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Defining the Scope of Residential Placement and Related Services under the EHA: Difficult Questions Left Unanswered in Illinois - In Re Claudia K.

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DEFINING THE SCOPE OF RESIDENTIAL PLACEMENT AND RELATED SERVICES UNDER THE EHA: DIFFICULT QUESTIONS LEFT UNANSWERED IN ILLINOIS— *IN RE CLAUDIA K.*

The Education of the Handicapped Act (EHA or "the Act")[1] creates an entitlement grant program[2] under which federal funds are provided to assist states in establishing, expanding, and improving special education programs for handicapped children.[3] A state's voluntary acceptance of EHA funding[4]

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1. Pub. L. No. 94-142, 89 Stat. 774 (1975) (codified as amended at 20 U.S.C. §§ 1400-1461 (1976 & Supp. V 1981)). The purpose of the Act was:

> to assure that all handicapped children have available to them, within the time period specified . . . 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.

20 U.S.C. § 1400(c) (Supp. V 1981). The specific congressional findings which led to the EHA's enactment were incorporated under § 1400(b). Congress concluded that inadequate financial resources precluded state and local educational agencies from fulfilling their responsibility to the more than eight million handicapped children in the United States. Accordingly, in order to ensure equal protection of the law, Congress determined that the national interest compelled the federal government to assist state and local efforts in meeting the special educational needs of the handicapped. For a discussion of the issues surrounding the Act's implementation, see Colley, *The Education for All Handicapped Children Act (EHA): A Statutory and Legal Analysis,* 10 J.L. & EDUC. 137 (1981) [hereinafter cited as Colley]; Krass, *The Right to Public Education for Handicapped Children: A Primer for the New Advocate,* 1976 U. ILL. L.F. 1016; *Special Section: Education for the Handicapped,* 14 CONN. L. REV. 471 (1982); Note, *The Education of All Handicapped Children Act of 1975,* 10 U. MICH. J.L. REF. 110 (1976).

2. The entitlements and allocations are established through a formula designed to determine the maximum state entitlement. Under the Act, "the maximum amount of the grant to which a State is entitled . . . for any fiscal year [is] equal to the number of handicapped children aged three to twenty-one, inclusive, in such State who are receiving special education and related services" multiplied by a certain percent, ranging from 5 to 40, of the national average pupil expenditure in public elementary and secondary schools for the fiscal years from 1978 to 1982. 20 U.S.C. § 1411(a)(1)(B)(i)-(v) (1976).

3. The Omnibus Budget Reconciliation Act, Pub. L. No. 97-35, § 602(a)(1), 95 Stat. 483 (1981), authorized the appropriation of $969,850,000 for fiscal year 1982, and $1,017,900 for each of the fiscal years 1983 and 1984, to fund EHA programs.

4. A state's choice not to participate in acquisition of federal funds under the EHA has been held to be a decision within the state's power and not subject to judicial scrutiny. *See* New Mexico Ass'n for Retarded Citizens v. New Mexico, 495 F. Supp. 391, 394 (D.N.M. 1980) (raising the issue of whether the state's election not to participate in the grant program violates the fourteenth amendment's equal protection clause), *rev'd on other grounds,* 678 F.2d 847 (10th Cir. 1982). Prior to Pub. L. No. 94-142, states were required to participate in the federal grant program. Due to the discretionary nature of Pub. L. No. 94-142, however, absent a state's decision to participate in the federal program and acquire funding, the state is no longer obligated to implement the educational goals established in the EHA.

creates a duty on its educational authorities[5] to insure that all of its handicapped,[6] school-aged[7] children receive a free appropriate public education.[8] In certain cases, fulfilling this duty may require that a handi-

5. The EHA draws a distinction between the state educational agency (SEA) and the local educational agency (LEA). The SEA refers to the "State board of education or other agency or officer primarily responsible for the State supervision of public elementary and secondary schools. . . ." 20 U.S.C. § 1401(7) (1976). The SEA is responsible for insuring that: (1) the eligibility requirements of the Act are carried out; (2) each educational program for handicapped children within the state is under the general supervision of the persons responsible for educating the handicapped in the SEA; (3) the programs meet the educational standards of the SEA; and (4) the state complies with these responsibilities through local statute or some other written instrument. 34 C.F.R. § 300.600(a), (b) (1982).

Congress intended the SEA to be primarily responsible and accountable for the Act's implementation. Thus, the SEA is accountable for failures to deliver services, or violations of handicapped individuals' rights guaranteed by the EHA. S. REP. No. 94-168, 94th Cong., 1st Sess. 24 (1975) (the establishment of single agency responsibility for assuring the right to education for all handicapped children is of paramount importance). Congress understood that while different agencies might deliver various services, the responsibility for overseeing this delivery was to remain with the SEA. 34 C.F.R. § 300.600 comment (1982).

The LEA, as defined by the Act, is "a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools. . . ." 20 U.S.C. § 1401(8) (1976). The legislative history indicates that the LEA "becomes the lead agency for assuring that educational services are appropriate for the handicapped child and that all rights under this Act and other applicable law extend to such children." 1975 U.S. CODE CONG. & AD. NEWS 1425, 1446. The LEA is either a state agency, or a political subdivision of the state, to which the general provisions and regulations of the Act apply. 34 C.F.R. § 300.2(b) (1982). The Act places responsibility on the SEA to insure that the LEA provides adequate educational services to handicapped children. Georgia Ass'n for Retarded Citizens v. McDaniel, 511 F. Supp. 1263, 1278 (N.D. Ga. 1981). When the LEA fails to do so, the SEA is to provide the services directly. *Id.* The term "direct services" is defined as services provided directly to a handicapped child by the state, contractually or through other arrangements. 34 C.F.R. § 300.370(b)(1) (1982).

6. The general provisions subchapter of the EHA defines the term "handicapped children" as: "mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, or children with specific learning disabilities, who by reason thereof require special education and related services." 20 U.S.C. § 1401(1) (1976). Regulations further stipulate that handicapped children are "those children evaluated in accordance with §§ 300.530-.534." 34 C.F.R. § 300.5 (1982). These sections pertain to certain procedures for preplacement, evaluation, placement, and reevaluation which the SEA must insure are established and implemented by each public agency. *Id.* §§ 300.530-.534. These regulations also define the handicapping conditions listed in the statute. *Id.* § 300.5

7. A state is entitled to federal funds for handicapped children aged 3 through 21. 20 U.S.C. § 1411(a)(1) (1976).

8. The EHA defines "free appropriate public education" as:

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

20 U.S.C. § 1401(18) (1976). Regulations make it clear that the Act's purpose is to insure that all handicapped children receive a free appropriate public education. 34 C.F.R. § 300.1(a)

capped child be placed in a public or private residential program[9] at no cost[10] to the child's parents or guardian. Attempts to determine both who should pay the costs of such placement, and the extent of services required to be provided at public expense, have generated extensive litigation concerning interagency liability.[11] Most often, this litigation has focused on two issues

(1982). Other statutory provisions also confirm the importance of the free appropriate public education. *See* 20 U.S.C. §§ 1412(1) (to qualify for federal assistance, a state must have a policy that assures all handicapped children the right to a free appropriate public education), 1412(2)(B) (dates by which a free appropriate public education must be available), 1412(3) (identifying which handicapped children must be alotted funds first to provide them with a free appropriate public education), 1413(a)(2) (funds received by a state under any federal program may be used only in a manner consistent with the goal of providing a free appropriate public education) (1976).

The two major components of a free appropriate public education are special education and related services. The EHA declares that " 'special education' means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions." *Id.* § 1401(16) (implemented by 34 C.F.R. § 300.14 (1982)). The Act further declares:

> "related services" means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education. . . .

Id. § 1401(17) (implemented by 34 C.F.R. § 300.13 (1982)). For a comparison of the requirements contained in the implementing regulations with those specified in the federal statute, see 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) [hereinafer cited as BRIEFING PAPER]. For an overview of the problems which have been discussed in attempting to determine the definition of a free appropriate public education, see Haggerty & Saks, *Education of the Handicapped: Towards a Definition of An Appropriate Education,* 36 OHIO ST. L.J. 349 (1975); Comment, *Enforcing the Right to an "Appropriate Education" Under the Education for All Handicapped Children Act of 1975,* 34 ME. L. REV. 79 (1982) [hereinafter cited as Comment, *Enforcing the Right*].

9. Public residential programs are provided by public agencies, and political subdivisions of the state, that are involved in the education of handicapped children. 34 C.F.R. § 300.2(b) (1982). These agencies include the SEA, the LEA and other state agencies, such as the Department of Mental Health; certain state schools, such as those for the deaf and blind, are also included. *Id.* § 300.2(b)(1). A private residential program is one which is not provided by a public agency. The Act's protections extend to children who are referred to, or placed in, private schools and facilities as a means of providing a free appropriate public education. *Id.* § 300.2(c). Thus, handicapped children in private programs must be provided special education and related services. 20 U.S.C. § 1413(a)(4)(B) (1976) (a state plan must delineate policies and procedures which assure that children in private programs have the same rights as those in public programs).

10. When a handicapped child is referred to a private school or facility by a public agency, the SEA must insure that a free appropriate public education is provided at no cost to the child's parents. 20 U.S.C. § 1413(a)(4)(B) (1976) (implemented by 34 C.F.R. § 300.401(a)(2) (1982)). Regulations define "at no cost" to mean without charge; however, this does not preclude incidental fees normally charged to nonhandicapped students as part of a regular educational program. 34 C.F.R. § 300.14(b)(1) (1982). Moreover, if a handicapped child is a ward of the state, the state is not considered a "parent" to whom no charges may be allocated for placement.

11. *See, e.g.,* Kruelle v. New Castle County School Dist., 642 F.2d 687, 695 (3d Cir. 1981) (whether residential placement for an emotionally troubled child is necessary for educational

arising from the political and financial realities surrounding the interagency liability concept. One involves the distinction between educational and noneducational placements;[12] the other focuses on whether services provided in conjunction with placement may be classified properly as "related services" and, therefore, within the funding provisions of the Act.[13]

Resolution of these issues requires the following analysis. First, if a handicapped child is placed in a residential program primarily for "educational" purposes,[14] or if a child's emotional and educational needs are so intertwined as to be inseparable, the placement is considered educational[15] and the EHA

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purposes or separable noneducational problems); Papacoda v. Connecticut, 528 F. Supp. 68, 70 (D. Conn. 1981) (a state is required to pay all the costs of residential placement of an emotionally disturbed student if that student could not be educated without residential placement which offered both a therapy and teaching program); Gladys J. v. Pearland Indep. School Dist., 520 F. Supp. 869, 873 (S.D. Tex. 1981) (the guarantee of a free appropriate public education requires the SEA and LEA to provide residential placement when it is necessary to accomplish the goals of a child's educational plan); Riley v. Ambach, 508 F. Supp. 1221, 1244 (E.D.N.Y. 1980) (the removal of all residential schools from a list of approved schools that treat learning disabled children conflicts with the EHA if local programs cannot adequately meet the educational need of such children); Cox v. Brown, 498 F. Supp. 823, 827 (D.D.C. 1980) (granting parents' request for a preliminary injunction requiring the Department of Defense to place handicapped children in private residential schools); Erdman v. Connecticut, No. H-80-253 (D. Conn. Sept. 16, 1980) (a state is required to pay room and board costs if residential placement is necessary for both educational and noneducational reasons); North v. District of Columbia Bd. of Educ., 471 F. Supp. 136, 139 (D.D.C. 1979) (a board of education is responsible for providing residential services to a multiple-handicapped child whose condition requires a residential treatment facility to provide medical supervision, special education and psychological support); *see also* Colley, *supra* note 1, at 157.

12. Federal regulations provide that "[i]f placement in a public or private residential program is necessary to provide special education and related services to a handicapped child, the program, including nonmedical care and room and board, must be at no cost to the parents of the child." 34 C.F.R. § 300.302 (1982). The comment to this regulation specifies that this requirement applies to placements which are made by public agencies for "educational purposes." *Id.* Thus, if a residential placement is made for a noneducational purpose, the placement is beyond the scope of this provision and will not necessarily be provided free to the child's parents.

13. *See supra* note 8 for the statutory definition of the term "related services." The list of related services appearing in 34 C.F.R. § 300.13 (1982) was not intended to be exhaustive; other services may be provided if they are required to assist a handicapped child to benefit from special education. S. REP. NO. 94-168, 94th Cong., 1st Sess. 12 (1975). On the other hand, all the services listed in the regulations may not be required for each handicapped child. *Id.* If a service does not appear in the regulations, or is shown to be unnecessary for a handicapped child to benefit from special education, that service is not a related service under the EHA and, therefore, need not be provided directly or indirectly by the SEA.

14. *See supra* note 12. The EHA provides that the residential placement must be a "means of carrying out the requirements of this subchapter or any other applicable law requiring the provision of special education and related services. . . ." 20 U.S.C. § 1413(a)(4)(B) (1976). The goal of this subchapter is to provide all handicapped children with a free appropriate public education. *Id.* § 1413(a)(2). It appears that a placement has an educational purpose if it is intended to provide a child with special education and related services. The inherent difficulties stemming from such circuitous reasoning become apparent when courts attempt to define the concept of educational purpose.

15. In applying the provisions of the EHA, courts have extended the concept of educational purpose to include those residential placements necessitated by a child's problems when

requires the educational agency to assume the placement's costs. If, on the other hand, the placement is primarily for "noneducational" purposes, such as when the placement is necessitated solely by family or social problems, financial liability is shifted from the school district to an appropriate service agency.[16] Second, the allocation of costs for services provided in the residential setting is determined by whether a specific service is regarded, under the

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the child's educational and noneducational needs are so intertwined as to be inseparable. *See, e.g.*, Kruelle v. New Castle County School Dist., 642 F.2d 687, 694 (3d Cir. 1981) (rejecting a school district's assertion that residential placement is required only for medical and domiciliary care, rather than for educational purposes, and holding that the unseverability of medical and educational grounds for residential placement is the very basis for finding that services are an essential prerequisite to learning, and that placement is therefore educational); Battle v. Pennsylvania, 629 F.2d 269, 275-76 (3d Cir. 1980) (because the concept of education is necessarily broad and includes basic self-help and social skills, and because Congress intended the EHA to provide education which will make children independent, placement which provides such education is considered to be educational); North v. District of Columbia Bd. of Educ., 471 F. Supp. 136, 141 (D.D.C. 1979) (enjoining a school board from denying a multiple-handicapped child free placement in a residential program because the child's social, emotional, medical, and educational needs were so intertwined that it was impossible for the court to separate them); Ladson v. Board of Educ., 3 EDUC. FOR THE HANDICAPPED L. REP. 551:188 (D.D.C. Mar. 12, 1979) (the residential placement of an 11 year old child suffering from down's syndrome, and possessing the mental capacity of an 18 month old infant, was considered educational because it was necessary to achieve the goals of an educational program); *see also* Stark, *Tragic Choices in Special Education: The Effect of Scarce Resources on the Implementation of Pub. L. No. 94-142,* 14 CONN. L. REV. 477, 514-16 (1982) [hereinafter cited as Stark]. Stark concludes that two standards for residential placement have been established. The first, taken directly from the EHA, focuses on whether residential placement is necessary to provide a free appropriate public education. The second, taken from *North* and *Kruelle,* requires residential placement when it is impossible to separate a child's emotional and educational problems. *Id.*

16. In Illinois, if a child is a neglected or dependent minor under 18 years of age and is adjudged a ward of the juvenile court, the court may commit that child to the Department of Children and Family Services (DCFS) for care and services. ILL. REV. STAT. ch. 37, § 705-707(f) (1981). Payment for board, clothing, care, training and supervision of any child placed in a licensed child care facility may be made by the DCFS, the child's parents, or by both. *Id.* ch. 23, § 5005. Similarly, when children are placed in facilities operated by the Department of Mental Health and Developmental Disabilities (DMHDD) for purely developmental problems, costs of residential placements and services are assumed by that agency. *Id.* ch. 91½, § 1-107; *see In re* White, 103 Ill. App. 3d 105, 429 N.E.2d 1383 (1982) (holding that the Juvenile Court Act authorizes placement of mentally retarded children in private licensed educational facilities which are approved by DMHDD for placement and its funding); *see also* Smith v. Cumberland School Comm., ___ R.I. ___, 415 A.2d 168 (1980) (a program created under the jurisdiction of the Department of Mental Health with a primarily therapeutic purpose is noneducational when educational services are merely incidental to medical and psychiatric services).

