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School Discipline And The Handicapped Child

SCHOOL DISCIPLINE AND THE HANDICAPPED CHILD

Over the past quarter-century American society has witnessed a revolution in the treatment of the mentally and physically handicapped.[1] Historically the objects of fear, superstition, and segregation from the mainstream of community life,[2] handicapped citizens only recently have begun to demand and receive the civil rights to which they are entitled.[3] The American educational system mirrored society's insensitivity by denying handicapped children schooling suited to their needs.[4] Although

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[1] *See* Burgdorf & Burgdorf, *A History of Unequal Treatment: The Qualifications of Handicapped Persons As a "Suspect Class" Under the Equal Protection Clause*, 15 SANTA CLARA LAW. 855, 855 (1975) (handicapped have recently begun to receive civil rights) [hereinafter cited as Burgdorf & Burgdorf]. The Education For All Handicapped Children Act of 1975 (EHA) defines handicapped children as those children suffering from mental retardation, hearing, speech, or visual impairment, emotional disturbance, orthopedic disability, or other physical or mental conditions requiring special treatment and education. 20 U.S.C. § 1401(1) (1976). Estimates of the number of handicapped children vary widely. *See* H. TURNBULL, LEGAL ASPECTS OF EDUCATING THE DEVELOPMENTALLY DISABLED 7 (1975) [hereinafter cited as TURNBULL]; Kirp, Buss & Kuriloff, *Legal Reform of Special Education: Empirical Studies and Procedural Reforms*, 62 CAL. L. REV. 40, 41 (1974) (estimates of number of handicapped students vary between 8-35% of school population). The disparity in the estimates of the number of handicapped children results from the lack of consensus on the definitions of various handicaps and the variety of potentially handicapping conditions. *See* TURNBULL, *supra*, at 8; 121 CONG. REC. 25531 (1975) (remarks of Rep. Quie) (learning disabilities often undefinable). Recent calculations estimate the number of students needing special education at approximately eight million. *See* HUMAN ADVOCACY AND P.L. 94-142; THE EDUCATOR'S ROLE VII (L. Buscaglia & E. Williams eds. 1979).

[2] *See* Krass, *The Right to Public Education for Handicapped Children: A Primer for the New Advocate*, 1976 U. ILL. L.F. 1016, 1018 (1976) (handicapped historically feared and abused) [hereinafter cited as Krass]. *See generally* S. BRAKEL & R. ROCK, THE MENTALLY DISABLED AND THE LAW 1-14 (1971) (tracing unequal treatment of handicapped).

[3] *See* Pittenger & Kuriloff, *Educating the Handicapped: Reforming A Radical Law*, 66 THE PUB. INTEREST 72, 73-74 (1982) (handicapped civil rights movement began during 1960's) [hereinafter cited as Pittenger & Kuriloff]. State statutes have prevented the mentally handicapped from exercising many basic civil rights. *See, e.g.*, ALA. CODE tit. 9, § 43 (1958) (denying mentally handicapped right to make contracts); COLO. REV. STATS. ANN. § 71-1-21 (1973) (same); MONT. REV. CODE ANN. § 48-104 (1947) (forbidding marriage of mentally ill); OHIO REV. CODE ANN. § 4507.08(B), (C) (Page 1973) (denying driver's license to mentally handicapped). *See generally* Burgdorf & Burgdorf, *supra* note 1, at 861-63. Architectural barriers have prevented the physically handicapped from utilizing modern transportation facilities. *See id.* at 866 (physically handicapped often unable to use public transportation). Some city ordinances forbade the deformed from even appearing in public. *See, e.g.*, CHICAGO ILL. MUN. CODE § 36-34 (1966) (repealed 1974) (fining "unsightly" for appearing in public); COLUMBUS, OHIO GEN. OFFENSE CODE § 2387.04 (1972) (same). One commentator considers the physically handicapped America's most oppressed minority. Sorkin, *Equal Access to Equal Justice: A Civil Right for the Physically Handicapped*, CASE & COMMENT Vol. 78, No. 2 (1973). *See generally* Note, *Abroad in the Land: Legal Strategies to Effectuate the Rights of the Physically Disabled*, 61 GEO. L.J. 1501, 1509 (1973).

[4] *See* Burgdorf & Burgdorf, *supra* note 1, at 870-76 (tracing history of education of handicapped).

education is essential to the achievement of the personal potential of the handicapped,[5] those afflicted with mental disabilities were denied access to the public schools.[6] Early special education[7] programs for the handicapped often merely amounted to removing handicapped children from the regular classroom and placing them in ineffective and poorly financed programs.[8] With the emergence of the civil rights movement seeking equal opportunity for all citizens, the handicapped began to demand proper treatment from society in general and from the education system in particular.[9] Federal statutes now encourage appropriate public education for the handicapped.[10] Problems continue, however, in integrating handicapped children into the education system as some areas of school policy, such as student discipline, remain unclear in relation to the handicapped.[11]

Although the Supreme Court has noted the importance of education,[12] the Court has not recognized any constitutional right to education.[13] The Supreme Court, however, has required states to provide

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[5] *See* Blakely, *Judical and Legislative Attitudes Toward the Right to an Equal Education for the Handicapped*, 40 OHIO ST. L.J. 603, 607 (1979) (mentally handicapped often need special training to become productive citizens).

[6] *See, e.g.*, Beattie v. Board of Educ., 169 Wis. 231, _____, 172 N.W.2d 153, 154-55 (1919) (excluding child with cerebral palsy from school); N.Y. EDUC. LAW § 3208 (Supp. 1974) (excluding those "unable to profit" from education); N.C. GEN. STAT. § 115-116 (1975) (same).

[7] Under § 1401(16) of the EHA, special education consists of designing school programs to meet the unique needs of the individual child. *See* 20 U.S.C. § 1401(16) (1976). Special education programs began around the beginning of the 20th century. *See* Record at 10, Pennsylvania Ass'n for Retarded Children (PARC) v. Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971) (testimony of expert, Ignacy Goldberg) (tracing early history of special education). By 1974, approximately one-half of the handicapped students were receiving special education. *See* Marcroff, *Hopes Rises on Education of Handicapped Students*, N.Y. Times, Apr. 21, 1974, at 1, col. 1.

