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# THE RIGHT TO SPECIAL EDUCATION IN ILLINOIS— SOMETHING OLD AND SOMETHING NEW

DAVID P. KULA\* \*\*

Recent legislative and judicial developments on both the state and federal fronts have kindled an intense interest in the rights of the handicapped in the area of education. As a result, much emphasis has been placed on the quality and adequacy of educational programs for the handicapped, and significant improvements in educational services have been made on a national scope. However, much of this new-found legislative and judicial energy has been directed only at the upper echelons of the administrative networks which must oversee the provision of educational services.

Although it is too early to determine whether or not increased legislative and judicial pressure at the top of the administrative framework has actually resulted in a corresponding improvement of services at the grassroots level, it is probable that the rights of many handicapped children have been lost in the shuffle while new mandates are being given their "shakedown" voyages. In this context, we will examine the present status of special education programs, with a heavy emphasis on Illinois statutes and cases. Hopefully, this article will provide the Illinois practitioner, whether school board attorney or child advocate, with working knowledge of the rights of his or her client, and, more importantly, with an awareness of the available remedies by which to vindicate those rights.

## BACKGROUND

The federal constitution does not expressly provide a right to an education, and in *San Antonio Independent School District v. Rodriguez*,<sup>1</sup> the United States Supreme Court determined that education is not among the rights implicitly protected by the Constitution. Nevertheless, it has been suggested that *Rodriguez* stands only for the princi-

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1. 411 U.S. 1 (1973).

ple "that equal educational opportunity is not measured in terms of equal financial expenditures,"<sup>2</sup> and that the provision of an inadequate education which results in the absolute deprivation of education may not satisfy the fourteenth amendment.<sup>3</sup> These interpretations of *Rodriguez* leave open the possibility of challenging inadequate special education services or the failure to provide any special education services on equal protection or due process grounds. The Supreme Court, in *Brown v. Board of Education*,<sup>4</sup> laid the foundation for the equal protection challenge when it stated:

Today, education is perhaps the most important function of state and local governments . . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.<sup>5</sup>

Similarly, in *Goss v. Lopez*,<sup>6</sup> the Supreme Court laid the foundation for a due process challenge, once a state chooses to operate a public school system, when it determined that the state was thereby "constrained to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause. . . ."<sup>7</sup>

In *Pennsylvania Association for Retarded Children v. Pennsylvania*<sup>8</sup> and *Mills v. Board of Education*,<sup>9</sup> two federal district courts determined that the exclusion of handicapped children from public school education could result in a denial of their constitutional rights to due process and equal protection. *P.A.R.C.* was a class action on behalf of those retarded students who had been excluded from the public schools, in accordance with a Pennsylvania statute,<sup>10</sup> as untrainable or ineducable. Although the three-judge district court approved a consent agreement reached by the parties, it also chose to gratuitously comment upon the constitutional issues raised by the plaintiffs. The court found that the Pennsylvania statute failed to provide for notice and a hearing before excluding the retarded child from public education and thus violated

2. *Fialkowski v. Shapp*, 405 F. Supp. 946, 958 (E.D. Pa. 1975).

3. 411 U.S. at 24, 25. See Krass, *The Right to Public Education for Handicapped Children: A Primer for the New Advocate*, 1976 U. ILL. L.F. 1016, 1034.

4. 347 U.S. 483 (1954).

5. *Id.* at 493.

6. 419 U.S. 565 (1975).

7. *Id.* at 574.

8. 343 F. Supp. 279 (E.D. Pa. 1972), *modifying* 334 F. Supp. 1257 (E.D. Pa. 1971) [hereinafter cited as *P.A.R.C.*].

9. 348 F. Supp. 866 (D.D.C. 1972).

10. 24 PA. CONS. STAT. ANN. §§ 13-1304, 13-1326, 13-1330(2), 13-1371 through 13-1380 (Purdon Supp. 1978).

his right to due process. The court also questioned whether the statute could withstand the plaintiffs' equal protection claim even if a rational basis analysis were used, since the parties agreed that all mentally retarded children were capable of benefiting from a program of education and training.<sup>11</sup> *Mills*, another class action suit, was brought on behalf of handicapped children in the District of Columbia to enjoin their exclusion from the public schools and to compel the District of Columbia to provide them with adequate education at public expense. The court viewed a District of Columbia statute,<sup>12</sup> which required parents to enroll their children in public or private schools, as presupposing that educational opportunity would be available for the children.<sup>13</sup> Even though the court relied on this statute in ordering the state to provide an adequate education for the handicapped at public expense, it, like the court in *P.A.R.C.*, gratuitously chose to comment upon the constitutional issues raised by the plaintiffs. The court determined that the failure to provide education at public expense to handicapped children while providing education to non-handicapped children violated the equal protection component of the due process clause.<sup>14</sup> In addition, the court found that due process required a hearing prior to exclusion, termination or classification into a special education program.<sup>15</sup> These two cases are generally considered as the landmark decisions in the area of special education and to have been the foundation for subsequent federal legislation<sup>16</sup> in this area.

The impact of *P.A.R.C.* and *Mills* is evidenced by congressional action which expanded federal special education assistance programs, such as the Education of the Handicapped Amendments of 1974.<sup>17</sup> Under this legislation, the congress required each state to establish a goal of providing full educational opportunity for all handicapped children as a condition to receipt of federal financial assistance.<sup>18</sup> These amendments also required the states to establish procedural safeguards similar to those discussed in *P.A.R.C.* and *Mills*.<sup>19</sup> Later, in 1975, the congress assumed greater financial responsibility for the education of handicapped children when it passed the Education for All Handi-

11. 343 F. Supp. at 296.

12. D.C. CODE §§ 31-201, 31-203 (Supp. 1978).

13. 348 F. Supp. at 874.

14. *Id.* at 875.

15. *Id.*

16. 20 U.S.C. §§ 1401-1461 (1976).

17. Pub. L. No. 93-380, §§ 611-621, 88 Stat. 579 (amending 20 U.S.C. §§ 1401-1461 (1970)) (current version at 20 U.S.C. §§ 1401-1461 (1976)).

18. 20 U.S.C. § 1413(12)(A) (1976).

19. *Id.* at § 1413(13).

capped Children Act of 1975.<sup>20</sup> The purpose of the Education Act is to provide handicapped children with:

[a] free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children.<sup>21</sup>

In order to receive funding under the Education Act, each state must submit a plan detailing its policies and procedures for educating the handicapped.<sup>22</sup> Local agencies must apply to the state educational agency and assure that the provisions of the Education Act are being met as a prerequisite to receipt of federal funding.<sup>23</sup>

The Education Act, and the regulations promulgated thereunder,<sup>24</sup> describe in detail the services and programs which must be instituted by the states to qualify for federal financial assistance. For instance, the states must identify, locate, and evaluate handicapped children and provide a plan describing the facilities and services to be established within the state.<sup>25</sup> The Education Act also requires that the local school system develop and annually review a written individualized educational program for each handicapped child<sup>26</sup> and that handicapped children be "mainstreamed" whenever possible.<sup>27</sup>

The parents and guardians of handicapped children also play an important role under the Education Act. For example, the parents are permitted to assist the local school system with development of the individualized educational program.<sup>28</sup> The Education Act also mandates that the procedural safeguards established by the states include an opportunity for parents and guardians to examine school records, prior notice to parents or guardians of proposed educational program changes or refusals to initiate or change the identification, evaluation, or educational placement of the child.<sup>29</sup> In addition, the Act requires that the parents or guardian be notified of their right to file a complaint with the educational agency regarding the child's identification, evalua-

20. *Id.* at §§ 1401-1461 [hereinafter referred to as the Education Act].

21. *Id.* at § 1401 note (Pub. L. No. 94-142, 89 Stat. 773, 775).

22. *Id.* at § 1413.

23. *Id.* at § 1414.

24. 45 C.F.R. §§ 121a.1-121a.754 (1977) (the regulations, promulgated by the Department of Health, Education and Welfare, became effective October 1, 1977).

25. 20 U.S.C. § 1412(2) (1976).

26. *Id.* at § 1412(4).

27. *Id.* at § 1412(5)(B).

28. *Id.* at § 1414(a)(5).

29. *Id.* at § 1415(b)(1)(A).

tion or placement,<sup>30</sup> and have the opportunity for hearing before a neutral hearing examiner.<sup>31</sup> The hearing procedure includes the right to appeal the decision of the hearing officer to the state educational agency and, if the latter decision is unfavorable, to the state or federal district court.<sup>32</sup> During the hearing stage, any party to the hearing has the right to be accompanied and advised by counsel and individuals with special knowledge of the problems of handicapped children; to present evidence; to confront, cross-examine and compel the attendance of witnesses; to obtain a record of the hearings and to receive written findings of fact and decision.<sup>33</sup>

### SECTION 504 OF THE REHABILITATION ACT OF 1973

In addition to providing financial support for special education programs, Congress has attempted to ban discrimination on the basis of one's handicap by enacting Section 504 of the Rehabilitation Act of 1973.<sup>34</sup> This section provides that:

No otherwise qualified handicapped individual in the United States, as defined in section 706(6) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.<sup>35</sup>

While the Education Act<sup>36</sup> functions as a funding statute to assist the states in bearing the financial burden of educating the handicapped, and conditions the extension of funds upon state compliance with the mandates of the federal program, section 504 goes one step further. Failure of public programs to comply with the mandate of section 504 will result in the termination of federal financial assistance to the entire state education program, including non-handicapped education programs.

The final regulations,<sup>37</sup> issued by the Department of Health, Education and Welfare<sup>38</sup> under section 504, require recipients of federal assistance operating public elementary or secondary education programs to "provide a free appropriate public education to each qualified

30. *Id.* at § 1415(b)(1)(E).

31. *Id.* at § 1415(b)(2).

32. *Id.* at §§ 1415(c), 1415(e)(2).

33. *Id.* at § 1415(d).

34. 29 U.S.C. § 794 (1976).

35. *Id.*

36. 20 U.S.C. §§ 1401-1461 (1976).

37. 45 C.F.R. § 84 (1978).