Under the EHA, the SEA is required to insure that children receive special education and related services; this requirement extends to those placements which are provided by a public agency other than the educational agency, and are considered noneducational. 34 C.F.R. § 300.341(a) (1982) (this regulation applies to all public agencies, including other state agencies, such as the DMH and the Department of Welfare, which provide special education to handicapped children). Thus, even when a placement is considered noneducational, to the extent that the educational agency is not responsible for its costs, the child must receive a free appropriate public education whether provided by another public agency directly, by contract or through other arrangements.

Act, as "related" or "nonmedical";[17] such services are necessary to assist a handicapped child in benefiting from special education. Only these "related" services fall within the school district's financial responsibility.

Issues concerning whether placement is for educational or noneducational purposes, and whether a service provided in conjunction with placement is viewed as related under the EHA, were confronted by the Illinois Supreme Court in *In re Claudia K.*[18] In that case, the juvenile court granted a petition for a writ of mandamus[19] ordering the local school district to assume full costs, including those relating to psychotherapy,[20] for Claudia's placement in a residential program at a private psychiatric hospital. Despite a strong showing of public interest in the resolution of these controversial issues, the Illinois Supreme Court based its reversal of the lower court's order solely on the narrow procedural ground of whether mandamus should have issued.[21]

Claudia K. is important for several reasons. First, it presented a situation in which strict adherence to state regulations[22] precluded compliance with the EHA's requirement that all handicapped children be provided with a free appropriate public education. Second, the decision highlighted the inherent complexities in determining whether a placement is for educational or noneducational purposes. Third, the case provided an opportunity for the supreme court to decide whether psychotherapy qualifies as a related service and, thus, is within the financial responsibility of the educational

17. *See supra* notes 8 & 13. The regulations include medical services as related services only if they are for diagnostic or evaluative purposes, and are provided by a licensed physician. 34 C.F.R. § 300.13(a), (b)(4) (1982). Furthermore, the regulations declare that the program, including nonmedical care, room and board shall be provided at no cost. *Id.* § 300.302. Thus, if services provided at a residential placement are related, including medical services only for diagnosis and evaluation, or nonmedical under 34 C.F.R. § 300.302 (1982), costs for those services fall within the contemplation of the EHA and must be assumed by either the SEA or the LEA.

18. 91 Ill. 2d 469, 440 N.E.2d 78 (1982).

19. *In re* Claudia K., 3 EDUC. FOR THE HANDICAPPED L. REP. 552:501 (Ill. Cir. Ct. July 31, 1981). The writ of mandamus was sought by Claudia's attending physician and her mother to compel the district to place Claudia in an appropriate residential facility, and to pay all of the placement costs. *Id.*

20. *Id.* In granting the petition for mandamus, the juvenile court found that psychotherapy was a related service under both state and federal law. This was the first case in which an Illinois court explicitly made such a finding, and would have caused the educational agency to be financially liable for the cost of psychotherapy provided to handicapped children under the EHA. For a discussion of this highly controversial issue, see Rosenfeld, *Psychotherapy As a "Related Service": A Policy Paper Developed for the Second National Institute on Legal Problems of Educating the Handicapped,* 1 EDUC. FOR THE HANDICAPPED L. REP. AC 15 (Supp. 60 Nov. 13, 1981) [hereinafter cited as Rosenfeld]; BRIEFING PAPER, *supra* note 8, at 17-21.

21. 91 Ill. 2d at 479, 440 N.E.2d at 82. The supreme court acknowledged that disposing of the case on a procedural issue might require further action by the trial court on remand. *Id.* The court further acknowledged that nothing in the opinion was intended to preclude Claudia from receiving the necessary and proper treatment to which she was entitled. *Id.* Therefore, it appears that other public agencies might be compelled to provide Claudia with such services.

22. The supreme court found that a state regulation clearly indicated that the school district lacked the authority to place Claudia in either Ridgeway or Riveredge Hospital. *Id.* For the text of this regulation, see *infra* note 57.

agency. Finally, *Claudia K.* determined whether the mandamus amendment to the Juvenile Court Act[23] could be used as an enforcement mechanism for federal obligations imposed by the EHA.

Although the Illinois Supreme Court resolved the feasibility of using the Juvenile Court Act's mandamus provision as an EHA enforcement mechanism,[24] the other difficult substantive matters received little attention from the *Claudia K.* court.[25] There is an urgent need for the supreme court to interpret certain pivotal provisions of the Act, and to resolve conflicts created by existing state rules and regulations which prevent compliance with it. In light of *Claudia K.*'s failure to resolve these critical issues, this Note attempts to offer guidance for future resolution of the complex problems involved in defining the scope of residential placement and related services under the EHA.

THE DECISION

Claudia K. was a highly intelligent, but emotionally disturbed[26] and actively

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23. The mandamus amendment to the Juvenile Court Act provides: "Rights of wards of the court under this Act are enforceable against any public agency by petitions for writs of mandamus filed in any proceedings brought under this Act." ILL. REV. STAT. ch. 37, § 705-8(2) (1981).

24. The supreme court found that the sole purpose of the mandamus amendment was to give the juvenile court the power to "compel recalcitrant State custodial agencies to fulfill their obligations." 91 Ill. 2d at 476, 440 N.E.2d at 81.

25. Despite failing to address these issues, the court acknowledged and identified the difficult questions raised by the case. These included:

> the effect to be given Federal regulations in a State court where regulations of the designated State enforcement agency conflict; the effect, if any, of "letters of finding" by a Federal oversight agency which indicate State regulations are not in compliance with Federal guidelines; the effect of a Federal court's order enjoining certain State enforcement agency practices where the agency has not altered its policy, . . . as well as an overriding concern as to how to implement a Federal program which arguably mandates comprehensive care plans without providing sufficient resources for implementation.

Id. at 477, 440 N.E.2d at 81.

26. Brief for Appellees at 3, *In re* Claudia K., 91 Ill. 2d 469, 440 N.E.2d 78 (1982). Children who are seriously emotionally disturbed are included in the term "handicapped children" as defined under the Act. 20 U.S.C. § 1401(1) (1976 & Supp. II 1978). Federal regulations define the term "seriously emotionally disturbed" as follows:

> (i) The term means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree, which adversely affects educational performance:
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> (A) An inability to learn which cannot be explained by intellectual, sensory, or health factors;
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> (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
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> (C) Inappropriate types of behavior or feelings under normal circumstances;
>
> (D) A general pervasive mood of unhappiness or depression; or
>
> (E) A tendency to develop physical symptoms or fears associated with personal or school problems.
>
> (ii) The term includes children who are schizophrenic. The term does not in-

suicidal[27] adolescent. In September of 1980, shortly before her seventeenth birthday, Claudia was arrested in a tavern by the Wauconda police.[28] While incarcerated at the police station, Claudia set her blankets on fire.[29] Charged with arson, she was adjudicated delinquent and made a ward of the juvenile court.[30] After diagnostic evaluation confirmed Claudia's suicidal condition, the juvenile court ordered that she be placed at Chicago's Ridgeway Hospital, a high-security, private residential psychiatric facility.[31] On the same day the order was issued, the court vacated the adjudication of delinquency, entered an adjudication that Claudia was a neglected minor, and appointed the Department of Children and Family Services (DCFS) as her temporary guardian.[32] The DCFS reported, however, that it had no mechanism by which to pay for Claudia's care at a private hospital such as Ridgeway.[33] Nonetheless, Claudia remained at Ridgeway Hospital and charges continued to accrue.

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clude children who are socially maladjusted, unless it is determined that they are seriously emotionally disturbed.

34 C.F.R. § 300.5(b)(8) (1982).

27. Brief for Appellees at 3, *In re* Claudia K., 91 Ill. 2d 469, 440 N.E.2d 78 (1982). Claudia's actively suicidal condition was the reason that she was rejected for placement at many public residential facilities which lacked the capability to provide her with the constant supervision she required.

28. 91 Ill. 2d at 471, 440 N.E.2d at 78.

29. *Id.*

30. *Id.* The Juvenile Court Act provides that a neglected minor is one denied proper or necessary education, medical or other remedial care, or one whose behavior is injurious to his own welfare or that of others. ILL. REV. STAT. ch. 37, § 702-4(1) (1981). Due to Claudia's self-destructive and suicidal behavior, her status was changed by the juvenile court from delinquent to neglected minor. 91 Ill. 2d at 472, 440 N.E.2d at 78. Subsequent to Claudia's incarceration, her mother and stepfather refused to allow her to return home, and she ultimately was placed in a foster home prior to hospitalization.

31. 91 Ill. 2d at 472, 440 N.E.2d at 79. Ridgeway Hospital is a private psychiatric hospital, not a state mental health facility. Initially, costs at Ridgeway were paid by the Illinois Department of Public Aid under a special diagnostic program then operated by the Illinois Department of Mental Health. This funding ceased, however, after Claudia had been at Ridgeway for only three weeks.

32. Under the Juvenile Court Act, a neglected minor under 18 years of age may be committed to DCFS for care and services. ILL. REV. STAT. ch. 37, § 705-7(1)(f) (1981). The juvenile court, acting under this authority, ordered DCFS to pay for all the psychological services Claudia received from the date DCFS was appointed as Claudia's temporary guardian until the guardianship terminated upon the granting of the petition for mandamus. Brief for Appellants at 11, *In re* Claudia K., 91 Ill. 2d 469, 440 N.E.2d 78 (1982).

33. Brief for Appellants at 11, *In re* Claudia K., 91 Ill. 2d 469, 440 N.E.2d 78 (1982). The DCFS has the power to place and fund the placement of any child for whom it has retained temporary custody pursuant to the Juvenile Court Act. ILL. REV. STAT. ch. 23, § 5005(4) (1981). Yet, DCFS is required to assume placement costs only for children under 18 years of age whom DCFS places in a licensed child care facility. *Id.* Claudia, who was soon to be 18, was not placed by DCFS, and the facility in which she was placed was not a licensed child care facility. The uninsured costs of Claudia's private placement at Ridgeway Hospital, including psychotherapy expenses, were estimated in excess of $90,000 annually. Chicago Tribune, Oct. 18, 1981, at 1, col. 1. Due to these funding problems, Ridgeway was not reimbursed at the time it delivered services to Claudia; care and treatment were provided gratuitously by the facility. 91 Ill. 2d at 474, 440 N.E.2d at 80.

Several months after Claudia's admission to Ridgeway, representatives of the various public agencies which potentially were responsible for the costs of Claudia's placement met[34] to determine Claudia's special educational needs and to develop her individualized education program (IEP).[35] The public

34. A preplacement evaluation is required before any action may be taken regarding the initial placement of a handicapped child. 34 C.F.R. § 300.531 (1982). Such an evaluation is also required under Illinois law. ILL. REV. STAT. ch. 122, § 14-822(b) (1981). The preliminary evaluation occurs at a meeting which is referred to as a multidisciplinary staff conference or IEP meeting, and is defined as: "a deliberation among appropriate persons for the purpose of determining eligibility for special education, developing recommendations for special education placement, reviewing educational progress, or considering the continuation or termination of special education for an individual child." Rules and Regulations to Govern the Administration and Operation of Special Education, art. VIII, Rule 1.05a (1981) [hereinafter cited as Rules and Regs. of Special Educ.]. Federal regulations require the public agency to insure that the meeting is composed of a representative of that agency who is qualified to provide special education, the child's teacher, one or both of the child's parents, the child (when appropriate), and any other individuals invited at the discretion of the parent or agency. 34 C.F.R. § 300.344 (1982).

In Illinois, the state agencies responsible for assuming the costs of placing special education students in private residential facilities issued a formal memorandum of understanding in August of 1980. *See* Memorandum of Understanding Between the Department of Public Aid, Department of the Budget, Department of Children and Family Services, Department of Public Health, Illinois State Board of Education, Department of Rehabilitation Services, and the Governor's Office, Aug. 26-27, 1980 (adopted September 17, 1980) [hereinafter cited as Memorandum of Understanding]. This memorandum outlined the relative liability of these agencies in cooperative placement decisions. The State Board of Education recognized six categories of special education students for whom it considered residential placement to be primarily "noneducational," and for which other service agencies might be obligated to pay some or all of the placement costs. These categories included:

> (1) children placed for mental health or developmental disabilities purposes in residential mental health facilities pursuant to the Mental Health and Developmental Disabilities Code and the powers and duties of the Department of Mental Health and Developmental Disabilities; (2) children involved in juvenile court proceedings (or in family situations likely to lead to such proceedings) which would lead to the involvement of the Department of Children and Family Services (DCFS); (3) children who have actions pending in juvenile court seeking adjudication for MINS or delinquency or are already adjudicated; (4) persons against whom criminal charges are pending or who have been convicted as adults; (5) status offenders; and (6) children requiring primarily medical care and treatment.

Id. Arguably, Claudia was within several of these categories. Accordingly, *In re Claudia K.* would have been an excellent opportunity to define the relative financial obligations of various public agencies to provide private residential placements for handicapped children as required under the EHA.

35. The EHA defines an IEP as:

> [a] written statement for each handicapped child developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated dura-

school personnel at the IEP meeting determined that due to her suicidal condition Claudia was uneducable; she would benefit from educational services only if her mental condition were stabilized.[36] Consequently, the school district concluded that finalization and implementation of Claudia's IEP should be withheld indefinitely until she was no longer actively suicidal.[37]

Asserting that Claudia's mental condition necessitated a primarily noneducational placement, the school district referred her to the Department of Mental Health (DMH) for stabilization so that she might be receptive to educational services in the future.[38] The DMH proposed a placement in

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tion of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

20 U.S.C. § 1401(19) (1976). Similarly defined by Illinois regulations, an IEP is described as furnishing a declaration of specific special education and related services to be provided at projected dates of initiation. Rules and Regs. of Special Educ., *supra* note 34, art. I, Rule 1.02a. The Illinois regulations also require that related services be included in the child's IEP. *Id.* art. IX, Rule 9.18(a). For a further explanation of the IEP, see ILLINOIS STATE BOARD OF EDUCATION DEPARTMENT OF SPECIALIZED EDUCATIONAL SERVICES, A PARENT'S GUIDE: THE EDUCATIONAL RIGHTS OF HANDICAPPED CHILDREN 5 (Sept. 1980) (explaining the nature of a child's "custom-made education" program, the IEP).

36. Brief for Appellants at 12, *In re* Claudia K., 91 Ill. 2d 469, 440 N.E.2d 78 (1982). The ultimate placement decision was made exclusively by the public school personnel at the staff conference. The Memorandum of Understanding requires that the school district invite the various agency representatives to the conference. *See supra* note 34. Yet, the representatives from the different agencies are to provide only technical assistance and a preliminary assessment of eligibility for services. The school personnel make the final decision and are, therefore, free to disregard any input from other agencies. This situation seems ironic; the school district already had designated Claudia's placement as primarily "noneducational," and labeled her "uneducable." Indeed, the district accused the juvenile court of usurping its educational decision-making functions. Brief for Appellants at 42, *In re* Claudia K., 91 Ill. 2d 469, 440 N.E.2d 78 (1982).

37. 91 Ill. 2d at 473, 440 N.E.2d at 79. While it is permissible to place a child in a program temporarily as part of an evaluation before the IEP is finalized and implemented, the temporary placement may not become the final placement. 46 Fed. Reg. 5,464 (1981). The ostensibly open-ended placement of Claudia at a public mental health facility until she stabilized clearly violates this federal regulation. Additionally, a child undergoing assessment and not officially identified as handicapped is not within the protection of the Act. *See* 4 MENTAL DISABILITY L. REP. 42 (1980) (a federal court in Minnesota held that a child undergoing assessment for possible emotional problems is not deemed handicapped, and therefore, is not entitled to the procedural safeguards of the EHA); *see also* Vogel v. School Bd., 491 F. Supp. 989, 992 (W.D. Mo. 1980) (a state law which does not require the IEP to be finalized prior to placement of a handicapped child conflicts with federal mandates of the EHA).

Federal regulations specify that an IEP must be "in effect" before special education and related services may be provided to a child. 34 C.F.R. § 300.342(b)(1) (1982). These regulations further specify that the IEP must be implemented as soon as possible after the IEP meeting. *Id.* § 300.342(b)(2). The federal regulations emphasize that no delay is permissible between the time the IEP is finalized and when the special educational services are provided. *Id.* § 300.342 App. C. Consequently, by deciding neither to finalize nor implement an IEP for Claudia, the school personnel clearly violated both the letter and the spirit of the EHA and its implementing regulations.