[8] *See* Pechter, *Exceptional Law or Law With Exceptions*, 4 AMICUS 68, 68 (1979) (handicapped children were often "dumped" in ineffectual programs).

[9] *See* Pittenger & Kuriloff, *supra* note 3, at 73-74 (handicapped began demanding equal treatment during civil rights movements of 1960's).

[10] *See* Pub. L. No. 94-142, 89 Stat. 773 (codified at 20 U.S.C. §§ 1401-1461 (1976)) (Education For All Handicapped Children Act of 1975); text accompanying notes 38-81 *infra* (federal statutes on education of handicapped).

[11] *See* text accompanying notes 84-120 *infra* (problems in disciplining handicapped children).

[12] *See, e.g.*, Goss v. Lopez, 419 U.S. 565, 573-74 (1975) (right to education property interest protectable by courts); Brown v. Board of Educ., 347 U.S. 483, 493 (1954) (education essential to child's later success); Meyer v. Nebraska, 262 U.S. 390, 400 (1923) (education of "supreme importance").

[13] *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 35 (1973) (education not fundamental right created by Constitution). Although the *Rodriguez* Court found education was not a basic right guaranteed by the Constitution, the Court failed to decide whether some minimal level of education was essential to the exercise of other civil rights. *See id.* at 37 (some education necessary to meaningful exercise of right to vote). Arguably, the complete exclusion of handicapped children from public education would prove unconstitutional under *Rodriguez*. *See* Levin, *The Courts, Congress, and Educational Adequacy: The Equal Protection Predicament*, 39 MD. L. REV. 187, 217 (1979) (total educational exclusion of handicapped children might violate 14th amendment under *Rodriguez*).

education, if offered to any students, on an equal basis to all children.[14] During the early 1970's, parents of handicapped children began challenging the denial of equal educational opportunity to the disabled.[15] In *Pennsylvania Association for Retarded Children (PARC) v. Pennsylvania*,[16] parents of mentally retarded children filed a class action alleging that state education statutes[17] denied mentally handicapped students equal protection of the law.[18] The statutes labeled mentally retarded children "uneducable" and, thus, excluded those students from public schools.[19] The *PARC* plaintiffs also alleged that the state denied mentally handicapped children due process of the law by concluding that the children were uneducable without providing the children proper notice or opportunity to be heard.[20] Fearing the ramifications of a full constitutional decision and possible damage suits,[21] all but one of the *PARC* defendants entered into a consent decree that embodied the major demands of the plaintiffs.[22] When the non-consenting defendant in *PARC* later sought an injunction challenging the federal court's jurisdiction, the court found sufficient constitutional claims to support a federal cause of action.[23] The *PARC* court recognized that due process arguably requires a proper hearing before a state can exclude a mentally handicapped child from public schools.[24] Furthermore, the court questioned whether the state

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[14] *See* Brown v. Board of Educ., 347 U.S. 483, 493 (1954) (requiring equal educational opportunity if states offer public schooling). The *Brown* decision ruled racial segregation in public education unconstitutional but did not address specifically the rights of the handicapped. *Id.* Subsequent to *Brown*, some courts construed the decision to apply to handicapped children. *See* Mills v. Board of Educ., 348 F. Supp. 866, 874-75 (D.D.C. 1972) (*Brown* requires equal education for handicapped); Pennsylvania Ass'n for Retarded Children (PARC) v. Pennsylvania, 343 F. Supp. 279, 296-97 (E.D. Pa. 1972) (same).

[15] *See* text accompanying notes 16-35 *infra* (early cases seeking equal education for mentally handicapped).

[16] 334 F. Supp. 1257 (E.D. Pa. 1971), *modified*, 343 F. Supp. 279 (E.D. Pa. 1972).

[17] PA. STAT. ANN. tit. 24, §§ 13-1330, 1375 (Purdon Supp. 1978-79) (excluding "uneducable" from public education). The statutes challenged in *PARC* specifically excluded any person who had not reached a mental age of five years from attending public schools. *Id.* § 1304.

[18] PARC v. Pennsylvania, 334 F. Supp. 1257, 1258 (E.D. Pa. 1971). The equal protection clause of the fourteenth amendment provides in part, "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

[19] *See* note 17 *supra* (state education statutes at issue in *PARC*).

[20] 334 F. Supp. at 1258.

[21] *See* Note, *The Education for All Handicapped Children Act of 1975: In Need of An Advocate*, 19 WASHBURN L.J. 312, 314 (1980) (*PARC* defendants capitulated to avoid full litigation and potential damage suits) [hereinafter cited as *Advocate*].

[22] 334 F. Supp. at 1248-69 (consent decree). The *PARC* consent decree required the state to place each mentally handicapped child in a free educational program designed to meet the individual student's needs. *Id.* at 1260. The *PARC* court mandated full due process hearings before special hearing officers preceding the educational placement of any mentally retarded child. *Id.* at 1266.

[23] 343 F. Supp. 279, 295 (E.D. Pa. 1972), *modifying*, 334 F. Supp. 1257 (E.D. Pa. 1971) (acknowledging constitutional claims of *PARC* plaintiffs).

