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RIGHT TO EDUCATION FOR THE HANDICAPPED IN WEST VIRGINIA

Laura F. Rothstein*

1981 was the International Year of the Disabled Person. During that year handicapped individuals received much attention from the press. Hopefully this publicity will result in an increased awareness of the existence of handicapped persons in our society, the special problems they have, and also their special abilities.

Of the legal issues concerning handicapped individuals, the one receiving the most attention is the right to education. Many changes have occurred in the legal requirements placed on state and local educational agencies, and these changes in the law have caused dramatic changes in the attitudes of parents, teachers, administrators, and others towards the education of handicapped persons. As a result of these changes, all parties concerned are seeking to learn about the legal requirements regarding the education of handicapped persons.

This article is intended to provide a general survey of the relevant law as it applies in West Virginia and is directed primarily at the attorney whose legal counsel is sought involving these issues. The article examines the historical background of legal developments which have lead up to the present legal requirements, the constitutional and statutory bases for the right to special education, and a survey of recent procedural, substantive, and remedial issues with which courts are currently grappling. The survey will examine only primary and secondary education for handicapped individuals, and will not include post-secondary education (higher education), vocational or adult education, or education of incarcerated individuals.

Because many of the issues discussed are themselves the subject of detailed examination in numerous law review articles and treatment in other periodicals, the article does not attempt to provide an in-depth explanation of each issue. Rather, the article is intended as a beginning reference point for the attorney in West Virginia.

I. HISTORICAL BACKGROUND

The landmark case involving right to education is *Brown v. Board of Education*.¹ In that case, although the Supreme Court did not hold that there is a fundamental right to education, it found that if a state undertakes to provide education it must do so on an equal basis to all of its citizens. While not a fundamental right, education is "perhaps the most important function of state

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¹ 347 U.S. 483 (1954).

and local governments" according to the *Brown* Court.²

The constitutional requirements in *Brown* and other cases³ were in part the basis for the holdings in *Pennsylvania Association for Retarded Children v. Pennsylvania*,⁴ and *Mills v. Board of Education*⁵ which established a right to due process and a right to equal protection for handicapped children of school age. These cases in the early 1970s left many questions unanswered—such as what particular procedures meet the due process mandate and what particular type of education meets the equal protection requirement.

Some of the uncertainty surrounding the holdings in these cases was clarified in the passage of two federal laws, Section 504 of the Rehabilitation Act of 1973⁶ [hereinafter "section 504"] and the Education for All Handicapped Children Act of 1975⁷ [hereinafter "EHA"]. Section 504 prohibits discrimination on the basis of handicap by any program or activity receiving federal funds. The EHA requires state educational agencies to set up procedures and programs for a free appropriate public education for all handicapped children in order for the state to receive federal assistance under the EHA. The West Virginia Code section entitled "Education of Exceptional Children,"⁸ and the regulations⁹ promulgated pursuant thereto, establish the procedures and programs necessary for receipt of federal funding under the EHA.

II. RECENT LAW

A. Constitutional Basis

As was mentioned previously, there is no federal constitutional right to

² *Id.* at 493.

³ See *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1 (1973) (holding that public education financing through local property tax revenues was not a denial of equal protection, where the state is providing minimally adequate education); *Goss v. Lopez*, 419 U.S. 565 (1975) (outlining minimal due process requirements in disciplinary proceedings); and *Tinker v. Des Moines Ind. Community School Dist.*, 393 U.S. 503 (1969) (outlining first amendment protections for students).

For a West Virginia case decision reaching perhaps a different result than *San Antonio*, see *Pauley v. Bailey*, No. 75-1268 (Kan. Cir. Ct., May 11, 1982). In that case Circuit Judge Arthur Recht held the State's school finance system to be unconstitutional under the State constitutional mandate that the State shall provide a "thorough and efficient system of education." The case involved a discrepancy in per pupil expenditures resulting from the property tax based school finance system.

⁴ 334 F. Supp. 1257 (E.D. Pa. 1971), *aff'd*, 343 F. Supp. 279 (E.D. Pa. 1972) (settlement approved). In this case parents of handicapped children and the Pennsylvania Association for Retarded Children challenged a statute which exempted the Pennsylvania State Board of Education from educating untrainable or uneducable handicapped children. The consent decree outlined specifically what the State must do to fulfill its responsibilities to educate these mentally handicapped children.

⁵ 348 F. Supp. 866 (D.D.C. 1972). The holding in this case extended the right to an equal access to education to all handicapped children, not just those with mental handicaps.

⁶ 29 U.S.C. § 794 (1976).

⁷ 20 U.S.C. §§ 1401-61 (1976).

⁸ W. VA. CODE §§ 18-20-1 to -6 (1977 & Cum. Supp. 1982). West Virginia originally passed its Education of Exceptional Children Act in 1969, long before the passage of the EHA.

⁹ WEST VIRGINIA BOARD OF EDUCATION, STANDARDS FOR THE EDUCATION OF EXCEPTIONAL CHILDREN (Aug. 1980). [hereinafter cited as WEST VIRGINIA STANDARDS].

education.¹⁰ Every state in the country provides education to its citizens, therefore, education is to be provided on an equal basis, and denial of education is not to be allowed without due process. Because the United States Supreme Court has not yet held that there is a fundamental right to education, nor have they found that the handicapped are members of a suspect class, the current test for equal protection is the rational basis test rather than the strict scrutiny test. As long as the classification or segregation or denial bears a rational basis to achieving a legitimate legislative purpose, it will be upheld.¹¹ There are some lower court decisions which apply the more stringent strict scrutiny test,¹² some which have taken a middle ground by holding that the handicapped are a "quasi-suspect" class and that education is a "quasi-fundamental" right, have applied a "strict rationality" test in requiring that even if legislative discrimination can be rationally explained, it must withstand scrutiny in light of the primary purposes of the legislative scheme of which it is a part.¹³

The West Virginia Constitution provides that "The Legislature shall provide, by general law, for a thorough and efficient system of free schools."¹⁴ In *Pauley v. Kelly*,¹⁵ the West Virginia Supreme Court of Appeals held that this provision places education in the category of a fundamental constitutional right in West Virginia, and therefore the strict scrutiny test would be applied to discriminatory classification.

B. Statutory Requirements

There are three major statutes which affect education for handicapped children in West Virginia. They are the Rehabilitation Act (section 504),¹⁶ the Education for All Handicapped Children Act,¹⁷ and the West Virginia Code Section "Education of Exceptional Children."¹⁸

¹⁰ See *supra* text accompanying note 2.

¹¹ *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1, 40 (1973).

¹² *Fialkowski v. Shapp*, 405 F. Supp. 946, 958-59 (E.D. Pa. 1975) (dicta). See also *In re G.H.*, 218 N.W.2d 441, 447 (1974). Applying the Supreme Court standard for what constitutes a suspect class, it is certainly arguable that at least some, if not all, handicapped children fall within the definition. A suspect class is one which "saddled with such disabilities, or subjected to such a history of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

For a more complete discussion of the application of judicial scrutiny to education for the handicapped see Note, *Right of Handicapped Children to an Education: The Phoenix of Rodriguez*, 59 CORNELL L. REV. 519 (1974). For a discussion supporting the inclusion of handicapped as a suspect class, see Burgdorf & Burgdorf, *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a "Suspect Class" Under the Equal Protection Clause*, 15 SANTA CLARA LAWYER 855 (1975). See generally Note, *The Right to Education: A Constitutional Analysis*, 44 U. CIN. L. REV. 796 (1975).

¹³ *Frederick L. v. Thomas*, 408 F. Supp. 832, 835 (E.D. Pa. 1976).

¹⁴ W. VA. CONST. art. XII, § 1.

¹⁵ 255 S.E.2d 859, 878 (W. Va. 1979). This lengthy opinion provides an excellent analysis of the State constitutional provisions regarding education.

