendants cross-appeal, contending that action should be dismissed because plaintiffs failed to exhaust their administrative remedies. HELD: reversed and remanded with instructions.

Discipline of child in classroom, including short-term suspensions and "time-out" periods, is a matter that relates to the public education of a handicapped child and therefore falls within the scope of the EHA; because disciplinary measures complained of here are within the purview of the EHA, the plaintiffs are required to exhaust EHA administrative remedies before bringing suit in court.

Least Restrictive Environment -- Court Cites Test for Mainstreaming

√ *Daniel R.R. v. State Board of Education* 874 F.2d 1036 (5th Cir. 1989), 53 Ed.L.Rep. 824, EHLR 441:43.

Texas hearing officer approved, and federal district court affirmed, school district's recommendation that student with Down's Syndrome be removed from regular half-day prekindergarten class to attend only special education classes; contending that EHA's mainstreaming mandate required that student be maintained in regular education setting, parents appealed. HELD: affirmed.

Rowley assumes that statute's mainstreaming requirement has been met and, therefore, does not provide standard for striking balance between mainstreaming and FAPE.

Test for determining compliance with mainstreaming requirement involves: (1) whether education in the regular classroom can be achieved satisfactorily with the use of supplemental aids and services, i.e., (a) have steps been taken to accommodate student in regular education environment, (b) have more than mere token gestures been made to accommodate student, (c) will child receive educational benefit from regular education, (d) what has been child's overall educational experience in mainstreamed environment, and (e) what effect does presence of handicapped child have on regular classroom environment; (2) if not, whether child has been mainstreamed to the maximum extent appropriate, i.e., school must take intermediate steps, such as placing the child in regular education for some academic classes and in special education for others, mainstreaming the child for nonacademic classes only, or providing interaction with nonhandicapped children during lunch and recess.

√ *Devries ex rel. DeBlaay v. Fairfax County School Board* 882 F.2d 876 (4th Cir. 1989), 55 Ed.L.Rep. 442, EHLR 441:555)

Seventeen-year old autistic student appeals district court's judgment upholding the Fairfax County, Virginia, School Board's determination that a county vocational center located thirteen miles from his home, rather than a public high school closer to his home, is the "appropriate" and "least restrictive" educational environment. HELD: affirmed.

District court fully considered the Act's mainstreaming requirements, but correctly concluded that student could not be satisfactorily educated in regular classes even with the use of supplementary aids and services. Placement of handicapped children in special programs located in public schools is not necessarily evidence of discrimination under either the Education of the Handicapped Act or the Rehabilitation Act.

Placement/Reimbursement -- Those Who Follow the Procedures Will Prevail

√ *Drew P. v. Clarke County School Dist.* 877 F.2d 927 (11th Cir. 1989), 54 Ed.L.Rep. 456, EHLR 441:550.

School district appealed district court decision requiring that autistic student be placed in residential program and directing that parents be reimbursed previous costs and attorneys' fees. HELD: affirmed.

Trial court's findings that student required residential placement were not clearly in error; inasmuch as court found that unilateral placement in residential facilities was justified, court had authority to order reimbursement for their costs, even if they were in Tokyo and Boston; court did not require residential placement until student reaches 21 years of age, but only as required based upon annual review until student reaches 21; admission of Tokyo school records was harmless error.

√ *Gillette ex rel. Gilette v. Fairland Board of Education*
725 F. Supp. 343 (S.D. Ohio 1989) 57 Ed.L.Rep. 453, 16 EHLR 285

Parents of a dyslexic student, 18 years old at time of suit, sought private school tuition reimbursement necessitated by Ohio school district's alleged failure to place student in least restrictive environment during seventh, eighth and tenth grades; local hearing and state level review officers, finding proposed IEPs to be appropriate, denied reimbursement and parents appealed to federal court. HELD: portion of parents' request granted.