[24] *Id.* at 293-95; *see* Wisconsin v. Constantineau, 400 U.S. 433, 436 (1971) (due process requires hearing before posting of drunkard's name at liquor store).

had a rational basis for providing education to some children while denying the opportunity to the mentally handicapped, thereby positing an arguable equal protection claim.[25] The court thus enjoined the state from continuing to exclude mentally retarded children from public education.[26]

Soon after the *PARC* decision, a District of Columbia action presented an opportunity for the further litigation of the constitutional issues regarding the exclusion of the mentally handicapped from public education. In *Mills v. Board of Education*,[27] the plaintiff-students sought a declaration of their educational rights and an injunction compelling the defendant school system to provide appropriate programs for mentally handicapped children.[28] The *Mills* court granted the plaintiffs' motion for summary judgment after finding that a District of Columbia statute requiring school attendance[29] presupposed equal educational opportunities for all pupils regardless of any handicaps.[30] The *Mills* opinion held that the equal protection aspects of the fifth amendment, applicable to the federally controlled District of Columbia, require that all students receive a publicly supported education if the government undertakes the

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[25] 343 F. Supp. at 297. The Supreme Court has recognized two basic standards for evaluating equal protection claims. If a governmental classification relies on suspect criteria, such as race, or infringes on fundamental liberties, the case deserves strict judicial scrutiny. *See* United States v. Carolene Prod. Co., 304 U.S. 144, 152 n.4 (1938). Under strict scrutiny, the government must show that a compelling state interest demands the suspect classification and that no alternative means exist that adequately reach the desired goal. *See In re* Griffiths, 413 U.S. 717, 721-22 (1973); Kramer v. Union Free School Dist., 395 U.S. 621, 627 (1969); McLaughlin v. Florida, 379 U.S. 184, 196 (1964). Classifications receiving strict scrutiny seldom meet judicial approval. *See* Korematsu v. United States, 323 U.S. 214, 216 (1944) (racial classifications allowed only for urgent national concerns). Arguably, the handicapped meet the Supreme Court's definition of a suspect class. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (suspect class burdened by disabilities, history of unequal treatment, or political powerlessness). One state supreme court specifically has found the handicapped to be a suspect class. *In re* G.H., 218 N.W.2d 441, 446-47 (N.D. 1974).

If a governmental classification does not burden a suspect class or infringe on a fundamental liberty, the courts only will require that the challenged classification bear a "rational relation" to a legitimate goal. McGowan v. Maryland, 366 U.S. 420, 425-26 (1961). Government actions will pass the rational relation test if any possible justification exists for the challenged classification. *Id.* at 426.

[26] 343 F. Supp. at 302-03; *see* note 93 *infra* (requirements for preliminary injunction).

[27] 348 F. Supp. 866 (D.D.C. 1972).

[28] *Id.* at 868.

[29] D.C. CODE ANN. §§ 31-201 to -203 (1981). The District of Columbia school laws excluded from the public schools those handicapped children unable to profit from attendance unless the child could benefit from an individualized program of special education. *Id.* Prior to the *Mills* decision, the District of Columbia excluded many handicapped children from public schools because of an insufficient number of special education classes. *See* Miller & Miller, *The Handicapped Child's Civil Right as it Relates to the "Least Restrictive Environment" and Appropriate Mainstreaming*, 54 IND. L.J. 1, 12 n.36 (1978) (background to *Mills*) [hereinafter cited as Miller & Miller].

[30] 348 F. Supp. at 874.

education of any child.[31] Moreover, the district court recognized that due process requires that a full and fair hearing precede exclusion from or placement in a special education program.[32] The *Mills* court also noted that the District of Columbia Board of Education had violated the applicable state statutes and the Board's own regulations by failing to provide specialized education for handicapped students.[33] The court noted that the high cost of special education did not absolve the government of its responsibility to educate handicapped children or affect the plaintiff-students' constitutional rights.[34] In addition, the *Mills* court expressed a preference for educating handicapped children within the regular classroom whenever practicable.[35]

The impact of the *Mills* and *PARC* decisions accelerated the trend of increasing federal involvement in the special education field.[36] Although the federal government traditionally has viewed education as a matter for state and local control,[37] Congress has enacted a number of statutes involving the federal government in local special education programs.[38] In 1965, Congress passed the Elementary and Secondary Education Act[39] that announced a commitment to aid in the establishment of programs

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[31] *Id.* at 875; *see* text accompanying note 27 *supra* (equal protection as applied to *PARC*).

[32] 348 F. Supp. at 875.

[33] *Id.* at 874.

[34] *Id.* at 876. Congress has estimated that the education of a handicapped child costs approximately twice the amount expended on a non-handicapped child. *See* S. REP. No. 168, 168, 94th Cong., 1st Sess. 2, *reprinted in* [1975] U.S. CODE CONG. & AD. NEWS 1425, 1439 (relative costs of special education).

[35] 348 F. Supp. at 880. The practice of educating handicapped children within the regular classroom is known as "mainstreaming." *Advocate, supra* note 21, at 324. Integrating the handicapped child into the regular classroom is considered important to the social and educational development of handicapped children. *See* Note, *The Education For All Handicapped Children Act: Opening the Schoolhouse Door*, 6 N.Y.U. REV. L. & SOC. CH. 43, 51 (1976) (importance of mainstreaming) [hereinafter cited as *Opening the Schoolhouse Door*].

[36] *See* Miller & Miller, *supra* note 29, at 14 (*PARC* and *Mills* led to increased federal involvement in special education). Congress read the *Mills* and *PARC* decisions as recognizing a constitutional right to equal educational opportunity for the handicapped. *See* Act of Nov. 29, 1975, Pub. L. No. 94-142 § 3(b)(9), 89 Stat. 775 ("Statement of Findings and Purpose") (equal protection demands federal assistance to special education); Comment, *The Least Restrictive Environment Section of the Education for All Handicapped Children Act of 1975: A Legislative History and an Analysis*, 13 GONZ. L. REV. 717, 751 (1978) (Congress believed *PARC* and *Mills* required equal education for handicapped) [hereinafter cited as *Least Restrictive Environment*].

[37] *See* Epperson v. Arkansas, 393 U.S. 97, 104 (1968) (education a local concern); Note, *Enforcing the Right to an "Appropriate" Education: The Education For All Handicapped Children Act of 1975*, 92 HARV. L. REV. 1103, 1109 (1979) (education properly a local concern) [hereinafter cited as *Enforcing the Right*]. *See also* Wisconsin v. Yoder, 406 U.S. 205, 213 (1972) (education primary state function).

[38] *See* text accompanying notes 39-70 *infra* (evolution of federal law).