38. The Department of Health, Education and Welfare will hereinafter be referred to as HEW.

handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap."<sup>39</sup> Recipients of federal financial assistance, as defined by the regulations, include the states and their instrumentalities or political subdivisions, as well as public and private agencies, institutions, organizations or persons to which such assistance is extended directly or indirectly.<sup>40</sup> Federal financial assistance is also broadly defined. It includes grants, loans, contracts, services of federal personnel, and use or interests in real or personal property provided or made available by HEW.<sup>41</sup> The regulations define free appropriate education as "the provision of regular or special education and related aids and services that . . . are designed to meet individual educational needs of handicapped persons as adequately as the needs of non-handicapped persons . . ." <sup>42</sup> without cost to the handicapped person or to his parents or guardian, except for those fees that are imposed on non-handicapped persons or their parents or guardian.<sup>43</sup> The regulations impose upon the recipients an affirmative duty to identify and locate qualifying handicapped persons within their jurisdiction who are not receiving a public education and to inform these individuals and their parents or guardian of the recipient's duty to provide a free appropriate public education.<sup>44</sup>

The regulations incorporate by reference the enforcement provisions applicable to Title VI of the Civil Rights Act of 1964.<sup>45</sup> HEW officials are required to initiate an investigation whenever a report, complaint or any other source of information indicates a failure to comply with the mandates of section 504.<sup>46</sup> Termination of federal funding may result after an administrative hearing and upon a finding of a refusal to comply.<sup>47</sup> Any administrative action taken may be reviewed<sup>48</sup> in accordance with the provisions of the Administrative Pro-

39. 45 C.F.R. § 84.33(a) (1976).

40. *Id.* at § 84.3(f).

41. *Id.* at § 84.3(h).

42. *Id.* at § 84.33(b)(1).

43. *Id.* at § 84.33(c).

44. *Id.* at §§ 84.32(a), 84.32(b).

45. *Id.* at §§ 84.61, 80.6-80.10, 81.1-81.131.

The language of Section 601 of Title VI of the Civil Rights Act of 1964 is similar to Section 504 of the Rehabilitation Act of 1973. Section 601 provides:

No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 2000(d) (1976).

46. 45 C.F.R. § 80.7(c) (1978).

47. *Id.* at § 80.8.

48. 5 U.S.C. § 706 (1976).

cedure Act.<sup>49</sup>

While the regulations promulgated pursuant to section 504 permit the initiation of a department investigation upon receipt of a written complaint of non-compliance filed not later than 180 days from the date of the alleged discrimination,<sup>50</sup> neither the regulations nor section 504 expressly provide for a private cause of action to enforce section 504. Nevertheless, courts have utilized the common law doctrine of implication<sup>51</sup> and have determined that a private right of action is implicit in section 504. In *Lloyd v. Regional Transportation Authority*,<sup>52</sup> plaintiffs brought a class action on behalf of all mobility-disabled persons in the northeastern region of Illinois who were unable to use the defendant's public transportation system because of their physical disabilities. Plaintiffs sought both preliminary and mandatory injunctions to prevent the defendant from designing and operating any new federally funded facilities that would be inaccessible to mobility-disabled persons, and to compel the defendants to make accessible the existing transportation facilities. In *Lloyd*, the United States Court of Appeals for the Seventh Circuit viewed *Lau v. Nichols*<sup>53</sup> as conclusively establishing that affirmative rights under section 504 existed, and that a private cause of action to enforce these rights was permissible, even under the stringent requirements delineated by the Supreme Court in *Cort v. Ash*.<sup>54</sup> The Seventh Circuit vacated the dismissal order of the district

49. 5 U.S.C. §§ 701-706 (1976).

50. 45 C.F.R. § 80.7(b) (1978). Such time period may be extended by HEW or its designee. *Id.*

51. See Note, *Emerging Standards for Implied Actions Under Federal Statutes*, 9 U. MICH. J.L. REF. 294 (1976) for a discussion of the doctrine of implication.

52. 548 F.2d 1277 (7th Cir. 1977).

53. 414 U.S. 563 (1974). In *Lau*, the Supreme Court held that where a San Francisco school district passively discriminated against non-English-speaking Chinese students by not offering special services to enable the students to take advantage of the facilities, textbooks, and curriculum offered all students in the district, a private right of action could be implied to enforce the affirmative duties not to discriminate under Section 601 of Title VI of the Civil Rights Act of 1964. 414 U.S. at 566. The Seventh Circuit found *Lau* dispositive in *Lloyd* because of the "near identity of language in Section 504 of the Rehabilitation Act of 1973 and Section 601 of the Civil Rights Act of 1964. . . ." 548 F.2d at 1281.

54. 422 U.S. 66 (1975). In *Cort*, the Supreme Court consolidated conflicting prior case law concerning implication of a private cause of action and set out four relevant factors to determine whether a private remedy could be implied in a statute not expressly providing one. 422 U.S. at 78-9. The *Lloyd* court summarized the criteria set forth in *Cort* as follows:

First, is the plaintiff one of the class for whose especial benefit the statute was enacted, that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

548 F.2d at 1284 (citations omitted). The Seventh Circuit's reasoning in *Lloyd* has been severely



court<sup>55</sup> and remanded the case for consideration of the relief requested by the plaintiffs. Other federal courts have followed the Seventh Circuit's lead where discrimination against the handicapped in an educational program was found.<sup>56</sup> However, in those actions which were initiated subsequent to the effective date of the procedural enforcement regulations issued by HEW,<sup>57</sup> the courts have also followed the Seventh Circuit's suggestion that the result might differ.<sup>58</sup> For example, in *Crawford v. University of North Carolina*,<sup>59</sup> the plaintiff, a deaf graduate student, sought an injunction requiring the university to provide and pay for interpreter services, claiming that the university's refusal to do so violated his rights under section 504. The court viewed *Lloyd* as authority for a private right of action under section 504, but noted that *Lloyd* was decided prior to the issuance of the HEW regulations. Since administrative remedies were now available to the plaintiff, he would be required to pursue them. Nevertheless, the court issued a preliminary injunction requiring the university to provide free interpreter services, justifying its decision on the ground that the action was initiated prior to the regulations. In *Doe v. New York University*,<sup>60</sup> the plaintiff sought injunctive relief under section 504 to compel a medical school to readmit her as a student upon recovery from her mental disability handicap. The court found that the exhaustion of plaintiff's administrative remedies was required and refused to enter either a temporary restraining order or a preliminary injunction which would require plaintiff's readmission to the medical school.

Although the lower courts have required plaintiffs to exhaust administrative remedies subsequent to the effective date of the procedural

criticized for its failure properly to apply the *Cort* requirement. See Note, *Toward Equal Rights for Handicapped Individuals: Judicial Enforcement of Section 504 of the Rehabilitation Act of 1973*, 38 OHIO ST. L.J. 676 (1977).

55. 548 F.2d 1277, 1279-81 (7th Cir. 1977) (discussing the district court's memorandum opinion order).

56. See, e.g., *Doe v. New York Univ.*, 442 F. Supp. 522 (S.D.N.Y. 1978); *Crawford v. University of N.C.*, 440 F. Supp. 1047 (M.D.N.C. 1977).

57. 45 C.F.R. § 84 (1977).

58. In *Lloyd*, the Seventh Circuit stated:

We expressly leave open as premature the question whether, after consolidated procedural enforcement regulations are issued to implement Section 504, the judicial remedy available must be limited to post-administrative remedy judicial review. In any event, the private cause of action we imply today must continue at least in the form of judicial review of administrative action. And until effective enforcement regulations are promulgated, Section 504 in its present incarnation as an independent cause of action should not be subjugated to the doctrine of exhaustion. . . . But assuming a meaningful administrative enforcement mechanism, the private cause of action under Section 504 should be limited to a *posteriori* judicial review.

548 F.2d at 1286, n.29 (citations omitted).

59. 440 F. Supp. 1047 (M.D.N.C. 1977).

60. 442 F. Supp. 522 (S.D.N.Y. 1978).

enforcement regulations issued by HEW,<sup>61</sup> and it might thus appear that the function of the courts in enforcing section 504 rights is now merely one of review pursuant to the provisions of the Administrative Procedure Act,<sup>62</sup> the recent United States Supreme Court decision in *Cannon v. University of Chicago*<sup>63</sup> supports the argument for the existence of an implied right of action under section 504. In *Cannon*, the Supreme Court reversed the Seventh Circuit<sup>64</sup> and held that a private right of action could be implied to remedy an alleged violation of the Education Amendments to the Civil Rights Act of 1964.<sup>65</sup> The court determined that the implication requirements as defined in *Cort v. Ash*<sup>66</sup> were met and stated that the “. . . award of individual relief to a private litigant who has prosecuted her own suit is not only sensible but is fully consistent with—and in some cases even necessary to—the orderly enforcement of the statute.”<sup>67</sup> Furthermore, the Court stated that the individual suit was not inappropriate because of the plaintiff's failure to exhaust administrative remedies, pointing out that even HEW took the position that the private remedy would assist in the achievement of the statutory purpose.<sup>68</sup> The Court noted that the complaint procedures failed to permit the complainant to participate in the investigation and enforcement proceedings for Title IX violations, would not

61. 45 C.F.R. § 84 (1977).

62. 5 U.S.C. § 706 (1976). In cases involving judicial review of agency action under the Administrative Procedure Act, [hereinafter referred to as the APA], the reviewing court must set aside actions found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” 5 U.S.C. § 706(2)(A) (1976), or action taken contrary to various constitutional, statutory, or procedural requirements, *id.* at § 706(2)(F). See *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 413-15 (1971). *De novo* review of administrative decisions under the APA is proper in only two situations: (1) where the agency action is adjudicatory in nature and the reviewing court finds that the administrative fact finding procedures were inadequate, and (2) “. . . when issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action.” 401 U.S. at 415.

63. — U.S. —, 99 S. Ct. 1946 (1979).

64. 559 F.2d at 1063 (7th Cir. 1977) (amended 1978). In *Cannon*, the Seventh Circuit found that the individual plaintiff did not have an implied cause of action against the university for its alleged discrimination on the basis of sex in denying her entrance into medical school. The court distinguished the *Lloyd* case on the grounds that the plaintiff in *Cannon* was merely an individual discriminatee, whereas the plaintiff in *Lloyd* was a member of a large class of plaintiffs. The Seventh Circuit also stated that “in this instance, construing Title IX to provide a private cause of action before the administrative remedy has been exhausted would be to violate the intent of Congress.” 559 F.2d at 1072-73. For a discussion criticizing the Seventh Circuit's application of the tort requirements for implying a private right of action, see Note, *Implied Rights of Action to Enforce Civil Rights: The Case for a Sympathetic View*, 87 YALE L.J. 1378 (1978).

65. 20 U.S.C. § 1681 (1976) provides:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

66. *Supra*, at note 54.

67. 99 S. Ct. at 1962.