¹⁶ 29 U.S.C. § 794 (1976).

¹⁷ 20 U.S.C. §§ 1401-61 (1976).

¹⁸ W. VA. CODE §§ 18-20-1 to -6 (1977 & Cum. Supp. 1982).

1. The Rehabilitation Act of 1973

Section 504 of the Rehabilitation Act prohibits any program or activity which receives federal financial assistance from discrimination on the basis of handicap. It is not a prerequisite that the federal funds be applied directly to special education. So, for example, an education program which receives federal funds for the purpose of providing Head Start programming¹⁹ would be subject to the requirement of nondiscrimination under section 504. Inasmuch as the State Department of Education of West Virginia receives federal funding for numerous programs,²⁰ it is subject to the mandates of section 504. This federal funding is "passed through" from the state agencies to the local school districts, which are then in turn subject to the mandate. While there are general regulations²¹ specifying what is required under section 504, the more detailed regulations are set out under the EHA.

2. The Education for All Handicapped Children Act of 1975

The EHA amended an earlier federal education act and conditioned federal funding for state educational programming on the state's providing special education to children of school age.²² The regulations set out in detail what each state must provide in the form of due process and programming in order to receive the federal funds under the EHA.²³

3. West Virginia Law—Education of Exceptional Children

The West Virginia code provision dealing with Education of Exceptional Children [hereinafter referred to as "Special Education Law"],²⁴ and the Standards for the Education of Exceptional Children [hereinafter referred to as

¹⁹ 42 U.S.C. § 2809 (1976).

²⁰ It is arguable under a much criticized Fourth Circuit decision, *Trageser v. Libbie Rehabilitation Center, Inc.*, 590 F.2d 87 (4th Cir. 1978), *cert. denied*, 442 U.S. 947 (1979), that a recipient of federal funds is not subject to the mandates of the Rehabilitation Act for those programs which are not the direct recipients of the federal funds. This is a very narrow interpretation of the Rehabilitation Act, and in any event, has little import in the area of primary and secondary education because virtually every local school district receives federal funds for special education. In the event, however, that the federal education program become funded through block grants, it is possible that it might be argued that only local school districts which specifically receive federal funds for special education must comply with section 504. *See also* *North Haven Bd. of Educ. v. Bell*, 450 U.S. 909 (1982).

²¹ 45 C.F.R. §§ 84.1-10 (1980). For other more recent interpretations of section 504 in the regulations see 45 Fed. Reg. 30,937 (1980).

²² 20 U.S.C. §§ 1401-61 (1976). For an explanation of the funding formula see Shepherd, *The Repudiation of Plato: A Lawyer's Guide to the Educational Rights of Handicapped Children*, 13 U. RICH. L. REV. 783, 792-95 (1979).

²³ 34 C.F.R. §§ 300.121-.754 (1981). The Reagan administration has begun examining the possibility of deregulating the EHA. OFFICE OF SPECIAL EDUCATION, BRIEFING PAPER: INITIAL REVIEW OF REGULATIONS UNDER PART B OF THE EDUCATION OF THE HANDICAPPED ACT, AS AMENDED (Sept. 1, 1981). In addition, a number of policy interpretations by the Department of Education have been indefinitely suspended pending the deregulation review. 46 Fed. Reg. 19,001 (1981); 46 Fed. Reg. 25,614-15 (1981).

²⁴ W. VA. CODE §§ 18-20-1 to -6 (1977 & Cum. Supp. 1982).

“West Virginia Standards”]²⁵ set out the detailed requirements which comply with the EHA, thereby making West Virginia eligible for funding under the EHA.

In compliance with the EHA mandate, the West Virginia Standards establish the requirement that the West Virginia Department of Education shall identify, locate and evaluate all children within the state who qualify for special education.²⁶ Once the child is identified, located, and evaluated, the child is to be placed in the least restrictive environment appropriate to the child's needs and abilities.²⁷

a. *Procedural Safeguards.* The parents²⁸ of the child have a legal right to challenge the identification, evaluation, or placement of the child at any time.²⁹ The parents are entitled to have notice in advance of the intended placement, if it is a placement other than full time in the regular classroom.³⁰ There is also a right to challenge a placement in the regular classroom if the parents feel that the child would be more appropriately placed in a program of special education.³¹

The due process requirements for challenging a placement or evaluation are as follows. The parents must be given *written* notice of the proposed action, the reasons for the proposal, and notice of any available alternative programs.³² The notice must be given within a reasonable time before the proposed action and must indicate the parents' right to object and to have a hearing on the objection.³³ It must also notify the parents of the availability of

²⁵ The WEST VIRGINIA STANDARDS, *supra* note 9, are extremely detailed and comprehensive. A copy of the STANDARDS is available from the West Virginia Department of Education in Charleston. Any attorney or lay advocate counseling a client about rights to special education should obtain a copy of these STANDARDS. As of this writing, the STANDARDS were in the process of being revised, so advocates will want to be certain that they have the most current STANDARDS in effect. The revised document is expected to be completed in time to make the new STANDARDS effective for the following school year. Memorandum from Roy Truby, State Superintendent of Schools to Persons Addressed (April 19, 1982).

²⁶ WEST VIRGINIA STANDARDS, *supra* note 9 at Part II, Part IV §§ 100.000-300.900.

²⁷ *Id.* at Part III.

²⁸ The WEST VIRGINIA STANDARDS include the following within the definition of parent: “a parent, a guardian, a person acting as a parent of a child . . . a surrogate parent who has been appointed in accordance with Appendix A [of the STANDARDS], or the exceptional individual who has reached the age of majority.” *Id.* at Part I. The term “does not include the State, if the child is a ward of the State.” *Id.* Throughout the remainder of this article the term parent is intended to include those listed in the definition above.

²⁹ *Id.* at app. A § B(1). In West Virginia there are six steps involving the actual placement of the child into a particular program. The steps are: Identification and Referral, Individual Screening, Evaluation, Placement, Instruction, and Reevaluation. *Id.* Part IV. The right to a hearing relates to any one of these steps. *Id.* app. A, § B(1). Under the existing standards there is also a right of the parents to be present during both the Placement Stage (at which the Individualized Educational Program/Total Service Plan is developed) and the Instruction Stage. These two steps may be combined under the revised STANDARDS in the interest of efficiency of all parties.

³⁰ *Id.* at app. A § B, C, F.

³¹ *Id.* at app. A § B(1).

³² *Id.* at app. A § B.

³³ *Id.* at app. A §§ B(2) and B(3)(a)(4). For a more detailed listing of the other required contents of the notice see *Id.* at app. A § B(3).

free or inexpensive independent educational evaluations.³⁴ Following the notification about the proposed program, the county director of special education must set up a conference with the parents if there is disagreement about the appropriateness of the proposed program.³⁵ If at this conference, there is still disagreement, the parents have a right to request a hearing.³⁶

The request for the hearing should be in *writing*, and should be sent to the county superintendent responsible for the program.³⁷ The hearing must be impartial³⁸ and must be at a time and place convenient to the parents.³⁹ The hearing may be closed to the public if the parents request.⁴⁰

The hearing itself has a number of due process protections. The parents have a right to counsel,⁴¹ a right to present evidence,⁴² a right to advance notice of evidence to be presented by the school,⁴³ and a right to cross-examine witnesses.⁴⁴ They also have a right to examine school records (and to obtain copies at reasonable cost)⁴⁵ and to receive a copy of the transcript of the hearing.⁴⁶ A special education due process hearing is theoretically less adversarial than a courtroom trial in the sense that both the school and the parent have or should have a common goal, i.e. the appropriate education of the child.⁴⁷ The dispute is over the means to obtain that goal. It is less formal in some areas, such as not applying the strict rules of evidence. For example, there is no requirement that the evaluator be present to testify as to the contents of psycho-

³⁴ *Id.* at app. A § D. If the parent disagrees with the school's evaluation, an independent educational evaluation must be provided at public expense, unless the school shows in a hearing that its evaluation is appropriate. Even if the school is not required to pay for the evaluation, the parent has right to have one. *Id.* at app. A, § D(2).