Parents' failure to seek hearing following disagreement with proposed seventh grade placement precluded reimbursement for grades eight and nine; district had complied with necessary procedures in developing tenth grade IEP, but had not proposed placement in most integrated setting; since return to public school during middle of current (twelfth grade) year was not in child's best interest, district must reimburse parents for tuition incurred since removal (tenth through twelfth grades).

√ *Matta ex rel. Matta v. Board of Education - Indian Hill Exempted Village Schools*
731 F.Supp. 253 (S.D. Ohio 1990) 59 Ed.L. Rep. 36, 16 EHLR 544.

Parents of student classified as severely mentally retarded with language delay, believing him to be autistic, disputed Ohio school district's proposed classification and, after trying various placements, placed student in Higashi School in Japan; following hearing filed by parents for reimbursement of placement, hearing officer denied request; state level review officer also denied reimbursement, even though finding district's proposed IEP inappropriate, because she also found parent's placement inappropriate. On appeal to federal district court, HELD: reimbursement denied.

IEP proposed by district for 1986-87 school year recommended appropriate local placement; Higashi School was inappropriate because it prefers not to work with children having severe mental retardation.

√ *Tice ex rel. Tice v. Botetourt County School Board*
908 F.2d 1200 (4th Cir. 1990), 61 Ed.L.Rep. 1207.

Parents demanded reimbursement of all expenses incurred during psychiatric hospitalization of learning disabled son who suffered nervous breakdown within months after being declared ineligible for special education by Virginia school district, claiming that delays in his evaluation had denied him FAPE and necessitated subsequent need for psychiatric help as related services; hearing officer's findings for school district were affirmed by state level review officer and, subsequently, by federal district court. HELD: since parents may be entitled to partial reimbursement, judgment is vacated and matter remanded for further proceedings.

Because no IEP had been adopted, student was not receiving FAPE at time of hospitalization; however, parents are unable to demonstrate, after adoption of IEP even without psychiatric counseling, that student was not receiving FAPE because lower court did not clearly err in holding that IEP was reasonable calculated to enable him to receive educational benefit.

Reimbursement of hospitalization expenses prior to adoption of IEP depends upon whether that placement was proper to meet goals of EHA; however, since there is insufficient evidence for this determination, issue is remanded to district court for further consideration. Although hospitalization costs might be barred by EHA "medical services" exclusion, educational program student received and much of counseling may be recoverable if parents can show that student was not then receiving FAPE and that their placement of student was proper.

Related Services -- Order May be Restored!

√ *Clovis Unified School Dist. v. California Office of Admin. Hearings*
903 F.2d 635 (9th Cir. 1990), 60 Ed.L.REP. 728, 16 EHLR 944.

California administrative hearing officer directed school district to pay for placement of seriously emotionally disturbed child at an acute care hospital as a related service under EHA and was affirmed by U.S. district court, which also awarded attorney fees to parents; on appeal to the Ninth Circuit, HELD: reversed.

(1) School district must maintain child's placement at hospital pending judicial review proceedings under EHA's "maintenance of placement" or status quo provision, Sec. 1415(e)(3).
(2) Whether placement is for educational or medical reasons does not depend solely on whether they enable child to benefit from education or are provided by licensed physician, but rather on whether placement is for educational purposes or in response to medical, social, or emotional problems apart from learning process.
(3) Service is not "medical" within meaning of EHA simply because it is psychological or psychiatric in origin and must be treated by licensed physician, i.e., psychiatrist.
(4) Psychotherapeutic services were "medical", and hence not "related" under EHA, because of their intensity, required to be administered in a medical facility, and focused on treating a medical crisis.

√ *McNair v. Oak Hills Local School District*
872 F.2d 153 (6th Cir. 1989), 52 Ed.L.Rep. 950, EHLR 441:381.

Parents of hearing-impaired child appealed district court decision holding that public school district was not required by EHA to provide transportation to private school in which parents had made unilateral placement. HELD: affirmed.

When a child is voluntarily placed in a private school, a public school district need not provide a related service to that child under the EHA if that particular service is not designed to meet the unique needs of the child.