68. *Id.* at 1963.

necessarily insure relief for the complainant should a voluntary compliance agreement be reached between HEW and the funding recipient, and did not insure a decision on the complaint within a reasonable time.<sup>69</sup> Because of the similarities in the language, purpose and enforcement procedures of Title IX and section 504, the recognition of a private cause of action in *Cannon* clearly supports the existence of an implied private remedy under section 504 which may be utilized prior to the exhaustion of the administrative remedies.<sup>70</sup>

In addition to the possible implied cause of action under section 504, the advocate should be aware of the possibility of bringing suit against local school districts under the Civil Rights Act of 1871.<sup>71</sup> This action would be particularly useful where HEW provides insufficient relief for past violations of section 504.<sup>72</sup> Neither *Cannon* nor *Lloyd*

69. *Id.* at 1962-63.

70. For additional authority supporting the implied right of action under section 504, see *Davis v. Southeastern Community College*, 574 F.2d 1158 (4th Cir. 1978), *rev'd on other grounds*, No. 78-711 (U.S. July 11, 1979) and *Kampmeier v. Nyquist*, 553 F.2d 296 (2d Cir. 1977). In these cases, as in *Crawford* and *Doe*, the courts recognized *Lloyd* as authority for a private right of action under section 504, without discussing whether the existence of a large class of plaintiffs was indispensable to the maintenance of the action as required by the Seventh Circuit in *Cannon*.

*Davis* involved a suit brought by a hearing-disabled licensed practical nurse against Southeastern University which denied her admission to a program leading to certification as a registered nurse. The Fourth Circuit remanded the case to the lower court in light of the newly issued HEW regulations recognizing the plaintiff's right to a private cause of action under section 504 as an individual discriminatee. 553 F.2d at 299-300. The Supreme Court in its first case interpreting section 504, offered no express clarification on the issue in its response to Southeastern's contention that respondent could not seek judicial relief because section 504 did not provide for a private cause of action, and Davis' counterargument that whether or not a private right of action existed under section 504, she could maintain her suit under Section 1 of the Civil Rights Act of 1871, 42 U.S.C. 1983 (1976), and stated: "In light of our disposition of this case on the merits, it is unnecessary to address these issues and we express no views on them." 47 U.S.L.W. at 4691, n.5.

In *Kampmeier*, the court affirmed the lower court's denial of a preliminary injunction against public school officials who refused to allow two visually impaired junior high students to participate in contact sports. The court found exclusion of the plaintiffs justified on the strength of medical opinion relied on by the defendants to the effect that the plaintiffs were not otherwise qualified to play contact sports due to the high risk of eye injury. The court saw that the plaintiffs presented little evidence to cast doubt upon the defendant's rationale and that they therefore failed to make a clear showing of probable success on the merits. 574 F.2d at 1159, 1161. Since the HEW regulations were not yet in effect, the Second Circuit was not compelled to require the plaintiffs to exhaust their administrative remedies.

71. The statute provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1976).

72. In *Monell v. Department of Social Serv.*, 436 U.S. 658 (1978), the Supreme Court expressly overruled *Monroe v. Pape*, 365 U.S. 167 (1961), and held that a municipality (such as a school district) is no longer immune from suit under section 1983 for constitutional violations resulting from official municipal policy. However, in *Monell*, plaintiff alleged violation of a constitutional right clearly recognized by the Supreme Court in *Cleveland Bd. of Educ. v. LaFleur*,

precludes this avenue of relief.<sup>73</sup>

Whether or not the courts will have future occasion to imply a private cause of action under section 504, their role in enforcing the mandates of section 504 has not ended. For example, in *N.A.A.C.P. v. Wilmington Medical Center, Inc.*,<sup>74</sup> plaintiffs, five organizations and six individuals representing minority and handicapped persons residing in the City of Wilmington, brought suit charging that the defendant's proposed relocation discriminated against them in violation of their rights under Title VI of the Civil Rights Act of 1964 and Section 504 of the Rehabilitation Act of 1973. Subsequent to commencing the suit against the Wilmington Medical Center, plaintiffs asserted a cause of action against the Secretary of HEW, challenging the constitutionality of the administrative regulations promulgated by the Secretary in the implementation of Title VI of the Civil Rights Act of 1964 and Section 504 of the Rehabilitation Act of 1973. Plaintiffs contended that the HEW regulations violated due process since they failed to provide:

- (1) the right to submit relevant information to the Secretary in support of a complainant's position that he or she has suffered, or is likely to suffer, discrimination at the hands of a recipient; (2) an opportunity to review and comment upon proposed assurances, developed in the course of voluntary compliance negotiations, which the Secretary has concluded will eliminate or substantially mitigate the recipient's alleged discriminatory actions; and (3) if voluntary compliance is nevertheless achieved, a right to a trial-type hearing conducted by an impartial decisionmaker, together with other usual

414 U.S. 632 (1974). There has been no comparable Supreme Court recognition of a constitutional right of the handicapped child to an education. See *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973). However, *Rodriguez* did not preclude such a finding where there was an absolute deprivation. *Id.* at 36-37. In addition, the *P.A.R.C.* and *Mills* cases, albeit gratuitously, indicated that the denial of an appropriate education to the handicapped may be a violation of equal protection and due process. See text accompanying notes 8-15 *supra*. In addition, *Goss v. Lopez*, 419 U.S. 565 (1975), recognized the requirements of due process in education, a fourteenth amendment protection which could be vindicated by a section 1983 action.

73. In *Cannon*, a female plaintiff brought a civil rights suit against the University of Chicago and Northwestern University, alleging that she was denied admission to their medical schools on account of her age and sex. Her complaint alleged violation of her civil rights under the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1976), and Title IX of the Education Amendments to the Civil Rights Act of 1964, 20 U.S.C. § 1681 (1976) (prohibiting sex discrimination in federally funded programs). The Seventh Circuit affirmed the complaint's dismissal only because the plaintiff had failed to meet the state action requirement or establish a sufficient state nexus as required under section 1983. See *Washington v. Davis*, 426 U.S. 229 (1976). In a suit directly against a public school district or state administrative agency, there would be no state action issue under section 1983.

In *Lloyd*, the complaint was originally brought pursuant to section 1983, but this remedial avenue was abandoned because of the *Monroe v. Pape* exclusion of "municipalities" from section 1983 coverage. 548 F.2d 1277, 1278 n.1 (7th Cir. 1977). This roadblock no longer exists in light of the Supreme Court's reversal of *Monroe* in *Monell*. See note 72, *supra*.

74. 453 F. Supp. 330 (D. Del. 1978).

protections of an adjudicatory proceeding, at which the complainant may challenge the legal or factual sufficiency of the remedy prescribed by the Secretary and acquiesced in by the recipient.<sup>75</sup>

In response to the due process deficiencies alleged by the plaintiffs, the court agreed with the Secretary's contention "that the plaintiffs' interests under Title VI and Section 504 [were] more attenuated, and thus require fewer procedural protections, than more conventional forms of 'property' or 'liberty' interests created under state or federal laws,"<sup>76</sup> and concluded that "the Secretary's procedures were sufficient."<sup>77</sup> The court also rejected plaintiffs' claim that their right to equal protection of the laws was violated by the regulations, which afforded a hearing to applicants or recipients of federal funds before such grants could be withheld or terminated, but denied a hearing on the merits to persons charging a recipient with discrimination. The court reasoned that the distinction was justified because of the "clear difference in interest created under Title VI and Section 504, the nature of the loss caused by government action, and Congress' explicit direction that recipients threatened with a fund cut-off be afforded an adversary hearing."<sup>78</sup>

A problem which has arisen under Title VI of the Civil Rights Act of 1964, and one which will provide an additional role for the courts in the enforcement of section 504, is court action to require HEW to enforce the mandate of Title VI. For example, in *Adams v. Richardson*,<sup>79</sup> certain black students, and other citizens and taxpayers brought suit to secure declaratory and injunctive relief against the Secretary of HEW, alleging that HEW was derelict in its duty to enforce Title VI because no appropriate action was taken to end segregation in public educational institutions receiving federal funds. The court recognized that where a HEW request for voluntary compliance with the mandate of Title VI was not followed by responsive action by the recipient within a

75. *Id.* at 335-36 (footnote omitted).

76. *Id.* at 337.

77. *Id.* The court supported its finding that the secretary's procedures were sufficient by examining the case in terms of the analysis required in *Mathews v. Eldridge*, 424 U.S. 319 (1976). In *Mathews*, the Supreme Court stated:

[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

*Id.* at 334-35, quoted in 453 F. Supp. at 338. An analysis of the *Wilmington Medical Center* court's application of *Mathews* is beyond the scope of the article.

78. 453 F. Supp. at 347.

79. 480 F.2d 1159 (D.C. Cir. 1973).

reasonable time, the agency was required to initiate enforcement action. An action to compel HEW to insure compliance with section 504 would be particularly useful in speeding enforcement procedures and procuring appropriate educational services which have not been provided.

## THE RIGHT TO SPECIAL EDUCATION SERVICES IN ILLINOIS

### *The Illinois Constitution*

Although the United States Supreme Court has refused to recognize education as a right or fundamental interest guaranteed by the federal constitution,<sup>80</sup> the denial of a free education for the handicapped has been successfully challenged as violating the Education Article of the Illinois Constitution.<sup>81</sup> In *Elliot v. Board of Education of Chicago*,<sup>82</sup> the Appellate Court of Illinois for the First District declared that the *second* paragraph of the Education Article requires that the special education programs which have been established by the legislature be free of tuition charges through the secondary level. In *Elliot*, a handicapped child was required to attend a non-public school because of the defendant Chicago Board of Education's determination that the special education programs of the Chicago Public Schools were inadequate to meet his needs.<sup>83</sup> The complaint sought a declaration that the statute<sup>84</sup> which limited the amount of tuition the state was required to pay for the education of handicapped students attending non-public schools to \$2,500 per year violated the Education Article of the Illinois Constitution and the equal protection clause of the federal<sup>85</sup> and state<sup>86</sup>

80. See *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

81. ILL. CONST. of 1970, art. X, § 1 provides:

A fundamental goal of the People of the State is the educational development of all persons to the limits of their capacities.

The State shall provide for an efficient system of high quality public educational institutions and services. Education in public schools through the secondary level shall be free. There may be such other free education as the General Assembly provides by law.

The State has the primary responsibility for financing the system of public education.

82. 64 Ill. App. 3d 229, 380 N.E.2d 1137 (1978) (appeal to the Illinois Supreme Court denied).

83. For a discussion of non-public school placement for handicapped individuals, see text accompanying notes 178-208 *infra*.

84. ILL. REV. STAT. ch. 122, § 14-7.02 (1977) (current version at ILL. REV. STAT. ch. 122, § 14-7.02 (Cum. Supp. 1978) (amendment effective Aug. 25, 1978)).