38. Brief for Appellees at 6, *In re* Claudia K., 91 Ill. 2d 469, 440 N.E.2d 78 (1982). The school district stated that the DMH has a responsibility to "take suicidal people" such as Claudia. *Id.*

the adolescent unit of a public mental health facility.[39] Yet, as the DMH acknowledged,[40] the problems involved with such placement were: (1) the funding of Claudia's tenure at a public mental health facility would terminate upon her eighteenth birthday;[41] and (2) the average stay at the proposed state operated facility was only five months, due to a policy of discharging a patient once the problem which necessitated her admission had subsided.[42] Based on these shortcomings, the proposed state facility was rejected by Claudia's mother and therapists.[43]

On July 31, 1981, six months after Claudia had been placed at Ridgeway, the juvenile court granted an emergency petition, filed on Claudia's behalf, requesting a writ of mandamus to issue against the school district.[44] The petition requested that the district be required to place Claudia in an appropriate residential facility.[45] The juvenile court entered an order in favor of Claudia, finding that she was a handicappped child[46] eligible for special

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39. Reply Brief for Appellants at 20, *In re* Claudia K., 91 Ill. 2d 469, 440 N.E.2d 78 (1982). Under the Illinois Code of Mental Health, the DMH is obligated to provide all patients between the ages of 5 and 21, who reside in mental health facilities, with special education services to the extent that such services are "practical for each child's needs." ILL. REV. STAT. ch. 91½, § 100-11.1 (1981). By classifying Claudia as uneducable, the school district apparently precluded her from receiving such services because she could have no practical need for education.

40. Reply Brief for Appellants at 20, *In re* Claudia K., 91 Ill. 2d 469, 440 N.E.2d 78 (1982).

41. *Id.*

42. Brief for Appellees at 4, *In re* Claudia K., 91 Ill. 2d 469, 440 N.E.2d 78 (1982).

43. Brief for Appellants at 21-22, *In re* Claudia K., 91 Ill. 2d 469, 440 N.E.2d 78 (1982). The one public mental health facility found acceptable to all concerned refused to accept Claudia for admission, or even for evaluation, because it was not equipped to handle an actively suicidal adolescent. Therefore, Claudia was rejected as an inappropriate referral. *Id.*

44. *In re* Claudia K., 3 EDUC. FOR THE HANDICAPPED L. REP. 552:501 (Ill. Cir. Ct. July 31, 1981).

45. *In re* Claudia K., 91 Ill. 2d 469, 440 N.E.2d 78 (1982). An appropriate facility for Claudia was one which could provide her with long-term, residential placement and was equipped to provide an actively suicidal child with medical, psychotherapeutic and educational services as well as constant supervision when necessary. *Id.* at 474, 440 N.E.2d at 80 (finding of the circuit court).

46. The juvenile court found that Claudia was handicapped under both federal and state law. *In re* Claudia K., 3 EDUC. FOR THE HANDICAPPED L. REP. 552:501 (Ill. Cir. Ct. July 31, 1981). Illinois law defines handicapped children as:

> children between the ages of 3 and 21 for whom it is determined, through procedures described in the Illinois Rules and Regulations to Govern the Organization and Administration of Special Education, that special education services are needed. An individualized education program *must be written and agreed upon by appropriate school personnel and parents or their representatives for any child receiving special education.*

ILL. REV. STAT. ch. 122, § 14-1.02 (1982) (emphasis added). Illinois regulations provide the same sort of circuitous definition by using the word *exceptional* instead of *handicapped*. One Illinois regulation defines exceptional children as those designated in Article XIV of the Illinois School Code. *See* Rules and Regs. of Special Educ., *supra* note 34, art. VII, Rule 1.02; *see also* ILL. REV. STAT. ch. 122, § 14-7.02 (1982). Section 14-7.02 outlines the procedures and criteria for evaluating a child's needs for special educational services. A more substantive definition of exceptional children is found in another state regulation which includes "behavior disorder"

education and related services under the EHA.[47] The court further found that psychotherapy was a related service under the Act.[48] The school district was directed to place Claudia in an appropriate residential program, and to assume full costs for her placement and all related services.[49]

Subsequent to this order, the school district continued to fail in its efforts to locate an appropriate placement for Claudia and, consequently, she remained at Ridgeway Hospital until December of 1981.[50] At that time, the

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as a handicapping condition that specifically interferes with a child's learning or social functioning. Rules and Regs. of Special Educ., *supra* note 34, art. II, Rule 9.16. This condition seems to apply to Claudia. *See* ILLINOIS STATE BOARD OF EDUCATION, THE ILLINOIS PRIMER ON INDIVIDUALIZED EDUCATION PROGRAMS C-3 (Jan. 1981) (Illinois' definition of handicapped children is essentially identical to that provided in federal regulations) [hereinafter cited as ILLINOIS PRIMER].

47. By classifying Claudia as a handicapped child under the EHA, the juvenile court essentially completed the special education eligibility evaluation which the multidisciplinary staff meeting had failed to finalize. *See supra* note 37. Thus, it appears that rather than abuse its mandamus authority, the juvenile court brought the state and the educational agency into compliance with the requirements of the EHA.

48. The terms "medical services," "counseling services," and "psychological services" are defined in the EHA under "Related Services." 34 C.F.R. § 300.13 (1982). The term "psychotherapy," however, is not used in the Act or in its implementing regulations. *See* BRIEFING PAPER, *supra* note 8, at 18; *see also* Papacoda v. Connecticut, 528 F. Supp. 68, 72 (D. Conn. 1981) (psychological services that were required to assist an emotionally disturbed student to benefit from special education were discussed by the court under a section entitled "Psychotherapy," and were held to be within the psychological services provision of the EHA); *In re* "A" Family, ____ Mont. ____, ____, 602 P.2d 157, 165 (1979) (although the word *psychotherapy* is not specifically mentioned in the federal statutes or regulations, Webster's dictionary defines the term as "treatment of mental or emotional disorder or of related body ills by psychological means"; therefore, psychotherapy falls within the psychological services provision of the EHA); Rosenfeld, *supra* note 20, at AC 32. In a 1980 draft policy statement on psychotherapy issued by the Office of Special Education (OSE), one of the two federal regulatory agencies responsible for overseeing the implementation of the EHA, OSE would have required educational agencies to pay for psychotherapy if the service was: (a) labeled "psychological" or "counseling"; (b) provided by nonmedical personnel; or (c) provided by medical personnel as "other qualified personnel." 13 EDUC. DAILY 107, § 1 (June 2, 1980).

Due to the absence of any specific reference to psychotherapy in the Act, each state is free to interpret the word in terms of its own labeling scheme, classifying it as either a medical, counseling or psychological service. The classification chosen by the state determines whether psychotherapy falls within one of the related services under the EHA which must be provided by the educational agency. *See* Tatro v. Texas, 516 F. Supp. 968, 975 (N.D. Tex. 1981) (in construing the related services provision of the EHA, courts must look to state law to determine whether a service is medical, counseling or psychological; thus, the Act tolerates nonuniform application to the extent that a given service may be a related service under by the EHA in one state, and an exempt medical service in another state).

49. *In re* Claudia K., 3 EDUC. FOR THE HANDICAPPED L. REP. 552:501 (Ill. Cir. Ct. July 31, 1982). The school district failed to act promptly in locating an appropriate residential placement for Claudia. Consequently, in August of 1981, the juvenile court issued an amended order finding all DMH facilities, other than the Illinois State Psychiatric Institute, inappropriate for Claudia and directing the district to effectuate placement by September of 1981. *Id.* (Ill. Cir. Ct. Aug. 28, 1981) (order amending previous order of July 31, 1981).

50. The school district contended that it had contacted 12 appropriate placements which refused to accept Claudia while she was actively suicidal. Brief for Appellants at 21, *In re* Claudia K., 91 Ill. 2d 469, 440 N.E.2d 78 (1982).

administrator of Ridgeway testified that the hospital could do nothing more for Claudia.[51] In response, the juvenile court ordered that Claudia be transferred to Riveredge Hospital, another private psychiatric facility, to undergo diagnostic evaluation in preparation for an appropriate placement.[52] This order also directed the school district to assume full costs for the evaluation of any ongoing treatment provided to Claudia at Riveredge.[53] Moreover, the order directed the school district to pay for all costs of care and services Claudia previously had incurred at Ridgeway Hospital.[54]

The school district, disclaiming all financial liability for Claudia's care and treatment,[55] appealed from the juvenile court's order directly to the Illinois Supreme Court. The supreme court reversed the lower court's order solely on the procedural issue of mandamus and remanded the cause to the juvenile court for further disposition.[56]

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51. 91 Ill. 2d at 474, 440 N.E.2d at 80.

52. *Id.* Brown School in Texas responded that it might be willing to accept Claudia for residential placement pending the results of an independent 90 day evaluation. *Id.*

53. *Id.*

54. *Id.* These costs included psychotherapy, which the juvenile court found to be a related service under the Act, and for which the school district was, therefore, financially responsible to provide as part of Claudia's free appropriate public education.

55. Under Illinois law, placement costs must be assumed by an appropriate public agency when a child is placed in a private residential facility that has been both programmatically approved by the Illinois State Board of Education, and cost approved by the Governor's Purchased Care Review Board ("Review Board"). ILL. REV. STAT. ch. 122, § 14-7.02 (1982); *see also infra* notes 65-66. The school district in *Claudia K.* maintained that Claudia had not been placed by the district, and that neither Ridgeway nor Riveredge Hospital was approved by the Review Board. Additionally, the district insisted that psychotherapy could not be a related service for which it was liable because no special education program had been designed for Claudia; thus, there was nothing to which psychotherapy could relate. 91 Ill. 2d at 471, 440 N.E.2d at 80. By refusing to finalize Claudia's IEP, the school district essentially had made it impossible for her to receive either special education or related services under the EHA. 34 C.F.R. § 300.342(b)(1) (1982) (an IEP must be in effect before special education and related services may be provided to a handicapped child). This refusal also rendered Claudia ineligible for special educational placement under state law. ILL. REV. STAT. ch. 122, § 14-8.02(b) (1981) (no child is eligible for special education placement without a carefully completed case study fully reviewed by a staff conference).

56. 91 Ill. 2d at 474, 440 N.E.2d at 82 (1982). The Illinois Supreme Court held that the emergency petition for mandamus granted by the juvenile court was improper. The supreme court concluded that the school district had no "clear duty" to place Claudia in either of the private, unapproved facilities in which she had been placed. This conclusion was based on a single state regulation, Rule 1.04 of the Rules and Regulations for Approval of Nonpublic Facilities Educating Handicapped Students, which provides:

> No nonpublic facility shall be utilized by a district until: (1) The facility is approved by the SBE, (2) Costs have been established for it by the Governor's Purchased Care Review Board, (3) Proposed residential placements are reviewed and approved by the Illinois State Board of Education prior to placement. . . . Adopted Amendments to the Rules and Regulations for Approval of Non-public Facilities Educating Handicapped Students under section 14-7.02 of the School Code, 5 Ill. Reg. 4577 (April 24, 1981).

91 Ill. 2d at 479, 440 N.E.2d at 82; *see also* ILL. REV. STAT. ch. 122, § 14-7.02 (1981). *But cf.* Walker v. Cronin, 107 Ill. App. 3d 1053, 438 N.E.2d 582 (1st Dist. 1982) (concluding that

THE COURT'S RATIONALE

Neither the educational/noneducational placement issue, nor the issue of whether psychotherapy is a related service under the EHA, was addressed in the *Claudia K.* opinion.[57] The single and dispositive issue in the case was whether the juvenile court properly granted the petition for a writ of mandamus. Initially, the Illinois Supreme Court confirmed the general mandamus power of the juvenile court.[58] The supreme court then interpreted the mandamus provision of the Illinois Juvenile Court Act.[59] In 1980, the Juvenile Court Act was amended to authorize juvenile courts to grant writs of mandamus to enforce the rights of minor wards against public agencies.[60] In this case of first impression,[61] the supreme court stated that the sole purpose of the mandamus provision was to provide the juvenile courts with power to "compel recalcitrant . . . state agencies to fulfill their legal obligations" to the courts' wards.[62] Acknowledging that obligations had been imposed on the school district by the EHA,[63] the court proceeded to analyze the mechanics of the mandamus action.

The *Claudia K.* court recognized two prerequisites for mandamus to issue: a " 'clear duty' on the part of the defendant to do the act sought to be compelled, and a 'clear right' on the part of the plaintiff to the prayed-for relief."[64] To determine whether the school district had a clear duty to place Claudia at either Ridgeway or Riveredge Hospital, the court examined Rule 1.04 of the Illinois School Code's Rules and Regulations for Approval of

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the residential placement in which a student received instruction in an integrated treatment program was within the EHA's definition of special education and related services, the court found the school district liable, due to its long delay in determining appropriate placement, for the costs of placing the emotionally disturbed child in an unapproved residential program).

57. None of the substantive educational issues raised in the case was addressed by the supreme court. Discussion or resolution of such issues was rendered unnecessary by the initial finding of procedural error in the granting of the petition for writ of mandamus.

58. The supreme court noted that the juvenile court is a division of the circuit court which has jurisdiction over all justiciable matters. *See* ILL. CONST. art. VI, § 9. The issuance of writs of mandamus lies within the power and jurisdiction of the circuit courts and, therefore, of the juvenile court. 91 Ill. 2d at 475, 440 N.E.2d at 80.

59. The Juvenile Court Act was designed to provide protection, care, custody and guardianship for minors who are adjudged delinquent, neglected, dependent, or "otherwise in need of supervision." ILL. REV. STAT. ch. 37, § 701-2(1) (1981). Every child who is declared to be a ward of the court under the Juvenile Court Act is guaranteed a right to those services necessary to his or her proper development, including health, educational and social services. *Id.* § 701-2(3)(b).

60. *Id.* § 705-8(2); *see supra* note 23 for the text of the mandamus amendment to the Juvenile Court Act.

61. *In re Claudia K.* was the first case in which the Illinois Supreme Court articulated the specific purpose of the mandamus amendment to the Juvenile Court Act. 91 Ill. 2d at 475-76, 440 N.E.2d at 80-81.

62. *Id.* at 476, 440 N.E.2d at 81.

63. *Id.* at 472-73, 440 N.E.2d at 79. The supreme court acknowledged that the school district's involvement in the case resulted from obligations imposed on it by the EHA, its implementing regulations, and state law. *Id.*

64. *Id.* at 477, 440 N.E.2d at 81.

Non-public Facilities Educating Handicapped Students.[65] This rule prohibits

65. Under Rule 1.04 of the Rules and Regulations for Approval of Non-public Facilities Educating Handicapped Students, no nonpublic facility may be utilized by a school district until the facility is programmatically approved by the Illinois State Board of Education and cost approved by the Review Board. *See* ILL. REV. STAT. ch. 122, § 14-7.02 (1981); *see also supra* notes 55-56. The Review Board consists of the Directors of the Departments of Children and Family Services, Mental Health and Developmental Disabilities, Public Health, Vocational Rehabilitation, the Bureau of the Budget, and the State Superintendent of Education, as well as any other individuals designated by the Governor of Illinois. ILL. REV. STAT. ch. 122, § 14-7.02 (1981). One of the Review Board's duties is to review costs, including tuition, room, board, and services, for special education and related services provided by nonpublic schools or special education facilities, and to approve or disapprove such facilities for residential placement of handicapped students. *Id.*

The Review Board met on October 6, 1981, and cost approved Riveredge Hospital for the 1981-82 school year. *See* Memorandum from Governor's Purchased Care Review Board to Controller, Riveredge Hospital (October 8, 1981) (approving costs of tuition, room and board for in-state residential placement effective October 6, 1981). Riveredge Hospital was not programmatically approved, however, and Ridgeway Hospital was neither cost nor programmatically approved. 91 Ill. 2d at 479, 440 N.E.2d at 82. The school district expressed doubt as to whether any currently approved facility would have accepted Claudia, an actively suicidal adolescent, for residential placement. Brief for Appellants at 6, *In re* Claudia K., 91 Ill. 2d 469, 440 N.E.2d 78 (1982). The issue of approval was further complicated by the Memorandum of Understanding, in which the public agencies involved in cooperative residential placements agreed that no new psychiatric hospitals would be approved for the 1980-81 term. *See supra* note 34 & *infra* note 67.