√ *Taylor ex rel. Taylor v. Honig*
910 F.2d 627 (9th Cir. 1990), 62 Ed.L.Rep. 78, 16 EHLR 1138.

District court entered a preliminary injunction ordering to place and pay for a seriously emotionally disturbed student in San Marcos Treatment Center, a residential facility in Texas operating as both a school and psychiatric hospital; district appeals, contending that under EHA, it is not obli-

gated to pay for medical services, e.g., placement in psychiatric hospital. HELD: lower court's order is affirmed.

Parents were likely to succeed on merits because placement was appropriate for student's needs, district had been unable to find any in-state alternative, and facility had been accredited as educational institution; moreover, district's financial liability was time limited since lower court intended to apportion costs among various related service agencies providing services to student.

√ *Rapid City School Dist. 51-4 v. Vahle*
733 F. Supp. 1364 (D.S.D. 1990), 59 Ed.L.Rep. 1083, 16 EHLR 638.

South Dakota school district appeals decision by hearing examiner requiring it to reimburse parents $861 for occupational therapy provided to child with Williams Syndrome, which causes a learning disability, attention deficit disorder without hyperactivity, and scoliosis; parents secured therapy privately after dissatisfaction with how district personnel were handling son's case; although district ultimately agreed that therapy and provider were appropriate, it refused to reimburse parents for expenses previously incurred. HELD: for parents.

District was clearly aware that proposed service provider was inappropriate and, therefore, its refusal to reimburse parents $861 for privately secured therapy was unreasonable; district's appeal of hearing examiner's decision, resulting in total legal expense to the parties of $250,000, was not "prudent act of stewardship of public funds."

Supplements to the Experts' Choices: These 11 Cases Just May be the Most Important of 1990

Although they did not directly involve issues under EHA, certainly two or more important decisions affecting elementary and secondary special education handed down within the 12 calendar months of 1990 were Detsel and Rothschild, both by the Second Circuit. In the former, the court ruled that the U.S. Secretary of Health and Human Services had no reasonable basis for interpreting his Medicaid regulation, 42 C.F.R. Sec. 440.80, which defines "private duty nursing services," to exclude services provided under EHA.

As a result of the second decision, disabled parents of nonhandicapped students must be accommodated when participating in school-initiated activities related to their children's education; in this case, hearing impaired parents had to be provided sign language interpreters. It is unclear, however, as to why the court excluded graduation from those activities.

The landmark Honig decision left open at least two important questions that are addressed in the following two proceedings. The Kurtz-Imig decision from Illinois illustrates what schools must do to find new placements for dangerous handicapped students when parents refuse to agree to suspensions for more than ten days. The Davila litigation, which is really in its earliest stages, may resolve the difference between OSEP and OCR on whether a handicapped student may be expelled after a finding that his/her dangerous behavior was not a consequence of his/her handicapping condition.

The Third Circuit ruled in the Chester County Intermediate Unit case that private insurers can contractually limit the scope of their coverage to exclude services like physical therapy that are part of a free appropriate public education.

A persistent source of confusion has been whether meetings between parents and educators can be tape recorded. Two Connecticut federal district court decisions last year ruled that taping by parents can be an intrinsic part of effective participation, which hopefully will put this issue to rest. And the First Circuit has ruled that a school district could employ a court reporter to prepare a transcript of a due process hearing, noting that a copy of the transcript was available to the parents on payment of a fee.

Surprisingly, the Eighth Circuit, in Schuldt, upheld Minnesota's procedures permitting an Assistant State Commissioner to act as a review officer for a local due process hearing. Given the history of this problem, I suggest that it is far preferable to adhere to the bright line of prohibiting any state employee from acting in this function.

In another matter concerning Federal/State relations, OSEP's preliminary draft monitoring report was found to be a "public record" within the meaning of Missouri's State Open Meetings Act and not protected from disclosure by the Federal Freedom of Information Act. Thus, a Missiouri state court held in Missiouri Protection & Advocacy Services, the document was subject to public disclosure when sent to state officials for review and comment. And in a decision concerning parent access to records, a Michigan state court, in Tallman, awarded attorneys' fees to a parent for the difficulties she faced in attempting to examine and copy her son's educational records.