85. U. S. CONST. amend. XIV, § 1. For a discussion of equal protection and the handicapped child's right to an education under the federal constitution, see Alschuler, *Education for the Handicapped*, 7 J.L. EDUC. 523, 528 (1978); Krass, *The Right to Public Education for Handicapped Children: A Primer for the New Advocate*, 1976 U. ILL. L.F. 1016, 1033; Note, *The Education of All Handicapped Children Act of 1975*, 10 U. MICH. J.L. REF. 110, 114 (1976).

86. ILL. CONST. of 1970, art. I, § 2. The possible argument of basing a handicapped child's

constitutions. Under the Illinois statute, the parents of the handicapped child had to pay all costs of educating their child in excess of the arbitrary \$2,500 ceiling on state funding, while parents of non-handicapped children could obtain *free* education through the secondary level. The court chose to resolve the controversy based upon the Education Article only, thereby avoiding the necessity of deciding the state<sup>87</sup> and federal equal protection arguments raised by the plaintiff, and stated that the second paragraph of the Education Article established an entitlement to free education through the secondary level for those "programs of instruction other than the standard course of study established in the public school system."<sup>88</sup> The appellate court held, in effect, that *once educational programs were established*, the programs must be free through the secondary level.<sup>89</sup>

right to an appropriate education on the equal protection provision of the state constitution will not be considered herein. For the most part, any equal protection argument based on the state constitution would involve considerations not unlike those which have been made of the federal constitution. See text accompanying notes 8-15 *supra*.

87. Indeed, there appears to exist a persuasive argument *against* basing the rights of handicapped children to an appropriate education on state equal protection grounds. This argument is readily apparent upon a comparison of the state constitution's treatment of discrimination on the basis of sex and on the basis of a handicap. The Illinois constitution prohibits private discrimination on the basis of sex in the sale of rental property and in the hiring and promotion practices of any employer. It further guarantees that the equal protection of the laws shall not be denied by the state, local governments or school districts on the basis of sex. ILL. CONST. of 1970, art. I, §§ 17, 18. However, in regards to the handicapped, the Illinois constitution prohibits only discrimination in the sale of rental property and in the hiring and firing practices of employers. *Id.* at art. I, § 19. There is a noticeable lack of any comparable provision guaranteeing that the equal protection of the laws shall not be denied by the state, local governments or school districts on the basis of one's handicap. Any equal protection argument under the state constitution will have to come to grips with this rather significant gap in the state constitutional protection against discrimination.

88. 64 Ill. App. 3d at 235, 380 N.E.2d at 1142.

89. The Illinois Supreme Court has interpreted the effect of the Education Article of the Illinois constitution in several cases. In *Blase v. State*, 55 Ill. 2d 94, 302 N.E.2d 46 (1973), the Illinois Supreme Court considered the contention of the plaintiff-taxpayers that the third paragraph of the Education Article required the state to provide not less than fifty per cent of funds necessary to operate the public elementary and secondary schools. While the court noted that the words contained in the sentence *might* appear to require the state to bear the greater part of the burden of financing the education system, the court looked to the constitutional convention proceedings, 5 Record of Proceedings of 6th Ill. Const. Convention of 1970 4502, in supporting the state's contention that "the sentence was intended only to express a goal or objective, and not to state a specific command." 55 Ill. 2d at 98, 302 N.E.2d at 48. See also *Cronin v. Lindberg*, 66 Ill. 2d 47, 360 N.E.2d 360 (1976).

Later, in *Pierce v. Board of Educ. of Chicago*, 69 Ill. 2d 89, 370 N.E.2d 535 (1977), the Illinois Supreme Court interpreted the first paragraph of the Education Article as "a statement of general philosophy, rather than a mandate that certain means be provided in any specific form." 69 Ill. 2d at 92-3, 370 N.E.2d at 536. In *Pierce*, it was contended that the Chicago Board of Education had breached the duty imposed by the Education Article and the special education provisions of the Illinois School Code, ILL. REV. STAT. ch. 122, § 14-4.01 (1977), by not placing the plaintiff student in a special education class. The court stated that since there was no constitutional duty imposed upon boards of education to place students in special education classes—because the Education

*The Illinois Statutes & Regulations*

The Illinois General Assembly recently has revised the Illinois School Code<sup>90</sup> to bring it into technical compliance with the Education for All Handicapped Children Act<sup>91</sup> and Section 504 of the Rehabilitation Act of 1973.<sup>92</sup> In this section, the major provisions of the latest Illinois legislative enactments,<sup>93</sup> and their attendant regulations<sup>94</sup> will be discussed. In addition, certain past problems and inadequacies with special education legislation will be examined. Although some of these problems may have been ameliorated by new federal and state legislation, some may have been exacerbated by the uncertainty and confusion which is usually wrought by an enormous body of new legislation and underlying rules and regulations.

Although the intense national emphasis on the rights of the handicapped in education is only as recent as the Education for All Handicapped Children Act and Rehabilitation Act of 1973, Illinois has had legislation dealings with the education of the handicapped since the enactment of the Illinois School Code in 1961.<sup>95</sup> While educational programs for the handicapped were permissive at first, Illinois school districts have been under a direct mandate since July 1, 1969 "to establish and maintain special education programs as needed. . . ."<sup>96</sup>

As early as 1965, a full range of handicaps which were suitable for

Article is not self-executing—such a duty would have to be gleaned from state statutes or attendant rules and regulations concerning the administration of special education programs. The Illinois Supreme Court then found, apparently after analyzing Section 14-8.01 of the Illinois School Code and the State Board of Education's Rules and Regulations to Govern the Administration and Operation of Special Education, that it was the "State Board of Education, . . . and not the local school board, that is responsible for determining the eligibility of children for special education." 69 Ill. 2d at 92, 370 N.E.2d 537 (citation omitted). However, the continued validity of this finding is in doubt in that the statutory basis for the court's ruling in *Pierce* recently has been amended. See ILL. REV. STAT. ch. 122, § 14-8.01 (Cum. Supp. 1978). The statute now makes it clear that the state board of education shall prescribe standards and criteria for admission to special education programs, but that these standards must be "administered by local school boards." *Id.* at § 14-8.01 (Cum. Supp. 1978).

90. ILL. REV. STAT. ch. 122, §§ 1-1 through 1201 (1977 & Cum. Supp. 1978).

91. 20 U.S.C. §§ 1401-1461 (1976).

92. 29 U.S.C. § 794 (1976).

93. The sections of the Illinois School Code which are concerned with special education for the handicapped are located at ILL. REV. STAT. ch. 122, §§ 14-1.01 through 14-14.01 (1977) and §§ 14-1.03, 14-1.05, 14-1.08, 14-2.01, 14-3.01, 14-4.01, 14-6.01, 14-7.02, 14-7.03, 14-7.03a, 14-8.01, 14-8.02, 14-13.01 (Cum. Supp. 1978).

94. RULES AND REGULATIONS TO GOVERN THE ADMINISTRATION AND OPERATION OF SPECIAL EDUCATION art. I-XV, Ill. Reg. Vol. 3, Issue No. 5, 934 (Feb. 2, 1979) [hereinafter cited as Rules].

95. ILL. REV. STAT. ch. 122, §§ 14-1 through 14-12 (1961) (current version at ILL. REV. STAT. ch. 122, §§ 14-1.01 through 14-14.01 (1977 & Cum. Supp. 1978)).

96. ILL. REV. STAT. ch. 122, § 14-4.01 (1965) (current version at ILL. REV. STAT. ch. 122, 14-4.01 (Cum. Supp. 1978)).



special educational services had been defined by the Illinois School Code.<sup>97</sup> Local school districts were mandated to provide special services for individuals with these handicaps by July 1969. However, in 1968 the School Code was amended to permit a school district to place a handicapped child in a *private* school if the local public school program was inadequate to meet the child's special education needs.<sup>98</sup> So, in Illinois at least, when the implementing Rules and Regulations of the Education for All Handicapped Children Act and the Rehabilitation Act of 1973 became effective in the summer and fall of 1977, the basic bureaucratic framework for administering special education services had existed for almost a decade. In fact, long before the concepts of "mainstreaming" and "least restrictive alternative" were mandated by federal legislation,<sup>99</sup> Illinois had required that students enrolled in special education programs "be housed in public school buildings with students in the standard program."<sup>100</sup>

Although the Illinois mandatory special education system has existed for almost a decade, it has been the subject of relatively few reported court decisions.<sup>101</sup> Only in *Elliot v. Board of Education of Chicago*<sup>102</sup> has an Illinois court found the Illinois system of special education deficient in the face of state or federal constitutional requirements.<sup>103</sup> However, the specific Illinois School Code provision which was struck down in *Elliot* was amended<sup>104</sup> while the case was on appeal, probably curing the inadequacies which concerned the *Elliot* court.

### *Local School District Responsibility*

The Illinois School Code requires local school boards to establish and maintain the special education facilities necessary for handicapped

97. *Id.* at § 14-1.02 (current version at ILL. REV. STAT. ch. 122, § 14-1.02 (1977)).

98. For a discussion of placing handicapped children in non-public schools, see text accompanying notes 178-208 *infra*.

99. 20 U.S.C. § 1412(5)(B) (1976). See also Section 504 Rules and Regulations, 45 C.F.R. § 84.34(a) (1978).

100. RULES AND REGULATIONS TO GOVERN THE ADMINISTRATION AND OPERATION OF SPECIAL EDUCATION § 3.04 (1974).

101. See, e.g., *Nickerson v. Thomson*, 504 F.2d 813 (7th Cir. 1974). The United States Court of Appeals for the Seventh Circuit held that the district court should abstain from deciding pendant state issues concerning the special education provisions of the Illinois School Code. See also *Pierce v. Board of Educ. of Chicago*, 69 Ill. 2d 89, 370 N.E.2d 535 (1977); *Elliot v. Board of Educ. of Chicago*, 64 Ill. App. 3d 229, 380 N.E.2d 1137 (1978).

102. 64 Ill. App. 3d 229, 380 N.E.2d 1137 (1978).