³⁵ *Id.* at app. A § E.

³⁶ *Id.* Between 1978 and 1982, thirty-five due process hearings were requested in West Virginia. Twenty-six hearings were actually held. *Due Process Hearings*, unpublished chart, provided by Roy Truby, State Superintendent of Schools.

³⁷ *Id.* at app. A § F. Parents should be advised to keep a carbon or photo copy of any letters sent to school personnel, and to keep records of the dates of phone calls, the person to whom they spoke, and the content of the conversation.

³⁸ *Id.* at app. A § G. To ensure impartiality, the hearing officer is not to be an employee of the county school system, the regional education service agency (RESA), or any participating agency involved in the education or care of the child, or be someone who would otherwise have a conflict affecting objectivity. *Id.* at app. A & G(3). The STANDARDS also specify the qualifications of the hearing officer. *Id.* at app. A § G(1).

³⁹ *Id.* at app. A § F(4).

⁴⁰ *Id.* at app. A § I(1).

⁴¹ *Id.* at app. A § I(5)(a). The parents' counsel may be either an attorney or a lay advocate. *Id.*

⁴² *Id.* at app. A § I(5)(b).

⁴³ *Id.* at app. A § I(5)(c).

⁴⁴ *Id.* at app. A § I(b). It should also be noted that the school has the burden of proof in showing the appropriateness of its proposed action, and as to why a less restrictive alternative is not appropriate, if it is the party recommending the placement. *Id.* at app. A § I(3).

⁴⁵ *Id.* at app. A §§ H(4) and H(5). See also WEST VIRGINIA STANDARDS, app. B, §§ 9 and 10. Regarding access to medical records, see *infra* notes 79 and 80.

⁴⁶ WEST VIRGINIA STANDARDS, app. A § I(5)(d) (Aug. 1980).

⁴⁷ As a practical matter, however, parents should be prepared for the possibility that the hearing will be adversarial.

logical evaluations.⁴⁸ There is also no requirement that the formal rules of evidence apply.⁴⁹

The parents are entitled to receive a statement of the decision and reasons for the decision of the hearing officer.⁵⁰ The decision of the hearing officer may be appealed to the State Superintendent of Schools, whose decision will be based primarily on the information in the hearing record.⁵¹ If the decision of the Superintendent is unsatisfactory, the parents may then bring civil suit in either state circuit court or in federal district court.⁵² The judicial review is not limited to the information in the record,⁵³ but in the interest of efficiency it is advisable to raise all relevant matters at the due process hearing to avoid undue prejudice to the child's interest.

b. *Substantive Requirements.* In addition to the due process requirements, there are a number of specific substantive requirements relating to what is to be included within special education. The EHA regulations define appropriate education as including special education and related services such as transportation, speech and physical therapy, psychological services, and certain medical services.⁵⁴ West Virginia has broken down the program area standards, into the requisite appropriate programming by exceptionality.⁵⁵ Ten categories of exceptionality (such as visually impaired, mentally retarded, etc.)⁵⁶ have been defined. Eligibility requirements and program content have been generally established for each exceptionality.⁵⁷ The particular program for each individual is to be established in the form of an individualized educational program (IEP), which is to include the present level of performance, a statement of objectives to be achieved, specific services for the program, and

⁴⁸ WEST VIRGINIA DEPT. OF EDUCATION, HEARING OFFICER RESOURCE MANUAL, 36. Evidence is "[a]ny evaluation document, statement, observation, record, or correspondence disclosed to the other party at least five (5) days prior to the hearing. . . ." *Id.* For the advocate who plans to work in the area of right to special education, it is advisable to obtain a copy of the *Hearing Officer Resource Manual* to become familiar with the procedures.

⁴⁹ *Id.*

⁵⁰ WEST VIRGINIA STANDARDS, app. A § J(1) (Aug. 1980).

⁵¹ *Id.* at app. A § K. Between 1978 and 1982, fourteen decisions were appealed to the State Superintendent. *Due Process Hearings*, an unpublished chart, provided by Roy Truby, State Superintendent of Schools. From those fourteen appeals, in at least ten instances, the Hearing officers decision was upheld. In three of the ten instances in which the decision was upheld, the appeal had been made by the county superintendent. Memorandum from Margaret Mills, Appeals Officer, West Virginia Department of Education, to Rosalind Glick (June 22, 1982).

⁵² 20 U.S.C. § 1415 (1976). For a discussion of whether one may bring an action in court before exhausting administrative remedies see *infra* Section II (C)(1)(b).

⁵³ 20 U.S.C. § 1415 (1976).

⁵⁴ 34 C.F.R. §§ 300.4, 300.13 and 300.14 (1981). The medical services required relate primarily to identification and evaluation of the child. *Id.* at § 300.13(b)(4).

⁵⁵ WEST VIRGINIA STANDARDS, Part V § 400.100. West Virginia includes "Gifted" students as a group entitled to special education services. *Id.* Gifted students are not included within the protections of the EHA.

⁵⁶ The categories are the following: behavioral disorders, deaf-blind, gifted, hearing impaired, mentally retarded (educable, trainable, and profoundly mentally retarded), physically handicapped, preschool handicapped, specific learning disabled, speech-language impaired, and visually impaired. *Id.* at Part V.

⁵⁷ *Id.*

the criteria for evaluation of achievement of these objectives.⁵⁸ The IEP is to be developed at a meeting with parents, teachers, and other school personnel.

One of the most controversial areas in the EHA is the mainstreaming requirement—the education of handicapped children with non-handicapped children to the maximum extent appropriate.⁵⁹ It is important to understand that mainstreaming is a *general policy* favoring regular classroom placement in *appropriate* circumstances. Proponents of mainstreaming recognize that not every child can benefit from total integration into the regular classroom, but they argue for the goal of placement of the child in the least restrictive *appropriate* setting. One argument for mainstreaming is that segregating and labeling children can result in stigmatization.⁶⁰ Opponents argue that there is a possibility that handicapped children may be dumped into the regular classroom without adequate preparation by teachers. This may be a particularly serious problem where the child's handicaps include emotional and behavioral disorders that might be disruptive to the class. The response to that argument, however, is that what is needed is not to abolish the mainstreaming goal, but to move towards better teacher preparation in the form of new certification requirements, ongoing in-service training programs, and better cooperation between special education teachers and teachers in the regular classroom.⁶¹

⁵⁸ In West Virginia the placement decision currently involves two separate meetings. The first is to establish a program of comprehensive evaluation services to the individual. *Id.* at Part IV §§ 300.000 to 300.900. The second is to establish the details of the specific program for the individual child. Many states do both in a single meeting. *E.g.*, REGULATIONS OF THE STATE BOARD OF EDUCATION OF PENNSYLVANIA, ANNEX A, 341.15. *See also supra* note 29.

⁵⁹ 20 U.S.C. §§ 1412(5)(B) and 1414(A)(1)(C)(iv) (1976). For a discussion of the mainstreaming requirement see Miller & Miller, *The Education For All Handicapped Act: How Well Does It Accomplish Its Goal of Promoting the Least Restrictive Environment for Education?* 28 DEPAUL L. REV. 321 (1979). Whether the placement is appropriate is the issue raised most frequently in due process hearings in West Virginia. *See Due Process Hearings*, provided by Roy Truby, State Superintendent of Schools.

⁶⁰ E. GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* (1963). In *Pehowski v. Blatnik*, No. 78-0030-W(H) (N.D. W. Va. April 14, 1980), a federal district court in a declaratory judgment struck down the automatic placement of all severely retarded students in a segregated setting. The complaint has since been amended to be brought in the form of a class action for all special education students in West Virginia.