Will Litigation Decline in 90's?

Most educators will be relieved to hear that special education litigation is probably on the decrease. Both the numbers of decisions handed down during the last 15 months and the issues in dispute suggest that the wave of lawsuits instituted following enactment of P. L. 94-142 has crested.

Thus, it has taken approximately 15 years to delineate the major parameters of EHA. I do not mean to imply that there are no important questions remaining, and I will turn to these in a moment; what I am suggesting is that the

proliferation of lawsuits that usually follows enactment of new legislation may be over.

Among the reasons for this would be that most schools have now had more than adequate time to establish, implement and become familiar with EHA requirements. Familiarity with those procedures has bred a comfort and willingness to strive for compliance in spirit, as well as fact, a flexibility that allows both parties to strive for a result that is satisfactory to both sides. Even where the dance of implementation is still relatively stiff and formal, the availability of attorneys' fees provides a dose of realism which, I believe, urges school districts to err on the side of the parents.

There are a number of fundamental issues that will probably have to be resolved in court. One is the difficulty of drawing the line between medical and related services. Experience indicates that there is no intrinsic, "natural" dividing line between these categories. Thus, courts tend to require services that are reasonable in cost, not too complex to administer, and generally accepted as routine by health professionals. Therefore, these types of cases probably will be with us for some time, primarily because expensive, complex medical technology invariably becomes cheaper and easier to administer.

A second area in which additional litigation might be anticipated concerns implementation of "least restrictive environment." This is because, despite many years of discussion within the special education community, a consensus about the meaning of LRE is still missing. This consensus will remain elusive especially so long as the quality of the education program can vary considerably between the alternative placements.

Finally, there will be additional litigation, but probably no "explosion," concerning Sec. 504 and its application to elementary and secondary education. My guess is that our increasingly conservative courts are likely to reject many of the extreme positions taken by OCR in its letters of findings, especially concerning the scope of coverage and the breadth of required accommodation. Some of this will involve lawsuits brought by "EHA generation" students seeking comparable services at the college level.

Discipline -- School Upheld on Handling of Dangerous Student

√ *Board of Education of Township High School District Number 211, Cook County, Illinois v. Kurtz-Imig*
(N.D. Ill. 1989), 16 EHLR 17

Illinois school district seeks preliminary injunction to prevent return of dangerous or disruptive student from returning to high school special education class, alleging that student had threatened to kill students, teachers and staff and offering interim alternate placements (homebound or in-school). HELD: preliminary injunction issued.

School board offered "substantial credible and uncontradicted evidence" that preliminary injunction was required for a dangerous/disruptive student; provided 10 hours/week homebound instruction. Only evidence supporting student was mother's testimony; district had demonstrated potential irreparable injury, not compensable by damages, and likelihood of success on merits, and balance of harm was strongly in district's favor.

√ *Metropolitan School District of Wayne Township, Marion County, Indiana v. Davila*
(S.D. Ind. 1990) [In litigation]

Class action challenging OSERS' position that handicapped child must be served even if no connection between handicap and misconduct; class certified, discovery underway.

Funding -- Follow The Bouncing Checkbook!

√ *Chester County Intermediate Unit v. Pennsylvania Blue Shield*
896 F.2d 808 (3rd Cir. 1990), 16 EHLR 925.

Parents of two handicapped children who received physical therapy as related services under EHA were covered by health insurance policies issued by Capital Blue Cross and Pennsylvania Blue Shield; insurors refused to pay bills submitted by intermediate educational units that provided the therapy, relying on various contractual provisions; in parents suit for declaratory judgment, district court dismissed action holding that parents' claim was inconsistent with the reimbursement provisions of the applicable policy. On parents appeal, HELD: lower court decision is affirmed.

There is no discernible congressional intent to intervene in the contractual relationship between insurers and subscribers; on the face of the plain terms of the exclusions in the Major Medical policy, Blue Cross/Blue Shield are not liable for the costs of the physical therapy.