[39] Pub. L. No. 89-10, 79 Stat. 27 (codified at 20 U.S.C. §§ 236-244 (1965)).

for handicapped children deprived of an appropriate education.[40] The addition of Title VI to the Act in 1966[41] guaranteed federal assistance to the states in the development of programs for handicapped children.[42] A separate Education of Handicapped Children Act,[43] enacted in 1970, replaced previous federal law in the special education field. The evolution of federal law on the education of the handicapped continued with the Education of the Handicapped Amendments of 1974[44] and culminated in the Education For All Handicapped Children Act of 1975 (EHA).[45] The EHA announced a national policy seeking an appropriate education for all handicapped children.[46]

Under the EHA, Congress provides funds to subsidize special education in states meeting qualification requirements.[47] To qualify for funding under the EHA, a state must show that it maintains a policy of providing a free and appropriate public education to all handicapped children[48] and a comprehensive plan for the implementation of the policies that the EHA embodies.[49] The state plans must detail procedures to assure that handicapped children are, to the maximum extent practicable, educated

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[40] *Id.* § 201 ("Declaration of Policy").

[41] Pub. L. No. 89-750, § 161, 80 Stat. 1204 (codified at 20 U.S.C. §§ 1201-1213 (1966) (amending P.L. 89-10, 79 Stat. 27 (1965)).

[42] *Id.*

[43] Pub. L. No. 91-230, §§ 601-662, 84 Stat. 175-88 (codified at 20 U.S.C. §§ 1401-1461 (1970) (amending P. L. No. 89-750, 80 Stat. 1204 (1966)). The Education of Handicapped Children Act concentrated on the training of special education personnel and acquisition of proper resources. *Id.*

[44] Pub. L. No. 93-380, §§ 611-621, 88 Stat. 579-585 (codified at 20 U.S.C. §§ 1401-1461 (Supp. 1975) (amending 20 U.S.C. §§ 1401-1461 (1970)). Congress perceived the Education of the Handicapped Amendments of 1974 (EHA of 1974) as a temporary measure to subsidize special education until passage of more comprehensive legislation. *See* 120 Cong. Rec. 15,269, 15,270, 15,273, 15,276 (1974) (remarks of Sens. Mathias, Williams, Humphrey, & Kennedy respectively) (EHA of 1974 needed until passage of stronger bill); Pittenger & Kuriloff, *supra* note 3, at 82 (EHA of 1974 stop-gap measure). The EHA of 1974 provided state education systems grants of $8.75 for each student enrolled in handicapped education programs. 20 U.S.C. § 1411 (effective through September 30, 1977). The Education of the Handicapped Amendments mandated basic due process protections in connection with special education placements. *Id.* § 1413(13) (effective through September 30, 1977). *See generally Least Restrictive Environment, supra* note 36 at 763-68 (legislative history of EHA of 1974).

[45] Pub. L. No. 94-142, 89 Stat. 773 (codified at 20 U.S.C. §§ 1401-1461 (1976)). *See generally Least Restrictive Environment, supra* note 36, at 724-63 (legislative history of P.L. 94-142).

[46] Act of Nov. 29, 1975, Pub. L. No. 94-142 § 3(c), 89 Stat. 775 ("Statement of Findings and Purpose") (national policy to provide appropriate education to handicapped).

[47] 20 U.S.C. § 1411(a) (1976). States qualifying under the EHA receive a percentage of the average cost of educating a handicapped child multiplied by the number of children enrolled in special education programs in the state. *Id.* States may receive funds to supplement the educational costs of up to 12% of the school population. *Id.* § 1411(a)(5)(A)(1). State education systems must expend 25% of the federal funds received to provide direct services to handicapped students and to develop personal and other resources. *Id.* § 1411(c)(2)(A)(ii). Local education agencies receive the remainder of the funds allocated under the EHA. *Id.* § 1411(d).

[48] *Id.* § 1412(1).

[49] *Id.* § 1412(2).

with non-handicapped children.[50] To receive EHA funding, the state also must demonstrate that, as part of the state education plan, testing and placement procedures are not racially or culturally biased.[51] Once identified, a handicapped child must receive an individualized education program (IEP) prepared after consultation between school officials and the affected child's parents.[52] Special education teachers review and revise each student's IEP annually.[53]

After state and local education agencies qualify for funding under the EHA, the Act requires that the agencies adopt procedural safeguards to protect the rights of handicapped children and their parents.[54] Parents may examine all relevant records[55] and can obtain an independent evaluation of their child's educational needs.[56] Moreover,

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[50] *Id.* § 1412(5)(B). Mainstreaming handicapped and non-handicapped children in the same classroom has significant benefits for the children involved. *See* NATIONAL ADVISORY COUNCIL ON EDUCATION PROFESSIONS DEVELOPMENT, MAINSTREAMING: HELPING TEACHERS MEET THE CHALLENGE 18-19 (1976) (mainstreaming sensitizes non-handicapped children to plight of handicapped students); note 35 *supra* (benefits of mainstreaming to handicapped students). Mainstreaming handicapped children may impose significant burdens on non-specialist teachers, however. *See Opening the Schoolhouse Door*, *supra* note 35, at 53 (teachers unprepared to deal with handicapped children).

[51] 20 U.S.C. § 1412(5)(C) (1976). Observers have noted that biased evaluation procedures often misclassify males and minority students as mentally handicapped. Kirp, Buss & Kuriloff, *Legal Reform of Special Education: Empirical Studies and Procedural Proposals*, 62 CAL. L. REV. 40, 44, 50 (1974). Misclassification can have serious consequences for the child denied or unnecessarily placed in special education. *See* Note, *Legal Remedies for the Misclassification or Wrongful Placement of Educationally Handicapped Children*, 14 COLUM. J.L. & SOC. CH. 389, 398-401 (1979) (misclassification may lead to stigmatization, poor academic performance, and diminished future earning capability) [hereinafter cited as *Misclassification*]. In order to avoid misclassification the EHA forbids the use of any single evaluation device as the sole criterion for educational placement. 20 U.S.C. § 1412(5)(C) (1976); *see* Larry P. v. Riles, 343 F. Supp. 1306, 1313-14 (N.D. Cal. 1972), *aff'd*, 502 F.2d 963 (9th Cir. 1974) (sole use of IQ test for special education placement racially discriminatory).