⁶¹ The regulations promulgated pursuant to the EHA set out a program of personnel development. 34 C.F.R. §§ 300.380-300.387 (1981). These provisions basically require that each state's annual program plan, filed as a prerequisite to receiving funds under the EHA, must include an explanation of the programs for personnel development, including in-service training and other procedures. *Id.* at § 300.380. There are also provisions in the EHA for giving grants to states specifically for use in training of personnel. 20 U.S.C. §§ 1431-34 (1976).

In West Virginia, it is the responsibility of the State Department of Education to "establish certification requirements for personnel providing services to exceptional individuals." WEST VIRGINIA STANDARDS, Part 1. In carrying out this responsibility, the Department of Education is to work with colleges and universities in preparing personnel. In order to adequately prepare teachers and other personnel, it should be required that both regular classroom teachers and special education classroom teachers must take coursework involving education of exceptional children. Not all states require preparation in special education for all educators, and West Virginia is among those which do not. *State Certification Requirements*, J. TCHR. EDUC. 47 (Nov.-Dec. 1978). For a listing of those colleges and universities in West Virginia which have approved special education programs in teacher education, see 1981-82 DIRECTORY OF SPECIAL EDUCATION ADMINISTRATIVE PERSON-

c. *Practical Problems With Special Education Requirements.* There are several practical problems with the implementation of the EHA. These are not all problems which have been the subject of litigation, but they are problems which could potentially result in an ineffective provision of special education.

First is the problem of writing IEP's on the basis of available resources rather than on the basis of student needs. It is possible that some school districts may find that a child needs speech therapy three days a week, but since a speech therapist is not *presently* available that often, the IEP will be written on the basis of present availability of the therapist rather than on the child's needs. This is contrary to the requirements of the EHA. It is incumbent on school district authorities to hire additional personnel, or to do whatever else can be done to meet the educational needs of the individual student.⁶²

A second problem is the lack of sufficient funds, particularly in an era of economic depression and recession. If a school has insufficient funding to implement programming necessary for handicapped children, it must cut back on all programs for all children, rather than simply not providing any special education at all.⁶³

The lack of coordination between resource teachers and teachers in the regular classroom is a third problem. Although the EHA does not require the IEP to address the coordination of efforts by various personnel, teachers, and administrators, every effort should be made to include it in the IEP. For example, the IEP could state that the teacher and the speech therapist will meet every three weeks to consult on progress of the student or to plan coordination of programming.

A fourth problem, which is beginning to be resolved, is the need for cooperation between higher education institutions and state and local educational agencies on approaches to personnel training, teacher certification, funding, administration, and delivery of educational programming. Cooperation and coordination of efforts is essential if teachers in the regular classroom are to be prepared to deal with handicapped children. Without this cooperation, the individuals who will suffer will be the handicapped children themselves, who will feel the brunt of the teacher's frustration and anger towards being "forced" to educate a child without adequate preparation for themselves. Teacher education programs and in-service training programs must teach educators the skills

NEL 14 (published by West Virginia Department of Education).

Unfortunately, the efforts by teacher educators may not be sufficient to implement a uniform program of training of personnel qualified to work with exceptional children. It will probably be necessary for the State to adopt specific teacher certification requirements for both regular and special education personnel to require coursework on special education. At the very least, incentives in the form of release time for in-service training, etc. should be used more widely to prepare all school personnel for this responsibility.

⁶² See *Mills v. Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972). "If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system, then the available funds must be expended equitably in such a manner that no child is entirely excluded. . . ." *Id.* at 876. See *Stemple v. Board of Educ.*, 623 F.2d 893 (4th Cir. 1980), *cert. denied*, 450 U.S. 911 (1981).

⁶³ *Mills v. Board of Educ.*, 348 F. Supp. 866, 876 (D.D.C. 1972).

of dealing with behavior problem students, handling various handicapping conditions, coordinating with resource personnel, evaluating and testing, and management of recordkeeping.⁶⁴

A fifth practical problem is the lack of social and psychological preparation by the students themselves for the inclusion of handicapped children in the classroom. One highly successful response to this problem has been the implementation of a countywide "preparation program" given each fall since 1980, in Monongalia County. In this program children, teachers, and other personnel are prepared in advance for the handicapped children who will be entering school.⁶⁵

The resistance to this mandate will hopefully dissipate as students, parents, teachers, and other education personnel, become more accustomed to the legal requirements and the presence of handicapped children within the regular school system.

C. *Legal Issues*

In West Virginia and other states there are several legal issues which have been the subject of recent litigation. The following is an overview of the current legal status of some of the more significant issues.

1. Procedural Issues

Although more recent litigation has focused on substantive issues, there have been a number of procedural issues which are in the process of legal resolution.

a. *Private Right of Action.* Whenever a court is faced with the question of whether a particular statutory scheme permits an implied private right of action, where an express right of action is not included, the traditional test is that set out by the 1975 Supreme Court decision in *Cort v. Ash*.⁶⁶ The test has four criteria which are as follows: 1) whether the statute was enacted to protect the individual seeking relief under it, 2) whether allowing a private action would frustrate the statute's purpose, 3) whether a federal remedy is inappropriate because of preemption by the states, and 4) whether there is legislative intent regarding a private right of action.⁶⁷ The Supreme Court has not yet explicitly ruled on this issue as applied to the either the EHA or section 504 of the Rehabilitation Act. It appears that at present there is split of authority regarding a private right of action under the EHA, and the weight of authority

⁶⁴ There may be a "territorial" problem of special educators being threatened by having regular educators share in the expertise. There is a significant need for communication between administrators, institutions of higher education, and the educators themselves. The efforts already begun (see *supra* note 61) need to be recognized and further efforts encouraged.

⁶⁵ Program by the Monongalia County Department of Education, Division of Special Education, entitled "Preparing for Our Friends," adapted from the West Virginia Department of Education.

⁶⁶ 422 U.S. 66 (1975).

⁶⁷ 422 U.S. at 78.

favors a private right of action under section 504.⁶⁸ The Fourth Circuit found a private right under section 504,⁶⁹ and a federal district court in West Virginia has found a private right of action under the EHA.⁷⁰

b. *Exhaustion of Administrative Remedies.* Even courts that find a private right of action do not necessarily allow suits to be brought in court without the initial due process hearing and an appeal to the state education agency first. The Supreme Court has not explicitly resolved this issue, but several lower courts have held that one need not exhaust administrative remedies before bringing a private action under the Rehabilitation Act,⁷¹ but that one seeking judicial relief under the EHA must do so only as a review of the decision of the state administrative agency.⁷² In the Fourth Circuit it has been held that exhaustion is generally required under the EHA.⁷³

c. *Change in Placement.* A third procedural issue facing courts is what constitutes a change in placement which triggers the due process requirements.⁷⁴ Courts have generally held that transfer of a child to another special education program with substantially similar classes does not constitute a change in placement,⁷⁵ but that expulsion for disciplinary reasons does constitute a change in placement.⁷⁶

d. *Right to Records.* While not a procedural issue per se, it is essential in obtaining adequate due process that the parents have access to relevant school records. While the school district may charge the parents a reasonable fee for copying school records,⁷⁷ the school may not deny the right to obtain the records. If charging a reasonable fee for records would result in de facto denial of access in the case of indigent parents, it is possible to obtain records at no charge.⁷⁸

⁶⁸ For a discussion of the private right of action under the EHA and section 504, see Hyatt, *Litigating the Rights of Handicapped Children to An Appropriate Education: Procedures and Remedies*, 29 U.C.L.A. L. Rev. 1, 17-29 (1981).

⁶⁹ *Davis v. Southeastern Community College*, 574 F.2d 1158 (4th Cir. 1978), *rev'd on other grounds*, 442 U.S. 397 (1979).