√ *Kerr Center Parents Association v. Charles*
897 F.2d 1463 (9th Cir. 1990), 59 Ed.L.Rep. 22, 16 EHLR 781 (withdrawing 842 F.2d 1052 (9th Cir. 1988).

Handicapped students resident at private facility for mentally retarded children located in Oregon school district were served by district; district was reimbursed for educational costs of program by division of state's department of human resources subject, however, to availability of funds; when, during 1982-1983 school year, district reduced services because state legislature had not appropriated sufficient funds to permit full reimbursement of costs, parents association and students sued district, division of state's department of human resources and the state's department of education (SEA), alleging a denial of FAPE.

Federal district court found for plaintiffs and ordered SEA to ensure adequate funding, ultimately ordering state to reimburse district annually. On appeal by state agencies, HELD: affirmed in part, reversed in part, and remanded.

Order of prospective relief is not violation of state's Eleventh Amendment immunity; plaintiffs were not required to exhaust administrative remedies because requests for hearings from district and state agency were denied; because children were placed in program by public agency, SEA is responsible under EHA and regulations for ensuring that they receive FAPE and funding responsibility rests on state, not school districts; since availability of services is conditioned upon avialability of funds, SEA cannot ensure that plaintiffs are receiving FAPE.

State immunity (not 11th Amendment) no bar to action requiring compliance with Federal law; state cannot avoid

financial obligation by placing educational responsibility on division of Department of Human Resources.

Least Restrictive Environment -- What Does Closest To Home Mean?

√ *Schuldt v. Mankato Independent School District No. 77* (D.Minn. 1990), 16 EHLR 1111.

Parents of seven-year old girl with spina bifida, paralyzed from the waist down who uses a wheel chair for mobility, wanted child placed in school closest to home; Minnesota school district contended that other school in district, which was fully accessible, would provide FAPE in least restrictive environment; local hearing officer held for parents but state level review officer -- who was deputy state commissioner of education appointed by commissioner -- reversed. On appeal, HELD: review decision is affirmed.

Neither EHA nor Reg. 300.552 create an absolute duty to place child in school closest to home, only in school closest to home that can meet child's individual needs, including such factors as cost to district and benefit to child. Minnesota's hearing procedures adequately address problems concerning possible conflicts of interest by state level review officers, and they have been reviewed and approved by Office of Special Education Programs.

Monitoring -- Draft Monitoring Report Is A 'Public Record' in Missouri

√ *Missouri Protection and Advocacy Services v. Allan* 787 S.W.2d 291 (Mo. App. 1990), 59 Ed.L.Rep. 1208.

Preliminary draft monitoring report prepared by Office of Special Education Programs, Federal Department of Education, to ascertain whether Missouri was in compliance with requirements of federal educational programs for handicapped children was "public record" within meaning of State Open Meetings Act and was not protected by Federal Freedom of Information Act; thus when report was sent to state officials for review and comment, it became subject to public disclosure.

Parent Rights -- Parents Can Tape Record IEP Meetings

√ *E.H. v. Tirozzi* 735 F. Supp. 53 (D.Conn. 1990), 60 Ed.L.Rep. 478, 16 EHLR 787.

Connecticut district's refusal to permit Danish parent of child with Downs Syndrome who had difficulty understanding English to tape IEP meeting violated Reg.300.345, which requires district to ensure parent comprehends IEP process. To same effect: V.W. v. Favolise, 16 EHLR 1070 (D. Conn. 1990).

√ *Caroline T. v. Hudson School District* 16 EHLR 1343 (1st Cir. 1990).

Following prehearing conference, New Hampshire hearing officer issued order permitting school district to employ a court reporter to record the hearing, which would have been made available to both parties; when hearing commenced over one month later, parents' counsel, claiming lack of prior notice of recording, announced intention to appeal prehearing order and hearing was recessed; district court, on magistrate's recommendation, dismissed parents' complaint seeking injunction for failure to state cause of action. On appeal, HELD: lower court decision affirmed.