103. See text accompanying notes 82-89 *supra*.

104. ILL. REV. STAT. ch. 122, § 14-7.02 (Cum. Supp. 1978).

children who are residents of the district.<sup>105</sup> In addition, the rules promulgated under the school code mandate that the local school district is "responsible for providing and maintaining appropriate and effective education programs, at no cost to the child's parents, for all exceptional children who are resident therein."<sup>106</sup> Local school districts are required to provide comprehensive programs of special education and related services for district residents between the ages of three and twenty-one, either independently, or in cooperation with other school districts, and "have a goal of providing full educational opportunity to all handicapped children from birth to age three."<sup>107</sup> Such comprehensive programs would include "[a] viable organizational and financial structure, . . .<sup>108</sup> procedures for identifying and evaluating the need for special education and related services,"<sup>109</sup> and "a continuum of program options<sup>110</sup> which incorporate instructional programs, resource programs,<sup>111</sup> and related services,"<sup>112</sup> "qualified personnel"<sup>113</sup> and "[a]ppropriate and adequate facilities, equipment and materials."<sup>114</sup> The rules also require the local district to maintain a relationship with other public and private agencies which are able to supplement special education programs,<sup>115</sup> to maintain "[i]nteraction with parents,"<sup>116</sup> to provide for internal program evaluations,<sup>117</sup> and to plan "for program growth."<sup>118</sup> Local districts are also required by the rules to ensure that special education students participate to the greatest extent possible in non-handicapped programs, and thereby achieve the greatest possible interaction with their non-handicapped peers.<sup>119</sup>

105. ILL. REV. STAT. ch. 122, § 14-4.01 (Cum. Supp. 1978). Although the Illinois School Code and the rules impose mandates on "local" districts, it is much more efficient, both economically and administratively, for a number of local districts to join together collectively to discharge their respective mandates. ILL. REV. STAT. ch. 122, § 10-22.31 authorizes local districts to "enter into joint agreements with other school boards to provide needed special educational facilities . . . ." Most Illinois school districts have chosen to participate in special education "cooperatives." Hereafter when reference is made to a "local school district's" mandate or program, it is likely that the mandate is being discharged, and the program is being provided by the local district's agent—the special education "cooperative" to which the local district belongs.

106. Rules, *supra* note 94, at art. II, § 2.01.

107. *Id.* at art. II, § 2.02.

108. *Id.* at art. II, § 2.02(1).

109. *Id.* at art. II, § 2.02(2).

110. *See id.* at art. III, § 3.02 for the required continuum of program options.

111. *See id.* at art. IV, § 4.06 for the rules regarding resource programs.

112. *Id.* at art. II, § 2.02(3). *See also id.* at art. V, § 5.01 for rules pertaining to related services.

113. *Id.* at art. II, § 2.02(4).

114. *Id.* at art. II, § 2.02(5).

115. *Id.* at art. II, § 2.02(6).

116. *Id.* at art. II, § 2.02(7).

117. *Id.* at art. II, § 2.02(8).

118. *Id.* at art. II, § 2.02(9).

119. *Id.* at art. I, § 1.05; *id.* at art. III, § 3.04.

The related services referred to in the rules are defined as "those activities supplemental to the standard educational program, special education instructional programs, or resource programs which serve to facilitate the child's development. The activities must include evaluation, therapeutic or consultation services."<sup>120</sup> Specifically, the related services to be provided are "[s]peech and language services, . . . [s]chool psychological services [for those] students who require psychological evaluation and assistance in their educational or behavioral adjustment, . . . [s]chool social work services, . . . [s]pecial reader services," physical and occupational therapy services—when necessary for the student to receive the full benefit of the educational program provided, other therapeutic services—"as required to facilitate the education of exceptional children,"<sup>121</sup> and consultant services—as required by the student's individual education plan. While the rules appear to require the local district to provide a broad range of related services, the rules offer little or no guidance as to the specific scope of these mandated services. Particularly vague are the requirements that physical and occupational "therapy" services be provided where necessary to permit students to receive the full benefit of the instructional programs provided,<sup>122</sup> and that "other" therapeutic services as required be provided to "facilitate the education of exceptional children."<sup>123</sup> Many physical therapeutic services, and "other" therapeutic services such as intense psychiatric therapy, can be characterized as purely "medical" and outside the range of services required to be provided by the local school district. However, "medical" services rendered to a student on account of his or her particular handicap could also be characterized as necessary for the student "to receive the full benefit from the instructional program provided [him or her]."<sup>124</sup> The need for a clearly defined line between educationally related "therapy" and "medical services" is highlighted by the recent amendment to Section 14-1.08 of the Illinois School Code.<sup>125</sup> The statute defines "special educational services" as including *therapy*, but expressly *excludes* medical services, except as needed "only for diagnostic and evaluation purposes."<sup>126</sup> A

120. *Id.* at art. V, § 5.01.

121. *Id.* at art. V, §§ 5.01(1)-5.01(6).

122. *Id.* at art. V, § 5.01(5)(a).

123. *Id.* at art. V, § 5.01(5)(b).

124. *Id.* at art. V, § 5.01(5)(a).

125. ILL. REV. STAT. ch. 122, § 14-1.08 (Cum. Supp. 1978).

126. *See also* Rules, *supra* note 94, at art. I, § 1.08a which defines "related services" as including "medical services for diagnostic or evaluation purposes." The author has been involved in an article X due process hearing concerning the appropriateness of a private school placement, wherein the hearing officer directed that the student involved be given "psychiatric consultation."

school district might validly question at what point the psychiatric care ceases to be educationally related and becomes the provision of a "medical service," for which the district is *not* financially responsible. Because of the high cost of the related services, such as the cost of obtaining the expertise of a psychiatrist or of a licensed physical therapist, the temptation for a local school district to designate such services as purely "medical" appears to be great. On the other hand, parents will be inclined to characterize necessary but expensive services, such as physical and psychiatric therapy, as "educationally related" so that local school districts and state agencies would bear the total cost of these services. This conflict is presently a fertile area of disagreement between parents, child advocates, and school districts.<sup>127</sup> These issues will continue to be contested until either the Illinois Board of Education or the courts have defined the outer limits of "therapy" and "medical services" so that parental and school district responsibility may be determined with some degree of certainty and with a minimal drain on the Illinois Office of Education's due process hearing resources.

The greatest dilemma for local school districts providing mandated special education programs and facilities is the problem of adequately funding the programs from available state and local resources. The rules provide that no handicapped student can be permanently excluded from the public school system because of the inability of the district to provide an educational program.<sup>128</sup> This rule, when considered in conjunction with the Illinois Supreme Court's interpretation of the Education Article of the Illinois Constitution<sup>129</sup> in *Blase v. State*<sup>130</sup> and *Cronin v. Lindberg*<sup>131</sup>—that the state is not required to shoulder the bulk of the financial support for education programs and that state aid can be conditioned upon the local district's compliance with educational standards set by the state—places a heavy responsibility upon the local school district to provide the special education services required by the rules.<sup>132</sup> The funding dilemma and lack of adequate ju-

The provision of this "consultation" service by the school district, and payment for same, raises some serious questions concerning the "therapy"/"medical services" distinction, as rule 5.05(6)(a), Rules, *supra* note 94, at art. V, § 5.05(6)(a), permits that the psychiatric consultation involve a "therapeutic component."

127. A number of due process hearing decisions rendered pursuant to article X of the rules, Rules, *supra* note 94, at art. X, are presently at the Illinois Board of Education level of review on this very issue. For a discussion of the due process hearings and review thereof, *see* text accompanying notes 153-177 *infra*.

128. Rules, *supra* note 94, at art. II, § 2.04.

129. ILL. CONST. of 1970, art. X, § 1.

130. 55 Ill. 2d 94, 302 N.E.2d 46 (1973).

131. 66 Ill. 2d 47, 360 N.E.2d 360 (1976).

132. *See* discussion at note 89, *supra*.

dicial remedy was poignantly raised in *Board of Education School District No. 150, Peoria v. Cronin*,<sup>133</sup> where the plaintiff school board requested that the special education provisions of the Illinois School Code be declared illegal because they were incapable of being performed. In this case, the school district argued that because of the reduction of education appropriations by the Governor of Illinois, the school district did not receive full reimbursement from the State of Illinois for its special education claim, and that it was therefore impossible for the district to budget for expenditures or to maintain fiscal responsibility. The court decided that the school district had failed to present a justiciable question to the court, and that any action to alleviate the school district's dilemma would have to come from the general assembly. The court said: "the creation of school systems and the manner of financing and administering them is clearly a legislative prerogative and that our judicial system cannot impose its views, its ideas, and its will upon the General Assembly respecting such questions as were raised in the instant case."<sup>134</sup> It is clear that the local school districts have been required by the general assembly to carry the heavy burden of financial responsibility for the programs that it is required to initiate for its residents. It places on the local districts the apparent duty to raise the funds required to implement such programs through local taxation. The Illinois School Code and the rules promulgated thereunder fail to provide how the special education programs to which local residents are entitled will be provided should the local taxpayers fail to approve the additional tax required to finance such programs.

A third problem for local districts is determining the residency of handicapped children. Such an issue typically arises when a local school district program cannot deal with a particularly profound handicap, and the child is placed as an in-patient in a residential facility located outside the school district within which his or her parents or guardian resides. The issue of residency for school purposes is crucial because the school code requires the school district in which the child resides to provide any necessary cost of transportation and to pay to the school district actually operating the special education program the per capita cost of educating the child when the child attends school in an-

133. 51 Ill. App. 3d 993, 367 N.E.2d 501 (1977).

134. *Id.* at 841-42, 367 N.E.2d at 504. Other courts which have considered the lack of funds issue offered as a defense for the state's failure to provide education to handicapped children have explicitly rejected the defense. *See, e.g., Mills v. Board of Educ.*, 348 F. Supp. 866, 875-76 (D.D.C. 1972); *Wyatt v. Stickney*, 344 F. Supp. 373, 377 (N.D. Ala. 1972), *aff'd sub. nom., Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974).

other district because of his or her handicap.<sup>135</sup> This issue may also arise where a child temporarily resides with relatives in another school district in order to take advantage of that district's superior program. Fortunately, the Illinois courts have provided some guidance in this area. Generally, children are presumed to reside in the district where their parents reside, although the presumption may be rebutted by circumstances showing a different residence.<sup>136</sup> Each particular case demands an examination of circumstances relating to parental control and custody.