⁷⁰ *Medley v. Ginsberg*, 492 F. Supp. 1294, 1298-99 (S.D. W. Va. 1980). In *McGovern v. Sullins*, 676 F.2d 98 (4th Cir. 1982), it was held that no private action under 42 U.S.C. § 1983 could be brought where there was a remedy under the EHA.

⁷¹ For a discussion of the requirement that administrative remedies be exhausted under 504, see Hyatt, *Litigating the Rights of Handicapped Children to An Appropriate Education: Procedures and Remedies*, 29 U.C.L.A. L. Rev. 1, 35-38 (1981).

⁷² *Id.* at 30-34.

⁷³ *McGovern v. Sullins*, 676 F.2d 98 (4th Cir. 1982); *Scruggs v. Campbell*, 630 F.2d 237, 239 (4th Cir. 1980). In *Medley v. Ginsberg*, 492 F. Supp. 1294, 1309 (S.D. W. Va. 1980), however, exhaustion was not required because there was no proper opportunity to invoke hearing rights.

⁷⁴ 20 U.S.C. § 1415(b)(1)(C) (1976) (requires prior notice in writing whenever a change in placement is to be made). See generally Annot., 54 A.L.R. FED. 570 (1981).

⁷⁵ *Concerned Parents v. New York City Bd. of Educ.*, 629 F.2d 751 (2d Cir. 1980), *cert. denied*, 449 U.S. 1078 (1981).

⁷⁶ *S-1 v. Turlington*, 635 F.2d 342 (5th Cir.), *cert. denied*, 102 S. Ct. 566 (1981); *Stuart v. Nappi*, 443 F. Supp. 1235 (D. Conn. 1978). For further discussion of expulsion for disciplinary reasons see *infra* section II(C)(2)(d). WEST VIRGINIA STANDARDS, *supra* note 9, app. A § H(4).

⁷⁷ *Id.*

⁷⁸ *Id.* at app. B, § 3 "Education Records," (3). Medical records which are not used as part of

An issue that occasionally arises involving school records relates to access to medical records which are filed with school records. This arises most often in private school placement where a child is placed for both medical and educational purposes. The standard applied in determining which records are available to parents is that those medical records which are used as part of the educational placement decision process must be made available.⁷⁹ Those records which are strictly medical will be available according to the applicable state laws on access to medical records.⁸⁰

Inasmuch as school records are protected under the Family Education and Privacy Amendment (known as the Buckley Amendment),⁸¹ these records should be available to anyone other than the parents only upon presentation of a signed release.

e. *Mootness*. It is possible that a school district or state department of education might argue that once a student accepts a high school diploma, the student has relinquished all rights against the school. Whether this is a valid claim may depend on the remedy sought after the student has received or accepted the diploma. In a Missouri case decided by a state circuit court, the parents sought judicial review of an administrative determination that certain special education services would not be provided. The court dismissed on the basis of mootness by finding that the student would have graduated from high school by the time a new evaluation could be ordered. The appellate court, although disturbed by the delays in exhausting administrative remedies, affirmed on the basis of mootness.⁸² Under the reasoning in this case, it would seem that once a student graduates from high school, there is no longer any right to special education, even if it might be found that the required education had not been provided. To avoid the chance of being dismissed for mootness, it may be necessary not to accept the diploma if further special education is sought as a remedy. The Supreme Court standard is that issues "capable of repetition, yet evading review,"⁸³ are not moot. Applying this standard it could be argued, that because of the length of time necessary for due process procedures, those students in their last year or two of high school who are claiming a right to appropriate education through due process, are raising issues "capable of repetition, yet evading review."

If the remedy sought is damages for past injuries, it is perhaps less likely

the creation, maintenance, or implementation of the special education and related services program are not available for inspection and review without the permission of the professional or paraprofessional person who made the records.

⁷⁹ WEST VIRGINIA STANDARDS, *supra* note 9, app. B § 3.

⁸⁰ For a discussion of patient access to medical records, see Comment, *Access to Medical and Psychiatric Records: Proposed Legislation*, 40 ALB. L. REV. 580 (1976).

⁸¹ Pub. L. No. 93-380, § 513(a), 88 Stat. 571 (1974), amended by Pub. L. No. 93-568, § 2, 88 Stat. 1858 (1974) (codified at 20 U.S.C. § 1232g (1976)). The regulations issued pursuant to this Act may be found at 34 C.F.R. §§ 99.1-67 (1981).

⁸² *Pitts v. Board of Educ.*, 568 S.W.2d 595 (Mo. App. 1978); *contra* *Norris v. Massachusetts Dep't of Educ.*, 529 F. Supp. 759 (D. Mass. 1981).

⁸³ *Roe v. Wade*, 410 U.S. 113, 125 (1973).

that mootness would be a bar.⁸⁴ The success of this claim would, of course, depend on the acceptance of damages as a remedy for denial of appropriate special education.

2. Substantive Issues

a. *Pre-School Education.* It is generally accepted that the first few years of a person's development are extremely important.⁸⁵ That is the period of time when speech is generally learned, and when fine motor and gross motor skills begin development. Developmental delays during the first five years may never be made up, or at least not without great difficulty because of the development of the brain during this period of life. The EHA requires that to the extent that handicapped children between ages three and five are provided education by the state as the result of a "State Law or practice, or the order of any court respecting public education within such age groups in the State,"⁸⁶ education must be provided to handicapped preschool children on an equal basis. Most states do not have preschool education available on a statewide basis, therefore that means if public education is being provided to some non-handicapped preschoolers, public education must also be provided to at least a proportionate number of handicapped children of the same age.⁸⁷ For example, if twenty percent of the non-handicapped four-year olds in West Virginia were receiving free public education, then it would seem from the EHA regulation that twenty percent of the handicapped four-year olds must have public education available to them.

Another regulation under the EHA provides that if public education is being provided to fifty percent or more of the handicapped children in a particular disability category in any age group, then all the children of the same age group and same disability category must receive a free appropriate public education.⁸⁸ Therefore, if West Virginia were providing fifty percent or more of the three-year old children who were visually impaired with free appropriate public education, the State would have to provide all of them with that same opportunity. Once education is provided to a handicapped child in any age group then the child has all the rights under the EHA.⁸⁹

In West Virginia, preschool education is provided on a voluntary basis by counties. Each county is free to provide preschool education for any child under the age of five.⁹⁰ Those counties which do provide preschool education,

⁸⁴ See *Jaworski v. Rhode Island Bd. of Regents*, 530 F. Supp. 60 (D.R.I. 1981). See *infra* § II(E).

⁸⁵ See, e.g., J. PIAGET, *ORIGINS OF INTELLIGENCE IN CHILDREN*.

⁸⁶ 20 U.S.C. § 1412(2)(B) (1976).

⁸⁷ 34 C.F.R. § 300.300(b)(2) (1981).

⁸⁸ 34 C.F.R. § 300.300(b)(3) (1981). The categories are the following: deaf, deaf-blind, hard of hearing, mentally retarded, multihandicapped, orthopedically impaired, other health impaired, seriously emotionally disturbed, specific learning disability, speech impaired, and visually handicapped. 34 C.F.R. § 300.5 (1981).

⁸⁹ 34 C.F.R. § 300.300(b)(4) (1981).