In analyzing whether the school district had a "clear duty" to place Claudia in either Ridgeway or Riveredge Hospital, the Illinois Supreme Court cited § 14-7.02 of the School Code. *See* ILL. REV. STAT. ch. 122, § 14-7.02 (1979) (placing a ceiling on tuition for residential placements of handicapped children). The supreme court found that this section could be construed as authorizing placement in a nonapproved facility while denying reimbursement. 91 Ill. 2d at 478, 440 N.E.2d at 81. Because such a construction was not dispositive of the school district's liability, the court focused on another state regulation. *See supra* note 56. Interestingly, § 14-7.02 has been the statutory basis upon which both the Board of Education and the Review Board have been held in violation of the EHA for failure to provide a free appropriate public education to handicapped students. *See* Elliot v. Board of Educ., 64 Ill. App. 3d 229, 380 N.E.2d 1137 (1st Dist. 1978) (holding that § 14-7.02 violated article X, § 1 of the Illinois Constitution by depriving handicapped children of tuition-free education through limiting the amount of tuition to be paid by local school districts to $2,500 for special education services in nonpublic schools or special education facilities). *Elliot* was argued solely on the basis that § 14-7.02 violated the state constitution. Nevertheless, the *Elliot* court noted:

> An aspect of this problem which does not appear of record, nor in the arguments of counsel, concerns Illinois' conformity with the provisions of the Federal Education for All Handicapped Children Act of 1975. . . .
>
> The recently concluded session of the 80th General Assembly has passed legislation which once again amends section 14-7.02 of The School Code. . . . On August 25, 1978, this legislation became law and went into effect with the Governor's signature. (P.A. 80-1405.) The new section 14-7.02 provides for full tuition payments for handicapped students attending private facilities, and formally brings the State into compliance with the funding provisions of the Federal Act.

64 Ill. App. 3d at 238 n.5, 380 N.E.2d at 1143-44 n.5. One commentator has predicted that the Review Board's disapproval of tuition and related service expenses under the amended version of § 14-7.02 still might violate the *Elliot* court's interpretation of the Illinois Constitution. *See* Kula, *The Right to Special Education in Illinois—Something Old and Something New,* 55 CHI.[-]KENT L. REV. 649, 677-81 (1979).

any school district from utilizing a nonpublic facility for placement of a handicapped student until the facility has been both programmatically approved by the Illinois State Board of Education, and cost approved by the Governor's Purchased Care Review Board.[66] Because both Ridgeway and Riveredge Hospitals are nonpublic facilities, each had to meet the requirements of Rule 1.04.

Ridgeway Hospital was neither programmatically nor cost approved.[67]

Since the 1978 amendment to § 14-7.02, at least one federal court has found that the school board's refusal to pay the expenses of a handicapped child's private residential placement, on the grounds that it has no authority to do so under § 14-7.02, is violative of and preempted by the EHA's requirements. That court declared:

> There is no dispute that the outstanding bill for services provided . . . involves the provision of special education and related services. There is also no dispute that placement . . . was necessary . . . in order to provide . . . special education and related services. This being the case, the unambiguous mandate of federal law is that these services be provided at no cost to Lester's parents. While defendants' refusal to meet fully Lester's expenses may be authorized by state law, such laws are inconsistent with the mandate to provide an appropriate free public education and cannot stand.
>
> Defendants launch a number of arguments which are entirely irrelevant to the case at hand. First, defendants argue that the members of [the Review Board] are not authorized under state law to provide plaintiffs with the relief they seek. That is exactly the problem. The nub of this case is that state law is inconsistent with the EHA. Since the [Review Board] is bound by the EHA, it is the EHA itself which requires the [Review Board] to alter its practices, and protect plaintiffs' right to a free appropriate public education.

Parks v. Pavkovic, 536 F. Supp. 296, 304-05 (N.D. Ill. 1982); *see also* Letter from Office of Civil Rights (OCR) to the Governor's Purchased Care Review Board (Feb. 27, 1980) (Illinois' attempt to place ceiling on tuition, room and board costs for special education placement criticized by OCR), *reprinted in* 3 EDUC. FOR THE HANDICAPPED L. REP. 257:82 (Supp. 22, Apr. 18, 1980), *noted in* Stark, *supra* note 15, at 492-93 ("Illinois was criticized by OCR recently for attempting to place a $4,500 limit on the amount expendable for any special education child, a figure far less than the typical cost of residential placement"); *cf.* Note, *Illinois' State Subsidy of Special Education at Private Institutions Act*, 28 DEPAUL L. REV. 769, 778-82 (1979) (while Illinois has indicated a good faith commitment to the EHA by its passage of an amendment to § 14-7.02, the Illinois General Assembly has expressed concern regarding its enforcement in light of financial considerations).

66. *See supra* note 65. If a handicapped child is placed in an approved program and the costs, including tuition, room and board, have been approved by the Review Board, the costs of placement must be assumed by the appropriate state agency at public expense. *See* Rules and Regs. of Special Educ., *supra* note 34, art. VIII, Rule 8.01 (1981) (enacted pursuant to ILL. REV. STAT. ch. 122, § 14-8.01 (1982)). Rule 8.01 places all special education programs administered by any state agency under the general supervision of the State Board of Education. *Id.* For this reason, all private placements must be programmatically approved by the Illinois Office of Education.

A private facility becomes approved for special education funding once it satisfies nine specified criteria. *See id.* art. VIII, Rule 8.05(2)(a-i). In the Memorandum of Understanding adopted by the state agencies responsible for residential placements of handicapped children, the SEA agreed that no new psychiatric hospitals would be approved for 1980-81 funding. *See supra* note 34. It further agreed that any new placements in currently approved facilities would be prohibited. These agreements seem to make it impossible to find an appropriate placement for Claudia in an approved private psychiatric hospital.

67. 91 Ill. 2d at 478, 440 N.E.2d at 82.

Riveredge Hospital, to which Claudia was transferred, was not cost approved.[68] Thus, even if the school district had ascertained that one of these private facilities was appropriate for Claudia's placement, the supreme court concluded that under Rule 1.04 the school district lacked the authority to place her at either facility.[69] The court held that, in the absence of this authority, no clear duty existed on the part of the school district; hence, mandamus could not issue.[70]

CRITICISM OF THE COURT'S RATIONALE

The court relied on Rule 1.04 to determine that the school district had no clear duty to place Claudia in Ridgeway or Riveredge Hospital, or to assume placement costs.[71] Rather than rely on an Illinois School Code Rule to deny the existence of the school district's duty to Claudia, the Illinois Supreme Court could have invoked the doctrine of federal preemption to hold that a state or local rule which precludes a state from fulfilling federal obligations, upon which federal funding is premised, contravenes the preemption doctrine and, therefore, is invalid.[72]

The preemption doctrine arises from the Supremacy Clause of the United States Constitution, which provides that no state law shall be in conflict with the "laws of the United States."[73] There are basically three situations in which preemption occurs.[74] First, Congress may expressly declare that

68. *Id.*

69. *Id.*

70. *Id.* Having found that the school district had no clear duty, due to its lack of authority to place Claudia in unapproved, nonpublic facilities such as Ridgeway and Riveredge Hospitals, the supreme court was able to determine that the writ of mandamus should not have issued and to avoid reaching the issue of Claudia's "clear right" to the relief sought.

71. Rule 1.04, Adopted Amendments to the Rules and Regulations for Approval of Nonpublic Facilities Educating Handicapped Students (enacted pursuant to ILL. REV. STAT. ch. 122, § 14-7.02 (1981)), 5 Ill. Reg. 4577 (April 24, 1981). For a discussion of Rule 1.04, see *supra* note 57.

72. The preemption approach has been employed to relieve a handicapped child's parents from having to pay a relative liability charge, assessed against them for their child's placement in a residential special education facility by the DMHDD under a similar provision of the Mental Health Code. Parks v. Illinois Dep't of Mental Health, 110 Ill. App. 3d 184, 441 N.E.2d 1209 (1st Dist. 1982) (imposition of a relative liability charge cannot stand in light of the express language of the EHA to provide a free appropriate public education at no expense to the child's parents); *see also* ILL. REV. STAT. ch. 91½, § 1-100 (1979). The preemptive approach also was used to grant the same plaintiffs an injunction which prohibited their child's discharge from a residential facility, although the parents had failed to pay the liability charges assessed against them from the two previous years. Parks v. Pavkovic, 536 F. Supp. 296, 304 (N.D. Ill. 1982) (when placement is necessary to provide a handicapped child with special education and related services, even though DMHDD's refusal to pay full expenses for placement in authorized by Illinois law, such state law is preempted by the federal mandate to provide a free appropriate public education).

73. U.S. CONST. art. VI, § 2. State law in conflict with federal statutes is nullified to the extent that it conflicts with federal law. Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 102 S. Ct. 3014, 3022 (1982) (federal regulations implementing federal statutes have the same preemptive effect as the statutes which they implement).

74. *See, e.g.*, People v. Kerr McGee Chem. Corp., 677 F.2d 571, 579 (7th Cir. 1982).

federal authority over a particular subject area is to be exclusive.[75] Second, preemption may be implied by the language and legislative history of a federal statute.[76] Third, if a clear conflict between federal and state law makes it impossible to comply with both laws, state law may be invalidated to permit compliance with federal law.[77] The existence of any one of these situations is sufficient to render a state or local law unconstitutional.[78]

Despite the Act's failure to explicitly require exclusive federal authority over education of the handicapped, both the language and legislative history of the statute imply preemption.[79] Thus, to assess whether Rule 1.04 was preempted by the EHA, the Illinois Supreme Court should have examined the language and legislative history of the EHA[80] to determine whether they indicate preemptive intent.

The EHA was enacted in response to specific congressional findings which revealed that more than half of the eight million handicapped children in the United States were either receiving no public education, or were receiving some type of public education but were being denied equal opportunity because of the lack of adequate services within particular public school systems.[81] Congress expressly stated that, given appropriate funding, state

75. *See, e.g.*, Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977).

76. *See, e.g.*, Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 102 S. Ct. 3014, 3022.

77. *See, e.g., id.*

78. *See, e.g.*, Olsen v. Financial Fed. Sav. & Loan Ass'n, 105 Ill. App. 3d 364, 366-67, 434 N.E.2d 406, 411 (1st Dist. 1982).

79. The language of the EHA contains a statement of congressional findings which provides:

> given appropriate funding, State and local educational agencies *can and will provide effective special education and related services* to meet the needs of handicapped children;
>
> (8) State and local educational agencies *have a responsibility to provide education for all handicapped children,* but present financial resources are inadequate to meet the special educational needs of handicapped chidren; and
>
> (9) *it is in the national interest* that the Federal Government assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law.

20 U.S.C. § 1400(b)(7)-(9) (Supp V. 1981) (emphasis added). The Act's legislative history reveals that Congress intended to make public education available to all handicapped children by means of specialized educational services. While the EHA was designed to provide assistance to states in educating all handicapped chidren, the Act's primary intent was to "bolster the rights of handicapped children and their parents to assure that the right to education is firmly established." 121 CONG. REC. 19,494 (1975) (statement of Sen. Williams). The EHA places a priority on the handicapped child's right to education. "While the responsibility for education . . . has . . . rested with the States, it is also the responsibility of the Federal Government to assist the States when they are unable to provide necessary educational services." *Id.* (statement of Sen. Javits). These statements contained in the statute and its legislative history clearly demonstrate that once a state is allocated federal funds, it must provide all handicapped children with a free appropriate public education. *Cf.* Board of Educ. v. Rowley, 102 S. Ct. 3034, 3043 (1982) (Congress sought to provide assistance to the states in fulfilling their responsibility under the Constitution to provide equal protection of the law).

80. For a sample of the EHA's legislative history, see S. REP. No. 168, 94th Cong., 1st Sess. 6, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 1425-508.

81. 20 U.S.C. § 1401(b)(1)-(9) (1976) (congressional findings); *see also* 121 CONG. REC. 37,420 (1975) (statements of Sen. Hathway); *id.* at 37,417 (statements of Sen. Schweiker); *id.* at 37,028 (statements of Sen. Ford).

and local educational agencies "can and will" provide effective special education and related services.[82] Congress stressed the responsibility of state educational agencies to provide education for "all" handicapped children.[83] The emphasis on *all* is clearly apparent from the Act's express designation as funding priorities those children not receiving education and those most severely handicapped who are receiving inadequate education.[84] Thus, in enacting the EHA, Congress made clear its intent that no handicapped child in any state receiving EHA funding shall be deprived of a free appropriate public education.[85]

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82. 20 U.S.C. § 1401(b)(7) (1976).

83. *See, e.g.*, 1975 U.S. CODE CONG. & AD. NEWS 1425, 1468 (each state must have a current policy which assures that *all* handicapped children have the right to a free appropriate public education); *id.* at 1432 (the educational amendments of 1974 incorporated the major principles of the right to education cases, and added a new provision to the EHA which requires states to provide full educational opportunities to all handicapped children); *id.* at 1434 (by requiring that a free appropriate public education be available to all handicapped children, a state remains responsible for providing appropriate education at no cost to the child's parents); *id.* at 1437 ("it is the intent of the Committee to establish and protect the right to education for all handicapped children and to assist the States in carrying out their responsibilities under state law and the Constitution of the United States to provide equal protection of the laws"); *id.* at 1441 (the Office of Education has adopted the goal of providing a free appropriate public education for all handicapped children); *id.* at 1456 (the committee bill stipulates that a free appropriate public education should be available to all children within the state as a matter of public responsibility); *see also* 121 CONG. REC. 37,418 (1975) (statements of Sen. Biden) (there must be an assurance of an effective policy which guarantees the right of all handicapped children to a free appropriate public education); *cf.* Parks v. Pavkovic, 536 F. Supp. 296, 303 (N.D. Ill. 1982) (the Act's history clearly indicates that the purpose of the EHA is to assure that all handicapped children have a free appropriate public education available to them) (citing 1975 U.S. CODE CONG. & AD. NEWS 1446).

84. The funding priorities are delineated in both the EHA and its implementing regulations. *See* 20 U.S.C. § 1412(3) (1976); 34 C.F.R. §§ 300.320-.322 (1982). These priorities require that funding be allotted to "first priority children," those who are eligible for special education and are not receiving any education, and "second priority children," those who are eligible for services, have the most severe handicaps and are receiving inadequate services. Both the state and local educational agencies must allocate federal funds according to these priorities. *Id.* § 300.321 comment. At the time Claudia K. appeared before the juvenile court, she was a first priority child as defined by the EHA.

85. Prior to the EHA's enactment, the Senate Committee on Labor and Public Welfare flatly rejected the position that the "Federal Government should only mandate services to handicapped children if . . . funds are appropriated in sufficient amounts to cover the full cost of education," as grounds for a state's refusal to provide a handicapped child with special education and related services. 1975 U.S. CODE CONG. & AD. NEWS 1425, 1446; *cf.* Tatro v. Texas, 625 F.2d 557, 563 (5th Cir. 1980) (the mandate of the Act requiring the provision of a free appropriate public education is unequivocal). The congressional committee acknowledged both a state's primary responsibility to uphold the United States Constitution, its state constitution and state laws, and Congress's own responsibility to insure equal protection of the laws. 1975 U.S. CODE CONG. & AD. NEWS 1425, 1446. The hierarchy of the responsibilities identified in this acknowledgment, as well as the committee's refusal to excuse a state from providing services by claiming a lack of adequate funds, support an inference of federal preemption.

There is a significant and growing body of case law dealing with issues litigated under the EHA in which both federal and state courts have taken a preemptive approach in order to bring a state into compliance with the Act's requirements. *See e.g.*, Helms v. McDaniel, 657

The United States Supreme Court, in *Board of Education v. Rowley*,[86] recognized Congress's intent to provide all handicapped children with an appropriate education. The *Rowley* Court, interpreting the EHA, declared that the Act's statutory findings and priorities, its painstaking procedural safeguards, and its rigorous definition of free appropriate public education demonstrate "a congressional intent to bring previously excluded handicapped children into the public education system and to require the states to adopt procedures which . . . result in individualized instruction for each child."[87]

The *Rowley* Court's unequivocal interpretation of the congressional intent underlying the EHA suggests the presence of the third situation in which preemption may occur; when it is impossible to comply with both federal and state law, state law will be invalidated.[88] Thus, any local law that prevents a state from realizing the EHA'S substantive provisions, which require a state to provide all handicapped, school-aged children with special education and related services, should be declared invalid.[89] Applying this analysis

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F.2d 800, 805 (5th Cir. 1981) (state review procedures were found to conflict with the EHA, both formally and substantively, and would not be permitted to nullify the entire system of procedural safeguards by which Congress intended to assure the right to appropriate education); Springdale School Dist. No. 50 v. Grace, 656 F.2d 300, 306 (8th Cir. 1981) (court applied federal law, not state law, in determining appropriate education because the state law standard could have resulted in a failure to fulfill the handicapped child's needs); Town of Burlington v. Department of Educ., 655 F.2d 428, 431 (1st Cir. 1981) (federal specification for review under the EHA is designed to occupy the field over inconsistent state provisions); Parks v. Pavkovic, 536 F. Supp. 296, 304 (N.D. Ill. 1982) (the EHA requires review boards to alter practices that conflict with the Act); Blomstrom v. Massachusetts Dep't of Educ., 532 F. Supp. 707, 709 (D. Mass. 1982) (federal specification for review under the Act occupies the field over inconsistent state provisions); Papacoda v. Connecticut, 528 F. Supp. 68, 71 (D. Conn. 1981) (the denial of payment for room and board by a school district, on the grounds that placement is for noneducational reasons, conflicts with the EHA's requirement to provide a free appropriate public education); Norris v. Massachusetts Dep't of Educ., 529 F. Supp. 759, 761 (D. Mass. 1981) (a court should disregard any arguments and contentions of parties founded upon inconsistent state provisions in determining the appropriateness of private placement for a handicapped child); Monahan v. Nebraska, 491 F. Supp. 1074, 1087-88 (D. Neb. 1980) (a federal court should not exercise abstention when state law conflicts with federally mandated procedures under the EHA and, therefore, constitutes a supremacy clause claim).