In *School District No. 153, Cook County v. School District No. 154 ½, Cook County*,<sup>137</sup> SPEED Cooperative filed suit for declaratory judgment against ECHO Cooperative based on ECHO's refusal to enroll a handicapped child whose parent resided in a school district served by the ECHO Cooperative. The child had been placed by her mother in a residential facility located within a school district served by the SPEED Cooperative. The ECHO Cooperative refused to admit the child when the residential facility attempted to enroll her, claiming that the child's legal residence was the residential facility and therefore the ECHO Cooperative and the school district within which the parent resided was no longer responsible for the child's education. The court held that the child's mother had not relinquished custody and control over the child, who had been placed in the residential facility only to take advantage of the rehabilitative program and returned home on weekends. The court also declared that so long as the school district of the parent's residence and the ECHO Cooperative were unable or unwilling to provide educational facilities for the child, the SPEED Cooperative would have to do so, but that its costs would be reimbursed by the parent's home district.<sup>138</sup> This finding, that the district in which the child is actually located must "provide" the services if the "responsible" district will not or cannot, is consistent with the official analysis and interpretation of the federal rules and regulations adopted pursuant to Section 504 of the Rehabilitation Act of 1973. The official interpretation provides that: "in no case may a recipient refuse to provide services to a handicapped child in its jurisdiction because of another person's or entity's failure to assume financial responsibility."<sup>139</sup> While

135. ILL. REV. STAT. ch. 122, § 14-7.01 (1977).

136. See, e.g., *Turner v. Board of Educ.*, 54 Ill. 2d 68, 294 N.E.2d 264 (1973); *Kraut v. Rockford*, 51 Ill. App. 3d 206, 366 N.E.2d 497 (1977).

137. 54 Ill. App. 3d 587, 370 N.E.2d 22 (1977) [hereinafter referred to as *SPEED v. ECHO*].

138. *Id.* at 592, 370 N.E.2d at 26 (referring to ILL. REV. STAT. ch. 122, § 14-7.01 (1977)).

139. See 42 Fed. Reg. 22,690 (1977).

the *SPEED v. ECHO* decision helps determine which of the two possible districts is responsible for *paying* for special education services, both the *SPEED* decision and federal regulations make it clear that an eligible child is entitled to the *provision* of services by the school district in which he or she is located, notwithstanding any underlying dispute between the two school districts as to which district must pay for those services.

### *Identification, Evaluation and Placement*

In addition to defining the responsibilities of the local school district for developing educational programs geared to each handicapped individual's needs, the Illinois Rules and Regulations to Govern the Administration and Operation of Special Education require the local school district to develop and implement procedures necessary to create public awareness of the rights of exceptional children and special education programs.<sup>140</sup> It is incumbent upon the district, at least annually, to disseminate information to the community at large and specifically to all parents within the district regarding the special education programs and services available in or through the district, in each of the major languages represented in the district and in a manner understandable without regard to ethnic or cultural background as well as to the hearing and visually disabled.<sup>141</sup>

Once a child is identified through the screening process as a child who experiences problems which interfere with the child's educational progress, or once there is reason to believe that a child may require special education services, the child must be referred for a case study evaluation.<sup>142</sup> The local school district is directly responsible for overseeing the referral, deciding whether any action should be taken, and initiating the procedures, if necessary.<sup>143</sup> The school district may choose to conduct a preliminary evaluation to determine whether a formal case study evaluation is necessary, but should the school district decide not to conduct a formal case study evaluation, such decision is reviewable in an impartial due process hearing which may be demanded by the parent pursuant to article X of the rules.<sup>144</sup> Whether or not the school district determines that a formal case study evaluation is required, the district must notify the person who made the referral of

140. Rules, *supra* note 94, at art. IX, § 9.01.

141. *Id.*

142. *Id.* at art. IX, § 9.03.

143. *Id.*

144. *Id.* at art. X, §§ 10.01-10.

its decision, and in all cases must notify the parents or guardian of the determination. If the district determines that a case study or re-evaluation of the child, or that initial placement of an exceptional child in a special education program or related services program is necessary, the district must obtain the parent's consent to place the child in the program.<sup>145</sup>

Any formal case study evaluation of a child must be appropriate to the nature of the problems stated in the initial referral. The intensity of the procedures are flexible and are determined by the complexity of the child's problems.<sup>146</sup> The rules provide specific procedures when the child's problems are limited to the area of speech and language, or where a child requires placement at home or in a hospital due to temporary physical impairment.<sup>147</sup> In all other cases, rules mandate that the comprehensive case study include an interview with the child, a consultation with the parents, a complete social developmental study, a medical history and current health report, a vision and hearing screening, a review of academic history and current educational functioning, and that the district must formulate specialized evaluations specific to the nature of the child's problems.<sup>148</sup> Specialized evaluations may include psychological and medical examinations. Any case study must be conducted in a manner that insures no discrimination will occur due to linguistic, cultural, racial and sexual factors. The language used to evaluate the child must be consistent with his or her language use pattern, and any psychological evaluation may only be performed by a certified school psychologist who has demonstrated competency in and knowledge of the child's language and culture. Any test or other evaluation materials utilized must be validated for the specific purpose for which it is being used, and also must be selected and administered so as not to be racially or culturally discriminatory. If the parents or guardians disagree with the evaluation obtained by the school district, an independent evaluation may be obtained at public expense, unless the school district initiates a due process hearing prior to the independent evaluation and the district's evaluation is deemed appropriate.<sup>149</sup>

Once the formal case study evaluation is completed, a multidisciplinary conference<sup>150</sup> is convened to formulate program service op-

145. *Id.* at art. IX, § 9.06.

146. *Id.* at art. IX, § 9.09.

147. *Id.* at art. IX, §§ 9.09(1), 9.09(2).

148. *Id.* at art. IX, § 9.09(3).

149. *Id.* at art. IX, § 9.09(3)(i)(6).

150. A multidisciplinary conference is described as: "a deliberation among appropriate persons for purpose of determining eligibility for special education, developing recommendations for



tions. Such conference must include the parents, along with representatives of the local district, the special education director, school personnel involved in the child's evaluation, and those persons who will become responsible for providing a special education program or service to the child. The purpose of the conference is to establish an understanding of the child's learning characteristics and to determine the child's eligibility for special education programs and/or related services, the extent to which the child's needs may be met by the standard program and the nature and degree of special education required. The rules provide that the recommendations made at the conference be made by consensus,<sup>151</sup> but no guidance is offered as to the resolution of any conference disagreement.

Within thirty days of the multidisciplinary staff's determination that placement in a special education program or utilization of related services is necessary, an additional meeting is required for the purpose of developing an individualized education program.<sup>152</sup> The school district is required to insure parent participation in the development of the IEP, and must use alternative methods when the parents are unable to attend, such as individual or conference telephone calls. The meeting may only be conducted without parental attendance if the district is unable to convince the parents to attend. However, the district must document its attempts to arrange a mutually agreeable place and time. At least ten days prior to actual placement, parents must be notified, in writing, of the results of the case study evaluation, the programs or services needed by the child, the placement recommendations and the plan for implementing them, and of the right to object. The parents may agree to the placement and waive the ten day interval before placement. Should the parents object to the placement, the local district must arrange a conference to resolve the disagreement. The failure to resolve the disagreement at this conference may result in a request for an impartial due process hearing.

special education placement, reviewing education progress, or considering the continuation or termination of special education for an individual child." *Id.* at art. I, § 1.05a.

151. *Id.* at art. IX, § 9.17.

152. The rules define an individualized education program [hereinafter referred to as IEP] as: a written statement for an exceptional child that provides at least a statement of: the child's present levels of educational performance; annual goals and short-term instructional objectives; specific special education and related services; the extent of participation in the regular education program; the projected dates for initiation of services; anticipated duration of services, appropriate objective criteria and evaluation procedures; and a schedule for annual determination of short-term objectives.

*Id.* at art. I, § 1.02a.

### *The Impartial Due Process Hearing*

Illinois statutes<sup>153</sup> and the attendant rules<sup>154</sup> permit parents, guardians, the local school district, or the child to request an impartial due process hearing to resolve disagreements concerning the child's proper placement, change, continuation, or termination of placement after all informal procedures have been completed. These procedures may also be utilized to object to the school district's failure to provide adequate related services or instructional and resource programs, to comply with the Illinois School Code or the rules, or to provide the child with a free appropriate education. It is incumbent upon the local district to notify the parents or guardian in writing of both the right to a hearing, and the procedures to follow, as well as to inform them of any free or low cost legal or other services available to aid them. The request for a hearing must be made in writing to the superintendent of the local school district in which the child is a resident, and, where the request is made pursuant to the parent's receipt of a notification regarding proposed placement, it must be made within ten calendar days of the receipt of the notice.<sup>155</sup> Within five calendar days of receipt of the request for the hearing, the school district must either request the Illinois Office of Education to appoint an impartial hearing officer or notify the parents or guardian of the decision not to honor the request for the hearing and the reasons for the denial. Should the local district fail to honor the request for the hearing, or if the district fails to provide a hearing, an appeal may be taken directly to the Illinois Office of Education.<sup>156</sup> The Illinois Office of Education, within five days of the receipt of the local district's request for the appointment of an impartial hearing officer, will provide a list of five trained impartial hearing officers who are neither employees of the Illinois Office of Education, the local district, any joint agreement or cooperative program in which the district participates, nor residents of the district involved. Such prospective officers must not have been involved with any decisions made about the child's identification, evaluation or placement, and may not have any conflict of interest which might impair their objectivity. The selection of the impartial hearing officer is made jointly by the parents or guardian and the school district alternately striking names from the

153. ILL. REV. STAT. ch. 122, § 14-8.02 (Cum. Supp. 1978).

154. Rules, *supra* note 94, at art. X, §§ 10.01-10.

155. If the request for the impartial due process hearing is not made within this ten-day period, the hearing may then be requested at any time subsequent to placement of the child. *Id.* at art. X, § 10.03(2).

156. *Id.* at art. X, § 10.05(2).

list, within five calendar days of the date that the local district receives the list from the Illinois Office of Education. Within five days of Illinois Office of Education's appointment of the hearing officer selected by the parents or guardian and the local district, the hearing officer is required to set a time and place for the hearing which is not later than fifteen days from the officer's appointment. Prior to the hearing, the parents or guardian must be informed of the right to inspect and copy the child's school records, and of the right to request an independent evaluation of the child, both at the expense of the parents or guardian. The parents may also require the attendance of any person having relevant information concerning the abilities and needs of the child or about the proposed programs. Subpoenas may be utilized by the hearing officer to require the attendance of such persons.