⁹⁰ WEST VIRGINIA STANDARDS, *supra* note 9, Part V, § 400.000-500.500 (Preschool Handicapped).

however, will be subject to the EHA requirements set out above. West Virginia Standards specify the requirements for preschool programming if a county elects to provide services to the preschool population.⁹¹

b. *Related Services and Reasonable Accommodations.* Part of the definition of "free appropriate public education" under the EHA and the West Virginia law is the requirement to provide "related services." "[R]elated services" means transportation and such developmental, corrective, and other supportive services as are required to assist a handicapped child to benefit from special education. . . .⁹² Related services include such things as psychological services, therapy, recreation, counseling, and certain medical services.⁹³ The list of related services is not intended to be exhaustive and other services are to be considered as related services if they are necessary to assist the child in benefiting from special education.⁹⁴

The major recent case in the area of accommodations, modifications, and related services is *Battle v. Pennsylvania*⁹⁵ which was recently resolved. That case involved an administrative policy in the State of Pennsylvania which limited the instruction available to any school age child to a certain number of days ("the 180-day rule"). The Third Circuit held that this inflexible policy was incompatible with the EHA's purpose. Since the Supreme Court declined to evaluate this decision, the Third Circuit's holding stands as the current standard, i.e., individual programming mandated under the EHA is not provided if a state has an inflexible application of a policy which denies appropriate programming to certain handicapped children.

Another case relating to modifications under the EHA, *Espino v. Besterro*,⁹⁶ involved a child unable to regulate his body temperature. The parents' request that the school provide an air-conditioned classroom in which the child could fully interact with his classmates was granted in a preliminary injunction.

An issue more likely to occur in many school districts is the accommodation involving sign language interpreters required for some hearing-impaired students. In *Rowley v. Board of Education*,⁹⁷ the Second Circuit Court of Ap-

⁹¹ *Id.*

⁹² 34 C.F.R. § 300.13(a) (1981). *Accord* WEST VIRGINIA STANDARDS, *supra* note 9, Part I (Definitions).

Transportation as one of the related services is an important issue which should be addressed in the IEP. In West Virginia there are limits on the amount of time to be spent in transit for exceptional children of different age groups. WEST VIRGINIA STANDARDS, *supra* note 9, app. F § B(W). These limitations are maximum times, and lesser time in transit should be specified in the IEP if it is necessary for the needs of the child. In a 1981 due process hearing in Mercer County, West Virginia, it was found that a trip of two hours and fifteen minutes one-way was out of compliance with State standards. Decision of Hearing Officer Thomas Lombardi, Mercer County (Sept. 1981).

⁹³ 34 C.F.R. § 300.13(a) (1981). The required medical services are those necessary to determine the "child's need for special education and related services." *Id.* at 300.13(b)(4).

⁹⁴ 34 C.F.R. § 300.13 comment (1981).

⁹⁵ 629 F.2d 269 (3d Cir. 1980), *cert. denied*, 452 U.S. 968 (1981).

⁹⁶ 520 F. Supp. 905 (S.D. Tex. 1981).

⁹⁷ 632 F.2d 945 (2d Cir. 1980), *rev'd*, 102 S. Ct. 3034 (1982).

peals held that Amy Rowley had a right to have a sign language interpreter in the classroom because it was necessary "to bring her educational opportunity up to the level . . . being offered to her non-handicapped peers."⁹⁸ The court noted that sign language interpreters would not necessarily be provided in all instances, and that the term "appropriate education" does not mean that schools are required to maximize the potential of all students.⁹⁹ The Supreme Court reversed the Second Circuit on the interpreter issue, finding that since Amy performed better than the average child, was advancing easily from grade to grade, and was receiving personalized instruction to meet her needs, "the lower courts should not have concluded that the Act requires the provision of a sign-language interpreter."¹⁰⁰ Still, the guideline for schools trying to determine whether they are required to provide interpreters for hearing impaired students would seem to be that interpreters must be provided if necessary for a learning opportunity equal to other students.

The question as to whether catheterization is a related service which a school must provide would have been resolved had the Reagan administration not postponed¹⁰¹ implementation of a policy interpretation clarifying that under both the EHA and section 504, catheterization is a related service that public schools are required to provide.¹⁰² This regulation interpretation and several others have been suspended indefinitely during the Reagan administration's review of deregulation.

Although the resolution of this issue remains unsettled within the regulatory process, at least two courts have concluded that because catheterization is necessary to enable a handicapped child to attend school and to benefit from education, and because it is a school health service, it must be provided without cost.¹⁰³ One of the earliest cases interpreting the requirements under section 504 arose in West Virginia and involved a child who needed catheterization to benefit from education. In *Hairston v. Drosick*,¹⁰⁴ a six year old girl with normal mental functioning brought suit under section 504, claiming that she had been excluded from the regular classroom because her attendance in regular school was conditioned on the mother's attendance at the school in order to carry out the catheterization procedure. While the Fourth Circuit Court of Appeals did not specifically hold that catheterization must be provided by the school, it did find that the school's denial of access to the regular classroom "without compelling educational justification" was discrimination under section 504.¹⁰⁵ The school was ordered to admit the child until a legally justifiable reason could be found to exclude the child, and that any exclusion could not be made without appropriate due process as mandated under section

⁹⁸ *Id.* at 948.

⁹⁹ *Id.*

¹⁰⁰ Board of Educ. v. Rowley, 102 S. Ct. 3034, 3052 (1982).

¹⁰¹ 46 Fed. Reg. 50,809 (1981).

¹⁰² 46 Fed. Reg. 4912 (1981).

¹⁰³ Tokarcik v. Forest Hills School Dist., 665 F.2d 443 (3d Cir. 1981) (appeal no. 81-1290 filed), see also Tatro v. Texas, 625 F.2d 557 (5th Cir. 1980).

¹⁰⁴ 423 F. Supp. 180 (S.D. W. Va. 1976).

¹⁰⁵ *Id.* at 184.

504.¹⁰⁶ It can be assumed, therefore, that schools within the Fourth Circuit may not exclude a child simply because catheterization needs to be provided unless there is a bona fide educational reason for doing so, and that bona fide reason must be determined through the due process procedures.

Transportation is one of the related services which must be provided to handicapped children who require it because of special program needs.¹⁰⁷ Transportation services should be spelled out in the IEP, and parents should be sure that the IEP designates the length of the time the child is to spend being transported. The West Virginia Standards specifically delineate the maximum time for transportation each way. Parents should ensure that a lesser time be designated if it is necessary to the physical, mental or emotional well being of the student.¹⁰⁸

c. *Testing.* The question of the appropriateness and validity of certain testing procedures is currently the subject of much debate. There is a split of opinion on the validity of intelligence testing. In *Larry P. v. Riles*,¹⁰⁹ a federal district court in California has enjoined the use of intelligence tests for placement purposes until it can be shown that a particular test is not discriminatory or administered in a discriminatory manner.¹¹⁰

Another issue involved in testing is whether a school district must modify competency tests to accommodate handicapped individuals. While there is little case law to clarify this question, it would appear that at least at present, the state department of education is permitted to require minimal competency testing as a reasonable means to measure effectiveness of the educational program.¹¹¹ As to modification, while the test need not be modified to take into account the lack of mental ability or capacity, it must probably make reasonable accommodations for the physically impaired student.¹¹²

d. *Discipline.* Any removal of a handicapped child from the classroom or school, except for a brief period in emergency situations,¹¹³ constitutes a change in placement under the EHA and requires the implementation of due process procedures.¹¹⁴ If the discipline problem is not related to the handicap, the child may be expelled but the burden is on the educational agency to show

¹⁰⁶ *Id.* at 184-85.

¹⁰⁷ WEST VIRGINIA STANDARDS, *supra* note 9, Part I at 4 n.4 & app. F.

¹⁰⁸ *Id.* at app. F. § B(1).

¹⁰⁹ 495 F. Supp. 926 (N.D. Cal. 1979). The factual background involved a disproportionate percentage of black students being placed in special education classes.

¹¹⁰ For a case upholding the validity of intelligence testing, see *PASE v. Hannon*, 506 F. Supp. 831 (N.D. Ill. 1980). For a discussion of testing, see Note, *Discrimination Law-Standardized Testing: What Standard Is Standard?*, 3 W. NEW ENG. L. REV. 821 (1981).