[52] 20 U.S.C. § 1412(4) (1976). The individualized education program (IEP) must detail the child's current development, appropriate classroom placement, short and long term educational goals, as well as appropriate means for evaluating the child's progress. 34 C.F.R. § 300.346 (1981). Teachers prepare IEP's after consultation between school representatives, the parents of the handicapped child, and, if appropriate, the child involved. *Id.* § 300.344. Despite the ability to participate in planning decisions, parents of handicapped children often cannot provide meaningful input because of lack of expertise or deference to professional educators. *See Enforcing the Right*, *supra* note 37, at 1111. Teachers are not liable for a child's failure to reach IEP goals. *See* 34 C.F.R. § 300.349 (1981) (IEP guidelines). The IEP requirement recognizes the unique needs of each handicapped child although adding an onerous burden of paperwork on individual teachers. *See* Pittenger & Kuriloff, *supra* note 3, at 94-95 (problems created by IEP's).

[53] 20 U.S.C. § 1414(a)(5) (1976).

[54] *Id.* § 1415.

[55] *Id.* § 1415(b)(1)(A). If the parents of a handicapped child are unknown or the child is a ward of the state, an independent surrogate represents the child's interests. *Id.* § 1415(b)(1)(B).

[56] *Id.* § 1415(b)(1)(A). Parents seeking an independent educational evaluation of their children must bear the costs of the evaluation if a subsequent due process hearing finds the original evaluation appropriate. 34 C.F.R. § 300.503(b) (1981).

parents or guardians of handicapped children must receive prior written notice whenever an educational agency proposes or refuses to change the evaluation or placement of a child.[57] In addition, an impartial due process hearing before an independent hearing officer follows any complaint alleging a violation of the provisions of the EHA.[58] At any hearing conducted pursuant to the EHA, parties receive the right to advice of counsel and educational specialists, the right to present evidence, and the right to cross-examine and compel the attendence of witnesses.[59] The education hearing is conducted on the record, thus providing a transcript if the case is appealed to a reviewing body.[60]

Any party aggrieved by the outcome of a local hearing may appeal to the state education agency for a review of the decision.[61] The state review examines the local hearing record and procedural history and may receive additional evidence or argument.[62] The hearing officer conducting the state review makes an independent decision, unaffected by the rulings of the local hearing.[63] The decision at the state level is final unless a party to the controversy appeals the case for judicial consideration.[64]

Any aggrieved party may bring a civil action challenging the findings of the hearings conducted at the state or local level.[65] State and federal courts have concurrent jurisdiction to hear complaints under the EHA.[66] The EHA empowers courts to grant full de novo review of educational hearings and decide the merits of the case by a preponderance of the

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[57] 20 U.S.C. § 1414(b)(1)(C) (1976).

[58] *Id.* § 1415(a)(2). The officer conducting the hearing must not be an employee of the educational unit responsible for the education of the child. *Id.*

[59] *Id.* § 1415(d); *see* Eberle v. Board of Pub. Educ. of School Dist., 444 F. Supp. 41, 43 (D. Pa. 1977), *aff'd*, 582 F.2d 1274 (3d Cir. 1978) (states may utilize more rigorous due process procedures than required by EHA).

[60] 20 U.S.C. § 1415(d)(3) (1976); *see* text accompanying notes 61-70 *infra* (EHA appeals procedures). Although the EHA specifically does not allocate the burden of persuasion, policy considerations recognizing the relative expertise and resources of the parties favor placing the burden on the school authorities. *See Misclassification, supra* note 51, at 422-28 (suggested burden of proof at local education hearings).

[61] 20 U.S.C. § 1415(c) (1976).

[62] *Id.*; 34 C.F.R. § 300.510 (1981). *See Enforcing the Right, supra* note 37, at 1107 (state should give full de novo review of local proceedings). State review, away from local pressures, may result in fairer results than the local due process hearing. *See* Diamond, *Survey of New York Education Law 1977*, 29 SYRACUSE L. REV. 103, 144 (1978) (state review more objective and knowledgeable).

[63] 20 U.S.C. § 1415(c) (1976).

[64] *Id.* § 1415(e)(1).

[65] *Id.* § 1415(e).

[66] *Id.* § 1415(e)(2). Some commentators feel that the grant of concurrent jurisdiction under the EHA encourages forum shopping by parties seeking the court most amenable to EHA claims. *See* Pittenger & Kuriloff, *supra* note 3, at 94 (proposing abolition of concurring jurisdiction under EHA).

evidence.[67] No changes in a child's educational placement may occur during the pendency of any proceedings authorized by the EHA unless all parties involved acquiesce.[68] If a handicapped child seeks initial admission to a public school, the child shall, with parental consent, be placed in the regular program during the pendency of any EHA proceedings.[69] Courts have required parents to exhaust the preliminary administrative remedies prior to bringing a judicial action under the EHA.[70]

Other federal laws also protect the rights of handicapped children. Section 794 of the Rehabilitation Act of 1973 (section 794),[71] prohibits discrimination against any otherwise qualified individual in connection with any program receiving federal funding, if the discrimination results solely from the individual's handicap.[72] In view of the pervasiveness of federal aid to education, section 794 reaches every public school system in the United States.[73] Although the Supreme Court has limited the application of section 794 to instances in which the handicapped individual is fully capable of functioning in the program in spite of the handicap,[74] the section supplements the protections that the EHA provides.[75] While

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[67] 20 U.S.C. § 1415(e)(2) (1976); *see* S. REP. No. 455, 94th Cong., 1st Sess. 47-50 (1975), *reprinted in* [1975] U.S. CODE CONG. & AD. NEWS 1480, 1480, 1500-02 (rejecting limited judicial review of hearings under the EHA).

[68] 20 U.S.C. § 1415(e)(3) (1976). One observer believes that some parents intentionally delay EHA proceedings in order to postpone changes in their children's educational placement. *See* Jacobs, *Hidden Damages, Hidden Costs*, 4 AMICUS 86, 87 (1979).