At the hearing, which is designated as non-adversary and directed towards the presentation of all the facts necessary for the hearing officer to make a decision,<sup>157</sup> each party may be represented by counsel at the expense of the respective party. All of the parties and their representatives are permitted to participate in the hearing according to procedures established by the impartial hearing officer.<sup>158</sup> Any party to the hearing may prohibit the introduction of any evidence not disclosed to them at least five days before the hearing.<sup>159</sup> The hearing examiner is required to insure that interpreters are made available if needed, and that the parents or guardian are aware of and understand their rights and responsibilities. The hearing officer may require further information or evidence where necessary to complete the record and may order that the child receive an independent evaluation at the expense of the local school district.<sup>160</sup> The school district has the burden of presenting "evidence that the special education needs of the child have been appropriately identified and that the special education program and related services proposed to meet the needs of the child are adequate, appropriate and available."<sup>161</sup> The parents and the school district have the right to present testimony, cross-examine and confront all witnesses presented.<sup>162</sup> It is the responsibility of the school district to make a record of the hearing, and the parents have the right to obtain a written or electronic record of the hearing as well as the written findings of fact

157. *Id.* at art. X, § 10.06b.

158. *Id.* at art. X, § 10.07(2)(d).

159. *Id.* at art. X, § 10.07(2)(f).

160. *Id.* at art. X, §§ 10.09(1)-10.09(4).

161. *Id.* at art. X, § 10.11a.

162. *Id.* at art. X, § 10.12.

and decision;<sup>163</sup> however, the rules fail to indicate whether a record will be made available to the parent or guardian without charge. The hearing officer must render a decision within ten school days after the hearing's conclusion, and such decision is binding upon the school district and the parent unless appealed.<sup>164</sup>

The rules provide that any party may appeal the decision of the hearing officer to the state superintendent of education by submitting the request and the reasons for appeal to the Illinois Office of Education within fifteen calendar days of the receipt of the hearing officer's determination.<sup>165</sup> During the pendency of the appeal, as in the initial impartial due process hearing stage, there can be no change in the placement of the child unless the state superintendent of education determines that the safety and health of the child or others would be endangered.<sup>166</sup> The appeal is considered by a reviewing panel comprised of attorneys and educational employees of the Illinois Office of Education, and is based upon the materials provided by the parties including the hearing record.<sup>167</sup> The rules state that the reviewing panel has discretion as to whether the parties should be afforded an opportunity to present oral and/or written testimony.<sup>168</sup> However, it appears that this particular rule is in direct conflict with the newly amended Section 14-8.02 of the Illinois School Code.<sup>169</sup> This statute provides that:

The parties to the appeal *shall* be afforded the opportunity to present oral argument and additional evidence at the review.<sup>170</sup>

Therefore, it seems that the reviewing panel no longer has the discretion to afford the opportunity for oral argument and presentation of additional evidence, but that the opportunity is mandated by statute.

The rules go on to provide that the Illinois superintendent of education makes the final decision after the reviewing panel submits its report and recommendations, and may dismiss the appeal if he deems it to be lacking in substance.<sup>171</sup> While the rules designate the decision of the state superintendent as "final and binding on all parties," and requires the implementation of the decision by the local school district,<sup>172</sup> the statute again seemingly provides the contrary. Section 14-

163. *Id.* at art. X, § 10.14.

164. *Id.* at art. X, § 10.15.

165. *Id.* at art. X, § 10.16.

166. *Id.* at art. X, § 10.18.

167. *Id.* at art. X, § 10.19.

168. *Id.* at art. X, § 10.20.

169. ILL. REV. STAT. ch. 122, § 14-8.02 (Cum. Supp. 1978).

170. *Id.* (emphasis added).

171. Rules, *supra* note 94, at art. X, § 10.21.

172. *Id.* at art. X, §§ 10.23, 10.24.

8.02 of the Illinois School Code expressly states that a civil action may be brought by any party aggrieved by the decision of the state superintendent.<sup>173</sup> Judicial review of the state superintendent's finding is not limited to the narrow strictures of the Administrative Review Act<sup>174</sup> but is apparently a trial *de novo* on the issues presented throughout the statutory hearing and review process. The statute provides that:

[T]he court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and basing its decision on the preponderance of the evidence shall grant such relief as the court determines is appropriate.<sup>175</sup>

This apparent conflict between the rules and the statute is significant for several reasons. First of all, the rules provide for some rather severe sanctions which may be visited upon a local school district for failure to implement the "final and binding" decision of the state superintendent of education. Rule 10.24 provides that the state superintendent's decision may be enforced by "denying approval of special education programs, denying personnel reimbursement, reducing school district recognition status, or by such other measures as may be appropriate."<sup>176</sup> The rules do *not* provide for a stay of decision implementation, or imposition of sanctions, pending outcome of the judicial review. The availability of judicial review of the state superintendent's decision is significant for another reason; that is, the requirement imposed by Section 14-8.02 of the Illinois School Code:

During the pendency of any proceedings conducted pursuant to this Section, . . . the student shall remain in the then current educational placement of such student, or if applying for initial admission to the school district, shall, with the consent of the parents or guardian, be placed in the school district program *until all such proceedings have been completed*.<sup>177</sup>

Due to the time element in securing a judicial decision through the trial and appellate process, many placement disputes will become moot where judicial review is sought because the Illinois School Code requires "current placements" to be maintained, and "initial placements" sought by the parents to be granted "until all such proceedings have been completed." Therefore, a parent who disagrees with a district's refusal to enroll his or her child in the district programs can secure that enrollment for a number of years by demanding a hearing and seeking

173. ILL. REV. STAT. ch. 122, § 14-8.02 (Cum. Supp. 1978).

174. ILL. REV. STAT. ch. 110, §§ 264-279 (1977).

175. ILL. REV. STAT. ch. 122, § 14-8.02 (Cum. Supp. 1978).

176. Rules, *supra* note 94, at art. X, § 10.24.

177. ILL. REV. STAT. ch. 122, § 14-8.02 (Cum. Supp. 1978) (emphasis added).

judicial review of an unfavorable ruling by the hearing officer or state superintendent.

### *State Operated and Private Programs*

Although the local school district is mandated to “provide” special education and related services where appropriate, it was quite apparent to drafters of the Illinois School Code that some child might exhibit such extreme and unique characteristics that no local special education program could adequately meet the child’s needs. Therefore, the Illinois legislature authorized local districts to discharge their mandates in these situations by allowing the local districts to avail themselves of other important resources—in-state or out-of-state private schools, private special education facilities, and out-of-state public schools.<sup>178</sup> It is manifestly more practical, both financially and logistically, to utilize existing private or public programs than to force a local district to duplicate these resources by developing a local program for a unique handicap, the incidence of which may be so infrequent that the development of a program would not be justified. The legislature expressly acknowledged this reality when it added a new introductory sentence to Section 14-7.02 of the Illinois School Code:

The General Assembly recognizes that non-public schools or special education facilities provide an important service in the educational system in Illinois.<sup>179</sup>

However, several caveats have been affixed to the availability of private resources in order to deter local districts from relaxing efforts to develop local programs in deference to private resources. Rule 8.02 of the Rules and Regulations to Govern the Administration and Operation of Special Education provides that: “[t]he availability of community resources as an extension of the public school education program in no way relieves the local district of its responsibility to provide a comprehensive program of special education nor of its responsibility to the individual student.”<sup>180</sup> Also, the local district which is sending its handicapped residents to a private program is not eligible for reimbursement from the state for payments which it makes to the private facility unless the local district certifies to the Illinois State superintendent of education that the special education program of the district is

178. ILL. REV. STAT. ch. 122, § 14-7.02 (Cum. Supp. 1978). In addition, the special education program of another Illinois *public* school is a significant resource which may be available. *Id.* at ch. 122, § 14-7.01. See *School Dist. 153 v. School Dist. 154½*, 54 Ill. App. 3d 587, 370 N.E.2d 22 (1977), for an example of the applicability of section 14-7.01 prior to amendment.

179. ILL. REV. STAT. ch. 122, § 14-7.02 (Cum. Supp. 1978) (effective Aug. 25, 1978).

180. Rules, *supra* note 94, at art. VIII, § 8.02.

unable to meet the needs of the child, because of his or her unique handicap, *and* the state superintendent finds that the local district is in "substantial compliance" with the legislative mandate to provide special education programs as needed.<sup>181</sup> In this context, alternative state-operated or private programs may be utilized by the local district. Where the multi-disciplinary conference has determined that the local school district's special education program is unable to meet the child's needs because of the child's unusual handicap, the district must locate an appropriate state-operated or private program which can accommodate the child's handicap.<sup>182</sup> If the non-public school, public out-of-state school, or private special education facility provides the special education services required by the child and is in compliance with the Rules and Regulations to Govern the Administration and Operation of Special Education, the school district in which the child is a resident must pay either the actual cost of tuition for special education and related services, excluding room and board, or \$4,500 per year, whichever is less.<sup>183</sup> The school district making tuition payments may be reimbursed by the state for the amount of the payments to the private facility which exceed the per capita tuition costs for students who are not receiving special education services. If the cost of the appropriate special education program's tuition and related services increases more than ten per cent over the previous year, or exceeds \$4,500 per year, the child may not be placed in the program unless the costs are approved by the Governor's Purchase Care Review Board.<sup>184</sup> The review board has established emergency rules and regulations for its operation, and uniform standards and criteria for review of such programs.<sup>185</sup> If the review board approves tuition costs in excess of \$4,500, the local district

181. ILL. REV. STAT. ch. 122, § 14-4.01 (Cum. Supp. 1978).

182. Rules, *supra* note 94, at art. VIII, § 8.03. The parents may *unilaterally* place a child in a private program if the district has an appropriate program for the child. However, the school district is *not* responsible for funding this type of placement and the parents bear the financial burden of unilateral placement. *Id.* at art. VIII, § 8.04.1. Therefore, the question of whether a district's program is appropriate for a child is one of the most common questions encountered in the due process hearings, *id.* at art. X, because the answer to the question may well determine if a parent will legally be required to pay the cost of a private placement.

183. ILL. REV. STAT. ch. 122, § 14-7.02 (Cum. Supp. 1978).

184. *Id.* [hereinafter the Governor's Purchase Care Review Board will be referred to as the review board].

185. Emergency Rules of the Governor's Purchase Care Review Board, Ill. Reg. Vol. 2, Issue No. 52, 178 (Dec. 29, 1978) (effective Dec. 19, 1978) [hereinafter cited as Emergency Rules]. Although the stated purpose of the emergency rulemaking was to comply with the statutory requirement that the review board "establish uniform criteria and standards which it will follow," ILL. REV. STAT. ch. 122, § 14-7.02 (Cum. Supp. 1978), an examination of the Emergency Rules discloses no such "criteria and standards," apart from some general reiteration of statutory requirements. Also, section 14-7.02 does not clearly define the limits of the review board's power to establish "allowable costs," but intimates that the board's power may be limited to verifying that

must pay the excess; however, the district is eligible for reimbursement from the state for payments in excess of the per capita tuition charge for students not receiving special education services.