Recently, an Illinois appellate court applied the doctrine of federal preemption to prevent the DMHDD from enforcing a state law which permits the agency to assess a relative liability charge against the parents of a handicapped child placed in a residential special education facility. *See* Parks v. Illinois Dep't of Mental Health and Developmental Disabilities, 110 Ill. App. 3d 184, 186, 441 N.E.2d 1209, 1212 (1st Dist. 1982) (ILL. REV. STAT. ch. 91½, § 5-105 (1979)). Relying on the reasoning of Parks v. Pavkovic, 536 F. Supp. 296 (N.D. Ill. 1982), the appellate court concluded that the imposition of the relative liability charge, authorized by state statute, was invalid under the doctrine of federal preemption in light of the express language of the EHA and its implementing regulations. 110 Ill. App. 3d at 186, 441 N.E.2d at 1212.

86. 102 S. Ct. 3034 (1982) (although the EHA places primary responsibility with the states for executing educational programs for the handicapped, the Act significantly regulates how the states may discharge that responsibility).

87. *Id.* at 3042.

88. Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 142-43 (1963) (state law is nullified when compliance with both federal and state regulations is physically impossible).

89. *See, e.g.*, Parks v. Pavkovic, 536 F. Supp. 296, 304 (N.D. Ill. 1982) (state law found to be inconsistent with the EHA's requirements was declared to be preempted by the Act);

to the facts in *Claudia K.*, the state regulation should have been declared invalid because Rule 1.04 prevented Illinois, a state receiving federal funding under the EHA, from fulfilling the obligations imposed upon it by the Act.[90]

Claudia, a handicapped, school-aged child, required residential placement and psychotherapy in order to obtain an appropriate education. Yet, the only facilities both willing to accept her, and equipped to meet her special educational needs and provide the necessary related services, were private, unapproved[91] psychiatric hospitals. Rule 1.04 prohibits a school district from placing a student in any unapproved, nonpublic facility.[92] In Claudia's particular case, this rule created a conflict which made it impossible for Illinois to comply with the EHA.[93] The Illinois Supreme Court could have invoked the doctrine of preemption to invalidate Rule 1.04, thereby enabling the school district to provide Claudia with a free appropriate public education as required by the EHA. Despite such convincing arguments for preemption, the Illinois Supreme Court, relied on Rule 1.04 to find that the school district had no clear duty to place Claudia at either Ridgeway or Riveredge Hospital and, therefore, mandamus could not properly issue.[94]

EDUCABILITY UNDER THE EHA

The school district in *Claudia K.* maintained that if any duty existed under

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Parks v. Illinois Dep't of Mental Health and Developmental Disabilities, 110 Ill. App. 3d 184, 441 N.E.2d 1209 (1st Dist. 1982) (while DMHDD's refusal to pay costs may be authorized by state law, that law is inconsistent with, and therefore, preempted by the federal mandate that all expenditures for the education and welfare of the handicapped child be assumed by the state's educational authorities); *see also supra* note 65.

90. Because the Illinois Supreme Court chose not to apply the doctrine of federal preemption, it should have made Claudia's particular situation an exception to the state rule; this would have prevented the absurdity of the state being unable to offer her an appropriate, approved placement. *See* Helvering v. Hammell, 311 U.S. 504, 510-11 (1941) (exceptions to statutes should be implied when they are necessary to prevent absurd results or consequences which obviously are at variance with the policy of the statute as a whole). The consequences Claudia faced due to the supreme court's failure to preempt the state rule clearly were at odds with the purposes and goals of the EHA. *See* Anderson v. Thompson, 658 F.2d 1205, 1212-13 (7th Cir. 1981) (in enacting the EHA, Congress was concerned primarily with meeting the needs of handicapped children; the Act's legislative history reveals an emphasis on procedural safeguards to insure that handicapped children receive appropriate placements).

91. *See supra* notes 65 and 66.

92. *See supra* note 56.

93. Under the EHA, Illinois must provide all its handicapped school-aged children with a free appropriate public education. *See* 20 U.S.C. § 1412(1) (1976) (to qualify for federal assistance, states must have a policy that assures all handicapped children the right to a free appropriate public education, and makes a free appropriate public education available to all children between the ages of 3 and 21). Claudia K. was a school-aged, handicapped child. No private, approved residential placement could furnish her with the special education and related services necessary for Claudia to receive a free appropriate public education. Two private, unapproved placements could provide her with a free appropriate public education, but State Rule 1.04 prohibited her placement in these unapproved facilities and, thereby, prohibited Illinois from complying with federal law. *See supra* note 56.

94. 91 Ill. 2d at 479, 440 N.E.2d at 82.

the EHA to provide a handicapped child with a free appropriate public education, the duty only extended to "educable" handicapped children.[95] The school district further maintained that Claudia's unstable condition rendered her "uneducable" and, therefore, the district had no duty to provide Claudia with the Act's guarantees.[96] Finding that the school district had no clear duty to place Claudia in either Ridgeway or Riveredge Hospital, the Illinois Supreme Court was able to avoid the question of whether the EHA provided Claudia with a "clear right" to receive a free appropriate public education and all its related services.[97] Because the court did not address this issue, confusion will continue to pervade the lower courts. Consequently, it is necessary to discuss the existence of a clear right to an education[98] in relation to the concept of educability under the EHA.

By enacting the EHA, Congress intended to bring all handicapped children presently excluded from receiving an adequate public education into the public education system, and to require states accepting federal funds to provide individualized consideration and instruction to each handicapped child.[99] In-

95. Brief for Appellants at 12, *In re* Claudia K., 91 Ill. 2d 469, 440 N.E.2d 78 (1982). The school district decided that Claudia needed to be stabilized before she could be educated and, therefore, referred her to DMHDD. *Id.* The school district asserted that DMHDD has the responsibility to take suicidal people; accordingly, Claudia was that agency's "problem." Brief for Appellees at 6, *In re* Claudia K., 91 Ill. 2d 469, 440 N.E.2d 78 (1982).

96. Brief for Appellants at 13, *In re* Claudia K., 91 Ill. 2d 469, 440 N.E.2d 78 (1982). The determination that Claudia was uneducable was based only on Claudia's conduct while she was at Ridgeway Hospital. Claudia had received no grades from the Ridgeway School, and her attendance was irregular due to her frequent need to be confined when she was dangerously suicidal. *Id.* at 15. When confined, however, Claudia was tutored by a teacher provided by the school district. *Id.* In addition to this implicit acknowledgment that Claudia was indeed educable, one of her psychologists testified that Claudia was "certainly educable." Brief for Appellees at 6, *In re* Claudia K., 91 Ill. 2d 469, 440 N.E.2d 78 (1982).

97. The Illinois Supreme Court noted that many difficult questions were involved in a determination of Claudia's "clear right" to the services which the juvenile court had ordered the school district to provide. 91 Ill. 2d at 477, 440 N.E.2d at 81. Nevertheless, the court concluded that it would "suffice to discuss only the question of the school district's 'clear duty.' " *Id.* Thus, the difficult questions were raised but never addressed by the supreme court.

98. The Education Amendments of 1974 were the basis of the current EHA. *See Board of Educ. v. Rowley,* 102 S. Ct. 3034, 3044 (1982). These amendments incorporated the major principles of the right to education cases. *See* 1975 U.S. CODE CONG. & AD. NEWS 1425, 1432. The two most prominent cases contributing to the enactment of the EHA, Mills v. Board of Educ., 348 F. Supp. 866 (D.D.C. 1972), and Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971), *modified,* 343 F. Supp. 279 (E.D. Pa. 1972), are described in the Act's legislative history as guaranteeing the "right to publicly-supported education for handicapped children." 1975 U.S. CODE CONG. & AD. NEWS 1425, 1430. Almost a decade ago, Congress acknowledged that "it is clear today that this 'right to education' is no longer in question." *Id.*

99. *See* Board of Educ. v. Rowley, 102 S. Ct. 3034, 3042 (1982); 20 U.S.C. § 1400(b)(4) (1976 & Supp. V 1982) (one million handicapped children are excluded entirely from the public school system). The congressional intent underlying the enactment of the EHA was recognized in Kruelle v. New Castle County School Dist., 642 F.2d 687, 690-91 (3d Cir. 1981). The *Kruelle* court noted:

> The Education Act embodies a strong federal policy to provide an appropriate education for *every* handicapped child. Three interrelated purposes underlay its passage.

deed, the parties never disputed that the manifest purpose of the EHA was to provide handicapped children with a free appropriate public education.[100] Nevertheless, a conflict concerning whether the school district was responsible for Claudia K.'s education arose because the district drew an arbitrary distinction between educable and uneducable handicapped children; no such distinction is expressed in the Act.[101]

This arbitrary distinction based on educability refutes the inherent, implicit presumption of the EHA that all children are educable.[102] The Act explicitly requires that a free appropriate public education be provided to all children "regardless of the severity of their handicap."[103] Moreover, first and second funding priorities of the Act insure educational and related services to those children currently receiving no services, and to those most severely handicapped who are receiving inadequate services.[104] Beyond establishing a funding priority for those children who are most severely afflicted, the regulations specifically include schizophrenic children within the definition of the term "handicapped"; like Claudia, such children are typically unstable and experience periods of retrogressive or dissociative behavior.[105] The explicit provisions of the Act and its implementing regula-

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> First, Congress sought to secure by legislation the right to a publicly-supported equal educational opportunity which it perceived to be mandated . . . and explicitly guaranteed with respect to the handicapped. . . . Second, Congress intended the provision of education services to increase the personal independence and enhance the productive capacities of handicapped citizens. Third, Congress acknowleged the need for an expanded federal fiscal role to aid state compliance with the court decisions and to assure protection for the rights of handicapped children.

Id. (emphasis added).

100. The manifest purpose of the EHA is to assure that all handicapped children receive a free appropriate public education which emphasizes special education and related services designed to meet each child's unique needs. 20 U.S.C. § 1400(c) (Supp. V 1982).

101. *See* Kruelle v. New Castle County School Dist., 642 F.2d 687, 693 (3d Cir. 1981) (the EHA unqualifiedly requires a free appropriate public education for all handicapped children "regardless of the severity of their handicap") (citing 20 U.S.C. § 1412(2)(C) (1978)).

102. *See, e.g.*, Gladys J. v. Pearland Indep. School Dist., 520 F. Supp. 869, 879 (S.D. Tex. 1981) (the language and legislative history of the EHA simply do not recognize the possibility that some children may be beyond the reach of educational expertise); Armstrong v. Kline, 476 F. Supp. 583, 603 (E.D. Pa. 1979) (by its terms, the EHA appears to demand that the state supply instruction to handicapped children without limitations), *remanded on other grounds sub nom.* Battle v. Pennsylvania, 629 F.2d 269 (3d Cir. 1980); Matthews v. Campbell, 3 EDUC. FOR THE HANDICAPPED L. REP. 551-264 (E.D. Va. July 16, 1979) (neither the Act's language nor its legislative history appears to contemplate the possibility that some children may be untrainable); *see also* Colley, *supra* note 1, at 144 (concluding that the presumption of educability under the EHA is irrebuttable); Rothstein, *Educational Rights of Severely and Profoundly Handicapped Children*, 61 NEB. L. REV. 586, 600 (1982) (the EHA's premise is that all children are educable) [hereinafter cited as Rothstein]. Rothstein believes that Congress should hold committee hearings to resolve whether certain individuals may be classified as uneducable under the EHA and, if so, who should make this determination and what criteria should be employed.

103. 20 U.S.C. §§ 1412(2)(C), 1414(a)(1)(A) (1976).

104. 34 C.F.R. § 300.320 (1982) (defining first and second priority children).

105. *See id.* § 300.5(b)(8)(E)(ii) (the classification of seriously emotionally disturbed under the Act includes children who are schizophrenic); *see also supra* note 26.

tions convincingly demonstrate that the EHA was intended to encompass all handicapped children, especially those with disorders similar to Claudia's.

In cases involving profoundly retarded children whose needs centered more on custodial care and maintenance than on educational services, courts have held that such children are beyond the scope of the EHA.[106] These cases, however, are rare and their facts are extreme.[107] Most courts have held that even profoundly retarded,[108] schizophrenic,[109] and highly aggressive children[110]

106. *See, e.g.*, Cuyahoga County Ass'n for Retarded Children v. Essex, 411 F. Supp. 46, 52 (N.D. Ohio 1976) (upholding a state statute that excluded from free public schools those mentally retarded children classified as "incapable of profiting substantially from further instruction"); Levine v. Institution & Agencies Dep't, 84 N.J. 234, 250-54, 418 A.2d 229, 239-40 (1980) (profoundly retarded children who fall within the state statutory definition of subtrainable are not capable of receiving or benefiting from education, and residential care that includes minimal incidental instruction does not qualify as education for which a school district must pay). *But cf.* Armstrong v. Kline, 476 F. Supp. 583, 591 (E.D. Pa. 1979) (when severely and profoundly mentally impaired children enter a school system without basic skills such as toilet training and self-feeding, the educational program must be designed to teach these skills), *remanded on other grounds sub nom.* Battle v. Pennsylvania, 629 F.2d 269 (3d Cir. 1980).

107. In Levine v. Institution & Agencies Dep't, 84 N.J. 234, 418 A.2d 229 (1980), certain children were statutorily classified as subtrainable. The applicable New Jersey statute defined subtrainable children as those who "are so severely mentally retarded as to be incapable of giving evidence of understanding and responding in a positive manner to simple directions expressed in the child's primary mode of communication and . . . in some manner express basic wants and needs." N.J. STAT. ANN. § 18A: 46-9(c) (West 1975). Subtrainable children were further defined as possessing a maximum I.Q. of 24. *Id.* § 18A: 46-9(b). The two profoundly retarded children in *Levine* had I.Q.'s of 1 and 14. 84 N.J. at 239-40, 418 A.2d at 233. If classifying such low-functioning children as uneducable is questionable under the EHA, it is unfathomable that the school district in *Claudia K.* could have classified Claudia as uneducable; Claudia's I.Q. was estimated at 160 and her psychologist described her as being brilliant. *See* Chicago Suburban Tribune, Oct. 24, 1981, at 14, col. 1.

108. *See, e.g.*, Kruelle v. New Castle County School Dist., 642 F.2d 687, 693 (3d Cir. 1981) (a profoundly retarded adolescent who possessed an I.Q. below 30 and was afflicted with cerebral palsy was held to be educable); Battle v. Pennsylvania, 629 F.2d 269, 274 (3d Cir. 1980) (plaintiff class of the severely and profoundly impaired, either by retardation alone or combined with other impairments, and with I.Q.'s below 30, was held to be educable); Matthews v. Campbell, 3 EDUC. FOR THE HANDICAPPED L. REP. 551:264 (E.D. Va. July 16, 1979) (court ordered residential placement for a severely retarded child despite grave doubts as to the probable success of instruction).

109. *See* Gladys J. v. Pearland Indep. School Dist., 520 F. Supp. 869, 876 (S.D. Tex. 1981) (a multiple-handicapped child with severe language, learning and behavioral impairments symptomatic of childhood schizophrenia, who was functioning at a pre-kindergarten level, was found to be educable). After acknowledging that the child's prognosis was extremely doubtful, the *Gladys J.* court stated:

> Yet there is hope, abundant hope, that with an appropriate education, with specially designed instruction to meet the unique needs of this severely multiple-handicapped girl, Laura J. can avoid this dismal prognosis. That hope—indeed, that expectation—is the very foundation upon which Congress created the Education for All Handicapped Children Act. The language and legislative history of that Act simply do not admit of the possibility that some children may be beyond the reach of our educational expertise. That is the premise upon which this Court's decision is based.

Id. at 879.