[69] 20 U.S.C. § 1415(e) (1976).

[70] *E.g.*, H. R. v. Hornbeck, 524 F. Supp. 215, 218 (D. Md. 1981); Monahan v. Nebraska, 491 F. Supp. 1074, 1086 (D. Neb. 1980). Plaintiffs may bring civil actions under the EHA without pursuing local or state hearings if the hearings would prove ineffectual. *See* H.R. v. Hornbeck, 524 F. Supp. 215, 218 (D. Md. 1981) (parents need not pursue futile administrative remedies); Sherry v. New York State Educ. Dept., 479 F. Supp. 1328, 1333 (W.D.N.Y. 1979) (biased hearing officers render administrative remedies futile).

[71] 29 U.S.C. § 794 (Supp. 1979).

[72] *Id.* The Rehabilitation Act is modeled after Title VI of the Civil Rights Act of 1964, which forbids racial discrimination by any program receiving federal assistance. Baugh, *The Federal Legislation On Equal Educational Opportunity For The Handicapped*, 15 IDAHO L. REV. 65, 74 (1978) (§ 794 extends civil rights protection to handicapped) [hereinafter cited as Baugh]; *see* 42 U.S.C. § 2000(d) (1976) (forbidding racial discrimination in federally funded programs).

[73] Gurmankin v. Costanzo, 411 F. Supp. 982, 989 (E.D. Pa. 1976), *aff'd*, 556 F.2d 184 (3d Cir. 1977), *cert. denied*, 450 U.S. 923 (1981) (§ 794 applies to local school districts); *see* Baugh, *supra* note 72, at 73 (§ 794 reaches every school district).

[74] Southeastern Community College v. Davis, 442 U.S. 397, 405-06 (1979). In *Davis*, the Supreme Court upheld the denial of admission of a hearing impaired woman to a federally subsidized nurse training program. *Id.* at 400-01. The *Davis* Court ruled that § 794 does not require any substantial modification of standards solely to benefit handicapped individuals. *Id.* at 413. The Court interpreted § 794 only to prohibit discrimination based solely on irrational prejudice against the handicapped. *Id.* at 405.

[75] *See* Riley v. Ambach, 508 F. Supp. 1222, 1227 (E.D.N.Y. 1980) (EHA and § 794 have same features and goals in connection with public education of handicapped children).

section 794 does not grant specifically a private right of action, a number of federal courts have implied such a cause of action.[76]

Parents alleging improper education of their handicapped children also may bring suit under section 1983 of the federal civil rights statutes.[77] Since section 1983 is a purely remedial statute, conferring no independent rights,[78] plaintiffs must allege a violation of a specific federal right in order to bring a general civil rights action. Although the courts remain divided on the necessity of exhausting administrative remedies prior to the initiation of a section 1983 action,[79] one federal court has ruled that a plaintiff seeking redress of a violation of the EHA could bring a civil rights action without appealing a local hearing decision to state authorities.[80] Nevertheless, school districts may be immune from liability under federal civil rights legislation thus limiting the availability of section 1983 relief to parents alleging a denial of equal educational opportunity to handicapped children.[81]

In response to the growing awareness of the educational needs of handicapped children, the federal government has attempted to enact comprehensive legislation to ensure appropriate education for disabled students.[82] Many areas of special education law remain unsettled, however, because of the vagueness of the EHA and the absence of applicable case law.[83] The ability of school authorities to suspend or expel

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[76] *See, e.g.*, Adashunas v. Negley, 626 F.2d 600, 603 (7th Cir. 1980); United Handicapped Federation v. Andre, 558 F.2d 413, 415 (8th Cir. 1977); Kampmeir v. Nyquist, 553 F.2d 296, 299 (2d Cir. 1977). *But see* Trageser v. Libbie Rehabilitation Center, Inc., 462 F. Supp. 424, 426 (E.D. Va. 1977) (mem.), *aff'd*, 590 F.2d 87 (4th Cir. 1978), *cert. denied*, 442 U.S. 947 (1979) (no congressional intent to grant private right of action against private employer). *See also* Cort v. Ash, 422 U.S. 66, 78 (1975) (test for implying private right of action).

[77] *See* 42 U.S.C. § 1983 (1976) (authorizing civil actions against any person denying civil rights of another under color of state law).

[78] *See* McGowen v. Hahn, No. 78-C-4233 (N.D. Ill. July 27, 1981) (§ 1983 purely remedial statute).

[79] *Compare* Patsy v. Florida Int'l Univ., 634 F.2d 900, 902-03 (5th Cir. 1981) (court may require exhaustion of administrative remedies prior to § 1983 action) *and* Adams v. City of Chicago, 491 F. Supp. 1257, 1260 (N.D. Ill. 1980) (same) *with* Fialkowski v. Shapp, 405 F. Supp. 946, 957 (E.D. Pa. 1975) (plaintiff need not exhaust administrative remedies prior to § 1983 action).

[80] Fialkowski v. Shapp, 405 F. Supp. 946, 956 (E.D. Pa. 1975). In *Fialkowski*, plaintiff's parents did not appeal a local hearing board decision to the state education authorities before bringing a civil action under the EHA. *Id.*

[81] *See* Memphis Am. Fed'n of Teachers v. Board of Educ., 534 F.2d 699, 702 (6th Cir. 1976) (school district not "person" liable under § 1983); Mims v. Board of Educ., 523 F.2d 711, 716 (7th Cir. 1975) (same); Huntley v. North Carolina State Bd. of Educ., 493 F.2d 1016, 1017 n.2 (4th Cir. 1974) (same). *But see* Keckeisen v. Independent School Dist., 509 F.2d 1062, 1064 (8th Cir.), *cert. denied*, 423 U.S. 833 (1975) (school district "person" liable under § 1983).

[82] *See* text accompanying notes 38-76 *supra* (federal law on education of handicapped children).