The provision of special education services through state-operated or private programs may create serious obstacles to the provision of free education to handicapped children, notwithstanding the statement in the statute that services provided be "at no cost to the parents."<sup>186</sup> The \$4,500 cost limitation may again raise the question considered in *Elliot v. Board of Education of Chicago*.<sup>187</sup> In *Elliot*, the court held that a provision<sup>188</sup> of the school code limiting the amount of the tuition to be paid by the local school district for special education services in a non-public school or special education facility to \$2,500 per year violated the Education Article of the Illinois Constitution<sup>189</sup> because the *parent* would have been responsible for actual costs in excess of \$2,500. The \$2,500 ceiling provided in the school code has now been elevated to \$4,500, and the review board now has the authority to approve tuition and related service costs that exceed the limitation.<sup>190</sup> However, it is not at all clear whether the review board must in fact approve the excess expense. The mere fact that the review board has the power to approve implies it also has the power to disapprove. But, the review board's disapproval of tuition and related service expenses could violate the *Elliot* court's interpretation of the second paragraph of the education article—that special education programs which have been established by the legislature be free of tuition charges through the secondary level.

Another substantial area of uncertainty concerning the effect of "cost approval" on the ability of the local district and state to provide services "at no cost to the parent" involves the legislature's disclaimer in Section 14-7.02 of the Illinois School Code:

In no event, however, shall the State's liability for funding of these tuition costs begin until after the *legal obligations* of third party payors have been subtracted from such costs.<sup>191</sup>

"all fees, tuitions, and charges are fair and justified." ILL. REV. STAT. ch. 122, § 14-7.02 (Cum. Supp. 1978).

186. ILL. REV. STAT. ch. 122, § 14-7.02 (1977).

187. 64 Ill. App. 3d 229, 380 N.E.2d 1137 (1978) (appeal to the Illinois Supreme Court denied). See text accompanying notes 82-89 *supra*.

188. ILL. REV. STAT. ch. 122, § 14-7.02 (1977) (current version at ILL. REV. STAT. ch. 122, § 14-7.02 (Cum. Supp. 1978)).

189. ILL. CONST. of 1970, art. X, § 1, ¶ 2.

190. Emergency Rules, *supra* note 185, at 3.40.

191. ILL. REV. STAT. ch. 122, § 14-7.02 (Cum. Supp. 1978) (emphasis added). Third party payors would include, for example, insurance companies, public aid, and medicaid.



This limitation on the state's liability is extremely crucial in that, presumably, in allowing the state to reduce its liability by the amount of third party payor's *legal obligations*, as opposed to funds *actually received* from third party payors, the legislature may have placed the parent in the position of having actually to collect the legal obligations from third party payors. The alternative may be that the handicapped child's parents will be faced with a contractual liability to the private facility for the uncollected payments from third party sources, notwithstanding the fact that the parent or facility may be legally entitled to such payment. A lawsuit by the parent or private facility may then be necessary to vindicate such an entitlement, but this would hardly be "at no cost to the parent."

Equally uncertain is what will happen to the parent's liability to the private facility for providing special education services to their child if funds appropriated by the general assembly for purposes of reimbursing school districts for payments to private facilities are inadequate to meet claims for such reimbursement. The statute provides that the funds so appropriated shall "be apportioned on the basis of claims approved,"<sup>192</sup> but does not specify the attendant interrelationship between the local district, the private provider of services and the parent, other than to state that services shall be provided "at no cost to the parent." Whether the private program framework will indeed provide services to children at "no cost to the parent" will remain unanswered until the Illinois State Board of Education has had an opportunity to administer Section 14-7.02 of the Illinois School Code and article VIII of the rules.

Finally, another new element of section 14-7.02 is the funding of room and board costs for placement of a child at a private facility.<sup>193</sup> This additional element of funding is important in light of the expense involved with providing room and board services such as those provided by residential pediatric facilities, and because of the substantial expense which is involved.<sup>194</sup> Room and board costs, when approved by the review board, are to be paid to the private facility by the appropriate state agency,<sup>195</sup> such as the Illinois Department of Mental Health and Developmental Disabilities or the Illinois Department of Public

192. ILL. REV. STAT. ch. 122, § 14-7.02 (Cum. Supp. 1978).

193. *Id.*

194. Some of the private facilities listed in the state superintendent's memorandum on "Interim Tuition, and Room and Board Rates for Non-Public Facilities" are approved for costs in excess of \$30,000.

195. ILL. REV. STAT. ch. 122, § 14-8.01 (1977) provides that:

[S]tate agencies (other than the State Board of Education) providing special education

Aid. However, if these costs are not picked up by another state agency, the costs will be paid by the state board of education.<sup>196</sup> Unfortunately, the review board's emergency rules are again vague in the area of providing ascertainable standards with which local school districts *and* private providers of services may determine what room and board costs will be approved or disapproved. The review board's emergency rule 3.30, "Cost Finding,"<sup>197</sup> is in apparent conflict with the underlying statute.<sup>198</sup> The emergency rule provides that allowable costs for room and board will be lodging costs determined to exist as of September 1977 increased by a flat ten per cent. This formula is totally unrelated to the concept of "actual cost" for room and board. Emergency rule 3.30 also provides that, for both programatic and residential costs: "[w]here the [Purchased Care Review] Board deems either methodology yields inappropriate allowable costs, it may approve different allowable costs. However, it must set forth its specific reason for doing so."<sup>199</sup>

Again, there seems to be no certain standard to which either the local school board or a private provider of services may look for guidance when making residential placements and seeking funding therefor. The express wording of emergency rule 3.30 clearly raises the probability that much of the cost approval and funding will be accomplished on an *ad hoc* basis. This uncertainty may well jeopardize the program continuity which is necessary to provide special education services to the child involved, and may also put the parents in between the local school district and the private provider of services who have found their expectations of funding dashed, and are looking for someone to pay the bills.

### *Parochial and Private Non-Sectarian Schools*

Even though the Illinois School Code and the attendant rules provide that all children shall receive a free education in the public school system, the federal regulations adopted pursuant to the Education for All Handicapped Children Act state that the parents of a child may choose to send the child to a non-public school, such as a parochial school or private non-sectarian school, for standard education rather

and related services, including room and board . . . shall continue to provide these services according to current law and practice.

It is probable that this attempt to base agency responsibility on "current practice" of three or four separate state agencies will be a breeding ground for clarifying litigation.

196. *Id.* at ch. 122, §§ 14-7.02, 14-8.01 (Cum. Supp. 1978).

197. Emergency Rules, *supra* note 185, at 3.30.

198. ILL. REV. STAT. ch. 122, § 14-7.02 (Cum. Supp. 1978).

199. Emergency Rules, *supra* note 185, at 3.30.

than take advantage of the free public education.<sup>200</sup> In these situations, the state and its local educational agencies must design their special education programs so that handicapped children in non-public schools can participate in the special education and related services offered by the local educational agencies.<sup>201</sup> The federal regulations state that:

(a) Each local educational agency shall provide special education and related services designed to meet the needs of private school handicapped children residing in the jurisdiction of the agency [school district].

(b) Each local educational agency shall provide private school handicapped children with genuine opportunities to participate in special education and related services consistent with the number of those children and their needs.<sup>202</sup>

The rules further provide that services to non-public school handicapped children may be provided through such arrangements as dual enrollment, educational radio and television, or mobile educational services and equipment.<sup>203</sup> Also, public school personnel may be made available in other than public school facilities, but only to the extent necessary to provide services which are not normally provided by the private school and are required by the handicap. Under the rules, these services will be funded by the federal government. However, these funds may not be used to pay the salaries of teachers or other employees of the private schools, nor may they be used to finance the existing level of instruction in the private schools.<sup>204</sup> Services to non-public school students must be comparable in quality, scope, and opportunity to those provided to public school children with equal needs.<sup>205</sup>

Although the foregoing discussion is based solely on federal regulations, the discussion is nonetheless pertinent to an analysis of Illinois' program because it has failed to guarantee parochial student accessibility to special education programs. The state board of education, in

200. 45 C.F.R. § 121a.403(a) (1977).

201. *Id.* at § 121a.403, official comments app. A. The official comments provide that:

Free appropriate public education must be made available at no cost to the parents. If the parents felt that services were not adequate, they may have a due process hearing to show that more or better services must be provided to give their child FAPE. However, if the parents choose not to educate their child in the public school system, they are not required to do so. In that case the relevant public agency has the remaining duty of offering special education and related services under sections 121a.450-121a.460, but does not have the duty of insuring that the private school meets the requirements of Part B (unless other handicapped children have been placed in or referred to that private school by the agency), or of paying for the cost of the private school.

202. *Id.* at § 121a.452(a)(b) (enacted pursuant to 20 U.S.C. § 1413(a)(4)(A) (1976)).

203. 45 C.F.R. § 121a.454 (1977).

204. *Id.* at §§ 121a.459, 121a.460.

205. *Id.* at § 121a.455.

the draft of its Fiscal Year 1979 Annual Program Plan Amendment, has set forth *proposed* procedures and legislation which would guarantee participation of private school children.<sup>206</sup> Even though the legislative authority for the state board of education's proposed policy and rule changes finally passed the legislature,<sup>207</sup> the proposed additions to the Illinois Rules and Regulations to Govern the Administration and Operation of Special Education were not effected. The very pertinent issue then becomes one of whether the State of Illinois is in compliance with the Education for All Handicapped Children Act in the area of guaranteeing program accessibility to parochial students. As the Illinois draft *itself* concedes: "(existing efforts) are not sufficient in themselves, . . . to meet the mandates" of the Education Act. It would therefore seem that all of the aforementioned steps would be necessary to effect compliance.<sup>208</sup>

### CONCLUSION

The handicapped child now has an immense resource of statutorily and judicially defined rights upon which to draw in search of a free and appropriate, if not equal education. However, it should be apparent to the practitioner that some of those rights which are provided in *law* are not necessarily implemented in reality. But there is no reason why all parties involved in education of the handicapped should not have their respective rights recognized and implemented as the courts and legislature have provided numerous and effective remedial measures to ensure the practical realization of theoretical rights.

206. Illinois State Board of Education Fiscal Year 1979 Annual Program Plan Amendment for Part B of the Education of the Handicapped Act, as Amended by Pub. L. 94-142, art. XI, pp. 66-69.

207. ILL. REV. STAT. ch. 122, § 14-6.01 (1979).

208. Illinois State Board of Education Fiscal Year 1979 Annual Program Plan Amendment for Part B of the Education of the Handicapped Act, as Amended by Pub. L. 94-142, art. XI, p. 67.

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