110. *See* Papacoda v. Connecticut, 528 F. Supp. 68, 69 (D. Conn. 1981) (an emotionally

are educable under the Act. The controversy over educability, arising from the practical application of the EHA, has focused on whether extremely low-functioning children, who fit into a classification of trainable or subtrainable,[111] may properly be considered educable. Yet, a child such as Claudia K.—intelligent, verbal, and possessing a history of normal academic achievement[112]—is outside the sphere of the trainable/subtrainable issue.

In addition to assuming that the EHA contemplates the possibility that some children may be uneducable, the school district further assumed that the Act's system for determining appropriate placement of a child would serve equally as well as a mechanism to ascertain whether a child was educable.[113] This system establishes elaborate procedures which require the state school system to identify, evaluate, and place a child.[114] To do so, a multidisciplinary conference is held between parents, teachers, and qualified representatives of public agencies that ultimately might be responsible for placement costs.[115] The express purpose of this conference is to prepare a child's IEP, a program required by statute to be used as the central manage-

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disturbed adolescent with self-destructive behavior, discipline problems and excessive absences from school was found to be educable); *In re* "A" Family, ___ Mont. ___, ___, 602 P.2d 157, 159 (1979) (a mentally retarded child with uncontrollable, dangerous bouts of retrogressive behavior was found to be educable).

111. *See* cases cited *supra* note 106.

112. Claudia had received all "A's" and "B's" in the ninth grade before quitting school in the tenth grade. 91 Ill. 2d at 471, 440 N.E.2d at 78.

113. The EHA requires that a multidisciplinary staff conference be held in which the district must prepare, in conjunction with the child's parents and representatives of other state agencies which might be involved in the placement, an IEP for every child eligible for special education services. *Id.* at 473, 440 N.E.2d at 79; *see also supra* note 34. This system exists for the purpose of evaluating a child's eligibility for special education and related services, and for developing, reviewing and revising a handicapped child's IEP. 34 C.F.R. § 300.343(a) (1982). The EHA does not contemplate that this system be used to classify a child as educable or uneducable.

The legislative history of the Act reveals that the Senate Committee on Labor and Public Welfare was concerned about the misuse of identification dates, and the procedures and methods of classifying children as handicapped or not handicapped. 1975 U.S. CODE CONG. & AD. NEWS 1425, 1450. In discussing this problem, the committee emphasized the affirmative purposes for the multidisciplinary conference.

> In the educational process, the appropriate identification of handicapping conditions must take place to assure that a child receives appropriate services designed to meet his or her needs. Such identification must also take place in order that a State or local educational agency may plan for the provision of appropriate services to meet the child's unique needs.

Id. at 1451; *see also* 34 C.F.R. § 342(b)(2) (1982); ILL. REV. STAT. ch. 122, § 14-8.02 (1979); Final Draft Policy on IEP's, 2 EDUC. FOR THE HANDICAPPED L. REP. 203:2425 (Supp. 60 Nov. 13, 1981). In addition to the Act's legislative history, federal and state regulations ascribe the following purpose to the system established by the EHA: to identify, evaluate and provide services for handicapped children. There is nothing in any of these provisions which suggests that these procedures were designed to exclude a child from receiving services by classifying him as uneducable.

114. 34 C.F.R. § 300.128 (1982) (identification, location, and evaluation of handicapped children).

115. *See In re* Claudia K., 91 Ill. 2d at 473, 440 N.E.2d at 79; *see also supra* note 34.

ment tool in providing for and reviewing a child's educational needs.[116]

The IEP is intended to be a written commitment of the resources necessary to enable a handicapped child to receive an appropriate education.[117] Once a child is identified as handicapped, an IEP must be developed within thirty days to insure that there is no undue delay in implementing educational services for the child.[118] Without a finalized IEP, no special education and related services may be provided.[119] An examination of these exacting procedures reveals that the sole purpose and goal of the IEP conference is to determine an appropriate educational placement for the handicapped child.[120] There is no basis for concluding that the people involved in developing the IEP are competent to decide that a child is uneducable and, thus, should be excluded from educational placement. Yet, the public school personnel at Claudia's IEP conference determined that she was uneducable and withheld finalization of her IEP,[121] thereby withholding educational placement and the provision of any necessary related services.[122]

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116. *See generally* 20 U.S.C. § 1401(19) (1976) (definition of individualized education program); 34 C.F.R. §§ 300.34-.349 app. C (1982) (explaining the IEP); ILLINOIS PRIMER, *supra* note 46, at C-3 (explaining the IEP).

117. *See* 46 Fed. Reg. 5,460 (1981) (Interpretation of Requirements Under Part B of the Education of the Handicapped Act, As Amended by Pub. L. 94-142) (to be codified at 34 C.F.R. §§ 300.340-.349 app. C at 837 (1982)). The legislative history indicates "[i]t is intended that each handicapped child have an educational program which states . . . goals . . . as well as . . . instructional objectives." 1975 U.S. CODE CONG. & AD. NEWS 1425, 1484.

118. 34 C.F.R. § 300.343(c) (1982). It is expected that a child's IEP will be implemented "immediately" following the staff meeting. *Id.* § 300.342 comment. There can be "no undue delay in providing special education and related services" to a child once that child has been identified at the conference as handicapped. *Id.*

119. *See generally* Rothstein, *supra* note 102, at 613 (noting that while the procedural framework established by the EHA for educational placement may be satisfactory for that single purpose, the process is not necessarily adequate or appropriate to determine that a child is to be excluded totally from educational placement because the child is "uneducable").

120. Rothstein suggests three potential problem areas which might arise if the placement process were applied to decisions of educability. These areas focus on: (1) general due process considerations including the inappropriateness of the Act's procedural safeguards in regard to educability determinations, the potential costs involved in an educability decision, and the hearing officer's lack of professional expertise to make such a determination; (2) evidence of uneducability and the burden of proof; and (3) the need for reevaluation more frequently than the Act provides when a child is being denied educational services completely. *Id.* at 612-17.

121. 91 Ill. 2d at 473, 440 N.E.2d at 79. Claudia's IEP was never finalized at the multidisciplinary staff conference because the school personnel decided that "suicidal issues" needed to be settled before she could receive educational services. *Id.*

122. The unequivocal intention of Congress in outlining these procedures, and of the agencies in promulgating a veritable plethora of regulations to be followed in designing and implementing the IEP, was to guarantee that no handicapped child went without special education and services, or even experienced a significant delay in receiving them. *See, e.g.*, 34 C.F.R. §§ 300.340-.349 app. C, at 837-56 (1982) (defining and explaining the IEP). Despite this obvious intention and the school district's identification of Claudia as handicapped, the district refused to finalize Claudia's IEP on the grounds that she was currently uneducable. 91 Ill. 2d at 473, 440 N.E.2d at 79.

Under Board of Educ. v. Rowley, 102 S. Ct. 3034 (1982), a state satifies the Act's require-

EDUCATIONAL VERSUS NONEDUCATIONAL PLACEMENTS

Even if the Illinois Supreme Court had recognized Claudia as educable within the contemplation of the EHA, it would not necessarily have found the school district financially liable for her placement at either Ridgeway or Riveredge Hospital. Instead, the court would have focused on whether the school district had demonstrated that Claudia's need for residential placement arose primarily from her noneducational needs.[123] Only upon such a showing would financial responsibility for placement costs shift from the school district to an agency with jurisdiction over the noneducational problem necessitating placement.[124] If, for example, a child's need for placement was shown to be exclusively the result of family-related problems, placement costs might shift to the DCFS.[125] Similarly, if a child's need for residential placement clearly was attributable to a developmental disability, costs for placement might shift to the Department of Mental Health and Developmental Disabilities.[126]

Although distinguishing between educational and noneducational placements appears to be simple, the actual task of making such a determination presents significant difficulties.[127] It is only in exceptional cases that a child's social,

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ment to provide a child with a free appropriate public education by providing personalized instruction at public expense, under public supervision with sufficient supportive services to permit the child to benefit from the instruction. *Id.* at 3049. Such instruction must comport with the child's IEP, which must be formulated in accordance with the EHA requirements. *Id.* By classifying Claudia as uneducable, refusing to finalize her IEP, refusing to provide instruction in accordance with a finalized IEP, and refusing to provide supportive services and instruction at public expense, the school district clearly failed to satisfy the EHA requirements as interpreted by the *Rowley* Court and, thus, violated the Act.

123. *See supra* notes 12, 14 & 15. A court's analysis must focus on whether full-time residential placement is necessary for educational purposes, or whether it is necessitated by medical, social, or emotional problems that can be segregated from the learning process. *See* Kruelle v. New Castle County School Dist., 642 F.2d 687, 693 (3d Cir. 1981) (full-time residential placement is a necessary ingredient to learning when a handicapped child's needs are inseparable, and in such cases the costs of placement must be assumed by the State Board of Education).

124. *Kruelle,* 642 F.2d at 693-94 (when placement is required for emotional problems, either the child's parents or a social service agency must assume placement costs); *see also In re* Richard H., 3 EDUC. FOR THE HANDICAPPED L. REP. 502:203 (Ga. SEA DEC. No. 1980-28 Nov. 13, 1980) (placement in hospital for psychiatric reasons was held to be "medical" and, therefore, outside the school district's financial responsibility); Smith v. Cumberland School Comm., ___ R.I. ___, ___, 415 A.2d 168, 173 (1980) (holding that a school district is not liable for the costs of a program which is primarily therapeutic when educational services are only incidental to medical services). *See generally* Stark, *supra* note 15, at 513-16 (citing administrative decisions in which services were held to address therapeutic needs and placement was deemed to be other than educational).

125. *See* ILL. REV. STAT. ch. 23, §§ 5001-5040 (1981).

126. *See id.* ch. 91½, §§ 1-100 to 6-100.

127. *See* Gladys J. v. Pearland Indep. School Dist., 520 F. Supp. 869, 873 (S.D. Tex. 1981) (noting that the simplicity with which the issue may be defined belies its true complexity because federal statutes are of recent vintage and decisional law is in a state of flux as courts struggle to interpret difficult questions posed by the EHA). *See generally* Mooney & Aronson, *Solomon Revisited: Separating Educational and Other Than Educational Needs in Special Education Residential Placements,* 14 CONN. L. REV. 531, 551-56 (1982) (suggesting a new approach to

emotional, medical, and educational needs can be separated to disclose the predominant problem necessitating residential placement;[128] clear-cut distinctions between educational and noneducational needs rarely exist. As the complexity of a child's handicapping condition increases, the distinction becomes increasingly blurred.

Despite this problem, the school district in *Claudia K.* asserted that the primary cause for Claudia's residential placement was her suicidal mental condition that the district classified as a decidedly noneducational need.[129] Because Claudia's placement at both Ridgeway and Riveredge had been necessitated by a mental problem, the school district maintained that the placements were primarily noneducational and, accordingly, placement costs should shift to the DMH.[130] Notwithstanding this simplistic argument, the juvenile court recognized the complexity inherent in determining whether it was primarily Claudia's educational or noneducational needs that had necessitated placement.

Upon granting the petition for mandamus, the juvenile court concluded that a realistic separation between Claudia's educational and noneducational needs was impossible.[131] Indeed, most courts which have been requested to make similar distinctions have been unable or unwilling to do so.[132] Rather,

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give meaning to the statutory distinction between educational and other than educational placements under the EHA) [hereinafter cited as Mooney & Aronson].

128. *See supra* note 123; *see also* Kenneth B. v. Newton Pub. Schools, 3 EDUC. FOR THE HANDICAPPED L. REP. 502:348 (Mass. SEA Dec. No. 4584 July 24, 1981) (a handicapped student needed a residential program for psychiatric reasons); Mooney & Aronson, *supra* note 127, at 554 (a handicapped student may require treatment in a residential facility for medical reasons unrelated to the student's educational needs).

129. *See In re* Claudia K., 91 Ill. 2d at 474, 440 N.E.2d at 80. The school district maintained that treatment of Claudia's suicidal condition was a medical problem which was beyond its responsibility.

130. Brief for Appellants at 12, *In re* Claudia K., 91 Ill. 2d 469, 440 N.E.2d 78 (1982). The school district asserted that the DMH has the responsibility for caring for suicidal people. *Id.*; Brief for Appellees at 6, *In re* Claudia K., 91 Ill. 2d 469, 440 N.E.2d 78 (1978).

131. *In re* Claudia K., 3 EDUC. FOR THE HANDICAPPED L. REP. 555:501 (Ill. Cir. Ct. July 31, 1982).

132. *See, e.g.*, Kruelle v. New Castle County School Dist., 642 F.2d 687, 694 (3d Cir. 1981) (residential placement held to be necessary for educational reasons for a profoundly retarded adolescent whose educational and medical needs were inseparable; the inseverability is the very basis for holding that the services are an essential prerequisite to learning); Gladys J. v. Pearland Indep. School Dist., 520 F. Supp. 869, 876 n.8 (S.D. Tex. 1981) (holding that a 15-year-old suffering from childhood schizophrenia and functioning at a pre-kindergarten level required residential placement because her social, emotional, medical and educational problems were so intertwined that it was impossible for the court to separate them); School Dist. No. 4 v. Frazee, 3 EDUC. FOR THE HANDICAPPED L. REP. 553:259 (D. Ariz. Nov. 24, 1981) (finding that the social, emotional, medical and educational problems of a child suffering from cerebral palsy, greatly impaired motor functions and respiratory disabilities, were unseverable, and that services provided in a residential program were essential to the child's IEP); Erdman v. Connecticut, 3 EDUC. FOR THE HANDICAPPED L. REP. 552:218 (D. Conn. Aug. 22, 1980) (concluding that it was impossible to separate a handicapped child's emotional needs from his academic needs when planning an educational program that required placement in a residential facility in order for him to receive an appropriate education); North v. District of Columbia Bd. of

courts faced with this difficult task uniformly have held that residential placement is within the contemplation of the EHA, and that financial responsibility rests with the educational agency when a child's educational and noneducational needs are so intertwined as to defy separation.[133] This position was articulated first in *North v. District of Columbia Board of Education.*[134] Employing a bifurcated analysis, the *North* court held that: (1) the EHA mandates that a state's educational agency be the central agency responsible for insuring that each handicapped child receive a free appropriate public education;[135] and (2) when it is impossible to separate a child's educational and noneducational needs, the only legally viable alternative is to enforce the "clear duty" of the educational agency to provide residential placement.[136]

Although *North* clearly establishes that a state educational agency has the primary responsibility for insuring that all handicapped school-aged children receive a free appropriate public education, that agency's financial liability

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Educ., 471 F. Supp. 136, 141 (D.D.C. 1979) (residential placement was held to be educational for a 16 year old multiple-handicapped child who was suffering from epilepsy, emotional disturbance and learning disabilities; the court could not perform the "Solomon-like task" of separating the social, emotional, medical, and educational problems); Matthews v. Campbell, 3 EDUC. FOR THE HANDICAPPED L. REP. 551:264 (E.D. Va. July 16, 1979) (holding that a multiple-handicapped child required residential placement for educational reasons); Ladson v. Board of Educ., 3 EDUC. FOR THE HANDICAPPED L. REP. 551:188 (D.D.C. Mar. 12, 1979) (when necessary to meet the goals of an IEP, a residential placement is educational for a child with down's syndrome); San Francisco Unified School Dist. v. State, 131 Cal. App. 3d 54, 182 Cal. Rptr. 525 (1982) (a handicapped child's emotional problems were held to be so linked to his learning disability as to justify and require his residential placement for an educational program); Manchester Bd. of Educ. v. State Bd. of Educ., 3 EDUC. FOR THE HANDICAPPED L. REP. 552:397 (Conn. Super. Ct. Apr. 22, 1981) (residential placement held to be primarily for special education reasons when a handicapped child's educational program must integrate her academic, as well as social and emotional needs, to be successful); Wallingford Bd. of Educ. v. State Bd. of Educ., 3 EDUC. FOR THE HANDICAPPED L. REP. 552:305 (Conn. Super. Ct. Jan. 6, 1981) (holding that an autistic, mentally retarded child required residential placement for educational purposes); *In re* "A" Family, ___ Mont. ___, ___, 602 P.2d 157, 163 (1979) (holding placement to be educational when a child with severe emotional disturbance and suffering from schizophrenia required residential placement and psychotherapy).

133. *See supra* note 132; *see also* Mooney & Aronson, *supra* note 127, at 547-51 (the "Solomon syndrome").

134. 471 F. Supp. 136 (D.D.C. 1979), *noted in* Kruelle v. New Castle County School Dist., 642 F.2d 687, 693 (3d Cir. 1981); *see also* Mooney & Aronson, *supra* note 127, at 547-48 (discussing *North* as an important case in determining residential placements under the EHA); Stark, *supra* note 15, at 514-16 (asserting that *North* provided a blueprint for subsequent decisions involving the dichotomy between emotional and educational needs in the determination of residential placement).