[83] *See* Comment, *Self-Sufficiency Under the Education For All Handicapped Children Act: A Suggested Judicial Approach*, 1981 DUKE L.J. 516, 519-20 (1981) (EHA substantively vague).

handicapped children is unclear. Courts generally consider school disciplinary matters to be within the discretion and control of state and local authorities.[84] The Supreme Court has reviewed some instances of suspension and expulsion as a means of school discipline.[85] In *Goss v. Lopez*,[86] the Supreme Court ruled that a child's property right to education demands a proper due process hearing before a student could face suspension for ten days or more.[87] The discipline of handicapped children, however, involves more complex issues than those that are present in the suspension or expulsion of nonhandicapped children.

Disruptive behavior by handicapped school children may result from a number of sources. Behavior problems may arise directly from the nature of the child's handicap or from misclassification or inappropriate education.[88] Thus, the interrelation of a child's handicap and disruptive behavior leading to suspension or expulsion is seldom clear or easily determined by a court.

The first case discussing the expulsion of a child protected under the EHA arose in the federal district court for Connecticut.[89] In *Stuart v. Nappi*,[90] an emotionally disturbed student was suspended for ten days and faced a disciplinary hearing for expulsion resulting from her participation in a school-wide riot.[91] The plaintiff child received the suspension following regular disciplinary procedures.[92] The *Nappi* court ruled that the plaintiff had shown potential irreparable injury resulting from

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[84] Goss v. Lopez, 419 U.S. 565, 574 (1975) (school disciplinary rules state concern); Stuart v. Nappi, 443 F. Supp. 1235, 1243 (D. Conn. 1978) (school discipline within discretion of local authorities).

[85] *E.g.*, Goss v. Lopez, 419 U.S. 565, 573-74 (1974) (requiring due process in suspension proceedings); Tinker v. Des Moines School Dist., 393 U.S. 503, 505-06 (1969) (suspension of students for wearing armbands violated right to free speech); Board of Educ. v. Barnette, 319 U.S. 624, 642 (1942) (enjoining expulsion of students for not saluting flag).

[86] 419 U.S. 565 (1975).

[87] *Id.* at 584. School systems need not provide full due process hearings for students suspended less than 10 days because an informal meeting between the parties is sufficient to protect the students' rights. *See* Reineman v. Valley View Community School Dist., No. 81-C-2053 (E.D. Ill. Nov. 4, 1981) (informal meeting constitutes sufficient hearing prior to short suspension of student).

[88] *See* Doe v. Koger, 480 F. Supp. 225, 228 (N.D. Ind. 1979) (school cannot expel child for behavior related to handicap); Stuart v. Nappi, 443 F. Supp. 1235, 1241 (D. Conn. 1978) (misbehavior may result from inappropriate education of handicapped student); Frederick L. v. Thomas, 408 F. Supp. 832, 835 (E.D. Pa. 1976) (same).

[89] *See* Stuart v. Nappi, 443 F. Supp. 1235, 1241 (D. Conn. 1978) (no reported decisions discussing expulsion of handicapped child); text accompanying notes 90-104 *infra* (discussion of *Nappi*).

[90] 443 F. Supp. 1235 (D. Conn. 1978).

[91] *Id.* at 1239. The defendant school system in *Nappi* had diagnosed the plaintiff child as in need of special education. *Id.* After the *Nappi* plaintiff ceased attending the special program designed for her the school made no effort to create an apporporiate alternative program. *Id.*

[92] *Id.*

the possible expulsion.[93] In addition, the court found that the plaintiffs had demonstrated probable success on alleged violations of four federally created rights under the EHA.[94] Specifically, the *Nappi* court found potential violations of the EHA in that the suspension of the student would deny her the right to an appropriate education[95] and the right to maintain her current educational status until resolution of her complaint under the EHA.[96] In addition, the court found a violation of the plaintiff's right to an education in the least restrictive environment[97] and her right to have any changes in placement follow statutory procedures.[98]

In reviewing the *Nappi* controversy, the court noted the inherent ambiguity of the sparse federal regulation of disciplinary proceedings involving handicapped children.[99] A comment to the regulations enacted pursuant to the EHA states that while a handicapped child's educational placement may not be changed without following the strictures of the EHA, a school may utilize normal procedures for disciplining students dangerous to themselves or others.[100] A later comment on the regulations suggests that the EHA limits the ability of school systems to exclude disruptive handicapped children to emergency situations.[101] The *Nappi* court concluded that neither the EHA nor the applicable regulations permitted the expulsion of a handicapped student during the pendency of a complaint under the EHA.[102] Therefore, the court granted

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[93] *Id.* at 1240. In order to receive a preliminary injunction, the *Nappi* court required that the plaintiff show the possibility of irreparable harm to the child and a demonstration of probable success on the merits of the case. *Id.*; *see* Triebwasser & Katz v. AT&T, 535 F.2d 1356, 1358 (2d Cir. 1976) (requirements for preliminary injunction); Hartford v. Hicks, 408 F. Supp. 879, 882 (D. Conn. 1975) (same). The *Nappi* court found that irreparable injury to the plaintiff could result from the delay in developing a special education program for the plaintiff after her expulsion. 443 F. Supp. at 1240. The court found that irreparable harm to the plaintiff also could result from the denial of special education in public schools since the plaintiff would have to seek instruction from a private school or home tutor. *Id.*

[94] 443 F. Supp. at 1240.

[95] *Id.* at 1240; *see* 20 U.S.C. § 1401(1), (15)-(19) (1976) (handicapped child must receive appropriate public education). The *Nappi* court believed that the school had violated the plaintiff's right to an appropriate education by denying her a program designed to meet her educational needs. 443 F. Supp. at 1241. The violation of the right to an appropriate education did not involve the proposed expulsion of the student. *Id.*

[96] 443 F. Supp. at 1240; *see* 20 U.S.C. § 1415(e)(3) (1976) (child must remain in current placement until educational complaint settled).

[97] 443 F. Supp. at 1240. The *Nappi* court ruled that the EHA requires a change in placement to a more controlled environment, rather than expulsion from school. *Id.* at 1243. The regulations promulgated under the EHA require schools to provide a continuum of increasingly restrictive placements so that handicapped students will receive a proper education rather than being denied all education. *See* 34 C.F.R. 300.551 (1981) (requiring continuum of alternative placements.