There is no legal support for assertion that allowing school district to employ a third party to make unofficial recording of special education proceeding violates the due process rights of parents and their educationally handicapped children; presence of court reporter/stenographer is not equal to opening hearing to public so there is no violation of parties' privacy rights; even if presence of reporter/stenographer gave district unfair advantage, frightened child, or infringed privacy, it does not rise to level of constitutional violation, particularly where, as here, record is available to both parties upon payment of fee; finally, finding that action was completely devoid of merit and plagued by unnecessary parents' counsel's delay, appellate court remanded to district court for consideration of sanctions under Fed.R.Civ.P. 11 and directed payment of costs and attorneys' fees to school district.

√ *Tallman v. Cheboygan Area Schools* 454 N.W.2d 171 (Mich.App. 1990), 59 Ed.L.Rep. 1155, 16 EHLR 1117.

Claiming violation of Michigan Freedom of Information Act, mother of student undergoing physical rehabilitation brought action against school district that insisted upon charging for copies of student's file, at first $1 per page, subsequently under a sliding scale. HELD: reversed and remanded.

Although trial court was not clearly erroneous in ruling that mother was not denied access to or copy of her son's records, there was insufficient factual support for conclusion that school board's charge for copying documents requested under Act was reasonable and in compliance with Act. Although case was remanded for insufficient evidence, parents were awarded attorneys' fees.

Related Services -- HHS Exceeded Authority in Policy Interpretation

√ *Detsel v. Sullivan* 895 F.2d 58 (2nd Cir. 1990), 16 EHLR 427.

U.S. Secretary of Health and Human Services had no reasonable basis for intepretation of Medicaid regulation, 42 C.F.R. Sec. 440.80, defining "private duty nursing services" to exclude services provided under EHA, e.g., extraordinary medical care during periods of critical need, provided in recipient's home or in hospital. Severely handicapped child appealed district court's decision upholding interpretation of Medicaid rule limiting funding of private duty nursing; under interpretation of U.S. Secretary of Health and Human Resources, Medicaid funding was available only if nursing care was provided in a hospital, in a skilled nursing facility, or within the four corners of recipient's home, and not during the time she attends public school. HELD: secretary failed to provide a sufficiently reasonable explanation for his interpretation.

The at-home limitation is based on obsolete medical assumptions, leads to a net increase in government spend-

ing, and is inconsistent with the only other analysis of the rule that the agency appears to have undertaken. 42 C.F.R. Sec. 440.80 was unreasonably applied to preclude a claimant who resides at home from receiving Medicaid reimbursement for private duty nursing rendered during those few hours of each day when her normal life activities take her outside her home to attend school.

Section 504 -- Parents Are Covered Too!

√ *Rothschild v. Grottenthaler*
907 F.2d 286 (2nd Cir. 1990), 61 Ed.L.Rep. 490, 16 EHLR 1020.

New York school district refused to provide sign language interpreter for deaf parents of two nonhandicapped students, requested in connection with various school-initiated activities related to their children's education; parents sought declaratory and injunctive relief, and damages, under Section 504 of Rehabilitation Act and Civil Rights Act, 42 U.S.C. Sec. 1983, claiming they are unable to effectively participate in activities; district court dismissed damage claim, but otherwise found for parents, ordering provision of interpreter, reimbursement of expenses parents had incurred in privately hiring interpreters, and award of attorneys' fees. On appeal: largely affirmed.

Under 34 C.F.R. 104.30(4), school district cannot discriminate against "otherwise qualified handicapped persons" in providing any Federally aided programs; parents private hiring of interpreters indicates they are "otherwise qualified"; so while district is subject to Section 504 in providing educational services, it must refrain from discrimination on the basis of handicap in the provision of "other services" under Reg. 34 C.F.R. 104.3(k)(4). However, appellate court limited scope of district court's order by holding that parents are not entitled to interpreter at child's graduation ceremony.

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FIRST CLASS