¹¹¹ *Brookhart v. Illinois State Bd. of Educ.*, 534 F. Supp. 725 (C.D. Ill. 1982).

¹¹² *Id.* at 728-29.

¹¹³ *Stuart v. Nappi*, 443 F. Supp. 1235, 1243 (D.D.C. 1978) (where it was stated that a student could be excluded for up to ten consecutive days in emergency situations). See also *Board of Educ. v. Illinois State Bd. of Educ.*, 531 F. Supp. 148 (C.D. Ill. 1982).

¹¹⁴ *S-1 v. Turlington*, 635 F.2d 343 (5th Cir. 1981); *H.R. v. Hornbeck*, 524 F. Supp. 215 (D. Md. 1981); *Pratt v. Board of Educ.*, 501 F. Supp. 232 (D. Md. 1980); *Doe v. Koger*, 480 F. Supp. 225 (N.D. Ind. 1979); *Howard S. v. Friendswood Indep. School Dist.*, 454 F. Supp. 634 (S.D. Tex. 1978).

that the discipline problem is not related to the child's handicapping condition.¹¹⁶ If the discipline problem is related to the handicap, it may still be possible to remove the child from the presuspension placement if failure to do so would result in a substantial disruption in the classroom, but the child should still receive appropriate education in the least restrictive placement possible.¹¹⁶ This may mean that homebound instruction must be provided, but a less restrictive placement should be provided if possible. For example, the disruption may be a result of the child's frustration with an educational program which is too difficult, or which does not include sufficient teacher supervision. Rather than expelling the child and providing homebound instruction, a more appropriate placement within the school facility should be attempted.

e. *Residential Placement.* Another issue receiving much attention is that of residential placement. Where a residential placement is necessary for the child to benefit from the educational programming, the school is financially responsible for paying the expenses of the residential placement.¹¹⁷ Because it is often difficult to separate emotional and educational needs, at least one federal appellate court has required the school to pay the entire cost of residential placement.¹¹⁸ Parents should be cautioned, however, that voluntary placement of the child in a residential setting in the hope that it will later be determined that the placement is appropriate may not result in reimbursement of expenses incurred, even if it is later determined that the residential placement was an appropriate placement.¹¹⁹ Parents need also be reminded in this context that the EHA does not require the school to provide the *best* education, only an appropriate education in the least restrictive setting.¹²⁰

¹¹⁶ S-1 v. Turlington, 635 F.2d 343, 346-47 (5th Cir. 1981).

¹¹⁶ *Id.* at 347-48.

¹¹⁷ 34 C.F.R. § 300.302 (1981). Residential placement means placement in an institutional facility where the resident receives room, board and educational services.

¹¹⁸ *Kruelle v. New Castle County School Dist.*, 642 F.2d 687 (3d Cir. 1981). *See also North v. District of Columbia Bd. of Educ.*, 471 F. Supp. 136 (D.D.C. 1979). Other issues arise relating to residential placement, for example: which school district is financially responsible for paying for a residential placement? *See Doe v. Kingery*, 157 W. Va. 667, 203 S.E.2d 358 (1974); what is the appropriate measure of compensation for education where residential placement is required for other than educational purposes? *See Levine v. Inst. & Agencies Dept.*, 84 N.J. 234, 418 A.2d 229 (1980); and are the statutory ceilings on tuition reimbursement for private school placement constitutional? *See Halderman v. Pittenger*, 391 F. Supp. 872 (E.D. Pa. 1975). Two cases in the Fourth Circuit which have involved issues of residential placement and the allocation of costs for this situation are *Kruse v. Campbell*, 431 F. Supp. 180 (E.D. Va.), *vacated*, 434 U.S. 808 (1977) and *Matthews v. Campbell*, C.A. No. 78-0879-R (E.D. Va. July 16, 1979).

¹¹⁹ Although some courts have ruled otherwise, the Fourth Circuit Court of Appeals has denied reimbursement to parents who voluntarily remove the child from a placement without proceeding through the due process procedures. *Stemple v. Board of Educ.*, 623 F.2d 893, 897 (4th Cir. 1980), *cert. denied*, 450 U.S. 911 (1981). This strict interpretation of 20 U.S.C. § 1415(e)(3) can be criticized in cases where a school district unnecessarily "drags its feet" in implementing due process procedures to determine the appropriate placement for a particular child. The parents are then in the dilemma of choosing between placing the child voluntarily (and paying the costs until an appropriate placement is determined) or allowing the child to be placed in what may be a totally inappropriate setting.

¹²⁰ *See* 34 C.F.R. § 300.4 (1981). In *Medley v. Ginsberg*, No. 78-2099 (S.D.W. Va. Oct. 10, 1980) (settlement agreement), a settlement agreement was reached in January of 1981 in which a

f. *Educational Malpractice.* A comprehensive discussion of the relatively new concept of educational malpractice is beyond the scope of this overview. The concept arises in situations where the school district has negligently failed to identify, evaluate, or place a child, or where the school district has negligently failed to provide an appropriate education. Because of the difficulty in defining a duty of care or a standard of appropriate education for a child with a particular handicap, it is likely that courts will be very reluctant to find negligence on the part of a school or one of its employees in providing special education.¹²¹ A stronger case, can be made, however, in the situation where a clearly defined standard (such as the requirement that each child be tested within a certain period of time) is flagrantly violated or where the school unduly delays in setting up due process hearings, IEP conferences, or in implementing an agreed upon placement. In this situation it is more likely that a case for educational malpractice could be established. Courts are still likely to be deferential to educational agencies in determining whether there is a violation of accepted educational practice.¹²²

In bringing a case of educational malpractice, the practitioner should be aware that in addition to making out the necessary elements for a negligence case,¹²³ it will also be necessary to succeed in overcoming the defense of sovereign immunity¹²⁴ which is frequently raised in actions against instrumentalities of the state government.¹²⁵ A recent West Virginia Supreme Court of Appeals decision, however, has established that sovereign immunity does not apply to local boards of education.¹²⁶

plan was adopted for placing mentally retarded children and young adults in appropriate residential and community facilities. This agreement to "deinstitutionalize" these individuals is particularly significant in light of the recent Supreme Court decision in *Pennhurst State School and Hosp. v. Halderman*, 451 U.S. 1 (1981), in which it was held that under the Developmentally Disabled Assistance and Bill of Rights Act, there is no requirement that states must fund new, substantive rights for institutionalized mentally retarded individuals.

¹²¹ See generally 14 CLEARINGHOUSE REV. 1023 (1981). Many courts will defer to the primary jurisdiction of administrative agencies in any case. *Donohue v. Copiague Union Free School Dist.*, 47 N.Y.2d 440, 391 N.E.2d 1352 (1979); *Hoffman v. Board of Educ.*, 49 N.Y.2d 121, 424 N.Y.S.2d 376, 400 N.E.2d 317 (Ct. App. 1979), *reversing*, 410 N.Y.S. 99 (App. Div., 2d Dept. 1978). For articles discussing the issue of educational malpractice with respect to handicapped children see Remz, *Legal Remedies for the Misclassification or Wrongful Placement of Educationally Handicapped Children*, 14 COLUM. J.L. & Soc. PROBS. 389 (1979) and Comment, *Damage Actions for Denial of Equal Educational Opportunity*, 45 Mo. L. REV. 281 (1980). See generally 1 A.L.R.4th 1139 (1980).

¹²² See *supra* note 121.

¹²³ The elements are the following:

1. Duty to adhere to a standard of conduct or to exercise reasonable care
2. Breach of the duty or violation of the standard
3. Causal connection between the breach and the injury
4. Injury

W. PROSSER, HANDBOOK OF THE LAW OF TORTS, 143-45 (4th ed. 1971).

¹²⁴ W. VA. CONST. art. VI, § 35.