[98] 443 F. Supp. at 1240.

[99] *Id.* at 1242.

[100] 34 C.F.R. § 300.513 (comment) (1981).

[101] *Id.*

[102] 443 F. Supp. at 1242.

a preliminary injunction preventing a disciplinary hearing concerning the possible expulsion of the student.[103] The *Nappi* court tempered its decision by acknowledging that handicapped students could face short suspensions without receiving due process hearings and that proper placement committees could recommend a restrictive educational environment for handicapped students with behavioral problems.[104]

Until 1981, no federal appeals court offered guidance on proper disciplinary procedures for handicapped children.[105] In *S-1 v. Turlington*,[106] the Fifth Circuit considered the expulsion of seven mentally handicapped children from a Florida high school.[107] Six of the students neither requested nor received hearings concerning any possible correlation between their handicaps and their misbehavior.[108] The seventh student did not receive a hearing because the local superintendent of schools felt that the absence of serious emotional disturbance in the student precluded any finding that the alleged misconduct stemmed from the student's handicap.[109]

In affirming the issuance of an injunction, the Fifth Circuit held that an expulsion amounted to a change in educational placement invoking the protections of the EHA.[110] The *Turlington* court reasoned that since expulsion represents a change in placement, only a duly qualified and knowledgeable panel properly could initiate such a change in placement.[111] The court held, therefore, that before an expulsion could occur, the evaluation panel must determine whether the disruptive behavior resulted from the child's handicap.[112] The *Turlington* decision acknowledged, however, that expulsion of a handicapped child was permissible in some circumstances.[113] The court concluded that for an expul-

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[103] *Id.* at 1244.

[104] *Id.* at 1243.

[105] *See* S-1 v. Turlington, 635 F.2d 342, 345 (5th Cir.) *cert. denied*, 102 S. Ct. 566 (1981) (no appellate decisions considering expulsion of handicapped children).

[106] 635 F.2d 342 (5th Cir. 1981).

[107] *Id.* at 343-44. The offenses causing the expulsions in *Turlington* ranged from various sexual acts to defiance of authorities, insubordination, vandalism, and profanity. *Id.* at 344 n.1.

[108] *Id.* at 344.

[109] *Id.* Two other students joined the *Turlington* action, claiming their exclusion from special education programs constituted a denial of statutory rights. *Id.* The two students joining the *Turlington* action were not facing disciplinary proceedings, but rather were challenging the denial of an appropriate education. *Id.*

[110] *Id.* at 347-48; *see* Sherry v. New York State Educ. Dept., 479 F. Supp. 1328, 1337 (W.D.N.Y. 1979) (suspension of handicapped student due to lack of adequate supervision equals change in placement); Stuart v. Nappi, 443 F. Supp. 1235, 1240 (D. Conn. 1978) (expulsion equals change in placement invoking EHA); 34 C.F.R. § 300.533(a)(3) (1981) (proper placement panel must make all placement decisions).

[111] 635 F.2d 347; *see* 34 C.F.R. § 300.533(a)(3) (1981) (placement decisions under EHA must be made by group knowledgeable about child, meaning of evaluation, and available options).

[112] 635 F.2d at 348, *citing*, Doe v. Koger, 480 F. Supp. 225, 229 (N.D. Ind. 1979).

[113] 635 F.2d at 348.

sion decision to satisfy the *Turlington* guidelines, school districts must follow proper EHA procedures, and the expelled child must not be denied all educational services during the expulsion period.[114]

The limited case law concerning the expulsion of handicapped children illustrates the practical difficulties of applying the provisions of the EHA. The EHA requires numerous hearings that will increase the costs of an already overburdened education system.[115] The hearings could result in many judicial appeals, causing both delay of necessary special education changes and further involvement of the federal judiciary in local education. On a broader level, the hearing requirements of the EHA may introduce a disruptive measure of adversariness to the field of education.[116] Consequently, the possibility of judicial scrutiny of educational decisions may stifle innovation on the part of school officials.[117] The preferential treatment afforded handicapped children in expulsion proceedings may have other detrimental effects. Special treatment of the handicapped may lead to a general attitude of disrespect for school disciplinary processes.[118] One commentator has hypothesized that nonhandicapped students may claim disabilities in order to obtain a limited immunity from expulsion.[119] Hopefully, as schools become more familiar with the difficulties attendant to the education of the handicapped, school authorities will develop procedures for maintaining order within the strictures of the law. The future of educational rights for the handicapped, however, is not altogether clear.[120]

The passage of the EHA marked a great step forward in the struggle for equal educational rights for handicapped children. The provision of a free public education for handicapped children is costly,[121] and Congress has refused to appropriate the full measure of funds called for by the EHA.[122] If the federal government ceases to subsidize special education costs, the parents of handicapped children may have to pursue the constitutional remedies first enunciated during the early 1970's.[123] American society has recognized its obligation to train and educate handi-

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[114] *Id.*

[115] *See* Pittenger & Kuriloff, *supra* note 3, at 86-89 (costs under EHA potentially staggering).

[116] *See id.* at 90.

[117] *See id.*

[118] *See Enforcing the Right, supra* note 37, at 1107 n.33.

[119] *Id.*

[120] *See* text accompanying notes 121-23 *infra.*

[121] *See* note 3 *supra* note 3, at 87 (Congress has not appropriated sufficient funds for EHA program). Of the three and one-half billion dollars authorized by the EHA for fiscal year 1982, Congress only appropriated 874 million dollars. *Id.*

[122] *See* Pittenger & Kuriloff, *supra* note 3, at 87 (Congress has not appropriated sufficient funds for EHA program). Of the three and one-half billion dollars authorized by the EHA for fiscal year 1982, Congress only appropriated 874 million dollars. *Id.*

[123] *See* text accompanying notes 16-35 *supra* (*Mills* and *PARC* decisions).

capped children, but courts must still determine the parameters of educational rights and the sources of necessary funding. The judicial system and the education establishment must assist the parents of handicapped children in the struggle for equal education if the progress made in special education is to continue.

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