135. 471 F. Supp. at 139. The *North* court noted that the EHA clearly vests the educational agency with responsibility for administering all educational programs for handicapped children, and that the educational agency has a clear duty to place a handicapped, school-aged child in a residential facility when such placement is necessary to provide the child with a free appropriate public education. *Id.* at 139-40 (citing 20 U.S.C. § 1412(6) (1976)); *see also* 34 C.F.R. § 300.302 (1982) (residential placement).

136. 471 F. Supp. at 141.

is not limitless.[137] Because it is rarely possible to separate a child's educational and noneducational needs, in almost every case some aspect of a child's problem, and some component of a residential placement, will be educational.[138] Yet, it would be inequitable to classify all residential placements as educational and assign financial responsibility to the educational agency. It would be similarly inequitable to classify all placements as primarily noneducational, thus permitting the educational agency to escape financial responsibility. Fortunately, neither of these extremes appears to have been contemplated by the legislators who enacted the EHA.

As emphasized in *North* and explicitly delineated in the Act, the state educational agency is the single agency responsible for implementing the guarantees of the EHA.[139] The Act, however, neither requires nor expects

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137. The *North* court acknowledged that when a child's emotional or other medical problems affect his educational needs, the child's problems should be attended to by social service agencies rather than by the school authorities. *Id.* at 140. This acknowledgment suggests that the court believed that the educational agency, though primarily responsible for assuring placement, should not be singularly responsible for the direct delivery of all services. This issue was addressed directly in Gladys J. v. Pearland Indep. School Dist., 520 F. Supp. 869 (S.D. Tex. 1981). The *Gladys J.* court noted:

> Admittedly, the unequivocal congressional directive to provide an appropriate education for all children regardless of the severity of the handicap places a substantial burden on state and local educational agencies in certain instances. Perhaps this is one such instance. Regardless of the financial and administrative burdens that may obtain, however, the Act imposes upon schools the singular obligation to provide a comprehensive range of services to accommodate a handicapped child's educational needs, and if necessary, to resort to residential placement.

Id. at 879.

The problem of imposing potentially unlimited financial responsibility on the educational agency is addressed in Makuch, *Year-Round Special Educational and Related Services: A State Director's Perspective,* 47 EXCEPTIONAL CHILDREN 272, 274 (1981) [hereinafter cited as Makuch]. Makuch concludes that the expectation that the educational system will carry the entire burden of providing all handicapped children with a free appropriate public education will "run [the educational system] into the ground." *Id.* He further concludes that the EHA is not an appropriate funding vehicle for guaranteeing a free appropriate public education, and that total dependence on the educational system will render services unavailable to handicapped children both prior to and subsequent to school age. *See also* Colley, *supra* note 1, at 157-59 (observing that as state statutes have been passed to bring states into compliance with the EHA, a judicial trend has emerged which requires all costs of residential placement to be assumed by the local school district); Stark, *supra* note 15, at 493 (concluding that the financial impact of residential placements on school districts under the EHA could be catastrophic); Note, *supra* note 65, at 778-82 (discussing the financial realities of educating a handicapped student at a private residential institution, and noting that until the federal government extends its full proposed subsidy to the state, both state and local school districts must absorb the cost of increased services to handicapped students in private facilities).

138. The *North* court implicitly acknowledged this problem by stating that it was "reluctant to hold flatly that in every situation where emotional or other medical problems impact upon educational needs, the normal *parens patriae* role of the local authorities is displaced by federal law." 471 F. Supp. at 140.

139. *Id.* at 139. To prevent abdication of responsibility for educating handicapped children, Congress designated the SEA as the central point and single line of responsibility and accountability in implementing the Act's provisions. *See* 34 C.F.R. § 300.600 comment (1982).

the educational agency to deliver directly all necessary services and assume all costs for placement.[140] The EHA naively presumes that other service agencies will share responsibility for the provision of services with the state educational agency, particularly in costly areas such as private residential placements.[141] Yet, when there is a failure to deliver services, or a violation of EHA beneficiaries' rights, the educational agency must fulfill its responsibility[142] by either forcing another agency to pay for placement or by assuming placement costs itself.[143] These other agencies, unlike the educational agency, are under no federal mandate to provide residential placement necessary for certain handicapped children to receive a free appropriate

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140. *See* 34 C.F.R. § 300.600 comment (1982). This comment reveals that the EHA does not equate the designation of the SEA as the responsible agency with the expectation that the SEA will deliver all services directly. *See* Makuch, *supra* note 137, at 273 (the EHA and its implementing regulations suggest that the state educational agency is not required to provide all services directly, but rather is responsible for insuring that services ultimately are provided).

141. *See* Makuch, *supra* note 137, at 273; *see also* SRI INTERNATIONAL, EDUCATION AND HUMAN SERVICES RESEARCH CENTER, LOCAL IMPLEMENTATION OF P.L. 94-142: THIRD YEAR REPORT OF A LONGITUDINAL STUDY 18 (1981) (three year study including two special education districts in Illinois concludes that two issues which remain problematic at the local level are the provision of mental health services, and interagency coordination for providing related services under the EHA) [hereinafter cited as SRI REPORT]. A recent example of the mistaken presumption of interagency cooperation in providing services required by the EHA is William S. v. Gill, 536 F. Supp. 505 (N.D. Ill. 1982). In that case, a handicapped child brought a class action against the local school district to force it to pay the costs of certain related services which the school district insisted were noneducational and, consequently, refused to fund. The named defendants, a number of state and local educational officials and entities, filed a cross-claim against the State Board of Education and a third party claim against the Department of Public Aid, DMHDD, the Bureau of the Budget, DCFS, the Department of Public Health and the Review Board. *Id.* at 507. The third party claim was based on the named defendants' contention that these other agencies failed to fulfill the agreement reached under the Memorandum of Understanding. *Id.* at 514; *see also supra* note 34 (discussion of the Memorandum of Understanding); *cf.* North v. District of Columbia Bd. of Educ., 471 F. Supp. 136, 141 (noting that it is unfortunate that the two agencies responsible for the plaintiffs' care were seeking to shift the responsibility to each other; the Board of Education claimed that the plaintiffs' problems were emotional, while the Department of Human Resources asserted that they were educational).

142. *See* 34 C.F.R. § 300.600 comment (1982) (the SEA is responsible for the failure to deliver services or the violation of rights of handicapped children under the EHA).

143. *See, e.g.*, William S. v. Gill, 536 F. Supp. 505 (N.D. Ill. 1982) (state and local educational entities filed a cross-claim against the State Board of Education, and a third party claim against five state agencies and the Review Board, for costs of related services provided to a class of handicapped children). The Illinois School Code specifically provides that if a child has been placed in an approved residential program, room and board costs shall be paid by the appropriate state agency. ILL. REV. STAT. ch. 122, § 14-7.02 (1981). Room and board costs which are not provided by another state agency shall be provided by the State Board of Education. *Id.* § 14-8.01. Section 14-8.01 further provides that special education and related services included in a child's IEP, which are not provided by another state agency, shall be provided by the State Board of Education and the local school district. *Id.*; *see also* P. PIELE, THE YEARBOOK OF SCHOOL LAW 133-42 (1981) (discussing cases that involved disputes arising from the allocation of financial liability for the provision of services under the EHA).

public education.[144] The unfortunate results of this unilateral mandate, as poignantly illustrated by *Claudia K.*, are the following: (1) a trend toward requiring educational agencies to bear all costs of residential placements;[145] (2) a lack of integration of the various agencies' services to handicapped children;[146] (3) a considerable amount of interagency buck-passing and conflict;[147] and (4) a failure to provide handicapped children with a free appropriate public education.[148]

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144. *See* Makuch, *supra* note 139, at 274. Makuch concludes that the only agency that can be held accountable, if services are not provided, is the SEA. Other human service agencies are under no universal obligation to provide services to handicapped people. *But see* Parks v. Illinois Dep't of Mental Health and Developmental Disabilities, 110 Ill. App. 3d 184, 441 N.E.2d 1209 (1st Dist. 1982). The defendant in *Parks,* DMHDD, appealed from a finding that a relative liability charge, assessed against the parents of a handicapped child for residential placement, violated the EHA. DMHDD contended that under the Act only the SEA is authorized to educate handicapped children and, therefore, the plaintiffs must obtain relief exclusively from the educational agency. The court disagreed and quoted from a federal regulation that provided:

> "[The provisions of this part apply] to *all* political subdivisions of the State that are involved in the education of handicapped children. These would include:
> "(1) The State educational agency,
> "(2) local educational agencies . . .
> "(3) other State agencies and schools (*such as Departments [of] Mental Health and Welfare* . . .)
> . . . ."

110 Ill. App. 3d at 188, 441 N.E.2d at 1212 (quoting 34 C.F.R. § 300.2(b) (1981)) (emphasis in case). The court noted that it could not be asserted seriously that DMHDD is not "involved in the education of handicapped children," and concluded that the EHA is binding on DMHDD. A federal regulation supports this conclusion by providing that "the requirements of this part are binding on each public agency that has direct or delegated authority to provide special education and related services in a State that receives funds under Part B of the Act, regardless of whether that agency is receiving funds. . . ." 34 C.F.R. § 300(2) comment (1982).

145. *See supra* notes 11 & 132; *see also* Colley, *supra* note 1, at 158.

146. *See* SRI REPORT, *supra* note 141.

147. *See, e.g.,* William S. v. Gill, 536 F. Supp. 505, 513 (N.D. Ill. 1982) (a local school district and a special education district filed a cross-claim against the State Board of Education, refusing to pay for noneducational placements under the EHA, because state education officials and the State Board had threatened not to reimburse them for funding); North v. District of Columbia Bd. of Educ., 471 F. Supp. 136, 141 (D.D.C. 1979) (noting that it was unfortunate that the court's assistance had to be invoked under federal statutes to resolve what essentially were internal bureau disputes); *In re* Claudia K., 91 Ill. 2d 469, 475, 441 N.E.2d 78, 80 (1982) (a school district maintained that it had responsibility to provide medical services only for diagnostic and evaluative purposes, and that psychotherapeutic treatment of the plaintiff's suicidal condition was beyond its responsibility); Parks v. Illinois Dep't of Mental Health and Developmental Disabilities, 110 Ill. App. 3d 184, 186, 441 N.E.2d 1209, 1212 (1st Dist. 1982) (DMHDD argued that only the State Board of Education is authorized to educate handicapped children and, therefore, parents of handicapped children may seek reimbursement for costs of residential placement only from the State Board of Education); *see also* Letter of Finding from Office of Civil Rights (OCR) to Rockford School Dist. (Oct. 20, 1980) (noting an obvious deficiency in efforts of Illinois state agencies to coordinate educational programs for handicapped children), *reprinted in* 3 EDUC. FOR THE HANDICAPPED L. REP. 257:173-74 (Supp. 38 Dec. 12, 1980) .

148. *See* Letter of Finding from OCR to Illinois Governor's Purchased Care Review Board (Feb. 27, 1980) (identifying a major problem in Illinois regarding the provision of a free ap-

Interagency cooperation will be unattainable unless each human service agency is legally obligated to perform its respective role.[149] Despite current efforts in Illinois to encourage interagency cooperation in providing residential placements for handicapped children,[150] conflicts over which agency must assume placement costs persist among mental health, social service, and educational agencies.[151] The absence of any controlling standards for classifying a residential placement as educational or noneducational is exploited by these various agencies as a means of escaping financial responsibility.[152] It

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propriate public education to handicapped children requiring residential care), *reprinted in* 2 EDUC. FOR THE HANDICAPPED L. REP. 257:82 (Supp. 22 April 18, 1980). OCR concluded that the Illinois Board of Education failed to provide a free appropriate public education to a sizeable class of handicapped children. The letter provided the following outline of the problems revealed by OCR's investigation:

I. Handicapped children are being denied a free appropriate public education:
. . .
B. Insufficient residential free appropriate public education facilities exist to meet the needs of Illinois handicapped children;
C. Complexity of rate review system contributes to problems associated with the provision of free appropriate public education;
D. Great numbers of handicapped children are placed in residential facilities outside of Illinois.
E. Parents pay part/total costs of appropriate residential facilities:
1. Parents pay difference between actual costs and GPCRB [Review Board]-approved costs;
2. Handicapped children are removed from appropriate residential facilities when insurance coverage is depleted and actual costs exceed GPCRB-approved costs;
3. Parents are urged by ISBE [Illinois State Board of Education], GPCRB and LEAs to apply for Individual Care Grants; parents receiving these grants are liable for monthly, sliding-scale contribution cost;
F. Section 504 Violations.
II. Procedural safeguards are unavailable for issues relating to financial responsibility:
A. GPCRB-approved costs are not subject to due process review;
B. ISBE considers costs paid by parents to other state agencies assisting in the payment of free appropriate public education inappropriate for procedural review.

Id.

149. *See* Makuch, *supra* note 137, at 274 (all human service agencies must be equally accountable and responsible for providing services, and required to combine their resources).

150. *See* Memorandum of Understanding, *supra* note 34. *See generally* ILL. REV. STAT. ch. 127, § 742(1) (1981) (authorizing state and local governing bodies to cooperate in the performance of their respective responsibilities).

151. *See* ILLINOIS ST. BD. OF EDUC., DEP'T OF SPECIALIZED EDUC. SERV. MGMT. BULL. 13 (Winter/March 1981) (finding that Illinois lacks a comprehensive design for administering physical and mental health, juvenile justice, and child welfare services to identified special education students).

152. *See, e.g.*, William S. v. Gill, 536 F. Supp. 505, 509 (N.D. Ill. 1982). In that case, the parents of a handicapped child contended that in light of a statewide policy of dividing children into educational and noneducational components, it was fruitless to pursue an administrative remedy; the parents claimed that this policy prevented their children from receiving the most appropriate and beneficial placements. The parents also asserted that by refusing to fund noneducational components of a residential placement, the SEA and the school district

is imperative that the state legislature devise a method by which costs for residential placement can be apportioned on an equitable basis among the respective service agencies. By failing to articulate a position or request the legislature to act, the Illinois Supreme Court declined an opportunity to remedy this residential placement issue. The court could have remanded *Claudia K.* with instructions that placement costs for Claudia's care and treatment at Ridgeway and Riveredge be apportioned among the various agencies, including the school district, the DMH and the DCFS. As a result of the court's failure to order such cost apportionment, the educational/noneducational placement controversy will continue to exist.[153]

PSYCHOTHERAPY AS A RELATED SERVICE

Once a placement has been determined to be educational, the remaining problem is in deciding which agency is responsible for the costs of the various services a handicapped child receives while residing in the placement. The juvenile court found that Claudia's placement at both private residential hospitals was necessary to provide her with a free appropriate public education.[154] Under the EHA, this finding requires that the residential program, including room, board, and nonmedical care, be provided at no cost to the child's parents or guardian.[155] The obligation placed on the educational agency by the EHA, however, is not limited to paying the costs of room, board and nonmedical care. Under the Act, the educational agency also must provide each handicapped child with a free appropriate public education which consists of special education and related services.[156] The EHA, in addition to enumerating certain specific related services,[157] generally

forced them to seek recourse with other state agencies which either would not or could not provide funding; consequently, their handicapped child was denied a free appropriate public education. *Id.*; *cf. In re* Special Educ. Placement of Steven Walker, 107 Ill. App. 3d 1053, 438 N.E.2d 582 (1st Dist. 1982) (the Illinois State Board of Education and a school district denied that a handicapped student's need for residential placement was necessitated by educational needs).

153. Some states have devised such cost apportionment methods under which the educational agency pays for the educational component in a noneducational residential placement, while the other service agencies fund the placement's noneducational components. *See, e.g.*, Curtis H. v. Boston Public Schools, 2 EDUC. FOR THE HANDICAPPED L. REP. 502:240 (Mass. SEA Dec. No. 4109 Feb. 20, 1981) (under the authority of an interagency agreement, the Department of Youth Services and the LEA were each responsible for 50% of the costs of a handicapped child's residential program).

154. *In re* Claudia K., 3 EDUC. FOR THE HANDICAPPED L. REP. 552:501 (Ill. Cir. Ct. July 31, 1981) (order granting a petition for mandamus and finding that psychotherapy is a related service).

155. *See* 20 U.S.C. §§ 1412(2)(B), 1413(a)(4)(B) (1976 & Supp. II 1978) (implemented by 34 C.F.R. § 300.302 (1982)); *see also supra* note 12 (discussion of the implementing regulation).

156. *See* 20 U.S.C. § 1401(16)-(17) (1976) (implemented by 34 C.F.R. §§ 300.13-.14 (1982)); *see also supra* note 8 (discussion of implementing regulation).