¹²⁵ *Bradfield v. Board of Educ.*, 128 W. Va. 228, 36 S.E.2d 512 (1945) and *Boggs v. Board of Educ.*, 244 S.E.2d 799 (W. Va. 1978), *overruled*, 293 S.E.2d 437 (W. Va. 1982). See also *Krutili v. Board of Educ.*, 99 W. Va. 466, 129 S.E. 486 (1925).

¹²⁶ *Ohio Valley Contractors v. Board of Educ.*, 288 S.E.2d 814 (W. Va. 1982), *withdrawn*

Even if a case of educational malpractice is established, it is probable that courts will be reluctant to award much in the form of money damages because of the speculative nature of the injury. It could be argued that even if money damages are not awarded, compensatory education should be required.¹²⁷

D. Remedies

Like all other issues under the EHA and section 504, the issue of available remedies is in the stage of evolution.

The most clearcut remedy, of course, is the termination of federal funds. Under both the EHA and section 504, if after an investigation of a state's practices it is found that there is violation of the requirements of the statutes, federal funds may be cut off.¹²⁸

A second remedy is that the educational agency or the court may order the implementation of appropriate programming or at least order a due process procedure which should lead to appropriate programming.¹²⁹ The agency or the court may also make declaratory judgments which basically establish that there has been a violation of the requirements under the EHA or section 504.¹³⁰

The availability of relief becomes more difficult to resolve when a request for compensatory education, damages, or attorneys fees is involved. Courts have offered mixed responses to the availability of compensatory education¹³¹ or damages.¹³² The question of attorneys fees arises when a case is brought alleging violations of both the EHA and section 504. The EHA does not specifically provide for an award of attorney's fees, but section 504 does.¹³³ One court has held that where the violations of the EHA and section 504 were so intertwined as to make it impossible to determine how much time was spent working on each particular issue, there would be an award of the attorney's fees requested without any attempt to segregate the time spent on each of the two claims.¹³⁴ This might indicate that an aggrieved party should allege violations

pending rehearing.

¹²⁷ See *infra* note 131.

¹²⁸ 34 C.F.R. § 300.580 (for EHA) and 45 C.F.R. § 84.61 (for section 504).

¹²⁹ See, e.g., *Stemple v. Board of Educ.*, 623 F.2d 893 (4th Cir. 1980), *cert. denied*, 450 U.S. 911 (1981).

¹³⁰ 20 U.S.C. §§ 1415(c) and (e) (1976) (for EHA). This section makes the procedural provisions applicable to title VI applicable to section 504. See 45 C.F.R. §§ 80.6-10 and 81.1-131 (1981).

¹³¹ For a detailed discussion of the issue of compensatory education, see Remz, *Legal Remedies for the Misclassification or Wrongful Placement of Educationally Handicapped Children*, 14 COLUM. J.L. & Soc. PROBS. 389 (1979).

¹³² For an excellent discussion of the availability of damages as a remedy under the EHA, section 504, and under 42 U.S.C. § 1983 (Supp. III 1979), as well as other procedural and remedial issues, see Hyatt, *Litigating the Rights of Handicapped Children to an Appropriate Education: Procedures and Remedies*, 29 U.C.L.A. L. Rev. 1 (1981). In West Virginia it has been held that plaintiffs may bring section 1983 claims based on violations of section 504 or the EHA. *Medley v. Ginsberg*, 492 F. Supp. 1294, 1304 (S.D.W. Va. 1980).

¹³³ See generally Hyatt, *supra* note 132 at 61-64.

¹³⁴ *Robert M. v. Benton*, 671 F.2d 1104 (8th Cir. 1982).

of both section 504 and the EHA in judicial action. Attorneys should be aware, however, that not all violations of the EHA are violations of section 504,¹³⁵ and there should be a valid claim under section 504 if it is to be alleged as a basis for relief.

III. PRACTICE POINTERS

It is hoped that because of the availability of this general overview, general practitioners throughout West Virginia will be more willing to take on right to education cases. Several articles have been written which prepare the new advocate for the handicapped to deal with cases involving the right to special education,¹³⁶ and these would be helpful to the attorney handling one of these cases for the first time.

There are, however, a few points which should be highlighted for the advocate.

First, it is best to settle problems informally if possible before seeking formal review. Oftentimes parents become angry about not receiving appropriate programming, evaluation, etc. for their child, when the real problem may be that they have not discussed their needs with the appropriate person. Parents needing special services for their child or wanting to have their child placed in the regular classroom should first contact the Director of Special Education for their county. If he or she is unresponsive, it may be tactically wise to contact the classroom teacher or the county superintendent. It may well be that a simple lack of communication is the reason for the misunderstanding—the appropriate school personnel not realizing what was being requested. It is essential to keep copies of any letters sent and to keep track of phone calls made to these persons, and attorneys should advise parents to do so. If it appears that the school is giving the parents the “run-around,” then a request for a due process hearing should be made.

Second, the due process hearing should be approached as a non-adversarial hearing for the purpose of achieving a common goal. The due process hearing is theoretically a place for educators and parents to resolve problems in a positive, constructive atmosphere. However, if the non-adversarial attitude is not reciprocated by the school, the parents should be prepared to “do battle.” In other words, it should not be assumed that the school system is against the parents, but neither should they or their counsel be lulled into a false sense of security.

Because time limits between request for hearing and the hearing date are very short, the parents' representative should have the witnesses and records lined up, and three evaluations completed before filing a formal due process

¹³⁵ See Hyatt, *supra* note 132 at 14-17.

¹³⁶ See, e.g., Shepherd, *The Repudiation of Plato; A Lawyer's Guide to the Educational Rights of Handicapped Children*, 13 U. RICH. L. REV. 783 (1979); Miller & Miller, *The Education for All Handicapped Act: How Well Does It Accomplish Its Goal of Promoting the Least Restrictive Environment for Education?*, 28 DE PAUL L. REV. 321 (1979); Note, *Education of the Handicapped*, 54 TEMP. L.Q. 145 (1981); Remz, *supra* note 131; Hyatt, *supra* note 132.

hearing request. The child's complete school file should be reviewed before a hearing is requested to avoid any "surprises."

If possible, it is advisable to attend other hearings to get a feel for what goes on at a due process hearing before participating in one for the first time. The advocate should be sure all school records and other information is available and that the evidence to be presented by the school is known. The availability of witnesses and expert witnesses should be ensured, and they should be subpoenaed if necessary.¹³⁷ It is also advisable to have a solution or placement alternative prepared in advance to be made available to the hearing officer.

IV. CONCLUSION

There is a natural resistance by some to the high cost of special education. This is to be expected from school districts which are seeing every available dollar stretched to the limit by competing needs. It is also natural that teachers who have had years of experience and who have not been required to teach handicapped children in the regular classroom, will feel "forced" into teaching in a situation for which they feel unprepared. It should not be surprising that some non-handicapped children who have not been exposed to many of their handicapped peers will need some advance preparation to ease the social adjustment for all concerned. In the struggle to dissolve this resistance there are great gains to be made. Money spent now on special education will greatly diminish the future economic burden on society if those children were to be institutionalized or to lead non-productive lives relying solely on public support. Teachers and other school personnel who look on the mandate of special education laws as a challenge to meet, rather than a burden to bear, will see great rewards for their efforts. Additionally, those children who have the opportunity to interact with handicapped children will be greatly enriched for the experience, if it is done with a positive attitude.

In advocacy for the education of handicapped children, the attorney or other advocate should expect this kind of resistance and should nevertheless work for the right to education with a positive perspective. The attitude should not be "this is what you must do because the law says so," but rather "this is what you should do because everyone will gain from it."

In the words of Helen Keller, "a person who is severely impaired never knows his hidden sources of strength until he is treated like a normal human being and encouraged to shape his own life."

¹³⁷ WEST VIRGINIA STANDARDS, *supra* note 9, app. A, Part 1, § 5b; 34 C.F.R. § 300.508(a)(2).