157. *See* 20 U.S.C. § 1401(17) (1976); *see also supra* note 8 (discussing § 1401(17)). The regulations explicitly state that the list of enumerated related services is not exhaustive, and may include other supportive services if such services are required to assist a handicapped child in benefiting from special education. *See* 34 C.F.R. § 300.14 comment (1982). The regulations also clearly indicate that all related services may not be required for every child. *Id.*

defines related services as those supportive services "required to assist a handicapped child to benefit from special education."[158] Thus, under the Act, the school district in *Claudia K.* could be held financially responsible not only for the costs of nonmedical care, room, and board,[159] but also for the costs of any related service provided to Claudia at the residential placement.

Consequently, after determining that Claudia's placements were educational, the juvenile court was obligated to determine whether the treatment Claudia received could be classified as either nonmedical care or related services[160] within the purview of the EHA and its implementing regulations. This determination required the court to address one of the most frequently raised and controversial issues of compliance with the EHA: whether psychotherapy is a related service.[161] Finding that psychotherapy was a related service under both federal and state law, the juvenile court ordered the school district to assume costs for the psychotherapy Claudia received at Ridgeway and Riveredge Hospital.[162] Subsequently, the Illinois State Board of Education cautioned the supreme court that affirmance of this lower court finding would lead to the eventual bankruptcy of the state school system.[163] Despite the significant ramifications which might have resulted from a finding that psychotherapy is a related service under the EHA, the Illinois Supreme Court never reached this important issue.[164]

The controversy over whether psychotherapy constitutes a related service originates from ambiguities in the Act's definitions of related services.[165] While "psychotherapy" per se is not among the services enumerated in the EHA, it conceivably could be within the ambit of psychological, counseling, or medical services, all of which are designated as related services.[166] As defined

158. 20 U.S.C. § 1401(17) (1976).

159. Under the residential placement provision of the EHA, the educational agency is responsible for the costs of nonmedical care. 34 C.F.R. § 300.302 (1982). Similarly, under the free appropriate public education provision, the educational agency is liable for the costs of related services. *Id.* § 300.4. This provision further requires that related services be provided at public expense, under public supervision and direction, and without charge. *Id.* § 300.4(a).

160. *See supra* note 159.

161. For a discussion of this issue, see Rosenfeld, *supra* note 20, at AC 15-45; Stark, *supra* note 15, at 516-24; BRIEFING PAPER, *supra* note 8, at 17-21.

162. *In re* Claudia K., 3 EDUC. FOR THE HANDICAPPED L. REP. 552:501 (Ill. Cir. Ct. July 31, 1981) (order granting petition for mandamus and directing school district to assume costs for residential placement and psychotherapy).

163. Amicus Curiae Brief for the Illinois State Board of Education at 24, *In re* Claudia K., 91 Ill. 2d 469, 440 N.E.2d 78 (1982).

164. The dispositive issue in *Claudia K.* was whether the juvenile court properly granted the writ of mandamus against the school district. *See supra* notes 57-70.

165. The EHA merely lists examples of related services. *See* 20 U.S.C. § 1401(17) (1976). Furthermore, the implementing regulations define only those related services which are enumerated in the Act. *See* 34 C.F.R. § 300.13 (1982).

166. Although psychotherapy is not among those services enumerated under the Act's related services provision, the terms "psychological services," "medical services," and "counseling services" are listed in the statutory provision. *See* 20 U.S.C. § 1401(17) (1976). Moreover, the implementing regulations specifically define these terms. *See* 34 C.F.R. § 300.13(b)(2) (counseling services), (4) (medical services), (8) (psychological services) (1982).

by the Act's implementing regulations, the term "psychological services" refers to various procedures used to obtain psychological information from a child in order to develop the child's IEP.[167] These procedures include administering tests, interpreting test results, and consulting with the multidisciplinary team in planning the IEP.[168] The final product of such psychological services may be "planning and managing a program of psychological services," including "psychological counseling for children and parents."[169] Thus, while this provision refers to psychological counseling, it only obligates the educational agency to plan and manage psychological counseling, not to provide it. Moreover, the term "psychological counseling" is neither designated as a related service nor defined within the Act or its implementing regulations.

Counseling services are defined by federal regulations as services provided by qualified personnel including social workers and psychologists.[170] Although counseling services appear to encompass psychotherapy, there are two obstacles to reaching this conclusion. First, if psychotherapy is provided by a licensed physician, such as a psychiatrist, it may be categorized as a medical service[171] rather than a counseling service and, therefore, fall outside the scope of related services. Second, because psychotherapy has been widely identified as a medical service, it is arguable that if Congress had intended

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167. The regulations define the term "psychological services" to include the following:

(i) Administering psychological and educational tests, and other assessment procedures;
(ii) Interpreting assessment results;
(iii) Obtaining, integrating, and interpreting information about child behavior and conditions relating to learning.
(iv) Consulting with other staff members in planning school programs to meet the special needs of children as indicated by psychological tests, interviews, and behavioral evaluations; and
(v) Planning and managing a program of psychological services, including *psychological counseling* for children and parents.

34 C.F.R. § 300.13(b)(8)(i)-(v) (1982) (emphasis added). These regulations clearly emphasize the gathering of psychological information from and about the child in order to plan and manage a program of psychological counseling. Nevertheless, they completely fail to assign responsibility for the provision of such a program.

168. *See id.*

169. *Id.* § 300.14(b)(8)(v).

170. *Id.* § 300.14(b)(2). The regulations specifically designate services provided by "qualified social workers, psychologists, guidance counselors, or other qualified personnel" as counseling services. *Id.*

171. Medical services are distinguished from counseling services, in part, by the identity of the service provider. The regulations suggest that when a service is provided by a licensed physician, that service will not be classified as a counseling service; only nonmedical personnel can deliver counseling services. *Id.* Yet, under the regulations, not all services provided by a physician qualify as medical services. The definition of medical services focuses on both the identity of the service provider, a licensed physician, and the purpose of the service: "to determine a child's medically related handicapping condition which results in the child's need for special education and related services." *Id.* § 300.13(b)(4). This definition is consistent with the Act's limitation that medical services "shall be for diagnostic and evaluation purposes only." 20 U.S.C. § 1401(17) (1976).

to include psychotherapy under counseling services, it would have clearly indicated such an intent;[172] by failing to do so, Congress indicated that psychotherapy was not intended to be included as a counseling service. Both arguments have been raised by school districts attempting to escape the costs of psychotherapy administered to handicapped students in residential programs.[173]

Finally, under the EHA, medical services are confined to those services provided by a licensed physician, and limited to the purpose of diagnosis and evaluation.[174] Consequently, psychotherapy, which by definition is therapeutic rather than diagnostic, could not be considered a medical service.[175] Furthermore, if psychotherapy is provided by a licensed physician in a residential program, it is "medical" and, therefore, beyond the obligations imposed on the educational agency under the Act's residential placement provision which includes only room, board, and nonmedical care.[176]

A finding that psychotherapy does not fit comfortably under any of these provisions seems to contravene Congress's intent in enacting the EHA: to provide all handicapped children with a free appropriate public education.[177] Because all of the alternatives offered by the Act's provisions are problematic, it is necessary to look beyond the statute and to consider its various interpretations. One such interpretation was offered by the Office of Civil Rights (OCR), one of the federal regulatory agencies responsible for overseeing the EHA's implementation.[178] As early as 1979, OCR determined that psychotherapy was a psychological service and, therefore, a related service if its provision was necessary to enable a child to benefit from special education.[179] Subsequent OCR letters of finding have affirmed this position

172. *See* Rosenfeld, *supra* note 20, at AC 41-42.

173. *See, e.g.*, Papacoda v. Connecticut, 528 F. Supp. 68, 72 (D. Conn. 1981) (the defendants argued that psychotherapy was not a related service because the definition of such services excludes medical services that are not diagnostic or evaluative); *In re* "A" Family, ___ Mont. ___, ___, 602 P.2d 157, 165 (1979) (a school district asserted that psychotherapy was not a related cost in a severely emotionally disturbed child's residential placement).

174. *See* 20 U.S.C. § 1401(17) (1976) (implemented by 34 C.F.R. § 300.13(b)(4) (1982)).

175. *See, e.g.*, Papacoda v. Connecticut, 528 F. Supp. 68, 72 (D. Conn. 1981). The *Papacoda* court dismissed this argument as inconsistent with both the plain meaning of the EHA and the only case that had considered the issue. *Id.* Additionally, the court held that psychological services which are required to assist a handicapped child in benefiting from special education are not embraced within the excepted medical services; rather, they are related services which must be provided at no cost to the parents. *Id.* at 72 (citing *In re* "A" Family, ___ Mont. ___, ___, 602 P.2d 157, 165 (1979)).

176. *See* 34 C.F.R. § 300.302 (1982).

177. *See supra* note 1.

178. The Office of Civil Rights (OCR) has stated its position on psychotherapy clearly and consistently in letters of finding. In *Claudia K.*, the Illinois Supreme Court referred to the OCR letters as "letters of finding by a federal oversight agency which indicated that state regulations were not in compliance with federal guidelines." 91 Ill. 2d 469, 477, 440 N.E.2d 78, 81 (1982); *see also* Rosenfeld, *supra* note 20 at AC 21 (declaring that OCR generally has concluded that the cost of psychological services must be assumed by the educational agency).

179. *See, e.g.*, Letter from Office of Civil Rights to Connecticut Commissioner of Education (Oct. 17, 1979); Letter from Office of Civil Rights to Berkeley Unified School District (July 26, 1979).

and have stipulated further that the educational agency's failure to provide a child with necessary psychotherapeutic services violates the EHA.[180]

In Illinois, both state and federal courts have considered the psychotherapy issue. In *Gary B. v. Cronin,*[181] the plaintiffs, emotionally disturbed children, had to attend private residential schools because the Illinois public schools did not have appropriate special education facilities in which to place them. Injunctive relief was sought with respect to a rule, adopted by the Governor's Purchased Care Review Board, that excluded counseling and therapeutic services from being labeled related services to be provided at public expense.[182] The defendant, State Superintendant of Education, contended that any psychotherapy which might benefit the plaintiffs was related to their mental health, not to their educational needs.[183] The federal district court disagreed, holding that while psychotherapy may be related to mental health, it also may be required before a child can derive any benefit from education.[184] The court concluded that the Act's legislative history made it abundantly clear that if psychotherapy is part of a program at a residential placement recommended by the school district, it should be provided at public expense.[185]

Gary B. is consistent with other decisions rejecting the argument that psychotherapy is always a medical service.[186] Moreover, in *In re Special Education Placement of Steven Walker,*[187] the Illinois Court of Appeals for the First District disagreed with the defendants' assertion that psychotherapy received by a severely emotionally disturbed student in a residential school

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180. In a letter of finding issued to the Review Board in February 1980, OCR found that the state's refusal to finance counseling and therapeutic services violated the EHA. OCR concluded that there is a legal duty to provide psychiatric services when they are appropriate. *See* Letter from Office of Civil Rights to Illinois Governor's Purchased Care Review Board (Apr. 18, 1980); *see also* Letter from Office of Civil Rights to Rockford School District (Oct. 20, 1980) (failure to provide a child with psychotherapeutic services violates the EHA), *reprinted in* 3 EDUC. FOR THE HANDICAPPED L. REP. 257:173 (Supp. 38 Dec. 12, 1980); Letter from Office of Civil Rights to Simsbury Public Schools (June 16, 1980) (same), *reprinted in* 3 EDUC. FOR THE HANDICAPPED L. REP. 257:176 (Supp. 38 Dec. 12, 1980).

181. 542 F. Supp. 102 (N.D. Ill. 1982).

182. *Id.* at 106. The complaint in *Gary B.* alleged that Review Board Rule 3.21(c) excluded counseling and therapeutic services from being considered special education or related services which the state must provide, and that failure to provide these services violated both the EHA, by depriving the plaintiffs of a free appropriate public education, and the Illinois School Code. *Id.*; *see also* ILL. REV. STAT. ch. 122, §§ 14.1 to .01 (1977); Governor's Purchased Care Review Board Rule 3.21(c), *reprinted in* 3 Ill. Reg. 211, 212 (Oct. 19, 1979).

183. 542 F. Supp. at 117.

184. *Id.*

185. *Id.*

186. *See, e.g.*, Papacoda v. Connecticut, 528 F. Supp. 68, 72 (D. Conn. 1981) (psychotherapy is not embraced within the exception to medical services; rather, it is a psychological service); *In re* "A" Family, ___ Mont. ___, ___, 602 P.2d 157, 165 (1979) (psychotherapy is not regarded as a medical service for the purpose of determining related costs; rather, it is within the scope of psychological services which are related costs).

187. 107 Ill. App. 3d 1053, 438 N.E.2d 582 (1st Dist. 1982).

could not have been a related service within the meaning of the state rules and regulations.[188] The court held that the school's integrated treatment program, which consisted of specially designed instruction and supplemental services, including psychotherapy, fell within the EHA's definition of special education and related services.[189]

In *Claudia K.*, the school district articulated the following arguments: (1) Claudia was uneducable; (2) placement at a private residential psychiatric hospital was noneducational; and (3) because Claudia was incapable of benefiting from education and her placement was primarily noneducational, psychotherapy was not a related service. It is beyond dispute that Claudia was a handicapped child and, due to her actively suicidal condition, no appropriate, approved residential facility in Illinois would accept her for long-term placement. As a result, Claudia was receiving instruction at both Ridgeway and Riveredge Hospital; to benefit from such instruction, she required psychotherapy. Clearly, in Claudia's case, psychotherapy constituted a related service under the EHA.

To prevent the deleterious financial impact on the school system which might have resulted from a holding that psychotherapy is a related service, the Illinois Supreme Court could have: (1) limited its holding to the unique facts of the case; and (2) reversed and remanded the cause with instructions to apportion the costs of Claudia's psychotherapy among the school district and the other social service agencies.[190] Nevertheless, by disregarding this readily available opportunity to resolve the psychotherapy issue, the court failed both to provide any guidance for resolution of this issue, and to exert its judicial influence to prompt legislative or administrative action. This failure permits educational as well as other public agencies to continue exploiting the ambiguities of the Act's related services provisions in their attempts to escape responsibility for the provision of psychotherapy to students such as Claudia K.

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188. *Id.* at 1060, 438 N.E.2d at 587. The defendants in *Walker* contended that because the plaintiff received only mainstream instruction, rather than special education, the psychological support or psychotherapy he received at the residential program was not a related service under Rule 1.08a. That rule provides that related services include supportive services which are required to assist a handicapped child in benefiting from special education. Rules and Regulations to Govern the Administration and Operation of Special Education, art. I, Rule 1.08a, 6 Ill. Admin. Reg. 559-60 (Jan. 8, 1982). Such services include psychological services, counseling services, and medical services for diagnostic or evaluative purposes. *Id.* Thus, the Illinois definition of the term "related services," patterned after the EHA definition, lends itself to the same interpretative pitfalls. *See supra* note 8.

189. 107 Ill. App. 3d at 1061, 438 N.E.2d at 588.

190. *See, e.g.*, Curtis H. v. Boston Pub. Schools, 3 EDUC. FOR THE HANDICAPPED L. REP. 502:240 (Mass. SEA Dec. No. 4109 Feb. 20, 1981) (under the authority of an interagency agreement, the Department of Youth Services and the LEA were each responsible for 50% of the costs of a residential program which included counseling and psychotherapy).

CONCLUSION

Under the Education of the Handicapped Act, the primary responsibility for insuring that all handicapped, school-aged children receive a free appropriate public education lies squarely with the state educational agency. This mandate has placed a potentially insurmountable practical and financial burden on the state school system. To alleviate this burden, the educational agency has attempted to shift the costs of residential placements to other service agencies by classifying such placements as noneducational, and insisting that the care and treatment provided in the residential program, particularly psychotherapy, is not a related service under the EHA.

Interagency cooperation in the provision of residential placements for handicapped children will be unattainable unless each human service agency is legally obligated to assume its equitable portion of placement costs. While any legal obligation should be instituted by the state legislature, it is the state judiciary's enforcement of the Act's provisions which could prompt this legislative action. *In re Claudia K.* provided the Illinois Supreme Court with an opportunity to address several difficult issues arising from local implementation of the EHA. A decision on the merits might have motivated the state legislature to act, if only in response to pressure exerted on it by the agencies that could have been held liable for the costs of Claudia's care and treatment. It is incumbent upon the Illinois Supreme Court to resolve the intrinsic ambiguities in the EHA's language, and to articulate a standard for apportioning costs among various service agencies. Only if such action is taken can Illinois fulfill its federal obligation to provide all handicapped children with a free appropriate public education.

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